

*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

**BOOK OF AUTHORITIES OF THE PLAINTIFFS**

November 15, 2019

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# **TAB 1**

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2011 ONSC 292

Ontario Superior Court of Justice (Divisional Court)

Fischer v. IG Investment Management Ltd.

2011 CarswellOnt 800, 2011 ONSC 292, [2011] O.J. No. 562, 104 O.R.  
(3d) 615, 199 A.C.W.S. (3d) 361, 276 O.A.C. 84, 6 C.P.C. (7th) 139

**Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba, Appellants (Plaintiffs) and IG Investment Management Ltd., CI Mutual Funds Inc., Franklin Templeton Investments Corp., AGF Funds Inc. and Aic Limited, Respondents (Defendants)**

Molloy, Swinton, Herman JJ.

Heard: November 18-19, 2010

Judgment: January 31, 2011

Docket: Toronto 99/10

Proceedings: reversing *Fischer v. IG Investment Management Ltd.* (2010), 89 C.P.C. (6th) 205, 2010 CarswellOnt 135, 2010 ONSC 296 (Ont. S.C.J.)

Counsel: Joel Rochon, Sakie Tambakos, for Appellants

Benjamin Zarnett, Jessica Kimmel, Melanie Ouanounou, for Respondent, CI Mutual Funds Inc.

James D.G. Douglas, David Di Paolo, Margot Finley, for Respondent, AIC Limited

Subject: Civil Practice and Procedure

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.A Pleadings disclose cause of action

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.B Identifiable class

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.C Common issue or interest

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiff investors previously had motion for class certification dismissed — Defendant mutual fund managers were engaged in trading tactic that made profit for them at expense of longer-term investors such as plaintiffs — Managers were investigated by Ontario Securities Commission (OSC) and entered into settlement agreements from which they were required to directly compensate investors — Plaintiff investors claimed that OSC settlements were not full compensation — Motion judge agreed that investors' application for certification met most of applicable criteria, but ruled that OSC settlement met requirements of behaviour modification and providing investors access to justice — Investors claimed that motion judge erred in analysis of proper procedure — Investors appealed from dismissal of original motion — Appeal allowed — Motion judge failed to apply proper evidentiary burden, which was low on investors at early stage of action — As investors had some evidence of claim for compensation, they met their evidentiary burden for class certification.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiff investors previously had motion for class certification dismissed — Defendant mutual fund managers were engaged in trading tactic that made profit for them at expense of longer-term investors such as plaintiffs — Managers were investigated by Ontario Securities Commission and entered into settlement agreements from which they were required to directly compensate investors — Plaintiff investors claimed that OSC settlements were not full compensation — Motion judge agreed that investors' application for certification met most of applicable criteria, but ruled that OSC settlement met requirements of behaviour modification and providing investors access to justice — Investors claimed that motion judge erred in analysis of proper procedure — Investors appealed from dismissal of original motion — Appeal allowed — Motion judge properly defined class as held by OSC to be certain group of investors.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff investors previously had motion for class certification dismissed — Defendant mutual fund managers were engaged in trading tactic that made profit for them at expense of longer-term investors such as plaintiffs — Managers were investigated by Ontario Securities Commission and entered into settlement agreements from which they were required to directly compensate investors — Plaintiff investors claimed that OSC settlements were not full compensation — Motion judge agreed that investors' application for certification met most of applicable criteria, but ruled that OSC settlement met requirements of behaviour modification and providing investors access to justice — Investors claimed that motion judge erred in analysis of proper procedure — Investors appealed from dismissal of original motion — Appeal allowed — Issue of damages did not need to be certified as common issue at this stage of litigation.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiff investors previously had motion for class certification dismissed — Defendant mutual fund managers were engaged in trading tactic that made profit for them at expense of longer-term investors such as plaintiffs — Managers were investigated by Ontario Securities Commission and entered into settlement agreements from which they were required to directly compensate investors — Plaintiff investors claimed that OSC settlements were not full compensation — Motion judge agreed that investors' application for certification met most of applicable criteria, but ruled that OSC settlement met requirements of behaviour modification and providing investors access to justice — Investors claimed that motion judge erred in analysis of proper procedure — Investors appealed from dismissal of original motion — Appeal allowed — Motion judge failed to apply proper evidentiary burden, which was low on investors at early stage of action — Finding that OSC proceeding was preferable was improper as investors were not fully compensated — Motion judge erred by considering settlement approval at certification stage — Action was properly characterized as being for losses over and above what was compensated in OSC settlement — Taking factors for settlement approval criteria in account had effect of forcing settlement on investors without determination of whether this settlement was for — Past settlement not proper factor at preferable procedure stage.

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*Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389, 1999 CarswellOnt 1899, 99 C.L.L.C. 210-038, 36 C.P.C. (4th) 99, 45 C.C.E.L. (2d) 165 (Ont. S.C.J.) — referred to

**Statutes considered:**

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

s. 5(1) — considered

APPEAL from judgment reported at *Fischer v. IG Investment Management Ltd.* (2010), 89 C.P.C. (6th) 205, 2010 CarswellOnt 135, 2010 ONSC 296 (Ont. S.C.J.), dismissing plaintiff's motion for certification.

**Molloy J.:**

**I. Introduction**

1 This is an appeal from the decision of Perell J. dated January 12, 2010 dismissing the plaintiffs' motion for certification as a class proceeding. As of the date of the argument of this appeal, three of the five defendants had entered into settlements with the plaintiffs. The remaining defendants are CI Mutual Funds Inc. ("CI") and AIC Limited ("AIC").

2 The defendants are mutual fund managers. In November 2003, the Ontario Securities Commission ("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 daily value of a mutual fund is calculated only once a day at 4:00 pm EST. Because 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 value 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. Although market timing is not an illegal activity, the profit made by the market timers is at the expense of the long-term investors. Also, market timing activity in a fund impedes the efficient operation of the fund in a number of ways. The OSC 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 their clients.

3 At the conclusion of its investigation, the OSC took enforcement proceedings against the five defendant mutual fund managers for failing to act in the public interest in relation to market timing activity in their funds. All of the defendants entered into settlement agreements with the OSC pursuant to which they paid \$205.6 million in compensation directly to their investors. The settlements were approved by the OSC as being in the public interest. All of the settlements specified that they were without prejudice to the rights of any person to bring civil or other proceedings against the mutual fund managers with respect to the same subject matter. Shortly after the settlements were approved, this action was commenced.

4 The plaintiffs filed evidence on the certification motion that the OSC settlements did not constitute full compensation to investors. Indeed, according to the affidavit of Professor Zitzewitz (an expert relied upon by the plaintiffs) using what he believed to be the most accurate method of calculation, the harm to investors by market timing activity in these funds was \$760 million, and could be as high as \$831.9 million or as low as \$301.1 million using other calculation methods. Based on Professor Zitzewitz's preferred method of calculation: the total harm for which CI is responsible to investors is \$349.3 million, as compared to \$49.3 million which is the amount of the OSC settlement (being 1/7 of the total harm); and the total harm for which AIC is responsible is \$192.6 million, as compared to its OSC settlement of \$58.8 million (being 1/3 of the total harm). Thus, based on that method of calculation, the plaintiffs' current claim against AIC and CI, over and above the OSC settlement, is \$333.8 million.

5 The motion judge held that the plaintiffs had established four out of the five necessary criteria for certification: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) there are common issues of fact and law suitable for resolution in a class action; and (4) there are appropriate representative plaintiffs who could produce a workable litigation plan if some changes were made to the current plan. However, the motion judge found that the plaintiffs had not established the fifth criterion — that a class proceeding would be a "preferable procedure" — and this missing element was fatal to the plaintiffs' request for certification.

6 In his analysis of the preferable procedure requirement, the motion judge held that if he ignored the OSC settlement, he would conclude that the class action was the preferable procedure to resolve the plaintiffs' claims.<sup>1</sup> He accepted that the class action would be a "fair, efficient and manageable procedure."<sup>2</sup> However, he concluded that as part of the "preferable procedure" analysis, the OSC proceedings must be taken into account in determining whether there is an alternative method for resolving the plaintiffs' claims. It was on this aspect of the test that he found the plaintiffs had failed to meet the requirement for certification. The motion judge concluded that the OSC settlement satisfied the goal of behaviour modification and that the OSC proceedings provided the plaintiffs with "access to justice." He therefore ruled that the class action was not the preferable procedure for resolving the plaintiffs' claims and dismissed the motion for certification. It is clear that but for the OSC settlements, the action would have been certified.

7 The principal issue on this appeal is whether the motion judge erred in his analysis of the preferable procedure, and in particular in his finding that the OSC proceeding was a preferable alternative to the class action. If the plaintiffs are not successful on this point, then the appeal as a whole must fail as it is crucial to certification. If successful on this primary point, the plaintiffs also argue that the motion judge erred in his analysis of the identifiable class by improperly rejecting evidence with respect to market timers other than those identified by the OSC and by foreclosing the possibility that newly identified market timers could be excluded from the class over time. The plaintiffs also submit that the motions judge erred in failing to certify common issues with respect to aggregate and punitive damages and other ancillary issues.

8 For the reasons that follow, I believe that the motion judge's analysis of the impact of the OSC settlement on the issue of preferable procedure is fundamentally flawed as a question of law. The OSC proceedings had already been completed at the time this action was commenced. The action does not seek the recovery of the \$205 million already paid; it seeks recovery of the damages not recovered through the OSC proceeding. On the evidence before the motion judge, which must be accepted for purposes of the motion, a significant amount of money is still owed to these plaintiffs. It cannot be said that the OSC process is a preferable procedure for recovering damages it failed to recover in the first place. There is no possibility of an OSC proceeding to recover this short-fall on a going-forward basis. The effect of what the motion judge did was to treat the OSC proceeding as a reasonable settlement of the plaintiffs' claims, which was an improper consideration in the context of this certification motion. 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 and all of the other tests for certification had been met. Accordingly, in my view, the certification motion ought to have been granted.

9 However, on the other issues raised by the plaintiffs on this appeal, I find no reviewable error by the motion judge and would dismiss the appeal on those points.

## **II. The Standard of Review**

10 The standard of review from a judge's decision on a pure question of law is that of correctness. At the other end of the spectrum, a judge's findings of fact may only be interfered with on appeal if there is a "palpable and overriding error." For the most part, questions of mixed fact and law, where the legal questions are inextricable from the facts, are also reviewed on the basis of palpable or overriding error. However, where the decision can be traced to an error of law or a misapplication of the law to the facts, the correctness standard will apply.<sup>3</sup>

11 Appellate courts have recognized the special expertise of class action judges in this highly specialized area of the law, and have held that substantial deference is owed on certification decisions.<sup>4</sup>

12 However, appellate intervention is warranted where matters of general principle are at stake. The application of a wrong test is an error in principle and the decision which results can attract no deference.<sup>5</sup>

## **III. The Test for Certification**

13 The motion judge correctly identified the tests that must be satisfied for certification of an action as a class proceeding.

14 There are five requirements set out in s. 5(1) of the *Class Proceedings Act, 1992*<sup>6</sup> all of which must be met before a certification order can be made. The criteria are: (i) the pleadings disclose a cause of action; (ii) there is an identifiable class; (iii) there are common issues of fact or law; (iv) a class proceeding would be the preferable procedure to resolve the claim; and (v) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has a workable litigation plan.

15 The motion judge found that all of the criteria for certification had been met, other than the preferable procedure requirement, provided the plaintiffs revised the litigation plan. There is no challenge to the motion judge's findings with respect to those elements of the test he found had been met. The plaintiffs submit that he ought to have included more common issues for certification and should have permitted a more expansive identifiable class. I will return to those points later. First, however, it is appropriate to deal with the preferable procedure point, which is pivotal to the success or failure of this appeal, and indeed, of this class action.

#### **IV. Preferable Procedure**

##### **(a) The Decision of the Motion Judge**

16 The motion judge considered the evidence of Professor Zitzewitz that by his calculation shareholders had sustained \$760 million in losses, and had received only \$205 million in compensation under the OSC settlement. The motion judge also considered the arguments of the defendants as to alleged flaws they said undermined Professor Zitzewitz's opinion. He noted that for purposes of certification, there is a "very low standard of proof" placed on plaintiffs in respect of showing a factual foundation for their claim, and held that the plaintiffs had satisfied him that there was "some basis in fact" for the allegation that the investors were not fully compensated as a result of the OSC settlements. In short, he accepted the plaintiffs' position that the OSC settlement "left the investors' money on the table" and that it was this money the investors sought to recover in the class action.<sup>7</sup>

17 The motion judge referred to the defendants' argument that there was "strong evidence that the OSC was: (a) competent to assess the investors' losses; (b) on a declared mission to obtain for the investors full compensation for their losses; and (c) publicly (in its reports, reasons for decision, orders and announcements) satisfied that it had achieved its restitutive aims." The motion judge agreed with the defendants "that this strong evidence does exist" and stated that it "may be true that the investors have already received all and possibly more compensation than they are entitled." However, he held that for purposes of the motion the defendants' evidence would have to be "so powerful that it totally overcame the evidence of the plaintiffs," which he found it did not.<sup>8</sup>

18 The motion judge summarized the general principles to be applied in considering the issue of preferable procedure, referring to well-established case authority. He stated that the court should consider: (a) the nature of the proposed common issues; (b) the individual issues that would remain after determination of the common issues; (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 the certification furthers the objectives underlying the Act and (g) the rights of the parties. He also stated that the preferable procedure is to be 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." Finally, he recognized that the court must consider the viability of alternative proceedings for determination of the plaintiffs' claims, noting that the defendants must support the proposition that the other procedure is preferred with an evidentiary foundation.<sup>9</sup>

19 The motion judge started his analysis of this issue by considering all of the factors without taking the OSC proceeding into account. As a result of that analysis, he would have found a class action to be the preferable procedure. He held that a class action would be a fair, efficient and manageable method of dealing with the claims and that the common issues trial would advance the claim substantially.

20 He then considered the impact of the OSC proceeding on his analysis. He first rejected a number of bases advanced by the defendants for holding the OSC proceeding to be preferable. In particular, he found that:

- (a) The Superior Court is just as capable as the OSC to calculate the investors' losses;
- (b) Saving on judicial resources is not a basis for refusing certification;
- (c) It does not set a bad precedent from a public policy perspective to allow the class action to proceed after an OSC settlement. There is no reason to believe that certification would discourage future efforts by the OSC to obtain compensation for investors or have any effect whatsoever on future activities of the OSC. Further, the OSC settlement agreements expressly reserved the rights of parties to bring court proceedings.
- (d) The plaintiffs are not being unfair or "piggish" in taking the OSC compensation and then starting a class action. They did not ask the OSC to champion their cause. There is no reason to doubt that the plaintiffs genuinely believe they have been under-compensated and they are doing nothing wrong in seeking certification of a class proceeding.

21 Next, he considered whether it was relevant to take the OSC proceeding into account and concluded that it was. In particular, he examined case authority in which courts considered the preferability of procedures outside the traditional court system, including:

- a no-fault scheme for compensation of up to \$5000 for individual claims based on pollution from a landfill site;<sup>10</sup>
- a compensation program before an adjudicative panel, capped at recovery of \$60,000 per claimant, for deaf children who had been victims of abuse in a residential school;<sup>11</sup>
- an alternative dispute resolution process voluntarily offered to victims of abuse in an aboriginal residential school;<sup>12</sup>
- the availability of remedies before statutory tribunals for recovery of wages by dismissed employees;<sup>13</sup>
- voluntary programs instituted to review complaints from customers, sometimes accompanied by a right of appeal to an independent third-party adjudicator.<sup>14</sup>

22 In some of these cases, the alternative procedure was considered to be preferable, and in others, it was not. From this analysis, the motion judge drew what he referred to as "two modest conclusions." First, he found it was appropriate to include the OSC proceedings and settlements as part of the preferable procedure analysis. Second, he concluded that he should consider "a variety of open-ended factors to determine whether it is a genuine alternative that serves the purposes of a class proceeding, namely access to justice, behaviour modification and judicial economy."<sup>15</sup>

23 On the issue of behaviour modification, the motion judge noted that all parties acknowledged on the motion (as they did on the appeal) that the OSC settlement accomplished this purpose both with respect to the defendants and for fund managers of other mutual funds in the future. He then found judicial economy to be neutral factor. He therefore concluded that the issue of certification turned on whether the OSC proceedings and settlements provided access to justice for the investors.<sup>16</sup>

24 On the question of access to justice, the motion judge first stated that the preferable procedure did not necessarily have to include an adjudication process. He noted that most class actions result in settlements rather than the adjudication of rights after a trial, but that obtaining a settlement was nevertheless access to justice.<sup>17</sup>

25 On this point, he observed that the OSC staff and the OSC "gave itself the mission of obtaining restitutionary compensation for the harm suffered by the investors." The plaintiffs therefore received the same *form* of remedy they would receive in a class

action, even though they argue that the amount of the compensation received is inadequate. He distinguished those cases where the remedy obtainable in the alternative procedure was of a different kind than was sought in the litigation.<sup>18</sup>

26 Next, he observed that the OSC Staff "played much the same role as would be played by class counsel in a class proceeding," including taking an adversarial stance and demanding concessions and compensation. He also noted that the OSC's settlement agreements "left nothing on the table" about the defendants' responsibility to the investors, whatever might be said about the quantum of compensation.<sup>19</sup>

27 The motion judge stated that he agreed with the position of plaintiffs' counsel that the certification process should not be converted into a settlement approval hearing in which the court considers whether a settlement is in the best interests of the class members. However, he held that it was nevertheless relevant to consider the criteria taken into account in approval of a settlement when considering access to justice. In particular, he held that the following factors were relevant to consider: "(a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expense and likely duration of litigation and risk; (f) recommendation of neutral parties, if any; (g) the presence of good faith, arms length bargaining and the absence of collusion; (h) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation."<sup>20</sup>

28 The motion judge held that, with the exception of the communications with members of the class which was not applicable, all of these factors "favour the conclusion that the OSC proceeding was the preferable procedure." He stated that, "These observations taken separately or taken together provide sufficient reasons for concluding that the OSC proceedings and the settlement agreements satisfied the access to justice purposes of the *Class Proceedings Act*." He noted, however, that the plaintiffs still had the argument that the quality of access to justice was in doubt because the OSC may have left investors' money on the table.

29 He then referred to two arguments by the defendant in response to the plaintiffs' point about quantum, one of which he accepted, and the other of which he said he did not. The first argument was that the court should not second-guess the access to justice provided by the OSC upon being satisfied that the OSC's purpose was to obtain restitution and that the process to do so was adequate. The motion judge agreed with that principle. He was satisfied that the OSC purpose was to obtain restitution, based on material in which the OSC had stated that intention. He was also satisfied as to the adequacy of the process before the OSC.<sup>21</sup> The plaintiffs had pointed out that: they had no opportunity to participate in the investigative and enforcement stages of the OSC proceedings; were not advised as to the basis upon which the settlement figure had been arrived at; and were given insufficient notice of the approval hearings to have any meaningful opportunity to participate. However, the motion judge found that these were issues of procedural fairness, not access to justice.<sup>22</sup> He accepted that the investors did not have the right to opt out of the OSC proceeding as they would be entitled to do in a class action, but noted that the OSC settlement did not bind the investors and in any event they would be highly unlikely to opt out of a class action because given the size of the individual claims and the difficulties of forensic proof, a class proceeding would be the only viable means for them to exercise their private rights.<sup>23</sup>

30 Although the motion judge acknowledged that the investors had no opportunity to participate in the OSC proceedings, he observed that a class action is a representative proceeding and individual investors would not be participating in the carriage of the action, even though they would be bound by the result. He reasoned that class proceedings do not guarantee individual claimants their "day in court" in the conventional sense.<sup>24</sup>

31 The second argument advanced by the defendants to counter the plaintiffs' point about the quantum of their claims was that the OSC settlement did in fact fully compensate the investors. The motion judge stated that he did not accept that argument. However, on this point, he did not return to his previous ruling that the plaintiffs had met the onus of establishing a basis in fact for their claim that they were owed compensation beyond the amount of the OSC settlement. Instead, he reasoned that he could

not accept that argument because to do so he would have to decide the merits of the action and quantify the damages. He then stated that both parties' argument about whether the settlement fully compensated the plaintiffs were "problematic as a measure of access to justice because the Plaintiffs' argument assumes the Defendants are liable and the Defendants' counterargument about the quality of the recovery assumes that the quantum closely approached the correct sum payable." He then stated, "In any event, I do not rely on any of these qualitative arguments because there is no way to test their soundness or truth short of an actual adjudication."<sup>25</sup>

32 He therefore concluded that the plaintiffs had not satisfied the preferability branch of the preferable procedure criterion, because the OSC procedure was a better alternative. This was fatal to the certification motion, even though the plaintiffs had succeeded on all of the other requisite elements of the test.

### (b) Analysis

33 In my opinion, the motion judge erred in law both in respect of the test he applied and the manner in which he applied it. I have three areas of concern arising from the motion judge's reasons: (1) he failed to apply the proper low evidentiary burden on the plaintiffs at this stage; (2) he improperly found that the already 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 criteria for approval of a settlement at the certification stage.

34 In addition, I have one over-arching observation — it is necessary to recognize what this action is about. It is *not* about the \$108 million in losses already recovered from these two defendants; it *is* about the losses over and above that amount that the plaintiffs allege are still owing, and which the plaintiffs' expert estimates at \$333 million. In my opinion, the motion judge lost sight of that point and this led him into error when determining whether the OSC proceedings and the settlement agreements provided access to justice for the investors. I will deal with the three areas of concern in this context.

#### (i) Factual Foundation

35 In an earlier part of his reasons, the motion judge correctly held that the standard to be met by the plaintiffs in respect of the factual foundation for certification is a low one. In *Hollick v. Metropolitan Toronto (Municipality)*,<sup>26</sup> a case in which one of the central issues was preferable procedure, the Supreme Court of Canada described the standard as "some basis in fact to support the certification order." The "some basis in fact" standard has been referred to in other cases as a "minimum standard" or "very weak" evidentiary threshold.<sup>27</sup> The motion judge recognized that this low factual threshold applied for each of the certification requirements (other than the pleadings issue), as is consistent with the case law.<sup>28</sup> He also correctly applied that test in the earlier portion of his reasons and held that there was "some basis in fact" for the plaintiffs' assertion that the OSC settlement funds represented only a portion of their total damages. That should have been the end of his factual analysis with respect to this point, as it applied to all aspects of the certification test. However, later in his reasons when dealing with preferable procedure and access to justice, the motion judge erred in law by applying a more onerous standard on this point.

36 Counsel for the appellants (plaintiffs) argued that the motion judge also erred in finding that the defence had shown "strong evidence" that the investors received full compensation for their losses. I agree that this finding was an error by the motion judge. Indeed, in my view, there is no evidence at all to this effect. There were some statements in the OSC materials that the intention of OSC staff was to effect restitution, and there was a settlement reached. At the time of the approval of the settlement before the OSC, there was no disclosure of the method of calculation for the settlement amount, and despite the plaintiffs' requests, that information was not provided subsequently. There is therefore absolutely no way to evaluate the quantum of the OSC settlement based on material from the OSC proceeding itself and no other evidence to support the defendants' contention that it constitutes full recovery for the plaintiffs. The only actual evidence with respect to the quantum of loss that was before the motion judge was from the expert reports filed by the plaintiffs, which indicate that the OSC settlement was not even half of the total damages suffered. However, while I accept that the motion judge erred in concluding that this constituted "strong evidence of full compensation," I do not see this error as having contributed to his ultimate finding. Immediately after referring to this evidence as "strong," the motion judge nevertheless held that it was not sufficient to totally overcome the plaintiffs' evidence,

and that the plaintiffs should therefore be regarded as having met their onus. Therefore, any error with respect to assessing the strength of the defence evidence would appear to have had no impact.

37 When determining whether the plaintiffs have already had access to justice with respect to the full amount of their claims, the motion judge considered two arguments advanced by the defendants. One of the defendants' arguments was that the plaintiffs had already been fully compensated. The motion judge properly rejected that argument. I do have some difficulty with one aspect of the motion judge's analysis on this point. In my view, he erred with respect to the nature of the burden on the plaintiff. The motion judge held that both parties' arguments on this quantum of damages point were problematic and, in particular, he found that the plaintiffs' argument was problematic because it "assumes the defendants are liable." He then said he did not rely on *any* of the qualitative arguments (as to the quantum of recovery) "because there is no way to test their soundness or truth short of an actual adjudication." This is an erroneous analysis. The motion judge should have rejected the defendants' arguments because the plaintiffs had already satisfied the threshold of showing "some basis" for their position that they were still owed damages. Again, although this may be an error, it had no impact on the result since the motion judge rejected the defendants' argument in any event.

38 However, the same cannot be said with respect to the other argument made by the defendants in response to the plaintiffs' position on quantum. The defence argued that once it was established that the OSC purpose was to obtain restitutive compensation and that the OSC process was adequate, the court ought not to second-guess whether this constituted access to justice for the plaintiffs in respect of the full quantum of their claim. The motion judge accepted that defence argument. In my view, this does constitute a legal error with respect to the test to be applied and did affect the result.

39 The plaintiffs had met the onus of showing some evidence that they had a claim for compensation beyond what they had already received through the OSC proceeding. Once it was established for purposes of the certification motion that the OSC process did not provide full compensation to the plaintiffs, the purpose of the OSC proceeding or the intention of OSC staff were wholly irrelevant to the inquiry before the motion judge. There was no basis upon which he could have or should have deferred to the OSC by refusing to "second-guess" the OSC decision approving the settlement. This is particularly the case since the OSC settlement specifically contemplated future civil actions flowing from the same conduct and specifically reserved the rights of individuals to pursue those claims notwithstanding the settlement.

40 This is a fundamental error in principle by the motion judge and had the effect of negating the low factual burden on the plaintiffs and replacing it with one that was impossible for them to meet. This is an error which undermines the motion judge's determination that the class action was not the preferable procedure.

#### *(ii) Relevance of the OSC Proceeding*

41 The second area of concern flows from the first. The factual foundation for the class action is that the plaintiffs seek to recover damages significantly over and above those recovered in the OSC proceeding. It is therefore 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.

42 I agree with the motion judge's conclusion that in determining whether there is another preferable procedure he was required to consider all types of resolution possibilities, not merely traditional court proceedings. I also agree that access to justice does not necessarily require access to a system that will guarantee an adjudication of the claims on their merits. The case law cited by the motion judge fully supports that position.

43 However, this is a novel case. None of the case law cited by the motion judge addresses the issue of whether, in determining if there is another preferable procedure, it is appropriate to look to the past and to a procedure that has been fully completed. Rather, all of the case authority looks at the existing claim being asserted and considers the availability of alternative procedures for resolving those claims on a going forward basis.

44 There are some circumstances in which prior proceedings are clearly relevant to whether a class action should be certified. For example, a proceeding that has already been completed may be taken into account in determining whether the

plaintiffs' claims are barred by *res judicata* or issue estoppel, or whether in light of the resolution reached, there is anything left of the plaintiffs' claims to be tried in the class action. There may even be situations where it would be appropriate 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.

45 None of those issues arise here. There is no issue of *res judicata* or issue estoppel. The OSC proceedings are not a bar to a class action. On the contrary, the OSC settlements expressly reserved the rights of any person to bring other proceedings against the defendant with respect to the same conduct. Further, in light of the evidence presented by the plaintiffs with respect to their actual losses as compared to the amount of the settlement, it could not be said that there was nothing left to the plaintiffs' claim at the conclusion of the OSC proceeding. Indeed, on the evidence before the motion judge, the remaining amount of the plaintiffs' claim exceeds \$333 million.

46 It is not necessary to decide in this case whether, as a question of law, a fully completed prior proceeding or settlement can ever be considered to be a preferable procedure for an ongoing class proceeding. Since it is not necessary to this case, I leave that legal determination for another day. For purposes of this case, I am satisfied that there was no proper basis to refuse certification based on the OSC proceeding. In my view, the motion judge erred in finding that the access to justice criterion had been met in respect of the amount of the plaintiffs' claim that went significantly beyond the amounts recovered in the OSC settlement.

### (iii) Settlement Approval Criteria

47 The motion judge further erred by applying the test for approval of a settlement in the context of a certification motion. Although the motion judge stated that he agreed with the plaintiffs that the preferable procedure test should not be converted into a settlement approval hearing, the analysis he then conducted was even more unfair to the plaintiffs than if he had actually undertaken a proper settlement approval process. In particular, he held that in considering preferable procedure and the issue of access to justice, the court should consider the criteria that it takes into account when it approves or refuses a settlement. He then listed the criteria and concluded that "to the extent these criteria can be applied to the circumstances of the case at bar with the exception of communication to class members during the OSC proceedings, they favour the conclusion that the OSC proceeding was the preferable procedure."

48 A brief consideration of the nine criteria listed by the motion judge will illustrate the impropriety of taking them into account at the certification stage. The first criterion listed is the likelihood of recovery or success. The case law is clear that this is not a proper consideration to import into the certification analysis. As the Supreme Court of Canada stated in *Hollick*, the question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.<sup>29</sup>

49 The second criterion listed is the amount and nature of discovery, evidence or investigation. Again, this cannot properly be taken into account at the certification stage. There has been no discovery at this stage and the case law is clear that this cannot be counted against the plaintiffs. In *Lambert v. Guidant Corp.*,<sup>30</sup> Cullity J. discussed the reasons for the low evidentiary burden placed on plaintiffs at the certification stage, noting the inability of plaintiffs to muster all of the evidence until after production and discovery. He held at paras. 70-71:

Most fundamentally, the purpose of the certification stage of a class proceeding is to determine whether the requirements in section 5 (1) of the CPA are satisfied and, if so, to define the issues to be tried. It would be a reversal of the process to permit certification to be determined by deciding issues that are likely to be front and centre at a trial.

The use that defendants' counsel sought to make of evidence on this motion was not consistent with the above principles. The fact that productions and examinations for discovery do not occur prior to certification is consistent with the legislative intention that the certification stage is not the time for facts that bear on the merits of a plaintiff's claims to be determined. It would be inconsistent with the purpose of discovery - and manifestly unfair to plaintiffs - to deny certification on the basis of findings of fact that may be in dispute and that would likely be the subject of discoveries prior to trial. To a very large extent, this is what defendants' counsel urged me to do in this case.

50 The third criterion listed by the motion judge is the settlement terms and conditions. However, the motion judge specifically stated that he would not be entering into an approval of the settlement terms. It is difficult to see how this can be taken into account, without actually entering into an analysis of the fairness of the settlement in relation to the total amount of the plaintiffs' losses, which the motions judge purported not to be doing.

51 The fourth criterion is the recommendation and experience of counsel. It is not clear how this could be said to be relevant or how it would favour the OSC proceedings as the preferable procedure. There is no basis for assessing the experience of OSC Staff as compared to the expertise of plaintiffs' class action counsel and expert advisers. Further, the basis for the recommendation of the OSC settlement amounts has never been disclosed, so it is difficult to see how that "recommendation" can be influential in deciding anything.

52 The fifth criterion listed is the future expense and likely duration of the litigation and risk. Obviously, that favours a proceeding that is already completed, which by definition will have no duration and has no future expense. However, this ignores the fact that this action is about losses estimated at \$333.8 million that were not recovered in the OSC proceeding. The "risk" that this claim will not be recovered in the OSC is not a risk; it is an actuality. The application of this criterion makes no sense in this context.

53 The sixth criterion is the number of objectors and nature of objections. Again, this has no relevance in terms of the preferability of the OSC proceeding as compared to the class action. There can be no objectors to a settlement in the class action as it has not yet progressed to that stage. At the OSC, the investors were not involved in the process. There were two hearings before the OSC to approve the settlements negotiated by OSC staff. The OSC issued general public notices that these hearings would be proceeding. There was no direct notice to investors. The notice given for the first hearing was four days, and for the second hearing three days. No background information or material was provided to investors prior to the settlement hearings. The absence of objectors in that context is hardly surprising. However, the very fact that this class action was commenced may be considered to be similar in principle to an objection to the OSC settlement, and the expert evidence as to the significant quantum in damages left on the table may be relevant to the "nature" of the objection. If so, it is hard to see how this criterion could be said to favour the OSC proceeding over the class action.

54 The seventh criterion listed by the motions judge is the presence of good faith, arms length bargaining and the absence of collusion. Certainly, that can be said to be satisfied in the OSC process; but, it would equally be satisfied in the class action. Without conceding that this is a relevant consideration, I would at least regard it as neutral in its impact.

55 The eighth criterion is the degree and nature of communications by counsel and the representative plaintiffs with class members. This was the only criterion recognized by the motion judge as being inapplicable.

56 The ninth criterion is information conveying to the court the dynamics of and the positions taken by the parties during the negotiations. There is no information as to the conduct of the defendants during the negotiation of the OSC settlement and the plaintiffs were not involved at all. I do not see how this is a factor that could favour the OSC proceeding over the class action.

57 In my opinion, it was fundamentally wrong in law to take any of these factors into account. The effect of the motion judge doing so was to force the settlement on the plaintiffs without any consideration of whether it was a fair settlement in all of the circumstances. This is truly the worst of all worlds for the plaintiffs — the reasonableness or fairness of the settlement is not evaluated, but it is nevertheless used as the sole basis for refusing to certify the class action.

### **(c) Conclusion on Preferable Procedure**

58 In my opinion, the motion judge erred by applying the wrong test in his consideration of the preferable procedure test for certification. He considered factors relevant to the approval of a settlement that are not properly the subject of consideration at the certification stage, and which are fundamentally unfair to the plaintiffs at this stage. He 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.

59 I do 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. As I have already noted, concluded proceedings or payments may be relevant to issues of *res judicata* or issue estoppel, or to whether there are any remaining damages to support a cause of action. However, these are not factors at the preferable procedure stage. There may also be abuse of process issues that could arise if parties are attempting to re-litigate issues already dealt with in some manner before. I note, however, that in this case the motions judge made specific findings that there were no public policy concerns about permitting the class action to proceed notwithstanding the prior OSC proceeding. He also rejected the suggestion that the plaintiffs were acting greedily, or in any way, improperly in seeking to advance the claims they have raised in this action.

60 Accordingly, while I would not foreclose the possibility of a past settlement being relevant to a certification motion in another case in the future, this particular settlement was not relevant on this particular certification motion and should not have been taken into account. Since it was the only obstacle to certification, it follows that the certification order should now be made.

## V. Class Definition

### (a) *The Decision of the Motion Judge*

61 The motion judge found there was an identifiable class and, subject to two qualifications, accepted the definition of that class as proposed in the plaintiffs' "Option A." The plaintiffs submit that those two qualifications constitute errors in principle that should be set aside. The first qualification related to the plaintiffs' reliance on an article that appeared in the *Globe & Mail* to expand the number of mutual funds to be included beyond what was considered by the OSC. The second qualification related to the plaintiffs' stated intention to reserve the possibility of redefining the class following discoveries to exclude any investors found to have been market timers.

62 The motion judge held that a piece of investigative journalism reported in the *Globe & Mail* does not satisfy the weak evidentiary requirement of "some basis in fact" to support the expansion of the class definition to include these mutual funds. He noted that there was no "cross-examinable testimony" from the *Globe & Mail* investigators, and contrasted this to the conclusions from the OSC investigation to which extraordinary resources and expertise had been committed. He therefore refused to expand the class to include investors in mutual funds identified by the *Globe & Mail* as having participated in market timing activity.<sup>31</sup>

63 On the future exclusion issue, the motion judge accepted that the certification process should be a fluid and adaptable one, and also recognized that from time to time adjustments to the class definition are often permissible. However, he distinguished such adjustments from what the plaintiffs were seeking here because of the nature of the class. He first noted that market timing is not itself illegal and must therefore be defined in some manner to make the persons excluded from the class identifiable. The OSC, for purposes of its proceeding, defined a market timer to be a trader with a threshold of \$50,000 and a five-day duration (in-and-out) for their investment in the mutual fund. The motion judge found this to be an acceptable definition. He noted that unless some defined threshold and duration are part of the definition, every investor who made a propitiously timed trade would be excluded from the class, which would not be appropriate.<sup>32</sup>

64 The motion judge was concerned about creating a conflict of interest within the class if there was a specific provision that market timers defined in some other manner could later be excluded from the class. It would be in the best financial interest of some class members to have other class members excluded from the class because this exclusion would have the result of increasing the amounts of compensation for the class members who remained. He objected to manufacturing a conflict in this manner and concluded that the class definition should expressly specify that there shall be no exclusions from the class other than the defendants and the disruptive market timers identified by the OSC.<sup>33</sup>

### (b) *Analysis*

65 The motion judge did not err in respect of the legal test he applied to the evidentiary standard to be met by the plaintiffs. He correctly held that "some basis in fact" was the standard to be applied.

66 I do not see the motion judge's observation about the absence of "cross-examinable" testimony as changing that legal standard. He did not, for example, require that information from the OSC investigation be provided in a manner that could be cross-examined upon. Rather, his concern was that there was nothing in the form of actual evidence to support the reporter's evidence with respect to the "churn rates" said to be indicative of market timing and simply relying upon something you read in the newspaper is not enough to meet the "some basis in fact" standard. The fact that the plaintiffs' expert witnesses gave further evidence with respect to the significance of the "churn rates" does nothing to support the accuracy of the information in the newspaper as to the actual existence of the churn rates or where the reporter got that information.

67 I accept the plaintiffs' point that the motion judge would appear to have applied a different standard when considering the strength of the defence evidence that the plaintiffs have been fully compensated through the OSC settlement. However, as I have already noted, I believe the motion judge erred in the standard he applied to that evidence; that does not mean he was required to accept the plaintiffs' evidence at an equally unverifiable standard.

68 I do not see any error in principle in the manner in which the motion judge dealt with the *Globe & Mail* article, nor do I see any error of law. His decision is entitled to deference on this point and I would not interfere with it.

69 I am likewise of the view that there was no error in principle or error of law in the motion judge's findings with respect to the possibility of excluding other market timers at a later date, subject to one minor variation.

70 The class needs to be identifiable by objective criteria in order to be certified. Since market timing is not by itself an improper or illegal activity, or one which has a generally accepted definition, it needs to be defined for purposes of class definition. The OSC definition is one way to define the activity carried on by those who will be excluded from the class, but it is not the only way to define it. The evidence before the motion judge in this case supported that definition, and it was suggested by the plaintiff, so there is no difficulty with accepting that as the definition.

71 I see no error in the motion judge refusing to build into the definition the possibility that other activity will subsequently be defined as market timing and that those engaging in it will be excluded from the class. That creates the potential for conflict within the class as part of the definition of the class limits, particularly when the parameters as proposed by the plaintiffs are so vague. The plaintiffs propose, for example, including a notice stating, "If you are a class member who has engaged in frequent trading activity you may be excluded from the class by subsequent court order." It is impossible for prospective class members to know what conduct would be included within the vague term "frequent trading activity."

72 However, I do not see the need to build into the definition a proviso that no further exclusions will be permitted. There is no basis for concluding that the only market timers who can ever be excluded are those already identified by the OSC, provided that the same definition of market timer is accepted throughout. It is possible, for example, that the OSC missed some market timers who fit the already established criteria. There is no logical basis for continuing to include those traders as part of the class. As long as the definition of those excluded is settled as part of the definition of the class, there is no logical reason to restrict further amendment of the class as the action evolves. That unduly ties the hands of a future motion judge if grounds emerge which either of the parties believe warrant amendment to the class definition. There is substantial precedent for maintaining flexibility in these situations<sup>34</sup> and forbidding future amendment of the class, regardless of the reason, does not comply with those general principles.

73 Accordingly, while I agree with the motion judge's observations with respect to the proviso proposed by the plaintiffs referring to possible future exclusions as part of the class definition, I would not endorse the motion judge's proposed addition to the definition purporting to ban exclusions from the class for all time.

#### **(c) Conclusions as to Identifiable Class**

74 Accordingly, I would dismiss the appeal with respect to the challenges to the motion judge's findings on the identifiable class. The class definition should include the definition of the market timers excluded, in which case that there should not be a specific prohibition against future amendments to exclude others from the class.

## VI. Common Issues

### (a) *The Decision of the Motion Judge*

75 The motion judge found that whether the defendants owed a fiduciary duty of care or some other duty of care, and whether those duties of care had been breached, were common issues meeting the test for certification.

76 However, the motion judge rejected the plaintiffs' submission that there could be anything other than an individual assessment of damages in this case. He based that conclusion on the fact that there was no evidence proposing any method of assessing damages other than by summation of individual assessments, and he noted that the OSC settlement also involved individual assessments of loss. The motion judge also found that the effect of the dilution of the fund by market timing would be experienced differently by individual investors depending upon: (a) the timing and duration of that person's investment in the fund; (b) the occurrence of market timing during that period of investment; (c) the individual investor's own trading activity; and (d) the individual's tax situation. Further, the amount each investor had already received from the OSC settlement would have to be factored in on an individual basis. The motion judge therefore concluded that there was no basis in law or in fact for concluding that there were common issues with respect to the appropriate method of quantifying loss or the assessment of damages in the aggregate.<sup>35</sup> Given his conclusion about individual trials, the motion judge left pre-judgment and post-judgment interest to the trial judge.

77 The motion judge also refused to certify the availability of punitive damages as a common issue. He accepted that in some cases punitive damages can be a common issue. However, he held in this case an assessment of punitive damages would require an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of the compensatory damages; and (e) the adequacy of compensatory damages to achieve retribution, deterrence, and denunciation. He accepted that the last of these could be judged on a global basis, but since it was conceded by all parties that behaviour modification had already been achieved by the OSC settlement, this factor alone could not support making this a common issue. The motion judge concluded that all of the other issues could only be concluded on an individual basis.<sup>36</sup>

### (c) *Analysis and Conclusions as to Common Issues*

78 With respect to the issue of how to quantify the damages and whether this can be done on an aggregate basis, I agree with the motion judge that there is no basis in the evidence to conclude that this is possible in this case. It may emerge at the end of the common issues trial, and perhaps even at the conclusion of discoveries, that there is a viable alternative to individualized damage assessments. If so, the issue can be revisited at that time. For present purposes, however, there is no evidentiary foundation to support the argument that damages can be assessed globally and no basis upon which to interfere with the motion judge's refusal to designate these as common issues at this time.

79 In coming to his conclusion with respect to punitive damages not being a common issue, the motion judge relied on his own earlier decision in *Robinson v. Medtronic Inc.*,<sup>37</sup> which has subsequently been affirmed by the Divisional Court on appeal. For the same reasons as stated by this court in *Robinson*, I would dismiss the plaintiffs' appeal on the punitive damages issue here.

80 I agree with the respondents' position that the issues of costs of administration, distribution of damages, and interest calculations are administrative matters that can be taken care of in the course of the proceeding. They do not need to be certified as common issues at this stage.

## VII. Order

81 The appeal is allowed and a certification order shall issue on the condition that the motion judge approves a revised litigation plan. The common issues and the definition of the class shall be as directed by the motion judge, except with respect to the express restriction on future exclusions from the class definition, as set out in para. 73 above. The form of the formal order is to be settled before the motion judge in light of these reasons.

82 The parties may make written submissions on costs on a schedule to be agreed upon by them, with all of the submissions being delivered to the court by March 11, 2011.

*Appeal allowed.*

Footnotes

1 Reasons of Perell J. at para. 201

2 *Ibid*, para. 221

3 *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.)

4 *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, [2007] O.J. No. 4406 (Ont. C.A.) at para. 23; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at para. 677, leave to appeal refused (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para 33.

5 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 46.

6 S.O. 1992, c. 6

7 Reasons at paras. 84 -104, in particular paras. 86, 94, 100, 101

8 Reasons, paras. 87-90

9 Reasons, paras. 195-200

10 *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.)

11 *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.)

12 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) [already cited]

13 *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (Ont. S.C.J.); *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Ont. Gen. Div.)

14 *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (Ont. S.C.J.); *Bittner v. Louisiana-Pacific Corp.*, [1997] B.C.J. No. 2281 (B.C. S.C. [In Chambers]); *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (Ont. S.C.J.); *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.); *Brimmer v. VIA Rail Canada Inc.* (2000), 50 O.R. (3d) 114 (Ont. S.C.J.)

15 Reasons, para. 234

16 Reasons, paras. 236 and 237-243

17 Reasons, paras. 244-245

18 Reasons, para. 246

19 Reasons, paras. 248-250

20 Reasons, para. 253

21 Reasons, paras. 256-257

22 Reasons, para. 60 and 69

- 23 Reasons, paras. 61-62
- 24 Reasons, paras. 64-67
- 25 Reasons, paras. 258-259
- 26 *Supra*, note 6, at para. 25
- 27 *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at paras. 60-61 and 67-71; *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.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.); *Sauer v. Canada (Minister of Agriculture)* [2009 CarswellOnt 680 (Ont. Div. Ct.)], 2009 CanLII 2924 (leave application).
- 28 Reasons, para. 111; *Hollick* at para 25; *Sauer* at para.15.
- 29 *Hollick, supra*, at para. 25
- 30 *Lambert, supra*
- 31 Reasons, para. 161
- 32 Reasons, paras. 150-151
- 33 Reasons, para 154-155
- 34 *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 28; *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.); *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.); *Nantais v. Electronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.) at para. 15.
- 35 Reasons, paras. 181-186
- 36 Reasons, para. 189-190
- 37 [2009] O.J. No. 4366 (Ont. S.C.J.) (per Perell J.), [*Peter v. Medtronic Inc.*] 2010 ONSC 3777 (Ont. Div. Ct.) at paras. 34-39.

# **TAB 2**

2015 ONCA 572  
Ontario Court of Appeal

Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)

2015 CarswellOnt 12140, 2015 ONCA 572, [2015] O.J. No. 4267, 256 A.C.W.S. (3d)  
276, 337 O.A.C. 315, 387 D.L.R. (4th) 603, 38 M.P.L.R. (5th) 175, 76 C.P.C. (7th) 276

**Amyotrophic Lateral Sclerosis Society of Essex County, Plaintiff (Respondent)  
and The Corporation of the City of Windsor, Defendant (Appellant)**

Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated,  
Plaintiffs (Respondents) and The Corporation of the Town of Tecumseh, Defendant (Appellant)

G.R. Strathy C.J.O., H.S. LaForme, M. Tulloch JJ.A.

Heard: May 13, 2015

Judgment: August 12, 2015

Docket: CA C59525, C59526

Counsel: Scott Hutchison, for Appellant, City of Windsor

Brendan van Niejenhuis, for Appellant, Town of Tecumseh

Peter W. Kryworuk, Yola S. Ventresca, for Respondents

Subject: Civil Practice and Procedure; Constitutional; Public

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.E** Fair and adequate representation

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.iii** Subclass certification

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiffs commenced two class actions on behalf of those who paid licensing fees after 1990, claiming that charitable lottery licensing and administration fees collected by defendant municipalities were direct taxes and ultra vires — Certification judge certified proceedings for two classes, one for claims arising within two-year limitation period from 2006 on, and one for claims preserved by transitional provisions of Limitations Act, 2002 in 2002 and 2003, on ground that claims falling outside these periods were time-barred — Appellate court allowed plaintiffs' appeal and remitted matter back to certification judge — Certification judge then certified both class actions to 1990, finding that impact of limitations issues should be dealt with later — Appellate court dismissed municipalities' appeal — Municipalities appealed — Appeal allowed in part; judgment varied — Proceedings were certified as class actions, as modified — Class should not have been defined using arbitrary cut-off date of 1990 — Temporal boundary of class could be defined in rational way by reference to ultimate limitation period of 15 years, resulting in class definition encompassing persons who paid fees from 1993.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Subclass certification

Plaintiffs commenced two class actions on behalf of those who paid licensing fees after 1990, claiming that charitable lottery licensing and administration fees collected by defendant municipalities were direct taxes and ultra vires — Certification judge certified proceedings for two classes, one for claims arising from 2006 on, and one for claims arising in 2002 and 2003, on ground that claims falling outside these periods were time-barred — Appellate court allowed plaintiffs' appeal and remitted matter back to certification judge — Certification judge then certified both class actions to 1990, finding that impact of limitations issues should be dealt with later — Appellate court dismissed municipalities' appeal — Municipalities appealed — Appeal allowed in part; judgment varied — Proceedings were certified as class actions, as modified — Class was defined as persons who paid fees after 1993 — Subclass was certified respecting class members with presumptively time-barred claims — Certain issues that had been certified were only common to subclass members and were certified as issues of subclass.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Plaintiffs commenced two class actions on behalf of those who paid licensing fees after 1990, claiming that charitable lottery licensing and administration fees collected by defendant municipalities were direct taxes and ultra vires — Certification judge certified proceedings for two classes, one for claims arising from 2006 on, and one for claims arising in 2002 and 2003, on ground that claims falling outside these periods were time-barred — Appellate court allowed plaintiffs' appeal and remitted matter back to certification judge — Certification judge then certified both class actions to 1990, finding that impact of limitations issues should be dealt with later — Appellate court dismissed municipalities' appeal — Municipalities appealed — Appeal allowed in part; judgment varied — Proceedings were certified as class actions, as modified — Class was defined as persons who paid fees after 1993 — Subclass was certified respecting class members with presumptively time-barred claims — Representative plaintiffs were able to represent all class members — Representative plaintiffs had interest in advancing claims both timely and time-barred, and had interest with all class members in common issues of liability and damages.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiffs commenced two class actions on behalf of those who paid licensing fees after 1990, claiming that charitable lottery licensing and administration fees collected by defendant municipalities were direct taxes and ultra vires — Certification judge certified proceedings for two classes, one for claims arising from 2006 on, and one for claims arising in 2002 and 2003, on ground that claims falling outside these periods were time-barred — Appellate court allowed plaintiffs' appeal and remitted matter back to certification judge — Certification judge then certified both class actions to 1990, finding that impact of limitations issues should be dealt with later — Appellate court dismissed municipalities' appeal — Municipalities appealed — Appeal allowed in part; judgment varied — Proceedings were certified as class actions, as modified — Class was defined as persons who paid fees after 1993 — Subclass was certified respecting class members with presumptively time-barred claims — As modified, class proceeding was preferable procedure — Both liability and limitation period issues could be resolved relatively expeditiously — Although individual issues may remain after common issues resolved, this would not make proceeding unmanageable.

## Table of Authorities

### Cases considered by *G.R. Strathy C.J.O.*:

- Anderson v. Wilson* (1999), 122 O.A.C. 69, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 44 O.R. (3d) 673, 36 C.P.C. (4th) 17, 78 O.T.C. 320 (Ont. C.A.) — referred to
- Anderson v. Wilson* (2000), 2000 CarswellOnt 1837, 2000 CarswellOnt 1838, 258 N.R. 194 (note), 138 O.A.C. 200 (note), 185 D.L.R. (4th) vii (note) (S.C.C.) — referred to
- Caponi v. Canada Life Assurance Co.* (2009), 2009 CarswellOnt 113, 2009 C.E.B. & P.G.R. 8326 (headnote only), 70 C.C.L.I. (4th) 148, 74 C.C.P.B. 89, 72 C.P.C. (6th) 331 (Ont. S.C.J.) — referred to
- Caputo v. Imperial Tobacco Ltd.* (2004), 2004 CarswellOnt 423, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350, [2004] O.T.C. 112 (Ont. S.C.J.) — referred to
- Cloud v. Canada (Attorney General)* (2004), 2004 CarswellOnt 5026, 2 C.P.C. (6th) 199, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 247 D.L.R. (4th) 667, 192 O.A.C. 239, 73 O.R. (3d) 401 (Ont. C.A.) — considered
- Cloud v. Canada (Attorney General)* (2005), 2005 CarswellOnt 1866, 2005 CarswellOnt 1867, 344 N.R. 192 (note), 207 O.A.C. 400 (note), [2005] 1 S.C.R. vi (note) (S.C.C.) — referred to
- Dell'Aniello c. Vivendi Canada inc.* (2014), 2014 SCC 1, 2014 CarswellQue 28, 2014 CarswellQue 29, 2014 CSC 1, (sub nom. *Dell'Aniello v. Vivendi Canada Inc.*) 453 N.R. 150, 369 D.L.R. (4th) 195, (sub nom. *Vivendi Canada Inc. v. Dell'Aniello*) 2014 C.E.B. & P.G.R. 8066 (headnote only), 51 C.P.C. (7th) 1, (sub nom. *Vivendi Canada Inc. v. Dell'Aniello*) [2014] 1 S.C.R. 3, 8 C.C.P.B. (2nd) 163 (S.C.C.) — referred to
- Dominguez v. Northland Properties Corp.* (2012), 2012 BCSC 328, 2012 CarswellBC 518, 97 C.C.E.L. (3d) 241, 2012 C.L.L.C. 210-027 (B.C. S.C.) — referred to
- Dumoulin v. Ontario* (2005), 2005 CarswellOnt 4544, 48 C.L.R. (3d) 72, 19 C.P.C. (6th) 234 (Ont. S.C.J.) — referred to
- Eurig Estate, Re* (1998), 1998 CarswellOnt 3950, 1998 CarswellOnt 3951, (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar*) 231 N.R. 55, 23 E.T.R. (2d) 1, 165 D.L.R. (4th) 1, (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar*) 114 O.A.C. 55, [1998] 2 S.C.R. 565, [2000] 1 C.T.C. 284, 40 O.R. (3d) 160 (note), 40 O.R. (3d) 160 (S.C.C.) — referred to
- Fischer v. IG Investment Management Ltd.* (2013), 2013 SCC 69, 2013 CarswellOnt 17258, 2013 CarswellOnt 17259, 45 C.P.C. (7th) 227, 366 D.L.R. (4th) 1, 312 O.A.C. 128, 482 N.R. 80, (sub nom. *AIC Limited v. Fischer*) [2013] 3 S.C.R. 949 (S.C.C.) — considered
- Hollick v. Metropolitan Toronto (Municipality)* (2001), 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, 2001 CSC 68 (S.C.C.) — followed
- Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)* (2007), 2007 SCC 1, 2007 CarswellNB 6, 2007 CarswellNB 7, 2007 D.T.C. 5029 (Eng.), 2007 D.T.C. 5041 (Fr.), 355 N.R. 336, 25 B.L.R. (4th) 1, 51 Admin. L.R. (4th) 184, 309 N.B.R. (2d) 255, 799 A.P.R. 255, 276 D.L.R. (4th) 342, (sub nom. *Kingstreet Investments Ltd. v. New Brunswick*) [2007] 1 S.C.R. 3, 309 N.B.R. (2d) 225 (S.C.C.) — considered
- McCracken v. Canadian National Railway* (2012), 2012 ONCA 445, 2012 CarswellOnt 8010, 100 C.C.E.L. (3d) 27, 21 C.P.C. (7th) 57, 2012 C.L.L.C. 210-041, 293 O.A.C. 274, 111 O.R. (3d) 745 (Ont. C.A.) — referred to
- McKenna v. Gammon Gold Inc.* (2010), 2010 ONSC 1591, 2010 CarswellOnt 1460, 88 C.P.C. (6th) 27 (Ont. S.C.J.) — referred to
- Pearson v. Boliden Ltd.* (2001), 2001 BCSC 1054, 2001 CarswellBC 1855, 94 B.C.L.R. (3d) 133, [2001] B.C.T.C. 1054 (B.C. S.C. [In Chambers]) — referred to
- Pearson v. Boliden Ltd.* (2002), 2002 BCCA 624, 2002 CarswellBC 2769, 7 B.C.L.R. (4th) 245, 175 B.C.A.C. 104, 289 W.A.C. 104, 222 D.L.R. (4th) 453 (B.C. C.A.) — referred to
- Ragoonian Estate v. Imperial Tobacco Canada Ltd.* (2005), 2005 CarswellOnt 5992, 20 C.P.C. (6th) 262, (sub nom. *Ragoonian Estate v. Imperial Tobacco Canada Ltd.*) 78 O.R. (3d) 98 (Ont. S.C.J.) — referred to
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*Sankar v. Bell Mobility Inc.* (2013), 2013 ONSC 5916, 2013 CarswellOnt 13796, 52 C.P.C. (7th) 75 (Ont. S.C.J.) — referred to

*Sankar v. Bell Mobility Inc.* (2013), 2013 ONSC 7529, 2013 CarswellOnt 18414 (Ont. Div. Ct.) — referred to

*Serhan Estate v. Johnson & Johnson* (2006), 2006 CarswellOnt 3705, 24 E.T.R. (3d) 265, 28 C.P.C. (6th) 83, 213 O.A.C. 298, 269 D.L.R. (4th) 279, (sub nom. *Serhan (Trustee of) v. Johnson & Johnson*) 85 O.R. (3d) 665 (Ont. Div. Ct.) — referred to

*Serhan Estate v. Johnson & Johnson* (2007), 2007 CarswellOnt 2150, 2007 CarswellOnt 2151, (sub nom. *Johnson & Johnson v. Serhan*) 369 N.R. 397 (note), (sub nom. *Johnson & Johnson v. Serhan*) 234 O.A.C. 398 (note), [2007] 1 S.C.R. x (note) (S.C.C.) — referred to

*Stone v. Wellington (County) Board of Education* (1999), 1999 CarswellOnt 1039, 120 O.A.C. 296, 29 C.P.C. (4th) 320, 29 C.P.C. (4th) 400 (Ont. C.A.) — followed

*Stone v. Wellington (County) Board of Education* (2000), 2000 CarswellOnt 1156, 2000 CarswellOnt 1157, 254 N.R. 395 (note), 134 O.A.C. 400 (note) (S.C.C.) — referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 5(2) — considered

s. 12 — considered

*Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 53 — considered

*Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B

Generally — referred to

s. 15 — considered

s. 15(4) — considered

s. 24(7.1) [en. 2008, c. 19, Sched. L, s. 5(8)] — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 1.04 — considered

R. 20 — considered

R. 21 — considered

**Authorities considered:**

Board of Editors, Federal Judicial Center, *Manual for Complex Litigation*, 4th ed. (St. Paul, Minn.: Thomson West, 2004)

Winkler, Warren K. et al., *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) (looseleaf)

APPEALS by defendant municipalities from judgment certifying two class actions which claim that charitable lottery licensing and administration fees collected by municipalities are direct taxes and *ultra vires*.

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

1 The appellant municipalities appeal the certification of two class actions which claim that charitable lottery licensing and administration fees collected by the municipalities are direct taxes and therefore *ultra vires* because the revenues far exceed the costs of administration: see *Eurig Estate, Re*, [1998] 2 S.C.R. 565 (S.C.C.).

2 The appellants acknowledge that some of the respondents' claims are appropriate for resolution by class action. They initially consented to certification of claims for fees paid within the limitation periods prescribed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

3 The appellants' primary objection is to the temporal scope of the class, which includes charities that have paid fees since 1990. They say this reaches too far back in time. This means, they say, that some of the common issues are not common to all class members and a class proceeding is not the preferable procedure for the resolution of all claims.

4 These actions were commenced in 2008. Unfortunately, they are not yet out of the starting gate.

5 For the reasons that follow, it is my view that with some adjustment these proceedings meet the requirements of s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). The time has come to ring the bell and get them on their way.

**Judicial History**

6 These actions have had a tortuous judicial history, having been twice certified, with ensuing appeals. I will describe that history to the extent necessary to understand the issues on appeal.

**(1) Certification: Round One**

7 The plaintiffs commenced their actions on October 24, 2008. The proposed classes consisted of anyone who had paid licensing fees on or after January 1, 1990.

8 The certification judge initially certified a class of charities that paid licensing fees in two time periods:

- October 24, 2006 and thereafter; and
- October 24, 2002 to December 31, 2003.

9 The first period covered claims arising within two years of the commencement of this action and therefore within the two-year limitation period in the *Limitations Act, 2002*. The second period covered claims preserved by the transitional provisions of the *Limitations Act, 2002*.

10 In limiting the claim to these periods, the certification judge accepted the municipalities' argument that claims falling outside these periods could not succeed because they were time-barred. He explained that in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 (S.C.C.), which concerned allegedly illegal fees collected by New Brunswick, the Supreme Court held that the limitation period began to run at the moment the province received payment. He rejected the plaintiffs' submission that the applicability of the *Limitations Act, 2002* should be determined at a later stage, either on a summary judgment motion or at trial.

11 The plaintiffs appealed, with leave, to the Divisional Court. That court allowed the appeal for two reasons.

12 First, the court held that the certification judge erred by interpreting *Kingstreet* as having established an absolute limitation period for claims of this type. The court noted that in *Kingstreet*, there was no discoverability issue that could have extended the applicable limitation period. By contrast, in this case the plaintiffs pleaded a discoverability/concealment issue.

13 Second, and related, the discoverability/concealment issue raised questions of fact that could only be decided based on evidence. However, the inquiry under s. 5(1)(a) of the *CPA* is based on the pleadings alone and does not engage any discretion or fact finding. While it was not clear to the Divisional Court that the certification judge had considered any evidence under s. 5(1)(a), if he had, it would constitute an error of law.

14 The Divisional Court remitted the matter back to the certification judge for reconsideration. It explained that it was open to him to truncate the class or the common issues or to dismiss the certification motion altogether, if he found the proceeding was inappropriate for certification without a temporal limit.

## **(2) Certification: Round Two**

15 The certification rehearing was held in November 2012. This time, the certification judge certified both class actions using the plaintiffs' originally proposed, and admittedly arbitrary, commencement date of January 1, 1990.

16 The certification judge held, first, that the statement of claim disclosed a cause of action.

17 Second, there was an identifiable class, defined as "all persons whether natural (including unincorporated associations) or corporate who have paid lottery licensing fees and/or lottery administration fees to [the municipalities] on or after January 1, 1990."

18 Third, the proposed claims raised common issues as to liability, damages and limitation periods. The common issues certified were as follows:

1. In pith and substance are the lottery licensing fees and lottery administration fees that have been charged by [the municipalities] to members of the class during the claim period or any part thereof, taxes imposed in a manner contrary to s. 53 of the *Constitution Act, 1867*?

2. Do the statements and/or the conduct by and on behalf of the Hall Charities Association and/or Bingo Sponsor Association give rise to a defence in the nature of *laches*, estoppel, waiver or analogous equitable defences that bind the class or bind an identifiable subclass subject to the defendant's right to move under Rule 20 and/or Rule 21 of the *Rules of Civil Procedure*?

3. Apart from any arguments relating to discoverability and/or concealment, what is the limitation period applicable to such claims arising prior to the coming into force of the *Limitations Act, 2002* on January 1, 2004?

4. What is the effect, if any, of the transitional provisions contained in the *Limitations Act, 2002* upon the claims of the class members?

5. At what time (or times), if any, should the class members ought to have known that they had a claim against [the municipalities], such that the applicable limitation period began to run against all class members, having regard to the principles of discoverability and concealment?

6 If the said fees are taxes which are *ultra vires* or otherwise illegal, are class members entitled to an accounting and/or restitution of such taxes paid to [the municipalities] subject to any applicable limitation period, *laches*, waiver and/or estoppel arguments?

7. Having regard to all the circumstances, is an award of punitive damages appropriate in this case?

19 The contentious common issues before this court are issues 3, 4 and 5, which relate to limitation periods.

20 The certification judge rejected the municipalities' submission that these issues, and particularly common issue 5, would be unmanageable. He noted that because the plaintiffs limited the discoverability question to what a "reasonable person ought to have known", there would be no need to inquire into what each class member actually knew in order to determine this common issue.

21 He held that the impact of the limitations issues should be dealt with later, rather than at the certification stage. He explained that after pleadings, production of documents and discovery, the application of the *Limitations Act, 2002* could be appropriate for determination on a summary judgment motion.

22 Fourth, building on this analysis, the certification judge noted that he had previously held that a class proceeding would be appropriate to adjudicate the timely claims. He added, at para. 26: "And now on further analysis I am of the opinion that it is appropriate to permit those individuals who are outside the basic limitation period to have an opportunity to be heard." In his view, the limitations issue did not make the proceeding unmanageable.

23 Fifth, and finally, the certification judge found that the representative plaintiffs were able to advance the claims of all class members, including those with claims outside the basic limitation period. He did not address the issue of whether it was appropriate to create a subclass pursuant to s. 5(2) of the *CPA*.

24 Justice Nolan granted the municipalities' motion for leave to appeal to the Divisional Court. In her view, the certification judge's preferability analysis did not demonstrate that he had considered the advantages and disadvantages of a class action and the manageability of a proceeding that included potentially time-barred claims.

25 Justice Nolan also noted, at para. 25, that the certification judge "did not provide an analysis of whether the *prima facie* time-barred claims actually formed a subclass".

26 The Divisional Court dismissed the municipalities' appeal. The court emphasized that the certification judge's decision was entitled to substantial deference unless he erred in law or principle.

27 The Divisional Court approved the class definition and was not persuaded that the certification judge erred by failing to identify a subclass.

28 It rejected the municipalities' argument that it would be unfair and inefficient to litigate the timely claims alongside the presumptively time-barred ones. It also rejected the municipalities' argument that the certification judge erred in finding that the representative plaintiffs could represent all class members. The court held that it was open to the certification judge to find that the representative plaintiffs were suitable and did not have a conflict of interest.

29 Finally, the Divisional Court held that it was open to the certification judge to find that there were common issues, including issues of discoverability, notwithstanding that some of the claims were clearly brought in time.

30 The appellants appeal to this court, with leave.

### **Analysis**

31 The appellants' submissions focused on: (a) the class definition; (b) whether subclasses are required; (c) the lack of commonality of some issues; (d) the inability of the representative plaintiffs to fairly represent the claims of all class members; and (e) whether a class proceeding is the preferable procedure for the resolution of the claims.

32 I will address each of these in turn. In summary, in my view the class definition was arbitrary and some common issues lacked commonality. These are not fatal defects, however. They can be corrected by modifying the class definition, creating a subclass and stating subclass common issues. A subclass representative is not required, at this time. Thus modified, a class action remains the preferable procedure for the resolution of the claims.

**(a) The Class Definition**

33 It is a basic principle that the plaintiff must define the class with precision and in a way that is neither over-inclusive nor under-inclusive: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.). In *Hollick*, McLachlin C.J. held that the putative plaintiff must show that the class has been defined sufficiently narrowly. She explained the nature of the exercise, 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, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.

[Emphasis in original.]

34 In Warren K. Winker et al, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014), the authors set out the general principle that should guide the task of defining a class under s. 5(1)(b), at p. 93:

A satisfactory class definition should bind the persons who ought to be bound and, therefore, the definition should not be under-inclusive. By the same token, a satisfactory definition should not bind persons who ought not to be bound, and, therefore, the definition should not be over-inclusive. An optimal class definition should not arbitrarily exclude those who share the same cause of action, or include persons without a claim.

35 The certification judge recognized that s. 5(1)(b) of the *CPA* requires the plaintiff to define the class in a rational manner. He also correctly stated the purposes of the class definition: to identify persons who have a potential claim against the defendants; to define the parameters of the lawsuit so as to include persons who should be bound by the result; and to describe who is entitled to notice of certification. He acknowledged the January 1, 1990 date was arbitrary, but approved it nonetheless, suggesting that the scope of the class could be refined after a summary judgment motion based on the limitation period.

36 The Divisional Court saw no error in the date being "somewhat arbitrary". It suggested that having no date could make the proceeding unmanageable and that the date could be revisited after discoveries, once the parties had a better handle on the historical claims.

37 The actions were commenced on October 24, 2008. The "timely" claims, which the appellants concede can go forward, are those where payments were made: (a) from and after October 24, 2006, based on the standard two-year limitation period in the *Limitations Act, 2002*; and (b) between October 24, 2002 and December 31, 2003, based on the transition provisions in s. 24(7.1) of the *Limitations Act, 2002*, which provide for a six-year limitation period for claims relating to payments made before January 1, 2004.

38 The appellants argue that claims outside these periods are "presumptively time-barred" and do not meet the test for certification under s. 5(1)(c), (d) and (e) of the *CPA* — they lack commonality with the timely claims, the proposed representative plaintiffs are inappropriate, and a class proceeding is not the preferable procedure.

39 I agree with the appellants that the class should not have been defined using an arbitrary cut-off date. Arbitrariness in the class definition defeats some of the important purposes of class proceedings: binding all persons who ought to be bound by the decision, providing access to justice and achieving judicial economy. See *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234 (Ont. S.C.J.), at para. 20; *Ragoongan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 12, aff'd (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.). Nor was it appropriate to adopt a "wait and see" approach to the class definition, leaving it to the defendants to define its contours by a summary judgment motion. It is the plaintiffs' responsibility to define the class properly, not the defendants'.

40 How, then, should the class be defined in this case?

41 As I have explained, the appellants propose to limit the claims to the "timely" claims — i.e. those between October 24, 2002 and December 31, 2003, and from October 24, 2006 onward. The respondents complain that truncating the class in this way presupposes that claims outside these time periods are time-barred — a conclusion that depends on a factual inquiry regarding discoverability. However, the case law is clear: where the resolution of the limitation issue depends on a factual inquiry, such as when the plaintiff discovered or ought to have discovered the claim, the issue should not be decided on the motion for certification: *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.), at paras. 140-145, leave to appeal to C.A. refused (unreported), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 494 (S.C.C.). See also *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, 88 C.P.C. (6th) 27 (Ont. S.C.J.), at paras. 38-39.

42 On the other hand, if the classes are defined using no temporal limit, the claims would reach back to 1969/1970 when Ontario first introduced the licencing regime for charitable gaming. All parties appear to agree that a class definition stretching back more than four decades may make the proceeding unmanageable.

43 In my view, the temporal boundary of the class can be defined in a rational way by reference to the ultimate limitation period in s. 15(2) of the *Limitations Act, 2002*. That provides, "No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place." This would result in a class definition encompassing persons who paid fees from and after October 24, 1993.

44 Although s. 15(4) of the *Limitations Act, 2002* provides an exception to the ultimate limitation period in the case of wilful concealment, drawing the class boundary at the ultimate limitation period is not arbitrary because it separates claims that require proof of wilful concealment from those that do not.

45 As I will explain, concerns with respect to manageability can be addressed by the creation of a subclass, by stating common issues for the subclasses and by appropriate case management. I will discuss the subclass issue next.

#### **(b) Subclasses**

46 The court has the authority to certify a subclass of class members who have claims or defences not shared by all class members: *CPA*, s. 5(2). Subclasses are appropriate when there are common issues applicable to the class as a whole and other issues that are applicable to some, but not all class members: *Caputo v. Imperial Tobacco Ltd.* (2004), 44 C.P.C. (5th) 350 (Ont. S.C.J.), at para. 45.

47 Here, issues of liability and damages are common to all class members. However, the claims of class members with presumptively time-barred claims raise common issues of fact and law not shared by those with timely claims. They should form a subclass. I would therefore certify a subclass of persons who paid fees between October 24, 1993 and October 23, 2002 and between January 1, 2004 and October 23, 2006. These are the payments made within the "ultimate limitation period" in s. 15 of the *Limitations Act, 2002*, but not within the basic limitation period and not preserved by the transition rules of the statute.

#### **(c) Common Issues**

48 A common issue must be a substantial ingredient of every class member's claim and its resolution must serve to advance the resolution of that claim: see *Hollick*, at para. 18; *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1, [2014] 1 S.C.R. 3 (S.C.C.), at para. 46. The answer to the question must be capable of extrapolation to every member of the class: see *McKenna*, at para. 125; *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916, 52 C.P.C. (7th) 75 (Ont. S.C.J.), at paras. 91, 93, leave to appeal to Div. Ct. refused, 2013 ONSC 7529 (Ont. Div. Ct.).

49 The certification judge properly certified common issues relating to liability (issue 1), defences (issue 2) and remedies (issues 6 and 7) that are common to all class members.

50 However, common issues 3, 4 and 5 are of no interest to class members whose claims are timely. Those issues are only applicable to the subclass members, whose claims may be subject to a limitations defence. They should be subclass common issues.

**(d) Representative Plaintiffs**

51 The issue now is whether a separate subclass representative is required. The appellants say the representative plaintiffs cannot fairly and adequately represent the interests of the subclass.

52 They rely on the principle expressed in *Stone v. Wellington (County) Board of Education* (1999), 120 O.A.C. 296 (Ont. C.A.), at para. 10, leave to appeal to S.C.C. refused, (2000), [1999] S.C.C.A. No. 336 (S.C.C.), that "[w]here a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class."

53 The appellants say the representative plaintiffs have a conflict of interest, because they have admitted to knowledge of certain facts that makes it impossible to rebut the presumption that they "discovered" their claims outside the limitation period. They say the subclass members with presumptively time-barred claims would be prejudiced if they were represented by these plaintiffs. Moreover, say the appellants, the representative plaintiffs may be inclined to sacrifice their interests in the time-barred claims in order to prosecute their timely claims.

54 The appellants refer to s. 5(2) of the *CPA*, which provides that where, in the opinion of the court, the protection of subclass members requires that they be separately represented, the court shall not certify the proceeding unless there is a representative plaintiff who would fairly and adequately represent the subclass, has produced a workable litigation plan on behalf of the subclass and who does not have, on the subclass common issues, a conflict of interest with the subclass.

55 I do not read this statutory requirement as precluding the class representative from representing a subclass. It is only when the representative plaintiff cannot fairly and adequately represent the subclass that the need for a separate subclass representative arises: see *Pearson v. Boliden Ltd.*, 2001 BCSC 1054, 94 B.C.L.R. (3d) 133 (B.C. S.C. [In Chambers]), at para. 73, varied on other grounds, 2002 BCCA 624, 222 D.L.R. (4th) 453 (B.C. C.A.); *Dominguez v. Northland Properties Corp.*, 2012 BCSC 328 (B.C. S.C.), at paras. 75-83; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), leave to appeal to S.C.C. refused, (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *Caponi v. Canada Life Assurance Co.* (2009), 72 C.P.C. (6th) 331 (Ont. S.C.J.), at para. 56.

56 It is not necessary to resolve the appellants' concerns at this time. The representative plaintiffs, like many class members, may have claims that are both timely and presumptively time-barred. They have an interest, at least at the present time, in advancing both types of claims. They certainly have an interest with all class members in the common issues of liability and damages.

57 Moreover, I am not convinced that it is quite as obvious as the appellants suggest that the "admissions" made by the representative plaintiffs or their counsel are fatal to their claims. It has not been "definitively shown" that they have no claim.

58 On the present record, I am not satisfied the representative plaintiffs are unable to represent all class members. It may be that at some future date it will be necessary to revisit this issue, but that issue, and when it should be addressed, are matters best left to the judgment of the case management judge.

**(e) Preferable Procedure**

59 The remaining issue is whether this proceeding, as modified, meets the requirement of s. 5(1)(d) of the *CPA* — that is, whether it would be the preferable procedure for the resolution of the common issues.

60 The preferability analysis asks two main questions, as set out in *Hollick*: (a) whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (b) whether a class proceeding would be preferable to other procedures.

61 These questions are to be addressed through the lens of the three goals of class action proceedings — judicial economy, access to justice and behaviour modification: *Hollick*, at para. 27. However, there is no requirement to prove that the class action

will actually achieve these goals: *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.), at para. 22.

62 Although recent case law, particularly *Fischer v. IG Investment Management Ltd.*, has focused on the second question — the comparison to alternative procedures — the proposed class proceeding must nevertheless be "fair, efficient and manageable" in order for it to be certified. As stated by Winkler J., as he then was, in *Caputo*, at para. 62:

[I]t 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 In this case, there are two issues of preferability. The first is the complexity introduced by the need to resolve potentially time-barred claims along with the timely claims. The appellants concede that a class action *could* combine timely claims and the presumptively time-barred claims. They say, however, that in this case the court should certify only a focused class of timely claims and leave the other claims to be pursued individually by those claimants who wish to do so.

64 The second concern is the existence of different regulatory and fiscal regimes over the broad class period, which may necessitate individual inquiries, in individual time periods, to determine issues of both liability and damages.

65 The difficulties faced by defendants simply by virtue of having to respond to common and individual issues do not make a class proceeding unfair, inefficient or unmanageable if those issues will have to be dealt with by the defendants one way or another. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50 (S.C.C.), the defendants argued that a class action proceeding "would be unfair to them and would create an unmanageable proceeding." Justice Goudge rejected that submission, stating at para. 89-90:

The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials....

That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in Rumley unmanageable and does not do so here.... Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

66 The appellants argue that the certification judge failed to address the preferable procedure requirement. They say that combining the presumptively time-barred claims with the timely claims is not the preferable procedure for the resolution of either. They submit the large quantum at issue in the presumptively time-barred claims makes them amenable to ordinary litigation. Their small likelihood of success, given the admissions of the representative plaintiff and the challenges of litigating those claims, makes it clear that they should not be litigated with the timely claims.

67 I disagree. In my view, the significant features of class proceedings — the ability to case manage groups of claims raising common issues and the ability to make binding determinations of those issues — make a class proceeding appropriate to resolve these claims. With active and strategic case management, and a resolve by the parties to focus on the fair and efficient resolution of the issues, both liability and limitation period issues could be resolved relatively expeditiously.

68 Section 12 of the *CPA* empowers the case management judge to make appropriate orders to ensure the fair and expeditious determination of the proceeding and to impose appropriate terms on the parties. This provision is procedural (see *McCracken v. Canadian National Railway*, 2012 ONCA 445, 293 O.A.C. 274 (Ont. C.A.), at para. 142) and does not permit a judge to ignore or override provisions of the *CPA*. However, together with Rule 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, it does permit the judge to impose procedural terms that will promote access to justice and judicial economy as well as ensure the "just, most expeditious and least expensive determination" of the proceeding on its merits.

69 The *Manual for Complex Litigation*, 4<sup>th</sup> ed., published by the American Federal Judicial Center in 2004, provides a useful catalogue of the features of effective case management at 10.13:

Effective judicial management generally has the following characteristics:

- *It is active.* The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
- *It is substantive.* The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
- *It is timely.* The judge decides disputes promptly, particularly those that may substantively affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
- *It is continuing.* The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.
- *It is firm, but fair.* Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed ... for derelictions and dilatory tactics.
- *It is careful.* An early display of careful preparation sets the proper tone and enhances the court's credibility and effectiveness with counsel.

70 Case management judges in class proceedings are of course required to be fair to both parties, and they should take the representative plaintiff's litigation plan as an important starting point in guiding the case management process. At the same time, they are entitled to seek and impose creative solutions to the efficient determination of the issues. The resolution of issues does not always require an adversarial hearing. Some case management judges and counsel find case management conferences to be an efficient way of resolving procedural issues, through discussion, negotiation and consensus, facilitated by the case management judge and without the need for formal rulings.

71 The case management judge is entitled to give directions as to when certain steps should be accomplished and as to what motions may be brought, and when. The case management judge may prohibit motions from being brought before certain steps have been accomplished and may make orders as to the sequencing of motions. The case management judge is also entitled to determine the order in which some issues are addressed. He or she is entitled, but not required, to determine whether some issues are amenable to summary judgment and to schedule the proceedings accordingly.

72 In this case, individual issues may remain after the common issues have been resolved. It may be asserted that particular class members had special knowledge that triggered the commencement of the limitation period, notwithstanding that the information was not publicly known. Different regulatory regimes, fee scales and cost-recovery methods may require analysis of particular segments of the class period. I am not persuaded, however, that this would make the proceeding unmanageable or incapable of fair and efficient resolution. Indeed, it is my view that these issues can most effectively and fairly be resolved in the context of this proceeding.

73 As I suggested earlier, case management should be complimented by a resolve by the parties to focus on the fair and efficient resolution of the issues. That should be true in all litigation, but it is particularly important in complex litigation such

as class proceedings. All the more so in a case like this, in which the ultimate cost will be borne by the public, one way or the other. It behooves the parties, assisted by the case management judge, to focus their energies accordingly.

### **Disposition**

74 For these reasons, the appeal is allowed, in part, the judgment below is varied and the proceeding shall be certified as a class proceeding pursuant to s. 5(1) of the *CPA* on the terms set out herein.

75 As success is divided, I would make no order as to costs.

#### ***H.S. LaForme J.A.:***

I agree.

#### ***M. Tulloch J.A.:***

I agree.

*Appeals allowed in part; judgment varied.*

# **TAB 3**

**Most Negative Treatment:** Check subsequent history and related treatments.

2004 CarswellOnt 5608

Ontario Superior Court of Justice

Bellaire v. Independent Order of Foresters

2004 CarswellOnt 5608, [2004] O.J. No. 2242, 19 C.C.L.I. (4th) 35, 5 C.P.C. (6th) 68

## Ralph Bellaire, Plaintiff and The Independent Order of Foresters, Defendant

Nordheimer J.

Heard: February 23-24, 2004

Judgment: March 15, 2004 \*

Docket: London 39813/99

Proceedings: additional reasons at *Bellaire v. Independent Order of Foresters* (2004), 2004 CarswellOnt 5609 (Ont. S.C.J.)

Counsel: Andrew F. Camman, Peter Sengbusch for Plaintiff

J.D. Timothy Pinos, Helena Jankovic for Defendant

Subject: Civil Practice and Procedure; Insurance

### Related Abridgment Classifications

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.B Identifiable class

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.C Common issue or interest

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.D Preferable procedure

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.e Costs, fees and disbursements

V.2.e.vi Miscellaneous

### Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Insured purchased life insurance policy — Insured maintained that insurer represented that premiums on policy would never rise above certain amount — Statement in policy allowed for variable premiums — Insured's premiums later rose above amount alleged by insured — Insured brought action for breach of contract, breach of fiduciary duty and fraudulent misrepresentation — Insured brought motion for certification of action as class proceeding — Motion dismissed — Identifiable class was not obviously extant — Although insurer had received several complaints regarding policies, few complaints were similar in nature to insured's — Insured did not show that second identifiable member of class existed — Insurer was not adequate representation of potential class — Many other customers of insurer had complaints, which were unrelated to insured's complaint.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Insured purchased life insurance policy — Insured maintained that insurer represented that premiums on policy would never rise above certain amount — Statement in policy allowed for variable premiums — Insured's premiums later rose above amount alleged by insured — Insured brought action for breach of contract, breach of fiduciary duty and fraudulent misrepresentation — Insured brought motion for certification of action as class proceeding — Motion dismissed — No common issue existed — Issue was not one of interpretation of identical contracts — Insured's claim rested on individual representations by insurer — Class proceeding was not necessarily preferable procedure — Insurer created alternate complaint procedure, which would not prejudice rights of insured, and which insured had not used — Insurer was not adequate representation of potential class — Many other customers of insurer had complaints, which were unrelated to insured's complaint — Settlement by insured as representative plaintiff could prejudice other complainants.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Insured purchased life insurance policy — Insured maintained that insurer represented that premiums on policy would never rise above certain amount — Statement in policy allowed for variable premiums — Insured's premiums later rose above amount alleged by insured — Insured brought action for breach of contract, breach of fiduciary duty and fraudulent misrepresentation — Insured brought motion for certification of action as class proceeding — Motion dismissed — Class proceeding was not necessarily preferable procedure — Insurer created alternate complaint procedure, which would not prejudice rights of insured, and which insured had not used — Insurer was not adequate representation of class — Many other customers of insurer had complaints, which were unrelated to insured's complaint — Settlement by insured as representative plaintiff could prejudice other complainants — Insured put forth no litigation plan beyond normal steps of litigation.

## Table of Authorities

### Cases considered by *Nordheimer J.*:

*Caputo v. Imperial Tobacco Ltd.* (2004), 2004 CarswellOnt 423, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350 (Ont. S.C.J.) — considered

*Kumar v. Mutual Life Assurance Co. of Canada* (2003), 2003 CarswellOnt 1209, [2003] I.L.R. I-4181, 31 C.P.C. (5th) 205, 47 C.C.L.I. (3d) 43, 170 O.A.C. 165, 226 D.L.R. (4th) 112 (Ont. C.A.) — followed

*Lau v. Bayview Landmark Inc.* (1999), 1999 CarswellOnt 3442, 40 C.P.C. (4th) 301 (Ont. S.C.J.) — followed

*Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, 1998 CarswellOnt 5216 (Ont. Gen. Div.) — followed  
*Western Canadian Shopping Centres Inc. v. Dutton* (2001), 94 Alta. L.R. (3d) 1, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534 (S.C.C.) — considered

*Zicherman v. Equitable Life Insurance Co. of Canada* (2000), 2000 CarswellOnt 5779, 47 C.C.L.I. (3d) 39 (Ont. S.C.J.) — followed

### Statutes considered:

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — pursuant to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 8(1)(e) — considered

MOTION by insured for certification of class proceeding.

**Nordheimer J.:**

1 The plaintiff moves to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

2 This action was commenced on July 30, 2002. The claims asserted in this action arise out of an alleged failure by the defendant to honour the terms of certificates<sup>1</sup> of insurance that it issued, specifically Universal Life Insurance certificates, which the plaintiff claims were to have a fixed premium throughout the lifetime of the certificate.

3 The relief sought in the amended statement of claim includes declaratory relief relating to an alleged breach of fiduciary duties or breach of trust owed by the defendant to the plaintiff, damages for that breach, disgorgement of profits made, an accounting of alleged overpayments of premiums as well as damages for fraudulent misrepresentation in the amount of \$100,000, alternatively, damages for negligent misrepresentation in the amount of \$100,000, alternatively, damages for breach of contract or breach of collateral contract in the amount of \$100,000, together with interest and costs.

4 The statement of claim has been amended once to alter the definition of the proposed class. The proposed class is defined in the amended statement of claim and in the plaintiff's factum as:

Any person in Canada who:

- i) has entered into a Universal Life Policy of Insurance with the Defendant, whether now lapsed or surrendered; and
- ii) has been informed of a premium increase, or prospective increase; and
- iii) has been or will be deprived of the use of the difference of the insurance premiums actually charged and the contract premium contemplated by the parties; and
- iv) did not receive an accounting and payment of the fruits of such premium over payment or notification from the Defendant that such accounting or payment shall be made.

**Background**

5 In September 1984, the plaintiff, who was then thirty-eight years of age, purchased a Universal Life Insurance policy from the defendant. The relevant terms of the policy were:

- (a) a death benefit of \$50,000 payable at the insured's death, if death occurs prior to the policy maturity date;
- (b) a cash surrender value of \$50,000 payable at the policy maturity date, if the insured is still alive;
- (c) a maturity date of September 13, 2041 at which point the plaintiff would be at age ninety-five;
- (d) an initial monthly premium of \$52.60;
- (e) a cost of living allowance increase rider, and;
- (f) a 4% guaranteed savings rate.

6 Although Mr. Bellaire raises several causes of action in his claim, the central allegation advanced by Mr. Bellaire is that, under his Universal Life Insurance certificate, he was guaranteed a fixed monthly premium of \$52.60 for coverage until the earlier of death or age ninety-five. Contrary to that guarantee, the plaintiff was advised in April 2000 that his policy would lapse in 2011 unless his monthly premium increased to \$147.50.

7 The defendant's Universal Life Insurance was sold between 1984 and 1987. The defendant says that it was marketed as a flexible premium, flexible benefit product with various features and options to accommodate a range of insurance and other potential objectives specific to the certificate purchaser. The defendant also says that each certificate is member specific, in that it requires the member, in the application for insurance, to make selections including the amount of premium that the applicant proposes to pay.

8 The central feature of the defendant's Universal Life Insurance was the cash value fund which operated like a deposit account. Under such insurance, a member's premium, net of the "premium expense load", was deposited into the account. Out of that account the defendant deducted the cost of insurance, the cost of any riders, and the expense charges (collectively referred to as "monthly deductions"). Interest was added to the account, which accrued at a variable rate determined by the defendant, but with a minimum rate of 4%. The balance in the account at any point in time was the "cash value" of the certificate.

9 When purchasing a Universal Life Insurance certificate, the member selected the face amount and death benefit type (level or increasing), any riders (collectively referred to as "coverages") and, subject to a minimum level of premium, selected the premium and the planned frequency of its payment, for example, monthly, quarterly, semi-annually or annually. One feature of the Universal Life Insurance certificate was that it gave the member the option to change the frequency of payment of the selected premium, or to increase or decrease the amount of the premium, or to not pay any premium at all if the existing cash value of the policy was sufficient to cover the monthly deductions.

10 The cash value of a policy was dependent upon a number of factors - premiums deposited; interest credited; monthly deductions; and partial withdrawals made by the member. As long as the cash surrender value (cash value, net of any outstanding certificate loans and surrender charges, if applicable) was sufficient to fund the monthly deductions, the certificate remained in force. If not, and after a grace period, the certificate lapsed and was no longer in force.

11 After the issuance of the certificate, the basic elements of the certificate (i.e., coverages and premium) were subject to change at the option of the member: premiums could be increased or decreased; the coverages could be increased or decreased. The member could also take loans against, or make partial withdrawals from, the cash value. Each of these actions would have an impact on the cash value in the certificate and, consequently, how long the certificate might remain in force.

12 The plaintiff asserts that he was told by representatives of the defendant, and he understood, that the Universal Life Insurance certificate he was purchasing came with a fixed premium. In other words, the plaintiff says that it was represented to him that he would never have to pay more than \$52.60 per month in order to maintain the insurance he purchased. In contrast, the representative of the defendant who sold the certificate to the plaintiff says that he never represented to the plaintiff that his certificate would have a fixed monthly premium of \$52.60, or that coverage would last until age ninety-five.

13 In the course of his cross-examination, the plaintiff gave the following evidence:

- (a) that he was first told by an agent for a different insurer, Confederation Life, that the premium on a Universal Life policy was fixed and would provide him with coverage to close to age ninety-five;
- (b) that he could not recall exactly what he was told by the defendant's representative about the premium before he signed the application for insurance in 1984 although he did admit that the Universal Life Insurance certificate was thoroughly explained to him before he bought it;
- (c) that he understood how fluctuations in interest rates would have an impact on his certificate's cash value;
- (d) that following delivery of his certificate he never read it but simply "threw it in a filing cabinet".

14 In contrast to the asserted position of the plaintiff that the Universal Life Insurance certificate carried a fixed premium, the Certificate Specifications page delivered to Mr. Bellaire with his certificate shows a "planned" monthly premium of \$52.60 and goes on to expressly provide that "additional premiums may be required to provide coverage to the maturity date". In addition, the General Provisions applicable to the certificate set out a grace period in the following terms: "If the cash value less any debt will not cover the monthly deduction, a grace period of 61 days will be allowed to pay a premium that will cover the monthly deduction". Further, the Table of Values page applicable to the certificate states that "if the cash value becomes exhausted, additional premiums will be required to keep the certificate in force." Still further, the "Statement of Policy Cost And Benefit Information" which the defendant is required by the Province to provide to a purchaser stated: "This certificate provides life insurance as long as premiums paid and interest credited are more than charges for mortality and expenses, but not after age 95".

15 The plaintiff's claim here is not the first time that dissatisfaction with the Universal Life Insurance certificates has been made known to the defendant. In the latter part of 1997, a class action respecting these certificates was launched against the defendant in the United States. That class action was subsequently settled by the defendant and the settlement was ultimately approved by the U.S. court. As a consequence of that class action and the ensuing settlement, but before any action had been instituted in Canada, the defendant established the Foresters' Member Value Program ("MVP"). The defendant says that the MVP was created to provide an opportunity for Canadian purchasers of such life insurance certificates in the period January 1, 1984 to December 31, 1999, to come forward and raise any concerns regarding their certificates. I believe that it would be fair to conclude that the MVP was, at least in part, an effort by the defendant to pre-empt any similar action being commenced in Canada.

16 The MVP gave purchasers the opportunity to apply for an adjustment based upon their complaint or concern. The defendant mailed to each purchaser a package of information regarding the MVP including forms to be submitted to participate in the program. Each MVP participation form that was submitted was individually evaluated by staff of the defendant, all of whom had been involved in similar work in relation to the administration of the U.S. class action settlement. Those customers who submitted a complaint were then advised of the outcome of the assessment of their complaint and the accompanying adjustment, if any. Customers were also advised of a low-cost right of appeal and provided with an appeal form. An independent third party, who had been court-approved for claims evaluation in other class action settlements, considered the appeal and rendered a decision mailed directly to that member. The defendant's reviewers were monitored and checked by its internal auditors, and the files assessed were randomly audited by a retired Superior Court judge.

17 The plaintiff did not accept the invitation to participate in the MVP. However, the defendant took it upon itself to refer the plaintiff's complaint (which had been evidenced by letters which the plaintiff had sent to the defendant) to the MVP process. The plaintiff's complaints and the material in his certificate file were reviewed under the MVP procedure to determine whether his individualized situation merited an adjustment. Under MVP, it was determined that the plaintiff was eligible for an adjustment that would extend the lapse date for his policy from 2011 to 2027 before any increased premium was necessary.

18 On March 7, 2002, Mr. Bellaire was sent notice of his MVP adjustment. He was also advised of his appeal rights to an independent third party. The plaintiff did not exercise his appeal rights. Instead, he commenced this action. It should also be noted that, throughout all of this time, the plaintiff has never been obliged to pay more than \$52.60 per month to maintain his insurance coverage.

19 Some additional facts should be mentioned. There is no standard Universal Life Insurance certificate. Rather, the defendant has sold three different types of Universal Life Insurance from the period of 1984 to date, specifically, (i) Foresters Universal Life which was sold from 1984 to 1987; (ii) Foresters Universal Life 2 which was sold from 1987 to May 2001; and (iii) Foresters Passport<sup>2</sup> which has been sold since May 2001. Each of these Universal Life Insurance certificate types differ in: (a) the product features available; (b) the contractual wording; and (c) the extra-contractual materials delivered with the certificate. In addition, each certificate type may differ depending on the year the certificate was sold and the Province in which it was sold. For example, the plaintiff's certificate originally contained a two year "limitation of action" clause which was subsequently deleted but only

for those certificates sold in Ontario. Further, the training manuals and tapes used by the defendant's representatives differed for these three types of Universal Life Insurance.

20 Lastly, I should mention the likely size of the class. Since 1984, Foresters has sold over 55,500 Universal Life Insurance certificates in Canada. Of those, approximately 20,000 were certificates for the type of insurance which the plaintiff purchased. Approximately 25,000 were for the second type of insurance which the plaintiff also seeks to include in this proceeding.

### **Analysis**

21 In order to have an action certified as a class proceeding, the plaintiff must satisfy the requirements of section 5(1) of the Act which states:

The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or notice of applications 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 the other class members.

#### **A. Causes of Action**

22 The defendant fairly concedes, for the purposes of this motion, that the statement of claim discloses a cause of action for the purposes of section 5(1)(a) of the Act.

#### **B. Identifiable class**

23 I earlier set out the definition of the class as proposed by the plaintiff.

24 The importance of an identifiable class and class definition was highlighted in *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.) where Chief Justice McLachlin said, at p. 401:

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.

25 During the course of the hearing of the certification motion, plaintiff's counsel conceded that there may be some difficulty with even the revised wording of the class definition insofar as it purports to include purchasers who, for whatever reason, permitted their certificates to lapse. This is indeed problematic since it would be difficult, for example, to reconcile the inclusion

of the plaintiff, with his stated position that he had a fixed premium for his coverage and which premiums he has continued to pay, in the same class with those purchasers who chose not to pay even the alleged fixed premium with the consequence that their certificates lapsed. Plaintiff's counsel, however, submitted that these concerns could be addressed by allowing the court to adjust the class definition as it found necessary to address such problems as they might appear in the course of attempting to reach the end result of certifying the proceeding.

26 As experience develops with class proceedings, the tendency of plaintiffs to approach the definition of the class in this fashion seems to be increasing. The problems associated with this approach were recently stated by Mr. Justice Winkler in *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) where he said, at para. 41:

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.

Put another way, a more rigorous and careful approach to the definition of the class is to be expected of the representative plaintiff. It is not appropriate to attempt to foist that responsibility onto the court.

27 Having said that, however, there is another problem with respect to this requirement. Section 5(1)(b) requires an *identifiable* class of two or more persons. In my view, that entails placing evidence before the court that there are other individuals who both share the same complaint as that of the plaintiff and wish to have the complaint litigated through the mechanism of a class proceeding, save and except for those factual situations where the existence of such other individuals is obvious. In this regard, I note that, on the plaintiff's cross-examination, the following exchange occurred:

Q. Mr. Bellaire or through your counsel, are you aware of at the present time of the existence of any other individuals who satisfy this class definition apart from Mr. Bellaire:

Mr. Sengbusch: It arises it would seem from the material that Mr. Lintner presented in which there were seventy thousand or so packages sent out for the MVP program related at least in whole or in part to universal life insureds, but you mean individual names?

Mr. Pinos: Yes

Mr. Sengbusch: No.

28 The reference in the above exchange to the MVP program must be explained. Between June 2000 and March 2001 there were 69,247 MVP packages mailed by the defendant to its customers. The defendant's response statistics indicate that 3,263 Participation Forms were received in reply to that mailing. However, of those Participation forms, only 911 related to the plaintiff's type of Universal Life Insurance certificate, and 1,074 related to the second type of certificate, for a total of 1,985 or less than three percent of the total customers contacted.

29 Further, the MVP was designed to cover a broad range of possible complaints regarding Universal Life Insurance certificates — not just the complaint that the plaintiff asserts here. An even smaller group of the participation forms received actually identified their complaint as being of the same general nature and kind as the complaint raised by the plaintiff, that is, 571 holders of the plaintiff's type of Universal Life Insurance certificate, and 565 holders of the second type of certificate, identified "Duration of Universal Life" as their complaint. There are two problems with the plaintiff relying on that evidence to establish an identifiable class. One is that a generalized complaint of "duration" does not necessarily establish a common issue or interest between such complainants and the plaintiff, whose fundamental complaint is the lack of a fixed premium. The other is that this evidence does not establish that, even if there are common interests, these other complainants wish to have the issue litigated. Unlike the plaintiff, these other complainants may well be content with the status quo or with the relief that they received from the defendant through the MVP.

30 This concern has arisen in other cases. It was the subject of comment in *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.) where Mr. Justice Sharpe said, at p. 381:

Most 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. I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess the nature of those claims that exist that will enable the court to determine whether the common issue and preferability requirements are satisfied.

31 It arose again in *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (Ont. S.C.J.) where Mr. Justice Winkler said, at para. 23:

However, a class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. The record before the court must contain a sufficient evidentiary basis to establish the existence of the class.

32 This concern was repeated in a case similar to the one that is before me here, namely, *Zicherman v. Equitable Life Insurance Co. of Canada*, [2000] O.J. No. 5144 (Ont. S.C.J.) where Mr. Justice Ferrier said, at para. 7:

However, s. 5(1)(b) requires that there be 'an identifiable class of two or more persons that would be represented by the representative plaintiff.' There is no evidence that anyone other than Mr. Zicherman has raised a cause of action. There is no evidence of anyone other than Mr. Zicherman being willing to engage the courts or assert a cause of action.

33 I respectfully agree with the observations made in these cases. In my view, before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

34 I conclude, therefore, that in the particular circumstances of this case, the requirement that there be an identifiable class is not satisfied.

### C. Common Issues

35 The common issues, as stated by the plaintiff in his factum, are:

- (a) Interpretation of the certificates of insurance and particularly the guaranteed premiums for coverage;
- (b) Breach of contract.

36 In *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, Chief Justice McLachlin, in discussing the requirement of common issues, said, at para. 39:

Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim.

37 The defendant asserts that the common issues are not, in fact, common at all. It contends that this case is essentially a "point of sale" case and that the dealings which each and every member of the proposed class had with their respective representatives of the defendant would have to be examined to properly determine any claim. The defendant says that this case is no different

in kind from cases such as *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 47 C.C.L.I. (3d) 43 (Ont. C.A.) and that it suffers from the same flaws.

38 I agree with the defendant. Notwithstanding the considerable efforts by counsel for the plaintiff to portray the central issues in this proceeding as purely matters of contractual interpretation, in my view when examined closely and critically, the claims advanced by the plaintiff are, at their heart, claims of misrepresentation. I reach this conclusion, in part, on the following facts.

39 When the plaintiff originally complained to the defendant regarding this matter, he did so in terms of what he said he had been told by the defendant's representatives which, in at least one letter, he referred to expressly as a misrepresentation. In addition, in his affidavit, the plaintiff said:

Prior to purchasing the above referenced policy, I was approached by a representative of the Defendant, who made representations that were intended to induce, and in fact did induce, me to switch from a term policy with the Defendant to a Universal Life Insurance Policy at a higher premium. These representations were intended to lead, and in fact did lead me to believe that the policy would have a fixed monthly premium of \$52.60 until my death or until age 95, when the coverage would terminate.

40 Further, when cross-examined, the plaintiff defended his failure to review the certificate and its terms on the basis that he relied on the defendant's representative to explain the policy to him and that he relied on the representations which the representative made. Still further, in the plaintiff's draft litigation plan (about which I will have more to say later) it is stated that:

The substantive and determinative common issue turns on whether or not there was a misrepresentation which induced the Plaintiff to enter the contract, and whether there was a breach of fiduciary duty, or breach of trust by the Defendant.

41 In any event, it is readily apparent that, if a court attempted to interpret the documents in question, in light of the provisions I earlier set out, the issue would quickly change from what the contracts say on their face to what the plaintiff understood them to mean. The plaintiff concedes that there is no place in the documents where the premium is stated to be fixed. Consequently, the plaintiff is driven to assert that the references in the documents to "additional" premiums possibly being necessary to maintain the insurance is different in kind from "increased" premiums being necessary. While I would say that such a distinction is not one that readily leaps to mind, regardless of that fact, it is nonetheless an interpretation that could only be reached based on evidence of the plaintiff's understanding to that effect and of the circumstances that lead him to that understanding.

42 In the end result, therefore, this case suffers from the same problem which Mr. Justice Cumming found to exist in *Kumar v. Mutual Life Assurance Co. of Canada*, *supra*, and with which Mr. Justice Rosenberg expressly agreed in dismissing the appeal, when he said, at para. 48:

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

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

43 I conclude, therefore, that the proposed common issues are not in fact common issues at all because they cannot be determined on a common set of facts and thus made applicable to all members of the proposed class. The requirement under section 5(1)(c) of the Act is accordingly not satisfied.

#### **D. Preferable Procedure**

44 Given my conclusion that the common issues requirement is not met, I need only briefly deal with the requirement that a class proceeding be the preferable procedure for resolving the common issues. This requirement can be phrased in terms of the following general question: would the ultimate determination of the issues raised by each member's claim be better accomplished through the class proceeding or would they be better accomplished through other mechanisms such as joinder, test cases or simply by allowing each claim to proceed individually?

45 I will say that had the central issue raised by the plaintiff been purely an issue of contractual interpretation applicable to all members of the proposed class, then I would have been much more inclined to conclude that a class proceeding was the preferable procedure for its resolution. In that case at least two of the three advantages of a class action would be met. First, it would achieve judicial economy since the determination of that issue would leave only the question of the appropriate remedy to be dealt with. Second, given what may be the limited amounts in issue<sup>3</sup>, precluding the litigation of that issue through a class action might result in a denial of access to justice. Having said that, even such a claim would not likely satisfy the third advantage, namely behaviour modification, given the steps that the defendant has already taken, through the MVP, in an effort to address the underlying concerns raised.

46 However, as I pointed out in my analysis of the common issues requirement, this case is not one simply of contractual interpretation. It is a misrepresentation case. Such cases, almost by definition, involve so many individual issues that they do not generally allow for classwide determination, save and except for those rare cases where there is a single misrepresentation that is made in identical terms to all persons affected.

47 The plaintiff attempted to portray this case as such a case by submitting that there were standard training manuals used to train the defendant's representatives on how to sell the Universal Life Insurance product. The fact is that there were no standard training materials. They differed with the different type of certificates. However, even assuming standard training materials were used, that fact alone could not lead to the conclusion that what individual customers were told by those representatives, so trained, had to be universally identical or even similar. It is worthy of reminder in this context that this is a proposed national class action covering approximately 45,000 customers.

48 Finally, under this requirement, I repeat that the defendant has instituted the MVP in an attempt to address concerns arising from its issuance of Universal Life Insurance certificates. The MVP is based on a similar plan which received court approval in settlement of the U.S. class action. It is a plan which has many commendable aspects to it including a review process by a retired Superior Court judge and an avenue for appeal to a third party. While the plaintiff complains that there has been a relatively small takeup rate under the MVP, it seems to me that criticism is somewhat of a two-edged sword. While the plaintiff asserts that the small takeup rate shows that the MVP is not responsive to the vast majority of complaints, it is equally possible that the small takeup rate simply demonstrates that there is a limited group of disaffected customers.

49 In any event, it remains the fact that the MVP is a legitimate alternative form of relief available to members of the proposed class. The MVP is easy to access and is inexpensive to pursue. It appears to be procedurally and substantively fair. It does not require the claimant to renounce his or her right to institute legal proceedings. And for those persons who did not avail themselves of the MVP, there remains an ongoing complaints process which they can utilize.

50 While I would not necessarily conclude that the MVP alone was sufficient to establish that a class proceeding is not the preferable procedure, its presence in this case taken together with the other facts I have mentioned, leads me to conclude that the preferable procedure requirement is also not satisfied.

#### ***E. Representative Plaintiff***

51 There are three separate considerations to be addressed under this requirement. First, is whether the proposed representative plaintiff would fairly and adequately represent the interests of the class. I am not satisfied that he would. I reach that conclusion not as any criticism of the proposed representative plaintiff himself but rather as a consequence of the fact, as I mentioned in my consideration of whether there was an identifiable class, that the class as defined includes persons with differing complaints and is not, therefore, capable of being represented by one person. The results of the MVP demonstrates that there are a variety of concerns expressed regarding the defendant's Universal Life Insurance certificates. The complaint that the proposed representative plaintiff has with these certificates does not appear to be shared by others in the proposed class, or at least not by a majority of the members of the proposed class. While I recognize that subclasses can be used to distinguish between members of a class who have different aspects to their claims, there still has to be a common interest between the proposed representative

plaintiff and the members of the presumed class. The fact that all members of the presumed class might share a measure of dissatisfaction with the defendant does not constitute a sufficient common interest for these purposes.

52 I am also not satisfied with the litigation plan that is put forward. Indeed, I would suggest that it is not actually a plan at all. Rather, it is largely a recitation of the steps that would occur in any piece of litigation coupled with rather non-specific references to communicating with members of the class. I should mention, in addition, that the provision in the litigation plan, which states that a list of common issues will be provided by the plaintiff for comment by the defendant thirty days after certification, ignores the requirement of section 8(1)(e) of the Act that the order certifying the proceeding as a class proceeding set out the common issues.

53 Litigation plans will vary in the amount of detail they contain depending on the degree of complexity of the underlying claims. However, any litigation plan ought to contain some outline of how the representative plaintiff and his or her counsel intend to ensure that the common issues will be effectively and efficiently pursued if the action is certified. Without intending to be exhaustive, I suggest that the litigation plan ought to address matters such as the following:

- (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.

54 I appreciate that any litigation plan will be a work in progress. It will need to be adjusted as the action proceeds. It may also be that the defendant and the court will need to have some input into variations to the proposed plan. None of those realities, however, relieves the representative plaintiff from his or her obligation to put before the court, on the certification motion, an initial effort at a plan to address these and other matters so that the court can be satisfied that, if the action is certified, some level of attention has been given to how the action will progress thereafter.

55 Lastly, for the same reasons I outlined regarding my conclusion that the proposed representative plaintiff cannot fairly and adequately represent the interests of the class, I am also concerned that the representative plaintiff may well have a conflict with other members of the presumed class. Due to the fact that the proposed representative plaintiff has a particular complaint that many other members of the proposed class do not share, there is a distinct possibility that the proposed representative plaintiff might well be amenable to a resolution of his claim that would be of a much different character than would interest other members of the proposed class and vice versa. The resulting potential for conflict as the action progresses is obvious.

56 I conclude therefore that the fifth requirement is also not met in this case.

## **Conclusion**

57 I am not satisfied that the plaintiff has satisfied any of the four requirements that are in issue in this proposed class proceeding. The motion for certification is therefore dismissed.

58 If the parties cannot resolve the issue of costs, they may make written submissions on the appropriate disposition. The defendant's submissions are to be filed within 15 days of the release of these reasons and the plaintiff's response is to be delivered within 15 days thereafter. No reply submissions are to be filed without leave. The submissions should include the necessary bill of costs or equivalent information that will allow me to fix the costs of the motion should I decide that costs are to be awarded.

*Motion dismissed.*

Footnotes

- \* Additional reasons at *Bellaire v. Independent Order of Foresters* (2004), 2004 CarswellOnt 5609, 5 C.P.C. (6th) 84, 19 C.C.L.I. (4th) 51 (Ont. S.C.J.).
- 1 The terms "certificate" and "policy" were used interchangeably by counsel and, succumbing to that influence, they appear interchangeably in these reasons.
- 2 Just prior to the commencement of the certification hearing, the plaintiff confirmed that this third type of Universal Life Insurance was not part of the proposed class proceeding.
- 3 I would observe that there was little evidence placed before the court regarding the amounts that would be recoverable by class members.

# **TAB 4**

2007 MBQB 221  
Manitoba Court of Queen's Bench

Bellan v. Curtis

2007 CarswellMan 350, 2007 MBQB 221, [2007] M.J. No. 325,  
160 A.C.W.S. (3d) 222, 219 Man. R. (2d) 175, 33 B.L.R. (4th) 140

**BERNARD W. BELLAN (Plaintiff) and CHARLES E. CURTIS, PETER OLFERT,  
WALDRON (WALLY) FOX-DECENT, LEA BATURIN, ALBERT R. BEAL,  
RON WAUGH, DIANE BERESFORD, SYLVIA FARLEY, ROBERT HILLIARD,  
ROBERT ZIEGLER, JOHN CLARKSON, DAVID G. FRIESEN, HUGH ELIASSEN,  
SHERMAN KREINER, JAMES UMLAH, JANE HAWKINS, JANICE LEDERMAN,  
PRICEWATERHOUSE COOPERS LLP, NESBITT BURNS INC., WELLINGTON  
WEST CAPITAL INC., CROCUS CAPITAL INC., THE MANITOBA SECURITIES  
COMMISSION and THE CROCUS INVESTMENT FUND (Defendants)**

BERNARD W. BELLAN and ROBERT NELSON (Plaintiffs)  
and THE GOVERNMENT OF MANITOBA (Defendant)

Hanssen J.

Judgment: August 29, 2007  
Docket: Winnipeg Centre CI 05-01-42765, CI 06-01-46955

Counsel: David Klein, Douglas Lennox, Jay Prober, Norman Boudreau for Plaintiffs, Bellan, Nelson Kenneth A. Filkow, Q.C., Diane M. Stasiuk for Defendants, Curtis, Olfert, Fox-Decent, Baturin, Beal, Waugh, Beresford, Farley, Hilliard, Ziegler, Clarkson, Eliason

G. Patrick S. Riley for Defendants, Kreiner, Hawkins

Robert L. Tapper, Q.C., Jason D. Kendall for Defendant, Umlah

J. Kenneth McEwan, Q.C. for Defendant, David Friesen

William E. Pepall, David I. Marr, J. Graeme E. Young for Defendant, Pricewaterhouse Coopers

John Fabello, Andrew Gray, Charles Finlay for Defendant, BMO Nesbitt Burns Inc.

David M. Wright for Defendant, Wellington West Capital Inc.

William S. Gange, Jacqueline G. Collins for Defendant, Manitoba Securities Commission

E.W. Olson, Q.C., for Defendant, Government of Manitoba

Robert A. Dewar, Q.C., Karen R. Wittman for Receiver of The Crocus Investment Fund

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

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.1** Representative or class proceedings not under class proceedings legislation

**V.1.d** Pleadings

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings not under class proceedings legislation — Pleadings

Defendant investment fund offered common shares to public — Trading in shares of fund was halted — Fund was placed into receivership which resulted in loss of millions of dollars by shareholders — Plaintiff shareholder commenced proposed class action against defendant officers, directors, advisors, auditor and provincial securities commission for negligence, fraud and

negligent misrepresentation — Plaintiff commenced related proposed class action against province for abuse of public office — Statement of claim alleged prospectuses for fund did not contain proper disclosure and overstated value of assets — Defendants brought motions to strike entirety or portions of statement of claim — Motions dismissed — Defendants failed to show no triable issues for trial existed — Issues raised by defendants relating to plaintiff's suitability as class representative would be dealt with at certification hearing — Was not plain and obvious that plaintiff's claims would fail — Disputes over facts existed which were best left arbitrated by trier of fact — Plaintiff had properly pleaded requisite elements of torts in statement of claim.

#### Table of Authorities

##### Cases considered by *Hanssen J.*:

- Anns v. Merton London Borough Council* (1977), (sub nom. *Anns v. London Borough of Merton*) [1977] 2 All E.R. 492, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 S.J. 377 (U.K. H.L.) — referred to
- Balacko v. Eaton's of Canada Ltd.* (1967), 60 W.W.R. 22, 1967 CarswellSask 29 (Sask. Q.B.) — considered
- CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), (sub nom. *Mondor v. Fisherman*) 15 C.P.R. (4th) 289, 18 B.L.R. (3d) 260, 8 C.C.L.T. (3d) 240, 2001 CarswellOnt 4206 (Ont. S.C.J.) — followed
- Citheroe v. Hydro One Inc.* (2002), 2002 CarswellOnt 3919, 21 C.C.E.L. (3d) 197 (Ont. S.C.J.) — referred to
- Cooper v. Hobart* (2001), [2002] 1 W.W.R. 221, 2001 CarswellBC 2502, 2001 CarswellIBC 2503, 2001 SCC 79, 8 C.C.L.T. (3d) 26, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 277 N.R. 113, [2001] 3 S.C.R. 537, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 261 W.A.C. 268 (S.C.C.) — distinguished
- Dumont v. Canada (Attorney General)* (1991), 1991 CarswellMan 347, [1992] 2 C.N.L.R. 34, 75 Man. R. (2d) 273, 6 W.A.C. 273, 91 D.L.R. (4th) 654 (Man. C.A.) — referred to
- Edwards v. Law Society of Upper Canada* (2001), 34 Admin. L.R. (3d) 38, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, 2001 SCC 80, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, 206 D.L.R. (4th) 211, 277 N.R. 145, [2001] 3 S.C.R. 562, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2)*) 56 O.R. (3d) 456 (headnote only), 153 O.A.C. 388 (S.C.C.) — distinguished
- Falloncrest Financial Corp. v. Ontario* (1995), (sub nom. *Nash v. Ontario*) 27 O.R. (3d) 1, 1995 CarswellOnt 910 (Ont. C.A.) — referred to
- Frey v. BCE Inc.* (2006), 282 Sask. R. 1, [2006] 12 W.W.R. 545, 2006 SKQB 328, 2006 CarswellSask 448, 32 C.P.C. (6th) 223 (Sask. Q.B.) — referred to
- George v. Harris* (2000), 2000 CarswellOnt 1714 (Ont. S.C.J.) — considered
- Hercules Management Ltd. v. Ernst & Young* (1997), 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, 1997 CarswellMan 198, 211 N.R. 352, 1997 CarswellMan 199, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Management Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, [1997] 8 W.W.R. 80 (S.C.C.) — referred to
- Hunt v. T & N plc* (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellIBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to
- MacKinnon v. National Money Mart Co.* (2004), 203 B.C.A.C. 85, 332 W.A.C. 85, 2004 CarswellIBC 2252, 2004 BCCA 472, 33 B.C.L.R. (4th) 21, [2005] 1 W.W.R. 233, 19 C.P.C. (6th) 96 (B.C. C.A.) — considered
- McClelland v. Stewart* (2004), 204 B.C.A.C. 150, 333 W.A.C. 150, 2004 BCCA 458, 2004 CarswellBC 2154, 31 B.C.L.R. (4th) 203, 245 D.L.R. (4th) 162 (B.C. C.A.) — considered
- McClelland v. Stewart* (2005), 334 N.R. 198 (note), 2005 CarswellBC 415, 2005 CarswellBC 416, 220 B.C.A.C. 318 (note), 362 W.A.C. 318 (note) (S.C.C.) — referred to
- McCulloch Finney c. Barreau (Québec)* (2004), 24 C.C.L.T. (3d) 1, (sub nom. *McCulloch Finney v. Barreau (Québec)*) 240 D.L.R. (4th) 410, (sub nom. *Finney v. Barreau du Québec*) 2004 SCC 36, 2004 CarswellQue 1337, 2004 CarswellQue 1338, (sub nom. *McCulloch Finney v. Barreau du Québec*) 321 N.R. 361, [2004] 2 S.C.R. 17, 16 Admin. L.R. (4th) 165, [2004] R.R.A. 713 (S.C.C.) — considered
- Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389, 1992 CarswellOnt 1131 (Ont. Gen. Div.) — referred to

*Odhayji Estate v. Woodhouse* (2003), 19 C.C.L.T. (3d) 163, [2004] R.R.A. 1, 233 D.L.R. (4th) 193, 11 Admin. L.R. (4th) 45, [2003] 3 S.C.R. 263, 70 O.R. (3d) 253 (note), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 312 N.R. 305, 180 O.A.C. 201 (S.C.C.) — referred to

*Web Offset Publications Ltd. v. Vickery* (1998), 40 O.R. (3d) 526, 34 C.P.C. (4th) 343, 1998 CarswellOnt 5379 (Ont. Gen. Div.) — referred to

755165 *Ontario Inc. v. Parsons* (2006), 2006 NLTD 123, 2006 CarswellNfld 229, 41 C.C.L.T. (3d) 132, 273 D.L.R. (4th) 11, 31 C.P.C. (6th) 285, 259 Nfld. & P.E.I.R. 82, 781 A.P.R. 82 (N.L. T.D.) — considered

755165 *Ontario Inc. v. Parsons* (2006), 786 A.P.R. 222, 260 Nfld. & P.E.I.R. 222, 2006 NLCA 60, 2006 CarswellNfld 289, 273 D.L.R. (4th) 1 (N.L. C.A.) — referred to

**Statutes considered:**

*Class Proceedings Act*, S.M. 2002, c. 14

Generally — referred to

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

s. 36 — referred to

s. 52 — referred to

s. 52(1) — considered

*Corporations Act*, R.S.M. 1987, c. C225

s. 234 — referred to

s. 234(2)(b) — referred to

*Crocus Investment Fund Act*, S.M. 1991-92, c. 48

Generally — referred to

s. 15 — referred to

*Interpretation Act*, S.M. 2000, c. 26

s. 6 — referred to

*Mortgage Brokers Act*, R.S.B.C. 1996, c. 313

Generally — referred to

*Securities Act*, R.S.M. 1988, c. S50

Generally — referred to

Pt. VII — referred to

s. 141 — referred to

s. 141(1) — referred to

s. 142(1)(a) — referred to

**Rules considered:**

*Queen's Bench Rules*, Man. Reg. 553/88

R. 25.06(1) — referred to

R. 25.06(9) — referred to

R. 25.11 — referred to

MOTIONS by defendants to strike entirety or portions of proposed class action claim.

**Hanssen J.:**

## Background

1 The Crocus Investment Fund (referred to as the "Crocus Fund" or "Crocus" or the "Fund") is a labour sponsored venture Capital Corporation created by *The Crocus Investment Fund Act*, C.C.S.M. c. C308 (the "Crocus Act").

2 Following its incorporation on March 21, 1992, Crocus engaged in a continuous offering of its Class A common shares to the public under a series of prospectuses which were generally issued annually.

3 On December 10, 2004, trading in shares of Crocus was halted.

4 On June 28, 2005, the Crocus Fund was placed into receivership.

5 On July 12, 2005, Bernard Bellan commenced a proposed class action ("Bellan No. 1") against a number of former officers and directors of the Crocus Fund, two of its financial advisors, its auditor and the Manitoba Securities Commission. Among other things, the statement of claim alleges the prospectuses for the Crocus Fund did not contain proper disclosure and they overstated the value of its assets.

6 On May 8, 2006, Bellan and Robert Nelson commenced a related proposed class action ("Bellan No. 2") against the Government of Manitoba (the "Province"). Many of the allegations in Bellan No. 1 have been repeated in Bellan No. 2, but additional allegations have been made in an attempt to establish a cause of action against the Province.

7 Bellan and Nelson bring these actions on their own behalf and on behalf of a proposed class of shareholders who owned Class A common shares in the Crocus Fund on December 10, 2004. The proposed Class period is from March 21, 1992, the date Crocus was incorporated, until trading in its shares was halted on December 10, 2004.

8 Bellan bought 350 Class A shares in the Crocus Fund in September, 1993. He redeemed these shares and purchased new shares in January/February, 2001. Nelson bought 237.1541 Class A shares in 2003.

9 Bellan, Nelson and the other putative class members have been unable to recover any of their investments since trading in Crocus shares was halted.

10 Bellan and Nelson seek to have Bellan No. 1 and Bellan No. 2 consolidated and certified together. Their motions to consolidate and certify are tentatively scheduled to be heard September 24 to 28, 2007.

11 A number of the defendants have brought preliminary motions for particulars and/or to strike portions of the amended amended statement of claim in Bellan No. 1 and the amended statement of claim in Bellan No. 2. (For simplicity, I will refer to these two documents simply as statements of claim.)

## Motions for Particulars in Bellan No. 1

12 There are three motions for particulars in Bellan No. 1 — one by all of the defendant directors other than David Friesen, one by David Friesen and one by Wellington West Capital Inc. ("Wellington West").

13 Since the particulars being sought in all three motions are similar and the issues are essentially the same, it is convenient to deal with them together.

14 An order for particulars is a discretionary remedy. Particulars should be ordered where they are necessary:

(a) to inform the defendant of the nature of the case they have to meet as distinguished from the mode in which it is to be provided;

(b) to prevent the defendants from being taken by surprise;

- (c) to enable the defendants to know what evidence they ought to be prepared with and to prepare for trial;
- (d) to limit the generality of the plaintiff's claim;
- (e) to limit and decide the issues to be tried, and as to which discovery is required; and
- (f) to tie the hands of the plaintiffs so they cannot, without leave, go into any matters not included in their claim.

See *Dumont v. Canada (Attorney General)* (1991), 75 Man. R. (2d) 273 (Man. C.A.) at para. 29.

15 In the course of argument, counsel for the plaintiffs agreed to provide a letter to the defendants' counsel clarifying the following:

- (a) Bellan is alleging a director is only responsible for losses of shareholders who purchased shares during the currency of a prospectus the director signed or consented to being signed on his or her behalf;
- (b) Bellan is adopting as part of his statement of claim the allegations in the Auditor General's Report which are set out at paragraphs 29(a), (d) and (e) of the statement of claim;
- (c) the "statutory obligations" referred to in paragraph 70(d) of the statement of claim are those set out in Part VII and s. 141 of *The Securities Act*, C.C.S.M. c. S50, and s. 15 of the *Crocus Act*;
- (d) Bellan is only alleging Nesbitt Burns Inc. ("Nesbitt Burns") is liable with respect to the shares which were purchased under the prospectuses dated December 22, 1999 and January 11 and July 13, 2001.

Counsel for Bellan also consented to an order striking the phrase "participating and consenting to" in paragraph 27 of the statement of claim.

16 The defendant directors and Wellington West say that the statement of claim is still deficient because it does not adequately particularize the claims against them. I agree with them that Bellan should also be required to provide the following particulars:

- (a) what are the "business activities or interests" of the insiders and the financial advisor referred to in paragraph 52 of the statement of claim;
- (b) what are the "immediate pecuniary interests" referred to in paragraph 67 of the statement of claim.

They need to know precisely what "business activities or interests" and what "pecuniary interests" Bellan is referring to, in order to properly prepare for the certification motion.

17 In addition to these particulars, however, the defendant directors and Wellington West are seeking voluminous and detailed information regarding the claim. They are, in effect, demanding full discovery of the plaintiffs' case prior to the certification hearing and before filing their statements of defence.

18 I am dismissing the remainder of their requests. While there is no doubt room for improvement in the pleading, it does not fall as short of the mark as these defendants suggest. It contains a concise statement of the material facts upon which Bellan is relying. Anyone reading it will understand what the case is about.

19 Much of the information these defendants are seeking with respect to specific paragraphs in the statement of claim is set out elsewhere in the statement of claim or documents referred to in the statement of claim.

20 In many instances, the particulars being requested are with respect to details which Bellan probably does not have and couldn't be expected to have until the discovery process has been completed. In fact, at this time, these defendants likely have more knowledge of many of the details they are requesting than Bellan does. They were actively involved in the matters which

are the subject of the action. As well, they have as much access as Bellan does to the large volume of information which is in the public domain.

21 The balance of the information they are requesting is not necessary at this stage of the proceedings. There is a substantial difference between the particulars they require for the certification hearing or to file their statements of defence and the information they may later require for the purposes of trial.

22 The level of detail they are requesting is not required for the certification process. Any additional information required for the certification motion can be provided by affidavits filed in support of the motion and any cross-examinations on them. If Bellan fails to provide sufficient information, the class action will simply not be certified.

23 Although defendants in a class action proceeding often defer filing their statements of defence until the action is certified, once the particulars I have ordered have been provided, the defendants will have sufficient information to file their defences should they choose to do so.

24 Under the circumstances, at this stage of the proceedings, it would not be in the interest of judicial economy to put Bellan through the extensive effort and expense of providing the voluminous particulars these defendants are requesting. Indeed, if the action is not certified the result would simply be a waste of time and money.

25 If the class action is certified, the defendants will have ample opportunity to obtain any additional information they require for the purposes of trial through the discovery process.

### **Motions to Strike**

26 The main ground being alleged with respect to the motions to strike is that the impugned pleadings disclose no cause of action. Some of the defendants also allege the statements of claim are scandalous, frivolous or vexatious.

#### **(a) Effect of Documents Referred to in the Statements of Claim**

27 Prior to argument on any of the motions, a dispute arose amongst some counsel as to what use could be made of documents referred to in the statements of claim on a motion to strike for failure to disclose a cause of action.

28 The Province and the defendant directors argue a document referred to in the statement of claim can only be utilized if it is one upon which the plaintiff *must rely* for the establishment of his claim. In support of their position, they rely on the following comment by Disbrey J. in *Balacko v. Eaton's of Canada Ltd.* (1967), 60 W.W.R. 22 (Sask. Q.B.) at p. 26:

In light of these authorities I am of the opinion that the only documents which are properly to be considered on an application to strike out a statement of claim on the ground that it discloses no reasonable cause of action are the notice of motion, the attacked statement of claim, the particulars furnished pursuant to a demand therefor, and any document which is referred to in the statement of claim upon which the plaintiff must rely for the establishment of his claim; for such a document is to be considered for the purposes of the application as forming part of the pleading: *Hogan v. Brantford (City)* (1909-10) 1 OWN 226. Other documents referred to in a statement of claim which are merely evidential and from which the plaintiff's claim does not arise should not, in my opinion, be considered; for to do so would be to admit evidence to support the attacked pleading, which is not permissible.

(underlining added)

29 The plaintiffs take the position that the statements of claim are substantially adequate and that the court doesn't need to consider any of the documents referred to in them in order to determine whether they disclose good causes of action against each of the defendants.

30 Nesbitt Burns and Pricewaterhouse Coopers LLP ("PWC") both argue that the totality of the documents referred to in the statement of claim should be considered. They wish to rely on the documents to demonstrate that contrary to what is

pledaded in the statement of claim in Bellan No. 1, Bellan and/or other members of the putative class do not have a good cause of action against them.

31 The relevant Queen's Bench Rules are 25.06(1) and (9). They read:

25.06(1) Every pleading shall contain a concise statement of material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.

25.06(9) The effect of a document ..., if material, shall be pleaded as briefly as possible, but the precise words of the document ... need not be pleaded unless those words are themselves material.

(Emphasis mine)

32 By virtue of Rule 25.06(9), a material document may be incorporated into a pleading by merely referring to it. The purpose of the rule is to avoid the need to plead lengthy documents in the body of a pleading and/or provide particulars of them.

33 The documents which are referred to in the statements of claim in both Bellan No. 1 and 2 include the prospectuses, the auditors' reports, an agreement with Fonds de Solidarité, FTQ (Solidarité) dated November 15, 2002 and the Auditor General's report. The statement of claim in Bellan No. 2 also refers to a Cabinet memo dated November 27, 2000 and a Finance Department memo dated September 13, 2004.

34 I am satisfied that the prospectuses, the auditors' reports and the agreement with Solidarité are integral to both statements of claim. I am also satisfied the Cabinet and Finance Department memos are integral to the statement of claim in Bellan No. 2. Accordingly, these documents constitute material facts which the court may consider in assessing the substantive adequacy of the statements of claim. See *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.) at paras. 3 and 4; also see *Clitheroe v. Hydro One Inc.*, [2002] O.J. No. 4383 (Ont. S.C.J.) at para. 10(e); and *Web Offset Publications Ltd. v. Vickery* (1998), 40 O.R. (3d) 526 (Ont. Gen. Div.).

35 The Auditor General's report, on the other hand, does not appear to be a material document with respect to either of the statements of claim but the issue with respect to it is moot since none of the parties purported to rely on it in regard to any of the motions to strike.

**(b) Test for Striking Pleadings for Showing No Cause of Action**

36 A statement of claim should not be struck out unless it is "plain and obvious" that it discloses no reasonable cause of action. Nor should it be struck because it is novel or complex or the law is uncertain. See *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) at para. 33. The motion is decided on the pleadings alone and any document incorporated into them by reference. The statement of claim must be read generously. The court must accept the facts alleged in the statement of claim as true unless they are patently ridiculous or incapable of proof. See *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.).

**(c) Test for Determining if a Pleading is Scandalous, Frivolous or Vexatious**

37 Queen's Bench Rule 25.11 allows a court to strike a pleading that is scandalous, frivolous or vexatious. Epstein J. dealt with the meaning of "scandalous, frivolous or vexatious" in *George v. Harris*, [2000] O.J. No. 1762 (Ont. S.C.J.). At para. 20, he stated:

The next step is to consider the meaning of "scandalous", "frivolous" or "vexatious". There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions,

expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety.

**(d) Motion by Wellington to Strike Last Sentence of Para. 62 of Statement of Claim in Bellan No. 1**

38 Wellington West moves to strike out the last sentence of para. 62 of the statement of claim in Bellan No. 1 which reads:

In addition, Wellington West, as a recipient of investment funds from the Crocus Fund, was in a conflict of interest.

39 It submits that whether it was a recipient of investment funds and whether it was in a conflict of interest are entirely irrelevant to any cause of action pled against it.

40 Bellan takes the position that the allegation is a material fact which has been properly pled. He points to the fact that one of the causes of action he is alleging against Wellington West is based on a breach of s. 52(1) of the *Competition Act*, R.S.C. 1985, c. C-34, which reads in part as follows:

No person shall, for the purpose of promoting, ... directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

He says the fact Wellington West was a recipient of investment funds from Crocus shows it had an indirect business interest in the promotion of the sale of Crocus shares and as such is a material fact with respect to his claim under the *Competition Act*. He also says that the allegation it was in a conflict of interest is a material fact that may support an award of punitive damages.

41 As I am satisfied this plea constitutes a material fact for the reasons advanced by Bellan, I am dismissing Wellington West's motion.

**(e) Motions by Nesbitt Burns and Wellington West in Bellan No. 1 to strike claims against them other than those relating to Mr. Bellan's personal claim**

42 Nesbitt Burns and Wellington West are both requesting an order striking out the facts and claims asserted against them in Bellan No. 1 other than the facts and claims as to Bellan's alleged "reinvestment" of 350 shares of the Crocus Investment Fund in January/February, 2001 which was made under the Crocus Prospectus dated January 12, 2001.

43 For the purposes of their motions, they concede that Bellan has pleaded a personal cause of action against each of them with respect to his purchase of the 350 shares in January/February, 2001.

44 The real issue is whether Bellan can assert causes of action which he does not personally have on behalf of the putative class of plaintiffs. Nesbitt Burns and Wellington West maintain he cannot. They argue, there are separate and distinct causes of action under each of the prospectuses based on separate and distinct purchases of shares. They say it would open the floodgates if Bellan were allowed to assert claims for investors under each of the prospectuses over the twelve-year period Crocus was in the market-place. I do not agree.

45 I am satisfied that to the extent Nesbitt Burns and Wellington West focus their attacks on the personal claim of Bellan, they are engaging in the wrong inquiry under *The Class Proceedings Act*, C.C.S.M., c. C130 ("CPA").

46 Pleadings in class actions differ from pleadings in other lawsuits in that they may assert causes of action on behalf of the class and join defendants on behalf of the class even where such causes of action extend beyond the personal claim of the proposed representative plaintiff.

47 In *MacKinnon v. National Money Mart Co.*, [2004] B.C.J. No. 1960 (B.C. C.A.), Saunders J.A. speaking for the British Columbia Court of Appeal stated:

¶ 33 It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the Class Proceedings Act expressly provides that the Rules of Court apply. It does so, however, with the caveat "to the extent those rules are not

in conflict with this Act". I think it is also clear that an action commenced under the Class Proceedings Act is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.

¶ 34 I turn then to Rule 19(24). No doubt Rule 19(24)(a) can be invoked prior to a certification hearing. But what does it mean in the context of an action started under the Act? Obviously if the pleadings disclose no cause of action between any persons, whether or not named, the action may be dismissed. But that is not the case here. The statement of claim alleges a cause of action between members of the potential class and the defendants, even though those members have as yet no personal identity. Is this sufficient pleading to escape dismissal under Rule 19(24)?

....  
¶ 38 For the appellants to succeed on their Rule 19(24) application it must be plain and obvious that the action has no chance of success. In assessing the chance of success the action must be considered in the context of its stated ambition to be a class proceeding. On the authority of *Campbell v. Flexwatt and Harrington*, it is not plain and obvious that the action against the appellants has no chance of success. Those cases hold out the prospect that the action will be certified as a class action, and even that further representative plaintiffs may be appointed to represent a sub-class of persons who did have contractual dealings with the appellants.

....  
¶ 49 Considering that instruction, I find the flexibility in the Act supports the result of *Campbell v. Flexwatt*. While s. 2(1) displays an intention that, in ordinary cases, the representative plaintiff or plaintiffs themselves should have a cause of action, s. 2(4) shows that such a condition is not inherent to a class action. A representative plaintiff referred to in s. 2(4) is not a member of the class and would not be linked to the defendants by a cause of action. Rather the link would be between the defendants and the class, with the representative plaintiff simply the spokesperson of the class.

¶ 50 Although s. 2(4) only allows a nonmember of a class to be the representative plaintiff where it is necessary "to avoid a substantial injustice to the class", the fact that the Act allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is consistent with a litigation process that seeks to resolve common issues, rather than to resolve entire claims.

¶ 51 I conclude that while the Act requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff.

¶ 52 The appellants urge upon us the reasoning in [*Ragoonian Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603]. However, that case concerns a different statute, one without the equivalent of s. 2(4). It may be distinguished simply on that basis.

The same conclusion was reached by the Saskatchewan Court of Queen's Bench in *Frey v. BCE Inc.*, [2006] S.J. No. 453 (Sask. Q.B.).

48 The approach adopted by the courts in British Columbia and Saskatchewan is consistent with the recommendations made by the Manitoba Law Reform Commission in 1999. See Manitoba. Law Reform Commission. Report 100. Report on Class Proceedings. Winnipeg: The Commission, 1999. At p. 37, the Commission stated:

#### A. General Objectives

It must be kept in mind that there is little point in adopting a class proceedings law which appears to permit such actions but which, practically speaking, precludes them. The Ontario, British Columbia, and Uniform Acts take pains to ensure that barriers to class actions (particularly barriers identified in the American or Québec jurisprudence, or in decisions like that of the Supreme Court of Canada in [*Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3<sup>rd</sup>) 385 (S.C.C.)]) are removed or minimized. As discussed in more detail below, this objective is accomplished through liberal certification

standards (including a specific enumeration of factors that are not bars to certification) and a careful consideration of financial arrangements, including the rules on costs, fee arrangements, and funding mechanisms.

(Emphasis mine)

Further, at p. 57 it stated:

We have considered the various recommendations discussed above, and are satisfied that the requirements set out in the British Columbia and Uniform Acts are reasonable, desirable, and adequate for Manitoba's purposes. A class proceeding ought not to be allowed to proceed if the representative party is not in a position to "fairly and adequately represent" the class, and the court must be empowered to ensure that this criterion is met prior to certification. At the same time, there are persuasive reasons not to require that the representative necessarily be an actual member of the class he or she has applied to represent.

(Emphasis mine)

49 In response to the recommendations of the Law Reform Commission, the Manitoba Legislature enacted the *CPA*. It is in all material respects identical to the British Columbia statute.

50 I am satisfied the approach taken by the courts in British Columbia and Saskatchewan should be followed in Manitoba. Section 6 of *The Interpretation Act*, C.C.S.M. c. I80, provides:

#### **Rule of liberal interpretation**

6 Every Act ... must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

51 As far as possible a multiplicity of proceedings should be avoided. The goal of the *CPA* is judicial economy and access to justice. The result should be that cases are handled in the most just, expeditious and inexpensive manner possible.

52 A requirement that there be a separate plaintiff who purchased under each of the prospectuses for the class action to proceed would not serve the purpose of judicial economy.

53 I am satisfied that allowing a representative plaintiff to assert causes of action he does not personally have will not open the floodgates to unfocused, sector wide litigation as the court has a gatekeeper role to play at the certification stage.

54 The real issue is whether the representative party is in a position to fairly and adequately represent the proposed class. This is something which will be determined in the certification hearing.

55 While it may ultimately be determined that there are different subgroups of investors that have different rights against the defendants, if such differences emerge they can be dealt with at a later point. For example, subclasses may be added or the action may not be certified.

56 As Bellan has pleaded a cause of action by members of the putative class against Wellington West under each of the prospectuses and against Nesbitt Burns with respect to the prospectuses dated December 22, 1999 and January 11 and July 13, 2001, I am dismissing their motions to strike.

#### ***(f) Motion to Strike in Bellan No. 1 by PWC***

57 PWC is seeking an order dismissing the claim against it in Bellan No. 1 on the ground that the statement of claim fails to disclose a reasonable cause of action against it.

58 PWC audited the financial statements of the Crocus Fund and in its audit reports expressed its opinion about the Fund's operation for the financial years in the class period. Bellan is asserting three causes of action against it. He is claiming damages for negligence, negligent misrepresentation and a breach of s. 52 of the *Competition Act*.

59 Prior to argument on this motion, Bellan and PWC consented to an order striking out the last sentence of both paragraphs 88 and 93 of the statement of claim without leave to amend. These sentences both stipulated that Bellan was relying on s. 141(1) of *The Securities Act*. Bellan agreed that they should be struck as he is no longer alleging the investors who purchased Crocus shares are deemed, pursuant to s. 141(1) of *The Securities Act*, to have relied upon PWC's audit reports.

(i) *Negligence*

60 Counsel for PWC stated he did not read the statement of claim as pleading a cause of action in negligence but if it did, there could be no breach of duty unless Bellan received the audit report.

61 I do not agree. Bellan alleges PWC was negligent in performing its audits of the Crocus Fund and as a result he and other members of the putative class suffered damages. He claims that if PWC had exercised due diligence in conducting the audits, the Crocus Fund either would not have continued trading as a public company or its shares would have been traded at a proper value. This claim by Bellan is not dependent on whether he saw or relied on the audit reports.

62 Accordingly, I am not satisfied that it is plain and obvious that Bellan and the other putative class members do not have a cause of action against PWC in negligence.

(ii) *Negligent Misrepresentation*

63 For the purposes of this portion of the motion, counsel for PWC indicated he was not going to argue that PWC did not owe a duty of care to investors under the principles set out in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.).

64 However, he argued that actual reliance on the alleged negligent misrepresentation which is an essential element of a claim for negligent misrepresentation has not been pleaded or at least has not been pleaded with sufficient specificity. As a result, he submitted the claim for negligent misrepresentation should be struck.

65 Again, I do not agree. There is a specific plea of reliance in both paragraphs 89 and 93 of the statement of claim. Paragraph 89 reads "The plaintiff and other class members suffered loss and damage *as the result of relying upon the PWC opinion*." Paragraph 93 reads "The plaintiff and other class members *relied upon the PWC audit opinions* and the PWC opinion and purchased or held shares of the Crocus Fund and suffered loss and damage."

(iii) *The Competition Act Claim*

66 Section 52 of the *Competition Act* creates an offence with respect to the making of certain false or misleading representations. It reads:

52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

67 Section 36 of the *Competition Act* provides a right to claim civil damages for a breach of s. 52(1).

68 PWC takes the position that the claim against it pursuant to the *Competition Act* should be struck because:

(a) there is no pleading that Bellan received and relied upon the audited financial statements;

(b) the expression of an audit opinion is not the type of act or representation that is captured or engaged by s. 52(1) of the *Competition Act*.

69 As stated above, I am satisfied that actual reliance has been pleaded in paragraphs 89 and 93 of the statement of claim.

70 PWC argues that it was actually performing a service and not promoting a service and as a result there is no cause of action against it under s. 52(1) of the *Competition Act*. It claims that the audited reports it prepared were for the limited purpose of providing shareholders with information for the purpose of overseeing the management and affairs of Crocus.

71 I am, however, satisfied that they had a dual purpose. A second and equally important purpose was for inclusion in the prospectuses to enable Crocus to offer its shares to the public. PWC knew Crocus was going to offer shares to the public. It knew its services were, in part, for the purpose of obtaining approval for that public offering. It consented to the audit reports being included in the prospectuses. In 1997, the audit report was incorporated directly into the prospectus and in the other years the reports were incorporated into the prospectuses by reference. Without the audited reports, the prospectuses would not have been approved by the regulator and Crocus would not have been able to offer shares to the public.

72 In *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.), Cumming J. in a case similar to the case at bar stated at para. 85:

... I find that the [auditor's] alleged misrepresentations arguably may have been made for the purpose of promoting their "business interests" within the meaning of s. 52(1), even if that was only a subsidiary and indirect intention of the "representation". This novel cause of action of the plaintiffs advanced under the misleading advertising provisions of the *Competition Act* seems problematic and tenuous. However, in my view the s. 36 claim based on s. 52(1) of the *Act* should not be struck. I am not satisfied that it is plain and obvious that the claim advanced under ss. 36 and 52 of the *Competition Act* discloses no reasonable cause of action and that the plaintiffs' claim would necessarily fail.

73 I share that view in this case. Given the very broad language in s. 52(1), I am not satisfied it is plain and obvious that Bellan's claim under the *Competition Act* will necessarily fail.

74 PWC also takes the position that if the claim against it is not struck, it should be limited to the 2000 year-end audit opinion as this is the only opinion that could have had any impact on Bellan's 2001 share purchase. For example, it says, that by the time the Solidarité transaction was reported on the September 30, 2003 financial statements, Bellan had already purchased his shares and was subject to the hold period and therefore could not have acted on anything represented in the 2003 financial statements. This argument is identical to the one which I already rejected at paragraphs 42-56, when dealing with the motions by Nesbitt Burns and Wellington West. Under the circumstances, it is unnecessary for me to deal with it again.

75 PWC also argues that the documents incorporated into the plaintiffs' statement of claim by reference clearly show that the Solidarité transaction was not misclassified by PWC as Bellan maintains. However, the statement of claim alleges it was. Under the circumstances, I agree with Bellan that this is a question of fact for the trier of fact to determine.

76 Accordingly, I am dismissing PWC's motion to strike the statement of claim against it.

**(g) Motion to Strike in Bellan No. 1 by MSC**

77 MSC is seeking an order striking out the claim against it in Bellan No. 1 on the ground that the statement of claim fails to disclose a reasonable cause of action against it.

78 Relying primarily on *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.), it argues that a statutory regulator such as the MSC does not owe a private law duty of care to members of the investing public for negligence in failing to properly oversee the conduct of an investment company subject to its regulation. Both of these cases involved negligence actions against regulators — in one case a registrar of mortgage brokers and in the other a law society. The actions were brought by investors who alleged their losses were caused in part by the failure

of the regulator to take reasonable steps to protect them from parties who were subject to their regulation. The Supreme Court of Canada struck out both claims on the ground that there was no duty owed by the regulators to members of the investing public to protect their interests due to the absence of a sufficient degree of proximity between them.

79 Bellan argues that this case is distinguishable from *Hobart* and *Edwards*. He points to the fact that *The Securities Act* charges the MSC with the responsibility of administering that Act and empowers it to conduct an investigation. In this case, Bellan made a specific complaint to the MSC in about 2002 with respect to the alleged misleading valuation in the Crocus Fund. On April 28, 2003, the MSC publicly announced it was going to conduct a review of the Crocus Fund. Bellan alleges it completely botched this review and that this was an operational failure. He argues *The Securities Act* does not immunize the MSC from such failures. He points to s. 142(1) of that Act which provides:

142(1) No person may commence or maintain an action or other proceeding against ... the [Securities] Commission ... for any act done in good faith, or any neglect or default, in the performance or intended performance in good faith of a responsibility or in the exercise or intended exercise in good faith of a power or discretion

(a) under this Act or the regulations; ...

80 This provision, Bellan maintains, implies that the MSC may be civilly liable for conduct done in bad faith, or for conduct that goes beyond mere "neglect or default".

81 Bellan further argues a regulator can be civilly liable for its failure to conduct a proper investigation into complaints made by a clearly identified plaintiff. He relies on *McCulloch Finney c. Barreau (Québec)*, [2004] 2 S.C.R. 17 (S.C.C.); *McClelland v. Stewart*, [2004] B.C.J. No. 1858 (B.C. C.A.), leave to Supreme Court denied (2005), [2004] S.C.C.A. No. 492 (S.C.C.); and *755165 Ontario Inc. v. Parsons*, [2006] N.J. No. 224 (N.L. T.D.), leave to appeal refused [2006] N.J. No. 294 (N.L. C.A.).

82 *McCulloch Finney* concerned complaints made by a plaintiff regarding the conduct of a lawyer. The Barreau was found to be grossly incompetent in responding to these complaints. The Supreme Court of Canada affirmed an award of damages to the plaintiff and gave an expansive reading to the concept of "bad faith". At para. 39 it stated:

... [T]he concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness.

It went on at para. 46 to state:

... [T]he Barreau would have been no less liable in the circumstances of this case if the analysis adopted by this Court in *Edwards v. Law Society of Upper Canada* ... and *Cooper v. Hobart* ... had been applied. The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. ...

(Emphasis mine)

83 *McCulloch Finney* was applied by the British Columbia Court of Appeal in *McClelland* and by the Newfoundland and Labrador Supreme Court — Trial Division in *Myles-Leger Ltd. (Trustee of)*. Both of these cases involved claims against statutory regulators. In both cases, the courts refused to strike the claims, finding that the actions were arguable in light of *McCulloch Finney*.

84 In *McClelland*, the court refused to strike the claims of a group of patients who were suing the College of Physicians and Surgeons for its failure to act on information that a doctor was sexually abusing his female patients.

85 In *Myles-Leger Ltd. (Trustee of)*, the court refused to strike a claim against a law society for its failure to act on information regarding a lawyer's abuse of trust accounts. Green C.J. T.D. wrote at para. 74:

Given the foregoing factors, and reading the decisions in *Cooper* and *Edwards* in light of *McCulloch Finney* and *McClelland*, I am not satisfied it is "plain and obvious" that the plaintiff's claim in this case cannot succeed. There is not such a deficiency in pleading on the proximity issue that should preclude the plaintiff from proceeding with its action. Instead as in *McLelland*, the question as to whether there is sufficient proximity should "turn on the factual underpinning" of the plaintiff's claims.

86 I am satisfied that the same is true in this case. There are a number of factors which distinguish this case from *Cooper* and *Edwards*. In *Cooper* and *Edwards*, the parties were strangers to one another. In the present case, Bellan made a specific complaint to the MSC. The MSC publicly announced a review of the Crocus Fund. During its review, it failed to discover wrongdoing which Bellan alleges should have been obvious.

87 Also, while in *Cooper* and *Edwards*, there was a statutory provision granting the regulator immunity for acts done in good faith, there was no allegation in either of those cases that the regulator acted in bad faith.

88 Given the different factual circumstances in this case and the decisions in *McCulloch Finney*, *McClelland* and *Myles-Leger Ltd. (Trustee of)*, it cannot be said that it is plain and obvious that the claim in Bellan No. 1 must fail.

89 Accordingly, I am dismissing MSC's motion.

**(h) Motions by Province in Bellan No. 2**

90 The Province has filed two motions.

91 In its first motion it is seeking an order striking out the following parts of the statement of claim: the portions of paragraphs 1(c) and (d) relating to direct liability, paragraphs 10, 14, 16, 17, 18, 34, the portions of paragraphs 42, 49 and 50 relating to direct liability, paragraphs 51, 52, 53, 54, 55, 56, paragraph 57 as it pertains to direct liability, and paragraph 61, on the grounds that they do not disclose a reasonable cause of action or are scandalous, frivolous or vexatious.

92 In its second motion, it is seeking:

(i) an order striking out the following words in the statement of claim:

In paragraph 11, in the 5<sup>th</sup> line, the word "including"

In paragraph 12, in the 2<sup>nd</sup> line, the word "included"

In paragraph 13, in the 2<sup>nd</sup> line, the word "including"

In paragraph 15, the words "or for other improper reasons"

In paragraph 49, in the 4<sup>th</sup> line, the word "include"

In paragraph 53, in the 4<sup>th</sup> line, the word "including"

or, in the alternative, an order deleting the words in question and requiring the plaintiffs to provide full particulars;

(ii) an order striking out the portions of paragraphs 1(c) and (d) relating to vicarious liability, paragraph 15, the portions of paragraphs 42, 49, and 50 relating to vicarious liability, on the grounds that they do not disclose a reasonable cause of action;

(iii) an order striking out paragraphs 38 and 53.1 through 53.10 on the grounds that they do not disclose a reasonable cause of action, are the pleading of evidence rather than material facts, are scandalous, frivolous or vexatious, or are irrelevant and an abuse of the process of the court;

(iv) an order striking out the words "the agreement was highly restrictive and one-sided in favour of Solidarité" in the first line and the word "onerous" in the third line of paragraph 34, and the phrase "the picture thus created was a sham" in paragraph 42, on the grounds that they are scandalous, frivolous or vexatious.

93 I am ordering Bellan and Nelson to provide particulars with respect to the "other improper reasons" referred to in paragraph 15 of the statement of claim. I am satisfied these particulars may be of assistance to the Province with respect to the certification hearing and are necessary in order to enable it to file a statement of defence. I am not satisfied that the remainder of the particulars the Province is requesting are required for either the certification hearing or for the purpose of filing a defence.

94 I am also making an order striking out paragraph 38 of the statement of claim on the ground that it is scandalous because the facts set out in it are irrelevant.

95 I am dismissing the request to strike portions of paragraphs 34 and 42 as I am satisfied they constitute pleas of material facts.

96 For the reasons which follow, I am also dismissing the remainder of the Province's motions.

97 Bellan and Nelson are asserting three causes of action against the Province — negligence, a breach of s. 234 of the *Corporations Act* (oppression) and abuse of public office.

*(i) Negligence*

98 The Province relies primarily on *Cooper* to argue it owed no duty of care to investors in the Crocus Fund. In *Cooper*, the Supreme Court of Canada confirmed that the principles set out in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) are still appropriate in the Canadian context. In *Cooper* and its companion case *Edwards*, the Supreme Court reformulated the two-stage *Anns* test. The reformulation is concisely summarized in *Edwards* by McLachlin C.J. and Major J. as follows:

9 At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

10 If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

99 I am satisfied it is at least arguable that the Province was in such a close and direct relationship to investors in the Crocus Fund that it would be just to impose a duty of care upon it in the circumstances of this case.

100     *The Mortgage Brokers Act*, R.S.B.C. 1996, c. 50, at issue in *Cooper* is distinguishable from the *Crocus Act*. *Cooper* involved a statute of general regulatory application. The *Crocus Act* relates only to the Crocus Fund. It is not a broad public duty statute.

101     However, the Province submits that even if a *prima facie* duty of care can be established under the first branch of the *Anns* test, it would be negated at the second stage for overriding policy reasons. It argues that its role was limited to making policy decisions, not operational decisions, and as such its decisions are immune from attack under the second branch of the *Anns* test.

102     I agree with the Province that there is a serious issue as to whether it owed a private law duty of care to investors in Crocus and, if so, the extent of that duty. However, the distinction between policy decisions and operational decisions is not always easy to determine. In the circumstances of this case, I am satisfied a full factual record is necessary to determine if there was private law duty of care owed by the Province to investors in the Crocus Fund.

103     The facts in *Cooper* were very different from the facts pleaded in this case. In *Cooper*, the regulator had no involvement with the mortgage broker — it held no shares in it, did not appoint any directors for it, did not provide it with start up capital, did not co-invest with it, did not have employees who signed any prospectus for it and did not promote the sale of its shares.

104     In this case, the Province played a myriad of roles in regard to Crocus. It provided Crocus with start up capital and co-invested with it. Provincial government employees were involved in running, monitoring, regulating and promoting it. The Province was a Class G shareholder in Crocus and had the right to appoint and did appoint a director to the Crocus board. It appointed very senior employees to that directorship, including deputy ministers. Bellan and Nelson allege that this directorship was not just a personal posting for these individuals but was instead a position intended to represent the Province's interests on the board.

105     Of particular importance is the fact that the Province was very prominent in promoting the Fund. Investors were buying an investment in which the government was playing an active role. Bellan and Nelson contend that, under the circumstances, the reasonable expectations of investors as to what the government's responsibilities were would be quite different from a case like *Cooper* where the government had no role in the creation or operation of the mortgage fund.

(ii) *Oppression Remedy (s. 234 Corporations Act)*

106     Bellan and Nelson allege that as a Class G shareholder, the Province unfairly disregarded the interests of the Class A shareholders contrary to s. 234 of *The Corporations Act*. The relevant portion of this section reads:

**Grounds**

**234(2)** If, upon an application ..., the court is satisfied that in respect of a corporation ...

      (b) the business or affairs of the corporation ... have been carried on or conducted in a manner ...

that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder ..., the court may make an order to rectify the matters complained of.

(Emphasis mine)

107     Bellan and Nelson claim the Province had specific knowledge of serious problems at the Crocus Fund on or before November 27, 2002 and did not take steps to protect or alert the Class A shareholders. Quite to the contrary, they say it continued to promote the sale of Class A shares to the public.

108     Bellan and Nelson allege that the Crocus Fund had all the earmarks of a government promoted investment. Under the circumstances, they claim investors in the Fund had a reasonable expectation that material information about the Fund would

not be given to and retained by only the Class G shareholder. This is especially true, they say, where the Class A investors were, with the knowledge of the Province, being given false and misleading information through the prospectuses.

109 Under all the circumstances, I am not persuaded that it is plain and obvious this claim will fail.

*(iii) Abuse of Public Office*

110 The elements of the tort of abuse of public office are:

- (a) deliberate, unlawful conduct in the exercise of public functions;
- (b) awareness that the conduct is unlawful and likely to injure the plaintiff;
- (c) causation; and
- (d) damages.

See *Odhayji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 32.

111 The statement of claim in Bellan No. 2 alleges the Province was aware its employees were improperly shielding Crocus from compliance with the *Crocus Act* and from an adequate investigation, it was aware the actions of its employees were likely to injure investors in the Fund and the conduct of the Province's employees caused members of the putative class to suffer damages.

112 Accordingly, I am satisfied the requisite elements of the tort of abuse of public office have been pleaded.

*(iv) Vicarious Liability*

113 The Province argues that portions of the statement of claim which allege vicarious liability should be struck. It submits that Crocus was a stand alone corporation and that the government employees who became directors of it owed a responsibility to it and not the Province. But this misses the point being made by Bellan and Nelson. They acknowledge that the directors appointed by the Province had a legal duty to act in the best interests of Crocus but they claim that this is not what happened. Instead, they say the Province was, in fact, involved in the governance of Crocus through these directors. They assert the directors appointed by the Province, as employees of the Province, had a conflict of interest and did not act exclusively in the interests of Crocus. They allege the Province was negligent in permitting these directors, as well as certain other employees, agents and officers of the Province who also had multiple and conflicting roles in the direction and supervision of Crocus, to exercise authority with respect to monitoring and investigating the Crocus Fund. Under the circumstances, they say, the Province is both directly and vicariously liable for the actions of all of these employees, agents and officers.

114 Given all of the circumstances, I am not convinced that Bellan and Nelson's claim the Province is vicariously liable for the actions of its employees, agents and officers will necessarily fail.

**Costs**

115 If necessary, costs may be spoken to.

*Motions dismissed.*

# **TAB 5**

**Most Negative Treatment:** Not followed

**Most Recent Not followed:** Isaacs v. Nortel Networks Corp. | 2001 CarswellOnt 4404, 110 A.C.W.S. (3d) 246, 31 C.C.P.B. 41, [2001] O.J. No. 4851, 16 C.P.C. (5th) 69, 15 C.C.E.L. (3d) 78, [2001] O.T.C. 885 | (Ont. S.C.J., Oct 19, 2001)

1998 CarswellOnt 4645  
Ontario Court of Justice, General Division

Bywater v. Toronto Transit Commission

1998 CarswellOnt 4645, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172, 83 O.T.C. 1, 84 A.C.W.S. (3d) 230

**Sarah Bywater, Plaintiff and Toronto Transit Commission, Defendant**

Winkler J.

Heard: November 25, 1998

Judgment: December 2, 1998 \*

Docket: 97-CU-129694

Proceedings: additional reasons at (January 12, 1999), Doc. 97-CU-129694 (Ont. Gen. Div.)

Counsel: *Michael McGowan* and *Dorothy Fong*, for the Plaintiff.

*Brian M. Leck* and *Gary Peacock*, for the Defendant.

Subject: Civil Practice and Procedure; Public

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.H Miscellaneous

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.iv Nonbars to certification

Civil practice and procedure

XVIII Summary judgment

XVIII.11 Judgment on part of claim

**Headnote**

Practice --- Parties --- Representative or class actions --- General

Plaintiff passenger brought action for damages against defendant transit commission for personal injuries allegedly sustained in subway fire --- Transit commission made public admission of liability --- Passenger brought motion to obtain certification for class action proceeding --- Motion granted --- Passenger's pleadings disclosed cause of action and identifiable class existed --- Class not invalid on basis that all members not known at time of action --- Issues of fact and law common to members of proposed class --- Transit commission's admission did not resolve matter --- Liability not only issue common to class --- Admissions of liability do not defeat class actions as admission is only bare promise to members not party to proceeding --- Judicial economy served by class action as risk of inconsistent findings removed and resources conserved by single trial ---

Weighing of factors demonstrates class action preferable proceeding — Passenger could represent class adequately and was free from conflicts of interest and possessed litigation plan.

Practice --- Summary judgment — Judgment on part of claim

Plaintiff passenger brought action for damages against defendant transit commission for personal injuries allegedly sustained in subway fire — Transit commission made public admission of liability — Passenger brought motion for partial summary judgment — Motion granted — Admission of liability was sufficient to grant summary judgment on part of claim.

**Table of Authorities**

**Cases considered by *Winkler J.*:**

*Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — applied

*Anderson v. Wilson* (1998), 37 O.R. (3d) 235, 156 D.L.R. (4th) 735, 107 O.A.C. 274, 18 C.P.C. (4th) 208 (Ont. Div. Ct.) — applied

*Campbell v. Flexwatt Corp.* (1997), 98 B.C.A.C. 22, 161 W.A.C. 22, 15 C.P.C. (4th) 1, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (B.C. C.A.) — referred to

*Campbell v. Flexwatt Corp.* (1998), 228 N.R. 197 (note) (S.C.C.) — referred to

*Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (1997), 153 D.L.R. (4th) 33, 36 O.R. (3d) 384, 104 O.A.C. 179, 18 C.P.C. (4th) 189 (Ont. C.A.) — applied

*Nantais v. Electronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) — considered

*Thoday v. Thoday*, [1964] 1 All E.R. 341, [1964] P. 181 (Eng. C.A.) — referred to

*Westminister Canada Holdings Ltd. v. Coughlan* (1990), 73 D.L.R. (4th) 584, 41 O.A.C. 377, 75 O.R. (2d) 405 (Ont. Div. Ct.) — applied

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — pursuant to

s. 1 "common issues" — considered

s. 5(1) — considered

s. 5(1)(c) — considered

s. 6 — considered

s. 24 — considered

s. 24(1)(b) — considered

s. 24(1)(c) — considered

s. 25(1)(c) — considered

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

Generally — referred to

s. 61 — referred to

MOTION by passenger for class action certification and partial summary judgment in action for damages for personal injuries allegedly sustained in subway fire.

***Winkler J.*:**

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

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

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

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

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

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

## **Analysis and Disposition**

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

- 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action;
  - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
  - (c) the claims or defences of the class members raise common issues;
  - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
  - (e) there is a representative plaintiff or defendant who,
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

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

### **Cause of Action**

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

### **Identifiable Class**

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

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

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

10 The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

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

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

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

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

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

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

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

### **Common Issues**

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

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

The *Class Proceedings Act, 1992*, is an entirely procedural statute, and, as such, does not create any new cause of action. A decision on certification does not constitute a determination on the merits of the action. The presence of common issues is at the very center of a class proceeding. It is the advancement of the litigation through the resolution of the common issues in a single proceeding which serves the goals of the Act. It is clear from the language of s. 5(1)(c) that the Act contemplates that there be a connection between the common issues, the claims or defences and the class definition. In like fashion, the common issues must have a basis in the causes of action which are asserted.

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

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

The defendants have undertaken to this court not to raise the limitation defence in Nova Scotia. The appellant did not seek such an undertaking. Such an undertaking does not end the matter. In my view the juridical disadvantage remains. In his text, James Cooper Morton, *Limitation of Civil Actions* (Toronto: Carswell, 1988), states at p. 106:

An agreement not to rely on the passage of time must meet the formal requirements of a contract before it can be considered binding. Specifically, consideration must pass between the parties. A bare promise not to rely on the passage of time is unenforceable.

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

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

16 Evidence of the circumstances surrounding the fire, the general background of the events on August 6, 1997, including the evacuation of the affected portion of the subway system, the composition of the smoke, the manner in which TTC staff reacted

to the emergency, and other evidence of general application to all the individual claims is relevant and indeed essential for a determination of individual damage claims. It is expedient, and in the interests of judicial economy, that this evidence and any consequent findings be dealt with as common issues of fact. Apart from the obvious efficiencies, this has the added advantage of removing the risk of inconsistent findings which accompanies a multiplicity of proceedings.

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

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

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

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

19 In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual 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. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.

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

#### ***Preferable Procedure***

21 Before dealing with the fourth requirement for certification contained in s. 5(1), that is, whether a class proceeding would be the preferable procedure for the resolution of the common issues, a review of general principles may be useful. It is not necessary that a determination of the common issues will determine liability. Rather, the common issues need only be issues of fact or law, the determination of which will move the litigation forward. The reasoning of Cumming J.A. in *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C. C.A.), leave to appeal to S.C.C. denied [(1998), 228 N.R. 197 (note) (S.C.C.)] was adopted by Campbell J. in *Anderson* at 243, where he stated:

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

and further at 247:

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

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

Appellant's counsel, in argument, relied on the apparent mandatory wording of s. 5(1) of the Act, specifying "the court shall certify" if certain requirements are met. I am not persuaded that the approach to be taken is that simple.

Section 35 of the *Class Proceedings Act, 1992*, provides that the rules of court apply to class proceedings.

Rule 1.04(1) of the *Rules of Civil Procedure* provides:

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.

In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing certification.

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

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

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity, of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

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

Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification solely if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation.

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

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

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

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

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

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

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

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

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

Even if there was an error in the interpretation of s. 6 it could not affect the result because none of the three factors present in this case, individually or cumulatively, are significant enough to outweigh the degree of judicial economy and increased access to justice provided by the certification as a class action.

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

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

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

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

***Representative Plaintiff***

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

*i) Lack of Conflict/Adequate Representation*

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

*ii) Litigation Plan*

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

*iii) Notice*

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

***Partial Summary Judgment***

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

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

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

*Motion granted.*

**Footnotes**

\* Additional reasons at (January 12, 1999), Doc. 97-CU-129694 (Ont. Gen. Div.).

# **TAB 6**

2012 ONSC 399  
Ontario Superior Court of Justice

Cannon v. Funds for Canada Foundation

2012 CarswellOnt 503, 2012 ONSC 399, [2012] 3 C.T.C. 132,  
[2012] O.J. No. 168, 13 C.P.C. (7th) 250, 213 A.C.W.S. (3d) 558

**Michael Cannon, Plaintiff and Funds for Canada Foundation, Matt Gleeson and Sarah Stanbridge as trustees for the Donations Canada Financial Trust, Parklane Financial Group Limited, Trafalgar Associates Limited, Trafalgar Trading Limited, Appleby Services Bermuda Ltd. as trustee for the Bermuda Longtail Trust, Edwin C. Harris Q.C., Patterson Palmer also known as Patterson Palmer Law, Patterson Kitz (Halifax), Patterson Kitz (Truro), McInnes Cooper, Sam Albanese, Ken Ford, Riyad Mohammed, David Raby, Greg Wade, Gleeson Management Associates Inc., Mary-Lou Gleeson, Matt Gleeson and Martin P. Gleeson, Defendants**

G.R. Strathy J.

Heard: August 22-25, 2011  
Judgment: January 18, 2012  
Docket: CV-08-362807-00 CP

Counsel: Samuel S. Marr, Margaret Waddell, Susan Brown, for Plaintiff

John F. Rook, Q.C., Eric R. Hoaken, Mark W. Smyth, for Defendants, Patterson Palmer (aka Patterson Palmer Law), Patterson Kitz (Halifax), Patterson Kitz (Truro), McInnes Cooper, Edwin C. Harris, Q.C.

John P. Brown, Meighan Leon, for Defendants, ParkLane Financial Group, Trafalgar Associates Limited, Trafalgar Trading Limited

Deborah Berlach, Emma Holland, for Defendants, Funds for Canada Foundation, Sam Albanese, Ken Ford, David Raby, Greg Wade, Riyad Mohammed, Mary-Lou Gleeson

Gary H. Luftspring, Andrea Sanche, for Defendants, Matt Gleeson, Gleeson Management Associates Inc.

Bradley E. Berg, Charles Dobson, for Defendant, Appleby Services (Bermuda) Ltd. as trustee of The Bermuda Longtail Trust

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal)

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.E** Fair and adequate representation

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.F** Litigation plan

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.G** Conflicts of interest

Civil practice and procedure

**XVIII** Summary judgment

**XVIII.5** Requirement to show no triable issue

Tax

**II** Income tax

**II.17** Tax credits

**II.17.d** Charitable donations

**II.17.d.vii** Whether genuine gift

Tax

**II** Income tax

**II.17** Tax credits

**II.17.d** Charitable donations

**II.17.d.viii** Miscellaneous

## **Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — Section 5(1)(a) of CPA requires that pleadings disclose cause of action —

There was no reason that plaintiff could not plead both negligence and negligent representation, arising out of same factual circumstances, as long as claims were in fact distinct — Causes in action in negligence and negligent misrepresentation were properly pleaded against certain defendants — There were sufficient pleadings of fraud and fraudulent misrepresentation against certain defendants — It would be left to trial judge to determine, after all evidence was in, whether conspiracy and any of other causes of action had been made out and if so whether conspiracy claim added anything — While ordinary charitable donation would be highly unlikely to fall within Consumer Protection Act, 2002, gift program was far from ordinary — It would be wrong to resolve this issue at this stage — Taxpayer had pleaded tenable cause of action under Consumer Protection Act, 2002 against certain defendants — Whether benefit, if any, received by these defendants was sufficiently direct to give effect to successful claim for unjust enrichment was issue requiring proof at trial, but pleading itself was sufficient.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Developer developed software program and granted trust he established in Bermuda right to license software program to third parties — Software program was licensed by Bermuda trust to Bermuda company T Ltd. owned by developer — Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to Canadian taxpayers and created and settled private charitable trust to facilitate operation of gift program — Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — Class definition which included residents of Canada who participated in gift program in any of years of 2005 to 2009 was approved — Defendants did not dispute that there was identifiable class.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to Canadian taxpayers and created and settled private charitable trust to facilitate operation of gift program — Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — Breach of contract and rescission were certified as common issues against P Corp. — Negligence and conspiracy were certified as common issues against certain defendants — Fraud and fraudulent misrepresentation were certified as common issues against certain defendants — Unjust enrichment was certified as common issue against certain defendants — Consumer Protection Act, 2002 claims were certified as common issues against certain defendants — Negligent misrepresentation was certified as common issue against certain defendants — Vicarious liability of law firms was certified as common issue — Waiver of tort, aggregate assessment of waiver of tort damages, and punitive and exemplary damages were certified as common issues.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to Canadian taxpayers and created and settled private charitable trust to facilitate operation of gift program — Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — Class proceeding was found to be preferable procedure for resolution of common issues and claims of class members — Certification of proceedings would further purpose of CPA — There were really no alternative procedures that would be as effective as class proceeding in achieving goals of access to justice, judicial efficiency and behaviour modification — In light of its potential to promote access to justice and reduce or possibly eliminate need for individual trials, class action was found to be preferable procedure for resolution of common issues of Class.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to Canadian taxpayers and created and settled private charitable trust to facilitate operation of gift program — Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer withdrew notice of objection and paid CRA reassessment — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — It was found that taxpayer fairly and adequately represented Class — There was no dispute as to capacity of taxpayer to serve as representative plaintiff.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to Canadian taxpayers and created and settled private charitable trust to facilitate operation of gift program — Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer withdrew notice of objection and paid CRA reassessment — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — It was found that taxpayer had produced appropriate plan for notifying Class and advancing proceeding — Having concluded that action was workable as class proceeding, issue of production, discovery, proof of damages and trial of individual issues, if required, could be addressed through case management as case proceeded to trial and by directions of common issues judge who would, by that time, have full appreciation of what remained to be determined.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Conflicts of interest

Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to Canadian taxpayers and created and settled private charitable trust to facilitate operation of gift program — Taxpayer participated in gift program — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer withdrew notice of objection and paid CRA reassessment — Taxpayer brought action against defendants on his own behalf and on behalf of national class of Canadian residents who participated in gift program — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motion for certification granted — Action was certified under s. 5(1) of CPA — It was found that taxpayer did not have interest in conflict with Class — Taxpayer's evidence that without promise of tax credit he would never have participated in gift program was not proof of lack of donative intent — Taxpayer's evidence was consistent with tax credit being one reason to make gift — All Class members who did not opt out would have same interest as taxpayer on common issues, regardless of their position on their individual tax appeals and whatever may be merits of those appeals.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Developer incorporated P Corp. for purposes of promoting leveraged charitable donation programs to taxpayers and created and settled private charitable trust to facilitate operation of gift program — Senior tax lawyer issued opinion letters and comfort letters in 2005, 2006 and 2007 concerning gift program — Senior tax lawyer's name, photograph and biography were included in gift program materials — Every donor was required to sign certain standard form documents, including donor declaration and tax risk disclosure statement — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer and taxpayer had to repay deductions with interest — Taxpayer brought action against defendants — Taxpayer brought motion for certification as class proceedings — Motions for summary judgment were brought by P Corp. and by lawyers — Motions for summary judgment dismissed — Potential finding of fraud was so serious that fairness to parties required trial — It was in interests of justice that weighing of evidence, evaluation of credibility of witnesses and drawing of inferences from evidence should only be exercised by trial judge — Taxpayer discharged burden of showing that his claims had real chance of success and that there was genuine issue requiring trial — Senior tax lawyer and law firms also knew, or ought to have known, that gift program could not be launched without favourable tax opinion by leading Canadian tax expert and that

existence of such opinion would be touted by promoters — Evidence raised genuine issue, requiring trial, concerning existence of duty of care owed by lawyers to taxpayer — There was substantial evidence in support of existence of special relationship between senior tax lawyer and taxpayer so as to give rise to duty of care.

**Tax --- Income tax — Tax credits — Charitable donations — Whether genuine gift**

In gift program donor would write \$2,500 cheque or make pledge to "participating charity" — Simultaneously, donor applied to become beneficiary of charitable trust — Donor executed escrow agreement appointing P Corp. to hold trust units and donate them to designated charity on donor's behalf — On receipt of application, charitable trust made investment in sub-trust and was issued two units — P Corp. was issued two sub-trust units by charitable trust and donor was issued confirmation of issuance of "discretionary" interest in two sub-trust units having ostensible value of \$7,500 — Sub-trust units were then donated by donor to charity — Charity redeemed sub-trust units and Bermuda trust indirectly acquired sub-trust units through charitable trust — Donor would receive two charitable donation receipts — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer, taking position that donations were not gift because they were made in expectation of material advantage, and taxpayer had to repay deductions with interest — In absence of "donative intent" taxpayer was not entitled to claim charitable deduction — Taxpayer brought action against defendants — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motions for summary judgment were brought by P Corp. and by lawyers — Motion for certification granted; motions for summary judgment dismissed — Action was certified under s. 5(1) of CPA — Taxpayer discharged burden of showing that his claims had real chance of success and that there was genuine issue requiring trial — Evidence raised genuine issue, requiring trial, concerning existence of duty of care owed by lawyers to taxpayer — There was substantial evidence in support of existence of special relationship between senior tax lawyer and taxpayer so as to give rise to duty of care.

**Tax --- Income tax — Tax credits — Charitable donations — Miscellaneous**

In gift program donor would write \$2,500 cheque or make pledge to "participating charity" — Simultaneously, donor applied to become beneficiary of charitable trust — Donor executed escrow agreement appointing P Corp. to hold trust units and donate them to designated charity on donor's behalf — On receipt of application, charitable trust made investment in sub-trust and was issued two units — P Corp. was issued two sub-trust units by charitable trust and donor was issued confirmation of issuance of "discretionary" interest in two sub-trust units having ostensible value of \$7,500 — Sub-trust units were then donated by donor to charity — Charity redeemed sub-trust units and Bermuda trust indirectly acquired sub-trust units through charitable trust — Donor would receive two charitable donation receipts — Taxpayer claimed deductions for charitable gifts to gift program in 2005 and 2006 — CRA reassessed taxpayer, taking position that donations were not gift because they were made in expectation of material advantage, and taxpayer had to repay deductions with interest — In absence of "donative intent" taxpayer was not entitled to claim charitable deduction — Taxpayer brought action against defendants — Taxpayer brought motion for certification as class proceedings under Class Proceedings Act, 1992 (CPA) — Motions for summary judgment were brought by P Corp. and by lawyers — Motion for certification granted; motions for summary judgment dismissed — Action was certified under s. 5(1) of CPA — Taxpayer discharged burden of showing that his claims had real chance of success and that there was genuine issue requiring trial — Evidence raised genuine issue, requiring trial, concerning existence of duty of care owed by lawyers to taxpayer — There was substantial evidence in support of existence of special relationship between senior tax lawyer and taxpayer so as to give rise to duty of care.

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*Robinson v. Rochester Financial Ltd.* (2010), 2010 CarswellOnt 2153, 2010 ONSC 1899, 89 C.P.C. (6th) 118, 262 O.A.C. 148 (Ont. Div. Ct.) — considered

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**Statutes considered:**

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Generally — referred to

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — referred to

s. 1 "common issues" (a) — considered

s. 1 "common issues" (b) — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 6 — considered

*Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A

Generally — referred to

s. 1 "consumer" — considered

s. 1 "consumer agreement" — considered

s. 1 "consumer transaction" — considered

s. 2(2) — considered

s. 3 — referred to

s. 7(1) — considered

s. 14(1) — considered

s. 14(2) ¶ 1 — considered

s. 14(2) ¶ 6 — considered

s. 14(2) ¶ 8 — considered

s. 14(2) ¶ 13 — considered

s. 14(2) ¶ 14 — considered

s. 15(1) — considered

s. 15(2)(c) — considered

s. 15(2)(e) — considered

s. 15(2)(f) — considered

s. 15(2)(g) — considered

s. 17(1) — referred to

s. 18(1) — referred to

s. 18(2) — referred to

s. 18(3) — considered

s. 18(15) — referred to

ss. 37-40 — referred to

ss. 55-65 — referred to

ss. 66-76 — referred to

ss. 86-90 — referred to

*Criminal Code*, R.S.C. 1985, c. C-46

s. 380 — considered

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

*Law Society Act*, R.S.O. 1990, c. L.8

Generally — referred to

s. 9 — considered

*Securities Act*, R.S.O. 1990, c. S.5

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20.04(2)(a) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 21.01(1)(b) — considered

**Regulations considered:**

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

*Income Tax Regulations*, C.R.C. 1978, c. 945

Generally — referred to

**Words and phrases considered**

**Fraud**

Fraud is the deprivation of another's property by dishonest means. While many of the classic definitions of fraud have a component of false representation . . . , other cases have held that these definitions are not exhaustive and fraud can simply mean the dishonest deprivation of someone else's property . . .

Fraud, in its widest sense, may include a component of deceit or misrepresentation, but it need not necessarily do so.

In this case, the pleading of fraud refers not only to the alleged fraudulent misrepresentation (which was in essence, "you will receive a valid charitable receipt much greater than your cash contribution"), but also to the allegation that the defendants constructed and participated in a dishonest scheme to siphon the plaintiff's charitable donations out of the charities and into their own pockets. The allegations in the statement of claim, read generously, are broad enough to include fraud by deceit and fraud by other dishonest acts.

#### **consumer**

A "consumer" is defined as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes" and a "consumer transaction", means "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement" (s. 1 [of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A]).

. . . while the ordinary dictionary definitions of "consumer" or "consumer transaction" are more limited, the statute contains its own definitions which expand the ordinary meaning of these terms. [The plaintiff] is arguably a "consumer" within the meaning of the statute because he was "acting for personal . . . purposes" and the defendants were arguably engaged in a "consumer transaction", because they were "conducting business" or had "other dealings" with [the plaintiff].

MOTION by taxpayer for certification of action as class proceeding; MOTIONS by defendants P Corp. and lawyers for summary judgment.

#### **G.R. Strathy J.:**

#### **I. Introduction**

1 When Michael Cannon heard about the Donations for Canada Gift Program - an opportunity to obtain a \$10,000 charitable tax credit in return for a \$2,500 donation - he thought it was "too good to be true".

2 It was.

3 A few years later, his tax returns were reassessed by Canada Revenue Agency ("C.R.A.") and he had to repay his deductions, with interest. The only thing he received for his "donation" was a tax bill.

4 In the eyes of C.R.A., the Donations for Canada Gift Program (the "Gift Program") was nothing more than a scheme, in which the funds of "donors" like Cannon flowed through a giant circle and into the pockets of the promoters. In return for participating in the Gift Program, the charities got 1% of the total money donated and the promoters' promise of a 20-year income stream from an investment that the promoters would make, using a fraction of the Gift Program donations.

5 C.R.A. said that donors like Cannon lacked "donative intent" - there was no element of impoverishment in the so-called charitable donation, because the donor expected to be enriched by receiving a tax credit well in excess of his or her donation. The "donation" could not be characterized as a gift. Therefore, there was no allowable tax deduction and the full amount deducted had to be repaid - with interest.

6 Cannon brings a motion for certification of this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "C.P.A.") and seeks to represent a class composed of almost 10,000 Canadian taxpayers who contributed to the Gift Program.

7 Motions for summary judgment are brought by two groups of defendants, ParkLane Financial Group Limited ("ParkLane") and Edwin C. Harris Q.C. ("Harris") and law firms with which Harris has been associated.

8 For the reasons that follow, I certify this action as a class proceeding, on the terms set out below, and I dismiss the motions for summary judgment.

## II. The Facts

### 1. Cannon and the Proposed Class

9 Cannon is an Ontario resident who participated in the Gift Program by contributing \$10,600 in 2005 and \$12,500 in 2006. In 2008 and 2009, his tax returns were reassessed by C.R.A. The charitable tax credits he had claimed for his donations to the Gift Program were disallowed. He has since paid the reassessed taxes and \$6,703.76 in interest.

10 Cannon had a 33 year career as a police officer, having risen to the rank of Staff Sergeant. He is a reasonably sophisticated investor, with some experience in tax planning strategies. He understands their risks and rewards. He participated in the Gift Program after receiving advice from his "professional counsel and tax advisor", in whom he placed trust and confidence.

11 Cannon brings this action on his own behalf and on behalf of a national class of Canadian residents who participated in the Gift Program (the "Class"). The Class is described as follows:

Any person who participated in the ParkLane Donations for Canada Charitable Gift Program while resident in Canada during the period between January 1, 2005 and December 31, 2009 [The "class period"], excluding Edward Furtak, Wayne Robertson, the Defendants, their subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the families of the Individual Defendants, Wayne Robertson and Edward Furtak, and any entity in which any of the foregoing persons or entities has a legal or *de facto* controlling interest.

12 Cannon asserts that he is representative of the Class and that his experience can be extrapolated to all members of the Class. The defendants dispute this.

13 The Class consists of approximately 9,926 persons. There are Class members in every province and territory, except the Northwest Territories, with more than one-third located in Ontario. The out-of-pocket payments of Class members to the Gift Program total approximately \$144 million.

### 2. The Gift Program

14 In the following sections, I will describe the structure of the Gift Program, including the players involved and their functions. To put what follows in context, I will give a short and somewhat simplistic overview.

15 The Gift Program was the brainchild of Edward Furtak ("Furtak"), a developer of software and a sometime promoter of tax avoidance schemes, who is the President and CEO of the Trafalgar Group of Companies. Furtak had developed a computer program called the Trafalgar Global Index Futures Program (the "Software Program" or "Global Index Futures Program"), which purportedly had a methodology for making money from the trading of S & P futures contracts by predicting short-term movements in the financial markets. Furtak established a trust in Bermuda, called the "Bermuda Longtail Trust" (the "Bermuda Trust"), for the benefit of himself and his family and he granted the Bermuda Trust the right to license the Software Program to third parties. The Software Program was in turn licensed by the Bermuda Trust to a Bermuda company owned by Furtak called Trafalgar Trading Limited ("TTL").

16 Most of the cash donated to charities by participants in the Gift Program found its way into the pockets of Furtak's companies and the Bermuda Trust. The donations made by participants were super-sized by the very temporary injection of funds from the Bermuda Trust, which flowed briefly into the charities. Most of these funds were immediately returned to the Bermuda Trust, by way of the licensing agreement between the charities and TTL for the use of the Software Program. The

super-sizing made the taxpayer's donation appear to be much larger than it was in fact, thus justifying the enhanced charitable tax credit each taxpayer was to receive.

17 To make the Gift Program work, it was necessary to have six ingredients.

18 First, there had to be taxpayers, like Cannon, who were willing to buy into the concept that they could maximize their tax deductions not just by giving money to charity, but by getting a receipt for more than they had actually given - that is, by making a profit from their charitable donations. There were almost 10,000 Canadians who were convinced to do this. They came from all walks of life, teachers, lawyers, nurses, administrators, presidents and police officers. Some donated in multiple years. The minimum donation was \$10,000, but one enthusiastic donor made total donations of \$4,000,000. Over 1,700 Donors donated between \$50,000.00 and \$100,000.00 each, and over 700 Donors donated over \$100,000.00 each.

19 Second, there had to be legitimate charities or Registered Canadian Amateur Athletic Associations that were in need of cash and were prepared to give back 99% of the money donated to them to Furtak's companies in return for the promise of a future income stream from the use of the Software Program.

20 Third, there had to be an infrastructure of companies, trusts and agreements that would process the flow of funds. This infrastructure was designed by behind-the-scenes lawyers and accountants and populated by companies that were led by ParkLane and largely controlled by Furtak.

21 Fourth, there had to be a legal opinion, attesting to the fact that the Gift Program could likely sustain a challenge by C.R.A. Otherwise, no sensible donor would contribute to the program. Harris provided this opinion.

22 Fifth, there had to be a sales force to market the Gift Program to potential donors. This was done by a network of fundraisers, also called distributors (the "Distributors"), who were enlisted by ParkLane.

23 Sixth, there had to be cash, to inflate the donors' contributions, in order to convince C.R.A. that real money was being donated to the charities in return for the charitable receipts they were giving to the donors. This money was provided by Furtak through the Bermuda Trust.

24 As described in the marketing materials prepared by ParkLane, the Gift Program worked in the following way. I will take the case of a typical \$10,000 total donation. There were seven steps, which are identified in the diagram set out below.

25 The first step was that a donor would write a \$2,500 cheque or make a pledge to a "participating charity" - that is, a charity that had enrolled in the program and had entered into an agreement to use most of the funds donated to it to acquire a right to use the Software Program. Funds for Canada Foundation ("FFC Foundation"), was established in the second year of the Gift Program as an umbrella organization to receive donations and to disburse them to other qualified charities.

26 In the second step, which occurred simultaneously with the first, the donor applied to become a beneficiary of the Donations Canada Financial Trust (the "Donations Canada Trust"), a private charitable trust created by Furtak. The donor executed an escrow agreement appointing ParkLane to hold the trust units and to donate them to the designated charity on the donor's behalf.

27 On receipt of the donor's application, the third step occurred. The Donations Canada Trust made an "investment" in a sub-trust and was issued two units in the sub-trust.

28 The fourth step occurred when ParkLane, as escrow agent on behalf of the donor, was issued two sub-trust units by the Donations Canada Trust. The donor was issued a confirmation of issuance of the "discretionary" interest in two sub-trust units, having an ostensible value of \$7,500, in return for his or her cheque or pledge.

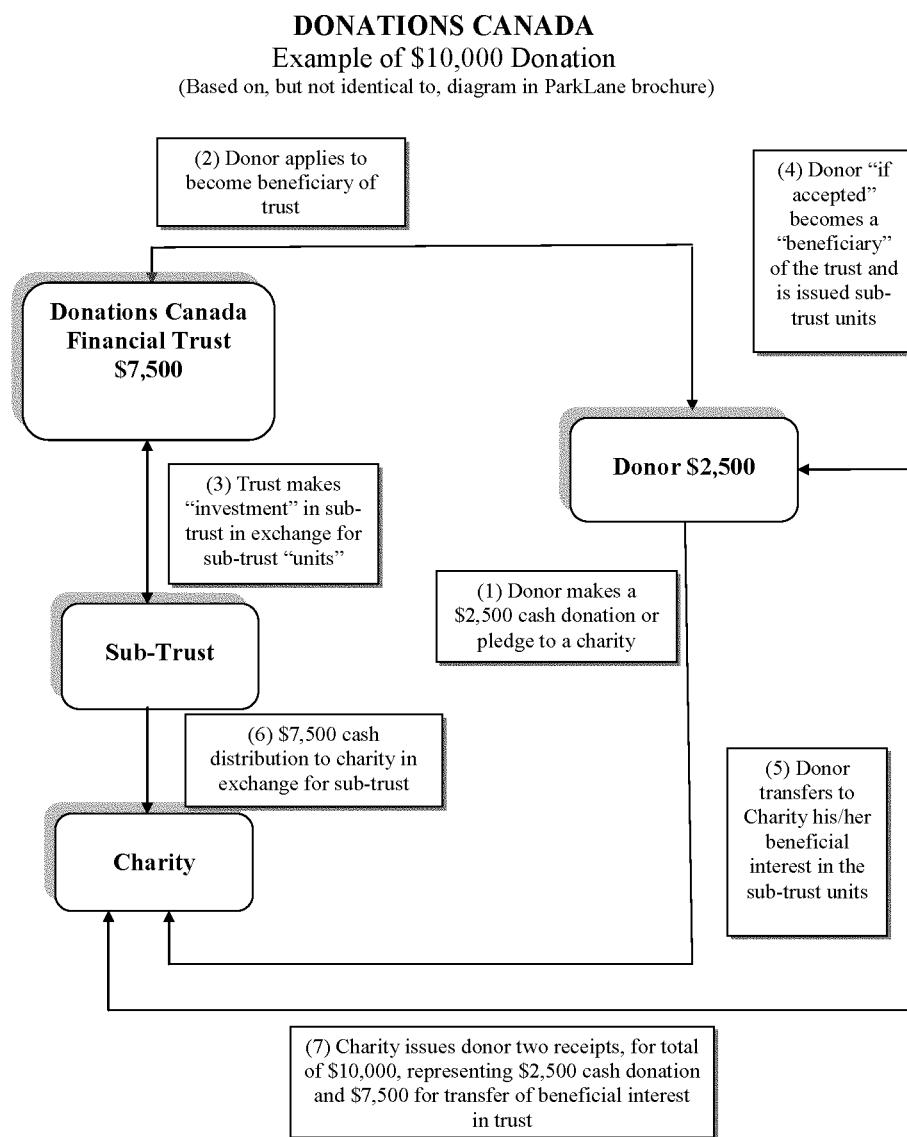
29 The fifth step was the donation of the sub-trust units by the donor to the charity. The charity was then sitting with \$2,500 in cash and a piece of paper representing the two sub-trust units donated by the donor, with an ostensible value of \$7,500.

30 Under the terms of its agreement with the Gift Program, the charity was required to "redeem" the sub-trust units. To provide the funds to make the redemption, the Bermuda Trust primed the pump by indirectly acquiring the sub-trust units, through Donations Canada Trust, for \$7,500. That was the sixth step. The charity was now sitting with a total of \$10,000 in cash.

31 At this point, the seventh step occurred: in return for his or her total donations, the donor would receive two charitable donation receipts, a cash receipt for \$2,500 and a donation-in-kind receipt for \$7,500, the stated value of the sub-trust units. At this stage, the donor's involvement ended and he or she would submit the charitable receipts along with his or her tax return.

32 In point of fact, as I will describe below, the \$10,000 did not remain with the charity for more than a *scintilla juris* - a "spark of right". At the "closing" of the donor's contribution, which was invariably done at the same time as a number of other transactions, most of the funds flowed in and out of the charity's bank account in rapid succession.

33 The following chart describes the "front half" of the Gift Program, as it was depicted in ParkLane's marketing materials. The chart is taken from those materials, with some minor modifications.



Graphic 1

34 I will now describe the "back half" of the Gift Program - that is, what happened to the money after it was donated to the charity. This part of the Gift Program was not described in the marketing materials; however, ParkLane and some of the Distributors have adduced evidence that the Distributors were informed about various aspects of the back half, including the involvement of the Bermuda Trust, the software licensing agreement between the Bermuda Trust and TTL, and the royalty agreement the charity was required to enter into with TTL. A chart illustrating the "back half" of the Gift Program is contained at the end of this description.

35 In order to participate in the Gift Program, a charity was required to enter into a royalty agreement with TTL. In consideration for this agreement, the charity paid TTL 99% of the total donations it received. The charity was entitled to keep 1% of each donation (i.e., \$100 for each \$10,000 donation) for its own operating expenses. In cases where FFC Foundation received donations, it kept 25% of the 1% and paid the balance to either the charity to which the funds were directed or to one of its own approved charities.

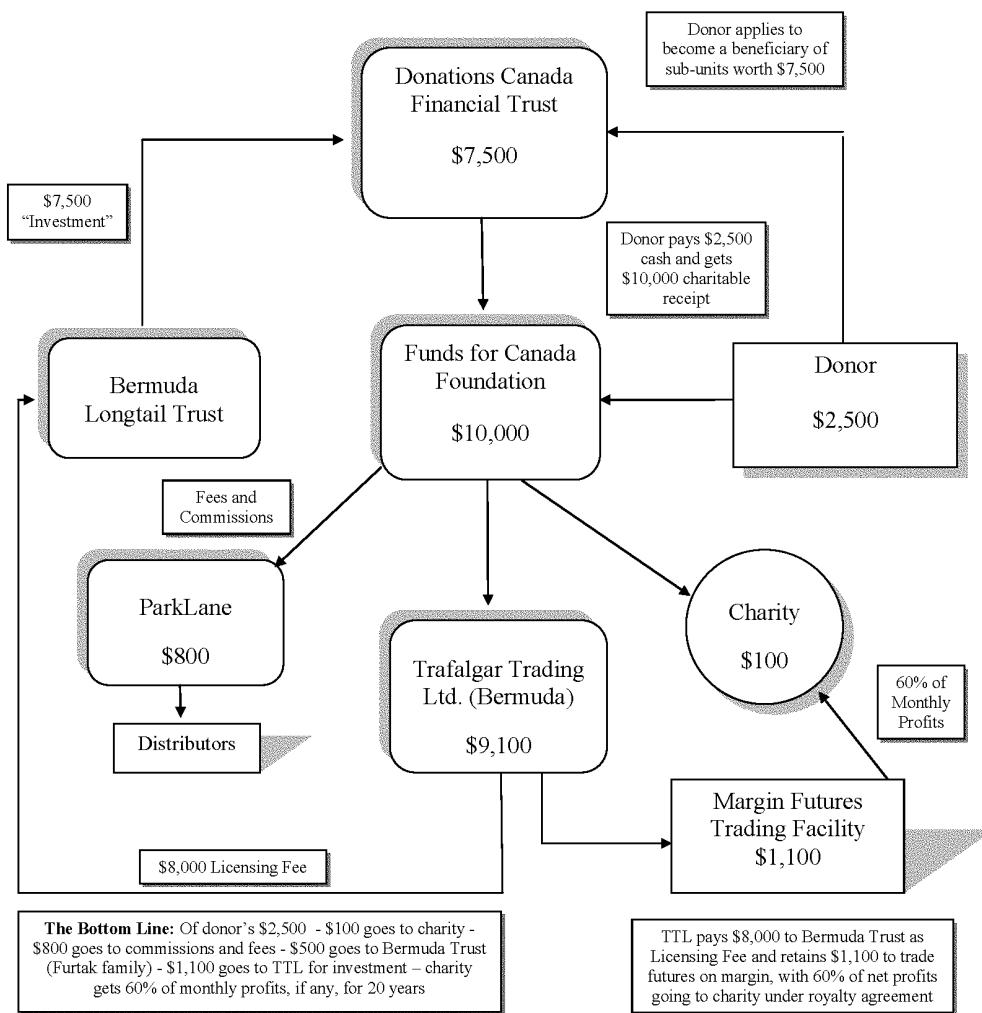
36 As I mentioned earlier, Furtak's Software Program was licensed to TTL by the Bermuda Trust. The funds paid by the charity to TTL were to be invested by TTL on behalf of the charity, using the Software Program. TTL established a leveraged cash and margin trading facility on behalf of the charity, using the charity's cash, ostensibly leveraged up to the amount paid by the charity for the royalty agreement. The charity was to receive a speculative and unguaranteed future income stream from the Software Program, based on 60% of the monthly profits generated by its investment, for a period of twenty years. TTL was to receive 20% of the monthly profits and the remaining 20% was to be re-invested in the trading facility. The charity was never to receive a return of its principal.

37 After it had received the licensing fee from the charity, i.e., the payment of 99% of the donations the charity had received, TTL:

- (a) paid \$600 or \$800 (the amount varied in different program years) to ParkLane to cover ParkLane's profit and the Distributors' commissions of about 18-20% of the donor's cash contribution;
- (b) paid approximately \$8,000 to the Bermuda Trust as a "software licensing fee" for the use of the Software Program - the effect of this was that the advance of \$7,500 was immediately repaid to Furtak and his family, through the Bermuda Trust, with an overnight profit of \$500. This profit was ostensibly for giving TTL the privilege of using the Software Program on behalf of the charity;
- (c) retained approximately \$1,100 in its own account to trade futures on margin, notionally leveraged up to as much as \$9,100, using the Software Program, for the benefit of the charity to whom the donor made his or her contribution.

38 The following schematic describes the "back half" of the Gift Program.

The “Back Half” of the Gift Program



Graphic 2

39 There are, unfortunately, some messy questions that remain. It is not necessary for me to answer these questions, for the purpose of either the certification motion or the summary judgment motion. I will mention them only because I have concluded that a trial is required in order to answer them and the numerous other questions that must be answered in order to determine the liability of the defendants.

40 First, there is no conclusive evidence that the sub-trust units donated by the donor had any significant intrinsic value and certainly no evidence that they had the value of \$7,500 that was assigned to them. Second, there is no evidence that the right to the future income stream represented by the royalty agreement was commensurate with the consideration paid by the charity. Third, while there is some evidence that a few charities have obtained some returns for their "investments", the evidence does not show whether the "software licensing fee" paid by the charity to TTL represented the fair market value of the future investment stream. This is particularly troubling considering that the charity did not retain its capital. There is evidence that the returns generated by TTL for the charities have been meager.

41 Some of the people and entities that populated this structure have already been introduced. I will describe them in more detail.

### ***3. The Defendants***

#### ***(a) Edward Furtak***

42 Furtak was the puppet master of this complex machinery. He was the President and CEO of the Trafalgar Group of Companies, which included ParkLane, TTL and Trafalgar Associates Limited ("TAL") (together, the "ParkLane Defendants"). He was also the settlor of the Bermuda Trust.

43 Furtak was originally a defendant in this action, but the plaintiff has settled with him in exchange for information and some degree of cooperation.

44 The evidence is open to the conclusion that the primary purpose of the Gift Program was to benefit Furtak and his family, through both:

- Furtak's control of the Bermuda Trust, of which the defendant Appleby Services Bermuda Ltd. ("Appleby") is ostensibly the trustee, but which appears to have been manipulated by Furtak and his colleagues to serve the ends of the Gift Program; and
- the ParkLane Defendants, which were the public face of the Gift Program and which facilitated the flow of funds.

#### ***(b) ParkLane***

45 ParkLane is an Ontario corporation incorporated by Furtak for the purposes of promoting leveraged charitable donation programs, including the Gift Program, to Canadian taxpayers. Between 2003 and 2006, ParkLane had promoted a tax shelter called the "Donation Program in Support of Canadian Amateur Athletics". Beginning in 2005, and continuing until 2009, under the direction of Furtak, ParkLane created, promoted and operated the Gift Program and sold it to the Class through its network of Distributors, which I will describe below.

#### ***(c) TAL and TTL***

46 TAL is an Ontario corporation, also incorporated by Furtak. It worked in conjunction with ParkLane to create, promote and operate the Gift Program.

47 TTL is a Bermudan corporation established by Furtak. It participated in the creation and operation of the Gift Program and played a key role in the transfer of funds to the various participants in the program. Its role will be described in more detail below.

48 The plaintiff alleges that the ParkLane Defendants are closely affiliated. They share common offices, computer systems, employees, officers, directors, shareholders, legal and beneficial owners, and professional advisors.

#### ***(d) Donations Canada Trust***

49 The Donations Canada Trust was a private charitable trust, created and settled by Furtak to facilitate the operation of the Gift Program. The plaintiff asserts that the purpose of the Donations Canada Trust was to be the false front of the Gift Program. It posed as a "charitable Canadian trust" and the ostensible source of the "matching" payments in the Gift Program. The plaintiff argues that, in reality, it was a shell through which funds flowed from the Bermuda Trust.

#### ***(e) Funds for Canada Foundation***

50 FFC Foundation was a registered charity, created in 2005 as a vehicle for disbursing donations to qualified charities. It facilitated the operation of the Gift Program in two ways. In the "front half" of the Gift Program, it received donations directly from donors and issued tax receipts to them. In the "back half" of the Gift Program, it served as a link between the participating charity and TTL. It gave the participating charity 75% of 1% of the initial donation, entered into a royalty agreement with TTL

for the investment of a portion of the funds donated by the donor, received royalty payments from TTL, and distributed a portion of those royalties to the participating charity, less its own administration fee.

51 FFC Foundation was established by the defendant Matt Gleeson, also known as Martin P. Gleeson ("Gleeson"), who provided consulting services to charities through his company, Gleeson Management Associates Inc. ("GMA"). Donations were received by FFC Foundation under the Gift Program from 2006 to July 2009, when its status as a registered charity was revoked by C.R.A. During that period, FFC Foundation disbursed funds it received to the participating charities, as required by the Gift Program.

52 FFC Foundation informed participating charities that it had entered into the royalty agreement with TTL, which provided for a stream of royalty payments based on the profits from the licensing of the Software Program.

53 There is evidence that the total returns through the Gift Program to the charities have been in the range of \$6 million since 2006. Considering that the aggregate donations by Canadian taxpayers to the Gift Program were in excess of \$140 million, this rate of return is less than 1% per annum on the contributors' donations and is an infinitesimal return on the total supersized donation that taxpayers were allegedly making to support the inflated charitable donation receipts that they received. In assessing these returns, it must be kept in mind that the charities have no right to receive the principal at the expiry of the 20 year royalty agreements with TTL.

*(f) Directors of FFC Foundation*

54 The defendants Sam Albanese, David Raby, Ken Ford, Riyad Mohammed and Greg Wade were the directors of FFC Foundation during the Class period (the "FFC Directors").

*(g) The Gleesons*

55 Gleeson was the founding director of FFC Foundation and the original trustee of the Donations Canada Trust. He held the position of trustee of the Donations Canada Trust until 2006, when he was replaced by Sarah Stanbridge. Through GMA, he also acted as "Director of Development" for FFC Foundation. In that capacity, he recruited charities to participate in the Gift Program through the FFC Foundation and was actively involved in the operations of FFC Foundation.

56 Gleeson's wife, Mary-Lou Gleeson ("Ms. Gleeson") was and continues to be the Executive Director of FFC Foundation. Ms. Gleeson is also a shareholder of GMA and ran that company with her husband.

57 GMA provides fundraising consulting services to charities and foundations. In 2005, GMA introduced a number of its pre-existing charity clients to the Gift Program. Six of these charities became beneficiaries of FFC Foundation through which they received charitable donations raised by the Gift Program.

58 Gleeson is sued both in his personal capacity and, together with Sarah Stanbridge, in his capacity as trustee of the Donations Canada Trust. The action has been dismissed against Stanbridge as a result of a settlement.

59 I will refer to Gleeson, Ms. Gleeson and GMA as the "Gleesons".

*(h) The Lawyers*

60 Harris is a senior tax lawyer. In each of 2005, 2006 and 2007, Harris issued an opinion letter to ParkLane concerning the Gift Program (each of which will be referred to as the "Opinion Letter").

61 The 2005 Opinion Letter was based on a statement of facts prepared by ParkLane's in-house lawyer. Although the 2005 Opinion Letter did not expressly say so, the clear implication was that a donor to the Gift Program would be entitled to receive tax credits both for his or her cash donation and for the donation in kind of sub-trust units. This implication was made express in the 2006 and 2007 Opinion Letters, although it was expressed to be "[S]ubject to the remaining uncertainties regarding the application of the GAAR [General Anti-Avoidance Rule] ..." .

62 Harris's evidence is that he issued the Opinion Letter on the understanding that it was not to be shown to donors but could be used by their professional advisors for the purpose of advising their clients and that all donors would be required to sign documents acknowledging that they had received independent advice and were prepared to assume the risk of reassessment.

63 In addition to providing an Opinion Letter, Harris provided what I will describe as a "Comfort Letter" in each of 2005, 2006 and 2007. The Comfort Letter, which I will refer to in more detail below, was included in the Gift Program materials given to potential donors and confirmed that Harris had provided ParkLane with an opinion concerning the Gift Program. Harris understood that the Comfort Letter would be used by ParkLane to inform prospective donors that he had issued the Opinion Letter for the benefit of ParkLane.

64 Harris's name, photograph and biography were included in the Gift Program materials, along with the Comfort Letter. The fact that he had given ParkLane a tax opinion was highlighted several times in the Gift Program materials, along with an invitation to donors to have their professional advisors review his opinion.

65 Patterson Kitz (Halifax), Patterson Kitz (Truro), Patterson Palmer, also known as Patterson Palmer Law, and McInnes Cooper (together, the "Law Firms" and, together with Harris, the "Lawyers") are partnerships carrying on the practice of law in Eastern Canada. Patterson Kitz (Truro) and Patterson Kitz (Halifax) carried on business in partnership under the name Patterson Palmer Law until December 2005. Harris was counsel at Patterson Palmer in 2005. Since January 1, 2006, he has been counsel at McInnes Cooper.

66 I will describe in more detail below the involvement of Harris in the Gift Program.

*(i) Appleby and the Bermuda Trust*

67 Appleby is an independent corporate trustee, based in Bermuda. Furtak created the Bermuda Trust in 1998, naming a predecessor of Appleby as trustee. The trustee was given wide-ranging powers to manage the assets of the trust, but was not required to interfere in the management or conduct of any company owned by the trust. Included in the trust assets managed by Appleby were two computer software programs developed by Furtak, the most recent being the Software Program. In its capacity as trustee, Appleby licensed the use of the Software Program to third parties.

68 Appleby granted TTL a limited, non-exclusive licence to use the Software Program, in return for license fees that were to be paid to the Bermuda Trust. The "software licensing fee" of about \$8,000, paid by TTL to Appleby out of the funds remitted from each \$10,000 "donation", was ostensibly for the privilege of using the Software Program to trade on behalf of the charity.

69 Appleby professes to have little knowledge of the Gift Program. It does acknowledge, however, that from time to time it was requested, by or on behalf of Furtak, to transfer sums of money from the Bermuda Trust to the Donations Canada Trust. Appleby claims that it has no knowledge of the reasons for those transfers. It also acknowledges that TTL paid licence fees to Appleby, to the account of the Bermuda Trust, during the life of the Gift Program.

70 I will now describe some of the other participants in the Gift Program, namely the Distributors, the Donors and the Charities.

**4. The Distributors**

71 As noted earlier, ParkLane did not market the Gift Program directly to the public. Instead, it relied on a network of 455 Distributors, who were financial planners and the like, who marketed the Gift Program to their clients. The defendants attach considerable importance to the Distributors, whom they call "Independent Financial Advisors", as sources of independent advice to the donors regarding the Gift Program and its associated risks.

72 ParkLane recruited the Distributors. It conducted training sessions for the Distributors and provided them with written materials, explaining the structure of the Gift Program. ParkLane told the Distributors how the Gift Program worked and that \$7,500 of the total donation was provided by the Bermuda Trust. It showed the Distributors copies of Harris's Opinion Letter.

73 All Distributors were required to enter into a "Charity Fundraising Agreement" with ParkLane. The recital to this agreement referred to the desire of ParkLane to engage the Distributor to raise donations for and to refer clients to the Gift Program. The agreement provided, in part, that the Distributor was strictly limited to supplying donors with written materials about the Gift Program that had been approved in advance by ParkLane:

4.4 The Distributor shall not, without the consent of ParkLane, make any representations, tax or otherwise, in the course of marketing the Donation Program and he or it will not distribute any written material with respect to the marketing of the Donation Program which representations and material have not been provided or approved in advance by ParkLane.

4.5 Neither the Distributor or any other person is authorized to give any information or to make any representations, tax or otherwise, in connection with the Donation Program other than as contained in the Donation Program Materials, as approved by ParkLane, or in any amendments or supplements thereto, or in any other marketing materials provided by ParkLane ... to the Distributor.

4.6 The Distributor shall, in furtherance of his or its obligations hereunder, and at his or its own cost and expense:

(a) take all diligent and reasonable steps to ensure that every potential or actual donor is fully informed as to the structure and mechanics of, and any and all amounts and fees payable or to be contributed pursuant to, the Donation Program and has been advised by a professional advisor of the nature of any and all potential tax and business/commercial risks associated with entering into the Donation Program and to take reasonable efforts to ensure that each such participant is a suitable candidate for the Donation Program and that funds contributed to the Donation Program by each such participant is from a legitimate source ...

74 ParkLane has filed affidavit evidence from three Distributors, Ted Gacich ("Gacich"), William MacKay ("MacKay") and Lorne Allen ("Allen"). As well as advising their clients to participate in the Gift Program, each of these three Distributors participated for several years as a donor.

75 Gacich was Cannon's financial advisor. He holds designations as a Financial Planner, Chartered Life Underwriter and Chartered Financial Consultant and has been in the financial services business for 19 years, specializing in tax planning. He marketed the Gift Program in 2005, 2006 and 2007 to approximately 80 clients and participated himself as a donor in two of those years. In 2005, he was a sub-distributor of another Distributor, Life Planning Insurance Agency Limited ("LPL"). Thereafter, he was a Distributor in his own right, through his company.

76 The Fundraising Agreement between ParkLane and Gacich for 2006 begins with the following recital:

WHEREAS ParkLane and LPL wish to engage the Distributor to raise donations to and to refer clients to the ParkLane Donations for Canada Program ...

AND WHEREAS the Distributor wishes to refer clients to the Donation Program for the fundraising fees enumerated herein ...

77 The Agreement goes on to provide that:

- ParkLane and LPL grant Gacich, the Distributor, a non-exclusive right to raise donations for and to refer clients to the Gift Program;
- Gacich accepts the appointment and undertakes to use best efforts to raise donations and refer clients;
- the Distributor is entitled to remuneration for raising donations and securing and closing transactions;
- the information that the Distributor was entitled to provide to his or her clients concerning the Gift Program was strictly controlled, as set out in clauses 4.4, 4.5 and 4.6 above;

- there is also an acknowledgment that the Distributor has no authority to act on behalf of ParkLane in connection with the Gift Program and a statement that there is no partnership, agency or employment relationship between them.

78 Gacich deposed that prior to recommending the Gift Program to his clients, he did due diligence to satisfy himself that it was a valid and viable program. He deposed that he always carefully reviewed the Donor Declaration and the Tax Risk Disclosure Statements (described below) with his clients to ensure that they understood the obligations and risks involved in participating in the Gift Program. He said that he reviewed the Donor Declaration with Mr. Cannon in 2005 and 2006 and he reviewed the new Tax Risk Disclosure Statement with him in 2006.

79 Gacich stated:

I recall reviewing each of the matters addressed in the Donor Declaration with Cannon in 2005 and 2006 before he decided to participate in the Gift Program in each of those years. Based on my discussions with him and the questions he asked of me on the various different occasions that I met with him I was of the view at the time, and I continue to be of the view that he is a reasonably knowledgeable investor who understood the nature of the Gift Program and how it worked and the risks involved in the Program, including the risk that he might be re-assessed and be required to pay penalties and interest as a result.

80 Gacich stated that the Tax Risk Disclosure Statement, which Cannon signed in 2006, reflects an acknowledgement of the risks that Gacich had discussed with Cannon. He denied that he "promised" Cannon that he would receive a tax credit and says that, on the contrary, he fully reviewed the risks with Cannon. Gacich swore that Cannon was also aware that by signing the Donor Declaration, he was unconditionally releasing ParkLane.

81 Gacich swore that he discussed these matters with all his clients and that, in some cases, clients decided not to participate because they were risk adverse. His clients' donations varied: one was \$1 million in total and others ranged as high as \$100,000 to \$280,000.

82 Gacich swore that he received a commission of 18-20% of each client's cash donation. He had 80 clients who participated in the Gift Program. He likely made tens of thousands, if not hundreds of thousands of dollars in commissions through the sale of the Gift Program to his clients.

83 Gacich testified that he was aware of the "back half" of the Gift Program - that is, the part that was not described in the glossy marketing brochures that were given to donors. He knew that:

- the charities did not retain more than \$100 of the total donation;
- the charities paid the balance in exchange for an unguaranteed and unsecured future income stream from the use of the Software Program;
- the Bermuda Trust financed the sub-trust units by paying \$7,500 to Donations Canada Trust, which was immediately returned to the Bermuda Trust with an additional \$500, ostensibly for the charity's use of its Software Program; and
- most of the donations circulated back to the promoters.

84 Gacich was not aware, at the time at least, that the Bermuda Trust was established by Furtak for the benefit of himself and his family. Nor did he tell his clients - unless they asked - where the money was coming from to finance the acquisition of the sub-trust units.

85 Gacich did not recall having told Cannon that the money he was putting into the Gift Program would be used by the charity to purchase the royalty agreement. He acknowledged that, under the terms of the distributorship agreement, this was not information he would likely have provided to Cannon. He also acknowledged that he did not inform Cannon of the role played by TTL and the Bermuda Trust in the structure of the Gift Program.

86 Allen was the President of LPL, the company that originally engaged Gacich as a sub-distributor. Allen recruited approximately 100 sub-distributors and entered into agreements with them to market the Gift Program. Most of these people were professional financial, tax or legal advisors, including accountants, life insurance agents, licensed financial planners and occasionally lawyers or mortgage brokers. He also did some individual marketing to his own clients. Like Gacich, Allen says that he was careful to review the Donor Declaration, the Tax Risk Disclosure Statement and the release of ParkLane with his clients.

87 MacKay is a financial planner and provided financial services and tax planning advice to his clients. He marketed and promoted the Gift Program; approximately 200 of his clients participated in the Gift Program. He personally participated in the Gift Program from 2005 to 2008. His evidence concerning his dealings with his clients is substantially the same as the evidence of Gacich and Allen.

88 ParkLane, TAL and TTL have issued a third party claim against all the Distributors. They say that if Cannon's action is certified, they will proceed with their claims against the Distributors for any donors who do not opt out of the action, in order to ensure that all liability issues are determined in the same proceeding.

89 As I mentioned earlier, the defendants make much of the role of the Distributors, whom they call the "Independent Financial Advisors", an expression that appears to be an artful creation of counsel, rather than a term that was actually used by the promoters of the Gift Program. This label glosses over the fact that the Distributors were retained and paid by ParkLane under a "Fundraising Agreement" and that their role was to "raise funds" for the Gift Program. The Distributors were limited in the information concerning the Gift Program that they were permitted to provide to donors. They made substantial commissions if their clients donated to the Gift Program. There are certainly arguments to be made that the Distributors were a cog in the machinery of the Gift Program and that they were recruited because they had a stable of well-heeled clients who would be interested in contributing to the Gift Program as a way of reducing their taxes. It could open to a trial judge to find that, in spite of the language in the "Fundraising Agreement", the Distributors were agents of ParkLane for the purpose of raising funds.

### **5. The Donors**

90 ParkLane has adduced evidence from six Donors who participated in the Gift Program between 2005 and 2008. These include: Mr. Russ Mergelas, Mr. Ralph Narum, Mr. Robert MacKay, Mr. Lorne Allen, Mr. William MacKay and Mr. Gacich.

91 Each of these could be described as a reasonably knowledgeable investor, who participated in the Gift Program after being advised by his personal financial advisor and who understood how the program worked and the risks involved, including the risks of a re-assessment by C.R.A., penalties and interest. Each reviewed the Donor Declaration and Tax Risk Disclosure Statement with his advisor before participating in the program and understood the nature and scope of the release that he signed in favour of ParkLane. Like Cannon, these donors have had their tax returns reassessed by C.R.A. but, unlike him, they have not accepted C.R.A.'s position and they are appealing the re-assessment.

### **6. The Charities**

92 In 2005, there were six participating charities that received funds through the Gift Program. These were all Registered Canadian Amateur Athletic Associations: Biathlon Canada, Canadian Amateur Football Association, Canadian Amateur Wrestling Association, Canadian 5 Pin Bowlers Association, Canadian Lacrosse Association, and Little League Baseball Canada. Donors could designate one of these charities as the recipient of their donations. It is fair to note that these organizations were not well-recognized in the Canadian not-for-profit landscape and the idea of a sustained flow of income, even with modest returns, was probably enticing to them.

93 From 2006 onward, FFC Foundation was prominently identified in the promotional materials of the Gift Program as a registered Canadian charity that supported a group of participating Canadian charities. It received donations through the Gift Program and disbursed them to the participating Canadian charities, including at least some of the charities that had participated in 2005. Charities that participated in the Gift Program through FFC Foundation included Canadian Community

Living Foundation, Scarboro Foreign Missions and the New Brunswick Foundation for the Arts. Other charities continued to participate directly in the Gift Program rather than through the FFC Foundation.

94 Certain qualifying charities could receive "directed donations" through the FFC Foundation, that is, donations specifically earmarked by donors to the charities. To qualify for a directed donation, the charity or Distributors would have to assemble \$1.5 million in aggregate donations, i.e. \$375,000 in contributions from donors. All charities participating through FFC Foundation entered into letters of understanding, committing to their participation in the Gift Program.

95 If FFC Foundation was the charity designated by a participant, then it decided which qualifying charity would be the recipient of Gift Program funds, unless donations were earmarked for a particular charity through a directed donation.

## ***7. Marketing Materials***

96 ParkLane prepared a promotional brochure that, with some variations, was in substantially the same form from year to year. The cover for the brochure in 2005 was entitled "Donations Canada" and showed pictures of athletes, presumably representing the beneficiaries of the 1% of the charitable donations actually retained by the charities, though this fact was not mentioned in the brochure.

97 Inside the brochure, there was a description of how the Gift Program worked. The brochure for 2005 described the Gift Program as a "unique charitable donation program" that would enable donors to "enhance their personal cash contributions to a variety of supported Canadian charities through a gift of [sic] beneficial interest in a Canadian resident trust." The brochure said that the Gift Program was designed to "assist charities in raising much needed funding." It described Donations Canada Trust as having been established "with a funding commitment of \$200,000,000 in cash to promote charitable giving in Canada". I note parenthetically that if this "funding commitment" was made by the Bermuda Trust to the Donations Canada Trust, there is no evidence at all that the Bermuda Trust had resources of this magnitude.

98 The brochure went on to explain that donors who donated cash to a charity would be able to apply to become a beneficiary of Donations Canada Trust and that upon this happening, the donor would assign his or her beneficial interest in the trust to the charity "which will result in an additional cash contribution to the charity". The clear implication of all this was that the donor's cash would be matched with an appropriate portion of the \$200 million "funding commitment" provided by the Donations Canada Trust and given to the charity.

99 The brochure contained a diagram, showing how the entire donation of \$10,000, the \$2,500 cash donation from the donor and the \$7,500 "investment" from the Donations Canada Trust to the sub-trust, were distributed to the charity. That diagram was in substantially the same form as the first of the two diagrams earlier in these reasons.

100 Nowhere in the brochure was there any explanation of the role of the Bermuda Trust or of the fact that the funds "donated" to the charity were not actually retained by the charity and that 99% of the funds flowed back to the promoters. The niceties of these issues were, apparently, left to the Distributors, who were limited in what they could tell their clients, as set out above. It is apparent, at least from the evidence of Gacich, that he only told his clients about the "back half" of the Gift Program, when they asked.

101 The 2005 brochure contained a letter dated June 15, 2005, on Patterson Palmer letterhead, signed by Harris, which stated as follows:

You requested our opinion concerning the consequences under the Canadian Income Tax Act and Regulations of participation in the Program by an individual who donates cash and a beneficial interest in a trust to a charitable organization, a charitable foundation, or a registered Canadian amateur athletic association.

We reviewed the Program and its compliance with the Income Tax Act and Regulations and with the proposed amendments thereto, and we issued our opinion to you dated May 18, 2005.

That opinion may be viewed by the professional adviser of any potential donor by contacting your office, providing that the adviser agrees that the opinion is the property of ParkLane Financial Group and is provided to the adviser without responsibility on our part, or the part of ParkLane Financial Group, for his or her sole use in assessing the Program and in determining its suitability to a donor's specific circumstances.

102 This letter and similar letters written by Mr. Harris and included in the marketing materials in 2006 and 2007 are what I have referred to above as the "Comfort Letter", because they were intended to give a prospective donor comfort that the Gift Program had been vetted by a respected Canadian tax lawyer who was satisfied that it complied with the *Income Tax Act* and regulations.

103 Also included in the brochure was a page addressed "To Donors", with this statement:

ParkLane Financial Group Ltd. has received a tax opinion from Mr. Edwin C. Harris, Q.C. of Patterson Palmer, Halifax, with respect of [sic] the Donations Canada Program.

Mr. Harris' opinion is available for review by your professional advisor. For more information, please have your accountant or lawyer contact our Burlington, Ontario office at [phone number].

104 Underneath these statements was a picture of Mr. Harris and a brief summary of his impressive credentials:

B.Com. (Dalhousie) 1954; LL.B (Dalhousie) 1958; LL.M. (Harvard) 1959; C.M.A. (1956); C.A. (1957); Admitted to Nova Scotia Bar (1959); Q.C. (1975); F.C.M.A. (1984); F.C.A. (1984).

105 Beneath this was the following statement:

Mr. Harris is counsel with the law firm of Patterson Palmer, Halifax. The author of many articles on taxation and estate planning, and texts on Canadian income taxation, he is an adjunct professor at Dalhousie Law School, Halifax and the Former Chair of the Canadian Tax Foundation.

106 The marketing materials for the Gift Program in 2006 and 2007 were substantially similar to the 2005 materials, except that they now contained a description of FFC Foundation, which had come into existence in 2005. There was also a description of some of the participating charities. The materials in each year up until and including 2007 contained a Comfort Letter from Harris and a note addressed from ParkLane "To Donors", indicating that it had received a "tax opinion" from Harris with respect to the Gift Program. Additionally, one of the benefits of the Program listed in the brochure was a:

Tax Opinion by top Canadian legal professionals

107 Inside the cover of the 2007 brochure, there was a letter from Mr. Olsthoorn, the President of ParkLane. In the letter, Mr. Olsthoorn described the Gift Program as an "innovative product design [which] provides a unique opportunity for Canadian donors to make significant cash contributions to registered Canadian Charities and Foundations."

108 Mr. Oolsthoorn went on to say in his letter that:

ParkLane has consulted with top Canadian tax and legal professionals in the design of this program. In addition, the Program has been reviewed by hundreds of tax and legal advisors of participating donors.

109 As we now know, the ParkLane brochure told only half the story about the Gift Program. In particular, it did not describe what happened to the donor's money after it reached the hands of the charity. It did not show that 99% of the \$10,000 aggregate donation immediately left the charity, which was left with \$100 and a promise of a future income stream.

## ***8. Contractual Materials for the Gift Program***

110 Every donor participating in the Gift Program was required to sign certain standard form documents. These documents were amended from time to time during the Gift Program. In 2005, the standard documents included:

- (a) a Pledge to a Charity directed to ParkLane as escrow agent;
- (b) an Enduring Property Pledge to a Charity directed to ParkLane as escrow agent, directing that the "cash gift shall be retained by the Charity ... for not less than 10 years from the date the gift was received by the Charity...";
- (c) an Application to be Designated as a Beneficiary of the Donations Canada Trust, stating, among other things, "I am interested in supporting the work of the charity to which I have made a pledge of a cash gift (the "Charity") and would like to see it benefit from further gifts";
- (d) a Donor Declaration in which the donor declared and agreed that:
  - (i) they had read and fully understood all and any written materials and documents in the Gift Program Materials, including (after 2005) the Tax Risk Disclosure Statement, in respect of their participation in and donations to the Gift Program;
  - (ii) except for what was contained in the materials provided by ParkLane, no other promise, representation or warranty had been made by ParkLane to them or was relied upon by them;
  - (iii) they had received independent professional advice in respect of the Gift Program from their own personal advisor/lawyer/accountant;
  - (iv) they fully understood the advice and information provided to them by their own personal advisor/lawyer/accountant in respect of all and any legal, commercial/business and tax consequences related to their participation in the Gift Program, including the fact that up to 8% of their aggregate donation amounts would be used to pay charity fundraising fees;
  - (v) they accepted any and all tax risks whatsoever related to their participation in the Gift Program, including the risk that their charitable donations, or a portion of them, might be re-assessed and even denied; and
  - (vi) they unconditionally released ParkLane and its officers and employees from any and all claims or liabilities of any kind whatsoever that they then had, or in the future might have with respect to matters occurring on, prior to or after the date of the Donor Declaration, arising out of, based upon, resulting from or in connection with their participation in the Gift Program; and
- (e) a Transfer of Units of Sub-trust to Charity, recognizing that all registered holders of the sub-trust units "have mutually agreed to donate our respective units to" a participating charity and designating ParkLane as escrow agent to hold and transfer the sub-trust units.

111 In 2006, a Tax Risk Disclosure Statement was included in the documents to be signed by donors. It provided, among other things:

- (a) The ParkLane Donations for Canada Program (the "Program") is being offered by ParkLane Financial Group Ltd. ("ParkLane") to assist registered Canadian amateur athletic associations, foundations, charities and other qualified donees under the *Income Tax Act* (Canada) (the "Act") ("Charity" or "Charities") in raising long-term and short-term charitable funding. The Program is principally designed to provide a donor resident in Canada ("Donor" or "Donors") with the means of effecting: (1) a cash donation to a Charity, entitling such Donor to a cash receipt; and (2) a distribution from a sub-trust ("Sub-Trust") of a Canadian-resident trust ("Master Trust") to a Charity, entitling the Donor to a donation-in-kind receipt.
- (b) *Tax Opinion & Advice*

(c) Edwin C. Harris, Q.C., of McInnes Cooper, tax counsel to ParkLane, has, based on the interpretation of the Act and favourable case law, provided a legal opinion to ParkLane outlining the tax consequences and the intended results for a Donor making a donation under the Program. *ParkLane recommends and urges any prospective donor interested in participating in the Program to review the tax consequences of making a donation with his or her professional legal, accounting and tax advisor.*

(d) ParkLane has worked closely with leading Canadian accounting and tax law professionals in the structure, design and development of the Program. Should C.R.A. or RQ choose to challenge the tax structure of the Program, ParkLane believes that very strong arguments can be made in supports of its position. ParkLane has at its disposal a contingency fund of \$500,000 set aside to support Donors in dealing with audits, reassessments or challenges made against the Program. This fund will remain in place until December 31, 2010 and will be used exclusively to provide assistance to Donors, which, in the past, has included assisting clients in responding to C.R.A. questionnaires drafting and filing of notices of objection, preparing appeals and funding tax litigation.

(e) While ParkLane intends to assist and support Donors in the event of such challenges and has committed the funds in this regards, *ParkLane cannot guarantee that each Donor will receive the income tax consequences contemplated under the Program and makes no representations in respect of a Donor's entitlement to claim the tax credits in respect of any donations made pursuant to the Program. ParkLane cautions each Donor that he or she may not ultimately obtain the income tax results designed to be achieved under the Program and may, in fact, incur certain costs and interest payments associated with any reassessment by the C.R.A. or RQ.* [emphasis in original]

#### **9. The C.R.A. Re-Assessment**

112 Cannon was reassessed by C.R.A., which disallowed his deductions for his charitable gifts to the Gift Program in 2005 and 2006. On about May 7, 2008, he received a letter from C.R.A. indicating that of the \$40,000 he had claimed, representing \$10,000 in cash and \$30,000 in kind, no amount was allowable as a charitable gift. A letter dated February 4, 2009 gave him the same bad news concerning his 2006 donation, \$12,500 of which was in cash and \$37,500 was in kind.

113 The C.R.A. letters described the nature of the Gift Program and described the Bermuda Trust as the "Facilitator". They stated that in the first year of the agreement, the charities that participated in the Gift Program received payments from TTL equivalent to an annual return of 0.16% (zero point sixteen percent). C.R.A. was unable to confirm that the funds paid had actually been invested on behalf of the charities.

114 The position taken by C.R.A. was that the donations made by Cannon were not a gift, because they were made in the expectation of a material advantage, namely, the expectation that he would receive the trust units at no costs to himself and that he would transfer those units to a charity and receive a second charitable donation receipt for three times the value of his cash payment. The 2008 letter continued:

Furthermore, the charities were obliged as a condition of participation in the Program to transfer almost all of these funds to specific parties. Through a series of transactions and directions signed by all parties involved, these funds followed a circular flow and ended up back in the hands of the promoters. This series of transactions was preordained with the result that, for a cash payment, you would claim donation receipts four times greater than the cost of participating in this scheme. It is our opinion that you participated in this scheme with full knowledge of this material benefit. Accordingly, it is our opinion that the full amount of the funds transferred to the charities does not represent a gift.

115 In the absence of a "donative intent", Cannon was not entitled to claim a charitable deduction.

116 In 2008, C.R.A. audited FFC Foundation for the period December 2005 to December 2006. It concluded that the Foundation had not complied with the requirements of the *Income Tax Act* and revoked its charitable status in 2009. C.R.A. has also disallowed all charitable deductions made by Class members with respect to tax receipts issued under the Gift Program.

### III. The Certification Motion

#### 1. Introduction

117 The plaintiff submits that this is an ideal case for certification and that it is substantially the same as *Robinson v. Rochester Financial Ltd.*, [2010] O.J. No. 187, 2010 ONSC 463 (Ont. S.C.J.), application for leave to Divisional Court denied, 2010 ONSC 1899 (Ont. Div. Ct.) ("Banyan Tree"), a decision of Justice Lax, certifying a class action relating to a charitable donation scheme called the "Banyan Tree Gift Program". The plaintiff says that he relies on well-established causes of action, that the Class is clearly identifiable and that the common factual and documentary underpinnings of the claim of every Class member give rise to common issues of fact and law. He says that he is an appropriate representative of the Class, that he has a suitable litigation plan and that certification is the preferable procedure for the resolution of claims of Class members and will accomplish the goals of the *C.P.A.*

118 The defendants say that this case is distinguishable from *Banyan Tree*. While they make a number of objections, their fundamental complaint is that the claims of the Class members are not common, because they can only be resolved by analyzing individual circumstances. They say that liability cannot be determined on a class-wide basis and will require an examination of such matters as the investor's knowledge, sophistication, experience and risk tolerance and the information, written and oral, disclosed to each investor. The defendants say that for those reasons a class proceeding is not the preferable procedure for dealing with the claims of the Class.

#### 2. Banyan Tree

119 In *Banyan Tree*, the plaintiffs sought to certify a class action on behalf of taxpayers, who had contributed to the Banyan Tree gift program. They sued the promoters and a law firm as a result of C.R.A.'s disallowance of their tax deductions. Lax J. certified causes of action in negligence and breach of contract against the promoters and also certified the action against the law firm in negligence.

120 The structure of the Banyan Tree gift program was quite different from the ParkLane Gift program, although as in this case, the participants were solicited by a network of "financial advisors" who promoted and sold the program. In *Banyan Tree*, however, the charitable donation of each taxpayer was pumped up through a loan from the promoters of 85% of the amount of the donation. The plaintiffs alleged that it was an express or implied term of their contracts with the promoters that they would receive a charitable tax receipt that would be recognized by C.R.A. and that they would not be at risk to repay the loans. They pleaded causes of action in contract and negligence.

121 The promoters did not dispute that the statement of claim disclosed causes of action in breach of contract and negligence, and Lax J. agreed. There was substantial debate with respect to the commonality criterion for certification. The promoters argued that the action was essentially a point-of-sale misrepresentation case and that, even though a cause of action for misrepresentation was not being asserted, it would be necessary to present "evidence as to who said what to whom in respect of each and every transaction". Lax J. found that the standard form of brochure and program information, the standard contract language and the evidence of the plaintiffs and their witnesses provided a sufficient evidentiary basis to raise common issues "that the tax opinion was considered to be part of the gift program, that it was necessary to launch the program, and that participants entered into common contracts on express or implied terms that they would receive a charitable donation tax receipt recognized by CRA and a risk-free loan" (at para. 50).

122 In *Banyan Tree*, the plaintiffs alleged that the law firm's opinions were prerequisites for the promotion and sale of the program and that the law firm intended that the participants would rely on its opinion in deciding whether or not to participate in the program. They pleaded that the law firm owed the participants a duty of care and that it was negligent in the preparation of the opinions. The lawyers argued that because the plaintiffs had never read their opinions, there could be no duty of care and they brought a motion to dismiss the claim on the basis of the plaintiffs' admission that they had not read the opinion letters.

123 Justice Lax found a cause of action in negligence against the lawyers. She addressed the lawyers' argument as follows, at para. 21:

FMC [the law firm] submits that a duty of care cannot be created based on the fact that an opinion was prepared, when its contents were never read or relied upon by anyone. They say that the allegations against FMC arise from the existence and the contents of the letters and that, in substance, the claim is made for negligent misrepresentation. I disagree. The claim is not pleaded on the basis that the plaintiffs read or relied upon the FMC letters, but on the basis that FMC issued the opinion letters with the expressed intention that they be relied upon by the gift program defendants and knowing that the gift program defendants would rely upon and publish the existence of the opinions in promoting the gift program.

124 The law firm argued that the opinion letters disclaimed reliance on the letter by anyone other than the promoters and donors who were provided with copies of the letter, and that it was not reasonably foreseeable that persons who did not receive or read the letters would sustain damages as a result of the opinions in the letter. Lax J. concluded that the lawyers knew or ought to have known that the very existence of the opinion would be used to market the Gift Program and that potential donors would rely on the existence of the opinion in deciding whether to participate. She stated, at paras. 24 and 25:

The allegation is not that FMC provided the letters intending that they be read and relied upon by the plaintiffs and proposed class members, although some may have done so, but rather that FMC provided the letters (1) with the intention that they be used by the gift program defendants in the manner the plaintiffs allege, namely to market the program as one in which proposed class members would receive a charitable tax receipt recognized by C.R.A.; and (2) with the intention and knowledge that the existence of a tax opinion would inform the decision of class members about whether or not to participate in the gift program. If these allegations are made out at trial, it is not plain and obvious that they could not support a duty to take care that the opinions expressed in the letters were accurate and reliable and that a failure to take such care or a failure to warn was the proximate cause of the losses the plaintiffs allege they suffered.

To put this in a different way, the reliance the plaintiffs allege is not on the tax opinion *per se*, but on there being a tax opinion that FMC intended and knew would be used by the gift program defendants to support the legitimacy of the gift program for income tax purposes and would be relied upon by the class members in deciding whether or not to participate. I would therefore not give effect to FMC's argument that this is a negligent misrepresentation claim "dressed up" as a negligence claim. It is properly pleaded as a negligence claim and the essential elements of the cause of action - duty, foreseeability, proximity, breach, and damage - are present. The express qualifications on the opinion are not matters to be considered at the certification stage.

125 Justice Lax went on to note at para. 26 that "there is precedent ... for advancing a class action claim in negligence against a law firm even though generally, a lawyer owes a duty of care only to the lawyer's client: *Baypark Investments Inc. v. Royal Bank* (2002), 57 O.R. (3d) 528 (Ont. S.C.J.) at paras. 23 and 33, aff'd, [2002] O.J. No. 4377 (Ont. C.A.); *Elms v. Laurentian Bank of Canada*, 2004 BCSC 1013, 35 B.C.L.R. (4th) 373 (B.C. S.C.), at paras. 63-65, aff'd, 2006 BCCA 86 (B.C. C.A.)."

126 After reviewing previous decisions, such as *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (Ont. S.C.J.), *Delgrossio v. Paul* (1999), 45 O.R. (3d) 605 (Ont. Gen. Div.) and *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195 (B.C. C.A.), Lax J. found, at para. 30, that "there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed". She concluded at para. 31:

... it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.

127 Justice Lax found that the proposed class definition, "all individuals who participated in the Banyan Tree Gift Program for [the taxation years at issue]" was acceptable.

128 Justice Lax also found that a class proceeding would be the preferable procedure for the resolution of the common issues and rejected the defendants' motion to stay the proceeding until the donors' appeals to the Tax Court had been determined. Finally, she found that the representative plaintiff was appropriate and had produced a satisfactory litigation plan.

129 A motion for leave to appeal to the Divisional Court was dismissed by Dambrot J. He found that the appeal of the gift program defendants was highly fact-driven and did not meet the test for leave. Regarding the appeal by the lawyers, he found at paras. 23 to 25 that the absence of direct reliance on the advice of the law firm was not fatal to the claim in negligence:

It is arguable that reliance by the plaintiffs on the existence of a positive opinion given by Fraser [the law firm] to the gift program defendants supports their claim against Fraser in negligence. In my view, the words of Sharpe J., as he then was, at paragraph 10 of his judgment in *Delgross v. Paul* (1999), 45 O.R. (3d) 605 (Gen. Div.), one of the many cases relied on by Lax J., are apposite:

The defendant also submits that there can be no cause of action for breach of duty, whether as a solicitor or as a fiduciary, absent a plea of reliance by the plaintiff on his advice. While the plaintiff does not allege direct reliance on the solicitor, it seems to me at least arguable that where a party invests money in an RRSP to be invested in mortgages, the reliance the party places on the trustee or other advisors to ensure that adequate steps are taken to protect his interests may be adequate to support a claim against the solicitor retained by the trustee or advisor, particularly where the solicitor is aware of the identity of the party and the nature of the party's interest: see *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).

Here, equally, the absence of direct reliance by the plaintiffs on the solicitor's advice may not be determinative. Even without direct reliance on the advice, it remains arguable that when the plaintiffs entered the scheme, they were relying on the legal advisors of the architects of the scheme to ensure that their pledges would qualify as valid charitable donations for tax purposes. If the legal advisors acted negligently in giving their advice to the gift plan defendants, the plaintiffs could have a claim in negligence against those legal advisors.

While it may be, particularly taking into account the qualifications and reservations expressed in Fraser's opinion, that the claim against Fraser will ultimately fail, I cannot say that there is good reason to doubt the correctness of the orders in issue, namely, the order to certify as against Fraser, the order to decline to strike the pleadings against Fraser and the order refusing to strike the claim against Fraser.

130 Accordingly, leave was not granted.

131 Against this background, I turn now to the question of whether, and on what terms, this action should be certified as a class proceeding.

#### A. The Test for Certification

132 Section 5(1) of the *C.P.A.* sets out the criteria for the certification of a class proceeding. The court *shall* certify the action as a class proceeding where the five-part test for certification is met:

- (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;
- (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 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.

133 As Justice Lax observed in *Banyan Tree* at para. 14, these requirements are linked:

"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": *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (Sup. Ct.) at para. 14.

134 It has been observed on many occasions that the *C.P.A.* is remedial legislation and that it should be interpreted generously in order to give effect to its objectives: access to justice, behaviour modification and judicial economy: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.); *Abdoool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 (Ont. Gen. Div.), at 47, aff'd (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.).

135 I turn to the five components of the s. 5(1) test.

### ***1. Causes of Action***

136 Section 5(1)(a) of the *C.P.A.* requires that the pleadings disclose a cause of action. The test is the same as that applied in a motion to strike a pleading under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 on the ground that it discloses no reasonable cause of action: "assuming that the facts as stated in the Statement of Claim can be proved, is it 'plain and obvious' that the plaintiff's Statement of Claim discloses no reasonable case of action?" - *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.) [Hereinafter *Hunt v. Carey Canada Inc.*] at para. 33.

137 This test was summarized by Cameron J. in *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300, [1999] O.J. No. 2162 (Ont. S.C.J.) at para. 25 as follows:

The test to be applied is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action. Only if the action is certain to fail because the pleading contains a radical defect should the relevant portions be struck out. If the pleading has some chance of success, it should remain. An arguable point of law or a novel cause of action should be left to the trial judge or a motion for judgment based on the point after exchange of pleadings. The motion for judgment may be under Rule 21.01(a) on the basis of some question of law or under Rule 20 where a factual context is required for its resolution: see *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959; *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Abramovic v. Canadian Pacific Ltd.* (1991), 6 O.R. (3d) 1 (C.A.).

138 The principles applicable to this aspect of the test are settled:

- no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- the pleading will be struck only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;

- matters of law that are not fully settled by the jurisprudence must be permitted to proceed; and,
- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information.

See generally: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 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. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Abdoole v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

139 As is so often the case in class actions, the plaintiff asserts multiple causes of action against multiple defendants. The following chart describes the causes of action asserted against the various defendants:

<i>Cause of Action</i>	<i>Party</i>
(a) Negligence	All Defendants
(b) Negligent Misrepresentation	The ParkLane Defendants The Gleesons Harris Patterson Palmer Law (for 2005 only) McInnes Cooper (for 2006 - 2009)
(c) Fraud and Fraudulent Misrepresentation	The ParkLane Defendants
(d) Conspiracy	Appleby Trustee Gleeson (which refers to Gleeson in his capacity as trustee for the Donations Canada Trust from 2005 to in or about April 2006) The Gleesons
(e) Consumer Protection Legislation (rescission and damages)	The ParkLane Defendants FFC Foundation (from 2006 - 2009) and FFC Directors Trustee Gleeson The Gleesons
(f) Breach of Contract	ParkLane Trustee Gleeson The ParkLane Defendants FFC Foundation and FFC Directors, Appleby
(g) Unjust Enrichment and Constructive Trust	Trustee Gleeson The Gleesons

140 The claims against the FFC Directors begin from the time period of 2006 onwards. Although this chart indicates that the plaintiff claims against the FFC Directors for negligence, breach of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, and unjust enrichment, there is no pleaded claim against them for unjust enrichment.

*(a) Negligence*

141 There are allegations of negligence against all defendants and separate allegations of negligence against the Lawyers and the FFC Directors. The allegations of negligence essentially boil down to this:

- (a) all the defendants, other than the FFC Directors, were negligent in the planning and creation of the Gift Program and in failing to ensure that C.R.A. would recognize the charitable donation receipts issued to Class members and the tax credits they claimed;
- (b) all the defendants, other than the FFC Directors, negligently misrepresented that the Gift Program would provide valid charitable donation receipts when they knew or ought to have known that this would not occur;
- (c) the Lawyers issued their Opinion Letters and Comfort Letters without due care and attention, with the intention that those letters would be relied upon by the Class, when they knew or ought to have known that the letters were inaccurate;
- (d) the FFC Directors owed a duty of care to the Class to ensure that the charity was properly operated and they failed to ensure that Class members' donations were being received by the charities as gifts so that the donations would qualify for charitable tax credits.

142 In *Banyan Tree*, the "gift program defendants" did not dispute that there was a properly pleaded claim against them in negligence and a cause of action was certified in negligence.

143 I will make some general observations about the negligence pleading before turning to the submissions of each group of defendants.

144 The ParkLane Defendants, together with some of the other defendants, say that the claim in negligence is in substance a claim in negligent misrepresentation and is "subsumed" by that claim. They say that where the plaintiff's claim is that the defendant breached a duty to provide accurate information and not to make false or misleading statements, the cause of action is for negligent misrepresentation and the plaintiff cannot circumvent the requirement to plead reliance by pleading the case in negligence. The defendants rely, in particular, on *Deep v. M.D. Management*, [2007] O.J. No. 2392 (Ont. S.C.J.) at para. 28, aff'd *2008 ONCA 189* (Ont. C.A.) and *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113, 2010 ONSC 42 (Ont. S.C.J.).

145 This is a major battle ground for the defendants, for understandable reasons. If the claim is for negligent misrepresentation alone, the defendants will argue that issues of individual reliance make the claim unsuitable for certification: see *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057 (Ont. S.C.J.) at para. 135, varied, *2010 ONSC 1591*, [2010] O.J. No. 1057 (Ont. S.C.J.) and the authorities referred to there. If, on the other hand, the plaintiff has a cause of action in negligence, as was the case in *Banyan Tree*, the focus will be on the defendants' conduct, making the claim more amenable to certification. This is, no doubt, why the plaintiff's pleading describes the claim under the heading of "Negligence", although most of the allegations sound like negligent misrepresentation.

146 I agree that a plaintiff cannot dress up a negligent misrepresentation claim in negligence clothes and then assert negligence as a separate cause of action. That is what happened in *Deep v. M.D. Management*. The plaintiff owned Nortel shares in his RRSP and claimed against Nortel when the value of the shares dropped dramatically. Justice Brown struck the claim for negligent misrepresentation, as the plaintiff had failed to plead that he had relied upon any representations made by Nortel. This left a claim for negligence, but Brown J. found that it was in substance a claim for misrepresentation. The alleged duty of care was to accurately represent Nortel's financial situation and the breach of this duty was by misrepresentation and failure to disclose. Justice Brown held, at para. 28:

As I read Dr. Deep's negligence pleading, it acts simply as an additional pleading of the first element for the cause of action of negligent misrepresentation - the existence of a duty of care based on a special relationship. In my view opinion [sic] Dr. Deep has not pleaded a cause of action sounding in negligence that is separate from his cause of action for negligent misrepresentation. As a result, it suffers from the same defects as his pleading of negligent misrepresentation.

147 It was clearly a case where the pleading of negligence was in substance a pleading of negligent misrepresentation.

148 Similarly, in *Singer v. Schering-Plough Canada Inc.*, the plaintiff claimed that two sunscreen manufacturers had misrepresented the degree of protection their products provided against UVA rays. Causes of action were asserted for negligence

and breach of the *Consumer Protection Act, 2002*, among others. In an apparent effort to avoid the issue of reliance that would arise in a claim for negligent misrepresentation, the plaintiff asserted a cause of action in negligence.

149 I found in that case that the pleading of negligence was essentially that the defendants owed a duty of care to provide consumers with accurate information on the labels of the products and not to make false or misleading claims in the labeling and advertising of their products. In substance, it was a claim for misrepresentation without a pleading of reliance and was therefore not properly pleaded. There was no allegation in that case that the product itself was defective.

150 In *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), van Rensburg J. made a similar observation at para. 88:

The negligence pleading in this case is in substance a pleading of negligent misrepresentation without the ingredient of reliance. There is also no pleading that the alleged negligence caused damage to the plaintiffs and no separate claim for a remedy based on negligence. Accordingly, the claims sounding in negligence *simpliciter* ... will not be permitted to proceed and the claim shall be amended accordingly.

151 On the other hand, there is no reason that a plaintiff cannot plead both negligence and negligent misrepresentation, arising out of the same factual circumstances, as long as the claims are, in fact, distinct. Thus, in *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932, 2011 ONSC 25 (Ont. S.C.J.), there were distinct pleadings of negligence on the one hand and of negligent misrepresentation on the other. It was pleaded not only that the defendants issued prospectuses that contained misrepresentations, but also that, had the defendants fulfilled their duties, the securities would either not have been issued or would have been offered at lower prices. In that case, Tausendfreund J. noted, at para. 59:

A review of the pleadings in the case before me indicates that unlike *Deep* and *Imax*, the claims of negligence and negligent misrepresentation are pleaded quite differently and raise separate causes of action. The negligence *simpliciter* claim asserts that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants. The negligent misrepresentation pleading, on the other hand, points to a number of misrepresentations contained in various prospectuses and public disclosures.

152 Similarly, in *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724, [2011] O.J. No. 5062 (Ont. S.C.J.), Perell J. certified a class action pleading both negligent misrepresentation and negligence. He stated, at para. 79:

I agree with Justice Lax's analysis [in *Banyan Tree*]. The [*Banyan Tree*] case is not distinguishable from the case at bar, and, indeed, the case at bar is a stronger case for her analysis, which posits that it is arguable that the law firm had a duty of care and that the other constituent elements of negligence claim might be established; i.e. it is not plain and obvious that Mr. Lipson and the Class Member's do not have a free-standing claim for negligence that is discrete from a claim for negligent misrepresentation. See also: *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd.*, [1986] B.C.J. No. 3254 (B.C.S.C.); *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381 (B.C.C.A.); *McCann v. C.P. Ships*, [2009] O.J. No. 5182 (S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25.

153 In the *Lipson* case before Justice Perell, the lawyers' letters were expressly stated to be prepared so that they might be relied upon by potential donors. In the case at bar, they were not. It is arguable, however, in this case, as it was in *Banyan Tree*, that it was reasonably foreseeable that the Opinion Letters and the Comfort Letters in this case would be used to market the Gift Program.

154 It seems to me that, in the application of the s. 5(1)(a) test, the court should be careful not to strike a pleading on the ground that it has been "subsumed" by another pleading when the evidence at trial could well support separate causes of actions under both pleadings. Put another way, only when it is plain and obvious that a pleading has been dressed up to hide its real identity, should a court refuse to allow it to go forward.

155 In this particular case, reading the pleading generously, there are allegations that the "product" - the Gift Program - was negligently designed and that it did not work. There are also allegations that the defendants negligently made misrepresentations that it would work. It is conceivable that one claim might succeed and the other might fail. Why should it not be left for the

common issues judge to determine whether one or both claims have been made out, assuming that both claims are appropriate for certification? Similar observations were made by Wilson J. in *Hunt v. Carey Canada*, above, in the context of conspiracy pleadings.

156 I now turn to a consideration of the negligence pleading against each group of defendants.

**(i) ParkLane, TTL, TAL**

157 The pleading against the ParkLane Defendants includes allegations that these defendants "negligently planned and created the Gift Program" and that they "failed to ensure that C.R.A. would in fact recognize the charitable donation receipts issued and tax credits claimed by the Class members".

158 Reading the pleading generously and with due allowance for drafting deficiencies, including the lack of particulars, there is a pleading of negligence that is distinct from the pleading of negligent misrepresentation. It is possible to envisage circumstances in which the misrepresentation claim could fail, but the negligence claim could succeed. If, for example, the Gift Program could have been structured in such a way that the Class members at least obtained a valid receipt for their \$2,500 cash donations, then the ParkLane Defendants could have a liability in negligence, whether or not they misrepresented the fact that donors would be able to "supersize" their donations. Alternatively, as in *Dobbie v. Arctic Glacier Income Fund*, the plaintiff could argue that the Gift Program would not have been offered at all had the ParkLane Defendants properly investigated the tax consequences.

159 I am satisfied, therefore, that the plaintiff has properly pleaded a cause of action in negligence against the ParkLane Defendants.

**(ii) FFC Foundation**

160 Reading the pleading generously, the plaintiff pleads that FFC Foundation was negligent in failing to ensure that C.R.A. would recognize its charitable donation receipts as valid. It is arguable and not therefore plainly and obviously wrong that a charity owes a duty of care to donors to ensure that it is operated in such a way as to give the donor a valid charitable receipt in return for a donation. I will therefore certify a cause of action in negligence against FFC Foundation.

**(iii) FFC Directors**

161 The plaintiff asserts a claim in negligence against the FFC Directors, and Ms. Gleeson, the Executive Director of FFC Foundation. He also says that he is asserting a claim for negligent misrepresentation against Ms. Gleeson, but apparently not against the FFC Directors.

162 The pleading against the FFC Directors is that they, among other things:

- owed a duty to Class members to ensure that the FFC Foundation was operated in keeping with its objects and that their donations were in fact gifted to charities as set out in the promotional materials;
- owed a duty to Class Members to supervise Ms. Gleeson to ensure that the charity was operated in keeping with its objects and their donations were in fact gifted to charity;
- were negligent in the performance of their duties and obligations as directors of the FFC Foundation and, as a result, caused damages to the plaintiff and Class members;
- negligently breached their duties by permitting the FFC Foundation to be used as a vehicle whereby the other defendants (other than the Lawyers) perpetrated a fraud; and
- failed to identify the fact that the charitable donees did not have free use of the funds donated to them and were in fact required to pay the vast majority of the donations they received to the Bermuda Trust or to TTL.

163 There are no pleadings that:

- the FFC Directors were parties to any breach of contract;
- that they negligently planned or created the Gift Program;
- that they were involved in any conspiracy, fraud, or misrepresentation; or
- that they were unjustly enriched.

164 While there is no question that directors of a not-for-profit corporation owe a duty of care and a fiduciary duty to the corporation, they do not owe a duty to the corporation's shareholders or other stakeholders. In *London Humane Society, Re*, [2010] O.J. No. 4827, 2010 ONSC 5775 (Ont. S.C.J.), Granger J. observed, at para. 19:

Directors of not-for-profit and charitable organizations are subject to fiduciary duties at common law. The Supreme Court of Canada has held that directorial fiduciary duties are owed primarily to the corporation, not to the corporation's shareholders or other stakeholders (See *Re BCE Inc.*, 2008 SCC 69 at paras. 36-38). While most litigation in this area focuses on for-profit corporations, various academic texts apply the same concept to the directors of not-for-profit corporations (See McCarthy Tétrault, *Directors' and Officers' Duties and Liabilities in Canada*, M.P. Richardson, Ed. (Toronto: Butterworths, 1997)).

165 Officers and directors may have a liability to persons other than the corporation where they engage in "fraud, dishonesty, want of authority or other conduct specifically pleaded which justified piercing the corporate veil": *Alvi v. Misir* (2004), 73 O.R. (3d) 566, [2004] O.J. No. 5088 (Ont. S.C.J. [Commercial List]), at para. 52. In this case, however, there is no pleading of fraud, dishonesty, want of authority or other conduct of FFC Foundation or the FFC Directors that would justify the piercing of the corporate veil: see *Budd v. Gentra Inc.*, [1998] O.J. No. 3109 (Ont. C.A.); *McKenna v. Gammon Gold Inc.*, above.

166 In fact, the plaintiff has assiduously avoided lumping the FFC Directors into the allegations of malfeasance and fraud made against the other defendants.

167 The plaintiff argues that the claim against the FFC Directors should be allowed to proceed because it falls within the principle that "novel" claims should be allowed to proceed. There is nothing novel about this area of the law. The principle that directors owe a duty to the corporation and not to others goes back to *Foss v. Harbottle* (1843), 67 E.R. 189 (Eng. V.-C.).

168 The plaintiff therefore has no cause of action in negligence against the FFC Directors and that claim will be struck.

#### (iv) The Gleesons

169 It is pleaded that the Gleesons, together with the ParkLane Defendants and the Bermuda Trust, created the FFC Foundation and the Donations Canada Trust for the purpose of facilitating the operation of the Gift Program. It is also alleged that GMA, as agent for ParkLane and Gleeson, promoted, marketed and sold the Gift Program to Class members. There are also allegations that all of the defendants, other than the FFC Directors, negligently planned and created the Gift Program and negligently distributed or permitted the distribution of the promotional materials when they knew or ought to have known that the representations were false.

170 Counsel for Gleeson and GMA makes vigorous objections to the pleading against his clients. He submits that the pleading is devoid of material facts against Gleeson, that it contains broad sweeping allegations that lump Gleeson and GMA together with the other defendants and that the claim for negligence is subsumed in the claim for negligent misrepresentation.

171 For the reasons set out in relation to the claim against ParkLane, I find that there is a properly pleaded claim in negligence against Gleeson and GMA. Although the pleading against Ms. Gleeson lumps her in with all the other defendants, as having negligently planned and created the Gift Program, the pleading is broad enough to include her.

#### (v) The Lawyers

172 For the reasons set out below, dealing with the Lawyers' summary judgment motion, I find that there is a properly pleaded cause of action against the Lawyers in negligence.

**(vi) Appleby**

173 There is no separate pleading of negligence or negligent misrepresentation against Appleby - Appleby is simply bundled together, in the statement of claim, with "all of the Defendants", other than the FFC Directors.

174 Appleby contends that the statement of claim does not disclose a cause of action against it in negligence, because the plaintiff fails to plead the existence of a duty of care. It says that there is no duty of care, since the claim is for pure economic loss and does not fall within one of the relationships that have been recognized as giving rise to such a duty: see *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [1992] S.C.J. No. 40 (S.C.C.), at para. 31.

175 To establish a new duty of care, the plaintiff must meet the test set out in *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (Ont. C.A.), which in turn confirmed the approach described in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.). See also: *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] S.C.J. No. 22 (S.C.C.).

176 I will discuss the duty of care analysis at length when I consider the Lawyers' summary judgment motion. This approach requires, at the first stage, that the plaintiff establish that the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct and that there is sufficient proximity arising from the relationship between the parties to justify imposing a duty of care on the defendant. At the second stage, if the court has made findings of foreseeability and proximity, the onus shifts to the defendant to show that there are residual policy considerations that negative the imposition of a duty of care.

177 I do not accept Appleby's submission. There is a pleading that the Bermuda Trust, for which Appleby is the trustee, is affiliated with the ParkLane defendants and that it acted in concert with them in the creation, administration, marketing and sale of the Gift Program. Accepting these allegations as true for the purposes of the s. 5(1)(a) test, Appleby as a creator of the Gift Program arguably owed a duty of care to a prospective donor to ensure that the program would work and that the donor would receive a valid charitable donation receipt in return for his or her gift. I conclude that there is a properly pleaded cause of action against Appleby for negligence.

*(b) Negligent Misrepresentation*

178 A claim for negligent misrepresentation is made in para. 1(d) of the statement of claim against the ParkLane Defendants<sup>1</sup>, the Lawyers and the Gleesons.

179 In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), the Supreme Court of Canada set out the requirements of the tort of negligent misrepresentation:

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

180 Misrepresentation must be pleaded with particularity. The pleading must set out, with "careful particularity": (a) the alleged representation; (b) when, where, how and by whom it was made; (c) its falsity; (d) the inducement; (e) the intention that the plaintiff should rely on it; (f) the alteration by the plaintiff of his or her position relying on the misrepresentation; and (g)

the resulting loss or damage to the plaintiff: see *Lysko v. Braley* (2006), 79 O.R. (3d) 721, [2006] O.J. No. 1137 (Ont. C.A.), at para. 30 (C.A.).

181 As I have noted, in attempting to dance around the difficulties associated with certifying a class action based on negligent misrepresentation, the statement of claim has bundled together allegations of both negligence and negligent misrepresentation under the single heading of "Negligence". The pleading of negligent misrepresentation is lacking in "careful particularity", but, read generously, it does include allegations that the defendants, other than the FFC Directors:

- owed a duty of care to the Class;
- negligently created the Gift Program promotional materials;
- knew or ought to have known that Class members would be relying on the accuracy of those materials;
- knew or ought to have known that the materials were inaccurate;
- failed to take steps to correct the inaccuracy;
- failed to explain that the cash and in kind donations were granted to the charities conditionally and on terms limiting their use;
- failed to disclose to Class members that there was no charitable intent to the Gift Program and that the primary purpose was to financially benefit the defendants; and
- that Class members relied on the representations contained in the promotional materials to their detriment.

182 The plaintiff says in his factum that "[T]he facts alleged in the Claim that support the claim for negligent misrepresentation are included, above, in the facts that support the claim in negligence, *simpliciter*." He says that the defendants created promotional materials that contained material misstatements and omissions when they knew or ought reasonably to have known that the Class members would rely on these misrepresentations to their detriment, which in fact occurred.

183 Reading the pleading generously, as I must, with due allowance for drafting deficiencies, including the lack of particulars, I find that the plaintiff has adequately pleaded a cause of action for negligent misrepresentation against the defendants identified above.

*(c) Fraud and Fraudulent Misrepresentation*

184 The plaintiff pleads that the Gift Program was an elaborate fraud, planned and created by the ParkLane Defendants, Appleby and the Gleasons for the purpose of profiting themselves by approximately \$100 million at the expense of Class members. He also pleads that these defendants fraudulently misrepresented to the Class that they would receive tax benefits, which they knew or ought to have known would not occur, and that the Class members relied on these representations. He alleges that the defendants knew, or were reckless or willfully blind to, the fact that the representations in the promotional materials were untrue.

185 ParkLane does not contest that there is an adequately pleaded cause of action for fraudulent misrepresentation. It submits, however, that the claims in fraud are, in substance, claims for fraudulent misrepresentation and disclose no separate cause of action. The other defendants make similar submissions and also assert that the plaintiff has failed to provide sufficient particulars of the alleged fraud.

186 A pleading of fraudulent misrepresentation (also referred to as deceit) requires that there be: (a) a false representation of fact; (b) made with knowledge of its falsehood or recklessly, without belief in its truth; (c) with the intention that it should be acted upon by the plaintiff; and (d) that actually induces the plaintiff to act on it to his or her detriment: *Parna v. G. & S.*

*Properties Ltd.* (1970), [1971] S.C.R. 306, 15 D.L.R. (3d) 336 (S.C.C.); *McKenna v. Gammon Gold Inc.*, above, aff'd on this issue on motion for leave to appeal, 2010 ONSC 4068 (Ont. Div. Ct.) at para. 20.

187 Fraud is the deprivation of another's property by dishonest means. While many of the classic definitions of fraud have a component of false representation (see *Parna v. G. & S. Properties Ltd.*, above, at S.C.R. 316) or deceit (see *London & Globe Finance Corp., Re*, [1903] 1 Ch. 728 (Eng. Ch. Div.), [1900-3] All E.R. Rep. 891, 88 L.T. 194, 10 Mans. 198 at 732-33 [cited to Ch.]), other cases have held that these definitions are not exhaustive and fraud can simply mean the dishonest deprivation of someone else's property. For example, in *Scott v. Metropolitan Police Commissioner*, [1974] 3 All E.R. 1032, [1975] A.C. 819, 60 Cr. App. R. 124 (U.K. H.L.), 181 Sol. Jo. 863 [cited to All E.R.], Viscount Dilhorne held at p. 1038:

The definition of "defraud" in the *London and Globe Finance case* is not exhaustive and the word ordinarily means: "... to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled."

188 This is consistent with the definition of the criminal offence of fraud set out in s. 380 of the *Criminal Code*, R.S.C. 1985, c. C-46:

Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security ... [is guilty of an offence].

[emphasis added].

189 In *Harland v. Fancsali* (1993), 13 O.R. (3d) 103, [1993] O.J. No. 961 (Ont. Gen. Div.), at paras. 15-17, Ferguson J. pointed out that fraud is broader than deceit and there is no need to prove a false representation:

Many of the texts and cases are not very clear about the relationship and differences between a civil claim based on fraud and one based on deceit. It would appear that a remedy for fraud was originally only available in equity but that in current theory it would be more helpful to simply consider it as a category of liability based on unjust enrichment (Klar, *Remedies in Tort*, vol. 1 (Toronto: Carswell, 1987), at pp. 5-11; Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983), pp. 280-82) (where the defendant has benefited at the expense of the plaintiff) or, more generally, as simply a tort for which the court will grant a remedy to restore the plaintiff to his original position or compensate him for any loss caused.

As a theory of liability, fraud is much broader in scope than deceit. There is no need to prove a false representation. Indeed, the courts have recognized that it is difficult, if not impossible, to define fraud because it is capable of being committed in endless forms and new forms continually arise: see Klar, *Remedies in Tort*, supra, pp. 511-12.

Justice Montgomery reviewed the definitions of fraud in *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1990), 75 O.R. (2d) 513 (Gen. Div.). Perhaps the most general definition he quoted was that "defraud" means to deprive a person dishonestly of something which is his or of something to which he is or would or might, but for the perpetration of the fraud, be entitled.

190 Fraud, in its widest sense, may include a component of deceit or misrepresentation, but it need not necessarily do so.

191 In this case, the pleading of fraud refers not only to the alleged fraudulent misrepresentation (which was in essence, "you will receive a valid charitable receipt much greater than your cash contribution"), but also to the allegation that the defendants constructed and participated in a dishonest scheme to siphon the plaintiff's charitable donations out of the charities and into their own pockets. The allegations in the statement of claim, read generously, are broad enough to include fraud by deceit and fraud by other dishonest acts.

192 I agree with the submission of counsel for the plaintiff that some of the defendants could be found liable for having committed a fraud, without necessarily having made fraudulent misrepresentations, and other defendants could be liable for both fraud and fraudulent misrepresentation.

193 I therefore conclude that there are sufficient pleadings of fraud and fraudulent misrepresentation against the defendants identified above. The role of each defendant in the alleged fraud is sufficiently spelled out in the pleading to make it clear what acts made up the fraud.

(d) *Conspiracy*

194 The plaintiff pleads that all the defendants, other than the Lawyers, the FFC Foundation and the FFC Directors, engaged in a conspiracy to cause harm to the plaintiff and the Class. He also says that they agreed to act unlawfully, the predominant purpose of which was to cause injury to the plaintiff and the Class and that they did in fact cause injury. Alternatively, the plaintiff says that the defendants entered into an agreement to engage in unlawful conduct directed towards the Class, which they knew or ought to have known would cause injury, and which in fact caused injury to the Class by the loss of their donations. The allegations of conspiracy, and the particulars, are set out in paras. 95 to 106 of the statement of claim.

195 A pleading of conspiracy must include the following particulars:

- (a) the parties and their relationship;
- (b) an agreement to conspire;
- (c) the precise purpose or objects of the alleged conspiracy;
- (d) the overt acts that are alleged to have been done by each of the conspirators; and
- (e) the injury and particulars of the special damages suffered by reason of the conspiracy.

See *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (Ont. S.C.J.), at para. 90, rev'd on other grounds (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Ont. Div. Ct.); *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97, [1998] O.J. No. 391 (Ont. C.A.); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 (Ont. S.C.J.); *Cineplex Corp. v. Viking Rideau Corp.* (1985), 28 B.L.R. 212, [1985] O.J. No. 304 (Ont. H.C.).

196 There are two different ways that the tort of conspiracy may be established:

- (a) by proof of "simple motive conspiracy," e.g. that the defendants had a purpose of injuring the plaintiff; or
- (b) by proof of "unlawful conduct conspiracy" or "unlawful means conspiracy" - that the defendants were engaging in unlawful conduct that they knew or ought to have known would injure the plaintiff.

197 In *Harris v. GlaxoSmithKline Inc.* (2010), 101 O.R. (3d) 665, [2010] O.J. No. 1710 (Ont. S.C.J.), Perell J. identified the elements of the tort of conspiracy and the two different ways in which a conspiracy may be committed, and therefore pleaded, at para. 74:

In Canada, the tort of conspiracy can be committed in two discrete ways that may arise on the same set of facts; namely, (1) by two or more persons using some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff; and (2) by two or more persons using unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff. The other elements of the tort of conspiracy are: (a) an agreement to injure between two or more persons; (b) acts in furtherance of the agreement to injure; and (c) the plaintiff suffering damages as a result of the defendants' conduct.

198 Perell J. referred to the leading Canadian case of *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), in which the Supreme Court of Canada defined the tort of conspiracy as follows, at para. 33-34:

...[T]he law of torts does recognize a claim against [Defendants] in combination as the tort of conspiracy if:

- (1) whether the means used by the Defendants are lawful or unlawful, the predominant purpose of the Defendants' conduct is to cause injury to the Plaintiff; or
- (2) where the conduct of the Defendants is unlawful, the conduct is directed towards the Plaintiff (alone or together with others), and the Defendants should know in the circumstances that injury to the Plaintiff is likely to and does result.

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

199 In *Agribrands Purina Canada Inc. v. Kasamekas*, [2011] O.J. No. 2786, 2011 ONCA 460 (Ont. C.A.), the Court of Appeal identified the following elements of the tort of unlawful conduct conspiracy:

- (a) they act in combination, that is, in concert, by agreement or with a common design;
- (b) their conduct is unlawful;
- (c) their conduct is directed towards the respondents;
- (d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and
- (e) their conduct causes injury to the respondents.

200 The Court of Appeal confirmed that the "unlawful conduct" component of this form of conspiracy may include conduct that is "wrong in law", but not necessarily actionable in private law. This could include, for example, breach of a criminal statute or breach of a statute that does not confer a civil cause of action. The Court of Appeal stated, at paras. 37-38:

It is clear from that jurisprudence that quasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of *Canada Cement Lafarge* is an example. So too is conduct that is in breach of the *Criminal Code*. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. In Peter T. Burns & Joost Blom, *Economic Interests in Canadian Tort Law* (Markham: LexisNexis, 2009), the authors say this at p. 167-168:

There are two distinct categories of conduct that can be described as comprising "unlawful means": conduct amounting to an independent tort or other actionable wrong, and conduct not actionable in itself.

...

Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, and defamation. Of course, a breach of contract itself will support an action in civil conspiracy and, as one Australian court has held, the categories of "unlawful means" are not closed.

The second category of unlawful means is conduct comprising unlawful means not actionable in itself.

...

The first class of unlawful means not actionable in themselves, but which nevertheless supports a conspiracy action, is breach of a statute which does not grant a private right of action, the very instance rejected in *Lonrho* (1981) by the House of Lords. A common case is a breach of labour relations legislation, and another is the breach of a criminal statute such as the Canadian *Criminal Code*.

What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort.

201 The plaintiff's pleading sets out a proper cause of action for unlawful conduct conspiracy. It is alleged that the ParkLane Defendants, "Trustee Gleeson", and the Gleesons:

- (a) acted by agreement;
- (b) to engage in unlawful conduct, namely the allegedly fraudulent Gift Program;
- (c) which was directed at Class members;
- (d) which they knew or ought to have known would cause injury to the Class;
- (e) and that injury did, in fact, result.

202 The primary objection made by the defendants is that the conspiracy claim adds nothing, is "merged" in the underlying torts, and should be struck - see Lord Denning M.R. in *Ward v. Lewis* (1954), [1955] 1 All E.R. 55 (Eng. C.A.), at 56:

It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort means nothing. The prior agreement merges in tort.

See also *McKenna v. Gammon Gold Inc.* (Div. Ct.), above, at paras. 62-76; *Normart Management Ltd. v. West Hill Redevelopment Co.*, [1996] O.J. No. 3655 (Ont. Gen. Div.), aff'd [1998] O.J. No. 391 (Ont. C.A.).

203 Put another way, where the plaintiff complains that the defendants planned to do something and then did it, the pleading of conspiracy adds nothing: *Apple Bee Shirts Ltd. v. Lax* (1988), 27 C.P.C. (2d) 226 (Ont. H.C.).

204 Lord Denning amplified on the rationale of the merger principle in *Ward v. Lewis*, above, at p. 56:

The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort. It is sometimes sought, by charging conspiracy, to get an added advantage, for instance in proceedings for discovery, or by getting in evidence which would not be admissible in a straight action in tort, or to overcome substantive rules of law, such as here, the rules concerning republication of slanders. When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy on the simple ground that the conspiracy adds nothing when the tort has in fact been committed.

205 In para. 96 of the statement of claim, the plaintiff pleads that the defendants conspired to make fraudulent representations. There are pleadings in paragraphs 98 and 99 that the defendants agreed to participate in a "scheme" to acquire the Class member's money and, in para. 104, that the defendants conspired to commit a fraud. The plaintiff relies upon the same conduct for the claims for fraud and fraudulent misrepresentation.

206 The defendants say that in substance the pleading of conspiracy is that the defendants conspired to engage in a fraudulent scheme to separate the Class members from their money. The underlying facts supporting the conspiracy claim are the same facts that are pleaded in relation to the fraud and fraudulent misrepresentation claims.

207 The plaintiff relies upon *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.), a leading case on the pleading of conspiracy, and on the "plain and obvious" test on a motion to strike a pleading as disclosing no cause of action. In that case, Wilson J. refused to give effect to an argument that the conspiracy claim had merged with the tort claim, concluding that the issue should be left to the trial judge to determine after considering all the evidence. She stated at paras. 53-55:

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

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

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

208 *Hunt v. T & N plc* was discussed recently by the Divisional Court in an appeal from a certification decision in *McKenna v. Gammon Gold Inc.*, [2011] O.J. No. 3240, 2011 ONSC 3782 (Ont. Div. Ct.), a case involving alleged misrepresentations affecting the price of the shares of a publicly-traded company. I had adjourned the motion for certification, pending the delivery by the representative plaintiff of particulars of the special damages allegedly sustained that were separate and distinct from the damages arising from the underlying tort. Leave to appeal on this issue was granted, as well as on an issue related to the conspiracy claim on behalf of purchasers in the secondary market. The Divisional Court (Herman and Swinton JJ., Wilton-Siegel J. concurring in the result) held that the plaintiff was not required to provide particulars as a precondition to certification of the conspiracy claim.

209 The Divisional Court reviewed a number of authorities on the issue, including *Hunt v. T & N plc*. It noted that in *Yordanes v. Bank of Nova Scotia*, [2006] O.J. No. 280 (Ont. S.C.J.), Cullity J., following *Hunt v. T & N plc*, had rejected the idea that a conspiracy plea would only be certified if the damages claimed relate to losses not covered by the damages claimed in respect of the other pleaded torts. In *Dean v. Mister Transmission (International) Ltd.* (2008), 66 C.P.C. (6th) 287, [2008] O.J. No. 4372 (Ont. S.C.J.), Gray J., following the decision of the Court of Appeal in *Smith v. National Money Mart Co.*, [2006] O.J. No. 1807 (Ont. C.A.), had also left this issue for trial.

210 On the other hand, in *Normart Management Ltd. v. West Hill Redevelopment Co.*, the Court of Appeal upheld a decision to strike a conspiracy claim on the basis that it would have no impact on the success or failure of the action. The Court of Appeal held, per Finlayson J.A.:

[T]his court must determine whether the allegations relating to the claim of conspiracy and the ensuing damages are substantially the same as those of the cause of action for breach of contract and fiduciary duty, such that the two causes of actions relate to the same underlying factual foundation and no significant differences between the two causes of actions emerge.

211 The Divisional Court in *McKenna v. Gammon Gold Inc.* concluded that these decisions could be reconciled by the application of the principle set out immediately above. It stated, at para. 62:

... at the pleadings stage of a conspiracy claim, the court's task is to determine whether the allegations relating to the claim of conspiracy and the ensuing damages are substantially the same as those pleaded in another cause of action such that the conspiracy claim adds nothing.

212 The Divisional Court put the test as follows, at para. 64:

The question the court needs to consider is whether it is plain and obvious that the conspiracy claim adds nothing to the other claims. Is it plain and obvious that if the [other cause(s) of action] claim does not succeed, the conspiracy claim cannot succeed; and if the [other cause of action] claim does succeed, is it plain and obvious that the conspiracy claim adds nothing further?

213 It will be helpful for the analysis to juxtapose this test with the observation of Wilson J. in *Hunt v. T & N plc* at para. 55 that:

If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy.

214 I take the test set out by the Divisional Court to require me to determine whether it is plain and obvious that if the other causes of action do not succeed, the conspiracy claim could also not succeed, or that if the other cause of action does succeed, the conspiracy claim could add nothing.

215 In applying that test, I am required to construe the pleading generously, having regard, among other things, to the plaintiff's lack of access to key documents and discovery information at the pleadings stage. This observation is particularly apt in a conspiracy pleading, where the conduct complained of is invariably outside the plaintiff's knowledge. Cumming J. commented on this very point in *North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993, 84 C.P.R. (3d) 12 (Ont. Gen. Div.), at para. 22:

In truth, the very nature of a claim of conspiracy is that the tort resists detailed particularisation at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. The existence of an underlying agreement bringing the conspirators together, proof of which is a requirement borne by a plaintiff, often must be proven by indirect or circumstantial evidence. A conspiracy is more likely to be proven by evidence of overt acts and statements by the conspirators from which the prior agreement can be logically inferred. Such details would not usually be available to a plaintiff until discoveries. These considerations and the general theme of Hunt, instructing courts not to shy away from difficult litigation, also militate against holding pleadings in civil conspiracy cases to an extraordinary standard.

216 This is a case in which several causes of action are asserted against five sets of defendants. The allegations of conspiracy in the pleading are general and it is impossible to speculate what constellation of facts or combination of facts may ultimately be proven at trial and what underlying causes of action may ultimately be established against which defendants. It is possible, for example, that the unlawful conduct of the defendants might be sufficient to support the underlying cause of action, such as

misrepresentation, fraud, or breach of the *Consumer Protection Act, 2002*, but that the cause of action itself might fail for any number of reasons, leaving the cause of action for conspiracy still standing.

217 I am unable to say that it is plain and obvious that if none of the several causes of action succeeds, the conspiracy claim could not succeed, or, that if one of those claims does succeed, the conspiracy claim would add nothing.

218 I prefer, therefore, in this complex and multi-party action, to adopt the course suggested by Wilson J. in *Hunt v. Carey Canada* and to leave it to the trial judge to determine, after all the evidence is in, whether conspiracy and any of the other causes of action have been made out and, if so, whether the conspiracy claim adds anything.

219 Ms. Gleeson submits that there is no cause of action against her for conspiracy, in her capacity as an officer of GMA, for her actions on behalf of the corporation.

220 In *Normart Management Ltd. v. West Hill Redevelopment Co.*, above, the Court of Appeal observed, at para. 18:

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds: see *Scotia McLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 at 491 (C.A.).

See also: *Craik v. Aetna Life Insurance Co. of Canada*, [1995] O.J. No. 3286 (Ont. Gen. Div.) at para. 23, aff'd. [1996] O.J. No. 2377 (Ont. C.A.); *Accord Business Credit Inc. v. Bank of Nova Scotia*, [1997] O.J. No. 2562 (Ont. Gen. Div.) at para. 34.

221 In *Normart*, however, the Court of Appeal noted that there was no factual basis for the allegation that the individual directors were acting outside their corporate capacities. In the case before me, there are allegations that the Gleesons were acting in their own personal capacities, with a view to their own enrichment. That is sufficient to make out a cause of action in their personal capacities.

222 As I will explain when I discuss the breach of contract claim against Gleeson, there is no cause of action against Gleeson, referred to as "Trustee Gleeson", in his capacity as Trustee of the Donations Canada Trust, as he is no longer a trustee of that trust. The cause of action against him for conspiracy, in his personal capacity as opposed to his capacity as a trustee, will be certified.

223 In summary, a cause of action in conspiracy will be certified against the ParkLane Defendants, Appleby and the Gleesons.

*(e) Breach of Consumer Protection Legislation*

224 The plaintiff pleads that the Gift Program was a "consumer transaction" and as such, was governed by the *Consumer Protection Act, 2002* and comparable legislation in other provinces. The claim under the statute is asserted against all defendants other than Appleby and the Lawyers.

225 There are broad pleadings that:

- the ParkLane Defendants and the Gleesons marketed and sold the Gift Program to the Class;
- these defendants made misrepresentations to the Class concerning the Gift Program; and
- these defendants had a duty to comply with the *Consumer Protection Act, 2002*, and failed to do so.

226 The plaintiff alleges that these defendants engaged in unfair practices prohibited by s. 17(1) of the *Consumer Protection Act, 2002*, by making false, misleading or deceptive representations and unconscionable representations concerning the Gift Program, giving rise to a remedy in rescission or damages under s. 18.

227 The *Consumer Protection Act, 2002* applies to "consumer transactions" if the "consumer" or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place (s. 2(1)). A "consumer" is defined

as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes" and a "consumer transaction", means "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement" (s. 1).

228 The substantive and procedural rights conferred by the statute apply despite any agreement or waiver to the contrary (s. 7(1)).

229 The statute prohibits, among other things, an "unfair practice" (s. 17(1)). This includes making a "false, misleading or deceptive representation", defined by s. 14(1) to include a variety of statements, including:

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.

...

6. A representation that the goods or services are available for a reason that does not exist.

...

8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

...

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

230 It is also an unfair practice, and therefore prohibited, to make an "unconscionable representation" (s. 15(1)). Section 15(2) provides:

Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

...

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

...

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or

...

231 An unfair practice gives rise to a remedy in rescission under s. 18(1) or where rescission is not possible, damages, including exemplary or punitive damages, under s. 18(2).

232 To qualify for rescission or damages, section 18(3) requires that notice of rescission or recovery of damages must be given within one year. However, the Court has jurisdiction under s. 18(15) to waive this requirement if it is in the interests of justice to do so.

233 Cannon's argument on this cause of action is, in summary, as follows:

- (a) he and Class members fall within the definition of "consumer" in the *Consumer Protection Act, 2002*, because they are "an individual acting for personal, family or household purposes ... s. 1;
- (b) a "consumer transaction", is "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement": s. 1;
- (c) a "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment": s.1;
- (d) a "consumer transaction" is necessarily broader than a "consumer agreement" and can include agreements that are for something other than the supply of goods or services;
- (e) the general "anti-avoidance" section of the statute provides that, in determining whether the statute applies to an "entity or transaction", the court is required to "consider the real substance of the entity or transaction and in so doing may disregard the outward form": s. 3;
- (f) the defendants engaged in conduct that was an unfair practice and also engaged in making unconscionable representations;
- (g) the *Consumer Protection Act, 2002* applies to "all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.": s.2; and
- (h) since all the Defendants against whom the Plaintiff claims this relief are located in Ontario, except for TTL, the *Consumer Protection Act, 2002* will apply to all Class members' claims against all these Defendants, except TTL. The *Consumer Protection Act, 2002* will apply in respect of the claims of Ontario Class members as against TTL, as well. Only the consumer protection claims asserted against TTL on behalf of Class members located in other provinces will require reference to the legislation in the other provinces.

234 The plaintiff states no authority or precedent for the proposition that a claim such as this, which involves no sale of goods or provision of services, falls within the *Consumer Protection Act, 2002*. Nor is he required to do so. The novelty of the cause of action is not a factor in the application of the s. 5(1)(a) test: *Khanna v. Royal College of Dental Surgeons (Ontario)* (2000), 47 O.R. (3d) 95, [2000] O.J. No. 946 (Ont. C.A.); *Hunt v. T & N plc*, above at S.C.R. p. 980:

235 The ParkLane Defendants, FFC Foundation and the Gleesons have advanced some cogent arguments in support of the proposition that the plaintiff has no cause of action under the *Consumer Protection Act, 2002*. In summary, these arguments are:

- (a) in substance, Cannon's donation to the program was a "gift" - it had to be a gift, with the requisite donative intent, in order to qualify for a tax credit - and the *Consumer Protection Act, 2002* is plainly not intended to apply to gifts;
- (b) Cannon was not entering into an agreement requiring the payment by a "consumer" to a "supplier" in exchange for the supply of "goods" or "services";
- (c) a "consumer transaction" is generally associated with the exchange of goods and services and a "consumer" is defined in the *Canadian Oxford Dictionary* as "(i) a person who consumes, esp. one who uses a product and (ii) a purchaser of goods and services" - the ordinary grammatical reading of the statute is inconsistent with its application to charitable donations; and

(d) the overall scheme of the *Consumer Protection Act, 2002* is intended to regulate ordinary consumer agreements for the supply of goods and services, as well as specific sectors of the consumer market, such as internet agreements (sections 37-40), repair services for motor vehicles and goods (sections 55-65), credit agreements (sections 66-76) and leases (sections 86-90) - the fact that charitable giving is not included in the regulated transactions suggests that the statute was intended to regulate only ordinary and well-understood forms of consumer agreements.

236 There are some equally compelling answers to the defendants' submissions. First, the *Consumer Protection Act, 2002* is, as its name suggests, designed for the protection of the public - it is remedial legislation and should be liberally construed in order to give effect to its objects: *Weller v. Reliance Home Comfort Ltd. Partnership*, 2011 ONSC 3148, [2011] O.J. No. 2344 (Ont. S.C.J.) at para. 38.

237 Second, it is relatively new legislation and the Court should be reluctant to define its scope on a pleadings motion. Horkins J. made the observation recently in *Wright v. United Parcel Systems Ltd.*, 2011 ONSC 5044, [2011] O.J. No. 3936 (Ont. S.C.J.) at para. 134:

For most of the *Consumer Protection Act* causes of action, the jurisprudence is either unsettled or non-existent. As a result, it is important to respect the principle that matters of law not fully settled in the jurisprudence be permitted to proceed.

238 Third, s. 3 of the statute requires the Court to consider the substance and not the form of the transaction. While the form of Cannon's contribution to the Gift Program was a "gift", there is certainly an argument, which was advanced by C.R.A., that the substance of his contribution was not a gift, because he lacked the necessary donative intent. That is an issue of fact that will require an evidentiary record. It is also arguable that in providing an elaborate structure that would ramp up Cannon's donation by a multiple of four, the defendants were in fact providing a "service" or that, at the very least, the arrangement was a "consumer transaction" within the scope of the statute.

239 Fourth, while the ordinary dictionary definitions of "consumer" or "consumer transaction" are more limited, the statute contains its own definitions which expand the ordinary meaning of these terms. Cannon is arguably a "consumer" within the meaning of the statute because he was "acting for personal ... purposes" and the defendants were arguably engaged in a "consumer transaction", because they were "conducting business" or had "other dealings" with Cannon.

240 Fifth, it may not be stretching the scope of the language to say that, in substance, the Gift Program was selling a financial product or service, other than a product or service covered by the exceptions outlined in s. 2(2), below. ParkLane's own literature referred to the Gift Program as part of its "suite of products".

241 Sixth, the broad scope of the statute is illustrated by the exceptions set out in s. 2(2), which include:

- (a) consumer transactions regulated under the *Securities Act*, R.S.O. 1990, c. S.5;
- (b) financial services related to investment products or income securities;
- (c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;
- (d) consumer transactions regulated under the *Commodity Futures Act*;
- (e) prescribed professional services that are regulated under a statute of Ontario;
- (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
- (g) consumer transactions regulated under the *Residential Tenancies Act*.

242 Many of these exceptions, such as transactions in securities, investment products, financial products and commodity futures, would not normally be thought of as dealings in "goods and services" or as "consumer transactions". The fact that they have been specifically excluded from the scope of the *Consumer Protection Act, 2002*, suggests that other financial products or plans, such as a charitable donation program with enhanced tax benefits, might well be covered by the statute.

243 While an ordinary charitable donation would be highly unlikely to fall within the *Consumer Protection Act, 2002*, the Gift Program itself was far from ordinary. Bearing in mind the liberal test under s. 5(1)(a) of the *C.P.A.*, the caution that the novelty of the cause of action is not a bar, and the importance of allowing unsettled questions to be determined on a full record, it would be wrong, in my view, to resolve this issue at this stage.

244 I therefore find that the plaintiff has pleaded a tenable cause of action under the *Consumer Protection Act, 2002* against the defendants identified above. All those defendants, other than TTL, are located in Ontario and are therefore subject to the application of the statute. The statute will apply to TTL insofar as the claims of Ontario Class members are concerned. The liability, if any, of TTL in relation to Class members outside Ontario will fall to be determined under the consumer protection legislation of the particular province in which the class member resides. If necessary, this can be determined as a sub-issue.

245 Insofar as Appleby and the Bermuda Trust are concerned, I have previously ruled that there is no evidence of a contractual relationship between Cannon and Appleby to support service of the statement of claim under the *Consumer Protection Act, 2002* out of the jurisdiction on Appleby in Bermuda: see *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486, 2010 ONSC 4517 (Ont. S.C.J.).

*(f) Breach of Contract*

246 The plaintiff asserts a claim against ParkLane "and the Donations Canada Trustees" for breach of contract, rescission, and return of monies paid under the Gift Program. The pleading alleges that there was a contract between the plaintiff and ParkLane and the Donations Canada Trustees and that ParkLane and the trustees breached the contract, causing damages to the plaintiff and Class members. It further alleges that the terms of the contract between the plaintiff and ParkLane and the Donations Canada Trustees were set out in the promotional materials. The terms included, among other things, that in exchange for the donor's cash donation, he or she would receive a charitable receipt that would be accepted by C.R.A. as a valid and legitimate claim for charitable donation tax credits.

247 The pleading continues that there was a fundamental and material breach of the terms of their contracts by ParkLane and the Donations Canada Trustees, that the Gift Program was a fraud and that virtually none of the Class Members' donations were gifted to charities and the Class members did not receive valid receipts recognized by C.R.A.

248 The plaintiff claims rescission of the contract and return of all monies paid under the Gift Program.

249 In *Banyan Tree*, the plaintiffs had made a similar pleading to the effect that it was an express or implied term of the contract between participants and the gift program that participants would receive a charitable tax receipt that would be recognized by C.R.A. In that case, the gift program defendants did not oppose certification of that cause of action.

250 ParkLane does not contest the cause of action for breach of contract. It does, however, take issue with the proposition that the claim gives rise to common issues, a subject I will discuss below.

251 As noted earlier, and as pleaded, Gleeson was the original trustee of the Donations Canada Trust and the pleading asserts that Sarah Stanbridge became the trustee in 2006. She continued in that role until the action was dismissed against her on June 27, 2011, as a result of a settlement with the plaintiff, whereby she agreed to produce all documents in her possession or control relating to the Donations Canada Trust.

252 I agree with the submission on behalf of Gleeson that the only possible breach of contract claim against him would be in his capacity as a trustee of the Donations Canada Trust, a position that he no longer holds and that, on the face of the pleading, he ceased to hold in 2006.

253 In an earlier decision in this proceeding, relating to the Bermuda Trust, *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486, 2010 ONSC 4517 (Ont. S.C.J.), I noted at para. 65 that a trust does not have an independent legal status. It operates through its trustees and it is held accountable through its trustees - referring to *Foo v. Yakimetz*, [2002] O.J. No. 3958 (Ont. S.C.J.) at para. 72; *Kingsdale Securities Co. v. Minister of National Revenue*, [1974] 2 F.C. 760, [1974] F.C.J. No. 182 (Fed. C.A.).

254 In this case, the substance of the pleading is that the plaintiff and the Class members entered into a contract with Donations Canada Trust through its trustees. A breach of contract claim can only be asserted by suing the trust through its current trustees. Gleeson was not a trustee at the time the proceeding was commenced. There is no claim against him in his personal capacity in relation to his activities as trustee and there is no claim that he acted outside his duties. For this reason, any pleading against Gleeson in his capacity as trustee of the Donations Canada Trust should be struck.

(g) *Unjust Enrichment*

255 Cannon's pleading, under the heading "Restitution, Unjust Enrichment, Waiver of Tort, Constructive Trust", is a hodgepodge of allegations against "the Defendants, or some of them". It mixes causes of action and remedies to assert an entitlement to "damages on the basis of unjust enrichment and constructive trust." I remind myself, however, that I am required to read the pleading generously and with due allowance for drafting deficiencies.

256 The plaintiff claims that the actions of the defendants, other than the Lawyers and the FFC Directors, were intended to induce the plaintiff and Class members to invest in the Gift Program and that those defendants have received some or all of the money paid by the Class to the Gift Program. It is alleged that the Gift Program was a fraud, that the Class members have suffered a deprivation and that there has been enrichment of the defendants without juristic reason. The plaintiff pleads waiver of tort and seeks an order for restitution or a declaration that the defendants hold the proceeds on constructive trust.

257 The Supreme Court of Canada set out the essential elements to establish a claim for unjust enrichment in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21 (S.C.C.), at para. 30. The plaintiff must show that:

- (a) the defendant was enriched;
- (b) there was a corresponding deprivation to the plaintiff; and
- (c) there was no juristic reason for the enrichment.

258 The ParkLane Defendants do not challenge the pleading of a cause of action for unjust enrichment. For reasons discussed later, however, they take the position that the common issues based on unjust enrichment are not appropriate for certification.

259 Claims for unjust enrichment against FFC Foundation and the Gleesons have been lumped together with claims against the ParkLane Defendants. There is also a claim against Appleby as trustee of the Bermuda Trust. There is no pleading of unjust enrichment against the FFC Directors.

260 These defendants argue that the plaintiff's claim for unjust enrichment must fail, because, as pleaded, any enrichment they received was indirect and ancillary, rather than direct.

261 FFC Foundation argues that this is a case like *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, [2003] O.J. No. 2218 (Ont. C.A.) or *Singer v. Schering-Plough Canada Inc.*, above, because there is no direct *nexus* between the alleged deprivation of the plaintiff and the alleged enrichment of FFC Foundation and Ms. Gleeson. It says that the re-assessment of Cannon by C.R.A. is not, in itself, indicative of a lack of juristic reason for the funds being retained by FFC Foundation.

262 Gleeson and GMA make similar submissions, although most of their submissions are based on factual assertions that are not relevant on a motion of this kind. They say that, at best, any benefit or enrichment they may have received was indirect

and ancillary and that, at best, the pleading alleges that at some point they received payments from FFC Foundation and other charities.

263 Appleby makes much the same point. Appleby says that the claim cannot succeed because any benefit to it was only *indirectly* conferred. It submits that for there to be a cause of action for unjust enrichment, the enrichment must be direct, relying on *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, [1992] S.C.J. No. 101 (S.C.C.) at para. 58; *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, [2003] O.J. No. 2218 (Ont. C.A.), at para. 20. See also *Singer v. Schering-Plough Canada Inc.*, above, at para. 111. It says that on the plaintiff's case as pleaded, the enrichment was indirect, because it is alleged that the plaintiff's funds went initially to ParkLane, then to the charity, then to TTL and finally, to Appleby. In the course of this route, the funds flowed through the charities, which are not even parties to the proceeding and against which the plaintiff makes no allegation of wrongdoing.

264 The requirement that the benefit to the defendant be "direct" is to ensure that the plaintiff does not recover twice - once from the party who received a direct benefit and again from those who received indirect, incidental or collateral benefits. This point was addressed by Chief Justice Lamer in *Peel (Regional Municipality) v. Canada*, at para. 58:

While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice.

To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice — once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. ... It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do.

265 It was on this basis that claims for unjust enrichment were not permitted to proceed against manufacturers where the plaintiffs had purchased the product from retailers: *Boulanger v. Johnson & Johnson Corp.* (C.A.), above, at para. 20 and *Singer v. Schering-Plough Canada Inc.*, above.

266 This case is different. The core allegation in this case is that the defendants engaged in a course of conduct that was conspiratorial and fraudulent, that they intended to enrich themselves at the expense of the donors and that the elaborate structure of the Gift Program was contrived for that very purpose. The funds may have passed through various pockets before they got to any individual defendant, but that is all it was - a pass through. Reading the pleading generously, it cannot be said that the benefit to the defendants was an "incidental blow-by" or a "secondary collateral benefit", to use the words of Chief Justice Lamer in *Peel (Regional Municipality) v. Canada*.

267 The plaintiff pleads that the donors' money "travelled in a giant circle". Allegedly, some of it was retained by FFC Foundation, some was paid to ParkLane for fees, some was paid to the Gleesons, and some was paid to TTL, which in turn passed on most of what it received to Appleby for the Bermuda Trust.

268 Whether the benefit, if any, received by these defendants is sufficiently direct to give effect to a successful claim for unjust enrichment is an issue requiring proof at trial, but the pleading itself is sufficient.

269 Additionally, the allegation that FFC Foundation was enriched by its receipt of funds extracted from the Class due to the fraudulent conspiracy with the defendants is sufficient to meet the "absence of juristic reason" requirement.

270 Construing the pleading generously, again as I must, there is a pleading that the plaintiff suffered a deprivation, that there was an enrichment of Appleby in its capacity as trustee of the Bermuda Trust and that there was a fraud, which is the antithesis of a juristic reason.

271 As the ParkLane defendants have conceded that a cause of action of unjust enrichment is made out against them, I conclude that this pleading meets the test under s. 5(1)(a). The claims of unjust enrichment against the other defendants also meet s. 5(1)(a).

*(h) Summary Concerning cause of Action*

272 My conclusions concerning the cause of action requirement in section 5(1)(a) is that the plaintiff has pleaded the following causes of action against the defendants set out below:

- (a) Negligence: the ParkLane Defendants, Appleby, FFC Foundation, the Gleesons and the Lawyers;
- (b) Negligent Misrepresentation: the ParkLane Defendants, the Gleesons, and the Lawyers;
- (c) Fraud and Fraudulent Misrepresentation: the ParkLane Defendants, Appleby, and the Gleesons;
- (d) Conspiracy: the ParkLane Defendants, Appleby and the Gleesons;
- (e) *Consumer Protection Act, 2002*: the ParkLane Defendants, FFC Foundation, and the Gleesons;
- (f) Breach of Contract: ParkLane; and
- (g) Unjust enrichment and constructive trust: the ParkLane Defendants, FFC Foundation, the Gleesons, and Appleby.

273 The plaintiff has not pleaded a tenable cause of action against Gleeson in his capacity as a former trustee of the Donations Canada Trust and the action against him in that capacity will be dismissed.

274 The plaintiff has failed to plead a tenable cause of action against the FFC Directors and the claim against them will be dismissed.

275 To state the obvious, my conclusions on the cause of action requirement are not to be taken as conclusions on the merits of the plaintiff's cause of action against any defendants. Some of the defendants have made submissions going to the merits of the plaintiff's claims, raising numerous factual arguments to show why, in their view, the plaintiff's claims are bound to fail. That issue is not before me on the certification motion. I will deal with the specific motions for summary judgment of the ParkLane Defendants and the Lawyers later in these reasons.

**2. Identifiable Class**

276 Section 5(1)(b) of the *C.P.A.* requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant."

277 The Class is described above. It consists of residents of Canada who participated in the Gift Program during the period January 1, 2005 to December 31, 2009, the years in which it was offered. The identity of the Class members is readily ascertainable from the records of ParkLane.

278 The defendants do not dispute that there is an identifiable class. A class similar to this was certified by Justice Lax in *Banyan Tree*. I approve the Class definition.

**3. Common Issues**

279 Section 5(1)(c) of the *C.P.A.* requires that the claims of class members raise "common issues". These are defined in section 1 as:

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

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

280 The plaintiff refers to the principles applicable to the common issues analysis, which I summarized in *McKenna v. Gammon Gold Inc.* at paras. 125 and 126. No party has taken issue with those principles, but there is considerable disagreement about how they should be applied in this case. I do not propose to re-state those principles, which are well-understood and oft-quoted. The first principle, however, bears repeating: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis. This principle derives from the judgment of Chief Justice McLachlin in the important case of *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 (S.C.C.), at paras. 39 and 40:

Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

... with regard 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

281 The considerations mentioned in the second half of the first paragraph of this extract are properly factors to be considered in the preferability analysis under s. 5(1)(d). The Chief Justice's comment that the analysis should be approached purposively reminds us that the ability to engage in fact finding or legal analysis on a common basis drives the resolution of the claims of the class members and achieves both access to justice and judicial economy. If the issues put forward are simply not capable of resolution on a common basis, these goals cannot be achieved.

282 I would also emphasize the point that an issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Ont. S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Ont. Div. Ct.).

283 I turn to the common issues proposed by the plaintiff.

(a) *Did ParkLane and Matt Gleeson as Trustee of the Donations Canada Trust ("Trustee Gleeson") breach their contracts with the Class Members?*

284 I have found that there is no cause of action against Gleeson in his capacity as a former trustee of the Donations Canada Trust, but I have certified a cause of action against ParkLane for breach of contract.

285 The plaintiff claims that the contract for the Gift Program for the years 2005 to 2009 included substantially the same documents, all of which were executed by Class members when they participated in the program. The Tax Risk Disclosure Statement was not introduced until 2006.

286 ParkLane's submission on this issue is, essentially, that properly interpreted, the contract documents are clear and unambiguous and do not support Cannon's claims. It says that there is a disconnect between what Cannon says he was "promised" and what the contract actually says. As a result, ParkLane argues, that the breach of contract claim will ultimately have to be determined based on what Cannon, and every other Class member, understood about the contract and the individual

circumstances that lead him or her to that understanding. I disagree. The meaning of the contract will be determined objectively, not by what a party may have thought it means.

287 ParkLane relies upon *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242, 19 C.C.L.I. (4th) 35 (Ont. S.C.J.), in which Nordheimer J. declined to certify a breach of contract claim concerning the interpretation of an insurance policy because he found that the plaintiff's claim was fundamentally a "point of sale" misrepresentation case.

288 In effect, ParkLane's submission is really to interpret the contract and to say that the plaintiff's interpretation is so manifestly wrong that it cannot succeed, so there can be no common issue. This argument actually concedes that there is a common issue of contractual interpretation that is capable of providing an answer applicable to all donors.

289 I agree with the submission of the plaintiff that the issue is not who will ultimately win the breach of contract issue. The only issue is whether the proposed issue is common to the Class and whether its resolution will advance the proceeding. If ParkLane is correct in its interpretation, there will be a binding determination of the contractual rights of all Class members. If ParkLane is wrong, there will be an equally binding determination in favour of the entire Class.

290 In *Banyan Tree*, Lax J. certified common issues dealing with the existence of contract terms and whether the contract had been breached by the defendants.<sup>2</sup> She found that the gift program in that case was marketed in common to class members and sold by agents, many of whom were trained in a standard way and were given information that was prepared by the defendants and intended to be used to promote the program. She found that variations from year to year did not detract from the commonality. That is precisely the case here. There are common contractual materials and the Distributors were supplied with standardized information and training.

291 In this case, the plaintiff pleads that it was an express or implied term of the contract between the plaintiffs and Donations Canada Trust that the charitable tax receipts received by Class members "would be accepted by C.R.A. as valid and legitimate claims for charitable donation tax credits" and that Class members "would receive the tax savings as stated in the promotional materials and the contract."

292 In my view, the existence of such an implied term is an appropriate common issue. The case is not unlike *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 211 O.A.C. 301, [2006] O.J. No. 2393 (Ont. C.A.), at para. 47 and *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019, [2010] O.J. No. 1411 (Ont. S.C.J.), in which implied terms of a contract arising out of a university calendar were certified to be determined on a common basis.

293 To the extent there is an issue of an implied term, this case is similar to *Glover v. Toronto (City)*, [2009] O.J. No. 1523, 70 C.P.C. (6th) 303 (Ont. S.C.J.), in which there was an implied term to provide clean air, which would not depend on individual circumstances. The contract material, although varying slightly from year to year, was substantially the same in each year. To the extent there may be variations that might affect the answers, sub-issues can be developed.

*(b) Are the Class Members entitled to rescind their contracts with ParkLane and the Donations Canada Financial Trust?*

294 The plaintiff claims rescission, as an alternative to damages, on the grounds of fraud, total failure of consideration, and material misrepresentation inducing the contract. As I have found that the plaintiff has properly pleaded these causes of action, that these pleadings give rise to common issues of fact and law, it is appropriate to certify a common issue of whether Class members are entitled to the remedy of rescission if their claims are made out.

295 As I have found that the Donations Canada Trust is not properly before the Court, this common issue relates solely to ParkLane and is confined to the common law claim for rescission, as opposed to the claim under the *Consumer Protection Act, 2002*, which is addressed below.

*(c) Common Issues Relating to Negligence*

296 The plaintiff proposes the following common issues relating to negligence:

- (i) Did the Defendants owe the Class a duty of care?
- (ii) What is the applicable standard of care? Did the Defendants' acts and omissions breach the applicable standard of care?
- (iii) Was the gift program so poorly conceived that Harris and the other defendants, or some of them, should have determined that the Class were always unlikely to have received the stated tax benefits? Against those defendants against whom fraud is pled, was this failure to determine that the tax benefit would never be received the result of dishonesty and fraud?
- (iv) Was material information about the "back end" transaction missing from the Gift Program documents? If so, was the omission negligent or fraudulent?
- (v) Did the Gift Program documents fail to disclose other material information? Was the failure due to negligence? Was the failure due to fraud?

297 It seems to me that the second sentence in para. (iii) as well as paras. (iv) and (v) relate to fraud and fraudulent misrepresentation and are subsumed under those common issues.

298 I have found that there is a proper pleading of negligence against the ParkLane Defendants, Appleby, FFC Foundation and the Gleesons. In essence, the pleading against those defendants is that the Gift Program was negligently constructed and that the defendants failed to ensure that C.R.A. would recognize charitable receipts issued pursuant to the Gift Program. It also alleges that the defendants were negligent in continuing the Gift Program after they knew or ought to have known that it was defective.

299 I have also found that there is a properly pleaded cause of action in negligence against the Lawyers.

300 In *Banyan Tree*, Lax J. certified similar common issues relating to the existence of a duty of care and whether the duty of care had been breached.<sup>3</sup>

301 The essence of the defendants' objections relating to the negligence common issues is that the action is, at its core, about express misrepresentations and implicit misrepresentations by omission. The defendants say that liability cannot be established without determining what misrepresentations were made, whether those misrepresentations were material, whether there was reasonable reliance by the donor and whether that reliance caused each Class member's damages. Thus, they say, the issue of liability for negligence will require individual inquiries to determine each Class member's knowledge, motivations and sensitivity to risks.

302 The defendants focus, as they do throughout this motion, on the role played by the Distributors in the marketing of the Gift Program. ParkLane says that it had no direct dealings with Class members and that it was really the Distributors who were responsible for the "point of sale" representations to the donors. Thus, the defendants all say that each Class member's knowledge depends on the information about the Gift Program that he or she received from the Distributor and other financial advisors. In my view, those objections are not applicable to negligence common issues, but may be applicable to the negligent misrepresentation common issues.

303 In my view, the first three common issues above are appropriate. The question of breach of duty focuses on whether the Gift Plan was negligently designed. It can be examined by focusing on the structure of the Gift Program and the conduct of the defendants in putting the Program together. It does not require individual inquiries into the actions of particular Class members.

*(d) Are ParkLane, Trafalgar Associates, TTL, Appleby Services, the Donations Canada Trustees, GMA, Matt Gleeson and Ms. Gleeson (or any combination thereof) liable to the Class Members for conspiracy?*

304 I have set out above my conclusion that the plaintiff has pleaded a tenable cause of action for conspiracy. The elements of tort of unlawful conduct conspiracy focus on the conduct of the defendant. At the risk of repetition, as noted in *Agribrands*, the Court asks the following questions:

- (a) did the defendants act in concert, by agreement or with common design?
- (b) was their conduct unlawful?
- (c) was their conduct directed toward the plaintiff and the Class?
- (d) did the defendants know that injury to the plaintiff and the Class was likely to result?
- (e) did the conduct in fact cause injury to the plaintiff and the Class?

305 The first four requirements focus exclusively on the defendant's conduct and knowledge. Only the last requirement needs an examination of the effect of the defendant's conduct on the plaintiff and the Class. One could say that a conspiracy claim is ideally suited to class action treatment, because it focuses substantially on the conduct of the defendant.

306 It is not surprising, therefore, that common issues of conspiracy have been certified in a number of class proceedings - see, for example: *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (Ont. S.C.J.); *Silver v. Imax Corp.*, above; *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (Ont. S.C.J.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (Ont. C.A.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).

307 In this case, it is unlikely that individual inquiries will be required to determine injury to the Class, because the tax deductions claimed by all Class members have been treated in the same manner - all have been disallowed and all Class members have received no deduction in return for their donations.

308 The defendants argue that the conspiracy claim is not suitable for certification, because the unlawful conduct at issue is fraudulent misrepresentation, which necessitates individual findings of reliance, materiality, reasonableness and causation. They also say that conspiracy requires proof of causation and damages, neither of which can be determined on a common basis, because the Court would have to examine whether the defendants' fraudulent misrepresentation actually caused the plaintiff to take actions that resulted in damages.

309 I do not agree that the unlawful conduct must necessarily be the fraudulent misrepresentation. It could be fraud by other dishonest acts or a breach of the *Consumer Protection Act, 2002*. The answer to the common issue will focus on the conduct of the defendants, without a need for individual inquiries.

310 Moreover, the nature of the allegedly unlawful misrepresentation - telling people that in exchange for a \$2,500 donation, they would get a \$10,000 tax deduction - is such that reliance, materiality, reasonableness and causation would be presumed. Even if it cannot be presumed, the determination of common issues of fact relating to the conduct of the defendants would significantly advance the claim of every Class member.

311 While the evidence is sparse, as it necessarily will be at this stage, I am satisfied that there is a basis in fact for a common issue of conspiracy in relation to the ParkLane Defendants, the Gleesons and Appleby.

*(e) Are ParkLane, Trafalgar Associates, TTL, Appleby Services or the Bermuda Longtail Trust, the Donations Canada Trustees, GMA, Matt Gleeson and/or Ms. Gleeson liable to the Class Members on the basis of fraud or fraudulent misrepresentations?*

312 I have found that there are properly pleaded causes of action against the ParkLane Defendants, Appleby and the Gleesons for fraud and for fraudulent misrepresentation.

313 In arguing that these claims do not give rise to common issues, the defendants treat the claims as one and then attempt to demonstrate that the fraudulent misrepresentation claim is not an appropriate common issue. They argue that if the fraudulent misrepresentation claim fails then fraud must fail as a common issue as well. They say that claims based on negligent misrepresentation or fraudulent misrepresentation cannot give rise to common issues, due to the presence of individual issues of

reliance, materiality, reasonableness and causation that could not be determined in common: see *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112, [2003] O.J. No. 1160 (Ont. C.A.), *Zicherman v. Equitable Life Insurance Co. of Canada* (2003), 226 D.L.R. (4th) 131, [2003] O.J. No. 1161 (Ont. C.A.), app. for leave to appeal dismissed, (2004), [2003] S.C.C.A. No. 280 (S.C.C.); *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68, [2004] O.J. No. 2242 (Ont. S.C.J.) and *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770, [2002] O.J. No. 4297 (Ont. S.C.J.), aff'd. (2003), 67 O.R. (3d) 795, [2003] O.J. No. 4731 (Ont. Div. Ct.).

314 Applying the reasoning of the Court of Appeal in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (Ont. S.C.J.), aff'd. (1999), 46 O.R. (3d) 315, [1999] O.J. No. 5114 (Ont. Div. Ct.), rev'd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (Ont. C.A.), to which I will turn in a moment, the defendants say that if their arguments about negligent misrepresentation not being an appropriate common issue are accepted, the same fate should befall the fraudulent misrepresentation claim.

315 ParkLane and FFC Foundation argue that the claims in this case will require examination of what each Class member was told by one of the 455 "Independent Financial Advisors" (the Distributors) over a period of five years, an analysis of each Class member's particular knowledge, experience, sophistication and risk tolerance and a determination of whether each Class member was induced to act as a result of these representations. Similar arguments, ultimately unsuccessful, were made in *Carom v. Bre-X Minerals Ltd.*

316 In *Carom v. Bre-X Minerals Ltd.*, there was a claim in fraudulent misrepresentation. It was argued by the defendants there that there was no conceivable commonality since the plaintiff was relying on numerous representations contained in statements originating from Bre-X and some of the defendants over a period of almost four years. The plaintiffs said that these representations were, in effect, a single representation, namely "gold was present in mineable quantities in the Busang." There, as here, it was argued that the statements were received by investors of vastly different sophistication, knowledge and investment strategies.

317 Winkler J., who heard the certification motion, found at paras. 78 and 79 that the claim for negligent misrepresentation was not suitable for certification, but that the claim for fraudulent misrepresentation was suitable:

A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs' contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. As such, there is no prospect of a resolution in a trial on common issues which would advance this litigation in any manner as it relates to the claim in negligent misrepresentation.

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

318 The decision of Winkler J. was upheld by the Divisional Court. It observed at para. 4:

There is a complex, overlapping, differing and sometimes inconsistent tissue of representations made by different people at different times. As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what

representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.

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

319 The Court of Appeal reversed, holding that the claim for negligent misrepresentation should have been certified.

320 MacPherson J.A., giving the judgment of the Court, observed as a preliminary matter at para. 41 that the courts have been wary of setting the bar too high on the common issues test. He noted the observation of Cumming J.A. in *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C. C.A.), at p. 18:

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

[emphasis added].

321 The observation above that I have emphasized is particularly apt in a case such as this, where there are multiple defendants, each taking a run at the commonality of the common issues.

322 MacPherson J.A. went on to find that it was appropriate to certify common issues dealing with both fraudulent misrepresentation and negligent misrepresentation and that a class action was the preferable procedure for the resolution of those claims. On the first point, the common issues, he noted at para. 44 that there were substantial similarities between the definitions of the two torts and they shared some requirements:

There are substantial similarities in these definitions of the two torts. A fraudulent misrepresentation is "a false representation of fact"; a negligent misrepresentation is one that is "untrue, inaccurate or misleading". A fraudulent misrepresentation can be one that is made "recklessly, without belief in its truth"; a negligent misrepresentation is one that is made "negligently" or, to employ the standard non-conclusory word, "carelessly".

323 He went on to find that there was sufficient overlap in the two claims to justify certification of both and there was a substantial overlap of factual issues common to both torts - in fact, there were two core issues in the entire proceeding: Was there gold in mineable quantities in the Busang and, if not, what was the various defendants' knowledge of the true state of affairs. The latter inquiry might be complex and might require an examination of the state of mind and conduct of each defendant, but that was not a question for the common issues analysis.

324 In my view, there are some parallels between the *Bre-X* case and this case. As I have suggested earlier, it is arguable that there was a single misrepresentation: "you will receive a valid charitable receipt much greater than your cash contribution" that permeated every other representation about the Gift Program. If the donation program was a fraud, the Court could find that every representation, no matter how it was made or who made it, was tainted by the fraud. The question would then be: what did each defendant know and what did each defendant do in relation to the fraud? These are issues that can be addressed without reference to the behaviour of individual Class members.

(f) *Have ParkLane, Trafalgar Associates, TTL, the Bermuda Longtail Trust, Trustee Gleeson, the Funds for Canada Foundation ("FFC Foundation"), GMA, Matt Gleeson, Ms. Gleeson or any one or more thereof, been unjustly enriched?*

(i) *If so, are the Class Members entitled to an order imposing a constructive trust over the funds held by or for the benefit of FFC Foundation, or by TTL, or by Appleby in the Bermuda Longtail Trust and an order requiring restitution of the aforesaid funds to the Class?*

(ii) *If so, are the Class Members entitled to a tracing order tracing any amounts paid by the Class Members into the Gift Program to the current holders of such funds?*

325 The requirements for unjust enrichment have been discussed earlier. The defendants do not dispute that the issues of "deprivation" of the plaintiffs and "enrichment" of defendants are capable of determination on a common basis.

326 The defendants say, however, that there are three reasons why unjust enrichment is not a proper common issue.

327 First, they say that the issue of "juristic reason" cannot be determined on a common basis. They say that individual inquiries will be required to determine whether some donors had a "donative intent" to benefit a charity, thereby giving rise to a juristic reason for the enrichment. They argue that those donors who had no donative intent might be entitled to assert a claim for unjust enrichment, whereas those who had a true donative intent (including those who have appealed their tax reassessments) would have no claim, because their intent to benefit a charity would be a juristic reason for the enrichment.

328 Second, the defendants say that there is a juristic reason for the enrichment, namely a valid contract between the donors and ParkLane and Donations Canada Financial Trust.

329 Third, they raise a concern about the pending appeals by some of the Class members. If those appeals are successful and the Class members' deductions are restored, they say there would in fact be no "deprivation" and therefore no claim. If, on the other hand, the appeals are disallowed, they say there will have been a deprivation.

330 Turning to the first concern raised by the defendants, it is the absence of a juristic reason for the enrichment of the defendant that makes that enrichment "unjust". An enrichment of the defendants as a result of a class member's intent to benefit a third party, the charity, is not a juristic reason for the enrichment of the defendant. The juristic reason for the enrichment must be linked to the party that receives the enrichment - the defendants, not the charities. It is no answer for the enriched parties - the defendants - to say that "there is a juristic reason for our enrichment because you intended to enrich the charities."

331 I turn to the second concern. The question of whether the contracts are sufficient juristic reasons for the enrichment of ParkLane and Donations Canada Trust will depend upon whether they are found to be valid and enforceable, an issue that is likely to be capable of determination on a common basis. If the contracts are rescinded or voidable, the contracts cannot serve as "juristic reason" for the enrichment of the contracting party: *MacKinnon v. Ontario (Municipal Employees Retirement Board)* (2007), 88 O.R. (3d) 269, [2007] O.J. No. 4860 (Ont. C.A.) at para. 82; *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29, [1996] O.J. No. 552 (Ont. Gen. Div.), at para. 69; *Larsen v. Charron*, 2007 BCSC 675, [2007] B.C.J. No. 1012 (B.C. S.C.); *Metzler Investment GmbH v. Gildan Activewear Inc.*, [2009] O.J. No. 5695 (Ont. S.C.J.) at para. 30, referring to *Windisman v. Toronto College Park Ltd.*: "a contract rendered unenforceable by law or equity does not qualify as a juristic reason for the purposes of the test for unjust enrichment."

332 The third issue only arises in the event a donor's tax appeal is allowed, and the deduction is restored. That issue can be dealt with as an individual issue, if necessary.

333 In my view, this is a case in which the determination of the "deprivation" and "enrichment" aspects of unjust enrichment would move the claims of individual Class members well towards a resolution.

(g) *Did ParkLane, Trafalgar Associates, TTL, Trustee Gleeson, FFC Foundation, GMA, Matt Gleeson, and/or Ms. Gleeson engage in unfair and unconscionable practices in respect of the marketing and sale of the Gift Program, contrary to s. 17 of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?*

(i) *If so, is it in the interests of justice to waive any requirement for giving notice under s. 18(15) of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?*

(ii) *If so, are the Class Members entitled to an order rescinding the Gift Program contracts and granting to the Class Members: (a) damages, and/or (b) exemplary and/or punitive damages pursuant to s. 18 of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?*

334 As noted earlier, the plaintiff claims that the Gift Program was a consumer transaction governed by the *Consumer Protection Act, 2002* and comparable legislation in other provinces. I have concluded that there is a tenable cause of action under the *Consumer Protection Act, 2002* against the ParkLane Defendants, the Gleasons and FFC Foundation. I have noted that the claim against TTL on behalf of Class members in jurisdictions other than Ontario falls to be determined under the law of the provinces in which they reside.

335 The plaintiff requests the following remedies:

- (a) a declaration that these Defendants engaged in unfair and unconscionable practices with respect to the marketing and sale of the Gift Program;
- (b) a declaration that it is in the interests of justice to waive the statutory notice requirement; and
- (c) an order granting rescission of the Gift Program contracts and granting damages to the Class, including exemplary and punitive damages.

336 The defendants' primary argument against the certification of a common issue under the *Consumer Protection Act, 2002* is that establishing liability for an unfair practice or an unconscionable transaction will require the Court to look behind the marketing materials and make individual inquiries into what each Class member knew about the Gift Program and what advice the Class member obtained from his or her financial advisor. Moreover, they say that there is evidence before the Court from six donors that they were aware of the "back half" of the Gift Program but that the information was not material to them.

337 I do not accept this submission. Common issues under the *Consumer Protection Act, 2002* have been certified by the Court in similar circumstances: *Ramdath v. George Brown College of Applied Arts & Technology* (2010), 93 C.P.C. (6th) 106, [2010] O.J. No. 1411 (Ont. S.C.J.); *Matoni v. C.B.S. Interactive Multimedia Inc.* (2008), 163 A.C.W.S. (3d) 701, [2008] O.J. No. 197 (Ont. S.C.J.).

338 It is not necessary under the *Consumer Protection Act, 2002* to establish that the consumer was induced to enter into the contract due to the unfair practice or that the consumer relied on the representation. In *Matoni*, Hoy J. held at para. 149 that a false, misleading or deceptive representation, defined under the *Consumer Protection Act, 2002* as including "a failure to state a material fact if such failure deceives or tends to deceive", can be determined objectively, by reference to what would be conveyed to a reasonable person. She went on to state that "[T]he determination of whether the defendants engaged in an unfair practice under these statutes involves common issues of fact and common issues of law." She held that issues of breach of the statute, the remedies for the breach, and a potential waiver of the notice requirement were appropriate common issues. I certified substantially similar common issues in *Ramdath*, noting at para. 110 that the common issues were "ideally suited for resolution on a class-wide basis".

339 I conclude that these common issues are appropriate for certification.

(h) *Are Harris, ParkLane, Trafalgar Associates, TTL, GMA, Matt Gleeson and/or Ms. Gleeson liable to the Class Members for negligent misrepresentations made to the Class?*

340 In *McKenna v. Gammon Gold Inc.*, I set out at some length, commencing at para. 129, the problematic issue of the certification of common issues in misrepresentation claims, pointing to the difficulties associated with proving reliance on a class-wide basis. I noted, however, that there have been cases such as *Hickey-Button v. Loyalist College of Applied Arts & Technology*, above, where there is a single representation or a number of representations are made, all having had a common import. I would add to this list: *Ramdath v. George Brown College of Applied Arts & Technology*, [2010] O.J. No. 1411, 2010

ONSC 2019 (Ont. S.C.J.); *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (Ont. S.C.J.); *Silver v. Imax Corp.*, above. I also noted that there may be cases where proof of reliance could be made by inference: *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 15 C.P.R. (4th) 289, [2001] O.J. No. 4620 (Ont. S.C.J.); *Kripps v. Touche Ross & Co.*, [1997] B.C.J. No. 968, 89 B.C.A.C. 288 (B.C. C.A.) at para 101; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.), at 547, [1999] O.J. No. 4749 (Ont. C.A.).

341 The plaintiff says that this case falls within the relatively narrow range of misrepresentation cases that raise common issues because there was one overarching representation and reliance can be inferred.

342 Alternatively, the plaintiff says that the misrepresentations allegedly made by the defendants will be examined in any event in connection with the claim under the *Consumer Protection Act, 2002*, which asks whether, on an objective basis, the representation was false, misleading, deceptive or unconscionable. It therefore makes sense, as a matter of efficiency, to certify common issues in relation to both. He makes the same point with respect to the negligent misrepresentation claim and the claims for fraud and fraudulent misrepresentation.

343 The plaintiff's submission is supported by the decision of the Court of Appeal in *Carom v. Bre-X Minerals Ltd.*. In that case, the Court of Appeal reversed the decisions of the motion judge and the Divisional Court to certify common issues of fraudulent misrepresentation, but not common issues of negligent misrepresentation. MacPherson J.A., writing for the Court, noted that there was substantial overlap in the legal requirements for and factual issues raised by the two torts. At the core of both torts were the following issues: (1) what was the true state of affairs? and (2) what did the defendants know about the true state of affairs? Accordingly, he observed, at para. 47, there was no principled basis for treating the two torts differently. Both will focus on the knowledge and conduct of the defendants.

344 Precisely the same point can be made here. The negligent misrepresentation claim and the *Consumer Protection Act, 2002* claim will traverse much of the same legal and factual ground as the fraudulent misrepresentation claim. They will focus on the knowledge and conduct of the defendants. Having these issues addressed in a single trial will avoid duplication of fact-finding and legal analysis.

345 The defendants' primary attack on this common issue is in relation to the requirement of reliance, including issues of whether the representation was a material one, whether it was reasonable to the plaintiff to rely on the representation and whether in fact the representation was causative of each Class member's decision to participate in the Gift Program. They point out that in order to succeed in an action for negligent misrepresentation, it must be shown that the misrepresentation is a material one, in the sense that it "would be likely to influence the conduct of the plaintiff or would be likely to operate upon his judgment": *White v. Colliers Macaulay Nicolls Inc.* (2009), 95 O.R. (3d) 680, 2009 ONCA 444 (Ont. C.A.) at para. 25, citing *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 78 O.R. (3d) 561, [2005] O.J. No. 4667 (Ont. C.A.) at paras. 87-89; *Canada Trustco Mortgage Co. v. Bartlet & Richardes* (1996), 28 O.R. (3d) 768 (Ont. C.A.), at 773, [1996] O.J. No. 1551 (Ont. C.A.).

346 The defendants rely on *Kumar v. Mutual Life Assurance Co. of Canada*, [2003] O.J. No. 1160 (Ont. C.A.), *Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. No. 1161 (Ont. C.A.), *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (Ont. S.C.J.) and *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 4297 (Ont. S.C.J.) as cases in which certification of negligent misrepresentation common issues was refused due to the need to make individual inquiries concerning reliance, causation and damages, and in some cases, such as *Zicherman*, the need to separate out which representations were made by the defendants and which were made by others. As well, the defendants say that in this case, the decision of each Class member was informed by information and recommendations of his or her "Independent Financial Advisor" (the Distributor) and this information would have to be sifted through in order to determine whether the alleged representations were both material and causative. The individual donor's personal experience would also have to be examined to determine the person's sophistication, experience, risk tolerance and financial goals.

347 ParkLane relies on the evidence of the six donors who said that they were aware of the "back half" of the Gift Program and nevertheless decided to participate.

348 As well, ParkLane says that the Donor Declaration signed by Cannon expressly excludes a duty of care owed to Class members. It says that whether these terms should or should not apply will depend on individual circumstances.

349 The plaintiff replies that the alleged representations made by the Distributors would not have to be examined to determine what information the Class members relied upon, because the Distributors were expressly prohibiting from giving information to the donors other than the standardized materials that ParkLane had specifically approved in advance.

350 As I have indicated above, in my view, this is a case, like *Ramdath* and *Hickey-Button*, in which there is effectively one, or perhaps two representations, contained in written materials supplied by ParkLane to every Class member: "This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation."

351 This is also a case in which it may be possible to infer that each donor relied on the representation. The entire purpose of the elaborate structure was to achieve the ramped-up tax deduction. It can reasonably be inferred that taxpayers did not participate in the Gift Program only because they wanted to make a gift to the underlying charity. They did so due to the representation that they would receive an enhanced tax deduction.

352 By the same token, damages can reasonably be inferred, at least in the amount of the donor's cash donation and potentially for the amount of any re-assessment, penalties, interest and costs.

353 Even if there are some aspects of the misrepresentation claim that have to be determined as individual issues, this is a consideration for the preferability stage of the inquiry, not for this stage: *Hickey-Button* at para. 53.

(i) *Are Patterson Kitz (Halifax), Patterson Kitz (Truro), Patterson Palmer also known as Patterson Palmer Law [for 2005] and/or McInnes Cooper [for 2006 - 2009] vicariously liable for Harris' negligence or negligent misrepresentations?*

354 This is an appropriate common issue. It has not been suggested otherwise. The answer focuses entirely on the relationship between Harris and the law firms with which he was associated at the material times.

(j) *Are the Class Members entitled to pursue a restitution claim based upon waiver of tort as against ParkLane, Trafalgar Associates, TTL, Appleby Services or the Bermuda Longtail Trust, Trustee Gleeson, FFC Foundation, GMA, Matt Gleeson, and Ms. Gleeson?*

355 The plaintiff asks for a disgorgement of the defendants' profits based on what he describes as the "remedy" of waiver of tort. As a remedy, he claims either an order for restitution or a declaration of constructive trust. I certified such a claim as a common issue in *Pollack v. Advanced Medical Optics Inc.*, [2011] O.J. No. 2556, 2011 ONSC 1966 (Ont. S.C.J.), noting that common issues arising out of claims in waiver of tort have been certified in a number of class actions.

356 The ParkLane Defendants submit that waiver of tort is a remedy, not a cause of action. This seems to be conceded by the plaintiff. I am not quite so sanguine: see *Aronowicz v. EMTWO Properties Inc.*, [2010] O.J. No. 475, 2010 ONCA 96 (Ont. C.A.) at paras. 80-82. The availability of waiver of tort, and its scope, is an open question that may not be conclusively resolved for some time.

357 If waiver of tort is a remedy, it will only be of interest if the plaintiff establishes a cause of action or other wrongdoing: *Aronowicz v. EMTWO Properties Inc.* at para. 82. The nature of the cause of action and the damages recoverable will then determine whether the plaintiff and Class members have any interest in waiving their damages and claiming disgorgement.

(k) *If so, can the damages based upon a waiver of tort claim be assessed in the aggregate, and if so, in what amount?*

358 I noted in *Pollack v. Advanced Medical Optics Inc.*, [2011] O.J. No. 2556, 2011 ONSC 1966 (Ont. S.C.J.) at para. 25, there have been numerous cases in which the amount to be disgorged, if waiver of tort is available, has been stated as a common issue. I will not repeat that lengthy list.

359 In some cases, the *quantum* of waiver of tort damages has been bifurcated to proceed after a common issues trial. I followed that course of action in *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942, [2011] O.J. No. 1381 (Ont. S.C.J.), adopting the decision of the Divisional Court in *Peter v. Medtronic Inc.*, 2010 ONSC 3777, [2010] O.J. No. 3056 (Ont. Div. Ct.). In *Peter v. Medtronic Inc.*, the Divisional Court affirmed the decision of Perell J. to bifurcate the issue. Perell J. had noted, at para. 21 of his reasons, [2009] O.J. No. 4364 (Ont. S.C.J.), that the case before him was "one of the extraordinary and rare cases where it would be fair and just to have divided discovery and to bifurcate the common issue of the quantification of the amount of the waiver of tort claim."

360 While I have discretion to bifurcate the issue, I must exercise this discretion with regard to the factors summarized by Nordheimer J. in *Air Canada v. WestJet Airlines Ltd.* (2005), 20 C.P.C. (6th) 141, [2005] O.J. No. 5512 (Ont. S.C.J.) at para. 31. Having regard to those factors, I consider that:

- (a) the issues of liability are not clearly separate from the issues of remedies. In particular, the fraud and unjust enrichment claims will require an examination of the benefits that the defendants have received from their actions, the same questions that will be asked in the waiver of tort claim;
- (b) there is no obvious advantage to having the liability issues tried first;
- (c) nor will it result in a substantial saving of time and expense;
- (d) it will in fact likely lengthen the overall time frame of the proceeding; and
- (e) there is no agreement between the parties that bifurcation is appropriate.

361 In this case, I am not satisfied that the claim falls within the "rare and extraordinary" category, so as to justify a departure from the general rule that litigation by installments is to be avoided. While class actions are inherently bifurcated, addressing common issues before individual issues, the usual rule is that all common issues should be resolved at the same time. There is no reason to think that the aggregate assessment of waiver of tort damages will be particularly complicated or time-consuming in this case.

362 I conclude that this common issue should be approved and that it should not be bifurcated.

(l) *Are the Class Members entitled to damages and prejudgment interest, including:*

- (i) *The amount of their cash donations?*
- (ii) *The fair market value of any in kind donations?*
- (iii) *The interest and/or penalties payable to the Canada Revenue Agency ("C.R.A.") in respect of their tax reassessments?*
- (iv) *Their out of pocket expenses incurred in responding to the C.R.A. tax reassessments?*

363 The Defendants take the position that damages are not an appropriate common issue. They say that issues of mitigation, penalties, out-of-pocket expenses and interest will require individual inquiries. They note that there are allegations that Cannon and the Class members were contributorily negligent and that ParkLane has asserted a counterclaim against donors who participated in the Gift Program in 2008 and 2009, based on an indemnity given by those donors to ParkLane.

364 In *Banyan Tree*, Lax J. declined to certify common issues asking whether the defendants were liable to Class members for damages and, if so, the amount of such liability. She concluded that a damage assessment would require individual determinations.

365 I am not convinced that damages are an appropriate common issue in this case. This will not mean that a class proceeding is not a preferable procedure for the resolution of the issues. Section 6 of the *C.P.A.* stipulates that the fact that damages will require individual assessment after the common issues trial is not, on its own, a bar to certification.

(m) *Can or should the damages under paragraph (13)(i) be assessed in the aggregate?*

366 In *Singer v. Schering-Plough Canada Inc.*, above, I pointed out at paras. 189 to 191 that it is possible, but not necessary, to certify the aggregate assessment of damages as a common issue, referring to *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 70; *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (Ont. S.C.J.), leave to appeal ref'd [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Ont. Div. Ct.); *Lee Valley Tools Ltd. v. Canada Post Corp.* (2007), 57 C.P.C. (6th) 223, [2007] O.J. No. 4942 (Ont. S.C.J.).

367 In this case, although it might be concluded that the cash donations of all Class members can simply be aggregated, the expert evidence adduced by the Lawyers suggests that it may not be quite such a simple exercise. It may be necessary, for example, to offset any loss incurred by a donor against the benefit he or she received from the initial tax credit. There will also be questions about whether all Class members have been re-assessed, and whether some have settled with C.R.A.

368 It is not necessary to decide whether these are bars to an aggregate assessment. I have sufficient concerns about the availability of an aggregate assessment in this case to leave the issue to the common issues judge.

(n) *Are the Class Members entitled to an award of punitive or exemplary damages against any one or more of the Defendants, and if so, in what amount?*

369 The defendants, led by the Lawyers, say that punitive damages are not an appropriate common issue, because there are numerous individual issues of liability and damages that will have to be determined before liability for punitive damages can be determined or the quantum of such damages assessed. They point, in particular, to observations in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19 (S.C.C.), that punitive damages are only appropriate when the defendant's conduct would otherwise go unpunished or where other sanctions, including compensatory damages, are inadequate to achieve the goals of retribution, deterrence and denunciation.

370 In *Schick v. Boehringer Ingelheim (Canada) Ltd.*, [2011] O.J. No. 1381, 2011 ONSC 1942 (Ont. S.C.J.), I certified the following common issue:

Does the conduct of the defendant justify an award of punitive damages?

371 I concluded that, notwithstanding the concerns expressed by Perell J. in *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87, [2009] O.J. No. 4366 (Ont. S.C.J.), aff'd 2010 ONSC 3777, [2010] O.J. No. 3056 (Ont. Div. Ct.), flowing from the observations of Binnie J. in *Whiten v. Pilot Insurance Co.*, a common issue focusing solely on the defendant's conduct would avoid duplication of fact-finding and legal analysis, even though it would not establish either liability for punitive damages or the *quantum* of such damages. If the Court found that the defendant's conduct was not of such a nature as to justify an award of punitive damages, this would be the end of the inquiry. If, on the other hand, there was a finding of "high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour", the application of the other *Whiten* factors could be addressed after the common issues trial.

372 A somewhat similar approach was taken by Hoy J. in *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal denied, [2008] O.J. No. 1916 (Ont. Div. Ct.).

373 Additionally, Justice Lax discussed the case law in *Banyan Tree* and certified the following issue:

Should an award of punitive damages be made against the defendants? If so, in what amount?

374 She concluded, however, that although the issue could be certified, it could only be answered after the conclusion of all individual proceedings and the quantification of general damages.

375 Dambrot J., in granting leave to appeal in *Robinson v. Medtronic Inc.*, [2010] O.J. No. 1479, 2010 ONSC 1987 (Ont. Div. Ct.), noted that a compelling argument could be made for a common issue concerning the *prima facie* entitlement to punitive damages, notwithstanding that the ultimate liability for and *quantum* of punitive damages might have to await an assessment of compensatory damages.

376 I also note that, notwithstanding the concerns that he expressed in *Robinson v. Medtronic Inc.*, Perell J. in his recent decision in *Blair v. Toronto Community Housing Corp.*, [2011] O.J. No. 3347, 2011 ONSC 4395 (Ont. S.C.J.), concluded that a common issue of punitive damages, focusing on the defendant's conduct, would be appropriate. He stated, at para. 49:

For the Reasons I expressed in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (S.C.J.), aff'd [2010] O.J. No. 3056 (Div. Ct.), a claim for punitive damages will not be suitable for a common issue when the court cannot make a rational assessment about the appropriateness of punitive damages until after individual assessments of the compensatory losses of class members has been completed. However, where the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the common issues trial: *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2010 BCCA 560.

377 As Perell J. noted, a similar conclusion was reached by the British Columbia Court of Appeal in *Chalmers (Litigation Guardian of) v. AMO Canada Co.*, 2010 BCCA 560 (B.C. C.A.).

378 I conclude that a common issue should be certified on the same basis as *Schick v. Boehringer Ingelheim (Canada) Ltd.* This issue focuses solely on the conduct of the defendants and avoids duplication of fact-finding and legal analysis.

379 In summary, I have certified the following common issues

- (a) breach of contract, against ParkLane;
- (b) rescission, against ParkLane;
- (c) negligence, against the ParkLane Defendants, Appleby, FFC Foundation and the Gleesons;
- (d) conspiracy, against the ParkLane Defendants, Appleby and the Gleesons;
- (e) fraud and fraudulent misrepresentation, against the ParkLane Defendants, Appleby and the Gleesons;
- (f) unjust enrichment, against the ParkLane Defendants, Appleby, FFC Foundation and the Gleesons;
- (g) *Consumer Protection Act, 2002* claims against the ParkLane Defendants, the Gleesons and FFC Foundation;
- (h) negligent misrepresentation, against the ParkLane Defendants, the Gleesons, and Harris;
- (i) vicarious liability of the Law Firms;
- (j) waiver of tort;
- (k) aggregate assessment of waiver of tort damages;
- (n) punitive and exemplary damages.

#### **4. Preferable Procedure**

380 Section 5(1)(d) of the *C.P.A.* requires that a class proceeding be the "preferable procedure for the resolution of the common issues". This deceptively simple statement has been explained in different ways, but most decisions refer to the observation that a class proceeding must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.).

381 The preferability analysis is conducted through the lens of the goals of class actions: access to justice, judicial economy and behaviour modification. It also takes into account the importance of the common issues to the claims as a whole, including the individual issues: See *Cloud v. Canada (Attorney General)* at para. 73; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69 (C.A.), leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

382 In considering whether a class action would be the preferable procedure, the Court should examine: (a) the nature of the proposed common issue(s); (b) the individual issues that would remain after determination of the common issue(s); (c) the factors listed in the *C.P.A.*; (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 *C.P.A.*; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 16, aff'd (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.).

383 The defendants say that there are a number of individual issues lying at the core of this action that dominate the proceeding and outweigh the significance of the common issues. These include:

- (a) The ParkLane Defendants and the Lawyers have asserted claims against Cannon for contributory negligence and they will do so against all other donors - this is a substantive right that does not yield to certification: *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells* (1990), 41 C.P.C. (2d) 280 (Man. C.A.) at paras. 17-18. These claims raise individual issues concerning the knowledge and information possessed by each Class member at the time he or she subscribed to the Gift Program and call for individual inquiry.
- (b) ParkLane has asserted a counterclaim against all donors who participated in the Gift Program in 2008 and 2009 based on a written indemnity those donors gave to ParkLane for all claims arising out of the Gift Program. The resolution of these claims will give rise to individual issues.
- (c) ParkLane has commenced third party proceedings against every one of the 455 "Individual Financial Advisors" (the Distributors) and other defendants may do so as well - these claims will raise issues concerning the nature and scope of the information that was provided to the donors by their advisors.
- (d) The allegations of negligence require individual inquiries concerning the duty of care, the standard of care, causation and damages. The claim of negligent misrepresentation will require similar investigations. The extent and complexity of these investigations, and the costs involved, will outweigh any economy achieved by the resolution of the common issues in a single trial: *Dennis v. Ontario Lottery & Gaming Corp.*, [2010] O.J. No. 1223 (Ont. S.C.J.) at para. 238.
- (e) Even if the misrepresentation issues are found appropriate for certification, the need to prove reliance and damages, in each case, will make the proceedings unmanageable

384 The defendants rely on cases such as *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63, [1998] O.J. No. 2786 (Ont. Gen. Div.), and *Singer v. Schering-Plough Canada Inc.*, above, in which the need to prove reliance and damages on an individual basis was found to overwhelm the benefits that would be realized by resolving a few common issues.

385 In my view, the Court must look with some skepticism on threats of defendants to undertake scorched earth tactics that will make class actions unmanageable. Defences such as contributory negligence, third party proceedings and counterclaims

can be addressed efficiently and fairly by a combination of case management and the trial of individual issues if necessary. They will not have to be addressed if the common issues are decided in favour of the defendants.

386 The need to address individual issues will depend upon which common issues are answered in favour of the Class. If it is found that the Gift Program was a massive fraud, or that there were fraudulent misrepresentations, or that there were unfair or unconscionable practices under the *Consumer Protection Act, 2002*, the need for the trial of individual issues will be substantially reduced or, possibly, eliminated. In any event, this is a case in which the resolution of the common issues of liability will move the action considerably forward.

387 There is no doubt that certification of this proceeding would further the purposes of the *C.P.A.* The words of Lax J. in *Banyan Tree* at para. 69 are equally applicable to this case:

... a class action achieves judicial economy by make binding determinations affecting the rights of 2,825 individuals in one proceeding. It achieves behaviour modification by holding corporations and law firms accountable for the promotion of allegedly sham investments and it facilitates access to justice for litigants who would not bring individual claims.

388 There are really no alternative procedures that would be as effective as a class proceeding in achieving the goals of access to justice, judicial efficiency and behaviour modification. It has been suggested that the Class members could make a complaint to a Judge of the Superior Court under the *Charities Accounting Act*, R.S.O. 1990, c. 10. The judge has the authority to direct the Public Guardian and Trustee to make an investigation. However, this statute does not give the Court the jurisdiction to provide compensation on a class-wide basis.

389 In terms of access to justice, the defendants suggest that some of the Class members are wealthy individuals, with substantial losses, who could easily afford to bring individual actions. In making this suggestion, the defendants do not really expect individual actions if the action is not certified. What they surely expect and hope is that if the action is not certified, the claims will become dust in the wind. Most Class members will decide that the cost of individual action is prohibitive, as it would be, and they will not throw good money after bad. The result will be that nearly 10,000 people, who have suffered losses allegedly over \$100 million, will never have their day in court. In making this observation, I am not making any conclusion on the merits of the plaintiff's case and, indeed, it is quite obvious that the defendants have raised some significant defences.

390 The rights of defendants are, I agree, an important consideration. The substantive rights of defendants must be protected and it has been noted on many occasions that a class proceeding is procedural and does not change the substantive law. It should not be assumed, however, that the disposition of this action will necessarily require individual trials. If the plaintiff is successful on some common issues, such as fraud or conspiracy, the need for individual trials may be eliminated or reduced. If the defendants are successful on the negligence, contract and *Consumer Protection Act, 2002* common issues, there will be no need for individual trials. Additionally, success for the Class on the *Consumer Protection Act, 2002* or restitutionary claims may open up the availability of remedies that do not call for individual assessments of damages.

391 As I have noted earlier, some of the defendants say that the presence of a Distributor as an "Independent Financial Advisor" to every Class member raises individual issues of Class member knowledge and reliance that make this action unsuitable for certification. They point to the evidence of some of the Distributors and some of the donors to show that the Distributors were aware of the "back half" of the Gift Program and that, at least in some instances, that information was conveyed to donors.

392 The statements of defence of both ParkLane and the Lawyers make reference to the role played by Gacich in advising Cannon. In the third party claim asserted by ParkLane against the Distributors, it is alleged that the Distributors had a duty to protect their clients and that they are liable for any losses sustained by their clients as a result of participating in the Gift Program.

393 It will be interesting to see how the Distributors respond to the third party claim. Will they agree that ParkLane told them everything there was to know about the Gift Program? Will they agree that the information they were provided with made full disclosure of the flow of funds and the risks associated with the Gift Program? Will they agree that they were "independent" of ParkLane? Will they agree that if their clients have a complaint, it was all their (the Distributors') fault for not properly advising them of the risks?

394 It seems to me that the evidence raises a question of whether the Distributors were truly "independent financial advisors", the term coined by counsel, or whether they were, as described in their agreement with ParkLane, "fundraisers", who were retained to "raise donations" for the Gift Program. The evidence raises questions about exactly whose agents they were. It raises questions about the extent of disclosure made by ParkLane to the Distributors concerning the Gift Program.

395 I leave for another day, if necessary, the issue of whether these questions can be determined on a common basis. In my view, the questions are serious ones, and they significantly dilute the arguments made by the defendants concerning the role of the Distributors.

396 I have found that there are substantial common issues, the resolution of which will advance the claim of every class member. It is true that, depending on the resolution of the common issues, some individual issues may remain. I am satisfied, however, that the practical difficulties associated with the resolution of these common issues are not a reason to deprive Class members of the benefits associated with collective recourse. I am also satisfied that a process can be established to ensure that the rights of the defendants are protected and that the process is fair to both parties.

397 In light of its potential to promote access to justice and reduce or possibly eliminate the need for individual trials, I find that a class action is a preferable procedure for the resolution of the common issues of the Class.

### ***5. Representative Plaintiff and Litigation Plan***

398 Section 5(1)(e) of the *C.P.A.* requires that there be 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.

399 There is no dispute as to the capacity of Cannon to serve as representative plaintiff. The Lawyers, however, supported by some of the other defendants, submit that Cannon has a conflict with other members of the Class that prevents him from being a representative plaintiff. They also submit that the litigation plan he has submitted is deficient and unworkable due to deficiencies in the common issues and a failure to address issues such as production, discovery and damages.

400 Turning first to the alleged conflict, the Lawyers say that Cannon has acknowledged that he had no "donative intent" when he participated in the Gift Program and that this puts him in conflict with many other Class members who are challenging their C.R.A. reassessments on the ground that they did, in fact, have a "donative intent". Cannon withdrew his notice of objection and paid the C.R.A. reassessment, unlike many donors who have continued to challenge it.

401 The Lawyers put the argument as follows in their factum:

Because Cannon has, by denying that he had donative intent, conceded one of the arguments advanced by the C.R.A. against the Gift Program while the vast majority of proposed class members continue to actively oppose that position, he has an actual conflict exists [sic] between Cannon and the vast majority of the proposed class. Success for Cannon in this litigation depends on him establishing the absence of donative intent while the majority of class members who are disputing the C.R.A. reassessments can only succeed if they establish the opposite.

402 I am not sure that Cannon's evidence that "[W]ithout this promise of a tax credit I would never have participated in the Gift Program" is proof of lack of donative intent. Ordinary taxpayers might also say that they would not have made a charitable donation unless they knew that they would receive a tax credit. Cannon's evidence is consistent with the tax credit being one reason - but not the only reason - to make the gift. Nor do I agree with the proposition that Cannon can only succeed in this action if he establishes the absence of a donative intent. His case, as pleaded, is that the Gift Program was a fraud and that the money paid out of his own pocket went to enrich the defendants and not to the charity that he wanted to support.

403 Perhaps more important, section 5(1)(e) of the *C.P.A.* says that the representative plaintiff must not have a conflict with the Class members "on the common issues for the class." All Class members who do not opt out will have the same interest

as Cannon on the common issues, regardless of their position on their individual tax appeals and whatever may be the merits of those appeals.

404 In my view, therefore, Cannon does not have a disqualifying conflict.

405 I turn to the litigation plan. The defendants say that the plan is deficient because it assumes that the resolution of the common issues will resolve all questions of liability, when individual issues will remain, including contributory negligence and the third party claims. They point out that one purpose of the litigation plan is to ensure that the proceeding will in fact work as a class action.

406 As I have pointed out under the preferable procedure analysis, the need for examination of individual issues may be substantially circumscribed by the resolution of the common issues. Having concluded that the action is workable as a class proceeding, I am satisfied that issues of production, discovery, proof of damages and the trial of individual issues, if required, can be addressed through case management as the case proceeds to trial, and by directions of the common issues judge who will, by that time, have a full appreciation of what remains to be determined.

## ***6. Conclusions on Certification***

407 In summary, I have:

- (a) certified causes of action in negligence, negligent misrepresentation, fraud, fraudulent misrepresentation, conspiracy, breach of the *Consumer Protection Act, 2002*, breach of contract and unjust enrichment against the defendants identified earlier;
- (b) approved the class definition, which includes residents of Canada who participated in the Gift Program in any of the years 2005 to 2009, inclusive;
- (c) approved the common issues identified in section III.A.3 of these reasons;
- (d) found that a class proceeding is the preferable procedure for the resolution of the common issues and the claims of class members; and
- (e) found that Cannon would fairly and adequately represent the Class, does not have an interest in conflict with the Class and has produced an appropriate plan for notifying the Class and advancing the proceeding.

408 For these reasons, the action will be certified under s. 5(1) of the *C.P.A.*

409 I now turn to the motions for summary judgment.

## **IV. The Summary Judgment Motions**

### ***A. The Test for Summary Judgment***

410 In January 2010, the test for summary judgment was changed from "no genuine issue for trial" to "no genuine issue requiring a trial." Rule 20.04(2) now provides:

20.04 (2) The court shall grant summary judgment if,

- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;

...

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence

411 In *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.), released on December 5, 2011, the Court of Appeal, in a unanimous decision, cleared away much of the confusion and conflicting jurisprudence about the circumstances in which summary judgment can be granted. In the process, the Court of Appeal disposed of five jointly-heard appeals of summary judgment decisions through the application of the new "full appreciation test."

412 The new test focuses on procedural fairness and substantive fairness in reaching a just disposition of the parties' dispute. The Court cautioned that before embarking on the summary judgment analysis, and using the enhanced powers under Rule 20.04(2.1), the motion judge must apply the full appreciation test: "Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?"

413 The Court of Appeal pointed out that some cases, by their very nature, will be more suitable for determination on summary judgment than other cases and the analysis of whether a just result can be obtained must be carried out on a case-by-case basis.

414 The Court of Appeal summarized its opinion at paras. 72-75:

We have described three types of cases where summary judgment may be granted. The first is where the parties agree to submit their dispute to resolution by way of summary judgment.

As will be illustrated below, at paras. 101-111, a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The second class of case is where the claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motion judge must apply the full appreciation test.

The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record - as may be supplemented by oral evidence under rule 20.04(2.2) - or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

Finally, we observe that it is not necessary for a motion judge to try to categorize the type of case in question. In particular, the latter two classes of cases we described are not to be viewed as discrete compartments. For example, a statement of claim may include a cause of action that the motion judge finds has no chance of success with or without using the powers in rule 20.04(2.1). And the same claim may assert another cause of action that the motion judge is satisfied raises issues that can safely be decided using the rule 20.04(2.1) powers because the full appreciation test is met. The important element of the analysis under the amended Rule 20 is that, before using the powers in rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences, the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial.

415 The Court of Appeal described, at paras. 51 and 52, the circumstances in which, applying the full appreciation test, summary judgment might be appropriate. It cautioned against the use of summary judgment in cases where it is necessary to make numerous findings of fact based on an extensive testimonial record. In contrast, it said, document cases, or cases in which there are few contentious factual issues, may be more amendable to summary judgment:

We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.

In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.

416 The Court of Appeal emphasized that "full appreciation" means more than simply being aware of, familiar with and capable of interpreting the written record. The judge must ask whether he or she can fairly weigh the evidence, draw inferences from the evidence, or evaluate the credibility of witnesses without the "opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first hand" (at para. 55).

417 Having set out the principles applicable to summary judgment motions, the Court of Appeal proceeded to apply those principles to each of the five appeals before it. Two of those cases are particularly instructive.

418 The first case involved two related appeals, *Mauldin v. Hryniak* (C52912) and *Bruno Appliance and Furniture v. Hryniak* (C52913) on appeal from *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2010] O.J. No. 4661, 2010 ONSC 5490 (Ont. S.C.J.). The plaintiffs in both actions were investors who claimed that they had been defrauded by the defendant, Hryniak. They sued Hryniak for fraud and his law firm and one of its partners for fraud, conspiracy, negligence and breach of contract. The motion judge granted judgment against Hryniak, disbelieving his evidence and concluding that he had defrauded the plaintiffs. The motion judge concluded that a trial was necessary to determine whether Hryniak's lawyer was guilty of fraud or whether he was an innocent dupe and had liability apart from the claim for fraud.

419 The summary judgment motion had been lengthy and complex. The hearing lasted four days and there was affidavit evidence from eighteen witnesses. The motion record consisted of twenty-eight volumes and the cross examinations had taken three weeks. The amounts at issue were approximately \$1 million and \$1.2 million.

420 The Court of Appeal concluded that cases such as *Mauldin v. Hryniak* will generally require a trial and should not be decided on summary judgment. It noted its observations, at paras. 50 and 51 of its reasons, that a case that calls for "multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record" will not generally be appropriate for summary judgment.

421 The Court of Appeal found, at para. 148, that the actions had all the hallmarks of the kind of case in which, generally speaking, the full appreciation of the evidence and issues could only be achieved at trial. These included:

- a voluminous motion record;
- numerous witnesses, affidavits and extensive cross-examinations;
- different theories of liability against each of the defendants;
- the need to make numerous findings of fact;

- conflicting evidence of the main witnesses and the need for credibility determinations; and
- the absence of reliable documentary yardsticks to assess the credibility of the witnesses.

422 The Court of Appeal noted that the motion for summary judgment in that case had not provided access to justice, proportionality and costs savings - on the contrary, it had taken considerable time and resulted in enormous costs to the parties. Any efficiency achieved by the motion, insofar as Hryniak's liability was concerned, was attenuated by the decision that a trial was required to determine the liability of Hryniak's lawyer.

423 In spite of the Court of Appeal's conclusion that the case was not appropriate for summary judgment, and as a clear and unique exception to the principles it had stated, the Court considered whether the motion judge was correct in granting partial summary judgment. It concluded that the motion judge was correct, in one of the two actions, because Hryniak's defence had no credibility. In the other action, it concluded that the decision could not stand, because the motion judge had failed to address one of the elements of civil fraud and because it was not clear from the evidence whether Hryniak had obtained the benefit of the plaintiff's funds.

424 The second case was *394 Lakeshore Oakville Holdings Inc. v. Misek* (C53035), an appeal from a decision reported at [2010] O.J. No. 4659, 2010 ONSC 6007 (Ont. S.C.J.). The action involved a claim for a prescriptive easement over the property of the respondent. The motion judge, after reviewing the evidence, had concluded that the appellants simply had a personal licence to pass over the respondent's lands and not an easement that ran with the lands.

425 In dismissing the appeal, the Court of Appeal described the case as a good example of the kind of case that would be appropriate for summary judgment based on the application of the "full appreciation" test: the documentary evidence was limited and not contentious; there were a limited number of relevant witnesses; and the governing legal principles were not in dispute.

426 Following the release of the decision of the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, I invited the parties to make further written submissions concerning the application of the decision in this case. I have now received and considered those submissions, and I now turn to the summary judgment motions.

#### ***B. ParkLane's Motion for Summary Judgment***

427 ParkLane moves for summary judgment dismissing Cannon's claim. I will begin by setting out the submissions of the parties. I will then consider whether ParkLane has met the burden of showing that there is no genuine issue requiring a trial.

##### *1. Submissions of ParkLane*

428 ParkLane's argument is simple. It says that by signing the Donor Declaration and the Tax Risk Disclosure Statement, Cannon accepted the risk of his claim for a tax deduction being refused and expressly released ParkLane from liability for the claims advanced in this action. I have summarized these documents earlier, under the heading "Contractual Materials for the Gift Program."

429 To understand ParkLane's submission, it will be helpful, however, to set out portions of the text of the Donor Declaration signed by Cannon in 2006:

1. I have read and fully understand all and any written materials and documents in the marketing and donor kit prepared by [ParkLane] ... I acknowledge that, except for what is contained in the Documents, no other promise, representation or warranty has been made by ParkLane to, or relied upon, by the undersigned.
2. I have received independent professional advice in respect of the Program from my owner personal advisor/lawyer/accountant (my "Advisor"), as the case may be. I fully understand such advice and information provided to me by my Advisor in respect of all and any legal, commercial/business and tax consequences related to my participation in the

Program ... *I am prepared to accept any and all tax risks whatsoever related thereto, including the risk that the charitable donation, or a portion of it, may be reassessed and even denied.*

3. I understand that to facilitate various transactions in connection with the Program, monies have been or will be deposited to and/or transferred from accounts with one or two chartered bank(s) (collectively, the "Bank"). I further acknowledge that *ParkLane is acting, in addition to its role in marketing and facilitating the Program, as escrow agent in connection with the Program, and in such specific capacity as escrow agent*, is authorized to receive funds and to disburse them in accordance with written directions. Aylesworth LLP ("Aylesworth") is also acting as escrow agent in respect of the Program. I hereby unconditionally release the Bank, ParkLane and Aylesworth and their respective partners, officers, authorized agents and employees, from any and all claims or liabilities of any kind whatsoever that I or my executors and assigns, now has or in the future may have with respect to matters occurring on, prior to or after the date hereof, arising out of, based upon, resulting from or in connection with the Declarant participating in the Program. [Underlining in original; italics added].

430 ParkLane relies on the following facts, which are not in dispute:

- Cannon was a reasonably experienced and sophisticated investor;
- he had no direct dealings with anyone at ParkLane concerning the Gift Program and relied exclusively on Gacich, his "trusted financial advisor";
- Gacich was fully aware of the nature of the Gift Program, including the role of the Bermuda Trust and the royalty agreements between TTL and the charities - he thought that the Gift Program was "well thought out, well put together" and "a brilliant structure" - Gacich himself contributed to the Gift Program and recommended that his 80 clients do so;
- when Gacich originally discussed the Gift Program with him, Cannon thought it was "too good to be true", but after receiving information from Gacich, and Gacich's recommendation, he decided to participate;
- Cannon was aware of and understood the risks of participating in the Gift Program, including the risk that his donation might be re-assessed or denied;
- Gacich reviewed the Donor Declaration and Tax Risk Disclosure statements with his clients, including Cannon, before having them executed;
- Cannon executed and delivered a Donor Declaration in 2005; he executed a second Donor Declaration in 2006, as well as a Tax Risk Disclosure Statement; and
- Cannon read and understood the Donor Declaration and the Tax Risk Disclosure Statement before he signed them.

431 ParkLane also notes that in the Donor Declarations, Cannon declared and agreed that:

- he had read and fully understood all the Gift Program Materials, including (in 2006) the Tax Risk Disclosure Statement, in respect of his participation in, and donations to the Gift Program;
- except for what was contained in the materials provided by ParkLane, no other promise, representation or warranty had been made by ParkLane to him, or had been relied upon, by him;
- he had received independent professional advice in respect of the Gift Program from his own personal advisor /lawyer / accountant;
- he fully understood the advice and information provided to him by his own personal advisor/lawyer/accountant in respect of all and any legal, commercial/business and tax consequences related to his participation in the Gift Program, including the fact that up to 8% of his aggregate donation amounts would be used to pay charity fundraising fees;

- he accepted any and all tax risks whatsoever related to his participation in the Gift Program, including the risk that the charitable donations, or a portion of them, might be re-assessed and even denied; and
- he unconditionally released ParkLane and its officers and employees from any and all claims or liabilities of any kind whatsoever that he then had, or in the future might have with respect to matters occurring on, prior to or after the date of the Donor Declaration, arising out of, based upon, resulting from or in connection with his participation in the Gift Program.

432 Gacich has sworn that:

- at no time did he "promise" Cannon that he would receive a tax credit;
- he reviewed the risks associated with the Gift Program with Cannon, including the risk that no tax credit might be allowed;
- Cannon understood the risks and understood the nature and scope of the release that he was giving to ParkLane.

433 Cannon has not contradicted Gacich's evidence.

434 ParkLane says that this is exactly the kind of document-driven case, with limited controversial facts, that the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch* stated would be suitable for summary judgment. It says that the issue is a narrow one, namely the interpretation and application of the release clause in the Donor Declarations signed by Cannon.

435 ParkLane relies, in particular, on the decision of the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, [2010] 1 S.C.R. 69, [2010] S.C.J. No. 4 (S.C.C.), ("Tercon Contractors"). It says that the language of the exclusion clause is clear and unambiguous, it is not unconscionable and that public policy requires its enforcement.

## 2. Submissions of the Plaintiff

436 The plaintiff makes five submissions in response to ParkLane's motion for summary judgment.

437 *First*, he says that the release clause in the Donor Declaration is based on a factual premise that does not exist, namely the making of a valid charitable gift and, since the premise was not realized, the release is of no effect.

438 *Second*, referring to the language I have italicized in clause 3 of the Donor Declaration, he says that the release clause is confined to ParkLane's role as an escrow agent, and does not release ParkLane from its liability for misconduct as a promoter and operator of the Gift Program.

439 *Third*, and alternatively, he says that if the release is not so confined, the release is ambiguous and, applying the *contra proferentem* rule, the ambiguity must be resolved in his favour. This, he says, will require a trial in order to weigh the evidence of the factual matrix underpinning the interpretation of the contract.

440 *Fourth*, he says that there are "genuine issues requiring a trial" regarding the validity and enforceability of the contract, including issues of (a) whether there has been a total failure of consideration; (b) fraud or fraudulent misrepresentation on the part of ParkLane; (c) negligent misrepresentation by ParkLane; and (d) whether he is entitled to rescission under the *Consumer Protection Act, 2002*. If these issues are determined in his favour, the contract may be vitiated, voidable, rescinded or otherwise unenforceable.

441 *Fifth*, and finally, the plaintiff says that the *Tercon Contractors* analysis will require a determination of whether the release clause is unconscionable and whether there are public policy considerations that outweigh enforcement and the resolution of these issues requires a trial.

## 3. Discussion

442 I do not consider it necessary to consider Cannon's first, second and third submissions concerning the interpretation of the release, because I have concluded that, even if he does not succeed on these issues, a genuine issue requiring trial will remain concerning the enforceability of the contract as a whole.

443 I will elaborate, but in summary I have concluded that there is a genuine issue, requiring a trial, about whether the contract between Cannon and ParkLane, including the Donor Declaration and the Tax Risk Disclosure Statement, is vitiated by fraud, unenforceable due to unconscionability or for reasons of public policy, or subject to rescission under the *Consumer Protection Act, 2002*. I have concluded that the issues are of such factual complexity, and so dependent on findings of credibility that will require the balancing of the evidence of multiple witnesses, that a full appreciation of the evidence can only be obtained at a trial. Moreover, the potential finding of fraud is so serious that fairness to the parties requires a trial.

444 In light of these conclusions and because a trial will be required, I do not propose to comment on the issues of contractual interpretation raised by ParkLane. Those issues should be left to the trial judge, who will consider them in light of the entire factual matrix revealed at trial.

445 I turn to a consideration of the various grounds on which the contract between Cannon and ParkLane may be voided or found unenforceable in this case.

#### **(a) Fraud and Fraudulent Misrepresentation**

446 There is ample authority for the proposition that "fraud vitiates every contract and every clause in it": *S. Pearson & Son Ltd. v. Dublin Corp.*, [1907] A.C. 351 (U.K. H.L.), at 362. See also: *Ballard v. Gaskill*, [1955] 2 D.L.R. 219, 14 W.W.R. 519 (B.C. C.A.); *1018429 Ontario Inc. v. Fea Investments Ltd.*, [1999] O.J. No. 3562, 125 O.A.C. 88 (Ont. C.A.); *Francis v. Dingman* (1983), 43 O.R. (2d) 641, 2 D.L.R. (4th) 244 (Ont. C.A.), leave to appeal to S.C.C. refused, (1984), 23 B.L.R. 234 (note) (S.C.C.); *Nepean Hydro-Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347, [1982] S.C.J. No. 15 (S.C.C.).

447 If it were determined at trial that the Gift Program was a fraud, intended to enrich the promoters by dishonestly depriving the Class of their donations, then the contracts signed by Cannon, including the release clause in the Donor Declaration, could be considered part of the means used to perpetrate the fraud and therefore unenforceable. The same result would follow if ParkLane were found liable for fraudulent misrepresentation.

448 The application and effect of the proposition that fraud vitiates the contract is demonstrated by two decisions of our Court of Appeal. The first case is *Francis v. Dingman*, above, in which the defendant had entered into an agreement with the plaintiffs to purchase their shares in a family newspaper business. It was agreed that if, within ten years, the defendant resold the shares to someone outside the family, he would pay the plaintiffs the difference between the price he had paid for their shares and the resale price. About three years later, the defendant received an offer from a third party to purchase all the shares in the newspaper business. He told the plaintiffs that he had received an offer to purchase the shares, and that he wanted to come to an agreement with them concerning the price to be paid for their shares. When the plaintiffs asked about the price at which the shares were being acquired by the third party, the defendant responded, falsely, that the third party would not agree to the disclosure of this information, but he said that it was a fair price. The defendant also said that if the plaintiffs did not accept his offer for the purchase of their shares, he would not sell the newspaper until the expiry of the ten year period and the plaintiffs would get nothing more for their shares.

449 Predictably, the plaintiffs agreed to sell their shares to the defendant and later discovered that the price paid by the defendant was much less than the amount he had received from the third party.

450 The trial judge dismissed the plaintiffs' claim for fraudulent misrepresentation and held that, as there was no fiduciary relationship between the parties, a claim for negligent misrepresentation could not be made out. The Court of Appeal reversed. In response to the defendant's submission that the plaintiffs had executed a release of the defendant, Lacourcière J.A. held that the release could not stand in the face of, among other things, the fraudulent misrepresentation that the third party would not complete the transaction if the share price was disclosed. He stated, at paras. 28-30:

A misrepresentation is fraudulent and not merely negligent when it can be said that its maker has an absence of honest belief in its truth. In holding that the misrepresentation regarding disclosure of the price to the appellant Francis was not fraudulent, the learned trial judge stated that the respondent seemed to assume that the Thomson group [the purchaser of the shares] would not let him disclose it to anyone, not just the press and the general public. However, there was no evidence to support that statement and it is inconsistent with the evidence of the respondent that he did not think of asking Thomson for permission to disclose the price to the appellant Francis, although it would have been a decent thing to do. It is also inconsistent with the finding of the learned trial judge that the respondent did not ask permission to reveal the price to the plaintiffs because he had no intention of sharing with them the full proceeds of the sale.

I would go further and say that the respondent, who was found to have intended to not share the full proceeds of the share, could not have entertained an honest belief in the truth of the statement that Thomson would not go through with the transaction if the price was disclosed to the appellants. I take the view that this amounted to more than a negligent misrepresentation as found by the learned trial judge and constituted, in fact, a fraudulent misrepresentation within the meaning of Lord Herschell's statement in *Derry et al. v. Peek* (1889), 14 App. Cas. 337 at p. 376:

... if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

Accordingly, the consent and release which are based not only on incomplete information in breach of a fiduciary obligation of full disclosure but also on fraudulent misrepresentation, cannot be allowed to bar the appellants' action: 38 Hals., 3rd ed., pp. 964-6, paras. 1670-72.

451 Goodman J.A., with whom Zuber J.A. agreed, found that it was "inconceivable" on the evidence that the defendant honestly believed that the third party would cease negotiations if he disclosed the amount of the offer for the shares. He found that the defendant must have known that the third party would be aware that he would have to reveal the price to all shareholders. He concluded that the release was vitiated by the fraudulent misrepresentation - at para. 52:

A release obtained by a fraudulent misrepresentation will be set aside: see *Chitty on Contracts*, 24th ed. (1977), p. 643, para. 1359. In my opinion the plaintiff is entitled to rescind the agreement dated December 10, 1973, and to have a declaration that the release given pursuant to the terms thereof is null and void.

452 The second case is *1018429 Ontario Inc. v. Fea Investments Ltd.*, above. The plaintiff had bought an apartment building from the defendant. The agreement of purchase and sale contained warranties that there was no litigation pending or threatened and that all rent increases had been in accordance with the rent control legislation. The warranties were to survive closing for a period of one year. The agreement contained a disclaimer that the purchaser would have no remedy for breach of warranty or misrepresentation, other than rescission. Shortly after closing, the purchaser discovered that there had in fact been a notice from the Ministry of Housing to the defendant concerning high rent levels. The Ministry subsequently made an order rolling back rents on some of the apartments. The plaintiff brought an action against the vendor for damages for fraudulent misrepresentation. The Court of Appeal affirmed the trial judge's award of damages for fraudulent misrepresentation.

453 The Court of Appeal adopted the following observation in Waddams, *The Law of Contract*, 4th ed. (1999), at p. 299:

A fraudulent misrepresentation is a statement known to be false or made not caring whether it is true or false. A person induced to enter into a contract by such a statement is entitled, *prima facie*, to damages for fraud ... and to rescission.

454 The Court of Appeal accepted the trial judge's conclusion that the defendant either knew that the rents were illegal or was reckless about the legality of the rents being charged and knew that it was not disclosing this fact to the purchaser. The Court of Appeal also accepted the trial judge's conclusion that the purchaser had relied upon the representation made by the vendor.

455 Turning to the question of remedies, the Court of Appeal held that in cases of fraudulent misrepresentation the innocent party is entitled to avoid the contract and sue for damages. In response to the defendant's submission that the contract excluded any remedy other than rescission, the Court of Appeal cited with approval the following extracts from Professor Waddams' text and from Professor Fridman's work - at paras. 50 and 51:

The leading contracts scholars and case authorities do not support this proposition. Professor Waddams, in *The Law of Contracts*, supra, at p. 307, states:

A fraudulent misrepresentation permits the party deceived to avoid the contract and to sue in tort for damages based on the plaintiff's out-of-pocket loss including consequential damages but not expectation or loss of bargain damages.

Professor Fridman, in *The Law of Contract*, 3rd ed. (1994), at p. 294, states:

A fraudulent misrepresentation is one which is made with knowledge that it is untrue and with the intent to deceive. It may even constitute a term of the contract. Whether it does or not is immaterial, since fraud gives rise to effects in the law of contract and the law of tort. A contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent. Whether or not the effect of such fraud is to induce a mistake (which might render the contract void), the consent of the innocent party may be revoked at his option.

The case law in Ontario echoes Professors Waddams and Fridman.

456 The Court of Appeal found that the disclaimer clause in the agreement of purchase and sale, waiving remedies for breach of warranty or misrepresentation, did not immunize the defendant from a claim for damages for fraudulent misrepresentation.

457 These authorities demonstrate several propositions that are pertinent to this case:

(a) a fraudulent misrepresentation is one that is made with knowledge that it is untrue, or recklessly, without caring whether it is false;

(b) determining whether a fraudulent misrepresentation has been made requires a factual inquiry into the knowledge and state of mind of the representor to determine, among other things, whether the representor had an honest belief in the truth of the statement;

(c) a contract procured by fraudulent misrepresentation may be voided by the innocent party;

(d) if the contract is voided, any release or limitation of liability contained in the contract will also fall; and

(e) the innocent party will be entitled to rescission or damages for fraudulent misrepresentation.

458 Counsel for ParkLane submits that the exculpatory clause in the Donor Declaration is extremely broad and applies to all claims, including not only claims for breach of contract and misrepresentation, but also claims for fraud and unconscionable conduct. He says that the clause bars all claims, regardless of the potential that the contract may be unenforceable. Suffice to say that the language of the Donor Declaration is general and does not expressly refer to claims for misrepresentation, fraud, or unconscionability. To the extent it did, or did so by implication, there would be a strong argument that such a clause would be a nullity, based on the principles expressed in *S. Pearson & Son Ltd. v. Dublin Corp.*, above.

459 As I will explain, the plaintiff's evidence satisfies me that a trial is required to determine whether ParkLane committed a fraud or made fraudulent misrepresentations that would entitle Cannon to void the contract.

**(b) Consumer Protection Act, 2002**

460 The *Consumer Protection Act, 2002* stipulates that the procedural and substantive rights afforded by the statute cannot be waived. Section 7(1) provides:

The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

461 If it is determined at trial that ParkLane made false, misleading or deceptive representations, and thereby breached s. 17 of the statute, the release language in the Donor Declaration would be to no avail and Cannon may have a right of rescission.

### (c) Unconscionability and Public Policy

462 In *Tercon Contractors*, the Supreme Court of Canada laid to rest the doctrine of fundamental breach, as it applied to the effect of an exclusion clause. It substituted an analytical framework that requires the Court to determine:

- (a) whether, as a matter of interpretation, the exclusion clause applies to the circumstances established in the evidence;
- (b) if the exclusion clause applies, whether the clause was unconscionable and therefore invalid, at the time the contract was made; and
- (c) if the clause is held to be valid under (b), whether the Court should nevertheless refuse to enforce the exclusion clause, because of an "overriding public policy, proof of which lies on the other party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts" (at para. 123).

463 The analysis under (b) - unconscionability - will require an examination of the factual circumstances in which the contract was made, including whether there was unequal bargaining power. As applied to this case, the examination could include the role played by the Distributors and the amount and accuracy of information provided by ParkLane to the Distributors, as well as any limitations on the ability of the Distributors to disclose such information to their clients.

464 The analysis under (c) - an overriding public policy - will also require close consideration of the circumstances surrounding the making of the contract. As Binnie J. observed in *Tercon Contractors*, at para. 120:

Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause.

[emphasis added]

465 I turn now to the question of whether there is a genuine issue requiring a trial in this matter.

#### 4. Is a Trial Required?

466 ParkLane does not, in general, contest the propositions of law I have set out above. It submits, however, that Cannon has failed to show that his claims of fraud and unconscionability have a real chance of success and *require* a trial. It says that he has failed to provide "real evidence to support the finding, not inference and speculation" that ParkLane committed a fraud: see *Vaillancourt v. Watson*, [1994] O.J. No. 214, 69 O.A.C. 227 (Ont. C.A.) at para. 21. ParkLane says that Cannon cannot simply rest on his pleading or on assumptions about what the evidence may show at trial.

467 ParkLane relies on *Canada Trustco Mortgage Co. v. Barclay*, [1996] O.J. No. 2734, 12 C.C.L.S. 286 (Ont. Gen. Div.), which it says is on all fours with the facts of this case. Canada Trustco had brought a motion for summary judgment against eleven investors who had borrowed from it in order to finance their investments in a series of tax shelters. The investments went bad and the investors suffered a financial loss.

468 There was no dispute that the defendants had borrowed money from Canada Trustco or that they were in default. They asserted, however, that Canada Trustco had misrepresented the investment, that the investment breached the *Securities Act* because there was no offering memorandum, and that the representatives of the tax shelter had acted as agents for Canada Trustco.

469 Chadwick J. found that there was no genuine issue for trial on all three issues. There was no evidence of any close connection between Canada Trustco and the promoters of the tax shelter. Nor was there evidence of any misrepresentation. There was no evidence that Canada Trustco was aware of the *Securities Act* requirements and no evidence to show any agency relationship between the promoters and Canada Trustco.

470 ParkLane suggests that these circumstances are similar in the case before me because Cannon had little real contact with ParkLane and obtained his information from Gacich.

471 In my view, the differences between this case and *Canada Trustco* are significant. They only serve to highlight why this case is not suitable for summary judgment. Canada Trustco was simply a lender. It did not create the tax shelter and it did not market it. It loaned money to the defendants to enable them to make an investment that they had already decided to make. In this case, in contrast, Furtak and ParkLane created the Gift Program and the entire structure that supported it. They created the marketing materials that contain the alleged misrepresentations at issue. They created the marketing structure, recruited the Distributors, trained them and told them what information they could and could not provide to their clients. Furtak also created the "back half" of the Gift Program, which funneled most of the profits of the Gift Program to the Bermuda Trust and to the ParkLane Defendants, which he owned or controlled.

472 Unlike the situation in *Canada Trustco*, and as I have discussed elsewhere in these reasons, there is evidence in this case to support the existence of an agency relationship between ParkLane and the Distributors, the denial in the distributorship agreement notwithstanding. In this case, unlike *Canada Trustco*, there was also an inextricable link between ParkLane and the donors.

473 On one view of the evidence, the Gift Program was a *bona fide*, well-designed plan to minimize taxes, the risks of which were clearly understood and accepted by all participants. One of those risks unfortunately came to fruition, as every donor was aware it might.

474 On another view of the evidence, the Gift Program was a giant shell game and the so-called Independent Financial Advisors (the "Distributors") were the shills. ParkLane's marketing materials created the impression that there really was a pea under the shell when the donor made a contribution, whereas in fact it was whisked away and into ParkLane's pocket as soon as the donor put money on the table. On this cynical view of the evidence, ParkLane's answer is akin to saying, "Well, we may have been playing a shell game, but your trusted financial advisor knew that there was no pea under any shell."

475 Cannon has demonstrated that there are serious issues to be tried concerning the Gift Program and the conduct of the defendants, including ParkLane, Appleby, the Lawyers and others who were instrumental in the establishment, marketing and operation of the Gift Program. I am satisfied that there is indeed a genuine issue requiring a trial concerning where ParkLane's conduct lies on the scale between the innocent view and the sinister view - between *bona fides* and fraud. One of the issues to be considered, by no means the only one, is whether the disclosure of information concerning the "back half" of the Gift Program by ParkLane to the Distributors, to the extent that disclosure actually occurred, is a defence to the plaintiff's claim.

476 I am also satisfied that in the particular circumstances of this case, it is in the interests of justice that the weighing of the evidence, the evaluation of the credibility of witnesses and the drawing of inferences from the evidence should only be exercised by a trial judge.

477 I come to this conclusion for several reasons. First, a finding of fraud is a serious matter and proof of civil fraud, although on a balance of probabilities standard, requires rigorous examination of the totality and quality of the evidence as a whole. This frequently requires an assessment of the credibility of witnesses and, in a case such as this, may require the evaluation,

assessment and comparison of the credibility of a number of witnesses. Even using the motion judge's expanded powers under Rule 20.04(2.1) a summary judgment motion is not a suitable forum for this kind of assessment.

478 Second, as the authorities indicate, the defendant's knowledge and state of mind are vital considerations in cases of fraud and fraudulent misrepresentation. Did the defendant have an honest belief in the truth of the statement? Were the representations made recklessly, not caring whether they were true or false? These issues are best explored through examination and cross-examination in the context of all the other evidence in the crucible of trial.

479 Third, the very nature of the inquiries in cases of fraud, unconscionability and public policy requires that the factual foundation be carefully examined and reconstructed. This case raises an issue about the validity of a tax planning device that was marketed to almost 10,000 Canadians. It raises issues about the proper use and alleged misuse of the tax laws pertaining to charities. These are matters of public interest and it is desirable that there be a full airing of the issues in the context of a trial.

480 ParkLane has submitted, relying on *Tercon Contractors* and by way of reply to Cannon's arguments, that the Court has "no discretion to refuse to enforce a valid and applicable contractual exclusion clause" absent "some paramount consideration of public policy sufficient to over-ride the public interest in freedom of contract to defeat the contractual rights of the parties" (*Tercon Contractors* at para. 82). It also submits that Cannon's evidentiary burden is not simply to show that there are triable issues, but rather to show that there is real evidence to support a finding that ParkLane is prevented from relying on the exclusion clause for reasons such as fraud.

481 The first part of this submission begs the question of whether the exclusion clause is "valid". As I have shown, the authorities support the conclusion that if the contract is vitiated by fraud, the exclusion clause falls with it. The second part of this submission over-states Cannon's burden. He is not required to affirmatively establish that ParkLane cannot rely on the exclusion clause. He is required to show, by real evidence, that there is a genuine issue requiring a trial.

482 In my view, Cannon has done just this. The ParkLane marketing brochures were the only documents that were designed with the specific purpose that they would be provided to prospective donors. They contained statements such as:

- the Donations Canada Trust had been established "with a funding commitment of \$200,000,000 *in cash* to promote charitable giving in Canada" (emphasis added);
- the Gift Program had, as of January 2, 2007, "raised far in excess of \$400,000,000 for various registered charities";
- participation in the Gift Program would enable taxpayers to make "cash donations" to charities;
- the charity would receive "cash" from both the donor and from the redemption of the sub-trust units;
- there would be a \$7,500 "cash distribution" to the charity from the redemption of the sub-trust units in addition to the participant's \$2,500 "cash donation";
- the Harris Comfort Letter referred to the donor making a "cash donation" and a "donation in kind" to the charity.

483 These statements are capable of being interpreted as representations that there was \$200 million in real cash waiting to be pumped into Canadian charities to match the donors' cash donations and that the charities would be receiving real cash to support the charitable receipt that the donors would receive. Structuring the program so that the charity got next to nothing and most of the money went into the pockets of the promoters, and marketing the program in a way that masked or distorted the truth, raises a serious issue of whether the ParkLane Defendants should be able to rely any of the exclusionary language in their contracts.

484 In summary, while there is certainly an argument that the exclusion clause in the Donor Declaration bars Cannon's claims under the ordinary principles of contractual interpretation, this will not entitle ParkLane to summary judgment if Cannon is able to establish fraud, unconscionability, a breach of the *Consumer Protection Act, 2002* or a public policy reason not to enforce the contract. The donors have ended up with nothing. The evidence raises real questions about whether the charities have ended

up with anything of real value. ParkLane, its Distributors, (a.k.a. "Independent Financial Advisors", a.k.a. "fundraisers"), its founder and its affiliates have ended up with most of the donor's money in their pockets.

485 Having regard to the evidence adduced by both sides, and for the reasons I have expressed, I am satisfied that the plaintiff has discharged the burden of showing that his claims have a real chance of success and that there is a genuine issue requiring a trial. I am also satisfied that fairness to both parties - not just the plaintiff - requires that there be a trial. It would not be possible to acquire a full appreciation of the evidence on the written record and that it would not be in the interests of justice to decide these issues on a motion.

### ***C. The Lawyers' Motion for Summary Judgment***

486 The Lawyers move for summary judgment dismissing Cannon's claims for negligence and negligent misrepresentation. I will begin by setting out the positions of the parties, followed by my analysis of the evidence and the arguments.

#### *1. Submissions of the Lawyers*

487 The Lawyers say that Cannon is unable to establish that he was in a sufficiently close relationship with Harris and the Law Firms to give rise to the existence of a duty of care. They rely, in particular, on the decision the Supreme Court of Canada in *Cooper v. Hobart*, above, which I will discuss.

488 The Lawyers submit that the uncontested evidence is that Harris issued each Opinion Letter on the express understanding that:

- (a) the Opinion Letter was exclusively for the benefit of ParkLane (this was stated on the face of the letter);
- (b) donors and potential donors would not be permitted to view the Opinion Letter;
- (c) donors would be receiving independent professional tax advice;
- (d) professional advisors to the donors and to potential donors could view the Opinion Letter for the sole purpose of providing advice to their clients (although the ability of such advisors to view the opinion would be subject to strict limits and controls);
- (e) donors would be required to execute documentation acknowledging receipt of independent professional advice prior to participating in the Gift Program; and
- (f) donors would be required to execute documentation acknowledging the assumption of tax risks, including the risk of C.R.A. reassessment, relating to their participation in the Gift Program.

489 The Lawyers' argument is that they had no relationship of proximity to Cannon and therefore owed him no duty of care. It follows, they say, that Cannon's claims in negligence and negligent misrepresentation cannot succeed. They point out that Cannon had no direct contact with Harris, never saw the opinions he had written, and obtained advice concerning the Gift Program from Gacich. They say that Cannon's knowledge of the Gift Program was informed by the promotional materials he received in each of 2005 and 2006, by the contractual documents he executed in each of those years, by the advice he received from Gacich and by his own knowledge, in the fall of 2006, before he filed his own tax return, that C.R.A. would be auditing the Gift Program. They say that Cannon knew from the Comfort Letters contained in the ParkLane brochures that Harris and the Law Firms accepted no responsibility to the donors and Cannon was fully aware of the risk of re-assessment by C.R.A. He executed the Donor Declarations and the Tax Risk Disclosure Statement (in 2006), in which he confirmed his awareness of the risks and the fact that he had received independent advice from Gacich.

490 The Lawyers say that, as Cannon's claim against them is for pure economic loss and does not fit into one of the recognized duty of care categories, Cannon is required to establish a duty of care based on the principles set out in *Anns v. Merton London Borough Council (1977)*, [1978] A.C. 728 (U.K. H.L.) and amplified by the Supreme Court of Canada in *Cooper v. Hobart*.

491 On the first stage of the *Cooper v. Hobart* analysis, *proximity*, the Lawyers say that the relationship between Cannon and Harris was not sufficiently close to make it just and fair to impose a duty of care on Harris. On the second stage of that analysis, *public policy*, the Lawyers say that imposing liability on the Lawyers would give rise to indeterminate liability to an indeterminate class in circumstances where they took deliberate and reasonable steps to avoid such liability.

492 With respect to the claim in negligent misrepresentation, the Lawyers say that no duty of care was owed to Cannon on the basis of a "special relationship" and that reliance by Cannon was neither foreseeable nor reasonable.

493 The Lawyers say that this case falls nicely with the category of cases that the Court of Appeal has identified in *Combined Air Mechanical Services Inc. v. Flesch* as being suitable for summary judgment: there are few contentious factual issues, the case is largely documentary and it is not necessary to make findings of fact or to draw inferences based on contentious facts.

## 2. Submissions of the Plaintiff

494 Cannon submits that Harris had a broad role in the Gift Program, which was not limited to the preparation of his Opinion Letters and the Comfort Letters. He was involved in drafting some of the Gift Program documents and he reviewed and edited some of the promotional materials. He says that not only was Harris negligent in his preparation of the Opinion Letters and Comfort Letters, but he was negligent in the planning and creation of the Gift Program and the promotional materials, failed to provide appropriate information to Class members once he became aware of the C.R.A.'s position, and failed to allow the Class to view his Opinion Letters.

495 The plaintiff says that the Opinion Letters given by Harris are deficient in two ways:

- (a) they fail to disclose the "back half" of the Gift Program or to consider whether this will have tax consequences for donors;
- (b) they fail to address the issue, ultimately raised by the C.R.A. as a reason to disallow the deduction, of the lack of "donative intent" or genuine "impoverishment" of the donors.

496 As part of his case on certification, the plaintiff has adduced the evidence of Vern Krishna, Q.C., who expresses the opinion that Harris failed to address aspects of the Gift Program that Mr. Krishna considered to be an abuse of the charitable donation provisions of the *Income Tax Act*: the circular flow of funds and the enhanced benefit of a \$10,000 deduction that the taxpayer would receive for a charitable donation of only \$2,500.

497 Cannon disputes the assertion that his claim does not fall within a recognized category of economic loss. He says that these categories include negligent misstatement and that in any event, there is a body of authority, including the "disappointed beneficiaries" cases, which holds lawyers liable in negligence where they knew or ought to have known that the third party would be likely to rely on their work. Included in this line of cases, he says, is *Banyan Tree*.

498 In any case, the plaintiff says that this case can satisfy the test in *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*, above.

499 Cannon says that the claim against Harris for negligent misrepresentation meets the test in *Queen v. Cognos Inc.*, discussed above, the requisite proximity is present and the existence of a duty of care is not circumscribed by policy considerations or by the disclaimers and other exclusionary language in the Opinion Letters, Comfort Letters and contract documents.

## 3. Duty of Care: Is a Trial Required?

500 The factual foundation for the Lawyers' submission concerning proximity focuses on:

- (a) the lack of a direct connection between Cannon and Harris;
- (b) the fact that Cannon's knowledge of the Gift Program was informed by the advice he received from Gacich;

(c) the fact that Cannon was aware of the risks associated with the Gift Program, including the risk that his donation would be disallowed, and that he signed documents accepting those risks.

501 Viewed through a different lens, however, Harris and Gacich were simply accomplices in the marketing pitch for the Gift Program, which was carefully crafted by Furtak and ParkLane to distance themselves from the donors and to give the Gift Program an aura of credibility and respectability.

502 In the discussion of the facts under the heading of "Marketing Materials", I have described the brochure used by ParkLane to market the Gift Program and the prominent role given to Harris' Comfort Letters, his biography and his photograph. I do not propose to repeat those facts, but the language of the brochure can be interpreted as leading a reasonable reader to conclude that Harris had given opinions that the Gift Program complied with the *Income Tax Act* and that a donor would receive a valid tax credit for the full amount of the donation.

503 This conclusion could only have been reinforced by Harris' Comfort Letters, which, together with the other statements in the brochure, were manifestly intended to give the donor reassurance, that:

- (a) the Gift Program had been reviewed by Harris as a "top Canadian tax and legal professional" or "leading Canadian ... tax law professional";
- (b) Harris' tax opinion, which the donor's financial adviser would be permitted to review, was that the Gift Program complied with the *Income Tax Act*; and
- (c) the donor would receive a valid tax credit for a multiple of his or her personal donation.

504 In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.) at para. 3, the Supreme Court of Canada confirmed the test for negligence as requiring that the plaintiff demonstrate:

... (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damages; and (4) that the damages were caused, in fact and in law, by the defendant's breach.

505 In this case, the Lawyers address only the first component of the test - the existence of a duty of care. They are, of course, quite entitled to do so - to show that the claim has no chance of success because one of the critical elements of the cause of action cannot be established.

506 In *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35, 300 D.L.R. (4th) 415 (Ont. C.A.), the Court of Appeal summarized the test for the existence of a duty of care at para. 26:

In examining whether a duty of care is present, a court must first inquire whether the harm that occurred was the reasonably foreseeable consequence of the defendant's conduct. If foreseeability is established, the question becomes whether the parties were in a relationship of proximity to support a duty of care. If a court finds both foreseeability and proximity, it must then inquire at the second stage of the analysis whether any residual policy considerations negative the imposition of a duty of care.

507 In *Cooper v. Hobart*, the Supreme Court of Canada reviewed the test in *Anns v. Merton London Borough Council* and addressed the role of policy concerns in the scope of liability for negligence. The plaintiff had advanced money to a mortgage broker for investment and had lost much of it. She sued the Registrar of Mortgage Brokers, claiming that he negligently failed to supervise the conduct of the mortgage broker. She sought to have her action certified as a class proceeding. The issue was whether the Registrar owed a duty of care to the investing public for alleged negligence in failing to properly supervise the conduct of a company which he had licensed.

508 The Supreme Court stated that there are two stages in the duty of care analysis. In the first stage of the analysis, the Court looks at whether there is a sufficiently close relationship between the parties, such that it would be foreseeable, in the reasonable contemplation of the defendant, that carelessness on its part might cause damage to the plaintiff.

509 Foreseeability alone is not sufficient, however. The Court must undertake a proximity analysis to determine whether the relationship is sufficiently close to make it fair and just to impose a duty of care.

510 The Supreme Court said that proximity is used to describe relationships that give rise to duties of care. Some well-known categories have been considered to give rise to such a duty, but the law is evolving and new categories will be developed, applying a principled approach. Typically, a duty of care arises where the circumstances of the relationship 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": *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51 (S.C.C.) at para. 24.

511 In *Cooper v. Hobart*, the Supreme Court said that defining relationships that give rise to a duty of care may involve looking at issues of the parties' expectations, representations, reliance and the interests involved - at para. 34:

Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

512 The Court identified, at para. 36, certain categories in which proximity has been recognized. These include:

- the traditional and common case where the defendant's act causes foreseeable physical harm to the plaintiff or the plaintiff's property;
- cases of nervous shock;
- liability for negligent mis-statement;
- misfeasance in public office;
- a duty to warn of the risk of danger;
- a duty owed by municipalities to prospective purchasers;
- a duty of government authorities with respect to road maintenance;
- relational economic loss; and
- joint venture cases.

513 The Court stated that "when a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited."

514 If the case does not fall within one of these categories, the Court must determine whether there is sufficient proximity between the parties - such close and direct relationship between the parties, that it is fair and just to impose a duty of care.

515 The Supreme Court said that if foreseeability and proximity are established, one turns to the question of "whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care" (at para. 30). These considerations look to the overall consequences of recognizing a duty of care. The court explained this inquiry at para. 37:

This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

516 The Supreme Court emphasized that the second stage analysis is particularly important in novel cases that do not fall within existing categories where a duty of care has been historically recognized. Effectively, this analysis determines that even though foreseeability and proximity are present, giving rise to a *prima facie* duty of care, broader considerations of the effect on society of recognizing such a duty make it unwise to impose one.

517 In the companion case to *Cooper v. Hobart, Edwards v. Law Society of Upper Canada*, the plaintiffs in a proposed class action had paid money into a lawyer's trust account as consideration for gold delivery contracts made with a third party. The plaintiffs were not clients of the lawyer. The contracts turned out to be part of a fraudulent scheme. The lawyer alerted the Law Society of the unorthodox use of his trust account, and the Law Society commenced an investigation. Unfortunately, it was not completed in time to save the plaintiffs' investments. The plaintiffs alleged that that the Law Society had not acted fast enough and that, having been alerted of potential misconduct, it should have taken steps to ensure that the lawyer's trust account was not dissipated. The issues were: whether the Law Society owed a duty of care to persons, not clients of the solicitor, who deposit money into a solicitor's trust account, in respect of losses resulting from misuse of the account and, if there was such a duty, whether there were grounds rooted in policy that would limit or negate the finding of a duty.

518 The Supreme Court summarized the *Anns/Cooper v. Hobart* test as follows, at paras. 9 and 10:

At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

519 The Supreme Court found that the case did not fall within, nor was it analogous to, any category of cases in which a duty of care had previously been recognized. Thus, the plaintiff was required to establish foreseeability and proximity. There was nothing in the *Law Society Act*, R.S.O. 1990, c. L.8, the governing statute, to impose a private law duty of care on the Law Society. Rather, the legislation was geared towards the protection of clients, as opposed to creating a private law duty of care to members of the public who deposit money in a lawyer's trust account. There were existing mechanisms, through the Law Society's Compensation Fund and lawyers' mandatory professional liability insurance, to compensate clients who suffer losses due to dishonesty or negligence of lawyers. Above all, s. 9 of the *Law Society Act* conferred a statutory immunity on the Treasurer, benchers and officials of the Society for acts done in the performance of their duties. This precluded an inference

that the statute was intended to provide protection to members of the public. Accordingly, the Supreme Court found that there was no *prima facie* duty of care. Even if there was a duty of care, it would be negated by policy considerations.

520 In this case, the issue is whether a lawyer who provides an opinion concerning the compliance of a charitable donation program with the *Income Tax Act* and regulations owes a duty of care to donors who have not received or read the opinion and who have been informed that the opinion is available for review by their financial advisors without responsibility on the part of the lawyer. The plaintiff argues that this case is analogous to cases that have recognized proximity between a solicitor and investors or between a solicitor and beneficiaries who have suffered loss due to the negligence of the solicitor, even though they were not in a direct solicitor and client relationship.

521 In *Delgrossos v. Paul* (1999), 45 O.R. (3d) 605, [1999] O.J. No. 5742 (Ont. Gen. Div.), the plaintiff, along with other proposed class members, had invested his RRSPs in mortgages that were syndicated by one of the defendants. The mortgages had been prepared and registered on the subject properties by a solicitor, who was named as a defendant. The investments collapsed and the plaintiff sued the solicitor, alleging that he was negligent and that he knew or ought to have known that the mortgages were part of a fraudulent scheme. Sharpe J. acknowledged that the claim was "somewhat novel", but noted that there was a "developing line of authority" that the plaintiff could draw upon. He referred to *Filipovic v. Upshall* (1998), 19 R.P.R. (3d) 88 (Ont. Gen. Div.) as well as the "disappointed beneficiary" cases: *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C. S.C.) and *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495 (B.C. S.C.). He observed, at para. 8:

While I agree that the claim against Paul is somewhat novel, there is a developing line of authority the plaintiff can draw upon. As noted by Chapnik J. in *Filipovic v. Upshall* (1998), 19 R.P.R. (3d) 88 (Ont. Gen Div.) at pp. 104-05, there is a line of cases that holds a solicitor may place himself or herself in a sufficient relationship of proximity to a third party to owe that party a duty of care. In *Filipovic*, the solicitor was retained by a corporation with respect to a real property transaction. The issue was whether the solicitor was liable to the plaintiffs who were investors in the transaction. The plaintiffs thought they were acquiring a beneficial interest in property, but in fact they were shareholders in the corporation. While the solicitor was found not liable on the ground that he had not breached any duty, Chapnik J. did find that he owed the plaintiff investors a duty of care: see pp. 105-06. Solicitors have been found to owe a duty of care to persons not formally retained as clients in other cases which lend support to the plaintiffs [sic] contention that Paul may have owed him a duty of care. In *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C.S.C.), a solicitor was held to owe a duty of care to the intended beneficiary of a will where the solicitor had been retained by the testator. In *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632, the British Columbia Court of Appeal found that a solicitor, retained by the purchaser in a real estate transaction, owed a duty of care to the vendor, who was unrepresented, with respect to a take-back mortgage. Similarly, in *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495 (B.C.S.C.), a solicitor retained by the trustee of the estate was found to owe a duty to the beneficiaries of the estate.

522 In *Delgrossos v. Paul*, Sharpe J. was applying the test under s. 5(1)(a) of the *C.P.A.* and was not making a finding on the merits.

523 The authorities referred to by Justice Sharpe, and other authorities were referred to by Lax J. in *Banyan Tree* in her consideration of the s. 5(1)(a) analysis in relation to the law firm. In *Banyan Tree*, Justice Lax concluded that there was a sufficient relationship between the plaintiffs and the law firm to give rise to a duty of care - at paras. 30 and 31:

Notwithstanding the efforts of counsel for [the law firm] to confine these cases to their facts and to distinguish them, there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed. FMC pointed to no authority that rejected a third party negligence claim against lawyers at the certification stage. I regard *Hurst v. Price Waterhouse Coopers (PWC) LLP, Canada*, [2009] O.J. No. 1415 on which FMC relies as entirely distinguishable. This was a claim for negligent misrepresentation, reckless misrepresentation, and negligence in which the allegedly wrongful act by PWC amounted only to having its name appear as auditor on an offering memorandum. This was found insufficient to establish a relationship giving rise to a *prima facie* duty of care.

Whether or not the plaintiffs and proposed class members are akin to disappointed beneficiaries, it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.

[Emphasis added].

524 In answer to the law firm's argument that the plaintiffs admitted that they had not read the opinions, Justice Lax noted that the claim was not advanced on the basis that there was a direct relationship with the law firm and whether the plaintiffs read or relied on the opinions was irrelevant to the law firm's liability. The same is true here.

525 On an application for leave to appeal the decision of Lax J. in *Banyan Tree, Robinson v. Rochester Financial Ltd.*, [2010] O.J. No. 1481, 2010 ONSC 1899 (Ont. Div. Ct.), Dambrot J. stated at para. 24:

Here, equally, the absence of direct reliance by the plaintiffs on the solicitor's advice may not be determinative. Even without direct reliance on the advice, it remains arguable that when the plaintiffs entered the scheme, they were relying on the legal advisors of the architects of the scheme to ensure that their pledges would qualify as valid charitable donations for tax purposes. If the legal advisors acted negligently in giving their advice to the gift plan defendants, the plaintiffs could have a claim in negligence against those legal advisors.

526 That is precisely the situation here.

527 The Lawyers distinguish *Banyan Tree* on the basis that in this case, the Opinion Letters were not permitted to be shown to donors, whereas in *Banyan Tree*, the letters were written in contemplation that they would be provided to donors and specifically stated that they could be relied upon by donors as well as the promoters. They point out as well that Cannon acknowledged that he had received independent advice and was aware of the risk that his donation might be disallowed.

528 To the contrary, both the distinguishable facts in *Banyan Tree* and the fact that it was concerned not with summary judgment but with the "plain and obvious" test under s. 5(1)(a) of the *C.P.A.* make the case for a duty of care in this case even stronger than in *Banyan Tree* and the disappointed beneficiary cases.

529 In this case, the Comfort Letters were supplied by the Lawyers with the knowledge that they would be used to market the Gift Program. Harris and the Law Firms also knew, or ought to have known, that the Gift Program could not be launched without a favourable tax opinion by a leading Canadian tax expert. They knew that the existence of such an opinion would be touted by the promoters, as in fact it was. In *Banyan Tree*, Lax J. found that it was "arguable" that the law firm "ought reasonably to have foreseen that its tax opinion would be used to market the Gift Program and that the participants would be 'disappointed' and suffer damages if [the law firm] was negligent in giving the opinion." This case is stronger in that regard than *Banyan Tree* because, in this case, Harris and the Law Firms knew that the Opinion Letters were being used to market the Gift Program.

530 It is my view, therefore, that a strong argument can be made that this is a case that falls within an existing category in which a duty of care has been recognized -a duty of care owed by a solicitor to third parties who have not formally retained the solicitor but who rely on the solicitor to protect their interests. These would include the "disappointed beneficiary" cases (for example, *Whittingham v. Crease & Co.* and *Linsley v. Kirstiuk*), the investor cases (*Delgrossos v. Paul* and *Filipovic v. Upshall*), and charitable donation or tax shelter cases such as *Banyan Tree*, and *Lipson v. Cassels Brock & Blackwell LLP*.

531 I will, however, assume that this case does not fall within an existing category in which a duty of care has been recognized and I will ask whether there was a sufficient relationship of proximity between Cannon and Harris to give rise to a duty of care.

532 The proximity analysis requires the Court to engage in a fact-based examination of the relationship between the parties to determine whether that relationship is sufficiently close that it would be fair and just to impose a duty of care. The touchstones

for the analysis were, as I have noted, described by the Supreme Court of Canada as expectations, representations, reliance and the property or other interests involved.

533 Under these headings, the Lawyers point to the fact that the Gift Program had been carefully word-smithed to bullet-proof ParkLane and the Lawyers from claims by the donors if the program failed to deliver valid tax deductions. They say that the brochures provided to Cannon, the documents he signed and the advice and information he received from Gacich are inconsistent with either an expectation that Harris was looking after his interests or reliance on Harris's opinion. They say that the express representations made by Cannon are inconsistent with a close relationship with Harris and that, in light of those, Harris could not have contemplated that Cannon would rely on his opinion.

534 In my view, the Lawyers' analysis glosses over the significance of Harris in the successful marketing of the Gift Program - specifically, the significance of allowing his name, his impressive credentials and reputation and his photograph, along with his Comfort Letters, to be held out as having endorsed the Gift Program as being an effective and *bona fide* tax planning device. One over-riding representation that was made by the Gift Program brochure was: "This program has the endorsement of a leading Canadian tax expert, Edwin C. Harris Q.C., who has given an opinion that it is legitimate and that it will work." As I have noted, Harris permitted this representation to be made. He admitted on cross-examination that the Comfort Letter was prepared by him with the intention that it would be included in the Gift Program materials that would be given to potential donors to show that it was a *bona fide* program.

535 I noted earlier in these reasons that the successful marketing of the Gift Program depended on the existence of a legal opinion that the program complied with the *Income Tax Act* and that donors could expect to receive a tax deduction. Without such an opinion and the ability to publicize the opinion to prospective donors, the Gift Program would never have gotten off the drawing board. It was not enough for the promoters that Harris be an expert, but cloistered, tax "grinder", unlike some of the other lawyers and accountants who worked on the program - it was essential that they be able to use his name, his photograph, his credentials, his reputation and his opinion, in order to sell the Gift Program. Harris could have refused to permit this. He could have insulated himself from liability in the best way possible, by remaining anonymous, just as the other experts did. In allowing the use of his reputation and opinions, however, he clearly knew that he and his opinions were part of the sales package that was being offered to prospective donors.

536 By permitting himself and his Comfort Letters to be used in the marketing of the Gift Program, Harris intentionally put himself in a close and direct relationship with every donor.

537 The Lawyers rely on the bolded warning in the Opinion Letters stating, "*We assume no responsibility to Donors.*" As Cannon never saw the Opinion Letters and no donor was supposed to see them, this factor does not go to limit the scope of the representations made to the donor. By the same token, the fact that the Comfort Letters contained statements that the donor's financial advisor was permitted to view the Opinion Letter "without responsibility on our part, for his or her sole use in assessing the Program and in determining its suitability to a donor's specific circumstances" does not go to limitation of the Lawyers' responsibility to the donor - although it might be construed as limiting the Lawyers' responsibility to the financial advisor. Nor is there any representation made by Cannon in the Donor Declarations, that could reasonably be regarded as a representation to the Lawyers. There is no mention of the Lawyers in that document, although there is a release of Aylesworth LLP in its capacity as escrow agent.

538 It was reasonably foreseeable that if Harris was negligent in his advice to ParkLane, and the Gift Program did not comply with the *Income Tax Act*, donors such as Cannon would suffer harm. The evidence supports the conclusion that Harris knew, or ought to have known, that his Opinion Letters, and his Comfort Letters, were integral parts of the marketing of the Gift Program and that the whole purpose of his Comfort Letters was to assure donors that he had reviewed the Gift Program and that it was, in his words, *bona fide*.

539 In providing the Comfort Letters, his photograph and his biography, and permitting them to be used in the marketing of the Gift Program, Harris allowed his name and reputation to be put on the line in support of the Gift Program and in so doing became an integral part of the sales pitch. He knew, or ought to have known that his favourable opinion concerning the Gift

Program was being used to sell the Gift Program to donors. He could reasonably foresee that the donors would suffer a loss if he was negligent in the preparation of his opinion.

540 In my view, the evidence in this case raises a genuine issue, requiring a trial, concerning the existence of a duty of care owed by the Lawyers to Cannon. That evidence takes this case well beyond the disappointed beneficiaries cases and the disgruntled investors cases such as *Delgross v. Paul*, *Filipovic v. Upshall* and *Banyan Tree*. It does so because, in this case, Harris permitted himself and his opinion to be held out to donors in the marketing of the Gift Program. There is evidence that Harris knew that this was taking place and knew that donors would be given comfort by his involvement. There is some evidence that Cannon was in fact reassured by Harris' involvement. The circumstances suggest that there were expectations on both sides, representations by Harris and reliance by Cannon, sufficient to give rise to a duty of care and to make it fair and just to impose such a duty.

541 There is also an argument to be made that, in allowing his Comfort Letters to be included in ParkLane's marketing brochure, knowing that prospective donors would not be permitted to see his Opinion Letters, Harris had a duty to ensure that the brochure itself contained an accurate description of the Gift Program. I have identified some statements in the brochure that are capable of being considered misleading. It is arguable that Harris knew, or ought to have known, that they were misleading and that he owed a duty to Class members to either correct the statements or to refuse to permit his Comfort Letter to be used as part of the marketing materials.

542 There is also an argument, which I have discussed earlier, that the Donor Declaration and Tax Risk Disclosure Statement will fall by the wayside if it is established that the Gift Program is impeachable on the ground of fraud or misrepresentation. There is no suggestion whatsoever that Harris was implicated in or aware of any misfeasance, but Canon's execution of those documents will not amount to an assumption of risk if the execution was procured by fraud or in breach of the *Consumer Protection Act, 2002*.

543 I turn to the second stage of the *Cooper v. Hobart* analysis - are there residual policy considerations that would negative the duty of care? These may include such considerations as (a) whether recognizing a duty of care would create the spectre of unlimited liability to an unlimited class; (b) the effect of recognizing a duty of care on other legal obligations, the legal system and society in general; and (c) the existence of other remedies in law: *Cooper v. Hobart* at para. 37.

544 The Lawyers rely primarily on the first consideration - they say that imposing legal obligations on lawyers in these circumstances will impact the ability of lawyers to freely advise their clients and the ability of clients to disclose the fact that advice has been received. They say that this is an indeterminate liability to an indeterminate class "in circumstances where the Law Firms took active and reasonable steps to avoid any such potential exposure arising." They distinguish this case from *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), because, in this case, the Lawyers could not have known, at the time they gave their opinions, the identity or number of the donors. In *Hercules*, the auditors could have ascertained the identity of the shareholders at the time they prepared their report.

545 In this case, the concern is not that a tax opinion was provided to ParkLane. The concern is that the opinion was provided with the knowledge that ParkLane would advertise its existence to potential donors and would use its author as part of its marketing program. Imposing liability in these circumstances does not interfere with the ability of lawyers to freely advise clients. It may, however, cause lawyers to exercise caution or control when they give an opinion to a client with knowledge that the client proposes to distribute it to numerous third parties for the business purpose of selling the very product of the lawyer's advice. It seems to me that this is a policy reason that would support, rather than limit, the existence of a duty. As a trial is required to fully explore the duty of care analysis, I believe that conclusions on the policy question should be deferred to trial as well.

#### 4. Negligent Misrepresentation: Is a Trial Required

546 My conclusions with respect to the existence of a duty of care in negligence apply equally to the claim against the Lawyers for negligent misrepresentation.

547 The plaintiff pleads that the Lawyers prepared the Comfort Letters on the instructions of ParkLane and "with the intent that they would be read by the Class Members, and relied upon by the Class Members in making their decision to participate in the Gift Program." They go on to plead:

In particular, these Defendants other than the [FFC Foundation Directors] knew that the only reasonable inference to be drawn from the comfort letters was that the Gift Program was a legitimate charitable giving program and that the tax receipts generated by donations under the Gift Program would be accepted as charitable tax credits by CRA.

But for these comfort letters, the Gift Program would not have been launched and the Class would not have participated in the Gift Program. The comfort letters were designed to induce the Class to invest in the Gift Program without disclosing to the Class all of the material risks of investing in the Gift Program, or the true facts relating to the actual operation of the Gift Program. These Defendants, other than the [FFC Foundation Directors] knew, or ought to have known, that the Class Members receiving the comfort letters (but not the opinion letters), would assume that the opinion letters created by the lawyers would opine that the income tax savings represented in the promotional materials for the Gift Program would be permitted without objection from the CRA.

548 The Lawyers' motion for summary judgment on negligent misrepresentation is based on the assertion that the Lawyers owed no duty of care based on a "special relationship" between Harris and his law firms on the one hand and Cannon on the other hand, as required by *Queen v. Cognos Inc.*, discussed earlier. Again, they say that it was not reasonably foreseeable that Cannon would rely on the Opinion Letters, given that he was not permitted to see them, he signed documents denying any reliance and he obtained advice from his own financial advisor.

549 I have found that in providing the Comfort Letter, his biography and his photograph for use in the marketing brochure and as part of the sales pitch for the Gift Program, Harris knowingly brought himself into direct proximity with Cannon and Class members. The only purpose of the Comfort Letter was to help ParkLane sell the Gift Program.

550 It was foreseeable that a donor would rely on the Comfort Letters and it was entirely reasonable that he or she would do so. In *Hercules Management Ltd. v. Ernst & Young*, above, the Supreme Court of Canada set out a list of factors at para. 43 that could be indicative of "reasonableness":

- (a) the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
- (b) the defendant was a professional or someone who possessed special skill, judgment, or knowledge.
- (c) the advice or information was provided in the course of the defendant's business.
- (d) the information or advice was given deliberately, and not on a social occasion.
- (e) the information or advice was given in response to a specific enquiry or request.

551 The Supreme Court made it clear that these factors were not to be considered absolute, exclusive or a strict test of reasonableness.

552 In this case, most, if not all, of these factors are met in relation to Harris. As the Lawyer for ParkLane, who received fees in relation to the Gift Program year after year, he had an indirect financial interest in the success of the Gift Program. He obviously possessed special skill, a fact that was touted by ParkLane. He provided the Comfort Letters in the course of his business as a lawyer and as counsel for ParkLane. The information was given deliberately, and not casually or socially. Finally, the information was given in response to a specific request by ParkLane with knowledge that it would be conveyed to potential donors whose first question would undoubtedly be - "Is it legal?"

553 I find, therefore, that there is substantial evidence in support of the existence of a special relationship between Harris and Cannon so as to give rise to a duty of care.

554 Moreover, on the second aspect of the *Cooper v. Hobart* test, which asks whether there are residual policy considerations that justify denying liability, it seems to me that this is not a case where indeterminate liability would be a concern. Harris knew precisely how his Comfort Letter was going to be used and he knew precisely the class of persons to whom it would be provided. I have discussed this earlier.

555 As I have said, one reasonable interpretation of ParkLane's brochure was that Harris had expressed the opinion that the Gift Program was *bona fide* and would work. The plaintiff has adduced evidence that the Gift Program was not *bona fide*, was simply a scheme to enrich the promoters, had no real chance of success and that Harris should have known this. There is also a credible argument that if the Gift Program was a fraudulent scheme, none of the exclusionary language in any of the Gift Program documentation is of any value to any of the defendants, the Lawyers included. A trial is required in order to fairly examine these issues.

556 The Lawyers' motion for summary judgment is therefore dismissed.

## V. Summary and Conclusions

557 This was a hearing of both a certification motion against multiple parties and summary judgment motions by two sets of defendants. The evidentiary burden on the motions is obviously different. On the certification motion, the plaintiff was only required to show "some basis in fact" that the action meets the requirement for certification, other than the requirement in s. 5(1) (a) of the *C.P.A.* that there be a cause of action. On the summary judgment motions, the defendants were required to establish that there was no genuine issue requiring a trial. I have found, on the evidence before me, that the plaintiff met his burden on certification and that the defendants have failed to meet their burden on summary judgment. While it has been necessary for me to take a hard look at the evidence, it must be understood that my conclusions are not immutable findings of fact, but simply observations first, that there is a basis in fact that this action is appropriate for certification and second, that the plaintiff's claims have a real chance of success and a trial is required in order to come to conclusive determinations of fact and law.

*Motion for certification granted; motions for summary judgment dismissed.*

## Footnotes

- 1 The pleading in the statement of claim is actually against ParkLane and Trafalgar Trading Associates Limited, which appears to be a typographical error. The plaintiff's chart, set out earlier, indicates that the claim is against all the ParkLane Defendants.
- 2 The common issues were: (a) Was it a term of the contract of participation in the Gift Program that participants would receive a charitable donation receipt that would be recognized by Canada Revenue Agency for tax credit purposes? (b) Was it a term of the contract of participation in the Gift Program that participants would not be at risk to repay loans obtained from Rochester? (c) If the answer to (a) and/or (b) is yes, has the contract been breached by the Gift Program Defendants?
- 3 The common issues were: (d) Did the Gift Program Defendants owe a duty of care to participants? (e) If the answer to (d) is yes, what was the nature and extent of that duty? (f) Has the duty of care owed by the Gift Program Defendants to participants been breached?

# **TAB 8**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Murphy v. BDO Dunwoody LLP](#) | 2006 CarswellOnt 4127, [2006] O.J. No. 2729, 32 C.P.C. (6th) 358 | (Ont. S.C.J., Jul 5, 2006)

2000 CarswellOnt 3838

Ontario Court of Appeal

Carom v. Bre-X Minerals Ltd.

2000 CarswellOnt 3838, [2000] O.J. No. 4014, 103 A.C.W.S. (3d) 17, 11 B.L.R. (3d) 1, 138 O.A.C. 55, 196 D.L.R. (4th) 344, 1 C.P.C. (5th) 62, 51 O.R. (3d) 236

**Donald Carom, 3218520 Canada Inc., 662492 Ontario Limited, Osamu Shimizu and Eugene Schonberger, Plaintiffs/Moving Parties (Appellants) and Bre-X Minerals Ltd., Bresea Resources Ltd., John B. Felderhof, Jeannette Walsh, Estate Trustee of the Estate of David G. Walsh, deceased, Jeannette Walsh, personally, T. Stephen McAnulty, Nancy Jane McAnulty, John B. Thorpe, Rolando C. Francisco, Hugh C. Lyons, Paul M. Kavanagh, Nesbitt Burns Inc., Egizio Bianchini, First Marathon Securities Limited and Kerry Smith, Defendants/Responding Parties (Respondents)**

Finlayson, Feldman, MacPherson JJ.A.

Heard: September 19, 2000

Judgment: October 31, 2000

Docket: CA C33905

Proceedings: reversed [Carom v. Bre-X Minerals Ltd. \(1999\)](#), 1999 CarswellOnt 4716, 46 O.R. (3d) 315, 6 B.L.R. (3d) 82, 1 C.P.C. (5th) 82 (Ont. Div. Ct.); affirmed [Carom v. Bre-X Minerals Ltd. \(1999\)](#), 1999 CarswellOnt 1456, [1999] O.J. No. 1662, 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43 (Ont. S.C.J.)

Counsel: *Paul J. Pape*, for Appellants.

*H. Douglas Stewart, Q.C.*, for Bresea Resources Ltd.

*Joseph Groia, Kevin Richard*, for John Felderhof.

*Alan Lenczner, Q.C., Lawrence Thacker*, for Jeannette Walsh, personally and as estate trustee for David Walsh, T. Stephen McAnulty.

*Robert Potts, Robert Muir*, for John Thorpe.

*Brian Bellmore, K. Mitchell*, for Rolando Francisco.

*Paul LeVay, Johanna Braden*, for Paul Kavanagh.

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

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.C Common issue or interest

**Headnote**

Practice --- Parties — Representative or class actions — Procedural requirements

Company was involved in exploration and development of gold mining properties — Stock of company plummeted after press release indicated that properties did not contain levels of gold as represented — Plaintiff investors brought action against company and its senior officers for damages arising from conspiracy, fraudulent misrepresentation and negligent misrepresentation — Plaintiffs' motion for certification class action proceeding was granted in part — Motions judge found that claims of conspiracy and fraudulent misrepresentation raised common issues, but claim of negligent misrepresentation did not raise common issue — Motions judge found that class proceeding was preferable procedure and restricted plaintiff class to those who held shares on date of public disclosure of possible fraud — Plaintiffs' appeal was dismissed — Divisional court held negligent misrepresentation was not common issue because each individual plaintiff required individual inquiry into what representations plaintiff relied on and how plaintiff was affected by particular representation — Divisional court held fraudulent misrepresentation and conspiracy constituted common issues because of one single overarching allegation that every representation, whenever made, was tainted with fraud — Divisional court held motions judge had adequate basis for discretionary conclusion that class action was not preferable procedure for negligent misrepresentation — Appeal by plaintiffs allowed — Divisional court and motions judge erred on matter of general principle — No sufficient difference existed between plaintiffs' claims in fraudulent misrepresentation and negligent misrepresentation to justify certification of only claim of fraudulent misrepresentation — Creation of such dichotomy was error in logic, in principle and in policy — Bar is not to be set too high on common issues factor — Sufficient overlap existed in legal claims of plaintiffs grounded in fraudulent misrepresentation and negligent misrepresentation to justify certification for both claims — Substantial overlap also existed of factual issues common to both claims — Under both claims, focus would be on defendants, their knowledge and their conduct — Existence of numerous representations by defendants should not be used as reason to refuse certification — Certification was potentially way of reducing representations to much smaller number of relevant representations — As most of plaintiffs' claim was proceeding in class proceedings context, no strong reason existed to exclude claim in negligent misrepresentation from proceedings — Fact that determination of some of common issues relevant to claim in negligent misrepresentation would not resolve entire litigation was not determinative — Certification can be preferable procedure in situations far short of final resolution of lawsuit — Determination of common issues would move litigation forward.

#### **Table of Authorities**

##### **Cases considered by MacPherson J.A.:**

*Abdoor v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — considered

*Anderson v. Wilson* (1999), 122 O.A.C. 69, 175 D.L.R. (4th) 409, 44 O.R. (3d) 673, 36 C.P.C. (4th) 17 (Ont. C.A.) — applied

*Bendall v. McGhan Medical Corp.* (1993), 16 C.P.C. (3d) 156, 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Ont. Gen. Div.) — considered

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

*Campbell v. Flexwatt Corp.* (1997), 98 B.C.A.C. 22, 161 W.A.C. 22, 15 C.P.C. (4th) 1, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (B.C. C.A.) — applied

*Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.) — considered

*Controltech Engineering Inc. v. Ontario Hydro* (1998), 72 O.T.C. 351 (Ont. Gen. Div.) — considered

*Controltech Engineering Inc. v. Ontario Hydro* (2000), (sub nom. *Controltech Engineering Inc. v. Ontario Power Generation Inc.*) 130 O.A.C. 367 (Ont. Div. Ct.) — referred to

*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) — considered

*Hollick v. Metropolitan Toronto (Municipality)* (1999), 32 C.E.L.R. (N.S.) 1, (sub nom. *Hollick v. Toronto (City)*) 46 O.R. (3d) 257, 127 O.A.C. 369, 181 D.L.R. (4th) 426, 7 M.P.L.R. (3d) 244, 41 C.P.C. (4th) 93 (Ont. C.A.) — considered

*Hollick v. Metropolitan Toronto (Municipality)* (September 21, 2000), Doc. 27699 (S.C.C.) — referred to

*Maxwell v. MLG Ventures Ltd.* (1995), 7 C.C.L.S. 155 (Ont. Gen. Div.) — considered

*Mouhteros v. DeVry Canada Inc.* (1998), 22 C.P.C. (4th) 198, 41 O.R. (3d) 63 (Ont. Gen. Div.) — considered

*Nantais v. Electronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) — considered

*Peppiatt v. Nicol* (1993), 20 C.P.C. (3d) 272, 16 O.R. (3d) 133 (Ont. Gen. Div.) — considered

2000 CarswellOnt 3838, [2000] O.J. No. 4014, 103 A.C.W.S. (3d) 17, 11 B.L.R. (3d) 1...

*Robertson v. Thomson Corp.* (1999), 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 43 O.R. (3d) 161, 30 C.P.C. (4th) 182 (Ont. Gen. Div.) — considered

*Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776, 86 C.P.R. (3d) 1, 31 C.P.C. (4th) 340 (Ont. Gen. Div.) — considered

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — considered

s. 1 "common issues" — considered

s. 5(1) — considered

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 8(1) — considered

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

Pt. VI — considered

s. 36 — considered

s. 52 — considered

*Negligence Act*, R.S.O. 1990, c. N.1

Generally — considered

APPEAL by plaintiffs from judgment reported at (1999), 1 C.P.C. (5th) 82, 6 B.L.R. (3d) 82, 46 O.R. (3d) 315 (Ont. Div. Ct.), dismissing plaintiffs' appeal from judgment reported at (1999), 35 C.P.C. (4th) 43, 46 B.L.R. (2d) 247, 44 O.R. (3d) 173 (Ont. S.C.J.), limiting class proceeding to common issues of fraudulent misrepresentation and conspiracy.

**The judgment of the court was delivered by MacPherson J.A.:**

**INTRODUCTION**

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

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

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

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

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

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

The Commission is of the view that many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

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

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

8 However, certifications of class actions have not been automatic. Probably the most notable domain in which certification has been refused relates to claims grounded in allegations of misrepresentation. For example, a claim against a petroleum company for misrepresenting the nature of a franchise to potential franchisees was not certified: see *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 (Ont. Gen. Div.). A claim against Ontario Hydro for misrepresentation in the context of a bidding process was also not certified: see *Controltech Engineering Inc. v. Ontario Hydro* (1998), 72 O.T.C. 351 (Ont. Gen. Div.), aff'd. (2000), 130 O.A.C. 367 (Ont. Div. Ct.)

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

10 The motions judge, Winkler J., certified a class action with respect to three of the claims advanced by the plaintiffs — fraudulent misrepresentation, the tort of conspiracy and breach of the *Competition Act*, R.S.C. 1985, c. C-34. However, he

refused to certify a class action for a fourth claim put forward by the plaintiffs, namely negligent misrepresentation. Winkler J.'s decision was upheld by the Divisional Court.

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

## **A. FACTUAL BACKGROUND**

### **(I) The events**

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

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

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

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

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

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

18 On May 6, 1993, Bre-X and Bresea issued a press release announcing the deal and stating that the property showed sufficient gold to yield an annual after-tax cash flow of US \$10 million to Bre-X. Thereafter, Bre-X and Bresea issued a series

of 160 press releases and other statements building on the favourable results in the first release. From January 1994, Bre-X reported core drilling results that gave investors reason to believe that the Busang properties contained one of the largest gold deposits ever discovered. The price of Bre-X shares rose from 50 cents in 1993 to more than \$200 in late 1996. Many Canadians made fortunes during these years by trading in Bre-X shares.

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

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

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

### **(2) The parties**

21 At present, there are three representative plaintiffs in the class action. 3218520 Canada Inc. was the corporate investment vehicle for Greg Windsor. He purchased 500 Bre-X shares in September 1996 for \$13,975. Osamu Shimizu purchased 300 Bre-X shares in September 1996 for \$7887. Both of these sets of shares are now worthless. 662492 Ontario Limited was the corporate investment vehicle for Ivo Battistella. Between May 1996 and April 1997, he traded in Bre-X shares and lost about \$762,000.

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

### **(3) The litigation**

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

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

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

- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interest of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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

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

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

8. THIS COURT DECLARES that the common issues for the Class against the Certified Defendants are:

- (a) Did Busang contain gold in commercial quantities or in quantities sufficient to make the mining of it commercially viable ("gold in mineable quantities")?
- (b) Was Bre-X operating a legitimate business?
- (c) Were the core samples from Bre-X salted with gold and, if so, how, when, where and by whom?
- (d) Did Bre-X follow generally accepted mining exploration practices and techniques and, if not, how did it deviate? Was any deviation reasonable under the circumstances?
- (e) Did Bre-X, Bresea and the Insiders or any of them conspire to inflate the price of Bre-X and Bresea shares on the Markets? If they did, what are the particulars of the conspiracy?
- (f) Did Bresea and the named individual defendants, or any of them, know or ought to have known the answers to the questions (a), (b), (c), (d) and (e) or any of them and, if so, who knew or ought to have known what, when and why and what should have they done, if anything?
- (g) Did Bre-X and/or the named individual defendants represent that:
  - (i) There is gold in mineable quantities in the Busang?
  - (ii) Any company associated with SNC-Lavalin Inc. audited Bre-X's work or otherwise verified the accuracy of Bre-X's resource database?
  - (iii) Bre-X was operating a legitimate business?
- (h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?
- (i) Are the named individual defendants, or any of them, personally liable for any damages resulting from or caused by the representations identified by issue (g)?

- (j) What is the meaning of the words "as a result of" in section 36 of the *Competition Act*?
- (k) Does the *Negligence Act* or the concept of contributory negligence apply in assessing loss or damage under section 36?
- (l) Must the plaintiffs prove an anti-competitive component to the *Competition Act* cause of action? If so, have they? Does Part VI apply to behaviour which is not anti-competitive?
- (m) Should the full costs of investigation in connection with this matter and the cost of the proceedings or part thereof be assessed globally as provided for in section 36 of the *Competition Act*, and, if so, who should pay and in what amount(s)?
- (n) Was there a breach of section 52 of the *Competition Act* by Bre-X and the named individual defendants giving rise to liability pursuant to section 36 if the Class member can prove damages as a result of the representation(s)?
- (o) Was the conduct of the defendants, or any of them, such that they ought to pay globally to the Class members exemplary or punitive damages?

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

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

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

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

## **B. ISSUES**

32 There are two issues on this appeal:

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

## **C. ANALYSIS**

### ***(1) The "common issues" issue***

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

34 However, the motions judge further held that the 15 common issues did not relate to the plaintiffs' claim of negligent misrepresentation. He explained the different results for the torts of fraudulent misrepresentation and negligent misrepresentation in this fashion:

The essence of each tort is the representation made by the defendant to the plaintiff. The plaintiffs contend that the series of statements contained in the press releases and other documentation emanating from Bre-X, notwithstanding their number and diversity of content, contain a common misrepresentation, namely that "gold was present in mineable quantities in the Busang." Thus they contend that a number of common issues arise from what they state is a singular misrepresentation.

The plaintiffs identify some 160 statements made by the defendants over a 4 year period to a class indeterminate in number and national in scope. The statements were distributed to the public through various forms of media and subject to whatever editorial control that may have been exercised by the respective proprietors. The statements were received by investors with varying degrees of sophistication and knowledge, and more importantly, differing investment strategies.

.....

A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs' contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. *As such, there is no prospect of a resolution in a trial on common issues which would advance this litigation in any manner as it relates to the claim in negligent misrepresentation.*

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

35 In a relatively short endorsement, the Divisional Court agreed with the motions judge's reasoning and with the dichotomy he created. A. Campbell J. said:

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

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

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

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

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

38 My first two reasons are contextual ones.

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

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

40 The observation I would make about this definition is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high. The important procedural objectives of the *CPA*, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.

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

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

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

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

43 The best way to commence my discussion of my doubts on this issue is by setting out the motions judge's careful and accurate description of the elements of the two torts. He said:

The constituent elements of a claim for fraudulent misrepresentation were enunciated by the Supreme Court of Canada in *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at 344:

... *Anson on Contract*, 12<sup>th</sup> ed., p. 187, where "fraud" has been defined, reads:

[Fraud is] a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

See also *Derry v. Peek (1889)*, 14 A.C. 337 (H.L.) at 374.

The tort of negligent misrepresentation has five constituent elements. There must be a duty of care arising from a special relationship between a representor and a representee. There must be a representation made that was untrue, inaccurate or misleading. The representor must have made the statement negligently. The representee must have reasonably relied upon the statement and further, suffered damages as a result of the reliance. See *Queen v. Cognos*, [1993] 1 S.C.R. 87 at 110.

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

(g) Did Bre-X and/or the named defendants represent that:

(i) There is gold in mineable quantities in the Busang? . . .

(h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?

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

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

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

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

that would give rise to liability. In short, the complexity that exists with respect to determining the defendants' states of mind and conduct is inherent in both torts. It follows that certification should either be granted or withheld for both claims.

48 I make one other observation with respect to the overlap of factual issues common to both torts. Both the motions judge and the Divisional Court attached great significance to the fact that the contested representations by Bre-X were not made on a single occasion; rather they took the form of 160 statements and press releases. In the eyes of the motions judge and the Divisional Court, this posed particularly difficult problems on the reliance component of the tort of negligent misrepresentation. As expressed by the Divisional Court:

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

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

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

I accept the plaintiffs' contention that common issues are raised on the basis that it is arguable that a finding can be made at a common issue trial that there is a point in time at which the analysts were, or ought to have been aware of the alleged fraud.

.....

The essence of misrepresentation is the negligent statement. If a point in time is fixed at which the analysts knew or ought to have known of the alleged fraud, then any statement to the contrary after that point is an inaccurate, negligently made statement. Such a finding would advance the litigation.

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

51 In summary, the motions judge and the Divisional Court certified 15 common issues as appropriate for resolution in a class proceeding. The focus of these common issues is the knowledge and conduct of the defendants, the Bre-X insiders. The conduct, especially the reliance, of the plaintiffs stays on the sidelines at this juncture in the litigation. The plaintiffs advance four claims against the defendants. The courts below certified three of them, including the claim for fraudulent misrepresentation.

I agree with these components of the courts' decisions. However, the courts below refused to certify the claim in negligent misrepresentation. For the above reasons, I am of the view that they erred in this refusal. After setting out the definitions of fraudulent and negligent misrepresentation, the motions judge said: "The essence of each tort is the representation made by the defendant to the plaintiff." I agree with that statement. However, in my view it serves to bind together, not divide, the treatment of both claims under the *CPA*.

## **(2) The "preferable procedure" issue**

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

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

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

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

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

55 First, and at a general level, I am not aware of any Ontario case, before this one, in which some of the potential claims were certified while others were not certified. *Anderson v. Wilson*, *supra*, *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), *Maxwell v. MLG Ventures Ltd.* (1995), 7 C.C.L.S. 155 (Ont. Gen. Div.), and *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 (Ont. Gen. Div.) are all cases in which certifications were ordered. In several of these cases there were multiple claims advanced by the plaintiffs. On the other hand, *Hollick v. Metropolitan Toronto (Municipality)* (1999), 46 O.R. (3d) 257 (C.A.),<sup>2</sup> *Controltech Engineering Inc. v. Ontario Hydro*, *supra*, *Rosedale Motors Inc. v. Petro-Canada Inc.*, *supra*, *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Div. Ct.), and *Abdoole v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) are all cases in which certification was refused. Again, in several of these cases there were multiple claims against the defendants. The implicit message from these results is that the courts seem to employ a starting point or presumption — I put it no higher — in favour of either *complete* certification or *no* certification. The decisions of the motions judge and Divisional Court in the present matter are not in tune with these results.

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

Since I have found a class proceeding to be the preferable procedure for resolving the common issues in respect of the claim in conspiracy, I have concluded as well that it is in keeping with the goals of the *CPA* to determine the common issues arising out of the claims in fraudulent misrepresentation and breach of the *Competition Act* as part and parcel of the inquiry. The determination of the common issues proposed for the claims in fraudulent misrepresentation and under the *Competition Act* will not unduly complicate the common issue trial. In my view, it advances the goals of judicial economy to take advantage of the opportunity for efficiency presented by the common issue trial necessary for the claim in conspiracy. The fact that there will be a common issue trial between the same parties, on a claim which arises from the same

background circumstances, favours including the common issues arising from claims in fraudulent misrepresentation and breach of the *Competition Act*, even though the plaintiffs may still have to engage in lengthy individual trials to determine the actual liability of the defendants on the claims. In these unique circumstances, the efficiencies achieved on the one hand, offset the inefficiencies on the other.

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

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

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

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

The question then becomes whether there are sufficient common issues left to justify certification. In my view, it seems sensible with this number of potential plaintiffs and the similarities that are evident in their claims, that any potential efficiency in advancement of their claims through the flexibility provided by the *CPA* should, where reasonable, be utilized.

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

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

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

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

## **DISPOSITION**

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

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

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

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

*Appeal allowed.*

Footnotes

<sup>1</sup> Mr. Walsh is deceased. The action continues against his estate with his wife, Jeannette Walsh, as estate trustee.

<sup>2</sup> Leave to appeal granted on ([September 21, 2000](#), Doc. 27699 (S.C.C.).

# **TAB 9**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Lacroix v. Canada Mortgage and Housing Corp.](#) | 2012 ONCA 243, 2012 CarswellOnt 4342, 349 D.L.R. (4th) 1, 15 C.P.C. (7th) 1, 96 C.C.P.B. 222, 75 E.T.R. (3d) 42, 214 A.C.W.S. (3d) 619, 110 O.R. (3d) 81, 2012 C.E.B. & P.G.R. 8482 (headnote only), 290 O.A.C. 99 | (Ont. C.A., Apr 18, 2012)

**2001 CarswellOnt 4206**  
Ontario Superior Court of Justice

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman

2001 CarswellOnt 4206, [2001] O.J. No. 4620, 109 A.C.W.S. (3d)  
860, 15 C.P.R. (4th) 289, 18 B.L.R. (3d) 260, 8 C.C.L.T. (3d) 240

**Roger Mondor and Amit M. Karia, Plaintiffs and Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Corp., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell and Lawrence Wilder, Defendants**

Cumming J.

Heard: October 15, 2001  
Judgment: November 23, 2001  
Docket: 00-CV-193345CP

Counsel: *Harvey T. Strosberg, Q.C., Patricia A. Speight, Craig Allen*, for Plaintiffs.

*David F. Bell, Jane M. Waechter*, for Defendant, Parente, Randolph, Orlando, Carey & Associates.

*J.L. McDougall, Q.C., Randy Bennett*, for Defendant, Deloitte & Touche LLP.

*Lawrence Thacker*, for Defendant, Cassels Brock & Blackwell.

Subject: Intellectual Property; Property; Securities; Torts; Civil Practice and Procedure; Corporate and Commercial

**Related Abridgment Classifications**

Civil practice and procedure

**X Pleadings**

[X.2 Statement of claim](#)

[X.2.f Striking out for absence of reasonable cause of action](#)

[X.2.f.iii Need for clearly unsustainable claim](#)

Commercial law

**VI Trade and commerce**

[VI.7 Consumer protection](#)

[VI.7.c Misleading advertising](#)

[VI.7.c.iii Miscellaneous](#)

Securities

**III Trading in securities**

[III.4 Prospectus](#)

[III.4.c Misrepresentation](#)

**Headnote**

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Need for clearly unsustainable claim

Company became subject of criminal fraud investigation amidst allegations that it was money-laundering operation with fictitious sales, revenues and profits — Company's shares lost all value and ceased to trade — Plaintiffs, who had bought shares in company in secondary market, brought class action against several defendants, including company's auditors, claiming damages for alleged misrepresentations contained in prospectus issued by company — Auditors brought motions to dismiss claim against them as disclosing no reasonable cause of action — Motions dismissed — Fact that pleading did not disclose that plaintiffs had reasonable cause of action against auditors for negligence and negligent and fraudulent misrepresentation at common law was not plain and obvious — Plaintiffs pleaded material facts in support of claim of proximity such as to give rise to duty of care — Fact that auditors ought reasonably to have foreseen that plaintiffs would rely on their representations and that such reliance would be reasonable was arguable — Plaintiffs did not simply plead "fraud on market" theory and case law recognizes that reliance upon representations may be inferred from all circumstances — To foreclose consideration of issue of reliance on representations beyond pleading stage would be premature.

Securities and commodities --- Trading in securities — Prospectus — Misrepresentation

Company became subject of criminal fraud investigation amidst allegations that it was money-laundering operation with fictitious sales, revenues and profits — Company's shares lost all value and ceased to trade — Plaintiffs, who had bought shares in company in secondary market, brought class action against several defendants, including company's auditors, claiming damages for alleged misrepresentations contained in prospectus issued by company — Auditors brought motions to dismiss claim against them as disclosing no reasonable cause of action — Motions dismissed — Fact that pleading did not disclose that plaintiffs had reasonable cause of action against auditors for negligence and negligent and fraudulent misrepresentation at common law was not plain and obvious — Plaintiffs pleaded material facts in support of claim of proximity such as to give rise to duty of care — Fact that auditors ought reasonably to have foreseen that plaintiffs would rely on their representations and that such reliance would be reasonable was arguable — Plaintiffs did not simply plead "fraud on market" theory and case law recognizes that reliance upon representations may be inferred from all circumstances — To foreclose consideration of issue of reliance on representations beyond pleading stage would be premature.

Trade and commerce --- Consumer protection — Misleading advertising — Miscellaneous issues

Company became subject of criminal fraud investigation amidst allegations that it was money-laundering operation with fictitious sales, revenues and profits — Company's shares lost all value and ceased to trade — Plaintiffs, who had bought shares in company in secondary market, brought class action against several defendants, including company's auditors, claiming damages for alleged misrepresentations contained in prospectus issued by company — Plaintiffs also alleged violations of Competition Act with respect to making of false or misleading representations for purpose of promoting product or business interest — Auditors brought motions to dismiss claim against them as disclosing no reasonable cause of action — Motions dismissed — Novel cause of action advanced by plaintiffs under misleading advertising provisions of Competition Act was problematic and tenuous however it was not plain and obvious that claim advanced under Act disclosed no reasonable cause of action and would necessarily fail — Auditors' alleged misrepresentations arguably may have been made for purpose of promoting their "business interests" within meaning of s. 52(1) of Act, even if that was only subsidiary and indirect intention of representation — Competition Act, R.S.C. 1985, c. C-34, ss. 36, 52(1).

**Table of Authorities**

**Cases considered by Cumming J.:**

*Anns v. Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 W.L.R. 1024, (sub nom. *Anns v. London Borough of Merton*) [1977] 2 All E.R. 492 (U.K. H.L.) — followed

*Apotex Inc. v. Hoffmann-La Roche Ltd.*, 2000 CarswellOnt 4773, 195 D.L.R. (4th) 244, 9 C.P.R. (4th) 417, 139 O.A.C. 63 (Ont. C.A.) — considered

*Basic Inc. v. Levinson* (1988), 485 U.S. 224, 99 L. Ed. 2d 194, 56 U.S.L.W. 4232, 108 S. Ct. 978 (U.S. Ohio) — considered

*Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358, [1990] 2 A.C. 605 (U.K. H.L.) — considered

*Carom v. Bre-X Minerals Ltd.* (1998), 41 B.L.R. (2d) 246, 41 O.R. (3d) 780, 43 C.C.L.T. (2d) 310, 27 C.P.C. (4th) 73 (Ont. Gen. Div.) — followed

*Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463, 23 C.C.L.I. (2d) 294 (Ont. Gen. Div.) — considered

2001 CarswellOnt 4206, [2001] O.J. No. 4620, 109 A.C.W.S. (3d) 860...

*Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 8 W.W.R. 80 (S.C.C.) — followed

*Hunt v. T & N plc*, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) — followed

*Kripps v. Touche Ross & Co.* (1990), 52 B.C.L.R. (2d) 291 (B.C. S.C. [In Chambers]) — considered

*Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62, 94 D.L.R. (4th) 284, 15 B.C.A.C. 184, 27 W.A.C. 184 (B.C. C.A.) — referred to

*Kripps v. Touche Ross & Co.*, 78 B.C.L.R. (2d) xxxiv, [1993] 2 S.C.R. viii, 101 D.L.R. (4th) vii (S.C.C.) — referred to

*Kripps v. Touche Ross & Co.*, 1997 CarswellBC 925, 89 B.C.A.C. 288, 145 W.A.C. 288, 35 C.C.L.T. (2d) 60, [1997] 6 W.W.R. 421, 33 B.C.L.R. (3d) 254 (B.C. C.A.) — considered

*Midland Mortgage Corp. v. Jawl & Bundon*, 120 B.C.A.C. 254, 196 W.A.C. 254, 62 B.C.L.R. (3d) 239, [1999] 8 W.W.R. 535 (B.C. C.A.) — considered

*Midland Mortgage Corp. v. Jawl & Bundon* (1999), 64 B.C.L.R. (3d) 1, 127 B.C.A.C. 56, 207 W.A.C. 56 (B.C. C.A.) — referred to

*NBD Bank, Canada v. Dofasco Inc.* (1999), 1 B.L.R. (3d) 1, 47 C.C.L.T. (2d) 213, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 46 O.R. (3d) 514, 15 C.B.R. (4th) 67 (Ont. C.A.) — considered

*Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336, [1971] S.C.R. 306 (S.C.C.) — considered

*Peek v. Derry* (1889), 38 W.R. 33, 1 Meg. 292, 14 App. Cas. 337, [1886-1890] All E.R. Rep. 1, 58 L.J. Ch. 864, 61 L.T. 265, 54 J.P. 148, 5 T.L.R. 625, 14 H. of L. 337 (U.K. H.L.) — considered

*Queen v. Cognos Inc.*, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — followed

*R. v. Garibaldi Lifts Ltd.*, [1977] 3 W.W.R. 350, 33 C.P.R. (2d) 8, 35 C.C.C. (2d) 190 (B.C. Co. Ct.) — considered

*R. v. Wholesale Travel Group Inc.*, 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799 (note) (S.C.C.) — considered

*Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248, 8 B.L.R. (2d) 43, 12 C.P.C. (3d) 192 (Ont. Gen. Div. [Commercial List]) — considered

*Ultramar Corp. v. Touche* (1931), 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 139 (U.S. N.Y.) — considered

**Statutes considered:**

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — pursuant to

*Competition Act*, R.S.C. 1985, c. C-34

Generally — considered

s. 2(1) "article" [renumbered R.S.C. 1985, c. 19 (2nd Supp.), s. 20(1)] — considered

s. 2(1) "product" [renumbered R.S.C. 1985, c. 19 (2nd Supp.), s. 20(1)] — considered

s. 2(1) "service" [renumbered R.S.C. 1985, c. 19 (2nd Supp.), s. 20(1)] — considered

s. 36 — considered

s. 36(1) — considered

s. 36(1)(a) — considered

s. 51(2) — considered

s. 52 — considered

s. 52(1) — considered

*Securities Exchange Act of 1934*, 48 Stat. 881; 15 U.S.C.

s. 10(b) — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 21 — considered

R. 21.01(1)(b) — considered

R. 25.11 — considered

MOTIONS by defendant auditors to strike out pleading for failure to disclose reasonable cause of action.

**Cumming J.:**

**The Mondor class action**

1 The plaintiffs initiated this 165 page Fresh Statement of Claim (the "pleading") August 1, 2001. The proposed representative plaintiffs bring this class proceeding (the "Mondor class action") under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") (Given the length and complexity of the pleading, for ease of reference I have referred to some paragraphs of the pleading in brackets throughout these Reasons for Decision).

2 The plaintiffs Roger Mondor ("Mondor") and Anita M. Karia ("Karia") claim on behalf of every person (with certain excluded persons) who dealt in shares of YBM Magnex International, Inc. ("YBM") between March 7, 1996 and May 14, 1998 (the "class period") and suffered a loss as a result. That is, they claim on behalf of those persons who suffered losses through purchases of YBM shares in the secondary market. YBM's shares originally traded on the Alberta Stock Exchange (ASE) but throughout the class period the shares traded solely on the Toronto Stock Exchange ("TSE").

3 There is extensive litigation relating to YBM. In particular, there is another class proceeding, *Royal Trust Corporation of Canada et al. v. Igor Fisherman et al.* #00-CV-186800CP (the "Royal Trust class action") which includes within the class all persons who purchased or acquired shares in YBM distributed pursuant to a prospectus dated November 17, 1997 (the "1997 Prospectus").

4 There are Reasons for Decision of today's date in respect of the plaintiffs' motion to amend their pleading in the Royal Trust class action together with separate Reasons for Decision, also of today's date, with respect to motions to strike brought by certain defendants in that action.

5 YBM is an Alberta corporation, with its registered office in Calgary, Alberta and its head office in Newtown, Pennsylvania. Throughout the class period YBM purported to be a manufacturer and distributor of magnets and other products for sale through interests in certain wholly or majority-owned subsidiaries in Eastern Europe, North America and other parts of the world.

6 The plaintiffs allege (paras. 6, 60, 66 and 67) that in fact YBM was used to carry out a multi-layered conspiracy and fraud for several purposes, including: money-laundering, obtaining improper gains from the sale of shares of YBM to the public for prices predicated on the pervasive false representation that "YBM was a legitimate business with income only from legitimate business activities" (the pleading defines this in Schedule 1 as the "Representation"), obtaining improper gains by financial statement misrepresentation and manipulation, and by circling funds in ever-increasing amounts through YBM and sham suppliers and customers.

7 YBM's shares ceased to trade in May, 1998 after it became the subject of a criminal fraud investigation in the United States. The shares now do not have any value.

**Background**

8 A company known as Pratecs Technologies Inc. was incorporated pursuant to the laws of Alberta about March 16, 1994. The name was changed to YBM Magnex International, Inc. ("YBM" in these Reasons for Decision) about October 5, 1995. A final prospectus was issued in July, 1994 to qualify the distribution of four million shares at 10 cents per share for the purpose of acquiring the Canadian marketing and distribution rights from YBM Magnex, Inc., (not to be confused with YBM Magnex International, Inc., being "YBM" in these Reasons for Decision) a Pennsylvania corporation, with respect to its products in exchange for YBM shares.

9 On July 18, 1994 (para. 10) YBM issued shares to the public for aggregate consideration of \$400,000. The shares were then posted for trading on the Alberta Stock Exchange.

10 The plaintiffs allege (see in part paras. 15 to 28; 60 to 92; 98 to 160, 170 to 172; 196; 217; 220, 221, 224 to 230 to 239, 242; 283 to 286;) that YBM was employed by certain persons (the "Central Group") to perpetrate a fraud. The plaintiffs allege that members or associates of Russian organized crime associated with the so-called Solntsevskaya Organization (allegedly involved in weapons trafficking, nuclear materials trafficking, prostitution, drug trafficking, dealing in precious gems and money laundering), including one Semeon Mogilevitch ("Mogilevitch"), owned or acquired a number of foreign corporations.

11 These included a Russian company known as Arabat International ("Arabat"), a Channel Islands company called Arigon Company Limited ("Arigon") and a Hungarian corporation then named "Kiss es Kaiser Kian Kit". The name of this corporation was changed such that it ultimately became known as Magnex RT in 1992. These individuals allegedly determined in early 1994 to indirectly take Magnex RT public through the Alberta Stock Exchange. YBM Magnex Inc. [not to be confused with YBM Magnex International, Inc., herein referred to as "YBM"] was incorporated pursuant to the laws of Pennsylvania about February 10, 1994. YBM Magnex Inc. then allegedly purchased the assets of Magnex RT and the shares of Arigon in 1994.

12 About October 31, 1995 YBM merged by way of a share exchange with YBM Magnex, Inc., through a "reverse takeover transaction". The shareholders of YBM Magnex, Inc. obtained approximately 94% of the common shares of YBM which remained a public company and YBM became the owner of 100% of the shares of YBM Magnex, Inc.

13 The plaintiffs refer to the "Central Group" in their pleading, defined to include the defendants Fisherman and Bogatin as well as Mogilevitch and the Arigon shareholders,

14 YBM (para. 11) filed a final prospectus with the British Columbia Securities Commission (the "BCSC"), the Alberta Securities Commission (the "ASC") and the Ontario Securities Commission ("OSC") January 19, 1996, qualifying the issuance of 7,050,000 common shares and 1,768,750 share purchase warrants (the "1996 Prospectus"), and becoming a reporting issuer in Ontario. On March 7, 1996 YBM was listed and its shares posted for trading on the TSE.

15 YBM filed a final prospectus (the "1997 Prospectus") November 17, 1997, which ultimately qualified the distribution of a total of some 7,520,000 shares. This included 3,520,000 shares sold for aggregate proceeds of approximately \$52 million and an additional 4 million common shares issued pursuant to automatically convertible debt instruments (the "Notes"). The Notes had a face value of \$48 million.

16 The claim alleges (paras.23 to 28) numerous subsequent transactions involving the shares and/or assets of various companies in different countries.

17 On May 13, 1998 (para. 13) the United States' Federal Bureau of Investigation ("FBI") and other government agencies under the umbrella of the "Organized Crime Strike Force" raided the head office of YBM in Newtown, Pennsylvania for the purpose of executing a search warrant. On May 13, 1998 the OSC and ASC issued cease-trading orders in respect of the securities of YBM. The TSE subsequently de-listed YBM.

18 Ernst & Young YBM Inc. (the "Receiver") (para.14) was appointed as the receiver of YBM by order of the Court of Queen's Bench of Alberta December 8, 1998. On April 14, 1999 the Alberta court approved a guilty plea agreement entered into by YBM through its Receiver with the US District Attorney for the Eastern District of Pennsylvania. On June 7, 1999 YBM

pledged guilty to a charge in a one-count criminal information with a multi-object conspiracy to commit mail and securities fraud in the United States and was fined U.S. \$3 million.

## **The parties**

### ***The plaintiffs***

19 The plaintiff Mondor lives in Red Deer, Alberta. The plaintiff Karia lives in Mississauga, Ontario. Both purchased YBM shares in the secondary market.

### ***The insider defendants***

20 The plaintiffs allege that at the material times the following persons were officers and directors of YBM. The defendant Jacob C. Bogatin ("Bogatin") (para. 29) resides in Pennsylvania and was a director and, *inter alia*, the Chief Executive Officer. The defendant Igor Fisherman ("Fisherman"), who resides in Kiev, Ukraine, was a director and the Chief Operating Officer. The plaintiffs allege that Bogatin and Fisherman acted in concert with Mogilevitch and the shareholders of Arigon to defraud the shareholders of YBM. (Schedule 1 defines the Central Group as comprising Mogilevitch, Fisherman, Bogatin and the Arigon shareholders. The term "Core Conspirators" is defined as being Fisherman and Bogatin.)

21 The defendant Kenneth Davies ("Davies"), who resides in British Columbia, was a director of YBM. The defendant Michael Schmidt ("Schmidt"), who resides in British Columbia, was a director. Both were members of special committee #1 of YBM. The defendant Frank Greenwald ("Greenwald") resides in Delaware, was a director and was a member of special committee #2. The defendant Harry W. Antes ("Antes") resides in Pennsylvania and was a director who became Chairman of the board of directors in August, 1996. He was also a member of special committee #2. The defendant R. Owen Mitchell ("Mitchell") resides in Ontario and was a director. He was also a director and Vice-President of Investment Banking for the defendant National Bank Financial Inc., which acquired and merged with First Marathon Securities Limited ("First Marathon"). He was a member of special committee #2. The defendant David R. Peterson ("Peterson") resides in Ontario and was a director of YBM. He is also a partner in the defendant law firm, Cassels, Brock & Blackwell ("Cassels"). The defendant Daniel E. Gatti ("Gatti") resides in Pennsylvania and was Vice-President, Finance and Chief Financial Officer of YBM. He was also an accounting manager with the defendant, Parente Randolph Orlando Carey & Associates ("Parente") when that firm conducted YBM's initial audits in 1995. The defendant James J. Held ("Held") resides in Pennsylvania and was Vice-President, Business Development and Investor Relations of YBM. The defendant Guy R. Scala ("Scala") resides in Pennsylvania and was the Vice-President, Sales and Secretary. The plaintiffs allege (para. 40) that each of the above individual defendants was negligent and "so reckless as to be wilfully blind in the performance of his obligations and duties as a director or officer of YBM" and was a party to the conspiracy. The alleged "Conspiracy", is defined in Schedule 1 of the pleading as "[t]he issuance of false statements, announcements and press releases by the Conspirators and their failure to make required timely disclosure of material developments affecting YBM."

### ***The auditor defendants***

22 The defendant Parente is a firm of certified public accountants, with offices in Plymouth Meeting, Pennsylvania and elsewhere. Parente (para. 43) was appointed auditor of YBM about May 19, 1995. The plaintiffs allege Parente provided (paras. 41 to 44) its "unqualified audit opinion" in respect of the financial statements relating to YBM and its subsidiaries for the fiscal years 1993 to 1996, inclusive. Parente consented to the incorporation by reference of YBM's 1995 financial statements in the 1997 Prospectus.

23 The defendant Deloitte & Touche LLP ("Deloitte") is a certified public accounting firm with offices in Ontario, Philadelphia and elsewhere. Deloitte was engaged by YBM (para. 46) to re-audit its 1996 financial operations. Deloitte allegedly provided (paras 47 and 333) by letter dated October 13, 1997 "its clean or unqualified audit opinion" on the re-stated financial statements for the fiscal year ending December 31, 1996. Deloitte consented to the incorporation by reference of YBM's re-stated 1996 financial statements into the 1997 Prospectus, being a prerequisite to the 1997 Prospectus being filed with the securities' regulatory authorities. Deloitte was engaged by YBM about January 22, 1998 to perform its 1997 audit. Deloitte

resigned as YBM's auditor about June 26, 1998. (The defendants Parente and Deloitte are collectively referred to as the "auditor defendants.")

### ***The lawyer defendants***

24 Cassels is a law firm partnership carrying on the practice of law in Ontario and elsewhere. Cassels (para. 49) allegedly acted as counsel, including securities counsel, for YBM and drafted the 1997 Prospectus. Cassels also allegedly acted as counsel to special committee #1 and assisted with respect to special committee #2. The defendant Lawrence Wilder ("Wilder") is a partner of Cassels. It is alleged (para. 50) that he and the defendant Peterson were primarily responsible for the work performed by Cassels for YBM. A declaration is sought that Cassels is vicariously responsible for the acts and omissions of Wilder and Peterson.

### ***The lead financial advisor defendants***

25 The defendant National Bank Financial Corp. ("National") is an investment dealer formerly known as First Marathon Securities Limited ("First Marathon"). The defendant Griffiths McBurney & Partners ("Griffiths McBurney") is also an investment dealer. First Marathon and Griffiths McBurney (para. 55) were the "lead financial advisors" as agents for YBM with respect to a proposed special warrant financing about September 1, 1995. (Collectively, National/ First Marathon and Griffiths McBurney are referred to as the "lead financial advisors"). Ultimately, they became YBM's lead financial advisors for YBM's 1997 financing. The plaintiffs say (para. 56) that Griffiths McBurney and First Marathon/Mitchell had common knowledge as to certain matters. The plaintiffs assert (para. 57) that First Marathon had actual knowledge and is deemed in law to have had certain knowledge of its director and senior officer Mitchell with respect to the affairs of YBM.

26 The plaintiffs also allege (paras. 57 and 58) that both First Marathon and Griffiths McBurney and their officers and employees traded in the shares of YBM for their own accounts and as broker/agent traded in YBM shares on behalf of Mogilevitch., his associates and Arigon shareholders. They allege that First Marathon and Griffiths McBurney were negligent and so reckless as to be wilfully blind in the performance of their duties and obligations and were parties to the "Conspiracy".

### ***The causes of action alleged in the pleading***

27 The plaintiffs allege (paras. 66) that the Central Group used YBM to carry out a multi-layered conspiracy and fraud with several objectives, including, to launder funds obtained from other sources and to obtain improper gains from the sale of shares of YBM to the public for prices predicated upon the "Representation". The plaintiffs say (para. 67) that to achieve their objectives the Central Group had to mislead YBM's innocent shareholders by circulating funds, in ever-increasing amounts, through YBM, its sham suppliers and its customers. The Central Group had to get its sham magnets business past the auditors.

28 The plaintiffs do not allege that the defendants, apart from Bogatin and Fisherman, were intentionally dishonest. Rather, the plaintiffs assert (para. 69) that

the defendants' conduct, when coupled with their immediate pecuniary interests, was such as to constitute knowledge in law or such as to be considered reckless or wilfully blind, thereby making them in law parties to the conspiracy and liable in damages for the conspiracy, for misrepresentation and under the *Competition Act*.

29 The claim alleges negligence, negligent and reckless (caring not whether it was true or false) misrepresentation at common law (paras. 450 and 464). The claim is also advanced under provisions of the *Competition Act*, R.S.C. 1985, c. C-34.

### ***The motions***

30 The defendants Parente and Deloitte bring motions under rules 21.01(1)(b) and 25.11 to strike the pleading on the ground it fails to disclose a reasonable cause of action against them.

31 The test to be applied on a rule 21 motion is whether, accepting the facts alleged in the proposed pleading as proven unless they are patently ridiculous or incapable of proof, is it "plain and obvious" that the plaintiffs' pleading discloses no cause of

action and that the action cannot succeed. Neither the complexity of the issues, the novelty of the cause of action asserted, nor the potential for the defendants to present a strong defence is to prevent the plaintiffs from proceeding with their case. The proposed claim against the auditor defendants should only be struck "if the action is certain to fail because it contains a radical defect." A cause of action with some chance of success should not be struck out. *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980.

### **The pleading of negligence and negligent and fraudulent misrepresentation at common law**

32 A plaintiff must establish five elements to succeed in a claim of negligent misrepresentation.

- a duty of care based on a "special relationship" between the representor and the representee;
- the representation is untrue, inaccurate or misleading;
- the representor was negligent in making the misrepresentation;
- the representee reasonably relied upon the misrepresentation; and
- the reliance must have resulted in damages suffered by the representee.

See *Queen v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.) per Iacobucci J. at 643. The plaintiffs have pleaded (para. 106) the requisite elements of the claim in negligent misrepresentation.

33 A plaintiff must establish the following elements to succeed in a claim of fraudulent misrepresentation.

- that the representor knowingly made a false representation, or made the representation recklessly, caring not whether it was true or false;
- that the representation was intended to induce reliance; and
- the plaintiff relied upon the representation to his or her detriment and suffered loss and damage.

See *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (Ont. Gen. Div.).

34 The claim (at paras. 91, 200, 216, 294, 329, 445, 446, 458, and 459-461) expressly alleges that Parente and Deloitte intended that shareholders and the public rely upon the financial statements Parente and Deloitte had prepared in making investment decisions. The plaintiffs say the audit opinions contained the "Representation" which was made to the public (paras. 454, 455 and 467, 468) and that they relied upon the "Representation" and suffered loss as a result.

35 The plaintiffs plead (paras. 447 and 462) that Parente and Deloitte were negligent in the preparation of their audit opinions, failed to warn investors, failed to report the YBM's financial statements did not fairly present its financial position, failed to apply reasonable diligence and skill to investigate and discover the real situation and failed to apply the requisite professional standards. The plaintiffs say that (paras. 448, 449 and 463) if the auditor defendants had not been negligent YBM would not have become a public company and the 1997 Prospectus would not have come to fruition. The plaintiffs plead (paras. 450, 464 and 467) that Parente and Deloitte each negligently made the same materially misleading misrepresentation, being the "Representation" that YBM "was a legitimate business with income only from legitimate business activities".

36 The plaintiffs' claim (paras. 1 (m) and (n)) seeks a declaration that Parente owed a duty of care to the class members which duty it allegedly breached. The plaintiffs say that in connection with the issuance of its audit opinions Parente negligently made the Representation (paras. 1 (b), (6) and 450).

37 The same allegations are made against Deloitte (paras. 1 (o) and (p), 47) with respect to its re-audit and audit opinion concerning YBM's consolidated financial statements for the year ended December 31, 1996. The plaintiffs also say that Deloitte's audit opinion was given in part for the purpose of allowing the public financing by YBM through the 1997 Prospectus and with the expectation that investors would rely on it.

38 The plaintiffs allege (paras. 450 and 464) that the auditors' "Representation" that "YBM was a legitimate business with income only from legitimate activities" was made "recklessly, caring not whether it was true or false, intending that [the class] rely upon the Representation".

### The issue of a duty of care

39 In determining whether there is a duty of care in tort law, two questions must be answered: *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) per Lord Wilberforce at pp. 751,752. First, a *prima facie* duty of care is owed when there is a sufficient relationship of proximity between two persons such that it is reasonably foreseeable by the alleged wrongdoer that carelessness on his/her part may cause damage to the other person.

40 Second, upon a determination of a *prima facie* duty of care, it is necessary to consider whether there are any factors or policy considerations which ought to negative or limit the scope of the duty, or the class of person to whom the duty is owed, or the damages for a breach of the duty.

41 This test has been applied in Canada to claims arising with respect to the alleged negligence of an auditor. *Hercules Management Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.) at p. 586. In *Hercules* the court found that a *prima facie* duty of care existed, (at pp. 592-593 and 597 per La Forest J.). It was reasonably foreseeable that the shareholders in that case would rely on the statutory audited year-end financial statements in making their investment decisions and that such reliance could lead to financial loss.

42 However, La Forest J. held that the *prima facie* duty of care generally will be negated where the auditor faces unlimited liability. It is contrary to public policy that auditors be exposed to the "socially undesirable consequences" that would be consequential to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". (at pp. 592, 503) See 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 at pp. 169-171.

43 After weighing the respective interests of the users of financial statements and the interests of auditors, La Forest J. concluded:

In the general run of auditors' cases, concerns over indeterminate liability will serve to negate a *prima facie* duty of care. . . . 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. (at pp. 595 and 597)

44 The *prima facie* duty of care will be negated when either the auditor does not know the identity of the investor or of the limited class of investors or the investor did not use the audit report for the specific purpose for which it was prepared (at pp. 590, 592 and 599). La Forrest J. in *Hercules* at pp.595 to 597 allowed that a claim for negligent misrepresentation might proceed exceptionally where "the scope of liability can readily be circumscribed".

45 Parente and Deloitte submit that the claim in the case at hand is asserted by as broad a class as could almost possibly be as it includes every person who dealt in the shares of the corporation over the class period.

46 The principles articulated in *Hercules* must be considered in the situation at hand with respect to both the pleading of negligent misrepresentation and the pleading of negligence. *Hercules* involved a motion for summary judgment after lengthy examinations for discovery. By contrast, the motion at hand is a rule 21.01 (1) (b) motion. The factual matrix as pleaded must be taken to be true, unless patently ridiculous or incapable of proof. The pleading is deemed to include documents incorporated therein by reference.

47 The auditor defendants submit that the audit opinions in question were statutory audits, and not special purpose audits. Statutory year-end audits have the limited purpose of providing 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. *Roman Corp. v.*

*Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]) at p. 260 adopted in *Hercules* at pp. 600-601; *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.) at p. 583 per Lord Oliver, adopted in *Hercules* at p. 600.

48 The plaintiffs plead (para. 42 and 44) that the audit opinions of Parente were not simply statutory audit opinions but, as known to and consented to by Parente, were to be used for the purposes of the 1996 and 1997 Prospectuses. They make the same allegation (para. 47) in respect of Deloitte's audit opinion with respect to YBM's 1996 financial statements as restated, being incorporated in the filing of the 1997 Prospectus.

49 The plaintiffs plead (paras. 91, 200, 216, 294, 444 to 446) that Parente intended that the shareholders and public would rely upon the audited financial statements when making investment decisions. The plaintiffs make the same allegation in respect of Deloitte (para. 458 to 461). Hence, the plaintiffs submit that the instant case is an exception to the "general run" of cases involving auditors as contemplated by *Hercules*.

50 The plaintiffs also assert (paras. 447 (a) and 462 (b)) that the auditors failed to warn the shareholders of the facts which would lead to a change in management. The auditors' duty is to report to shareholders to allow them to scrutinize the conduct of the corporation's affairs and to exercise their collective powers to remove directors. See *Hercules* at pp. 600-5. The plaintiffs allege that the shareholders of YBM as a collectivity could not effectively scrutinize the conduct of management because of the negligence of the auditors.

51 I turn to the first part of the *Hercules* test and the case at hand. Is there arguably a *special relationship* such that there is a *prima facie* duty of care owed by Parente and Deloitte to the plaintiff class? Whether a duty of care does or does not exist is a factual enquiry. In my view, the plaintiff has pleaded material facts in support of the claim of proximity such as to give rise to a *prima facie* duty of care.

52 *Hercules* involved a summary judgment motion with a very extensive evidentiary record. The rule 21 challenge by Parente and Deloitte in the case at hand simply goes to the adequacy of the pleading. Accepting the alleged factual record as set forth in the pleading, in my view it cannot be said that its is plain and obvious that the pleading does not disclose a reasonable cause of action against Parente and Deloitte. It is arguable that they ought reasonably to have foreseen that the plaintiff class members would rely upon their representations. It is arguable that such reliance by the prospective shareholder investors would be reasonable. La Forest J. puts the test for establishing a *prima facie* duty of care as:

[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. (at p. 13)

53 I turn now to the second part of the *Anns* test. In *Hercules* the court held that even though the defendants owed the individual claimants a *prima facie* duty of care, such was negated by policy considerations which were not obviated by the facts of the case. Mr. Justice La Forest quoted (at p. 14) Cardozo C.J. in *Ultramarine Corp. v. Touche*, 174 N.E. 441 (U.S. N.Y., 1931) at p. 444 that the fundamental policy consideration to be addressed in negligent misrepresentation actions is whether a defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".

54 Where an auditor acts for a party in an arms-length transaction his/her normative duty is to his client and not to any party who has an interest adverse to that of his/her client. See for example *Midland Mortgage Corp. v. Jawl & Bundon* (1999), 62 B.C.L.R. (3d) 239 (B.C. C.A.); additional reasons at (1999), 64 B.C.L.R. (3d) 1 (B.C. C.A.). Something more must be shown before imposing a duty on one party to care for the purely economic interests of another, than simply that the former could foresee that his/her conduct might cause loss or damage to those interests.

55 Parente and Deloitte say that YBM was their client, not the investing public. Hence, they argue, they owed no duty of care at law to the investing public or, at least, such duty is to be negated on policy considerations. However, the factual situation in *Hercules* has less force than that seen in the pleading at hand. A statutory audit report such as that considered in *Hercules* is not generally prepared for the purpose of guiding personal investment decisions. (*Hercules*, pp. 19 and 22, citing with approval

*Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.); *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]).

56 In the case at hand, the specific purpose of the services provided by Parente and Deloitte to YBM, as known to them, was in part to enable YBM to raise more than \$100 million from the investing public through the 1997 Prospectus and the offering and qualifying of common shares. The plaintiffs argue that it ought to have been within the contemplation of the auditors that the 1997 Prospectus was incomplete and hence, misleading. The plaintiffs submit that the services of Parente and Deloitte are properly to be viewed within a much broader context than simply the provision of services to a client, YBM. Parente and Deloitte knew there was to be an offering to the public. They knew their services were for the purpose of achieving this public offering. They knew that the offering could not be made to the public without it being receipted by the regulators. They knew that a receipt would not be given if there were known to be misrepresentations in the Prospectus. They knew that if the public offering was made there would, of course, be trading in the secondary market. They allegedly negligently allowed the Prospectus to be receipted and the public offering to proceed.

### **The issue of reliance**

57 Proof of reliance is a necessary ingredient of actions based upon negligent misrepresentation. *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110. The plaintiffs assert (paras. 477 to 483) that the issue of reliance upon the "Representation" is a matter of fact. The plaintiffs claim that the market price of the shares of YBM reflected the "Representation" made in the Parente and Deloitte audit opinions. Thus, the plaintiffs argue, a court could conclude that by purchasing YBM shares each class member relied upon the "Representation". (paras. 480 and 481) See generally *Kripps v. Touche Ross & Co.*, [1997] B.C.J. No. 968 (B.C. C.A.), paras. 101, 103; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.), at 547.

58 The auditor defendants assert that this assertion by the plaintiffs is in reality to advance the American "fraud on the market theory" which is not part of the law of Canada. Therefore, they say the plaintiffs' allegations (paras. 477-481) concerning this "theory" in the pleading do not disclose a reasonable cause of action and must be struck.

59 The "fraud on the market theory" is an implied statutory cause of action arising from Rule 10b-5 of the United States Securities and Exchange Commission. Under American law, the fraud on the market theory was developed in relation to actions brought under s. 10(b) of the *Securities Exchange Act of 1934*, 15 U.S.C. s.78a, as a means to establish reliance for the purposes of this statutory cause of action. The theory results in deemed reliance where an actionable misrepresentation is established on the part of a company and there has been the purchase of its shares by an investor in the secondary market. This statutory cause of action was described by the United States Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (U.S. Ohio, 1988), at 241 as follows:

[It] is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of each stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

60 The theory negates the necessity of requiring proof of subjective reliance from each member of the proposed plaintiff class. The theory has been described as a legal fiction which has the effect of overcoming the need to prove reliance. Campion in "Misrepresentation in Class Proceedings: The Cardozo Nightmare", (2001) 24 Advocates Quarterly 129 at 164 notes, "The doctrine represents a form of deemed reliance and a mechanism to prove aggregate damages through experts' opinions on the impact of each statement on the market price."

61 The "fraud on the market theory" has been expressly rejected by Canadian courts because, *inter alia*, Canadian securities legislation does not include a similar concept, and that actual reliance is a necessary component under Canadian law concerning negligent and fraudulent misrepresentation. See *Kripps v. Touche Ross & Co.* (1990), 52 B.C.L.R. (2d) 291 (B.C. S.C. [In

Chambers]), aff'd on other grounds ([1992](#), **94 D.L.R. (4th) 284** (B.C. C.A.) , leave to appeal refused ([1993](#), **101 D.L.R. (4th) vii** (S.C.C.) and the recent Ontario decision of *Carom v. Bre-X Minerals Ltd.* ([1998](#), **41 O.R. (3d) 780** (Ont. Gen. Div.).

62 In *Carom*, at 794, Winkler J. noted the following:

The torts of fraudulent and negligent misrepresentation are neither novel nor undeveloped in Canada. Both have been canvassed by the Supreme Court of Canada and the pronouncements of that court on the elements of each must be considered to be settled law. In my view, the presumption of reliance created by the fraud on the market theory can have no application as a substitute for the requirement of actual reliance in either tort. In the context of the torts of fraudulent and negligent misrepresentation a representation of the nature advocated for by the plaintiffs does not exist in Canadian common law. Indeed, to import such a presumption would amount to a redefinition of the torts themselves.

63 The plaintiffs in the instant situation recognize that the "fraud on the market theory" is not available under Canadian common law. Winkler J. in *Carom* found that the amendments to the statement of claim in *Carom* were "framed specifically with the fraud on the market theory in mind." The plaintiffs' pleading in the case at hand does not, at least expressly, refer to that theory. The plaintiffs' claim must be examined within the context of the common law actions of fraudulent and/or negligent misrepresentation.

64 The plaintiffs assert that they plead *actual reliance* upon the "Representation". They claim (at para. 46 of their Factum) that they do not assert the "fraud on the market theory" at all. The plaintiffs claim that the issue of reliance upon the "Representation" is a matter of fact and that if the market price of YBM reflected the Representation, a court may conclude as a question of fact that each putative class member relied upon the "Representation" in purchasing shares in the secondary market. The plaintiffs note that Winkler J. in *Carom* did not decide this issue. In *Carom*, Winkler J. considered the fraud on the market theory and rejected the proposition that an inference of reliance upon a representation was a matter of law; that is, he only evaluated the submissions made to him within the context of the "fraud on the market theory".

65 Whether a plaintiff has actually relied upon a misrepresentation is a question of fact and may be inferred from all the circumstances. As Finch J.A. of the British Columbia Court of Appeal noted in *Kripps v. Touche Ross & Co.*, [[1997](#)] B.C.J. No. **968** (B.C. C.A.) at para 101.

Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many cases, however, as the authorities point out, it would be unreasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. . . .

66 Finch J.A. further held at para. 103 that

where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred. The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor.

67 Mr. Justice Rosenberg of the Ontario Court of Appeal has also recently held that whether or not a person relied upon a (mis)representation may be inferred from all the circumstances: *NBD Bank, Canada v. Dofasco Inc.* ([1999](#), **46 O.R. (3d) 514** (Ont. C.A.), at 547.

68 The plaintiffs claim that if one were to assume for the purposes of this motion that the market price of YBM shares, from time to time, reflected the "Representation", it is open to a trial judge to infer that as a question of fact a putative class member relied on the "Representation" made by Parente, Deloitte and others when a class member purchased YBM shares in the secondary market.

69 To foreclose the consideration of an arguable issue past the pleading stage, a moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected: *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (Ont. Gen. Div.). Had the plaintiffs simply pleaded the "fraud on the market theory" I would have foreclosed that consideration. Given, however, that the case law recognizes that a person's reliance upon a representation may be inferred from all the circumstances, in my view it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage.

70 The plaintiffs also allege that the defendants were reckless in their negligent misrepresentation, not caring whether it was true or false. That is, they did not care whether the "Representation" they made was true or false. While this is not a claim of fraud, it is an allegation that the defendants Representation was tantamount to a fraudulent misrepresentation. *Peek v. Derry* (1889), 14 App. Cas. 337 (U.K. H.L.), at 374; *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.), at 343-4. The concern as to indeterminate liability expressed in *Hercules* has no application to a claim of fraudulent misrepresentation.

71 For the reasons given, in my view, and I so find, it is not plain and obvious that the plaintiffs do not have a reasonable cause of action against the auditor defendants for negligence and negligent and fraudulent misrepresentation at common law.

### The Competition Act

72 Section 52 in Part VI of the *Competition Act* (the "Act") creates a criminal offence with respect to the making of certain false or misleading representations:

52(1): No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

73 Section 36 provides a right to claim civil damages for breach of the criminal provisions of the *Act*.

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,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct . . . 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.

74 The plaintiffs have pleaded that the "Representation" made by the auditor defendants was done "recklessly, caring not whether it was true or false intending that [the class] rely upon the Representation." Section 51(2) of the *Competition Act* is not restricted to representations based in intentional fraud. Rather it requires a false or misleading representation to the public that is made "knowingly or recklessly". See *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.); *Carom v. Bre-X Minerals Ltd.* *supra* at 795.

75 The term "product" is defined in subsection 2(1) of the Act to include both an article and service. The term "article" is defined, in part, to mean "personal property of every description." This definition would arguably include the publicly traded shares of YBM, being choses-in-action.

76 The term "service" is defined to mean "a service of any description whether . . . professional or otherwise". Because the term "service" includes professional services, the plaintiffs argue that Parliament intended subsections 52(1) and 36(1) to apply to false and materially misleading representations made to the public by professionals, including accountants.

77 The plaintiffs plead (paras. 452 to 455 and 465 to 468) that the Parente and the Deloitte audit opinions were materially false and were made to the public for the purpose of promoting, directly or indirectly, the business interests of Parente and Deloitte, respectively. In doing so, the plaintiffs allege that the auditor defendants made the "Representation" about YBM.

78 The plaintiffs say that Parente and Deloitte had a direct, or immediate pecuniary interest in that it was in their business interests to prepare the audited financial statements for YBM. The plaintiffs contend that the auditors also had a secondary interest in providing the service, that of promoting their own business interest as auditors. The plaintiffs argue that it was in Deloitte's own business interests to accept a "high risk" audit with respect to YBM, a high-profile public company which became part of the TSE 300 company index and to produce the restated audited financial statements when it was suggested as a possible auditor by the Ontario Securities Commission.

79 Parente and Deloitte contend that the decision in *Apotex Inc. v. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4732 (Ont. C.A.), is authoritative and that the plaintiffs' claim on this ground must be struck. In *Apotex* the Court of Appeal held that the words "any business interest" found in s.52(1) of the Act means the business interest of the alleged representor; and, quoting with approval the British Columbia County Court decision of Darling Co.Ct.J. in *R. v. Garibaldi Lifts Ltd.* (1977), 35 C.C.C. (2d) 190 (B.C. Co. Ct.), "promoting" means "enhancing or increasing the volume of business for the company". Accordingly, Parente and Deloitte argue, the plaintiffs' cause of action under s.52 can succeed only if the "Representation" was related to the defendants' business interests. The auditor defendants deny that the "Representation" was related to their own business interests and say that there is nothing in the pleading connecting the Representation to a business interest of the defendants.

80 In *Apotex* the defendants succeeded on a motion to have the claim struck out as disclosing no reasonable cause of action. The Court of Appeal granted the appeal in part and reinstated the action. The plaintiff's claim was based upon s.36 of the *Competition Act*, relying upon, *inter alia*, s.52. The plaintiff complained of the marketing strategy of the defendant brand name pharmaceutical companies.

81 The claim in *Apotex*, however, satisfied the requirement of s.52 by alleging that the misrepresentation was for the purpose of promoting "any business interest" because it promoted the business interest of the defendants in continuing the sale of the brand name drug at a higher price than the generic brand. The court doubted that Parliament intended to prohibit the type of conduct alleged and commented that the causal connection between the false representation and loss or damage to the plaintiff was weak. However, the court concluded that it was not plain and obvious that the plaintiff's claim would fail, given the strict test for striking out a claim.

82 In *Canadian Competition Law, Vol. 1* (Looseleaf ed.) (Scarborough: Carswell, 2001), the authors Affleck and McCracken note at 5A-10 a particular quotation from the Quarterly Misleading Advertising Bulletin issued by the Marketing Practices Branch of the Bureau of Competition Policy released in 1984:

... The primary object of the communication need not appear to be promotion of a business interest. Rather, a particular representation may be captured under section 36 (now section 52) if promotion of a business interest is a subsidiary or indirect intention of the communication.

83 The plaintiffs contend in their factum (at p.22) that "[w]henever an accountant prepares and puts its name on audited financial statements, containing a misrepresentation, a court may conclude that the accountant is directly or indirectly promoting its own business interests". When professionals put their name on any document intended for a public audience, there is arguably commonly a subsidiary or indirect intention to promote their own professional services.

84 The plaintiffs assert that the auditor defendants, in giving their unqualified audit opinions, made the "Representation" that YBM was a legitimate business with income only from legitimate business activities. The pleading asserts that in fact the opposite was true and hence, the "Representation" was a misrepresentation.

85 Based on the foregoing, I find that the Parente's and Deloitte's alleged misrepresentations arguably may have been made for the purpose of promoting their "business interests" within the meaning of s. 52(1), even if that was only a subsidiary and

indirect intention of the "Representation". This novel cause of action of the plaintiffs advanced under the misleading advertising provisions of the *Competition Act* seems problematic and tenuous. However, in my view the s.36 claim based on s.52(1) of the *Act* should not be struck. I am not satisfied that it is plain and obvious that the claim advanced under ss.36 and 52 of the *Competition Act* discloses no reasonable cause of action and that the plaintiffs' claim would necessarily fail.

### **Disposition**

86 For the reasons given, the auditor defendants' motions are dismissed.

*Motions dismissed.*

# **TAB 10**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Marshall v. United Furniture Warehouse Limited Partnership](#) | 2013 BCSC 2050, 2013 CarswellBC 3412, [2017] B.C.W.L.D. 2523, 237 A.C.W.S. (3d) 312 | (B.C. S.C., Nov 8, 2013)

2004 CarswellOnt 5026  
Ontario Court of Appeal

Cloud v. Canada (Attorney General)

2004 CarswellOnt 5026, [2004] O.J. No. 4924, [2005] 1 C.N.L.R. 8, 135 A.C.W.S. (3d) 567,  
192 O.A.C. 239, 247 D.L.R. (4th) 667, 27 C.C.L.T. (3d) 50, 2 C.P.C. (6th) 199, 73 O.R. (3d) 401

**MARLENE C. CLOUD, GERALDINE ROBERTSON, RON DELEARY, LEO NICHOLAS, GORDON HOPKINS, WARREN DOXTATOR, ROBERTA HILL, J. FRANK HILL, SYLVIA DELEARY, WILLIAM R. SANDS, ROSEMARY DELEARY, and SABRINA YOLANDA WHITEYE (Plaintiffs / Appellants) and THE ATTORNEY GENERAL OF CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON and THE NEW ENGLAND COMPANY (Defendants / Respondents)**

Catzman, Moldaver, Goudge JJ.A.

Heard: May 10-11, 2004

Judgment: December 3, 2004

Docket: CA C40771

Proceedings: reversing [Cloud v. Canada \(Attorney General\) \(2003\)](#), 65 O.R. (3d) 492, 2003 CarswellOnt 4630, 41 C.P.C. (5th) 226 (Ont. Div. Ct.); affirming [Cloud v. Canada \(Attorney General\) \(2001\)](#), 2001 CarswellOnt 3739, [2001] O.T.C. 767 (Ont. S.C.J.); additional reasons at [Cloud v. Canada \(Attorney General\) \(2002\)](#), 2002 CarswellOnt 706 (Ont. S.C.J.)

Counsel: Kirk M. Baert, Russell M. Raikes for Appellants

Paul Vickery, Monika Lozinska, Donald Padget for Respondent, Attorney General of Canada

Robert B. Bell for Respondent, New England Company

Brian T. Daly, Lisa Gunn for Respondent, Diocese of Huron

Subject: Civil Practice and Procedure; Public; Criminal; Churches and Religious Institutions

**Related Abridgment Classifications**

Aboriginal and Indigenous law

[XI](#) Practice and procedure

[XI.4](#) Representative or class actions

[XI.4.a](#) Residential school claims

Civil practice and procedure

[V](#) Class and representative proceedings

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It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — Workable litigation plan requirement under s. 5(1)(e)(ii) of Class Proceedings Act, 1992 was met — Certification motion did not fail on basis that plaintiffs had not yet produced workable litigation plan — Litigation plan produced

by the plaintiffs was, as was case with all litigation plans, something of work in progress — It would undoubtedly have to be amended, particularly in light of issues found to warrant common trial — Nothing in litigation plan exposed weaknesses in case as framed that undermined conclusion that class action was preferable procedure.

**Aboriginal law --- Practice and procedure — Parties — Representative or class actions**

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — All of requirements under s. 5(1) of Class Proceedings Act, 1992 were met.

**Churches and religious institutions --- Practice and procedure**

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — All of requirements under s. 5(1) of Class Proceedings Act, 1992 were met.

The plaintiffs brought an action against Canada, the Incorporated Synod of the Diocese of Huron and the New England Company for breach of fiduciary duty, negligence, assault, battery and breaches of aboriginal and treaty rights with respect to the operation of a residential school. The claims were made for the period from 1922 to 1969 on behalf of all students who attended the institute during that period. The plaintiffs estimated that there were approximately 1,400 such students. In addition, two of the plaintiffs advanced claims for breach of fiduciary duty and for loss of care, guidance and companionship under the Family Law Act. Those plaintiffs sought to represent the parents, siblings, spouses and children of former students. The number of such persons was estimated to be 4,200.

The plaintiffs moved for certification as a class proceeding. The motion judge determined that the Superior Court of Justice did not have jurisdiction to entertain claims under the Crown Liability and Proceedings Act arising from acts or omissions that occurred prior to May 14, 1953. The motion judge held that the plaintiffs did not have causes of action with respect to claims by family members of former students brought under the Family Law Act. The motion judge found that there were numerous, significant individual issues that would require trial beyond the resolution of any common issues and that the procedure of certification would not result in any judicial economy.

The plaintiffs' appeal was dismissed. The majority for the Divisional Court found that the motion judge committed no error with respect to the pre-May 14, 1953 claims and the Family Law Act claims. The majority found that the motion judge correctly determined that the resolution of the common issues presented to him for consideration would do nothing to avoid or limit the length of the individual claims which would be inevitable given the diverse experiences of each student. The majority found that even if the common issues advanced in this case were reformulated in terms of systemic negligence, the result would not be altered; the common issues would not significantly advance the action. The majority found that a class action was not the preferable procedure because the underlying policy objectives of access to justice, judicial economy and behaviour modification would not be served by certifying the action.

The dissenting judge for the Divisional Court found that the pre-May 15, 1953 claims against the Crown for breach of fiduciary duty were not barred by statute. The dissenting judge found that each of the criteria in s. 5(1) of the Class Proceedings Act ("CPA") was satisfied and that the action should be certified. The dissenting judge found that the primary class of plaintiffs consisted of all individuals who were students at the institute between 1922 and 1970. The dissenting judge found that if attention was directed solely to the possible existence of issues of systemic breach of duty in this case, such issues were common to the members of the primary class. The dissenting judge found that the required rational connection between the criteria for identifying members of the class and such issues was present. The dissenting judge found that a trial of the common issues would be a fair, efficient and manageable method of advancing the claims pleaded. The dissenting judge found that as the focus of the inquiry would be on the conduct of the defendants, those issues could be determined without regard to differences in the family backgrounds, the experiences of particular class members at the school and the facts of each incident in which harm was alleged to have occurred.

The plaintiffs appealed.

**Held:** The appeal was allowed and the action was certified.

The plaintiffs properly conceded that the Family Law Act claims, the claims for negligence occurring before 1953 and the claims for treaty rights could not be proceeded with. Otherwise, the claims for vicarious liability (although the plaintiffs conceded that those claims did not give rise to any common issue), breach of fiduciary duty and negligence (but only between 1953 and 1969 for negligence), survived the test in s. 5(1)(a) of the CPA that the claims must disclose a cause of action.

The identifiable class requirement under s. 5(1)(b) of the CPA was met. The motion judge applied the wrong test in this regard, by requiring that all students fully share a cause of action. The shared interest need only extend to the resolution of the common

issues. The majority of the Divisional Court did not address the identifiable class issue, but the dissenting judge correctly found that the requirement was met. The plaintiffs satisfied all dimensions of the requirement. None of the proposed classes was open-ended but, rather, were circumscribed by their defining criteria. The classes were rationally linked to the common issues found by the dissenting judge. All class members shared the same interest in the resolution of whether certain duties were owed to them and whether those duties were breached.

The common issues requirement under s. 5(1)(c) of the CPA was met. The motion judge focused on those aspects of the claim that in his view would require individual determination, student by student, and did not analyse what parts of the claim could be said to be common. The motion judge erred in his ultimate conclusion that there were no common issues. The majority of the Divisional Court did not address this requirement. The dissenting judge correctly analysed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims. The plaintiffs' claim of systematic breach of duty was a part of every class member's case and was of sufficient importance to meet the commonality requirement. A class action was sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. The existence of limitations defences did not negate a finding that there were common issues. The common trial would take the claims to the point where only causation and harm remained to be established, and it would adjudicate a substantial part of each class member's claim by doing so. Also, as stated by the dissenting judge from Divisional Court, in a trial of the common issues the claims for an aggregate assessment of damages and punitive damages were properly included as common issues.

The preferable procedure requirement under s. 5(1)(d) of the CPA was met. As the dissenting judge of the Divisional Court found, in the context of the entire claim the resolution of the common issues would significantly advance the action. Resolution of the common issues would take the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remained for determination. The common issues were fundamental to the action and could not be described as negligible in relation to the consequential individual issues or to the claim as a whole. A single trial of the common issues would achieve substantial judicial economy. Without a common trial, the issues would have to be dealt with in each individual action at an obvious cost in judicial time and possibly resulting in inconsistent outcomes. Access to justice would be greatly enhanced by a single trial of the common issues, and this consideration strongly favoured the conclusion that a class action was the preferable procedure. A class action was a manageable method of advancing the claim. The alternative dispute resolution ("ADR") system that had been put in place by Canada to deal with claims of those who attended native residential schools did not displace the conclusion that the class action was the preferable procedure. The ADR system was a system unilaterally created by one of the defendants and could be unilaterally dismantled without the consent of the plaintiffs. It dealt only with physical and sexual abuse. It capped the amount of possible recovery and, importantly, compared to the class action it shared the access to justice deficiencies of individual actions.

The "workable litigation plan" requirement under s. 5(1)(e)(ii) of the CPA was met. The certification motion did not fail on the basis that the plaintiffs had not yet produced a workable litigation plan. The litigation plan produced by the plaintiffs was, as was the case with all litigation plans, something of a work in progress. It would undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Nothing in the litigation plan exposed weaknesses in the case as framed that undermined the conclusion that a class action was the preferable procedure.

#### **Table of Authorities**

##### **Cases considered by Goudge J.A.:**

*Carom v. Bre-X Minerals Ltd.* (2000), 2000 CarswellOnt 3838, 51 O.R. (3d) 236, 1 C.P.C. (5th) 62, 138 O.A.C. 55, 11 B.L.R. (3d) 1, 196 D.L.R. (4th) 344 (Ont. C.A.) — referred to

*Hollick v. Metropolitan Toronto (Municipality)* (2001), (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158 (S.C.C.) — followed

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**Statutes considered:**

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

Generally — referred to

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e)(ii) — considered

s. 10 — referred to

s. 24 — referred to

s. 25 — referred to

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

Generally — referred to

s. 24(1) — referred to

*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50

Generally — referred to

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

Generally — referred to

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

s. 2(f) "Indians" — referred to

APPEAL by plaintiffs from judgment reported at *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492, 2003 CarswellOnt 4630, 41 C.P.C. (5th) 226 (Ont. Div. Ct.) dismissing appeal from judgment dismissing motion for certification of action as class proceeding.

**Goudge J.A.:**

**Introduction**

1 The appellants seek to bring this action on behalf of the former students of the Mohawk Institute Residential School, a native residential school in Brantford, Ontario, and their families. They seek to recover for the harm said to have resulted from attending the School. The action is against those said to be responsible for running the School, namely Canada, the Diocese of Huron and the New England Company.

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

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

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

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

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

## **The Background**

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

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

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

by the New England Company, an English charitable organization dating back to the 17<sup>th</sup> century, with the mission of teaching the Christian religion and the English language to the native peoples of North America.

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

10 This action covers the years from 1922 to 1969. During that time, there were 150 to 180 students at the School each year, ranging in age from 4 to 18 and split roughly equally between boys and girls. All were native children, that is Indians within the meaning of the *Indian Act*, R.S.C. 1906, c. 81, as amended. In all, approximately fourteen hundred native children attended the School in these years. They constitute the primary class of claimants proposed for this action. The appellants put forward two additional classes, a "siblings" class (namely the parents and siblings of the students) and a "families" class (namely their spouses and children).

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

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

### **The Judgments Below**

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

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

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

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

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

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

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

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

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

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

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

23 In addressing whether the pleadings disclose a cause of action as required by s. 5(1)(a) he found that claims against the Crown for vicarious liability for the actions of its employees prior to May 14, 1953, can be brought in the Superior Court of Justice because of the jurisdiction given to that court by the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 as amended, and because the ban in s. 24(1) of the *Crown Liability Act* does not extend to claims like this because they could have been brought against the Crown before May 14, 1953, in the Exchequer Court.

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

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

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

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

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

29 By the time of the appeal to the Divisional Court, the appellants had reworked their list and were proposing eight more broadly framed common issues. Cullity J. found that with some further refashioning there were common issues sufficient to satisfy s. 5(1)(c). He placed considerable reliance on the reasons of the Supreme Court of Canada in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) which were released after the decision of the motion judge here. He focused on the duty of care said to be owed to all members of the student class and the fiduciary duty owed both to them and the families and siblings classes. He found that the common issues could be defined in terms of these duties and their breach. He described his conclusion about the common issues at paras. 25 and 31 of his reasons:

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

.....

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

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

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

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

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

### **Analysis**

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

35 Before addressing in turn each of these factors, it is helpful to repeat the full subsection and set out the principles applicable to its application as they have been developed by the Supreme Court of Canada and this court. Section 5(1) reads as follows:

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

36 The Supreme Court of Canada has issued three important decisions to guide the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), and *Rumley*, supra. In *Hollick*, the Supreme Court of Canada had its first opportunity to enunciate the interpretive approach to be applied to the CPA in general and to its certification provisions in particular.

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

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

39 For its part, this court has said that because of the expertise developed in this new and evolving field of class actions by the small group of judges across the province who have significant experience in hearing certification motions, an appellate court should proceed with deference and should restrict its intervention to matters of general principle. See *Carom v. Bre-X*

*Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.). This admonition is somewhat complicated in this particular case because both Haines J. and Cullity J. have been part of that small group.

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

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

41 It is now well established that this requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

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

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

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

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

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

***The Identifiable Class Requirement — s. 5(1)(b)***

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

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

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

#### ***The Common Issues Requirement — s. 5(1)(c)***

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

49 Moreover, like the other criteria in s. 5(1), save for the disclosure of a cause of action, the common issues criterion obliges the class representative to establish an evidentiary basis for concluding that the criterion is met. McLachlin C.J.C. put it this way in *Hollick*, *supra*, at para. 25: "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."

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

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

A more difficult question is whether "the claims...of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial...ingredient" of each of the class members' claims.

52 This requirement has been described by this court as a low bar. See *Carom*, *supra*, at para. 42. Indeed this description is consistent with the commonality finding in *Hollick* itself. The class action proposed there was on behalf of some thirty thousand people who lived in the vicinity of a landfill site that was alleged to cause harm through noise and physical pollution. The Supreme Court found that the issue of whether the site emitted pollutants into the air met the test of s. 5(1)(c) because each class member would have to show this or see his claim fail. The Court did not see this conclusion to be at all undermined by the fact that this common issue was but one aspect of the liability issue and a small one at that. It clearly accepted that after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually. Yet it found the commonality requirement to be met.

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

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

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

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

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

58 The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. As the analysis in *Hollick, supra*, exemplifies, the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.

59 The respondents also argue that the claim of systemic negligence in running the School cannot serve as a common issue because the standard of care would undoubtedly change over time as educational standards change. However, in my view this argument is answered by *Rumley*, which was also a claim based on systemic negligence in the running of a residential school for children. There the Supreme Court found that the class action proceeding is sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. In that case the claim covered a forty-two year period. Here, in analogous circumstances, the negligence claim covers only sixteen years, from 1953 to 1969.

60 The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposes of s. 5(1)(c).

61 Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues.

62 The respondents other than Canada also argue that, at least for them, the finding of common issues by Cullity J. is undermined by their assertion that their proximity to Canada in exercising control over the operation of the School varied over time. Again, I disagree. At best that assertion may provide these respondents with a defence to the appellants' claims in the common trial for certain periods of time. Nonetheless the common issues remain and require resolution.

63 Lastly the respondents say that in reaching his conclusion about common issues Cullity J. should not have relied on *Rumley*, but should have distinguished it. They say this essentially for two reasons. First *Rumley* involved sexual abuse of students and therefore there could be little debate about the duty to prevent it owed by those running the school, whereas, here, the legal duties alleged are seriously contested. Second, they say that in *Rumley* there were very few individual issues requiring resolution because, for example, sexual abuse had been found to occur and there were no issues of vicarious liability or limitations requiring individual resolution.

64 In my view neither of these renders *Rumley* inapplicable to this case. Although the existence of the systemic duty of care to all students and its precise nature may be more hotly contested here than in *Rumley*, nonetheless the issue is a significant one requiring resolution for each class member and is a proper common issue.

65 Moreover, at para. 33 of *Rumley*, the Supreme Court made clear that the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment. Although the Court underlined that it was dealing with the British Columbia *Class Proceedings Act* (which explicitly states that the common issues requirement may be met whether or not these issues predominate over individual issues, whereas the CPA is silent on the point), in my view the same approach is implicit in the CPA. A weighing of the relative importance of the common issues and the remaining individual issues is necessarily an important part of the preferability inquiry. I do not think that the CPA contemplates a duplication of that task as part of the commonality inquiry. The CPA's silence on the point cannot be read as mandating the opposite of the B.C. legislation. Thus the extent of individual issues that may remain after the common trial in this case does not undermine the conclusion that the commonality requirement is met.

66 I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way.

67 In the affidavits of the ten representative plaintiffs there is a clear showing of some basis in fact supporting this description of the way in which the School was run. Although their cross-examinations support the conclusion that students were not all treated the same way and did not all experience the same suffering, the appellants have shown some basis in fact for their assertion that the management and operation of the School raises the common issues required for certification by s. 5(1)(c). They have met their evidentiary burden.

68 The appellants acknowledge that if they are successful in the common issues trial it will be necessary to separately establish causation of harm and quantification of damages for each individual class member for all three classes.

69 Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

70 I also agree with Cullity J. that in a trial of these common issues the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can also properly assess whether this conduct towards the members of the three classes as a whole should be sanctioned by means of punitive damages.

71 In summary, I agree with Cullity J. that the appellants have met the requirements set by s. 5(1)(c) of the CPA. The focus of the common trial will be on the conduct of the respondents as it affected all class members, and how and for what purpose they ran the School. Although evidence from individuals that speaks to the respondents' systemic conduct may be relevant to this, findings of causation and extent of harm must await the individual trials to follow.

72 As the class action proceeds, the judge managing it may well determine that the common issues should be restated with greater particularity in light of his or her experience with the class proceeding. To permit that process to unfold with flexibility, at this stage. I would state the common issues in general terms, as follows:

- (1) By their operation or management of the Mohawk Institute Residential School from 1953 to 1969 did the defendants breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?
- (2) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?
- (3) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the families and siblings of the students of the School?
- (4) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?
- (5) If the answer to any of these common issues is yes, were the defendants guilty of conduct that justifies an award of punitive damages?
- (6) If the answer to that is yes, what amount of punitive damages is awarded?

***The Preferable Procedure Requirement — s. 5(1)(d)***

73 As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.

74 *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

75 At para. 30 of that decision the Court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.

76 In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues. The preferability finding in *Hollick* itself was just this and the requirement was therefore found not to be met. That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

77 Neither the motion judge nor the majority of the Divisional Court properly addressed this vital aspect of the preferability inquiry and thus their conclusion cannot stand. As Cullity J. said, the determination of whether, in the context of the entire claim, the resolution of the common issues will significantly advance the action can only be done in light of the particular common issues identified. Here the motion judge found none and therefore could not make this assessment. The majority of the Divisional Court did not address the common issues requirement but simply stated its conclusion that any attempt to formulate common issues in terms of systemic negligence would not significantly advance the litigation given the numerous individual claims. With respect, without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made. It would risk a conclusion based not on relative importance but simply on the existence of a large number of individual issues. It would also preclude any appellate review.

78 On the other hand, as I have outlined, Cullity J. found that in the context of the entire claim the resolution of the common issues he found would significantly advance the action and that otherwise the preferability requirement was met. I agree with that conclusion.

79 As they did with the common issues, the respondents contest this finding in several different ways. Here too their primary attack is that the vast majority of issues require individual determination. They say that these issues involve individual acts of abuse, different perpetrators, unique individual circumstances both before and after attendance at the school widely varying impacts and damage claims, and an array of different limitations, triggers and discoverability issues. They argue that the common issues are negligible in comparison and that their resolution will not significantly advance the action.

80 I do not agree. An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class members. Together these assertions comprise the common issues that must be assessed in relation to the claim as a whole.

81 I agree with Cullity J. that whether framed in negligence, fiduciary obligation or aboriginal rights the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. Save for those relating to limitations they are all aspects of harm and causation, both of which the appellants acknowledge they will have to establish individual by individual. The limitations questions are all individual defences, which the appellants also acknowledge will require individual adjudication.

82 The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

83 The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor to the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.

84 This assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial. The finding in *Rumley* demonstrates this. The class there was defined as students at the residential school between 1950 and 1992 who reside in British Columbia and claimed to have suffered injury, loss, or damages as a result of misconduct of a sexual nature occurring at the school. The common issues were defined very similarly to those in this case. The Supreme Court recognized that following their resolution, adjudication of injury and causation would be required individual by individual. Although the number of individual adjudications appears to have been uncertain, the time frame of the action alone suggests that it might be relatively high. Yet the Court was able to conclude that the common issues predominated over those affecting only individual class members, which is a consideration required by the British Columbia legislation. This as an even higher standard than that set for preferability under the CPA, namely that viewed in the context of the entire claim, the resolution of the common issues must significantly advance the action. However, in both cases the assessment is a qualitative one, not a comparison of the number of common issues to the number of individual issues.

85 In this case that qualitative assessment derives from the reality that resolving the common issues will take the action a long way. That assessment is also informed in an important way by the considerations of judicial economy and access to justice. Because residential schools for native children are no longer part of the Canadian landscape, the third objective of class proceedings, namely behaviour modification, is of no moment here.

86 However, I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

87 Access to justice would also be greatly enhanced by a single trial of the common issues. I do not agree with the majority of the Divisional Court that there is nothing in the record to sustain this conclusion. The affidavit material makes clear that the appellants seek to represent many who are aging, very poor, and in some cases still very emotionally troubled by their experiences at the school. Cullity J. put it this way at para. 46 of his reasons:

While the goal of behavioural modification does not seem to be a value that would be achieved to any extent by certification, I am satisfied that the vulnerability of members of the class — as evidenced by the uncontradicted statements in the affidavits sworn by the representative plaintiffs — is such that the objective of providing access to justice would be served to an appreciable extent. Each of the representative plaintiffs referred to the poverty of many of the former students, their inability to afford the cost of individual actions and the effect such proceedings would have on the continuing emotional problems from which they suffer as a result of their experiences at the Mohawk Institute. These statements were not challenged on cross-examination and, unlike my colleagues, I see no reason to reject their truth or their significance.

88 In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure. The language used by the Chief Justice in *Rumley* at para. 39 is equally apt to this case:

Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

89 The respondents also attack Cullity J.'s preferability finding by saying that a class action would be unfair to them and would create an unmanageable proceeding. I do not agree. The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in fourteen hundred.

90 That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in *Rumley* unmanageable and does not do so here. Moreover, the CPA provides for great flexibility in the process. For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

91 Lastly, the respondents argue that Cullity J. was wrong because the class action is not preferable to other means of resolving class members' claims. They support this position with fresh evidence filed in this court describing the alternative dispute resolution system that has been put in place by Canada to deal with claims of those who attended native residential schools.

92 Even if we were to admit this fresh evidence I do not agree that this ADR system displaces the conclusion that the class action is the preferable procedure. It is a system unilaterally created by one of the respondents in this action and could be unilaterally dismantled without the consent of the appellants. It deals only with physical and sexual abuse. It caps the amount of possible recovery and, most importantly in these circumstances, compared to the class action it shares the access to justice deficiencies of individual actions. It does not compare favourably with a common trial.

93 Thus I conclude that each of the respondents' attacks must fail and that Cullity J. was correct to find that the appellants have met the preferability requirement.

#### ***The Workable Litigation Plan Requirement — s. 5(1)(e)(ii)***

94 Although it was not strenuously pursued in oral submissions, the respondents also argue in their factums that the action cannot be certified because the appellants have not yet produced a workable litigation plan.

95 I do not agree that the appellants' certification motion should fail on this basis. The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

#### **Conclusion**

96 I conclude that the appellants have shown that their action satisfies all the requirements of s. 5(1) of the CPA. It must therefore be certified and remitted to the supervision of the Superior Court judge assigned to manage the action.

97 That judge will undoubtedly face significant challenges as this class action unfolds. If they prove insurmountable, the CPA provides remedies. However, the CPA also provides the judge with much flexibility in addressing these challenges and assessing them at this stage of the proceedings, I am not persuaded that they cannot be satisfactorily met within this form of proceeding.

98 I would therefore allow the appeal, set aside the orders of the Divisional Court and the motion judge and substitute an order certifying the action consistent with these reasons.

99 The parties have given us proposed bills of costs. However given the amounts at stake, I invite the parties to make written submissions as to the costs here and below. These submissions are to be exchanged and filed within six weeks of the release of these reasons and are not to exceed five pages, double spaced. Within a further two weeks, each party may then file a written reply not to exceed three pages, double spaced.

**Catzman J.A.:**

I agree.

***Moldaver J.A.:***

I agree.

*Appeal allowed.*

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**TAB 11**

2004 BCCA 110  
British Columbia Court of Appeal

Collette v. Great Pacific Management Co.

2004 CarswellBC 410, 2004 BCCA 110, [2004] B.C.J. No. 381, 129 A.C.W.S. (3d)  
254, 195 B.C.A.C. 79, 26 B.C.L.R. (4th) 252, 319 W.A.C. 79, 42 B.L.R. (3d) 161

**Guy J. Collette (Appellant/Plaintiff) And Great Pacific Management Co. Ltd., Sector Financial Services Ltd. and Sector Securities Inc. (Respondents/Defendants) and Multimetro Mortgage Corporation and Ken Megale (Respondents/Third Parties)**

Braidwood, Mackenzie, Low JJ.A.

Heard: January 13-14, 2004

Judgment: March 1, 2004

Docket: Vancouver CA028283

Proceedings: reversing *Collette v. Great Pacific Management Co.* ([2003](#)), 2003 BCSC 332, 2003 CarswellBC 530 (B.C. S.C.)

Counsel: D.G. Fredricksen for Appellant

N. Campbell, D.T. Neave for Respondent, Great Pacific Management Co. Ltd.

A.R.S. Gangii for Respondents, Sector Financial Services Ltd., Sector Securities Inc.

Subject: Civil Practice and Procedure; Contracts

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.C](#) Common issue or interest

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff client investor was client of defendant investment brokers — Brokers suggested mortgage investment which client invested in, which declined in value and was eventually lost — Client brought action against brokers for damages for breach of contract, negligence and misrepresentation — Client's application for certification as class proceeding was dismissed — Trial judge found that each claim was dependant upon individual findings of fact — Trial judge found that contract claim was dependant on finding implied term of duty to ensure quality of investment — Trial judge found that brokers were not subject to duty to warn all clients, but that duties depended on nature of contact between broker and client — Client appealed — Appeal allowed — Common issues existed — Many claims were for amounts under \$10,000, and cost of litigating claims individually was prohibitive — Duplication of proceedings would be reduced by certification — No remedy in damages existed for breach of due diligence — Client alleged that brokers assumed responsibility to carry out due diligence on all investments and offer only suitable investments as opportunities to clients — Whether brokers assumed duty of care was triable issue — Assuming that duty of care existed, standard of care was triable issue — Proof of individual reliance on misrepresentation by broker was not necessary, as proof of breach of due diligence could establish causation — Issues which were subject to specific relationships between individual investors and brokers were not common issues and were not suitable for determination in class proceeding — Common questions of law predominated questions affecting individual class members — Resolving common issues would

substantially determine fate of litigation — Common issues were whether defendants owed duty in contract or tort to evaluate investments to standard of due diligence, did defendants breach duty, and did breach cause damage.

#### **Table of Authorities**

##### **Cases considered by *Mackenzie J.A.*:**

*Canadian National Railway v. Norsk Pacific Steamship Co.* (1992), 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289, 137 N.R. 241, (sub nom. *Norsk Pacific Steamship Co. c. Cie des Chemins de Fer nationaux du Canada*) [1991] R.R.A. 370, [1992] S.C.R. 1021, 1992 CarswellNat 168, 53 F.T.R. 79, 1992 CarswellNat 655, 1992 A.M.C. 1910 (S.C.C.) — referred to  
*Henderson v. Merrett Syndicates Ltd.* (1994), [1995] 2 A.C. 145, [1994] 3 W.L.R. 761 (U.K. H.L.) — considered  
*Hollick v. Metropolitan Toronto (Municipality)* (2001), (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158 (S.C.C.) — considered  
*Yorkshire Trust Co. v. Empire Acceptance Corp. (Receiver of)* (1986), 69 B.C.L.R. 357, 22 E.T.R. 96, 24 D.L.R. (4th) 140, 1986 CarswellBC 225 (B.C. S.C.) — referred to

##### **Statutes considered:**

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

s. 4(1) — referred to

s. 4(1)(c) — referred to

s. 4(1)(d) — referred to

s. 4(2)(a) — referred to

s. 12 — referred to

APPEAL by plaintiff from judgment reported at *Collette v. Great Pacific Management Co.* (2003), 2003 BCSC 332, 2003 CarswellBC 530 (B.C. S.C.), dismissing plaintiff's application for certification of class proceeding.

#### ***Mackenzie J.A.:***

#### **INTRODUCTION**

1 This is an appeal from a decision of a chambers judge dismissing the appellant's application to certify the action as a class proceeding. The learned chambers judge concluded that the action failed the test for common issues and preferable procedure under s. 4(1)(c) and (d) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

2 The appellant's action is for damages for losses on units of two mortgages he purchased from a representative of the respondent Great Pacific Management Co. Ltd. ("Great Pacific"), a financial advisor and investment broker. The mortgages were syndicated by the third party mortgage broker, Multimetro Mortgage Corporation ("Multimetro"), and marketed by the respondents to their clients for commissions.

3 The action alleges breach of duty in the provision of professional services, framed in both contract and tort. The appellant claims that the respondents breached due diligence obligations with respect to the mortgage investments before offering the units for sale to the appellant and other clients. The mortgages both went into default and the unit investors are likely to realize little or nothing from the net proceeds of the foreclosures.

4 The appellant seeks to represent between 1,000 and 1,600 other investors who invested in mortgage units either through Great Pacific or the other two respondents, Sector Financial Services Ltd. and Sector Securities Inc. (collectively "Sector"). Eight hundred to 1,200 of the investors made investments of \$10,000 or less and over 95 percent of the total number invested \$50,000 or less.

5 The appellant contends that because of the relatively small individual investments, individual actions are not economically viable and class proceedings are the only avenue realistically available for relief.

6 The certification application was argued on the basis of facts alleged in the statement of claim and affidavit evidence submitted by the parties. Those allegations and the filed materials have not been tested and therefore the facts as outlined below are to be taken with the caveat that they are set out only for the limited purpose of addressing issues of certification.

## **THE FACTUAL CONTEXT**

7 Multimetro arranged mortgage financing for two commercial developments in Nanaimo and Parksville (respectively the Nanaimo project and the Parksville project), acting as a mortgage broker. The developers proposed to purchase and redevelop a hotel in Nanaimo. The Parksville project involved the purchase of waterfront property and the development of 161 luxury resort condominiums.

8 The Nanaimo mortgage was for first mortgage construction financing to a maximum of \$15 million. Interest was calculated at 18 percent per annum, with eight percent to be paid quarterly and the balance of ten percent per annum to be paid at the time of payment out of the mortgage. The term of the mortgage was 24 months. Multimetro's commitment funded only \$10.24 million to the developers for the costs of land purchase and construction. The balance went for mortgage arrangement costs of \$3.6 million and an interest reserve fund of \$1.4 million.

9 The Parksville mortgage arrangements were similar. The loan of \$12 million was secured by first mortgage, but only \$8.6 million was advanced to the borrower. Mortgage arrangement costs of \$2.4 million and an interest reserve of \$1 million were deducted. The interest rate was 16 percent, eight percent to be paid quarterly and the balance of eight percent upon payment of the mortgage principal at the end of the 24 month mortgage term.

10 Multimetro syndicated the mortgages into units but it did not make sales to investors directly. Investment firms were engaged to sell its products to investors for a commission. Great Pacific and Sector were the selling firms involved. They were compensated through 8 to 10 percent commissions on sales.

11 The mortgage units were specialty investments, so classified because they were not securities traded on an exchange or otherwise generally available for purchase or resale in a publicly traded market. Before agreeing to sell any specialty investment products, Great Pacific carried out a "due diligence" review through its specialty investment department. Allegedly, only specialty investment products that met strict standards of review were passed by the specialty investment department and allowed to be offered for sale by Great Pacific investment advisors to clients. Sector is alleged to have had a similar, less formal process of due diligence review.

12 Multimetro raised a total of \$15 million for the Nanaimo project through the sale of units by financial planners. Of that total, Great Pacific sold units totalling \$5.508 million to between 458 and 654 different investor clients. Sector sold units totalling \$2.431 million to 205 investor clients.

13 Six hundred and twenty-one clients of Great Pacific purchased units in the Parksville project having a total of \$5.089 million. Ninety-six Sector clients invested a total of \$821,000.

14 The appellant purchased \$22,000 worth of units in the Nanaimo project in September 1996 from Great Pacific. In February 1997 he purchased a further \$10,800 worth of units in the Parksville project.

15 Other than payments made from the interest reserve held back by Multimetro, the borrower never made any payments of principal or interest on the Nanaimo mortgage. Eventually Multimetro commenced foreclosure proceedings. There is expected to be no realization for the appellant and the other investors after deduction of various expenses in connection with the foreclosure. Similarly, no mortgage payments were made on the Parksville mortgage, apart from those made from the interest reserve. The Parksville mortgage has also been foreclosed and the property sold. Again, there is expected to be no realization for the investors who invested a total of \$12 million.

## **THE REASONS OF THE CHAMBERS JUDGE**

16 The certification application was heard before the chambers judge on two occasions. The first argument was limited to issues of negligent misrepresentation at the invitation of counsel, although the pleadings were framed more broadly to include claims in contract and negligence. On appeal from that decision, this Court remitted the matter back to the chambers judge to address the contractual issues. The chambers judge granted the appellant leave to amend the statement of claim to redefine the contractual relationship alleged and then addressed the issues based on the amended statement of claim. He refused certification for reasons that he summarized succinctly as follows:

... Although it is possible to identify potential common issues in the pleadings as set out, it becomes apparent on analysis that those issues do not necessarily apply to all members of the putative class. Instead, further individualized inquiries into the specific contractual arrangements between the defendants and their clients would be needed to determine whether the alleged implied contractual terms exist. Absent such an inquiry, any determination of the proposed common issues would take place in a vacuum. While the need to demonstrate individual reliance, so problematic on the first application, is avoided by the presentation of the claim in contract, the need to prove the necessary contractual terms capable of giving rise to the duties as now alleged presents similar practical hurdles to certification.

17 The chambers judge found that the appellant met certain of the requirements for certification under s. 4(1) of the *Act*. He concluded that the pleadings disclosed a cause of action, that there was an identifiable class of two or more persons, and that the appellant was an appropriate representative plaintiff. He observed that if the action was certified it would be necessary to create a sub-class of Sector investors with another suitable representative plaintiff. These conclusions are not questioned on this appeal. The contentious issues are common issues and preferable procedure.

## **THEORY OF THE APPELLANT'S CASE**

18 The theory of the appellant's case is summarized in his factum as follows:

47. The case being put forth on behalf of the Plaintiff can be easily and succinctly summarized, as follows:

(a) The Defendants held themselves out to the general public as firms which provided professional investment services. In that capacity the Defendants owed a concurrent duty in tort (a duty of care) and in contract (as an implied term arising from the contract to provide services) to exercise reasonable care, skill and diligence when they rendered their services to their clients.

(b) Individuals or companies often made available to the Defendant firms "investment products" such as limited partnership units or units of a syndicated real estate mortgage, which were not generally available to the public through a stock exchange, seeking the assistance of the Defendant firms to market these products to the clients of the Defendant firms.

(c) In order to fulfill the duty of care owed by the Defendants to their clients, the Defendants had a duty to "screen out" investment products which had little or no investment merit, and accordingly, not make those investment products available to their clients.

(d) The Defendants breached their contract with their clients, and breached the duty of care owed to their clients, when they made available to their clients the Multimetro units.

(d) In respect of the breach of contract, the loss suffered by the Plaintiff, and by each of the prospective class members, arose naturally, that is, according to the usual course of things, such that the loss is recoverable in contract.

(f) With respect to the claim in negligence, but for the negligence of the Defendants, the Plaintiff and the other class members would not have purchased the Multimetro units, such that the Defendants are responsible for the loss suffered by the Plaintiff and the other potential class members.

48. The Plaintiff advances a further, or alternative claim, based upon negligent misrepresentation. The Plaintiff alleges that the Defendants, by making available to their clients the Multimetro units, impliedly represented to their clients that the Multimetro units had significant investment merit when such was not the case. The Plaintiff and the other proposed class members suffered damages as a result of the negligent misrepresentation.

19 The appellant's theory emphasizes a two stage process by Great Pacific and Sector in the sale of the mortgage units. The first stage involved a due diligence review of the mortgage units by the Great Pacific specialty investment department and equivalent review by Sector. The second stage involved offering the units to individual investors by particular financial advisors of the respondent firms.

20 The appellant contends that the due diligence responsibility of the specialty investment departments at stage one is a common duty to all clients and that the respondents breached that duty in passing the units for sale. That obligation is an implied term of the contractual relationship and is otherwise an obligation assumed in this context by a professional advisory firm dealing with specialty products which are not exchange traded or otherwise readily marketable.

21 The appellant concedes that the second stage duty of individual advisers to clients, often referred to as a "know your client" responsibility, is an individualized obligation that does not raise common issues. It involves an individualized process where the particular circumstances of investors and their individual "risk tolerance" are considered.

22 The appellant says that the alleged breach of duty at stage one satisfies the "but for" test of causation for all the investors because if the units had failed the due diligence review they would not have been offered for sale by either firm to any of their clients. The units were not generally available which distinguishes them from exchange traded or other securities readily available in an open market. They were specialty investments available only from firms who assumed a responsibility to carry out a due diligence assessment of the investment and offer the units to clients if they met the due diligence criteria.

23 The "strict standard" of objectively reasonable due diligence review allegedly assumed by Great Pacific and Sector will likely depend on expert and other evidence as to the standard appropriate in the circumstances, including the foreseeability that the units would be offered to a substantial number of clients. Individual financial advisers allegedly were exhorted by Great Pacific to "KEEP ON SELLING" the units to clients.

24 The appellant's case for certification is aimed exclusively at the stage one breach of duty. The "know your client" obligations related to the relationships between investment representatives or salesmen and particular clients are not relevant to the due diligence obligation. The appellant will not rely on any allegations of individualized fault by particular advisors at the second "know your client" stage. By restricting the action in this way, the appellant may be limiting grounds for liability that would be available to individual clients in separate actions. As the cost of separate actions for relatively small individual claims is prohibitive, the concession is justified as necessary to frame a viable class proceeding.

## **ANALYSIS**

25 In *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19, 13 C.P.C. (5th) 1 (S.C.C.) at para. 15, Chief Justice McLachlin, in a unanimous judgment, recognized that class proceedings offer important procedural advantages. They serve judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. They improve access to justice by combining claims that would not be economical to pursue individually. They serve efficiency and justice by ensuring that wrongdoers face the full consequences of harm caused and modify their behaviour accordingly. These advantages are reasons to apply class proceedings legislation flexibly and expansively.

26 All three advantages of class proceedings are evident in this case. There are between 1,000 and 1,600 claims that raise similar issues of fact and law. The cost of litigating those claims individually is prohibitive. That cost will effectively deter individual claims and insulate the respondents from responsibility for harm caused by any fault on their part. There will be no effective sanction in damages for breach of due diligence obligations. These are reasons to allow the appellant to frame the proceedings to concentrate on common issues that are amenable to class proceedings disposition. The result is a practical compromise which may limit the prospect of success but it allows common complaints to go forward. In every case, the choice is one for the plaintiff and class counsel to make in the first instance, although no doubt the court retains a residual discretion to assess whether the compromise is a reasonable one in the circumstances. Individual claimants who are unhappy with the compromise may of course opt out of the class proceeding and commence a separate action.

27 With these general observations in mind, I turn now to the issues in this case.

#### **Duty and Standard of Care**

28 The appellant alleges that the defendants assumed a responsibility to carry out a due diligence analysis on potential investments and offer for sale to clients only those investments that passed the standards of due diligence, objectively and reasonably applied. The appellant contends that this obligation was assumed with respect to all clients irrespective of whether or not individual clients were aware that the defendants were carrying out the due diligence analysis and expressly relied on representations to that effect. He will argue that the requirement for a due diligence analysis is inherent in the sale of specialty investments such as these mortgage units which are not widely available in an open market. He relies on the opinion of Lord Goff of Chieveley in *Henderson v. Merrett Syndicates Ltd.*, [1994] 3 W.L.R. 761 at 776, (1994), [1995] 2 A.C. 145 (U.K. H.L.) at 181 [cited to W.L.R.] for the proposition that:

if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services.

Lord Goff added:

Furthermore, especially in a context concerned with a liability which may arise under a contract or in a situation "equivalent to contract," it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff. see *Caparo Industries Plc. v. Dickman*[,] [1990] 2 A.C. 605, 637, *per* Lord Oliver of Aylmerton.

*Henderson* involved actions by "Names" in Lloyds' syndicates against underwriting agents for negligence in the conduct of their underwriting affairs. The House of Lords upheld the Court of Appeal and dismissed appeals from decisions of a chambers judge on preliminary issues finding a duty of care was owed by the agents to the Names.

29 The appellant finds further support for the *Henderson* propositions, stated in terms of proximity, in the reasons of McLachlin J. (as she then was) in *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1152, 91 D.L.R. (4th) 289 at 369, 11 C.C.L.T. (2d) 1 (S.C.C.).

30 In this case, the appellant contends that the due diligence duty for specialty products was an implied term of the contracts with all the respondents' clients as well as an assumed responsibility in tort. It is not for the Court at this stage to weigh the merits of the appellant's assertion that the respondents assumed a due diligence duty of care to all their clients beyond the question of whether it raises a triable issue. In my view, the appellant has met that test on the duty issue.

31 As evidence of the due diligence standard of care assumed by the respondents, the appellant will rely on a communication by a Great Pacific financial advisor to a client, referred to as the Woodfield memorandum. That memorandum, under the heading of "The Importance of Due Diligence", states that Great Pacific applies "strict standards" of due diligence and adds: "Each project or limited partnership is examined by our board before it can be used with any of our clients." The memorandum then refers to the Nanaimo mortgage units as "an excellent project with outstanding security". The appellant does not contend that

the Woodfield memorandum was generally circulated to clients but he contends that it is evidence that Great Pacific did in fact assume a due diligence duty to all of its clients and can be held liable for breach of that duty to all clients who invested in the mortgage units through Great Pacific. He will submit that Sector assumed a similar duty.

32 Apart from the Woodfield memorandum, there is little evidence of the particulars of the due diligence standards that the respondents applied, or reasonably should have applied, in assessing the investment quality of the mortgage units and whether they should have been approved to be offered for sale by the respondents' financial advisers. The reasonable standard may involve expert evidence and, in any event, it is an issue for trial. If the respondents had a due diligence duty of care to clients then the determination of a standard of care follows necessarily to reach the question of whether there has been a breach of duty. Assuming a duty, standard of care is a triable issue.

### ***Is Individual Reliance Required?***

33 The respondents submit that the investors cannot succeed without proof of reliance on the misrepresentation by each investor individually, particularly with respect to the claims for negligent misrepresentation. The chambers judge concluded that proof of reliance was required for the claims in tort but not in contract.

34 The reason for insistence on reliance is to establish causation. If causation can be established otherwise, then reliance is not required: see *Henderson, supra, per Lord Goff at 776, and Yorkshire Trust Co. v. Empire Acceptance Corp. (Receiver of)* (1986), 24 D.L.R. (4th) 140 at 145-47, 69 B.C.L.R. 357 at 354-55, 22 E.T.R. 96 (B.C. S.C.) *per McLachlin J.* Here if the mortgage units had not passed the due diligence test they would not have been offered for sale by the respondents to any clients. Causation is therefore established between a breach of due diligence duty and the investors' loss, independently of proof of individual reliance. In my view, proof of reliance does not present an obstacle to the appellant's case as framed. The appellant's case adequately links a breach of duty causally to the investors' losses.

### ***Common Issues and Preferred Procedure***

35 The chambers judge ultimately refused to certify the action because "common issues pertaining to the breach of an implied contractual term are dependent upon findings which will have to be made at individual trials." (para. 51) He concluded that the implied term depended upon "the individual factual circumstances of each investment advisor/client relationship" (para. 46). As discussed above, I agree with the chambers judge that the stage two relationship is dependent upon the individual circumstances and does not raise common issues. With respect, however, I do not think that the stage one issues are in the same category. The appellant's case is that no investment advisor could have offered the units to any client unless they passed the due diligence test of the specialty investment department. Any breach of duty at that stage, in allowing the units to be offered for sale by any advisor to any client, is common to all clients of the firm. As discussed above, the appellant does not rely on any allegations of breach of duty by individual investment advisors at stage two, which eliminates the individual issues that caused the chambers judge to refuse certification. I do not think that the appellant has shifted his position from that argued before the chambers judge but the distinction between due diligence and "know your client" obligations may not have been as clearly delineated before him as it was in this Court.

36 In summary I am satisfied that the claims of the class members raise common issues as required by s. 4(1)(c) of the *Act*. With the elimination of any individualized stage two issues from the litigation by the appellant, I am satisfied that "questions of fact or law common to the members of the class predominate over any questions affecting only individual members": s. 4(2)(a). Either way, the resolution of the stage one common issues should substantially determine the fate of the litigation. Individual actions are impractical because of the relatively small amount of the individual claims. Avoidance of duplication of fact-finding and legal analysis favours a class proceeding over individual actions. A class proceeding is therefore preferable for the fair and efficient resolution of the common issues: s. 4(1)(d).

37 The refusal to certify the action by the chambers judge rests on a misapprehension of the appellant's case as framed for certification. The error is therefore not a matter of discretion to which this Court should accord deference. I would therefore allow the appeal and certify the action as a class proceeding.

## **THE COMMON ISSUES TO BE CERTIFIED**

38 The common issues remain to be defined. I would state the common issues as follows:

1. Did the Defendants, or any of them, owe, to the class members with whom they dealt, a duty in contract, tort, or both, to evaluate the Multimetro Mortgages by a standard of due diligence and not to offer units in the mortgages for sale to class members if the investments did not meet the standard of due diligence?
2. If the answer to question 1 is "yes", did the Defendants, or any of them, breach that duty?
3. If the answers to questions 1 and 2 are "yes", did the breach of duty cause damage to the class members?

The common issues as stated are subject to the powers of the case management or trial judge to define sub-classes and revise or add to the common issues as may be appropriate to reflect the exigencies of the litigation in the exercise of the court's jurisdiction under s. 12 of the *Act*.

## **CONCLUSION**

39 For these reasons I would allow the appeal, direct that the action be certified as a class proceeding and define the common issues as set out above.

### ***Braidwood J.A.:***

I AGREE.

### ***Low J.A.:***

I AGREE.

*Appeal allowed.*

**TAB 12**

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [0742848 B.C. Ltd. v. 426008 B.C. Ltd.](#) | 2019 BCSC 1869, 2019 CarswellBC 3213 | (B.C. S.C., Nov 1, 2019)

2017 SCC 63, 2017 CSC 63

Supreme Court of Canada

Deloitte & Touche v. Livent Inc. (Receiver of)

2017 CarswellOnt 20138, 2017 CarswellOnt 20139, 2017 SCC 63, 2017 CSC 63, [2017] 2 S.C.R. 855, 286 A.C.W.S. (3d) 374, 416 D.L.R. (4th) 32, 43 C.C.L.T. (4th) 1, 55 C.B.R. (6th) 1, 71 B.L.R. (5th) 175

**Deloitte & Touche (now continued as Deloitte LLP) (Appellant)  
and Livent Inc., through its special receiver and manager Roman  
Doroniuk (Respondent) and Canadian Coalition for Good Governance  
and Chartered Professional Accountants of Canada (Intervenors)**

McLachlin C.J.C., Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: February 15, 2017

Judgment: December 20, 2017

Docket: 36875

Proceedings: reversing in part *Livent Inc. (Receiver of) v. Deloitte & Touche* (2016), (sub nom. *Livent Inc. v. Deloitte & Touche*) 342 O.A.C. 201, 128 O.R. (3d) 225, 24 C.C.L.T. (4th) 177, 31 C.B.R. (6th) 205, [2016] O.J. No. 51, 393 D.L.R. (4th) 1, 2016 CarswellOnt 122, 2016 ONCA 11, 52 B.L.R. (5th) 225, G.R. Strathy C.J.O., P. Lauwers J.A., R.A. Blair J.A. (Ont. C.A.); affirming *Livent Inc. (Receiver of) v. Deloitte & Touche* (2014), 10 C.C.L.T. (4th) 182, 26 B.L.R. (5th) 15, 11 C.B.R. (6th) 12, 2014 ONSC 2176, 2014 CarswellOnt 4365, Gans J. (Ont. S.C.J. [Commercial List])

Counsel: Peter H. Griffin, Matthew Fleming, Scott Rollwagen, Nina Bombier, for Appellant

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Markus Koehnen, David Kent, Jeffrey Levine, for Intervener, Canadian Coalition for Good Governance

Guy J. Pratte, Nadia Effendi, Duncan A.W. Ault, for Intervener, Chartered Professional Accountants of Canada

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

**Related Abridgment Classifications**

Bankruptcy and insolvency

**XVI** Effect of bankruptcy on other proceedings

**XVI.2** Proceedings by bankrupt

Business associations

**IV** Powers, rights and liabilities

**IV.10** Liability of corporations

Civil practice and procedure

**VI** Actions

**VI.2** Cause of action

**VI.2.f** Ex turpi causa non oritur actio (denial of right of action for illegality or immorality)

Contracts

**IX** Performance or breach

**IX.8** Breach

**IX.8.d** Miscellaneous

Professions and occupations

**VII** Auditors

**VII.3** Negligence

Remedies

**I** Damages

**I.11** Damages in contract

**I.11.h** Contract for service or repair

Remedies

**I** Damages

**I.15** Practice and procedure

**I.15.g** Appeals

**I.15.g.i** Grounds for appeal

**I.15.g.i.C** Quantum unreasonable

**I.15.g.i.C.1** Excessive award

Torts

**XVI** Negligence

**XVI.2** Duty and standard of care

**XVI.2.a** Duty of care

Torts

**XVI** Negligence

**XVI.3** Causation

**XVI.3.b** Foreseeability and remoteness

Torts

**XVI** Negligence

**XVI.5** Contributory negligence

**XVI.5.d** Proof of contributory negligence

**XVI.5.d.ii** Duty of care

**XVI.5.d.ii.D** Miscellaneous

Torts

**XVI** Negligence

**XVI.5** Contributory negligence

**XVI.5.d** Proof of contributory negligence

**XVI.5.d.v** Miscellaneous

## **Headnote**

Professions and occupations --- Auditors — Negligence

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — Auditor should not be liable for L Inc.'s increase in liquidation deficit which followed auditor's provision of negligent services in relation to solicitation of investment — As L Inc.'s losses did not flow from failure to solicit investment, recovery should be denied for increase in L Inc.'s liquidation deficit beginning in fall of 1997 — Auditor should be liable for increase in L Inc.'s liquidation deficit which followed statutory audit — Shareholders were unable to discharge their function of supervising management and safeguarding interests of corporation by reason of auditor's negligence — As consequence, L Inc.'s corporate life was artificially prolonged, resulting in deterioration of its finances — Recovery should be allowed for increase in L Inc.'s liquidation deficit which followed 1997 audit.

Torts --- Negligence — Duty and standard of care — Duty of care

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal

and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — Duty of care was established where proximity and reasonably foreseeability of injury were found — Auditor's undertaking in relation to soliciting investment, and 1997 audit, gave rise to proximate relationships — L Inc. relied on 1997 audit for purpose it was provided — Resulting injury was reasonably foreseeable — Same could not be said in respect of auditor's negligent assistance in soliciting investment — Overly broad characterization of established category of proximity which failed to consider scope of activity in respect of which proximity was previously recognized risked premature imposition of *prima facie* duty of care — This very error impaired reasons of trial judge and Court of Appeal — Auditor should not be liable for L Inc.'s increase in liquidation deficit which followed auditor's provision of negligent services in relation to solicitation of investment — Auditor should be liable for increase in L Inc.'s liquidation deficit which followed statutory audit.

**Torts --- Negligence — Causation — Foreseeability and remoteness**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — L Inc. asserted that increase in its liquidation deficit beginning in fall of 1997 was reasonably foreseeable consequence of auditor's negligence, because false financial picture that ought not to have been certified by auditor was relied upon by L Inc. to artificially extend its solvency — This type of injury, however, was not reasonably foreseeable consequence of auditor's negligent assistance in soliciting investment — L Inc. argued that it detrimentally relied on auditor's services and representations to artificially extend life of corporation — This reliance was not tied to solicitation of investment, but was matter of oversight of management — Auditor never undertook, in preparing comfort letter, to assist L Inc.'s shareholders in overseeing management — Proximity was established between L Inc. and auditor in relation to statutory audit, on basis of previously recognized proximate relationship identified by court — Increase in L Inc.'s liquidation deficit was reasonably foreseeable consequence of auditor's negligent audit, because audit preserved false financial picture upon which L Inc. relied to artificially extend its solvency and delay filing for bankruptcy.

**Contracts --- Performance or breach — Breach — Miscellaneous**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — Auditor should not be liable for L Inc.'s increase in liquidation deficit which followed auditor's provision of negligent services in relation to solicitation of investment — Auditor should be liable for increase in L Inc.'s liquidation deficit which followed statutory audit — Shareholders were unable to discharge their function of supervising management and safeguarding interests of corporation by reason of auditor's negligence — As consequence, L Inc.'s corporate life was artificially prolonged, resulting in deterioration of its finances — Dispute was primarily framed as one in negligence — Trial judge found that claim in contract succeeded for same reasons as claim in negligent performance of service, and that elements of contract claim were incorporated by reference to finding of "negligence" — Same quantum of liability for concurrent claim in breach of contract was to be imposed in case at bar.

**Business associations --- Powers, rights and liabilities — Liability of corporations**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part on other grounds; damages reduced — Defences of illegality and contributory fault both relied on applicability of doctrine of corporate identification — For defences to succeed, auditor had to attribute illegal or wrongful conduct of certain directors and managers to L Inc. itself — Doctrine is only one of judicial necessity, and where its application would not provide protection of any interest in community or would not advantage society by advancing law and order, rationale for its application fades away — Denying liability on basis that individual within corporation has engaged in very action that auditor was enlisted to protect against would render statutory audit meaningless — It would be perverse to deny auditor's liability for negligently failing to detect fraud where harm to corporation was likely to occur and likely to be most serious.

**Torts --- Negligence — Contributory negligence — Proof of contributory negligence — Miscellaneous**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part on other grounds; damages reduced — For auditor to rely on defence of contributory fault, it had to be able to attribute conduct of certain directors and managers to L Inc. itself — Negligence Act requires that plaintiff's fault be factored into apportionment of damages — Corporate identification was prerequisite to plaintiff, L Inc., being at fault — Auditor's claim that s. 3 of Negligence Act required that L Inc. bear its share of fault presupposed corporate identification — Negligence Act only makes contribution by negligent plaintiff mandatory; it does not make attribution of negligence to plaintiff mandatory — Auditor chose not to bring third party claims against guilty parties, D and G, but availability of third party claim against fraudulent director weighed against application of corporate identification doctrine.

**Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings by bankrupt**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — L Inc. asserted that increase in its liquidation deficit beginning in fall of 1997 was reasonably foreseeable consequence of auditor's negligence, because false financial picture that ought not to have been certified by auditor was relied upon by L Inc. to artificially extend its solvency — This type of injury, however, was not reasonably foreseeable consequence of auditor's negligent assistance in soliciting investment — L Inc. argued that it detrimentally relied on auditor's services and representations to artificially extend life of corporation — This reliance was not tied to solicitation of investment, but was matter of oversight of management — Auditor never undertook, in preparing comfort letter, to assist L Inc.'s shareholders in overseeing management — Proximity was established between L Inc. and auditor in relation to statutory audit, on basis of previously recognized proximate relationship identified by court — Increase in L Inc.'s liquidation deficit was reasonably foreseeable consequence of auditor's negligent audit, because audit preserved false financial picture upon which L Inc. relied to artificially extend its solvency and delay filing for bankruptcy.

**Civil practice and procedure --- Actions — Cause of action — Ex turpi causa non oritur actio (denial of right of action for illegality or immorality)**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part on other grounds; damages reduced — Defences of illegality and contributory fault both relied on applicability of doctrine of corporate identification — For defences to succeed, auditor had to attribute illegal or wrongful conduct of certain directors and managers to L Inc. itself — Doctrine is only one of judicial necessity, and where its application would not provide protection of any interest in community or would not advantage society by advancing law and order, rationale for its application fades away — Denying liability on basis that individual within corporation has engaged in very action that auditor was enlisted to protect against would render statutory audit meaningless — It would be perverse to deny auditor's liability for negligently failing to detect fraud where harm to corporation was likely to occur and likely to be most serious.

**Remedies --- Damages — Damages in tort — Other torts — Miscellaneous**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Trial judge found that L Inc. lost \$113,000,000 between time of auditor's negligent failure to end relationship with L Inc. and latter's insolvency — Trial judge reduced that amount by 25 per cent for contingencies, and awarded \$84,750,000 in damages — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — Trial judge and Court of Appeal erred in finding that auditor's negligence in relation to press release and comfort letter resulted in injuries that were reasonably foreseeable — At that time, auditor's services were engaged for purpose of soliciting investment, not management oversight — As L Inc.'s losses did not flow from failure to solicit investment, recovery should be denied for increase in L Inc.'s liquidation deficit beginning in fall of 1997 — Recovery should be allowed for increase in L Inc.'s liquidation deficit which followed 1997

audit — Trial judge assessed L Inc.'s damages following 1997 audit at \$53.9 million — Applying trial judge's 25 per cent contingency reduction resulted in final damages assessment of \$40,425,000.

**Remedies --- Damages --- Damages in contract --- Contract for service or repair**

D and G formed business, L Inc., and manipulated its financial records — L Inc. continued to raise capital and reinvested it in unprofitable enterprises — Auditor's report for 1997 did not disclose fraud — L Inc. filed for insolvency protection and went into receivership — L Inc. brought successful action in tort and contract against auditor — Trial judge found that L Inc. lost \$113,000,000 between time of auditor's negligent failure to end relationship with L Inc. and latter's insolvency — Trial judge reduced that amount by 25 per cent for contingencies, and awarded \$84,750,000 in damages — Court of Appeal dismissed appeal and cross-appeal — Auditor appealed — Appeal allowed in part; damages reduced — Trial judge and Court of Appeal erred in finding that auditor's negligence in relation to press release and comfort letter resulted in injuries that were reasonably foreseeable — At that time, auditor's services were engaged for purpose of soliciting investment, not management oversight — As L Inc.'s losses did not flow from failure to solicit investment, recovery should be denied for increase in L Inc.'s liquidation deficit beginning in fall of 1997 — Recovery should be allowed for increase in L Inc.'s liquidation deficit which followed 1997 audit — Trial judge assessed L Inc.'s damages following 1997 audit at \$53.9 million — Applying trial judge's 25 per cent contingency reduction resulted in final damages assessment of \$40,425,000 — Dispute was primarily framed as one in negligence, but same quantum of liability for concurrent claim in breach of contract was to be imposed.

**Torts --- Negligence --- Contributory negligence --- Proof of contributory negligence --- Duty of care --- Miscellaneous**

**Professions et métiers --- Vérificateurs --- Négligence**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — Vérificateur ne devrait pas être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la prestation négligente, par le vérificateur, de services relatifs à la sollicitation de fonds d'investissement — Comme les pertes de L inc. ne découlaient pas d'un défaut de solliciter des investissements, il fallait refuser l'indemnisation pour l'accroissement du déficit de liquidation de L inc. à compter de l'automne 1997 — Vérificateur devrait être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la vérification exigée par la loi — Actionnaires n'ont pas été en mesure de s'acquitter de leur tâche de superviser la gestion et de protéger les intérêts de la société à cause de la négligence du vérificateur — En conséquence, l'existence de L inc. en tant qu'entreprise a été artificiellement prolongée, de sorte que sa situation financière s'est entre-temps détériorée — Il y avait lieu d'accorder une indemnité pour l'augmentation du déficit de liquidation de L inc. qui a suivi le rapport de 1997.

**Délits civils --- Négligence --- Devoir et norme de diligence --- Devoir de diligence**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — Il y avait obligation de diligence si la proximité et la prévisibilité raisonnable du préjudice étaient établies — Engagements du vérificateur relativement à la sollicitation d'investissements, et le rapport de 1997, ont donné lieu à des liens de proximité — L inc. s'est fiée au rapport de 1997 aux fins pour lesquelles il a été préparé — Préjudice qui en a résulté était donc raisonnablement prévisible — Toutefois, on ne pouvait dire la même chose pour l'aide entachée de négligence que le vérificateur a fournie en ce qui a trait à la sollicitation d'investissements — Interprétation trop large d'une catégorie établie de liens de proximité qui ne tenait pas compte du champ d'activité à l'égard duquel l'existence d'un lien a déjà été établie risquait de donner lieu à l'imposition prématurée d'une obligation de diligence prima facie — C'était cette erreur même qui viciait les motifs du juge de première instance et de la Cour d'appel — Vérificateur ne devrait pas être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la prestation négligente, par le vérificateur, de services relatifs à la sollicitation de fonds d'investissement — Vérificateur devrait être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la vérification exigée par la loi.

**Délits civils --- Négligence — Lien de causalité — Prévisibilité et faiblesse du lien causal**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — L inc. a affirmé que l'augmentation de son déficit de liquidation à partir de l'automne 1997 était une conséquence raisonnablement prévisible de la négligence du vérificateur, parce qu'elle s'était fiée au faux portrait financier que le vérificateur n'aurait pas dû attester pour prolonger artificiellement sa solvabilité — Or, ce type de préjudice ne constituait pas une conséquence raisonnablement prévisible de l'assistance fournie par le vérificateur de manière négligente en vue de solliciter des investissements — L inc. a plaidé qu'elle s'était fiée à son détriment aux déclarations et aux services fournis par le vérificateur pour prolonger artificiellement l'existence de l'entreprise — Cette confiance n'était pas liée à la sollicitation de fonds d'investissement, mais plutôt à la surveillance de la gestion — En préparant la lettre de confort, le vérificateur ne s'est jamais engagé à aider les actionnaires de L inc. à surveiller la gestion — Existence d'un lien de proximité a été établie entre L inc. et le vérificateur quant à la vérification exigée par la loi, compte tenu du rapport de proximité déjà reconnu par la Cour — Augmentation du déficit de liquidation de L inc. était une conséquence prévisible de la vérification négligente du vérificateur, parce que le rapport de vérification a préservé un faux portrait financier sur lequel L inc. s'est appuyée pour prolonger de façon artificielle sa solvabilité et retarder sa mise en faillite.

**Contrats --- Exécution ou défaut d'exécution — Défaut d'exécution — Divers**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — Vérificateur ne devrait pas être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la prestation négligente, par le vérificateur, de services relatifs à la sollicitation de fonds d'investissement — Vérificateur devrait être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la vérification exigée par la loi — Actionnaires n'ont pas été en mesure de s'acquitter de leur tâche de superviser la gestion et de protéger les intérêts de la société à cause de la négligence du vérificateur — En conséquence, l'existence de L inc. en tant qu'entreprise a été artificiellement prolongée, de sorte que sa situation financière s'est entre-temps détériorée — On a considéré qu'il s'agissait principalement d'une poursuite fondée sur la négligence — Juge de première instance a conclu que la demande fondée sur le contrat était accueillie pour les mêmes raisons qu'il accueillait la demande fondée sur la prestation négligente d'un service, et que les éléments de la demande fondée sur le contrat étaient incorporés par renvoi à la conclusion relative à la « négligence » — Il fallait imposer dans le présent dossier une responsabilité dans la même mesure pour la demande concurrente fondée sur la violation de contrat.

**Associations d'affaires --- Pouvoirs, droits et responsabilités — Responsabilité des sociétés**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie pour d'autres motifs; montant des dommages-intérêts réduit — Illégalité invoquée comme moyen de défense et la faute contributoire étaient fondées sur l'applicabilité de la doctrine de l'identification à la société — Pour que le vérificateur puisse invoquer la défense d'illégalité, il devait pouvoir attribuer la conduite illégale ou fautive de certains administrateurs et dirigeants à L inc. elle-même — Doctrine n'en est qu'une de nécessité juridique, et lorsque son application ne protégerait aucun intérêt de la collectivité ou ne favoriserait pas l'ordre public, la règle n'aurait plus de raison d'être — Refuser d'imputer la responsabilité au motif qu'un employé de l'entreprise a commis les actes mêmes contre lesquels le vérificateur a été retenu pour protéger la société reviendrait donc à vider de son sens la vérification exigée par la loi — Il serait illogique de refuser de tenir responsable le vérificateur qui a omis par négligence de détecter une fraude lorsqu'il est probable que le préjudice de la société se produira et qu'il sera vraisemblablement très grave.

Délits civils --- Négligence — Faute contributoire — Preuve de la faute contributoire — Divers

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie pour d'autres motifs; montant des dommages-intérêts réduit — Pour que le vérificateur puisse invoquer la défense d'illégalité, il devait pouvoir attribuer la conduite illégale ou fautive de certains administrateurs et dirigeants à L inc. elle-même — Loi sur le partage de la responsabilité exige qu'il soit tenu compte de la faute du demandeur dans la répartition des dommages-intérêts — Or, l'identification à la société était une condition préalable à l'imputation d'une faute à la demanderesse L inc. — Argument avancé par le vérificateur que l'art. 3 de la Loi sur le partage de la responsabilité exigeait que L inc. supporte sa part de la faute presupposait l'identification à la société — Loi sur le partage de la responsabilité rend seulement obligatoire la contribution du demandeur négligent; elle ne rend pas obligatoire l'attribution d'une négligence au demandeur — Bien que le vérificateur ait décidé de ne pas demander que les parties coupables, D et G, soient mises en cause, la possibilité de mettre en cause un administrateur frauduleux jouait en défaveur de l'application de la doctrine de l'identification à la société.

Faillite et insolvabilité --- Effet de la faillite sur d'autres procédures — Procédures par le failli

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — L inc. a affirmé que l'augmentation de son déficit de liquidation à partir de l'automne 1997 était une conséquence raisonnablement prévisible de la négligence du vérificateur, parce qu'elle s'était fiée au faux portrait financier que le vérificateur n'aurait pas dû attester pour prolonger artificiellement sa solvabilité — Or, ce type de préjudice ne constituait pas une conséquence raisonnablement prévisible de l'assistance fournie par le vérificateur de manière négligente en vue de solliciter des investissements — L inc. a plaidé qu'elle s'était fiée à son détriment aux déclarations et aux services fournis par le vérificateur pour prolonger artificiellement l'existence de l'entreprise — Cette confiance n'était pas liée à la sollicitation de fonds d'investissement, mais plutôt à la surveillance de la gestion — En préparant la lettre de confort, le vérificateur ne s'est jamais engagé à aider les actionnaires de L inc. à surveiller la gestion — Existence d'un lien de proximité a été établie entre L inc. et le vérificateur quant à la vérification exigée par la loi, compte tenu du rapport de proximité déjà reconnu par la Cour — Augmentation du déficit de liquidation de L inc. était une conséquence prévisible de la vérification négligente du vérificateur, parce que le rapport de vérification a préservé un faux portrait financier sur lequel L inc. s'est appuyée pour prolonger de façon artificielle sa solvabilité et retarder sa mise en faillite.

Procédure civile --- Actions — Cause d'action — Ex tirpi causa non oritur actio (refus du droit d'action pour cause d'illégalité ou d'immoralité)

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie pour d'autres motifs; montant des dommages-intérêts réduit — Illégalité invoquée comme moyen de défense et la faute contributoire étaient fondées sur l'applicabilité de la doctrine de l'identification à la société — Pour que le vérificateur puisse invoquer la défense d'illégalité, il devait pouvoir attribuer la conduite illégale ou fautive de certains administrateurs et dirigeants à L inc. elle-même — Doctrine n'en est qu'une de nécessité juridique, et lorsque son application ne protégerait aucun intérêt de la collectivité ou ne favoriserait pas l'ordre public, la règle n'aurait plus de raison d'être — Refuser d'imputer la responsabilité au motif qu'un employé de l'entreprise a commis les actes mêmes contre lesquels le vérificateur a été retenu pour protéger la société reviendrait donc à vider de son sens la vérification exigée par la loi — Il serait illogique de refuser de tenir responsable le vérificateur qui a omis par négligence de détecter une fraude lorsqu'il est probable que le préjudice de la société se produira et qu'il sera vraisemblablement très grave.

**Réparations --- Dommages-intérêts — Dommages-intérêts fondés sur la responsabilité délictuelle — Autres délits civils — Divers**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Juge de première instance a conclu que L inc. avait subi des pertes de 113 000 000 \$ entre le moment où le vérificateur a négligé de mettre un terme à sa relation avec L inc. et l'insolvabilité de cette dernière — Juge de première instance a diminué ce montant de 25 pour cent pour tenir compte des imprévus et a accordé des dommages-intérêts s'élevant à 84 750 000 \$ — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — Juge de première instance et la Cour d'appel ont eu tort de conclure que la négligence dont le vérificateur avait fait preuve en ce qui concerne le communiqué de presse et la lettre de confort avait causé des préjudices qui étaient raisonnablement prévisibles — À l'époque, les services du vérificateur avaient été retenus afin de solliciter des investissements, non pas afin de faciliter la surveillance de la gestion de l'entreprise — Comme les pertes de L inc. ne découlaient pas d'un défaut de solliciter des investissements, il fallait refuser l'indemnisation pour l'accroissement du déficit de liquidation de L inc. à compter de l'automne 1997 — Il y avait lieu d'accorder une indemnité pour l'augmentation du déficit de liquidation de L inc. qui a suivi le rapport de 1997 — Juge de première instance a évalué les dommages subis par L inc. après le rapport de 1997 à 53 900 000 \$ — Si l'on applique à cette somme la réduction pour éventualités de 25 pour cent ordonnée par le juge de première instance, on obtient la somme finale de 40 425 000 \$ au titre des dommages-intérêts.

**Réparations --- Dommages-intérêts — Préjudice contractuel — Contrat de service ou de réparation**

D et G ont fondé une société, L inc., et ont manipulé ses dossiers financiers — L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets non rentables — Rapport du vérificateur pour l'exercice de 1997 n'a pas révélé la fraude — L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre — L inc. a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur, avec succès — Juge de première instance a conclu que L inc. avait subi des pertes de 113 000 000 \$ entre le moment où le vérificateur a négligé de mettre un terme à sa relation avec L inc. et l'insolvabilité de cette dernière — Juge de première instance a diminué ce montant de 25 pour cent pour tenir compte des imprévus et a accordé des dommages-intérêts s'élevant à 84 750 000 \$ — Cour d'appel a rejeté l'appel et l'appel incident — Vérificateur a formé un pourvoi — Pourvoi accueilli en partie; montant des dommages-intérêts réduit — Juge de première instance et la Cour d'appel ont eu tort de conclure que la négligence dont le vérificateur avait fait preuve en ce qui concerne le communiqué de presse et la lettre de confort avait causé des préjudices qui étaient raisonnablement prévisibles — À l'époque, les services du vérificateur avaient été retenus afin de solliciter des investissements, non pas afin de faciliter la surveillance de la gestion de l'entreprise — Comme les pertes de L inc. ne découlaient pas d'un défaut de solliciter des investissements, il fallait refuser l'indemnisation pour l'accroissement du déficit de liquidation de L inc. à compter de l'automne 1997 — Il y avait lieu d'accorder une indemnité pour l'augmentation du déficit de liquidation de L inc. qui a suivi le rapport de 1997 — Juge de première instance a évalué les dommages subis par L inc. après le rapport de 1997 à 53 900 000 \$ — Si l'on applique à cette somme la réduction pour éventualités de 25 pour cent ordonnée par le juge de première instance, on obtient la somme finale de 40 425 000 \$ au titre des dommages-intérêts — On a considéré qu'il s'agissait principalement d'une poursuite fondée sur la négligence, mais il y avait lieu d'imposer une responsabilité dans la même mesure pour la demande concurrente fondée sur la violation de contrat.

**Délits civils --- Négligence — Faute contributoire — Preuve de la faute contributoire — Devoir de diligence — Divers**

Two individuals, D and G, formed a partnership which carried on business through its nominee corporation, L Inc., the plaintiff. The defendant was the auditor for L Inc. until 1998. D and G manipulated L Inc.'s financial records and were later convicted of fraud. The auditor did not uncover the company's schemes. L Inc. continued to raise investment capital and reinvested it in unprofitable theatre enterprises. The auditor's report for L Inc.'s 1997 fiscal year did not disclose the fraud and, although the auditor objected when G presented a misleading quarterly financial statement to the audit committee in 1997, it did not resign. The truth came to light in 1998. New equity investors appointed new management who discovered irregularities. L Inc. filed for insolvency protection, and went into receivership. L Inc., through its special receiver and manager, brought an action in tort and contract against the auditor. The trial judge found that L Inc. lost \$113,000,000 between the time of the auditor's negligent failure to end its relationship with L Inc. and the latter's insolvency. The trial judge reduced that amount by 25 per cent for

contingencies, and awarded \$84,750,000 in damages. The Court of Appeal dismissed the appeal and cross-appeal. The auditor appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed in part, and the damages were reduced.

Per Gascon and Brown JJ. (Karakatsanis and Rowe JJ. concurring): The auditor should not be liable for L Inc.'s increase in liquidation deficit which followed the auditor's provision of negligent services in relation to the solicitation of investment. The auditor should, however, be liable for the increase in L Inc.'s liquidation deficit which followed the statutory audit. Shareholders were unable to discharge their function of supervising management and safeguarding the interests of the corporation by reason of the auditor's negligence. As a consequence, L Inc.'s corporate life was artificially prolonged, resulting in the deterioration of its finances. There was a sufficient evidentiary basis for liability based on impaired shareholder supervision. Application of the *Anns/Cooper* framework [*Anns v. London Borough of Merton* and *Cooper v. Hobart*], coupled with the basis for auditor liability identified by the Supreme Court of Canada in *Hercules Managements Ltd. v. Ernst & Young*, led the Supreme Court of Canada to uphold the trial judge's finding of liability in relation to the negligently prepared auditory statement. The trial judge's core findings, that the auditor's conduct fell below the standard of care on two occasions, either when it failed to discover fraud and act on it in August 1997, or when it signed off on L Inc.'s 1997 financial statements in April 1998, were not disputed. The trial judge's findings of negligence could be divided into two separate events: (1) the auditor's approval of a 1997 press release and provision of a comfort letter; and (2) the auditor's preparation and approval of the 1997 clean audit opinion.

At the first stage of the *Anns/Cooper* framework, a duty of care is established where proximity and reasonably foreseeability of injury are found. The auditor's undertaking in relation to soliciting investment, and the 1997 audit, gave rise to proximate relationships. L Inc. relied on the 1997 audit for the purpose it was provided. A resulting injury was reasonably foreseeable. The same could not be said in respect of the auditor's negligent assistance in soliciting investment. At the second stage of the *Anns/Cooper* framework, residual policy considerations could negate the auditor's duty of care, but none applied to the negligent provision of the 1997 audit. An overly broad characterization of an established category of proximity which fails to consider the scope of activity in respect of which proximity was previously recognized risks a premature imposition of a *prima facie* duty of care. This very error impaired the reasons of the trial judge and the Court of Appeal. The Supreme Court of Canada has not previously established a proximate relationship as between an auditor and its client for the purposes of soliciting investment. A full proximity analysis had to be undertaken. From August to October 1997, the services provided, particularly the auditor's ongoing assistance in relation to the press release and the provision of the comfort letter, were undertaken for the purpose of helping L Inc. to solicit investment. A relationship of proximity arose in respect of the content of the auditor's undertaking. The loss that resulted from L Inc.'s inability to attract investment could fall within the scope of the auditor's duty of care, though only in relation to the press release and comfort letter.

L Inc. asserted that the increase in its liquidation deficit beginning in the fall of 1997 was a reasonably foreseeable consequence of the auditor's negligence, because the false financial picture that ought not to have been certified by the auditor was relied upon by L Inc. to artificially extend its solvency. This type of injury, however, was not a reasonably foreseeable consequence of the auditor's negligent assistance in soliciting investment. L Inc. argued that it detrimentally relied on the auditor's services and representations to artificially extend the life of the corporation. This reliance was not tied to the solicitation of investment, but was a matter of oversight of management. Losses outside the scope of the undertaking were not recoverable. The auditor never undertook, in preparing the comfort letter, to assist L Inc.'s shareholders in overseeing management.

Proximity was established between L Inc. and the auditor in relation to the statutory audit, on the basis of the previously recognized proximate relationship identified by the Supreme Court of Canada. The increase in L Inc.'s liquidation deficit was a reasonably foreseeable consequence of the auditor's negligent audit, because the audit preserved a false financial picture upon which L Inc. relied to artificially extend its solvency and delay filing for bankruptcy. If the auditor had taken reasonable care in auditing L Inc., the latter would have discovered the fraud and avoided the interim deterioration of its assets. This type of injury was a reasonably foreseeable consequence of the auditor's negligent audit. L Inc.'s reliance on the auditor for the purpose of overseeing the conduct of management was both reasonable and reasonably foreseeable. As L Inc.'s injury arose from its detrimental reliance, the injury linked to that reliance was reasonably foreseeable.

Having found a proximate relationship based on a previously recognized category, it was not necessary to consider residual policy considerations. However, as McLachlin C.J.C. (dissenting in part in this judgment) found in the alternative that the policy consideration of indeterminate liability would deny recovery in this case, it was useful to examine how the established proximate relationship engaged in this case precluded indeterminate liability. None of the three pertinent aspects of the character

of indeterminacy: (1) temporal, (2) claimant; and (3) value, arose in the case at bar. The 1997 audit was prepared for the express purpose of oversight of management by L Inc.'s shareholders, and the loss at issue flowed from those shareholder's inability to conduct that oversight. The purposes underlying the 1997 audit did not give rise to potential indeterminacy, and by corollary, related to potential losses that were not indeterminate.

The auditor did not have complete immunity from liability flowing from a remoteness analysis. Remoteness overlaps conceptually with the reasonable foreseeability analysis conducted in the *prima facie* duty of care analysis. However, the two are distinct: the duty analysis is concerned with the type of injury that is reasonably foreseeable as flowing from the defendant's conduct; the remoteness analysis is concerned with the reasonable foreseeability of the actual injury suffered by the plaintiff. The loss in the present case, stemming from the auditor's failure to fulfill its undertaking, was reasonably foreseeable. It followed that remoteness was not a bar to recovery. The record supported the assertion that shareholders would have called management to account had they received a non-negligent audit. L Inc.'s response upon receiving a prudent audit in 1998 was telling, and belied any suggestion that informed shareholder scrutiny would have permitted L Inc. to act in any manner other than expected. Any speculation that shareholders might have done nothing in response to rampant fraud was unsustainable.

Although the auditor did not advise L Inc. on its business decisions, it "assumed responsibility" over providing accurate information upon which the shareholders could rely to scrutinize management conduct. The auditor did not escape liability simply because a negligent audit, in itself, cannot cause financial harm. It is only when audits are detrimentally relied upon that tangible consequences ensue. It should not be understated that to exclude those harms which are a reasonably foreseeable consequence of a negligent audit would undercut a central purpose for which a statutory audit was prepared, thus immunizing auditors from liability for any act of negligence impairing oversight.

Reliance on the so-called "SAAMCO principle" from a House of Lords' decision (*South Australia Asset Management Corp. v. York Montague Ltd.*) was mistaken for the same reason as reliance on the dichotomy between information and advice. In assuming responsibility for informing shareholder scrutiny of management, the auditor assumed responsibility for injuries flowing from that impaired scrutiny. The principle denies liability where an alternate cause that is unrelated to the defendant's negligence is the true source of the plaintiff's injury. L Inc.'s trading losses were not an alternate and unrelated cause of L Inc.'s injury. The shareholders' capacity to oversee the conduct of L Inc.'s business was entirely dependent upon the statutory audit. The SAAMCO principle did not limit the auditor's liability in respect of the 1997 audit. The principle, at least in the manner applied by McLachlin C.J.C. in the case at bar, conflicted with Canadian jurisprudence. Alternate hypothetical causes were already accounted for in the trial judge's 25 per cent reduction in damages. As to whether L Inc. failed to prove that alternate hypothetical causes did not cause the remaining 75 per cent of damages, it was the auditor, not L Inc., who bore the burden of proving that liability should be limited in this fashion.

The defences of illegality and contributory fault both relied on the applicability of the doctrine of corporate identification. The only illegal or wrongful conduct was committed by L Inc.'s directors, D and G, and portions of management. For the illegality defence to succeed, the auditor had to attribute the illegal or wrongful conduct of certain directors and managers to L Inc. itself. The doctrine is only one of judicial necessity, and where its application would not provide protection of any interest in the community or would not advantage society by advancing law and order, the rationale for its application fades away. Denying liability on the basis that an individual within the corporation has engaged in the very action that the auditor was enlisted to protect against would render the statutory audit meaningless. It would be perverse to deny the auditor's liability for negligently failing to detect fraud where the harm to the corporation was likely to occur and likely to be most serious. Courts retain the discretion to refrain from applying the doctrine where it would not be in the public interest to do so. Where, as in the case at bar, its application would render meaningless the very purpose for which a duty of care was recognized, such application will rarely be in the public interest.

For the auditor to rely on the defence of contributory fault, it had to be able to attribute the conduct of certain directors and managers to L Inc. itself. The Negligence Act requires that a plaintiff's fault be factored into the apportionment of damages. Corporate identification was a prerequisite to the plaintiff, L Inc., being at fault. The auditor's claim that s. 3 of the Negligence Act required that L Inc. bear its share of the fault presupposed corporate identification. The Negligence Act only makes contribution by a negligent plaintiff mandatory; it does not make attribution of negligence to a plaintiff mandatory. The auditor chose not to bring third party claims against the guilty parties, D and G, but the availability of a third party claim against a fraudulent director weighed against the application of the corporate identification doctrine.

The trial judge and the Court of Appeal erred in finding that the auditor's negligence in relation to the press release and comfort letter resulted in injuries that were reasonably foreseeable in light of the proximate relationship between the parties. At that time, the auditor's services were engaged for the purpose of soliciting investment, not management oversight. As L Inc.'s losses did not flow from a failure to solicit investment, recovery should be denied for the increase in L Inc.'s liquidation deficit beginning in the fall of 1997. Recovery should be allowed for the increase in L Inc.'s liquidation deficit which followed the 1997 audit. The auditor should not have signed off on the 1997 audit, and the increase in L Inc.'s liquidation deficit which followed fell within the duty of care owed by the auditor to L Inc. in relation to the preparation of a statutory audit, the express purpose of which was to assist L Inc. in management oversight. The trial judge assessed L Inc.'s damages following the 1997 audit at \$53.9 million. Applying the trial judge's 25 per cent contingency reduction to this amount resulted in a final damages assessment of \$40,425,000, and the auditor was liable for this amount. The dispute was primarily framed as one in negligence. The trial judge found that the claim in contract succeeded for the same reasons as the claim in negligent performance of a service, and that the elements of the contract claim were incorporated by reference to the finding of "negligence". As such, the same quantum of liability for the concurrent claim in breach of contract was to be imposed in the case at bar. The amount of the trial award was to be reduced from \$84,750,000 to \$40,425,000.

Per McLachlin C.J.C. (dissenting in part) (Wagner and Côté JJ. concurring): The appeal should be allowed. The auditor owed a duty of care to L Inc., which it breached when it failed to discover and expose L Inc.'s fraud in the audited statements it prepared. But the auditor was not liable for virtually all the loss that befell L Inc. as it pursued its precipitous decline into insolvency through doomed investments. Where an auditor falsely or wrongfully represents that the audit statements are sound and can therefore be used for their intended purpose, this constitutes negligence or wrongdoing. Economic loss tied to that particular wrongdoing is recoverable; other loss is not. The key to answering the question of the scope of the duty of care owed by the auditor to L Inc. was the purpose for which the auditor prepared the statements, which in turn defined the wrongful act — the negligent failure to provide the correct information for the intended purpose. Three purposes were discernable: (1) to report accurately on finances and provide audit opinions on which to rely for attracting investment; (2) to uncover errors or wrongdoing to enable correction or response to misfeasance; and (3) to provide audit reports on which shareholders could rely to supervise management. L Inc. was entitled to recover for losses occasioned by its own or its shareholders' reliance on the auditor's audit work for these purposes.

L Inc. did not rely on the "attract investment capital" purpose; L Inc. attracted a great deal of capital on the strength of the auditor's statements. That was the essence of the complaint — if it had not been able to attract this money, it would not have been able to spend it on new theatre ventures that failed and decreased L Inc.'s net worth. The company's assets were not diminished by an inability to attract investment, but by L Inc.'s improvident management of those investments. The possibility that the wrongful act prevented L Inc. from detecting misfeasance in the company's management, which would have been corrected, was not L Inc.'s situation. L Inc. led no evidence that its management did not know of D and G's misfeasance; it likely could not have done so. D and G, the fraudsters, were themselves the management. D and G knew the audit reports were inaccurate. There was no evidence that anyone at a lower level of L Inc. management would have "blown the whistle" if L Inc.'s statements had revealed the fraud at an earlier date.

The proposition that all loss that shareholder supervision might have avoided was recoverable, including the decline in the value of the company, faced two difficulties. First, the factual basis for liability based on impaired shareholder supervision was lacking. L Inc. did not prove and the trial judge did not find that L Inc.'s shareholders relied on the auditor's negligent audit statements, or that had they received and relied on accurate statements, they would have acted in a way that would have prevented L Inc. from carrying on business and diminishing its assets in the period between the issuance of the relevant statements and L Inc.'s insolvency. The broad view of the duty of care taken by L Inc. and accepted by the trial judge meant that the trial judge failed to consider the parameters of the shareholders' reasonable and foreseeable reliance as required in *Hercules* when defining the scope of the duty of care with respect to losses stemming from impaired shareholder supervision. Crucially, the trial judge did not ask whether the shareholders had in fact relied on the audits — a critical element to the cause of action. He did not ask whether, if they relied, this reliance prevented them from taking steps to replace directors or officers or otherwise alter course. He did not ask whether this would have included shutting down L Inc. earlier than when it was shut down. He did not ask whether these actions would have prevented the losses that L Inc. built up during the period in question. If the trial judge had asked these questions, he would have been obliged to answer them in the negative, since L Inc. offered no proof to support affirmative answers. The second difficulty was a related policy concern: to allow recovery in the absence of the required proof

would be to open the door to indeterminate recovery. L Inc.'s position that the auditor was liable for all loss without proof of the elements required to advance a case based on impaired shareholder supervision would result in an unfair allocation of loss and indeterminacy of damages. To make the auditor the virtual guarantor of everything L Inc. — not the collectivity of shareholders to which the duty was owed — did thereafter would not be a fair allocation of responsibility. Auditors would be unable to reasonably predict, when they were providing services to clients, what their ultimate liability would be.

The losses at issue were not shown to fall within the scope of the auditor's duty of care. The first step of the *Anns* test was not established. It was not necessary to go on to ask whether *prima facie* liability was negated by policy considerations unrelated to the relationship between the parties. Were it necessary to do so, the policy considerations of unfair allocation of loss and indeterminacy would preclude imposing liability on the auditor. It remained for future cases to explore the limits of an auditor's liability for impaired shareholder supervision. L Inc.'s failure to prove that any of the loss it suffered could be attributed to its shareholders' reliance on the negligent 1997 audit report for the purpose of corporate oversight was a sufficient basis on which to allow the appeal in its entirety.

There was a further problematic aspect of the shareholder supervision theory on which L Inc. now sought to rely — one of principle. The purpose of an annual audit report is to inform shareholder decision making, not to govern it. The auditor is not liable for the indeterminate quantum of loss that the shareholders' course of action or inaction may trigger. Loss that cannot be attributed to the auditor's breach will be too remote to recover. The language of lost opportunity was unavailing. The question was the extent to which the loss that in fact resulted may be attributed to the wrongness (i.e., the tortious quality) of the information provided. On the trial judge's findings, the auditor never assumed responsibility for any of the decisions that may be said to have occasioned L Inc.'s loss. A close and proximate connection between wrongful act and the loss claimed must be established. L Inc. could not recover the losses it claimed against the auditor. The tort claim had to be dismissed. The result was the same with respect to L Inc.'s action in contract; in the present case, too, the losses would be too remote. Given the trial judge's determination that the elements of action in contract were identical to the elements of the action in tort, it followed that the trial judge's conclusion that there was a breach in contract was erroneous.

Deux individus, D et G, ont fondé une société qui faisait affaire par l'entremise d'une société prête-nom, L inc., la partie demanderesse. Le défendeur était le vérificateur de L inc. jusqu'en 1998. D et G ont manipulé les dossiers financiers de L inc. et ont plus tard été déclarés coupables de fraude. Le vérificateur n'a jamais découvert les stratagèmes de la société. L inc. a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets de scène non rentables. Le rapport du vérificateur pour l'exercice de 1997 de L inc. n'a pas révélé la fraude, et même si elle a exprimé son opposition lorsque G a présenté des états financiers trimestriels falsifiés au comité de vérification en août 1997, le vérificateur n'a pas démissionné. La vérité a éclaté en 1998. De nouveaux investisseurs ont nommé d'autres dirigeants, qui ont découvert des irrégularités. L inc. a demandé la protection contre l'insolvabilité et a été mise sous séquestre. L inc., par l'entremise de son séquestre et administrateur spécial, a déposé une action en responsabilité délictuelle et en responsabilité contractuelle à l'encontre du vérificateur. Le juge de première instance a conclu que L inc. avait subi des pertes de 113 000 000 \$ entre le moment où le vérificateur a négligé de mettre un terme à sa relation avec L inc. et l'insolvabilité de cette dernière. Le juge de première instance a diminué ce montant de 25 pour cent pour tenir compte des imprévus et a accordé des dommages-intérêts s'élevant à 84 750 000 \$. La Cour d'appel a rejeté l'appel et l'appel incident. Le vérificateur a formé un pourvoi auprès de la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été accueilli en partie et le montant des dommages-intérêts a été réduit.

Gascon, Brown, JJ. (Karakatsanis, Rowe, JJ., souscrivant à leur opinion) : Le vérificateur ne devrait pas être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la prestation négligente, par le vérificateur, de services relatifs à la sollicitation de fonds d'investissement. Cependant, le vérificateur devrait être tenu responsable de l'augmentation du déficit de liquidation de L inc. qui a suivi la vérification exigée par la loi. Les actionnaires de L inc. n'ont pas été en mesure de s'acquitter de leur tâche de superviser la gestion et de protéger les intérêts de la société à cause de la négligence du vérificateur. En conséquence, l'existence de L inc. en tant qu'entreprise a été artificiellement prolongée, de sorte que sa situation financière s'est entre-temps détériorée. Des éléments de preuve suffisants permettaient de conclure à la responsabilité du vérificateur du fait que la surveillance par les actionnaires était compromise. L'application du cadre d'analyse établi dans les arrêts *Anns c. London Borough of Merton* et *Cooper c. Hobart*, conjuguée au fondement de la responsabilité du vérificateur que la Cour suprême du Canada a expressément reconnu dans *Hercules Managements Ltd. c. Ernst & Young*, permettait de confirmer la conclusion de responsabilité tirée par le juge de première instance du fait de la préparation négligente du rapport du vérificateur exigé par la loi. Les conclusions tirées par le juge de première instance, selon qui le vérificateur n'a pas respecté la norme de

diligence requise, et ce, à deux occasions, soit en août 1997, lorsqu'il n'a pas découvert la fraude et n'a pas pris les mesures que cette découverte rendait nécessaires, ou en avril 1998, lorsqu'il a approuvé les états financiers de 1997 de L inc., n'étaient pas contestées. Les conclusions de négligence formulées par le juge de première instance pouvaient être classées en fonction de deux événements distincts : (1) l'approbation par le vérificateur d'un communiqué de presse en 1997 et la fourniture d'une lettre de confort; et (2) la préparation et l'approbation par le vérificateur de l'opinion sans réserve du vérificateur pour l'exercice 1997. À la première étape du cadre d'analyse énoncé dans *Anns et Cooper*, il y a obligation de diligence si la proximité et la prévisibilité raisonnable du préjudice sont établies. Les engagements du vérificateur relativement à la sollicitation d'investissements, et le rapport de 1997, ont donné lieu à des liens de proximité. L inc. s'est fiée au rapport de 1997 aux fins pour lesquelles il a été préparé. Le préjudice qui en a résulté était donc raisonnablement prévisible. Toutefois, on ne pouvait dire la même chose pour l'aide entachée de négligence que le vérificateur a fournie en ce qui a trait à la sollicitation d'investissements. À la deuxième étape du cadre d'analyse des arrêts *Anns et Cooper*, des considérations de politique résiduelles pouvaient écarter l'obligation de diligence du vérificateur, mais aucune ne s'appliquait à la préparation entachée de négligence du rapport de 1997. Une interprétation trop large d'une catégorie établie de liens de proximité qui ne tient pas compte du champ d'activité à l'égard duquel l'existence d'un lien a déjà été établie risque de donner lieu à l'imposition prématurée d'une obligation de diligence prima facie. C'était cette erreur même qui viciait les motifs du juge de première instance et de la Cour d'appel. Il est faux de prétendre que la Cour suprême du Canada a déjà établi l'existence d'un lien de proximité entre un vérificateur et son client à des fins de sollicitation de fonds d'investissement. Il fallait procéder à une analyse exhaustive du lien de proximité. D'août à octobre 1997, les services fournis, notamment une assistance constante concernant le communiqué de presse et la fourniture de la lettre de confort, avaient pour objet d'aider L inc. à solliciter des investissements. Un lien de proximité s'est créé quant au contenu de l'engagement pris par le vérificateur. Les pertes découlant de l'incapacité de L inc. à attirer des investissements pouvaient être visées par l'obligation de diligence du vérificateur, mais seulement relativement au communiqué de presse et à la lettre de confort.

L inc. a affirmé que l'augmentation de son déficit de liquidation à partir de l'automne 1997 était une conséquence raisonnablement prévisible de la négligence du vérificateur, parce qu'elle s'était fiée au faux portrait financier que le vérificateur n'aurait pas dû attester pour prolonger artificiellement sa solvabilité. Or, ce type de préjudice ne constituait pas une conséquence raisonnablement prévisible de l'assistance fournie par le vérificateur de manière négligente en vue de solliciter des investissements. L inc. a plaidé qu'elle s'était fiée à son détriment aux déclarations et aux services fournis par le vérificateur pour prolonger artificiellement l'existence de l'entreprise. Cette confiance n'était pas liée à la sollicitation de fonds d'investissement, mais plutôt à la surveillance de la gestion. Les pertes associées à cet engagement n'étaient pas susceptibles d'indemnisation. En préparant la lettre de confort, le vérificateur ne s'est jamais engagé à aider les actionnaires de L inc. à surveiller la gestion.

L'existence d'un lien de proximité a été établie entre L inc. et le vérificateur quant à la vérification exigée par la loi, compte tenu du rapport de proximité déjà reconnu par la Cour suprême du Canada. L'augmentation du déficit de liquidation de L inc. était une conséquence prévisible de la vérification négligente du vérificateur, parce que le rapport de vérification a préservé un faux portrait financier sur lequel L inc. s'est appuyée pour prolonger de façon artificielle sa solvabilité et retarder sa mise en faillite. Si le vérificateur avait pris des précautions raisonnables en procédant à la vérification des états financiers de L inc., cette dernière aurait découvert la fraude et évité la dévalorisation de son actif entre-temps. Ce type de préjudice était une conséquence raisonnablement prévisible de la vérification négligente faite par le vérificateur. Que L inc. s'en soit remise au vérificateur dans le but de surveiller la conduite de la gestion était aussi raisonnable que raisonnablement prévisible. Puisque le préjudice subi par L inc. découlait de la confiance qu'elle a eue à son détriment, le préjudice lié à cette confiance était lui-même raisonnablement prévisible.

Ayant conclu à l'existence d'un lien de proximité relevant d'une catégorie déjà reconnue, point n'est besoin d'examiner les considérations de politique résiduelles qui écarteraient l'obligation de diligence ou en restreindraient la portée. Néanmoins, comme la Juge en chef McLachlin (dissidente en partie dans le présent jugement) a conclu que la considération de politique de la responsabilité indéterminée empêcherait toute indemnisation en l'espèce, il était utile d'examiner comment le lien de proximité établi en l'espèce rendait impossible la responsabilité indéterminée. Aucun des trois aspects pertinents, soit (1) un temps indéterminé, (2) un demandeur indéterminé et (3) un montant indéterminé, n'était présent en l'espèce. Le rapport de 1997 a été préparé dans le but exprès de permettre aux actionnaires de L inc. de surveiller la gestion, et la perte en question était le résultat de leur incapacité à assurer cette surveillance. Les buts qui sous-tendaient le rapport de 1997 ne donnaient pas

lieu à une éventuelle indétermination, et s'attachaient, corollairement, à des pertes éventuelles qui, elles non plus, n'étaient pas indéterminées.

Le vérificateur ne bénéficiait pas d'une exonération absolue de responsabilité à l'issue d'une analyse fondée sur le caractère éloigné. Le principe de l'éloignement recoupe en théorie l'analyse de la prévisibilité raisonnable considérée dans le cadre de l'analyse de l'obligation de diligence prima facie. Toutefois, les deux analyses sont distinctes : l'analyse relative à l'obligation de diligence s'intéresse au type de préjudice qu'il est raisonnable de prévoir qu'il découlera de la conduite du défendeur, alors que l'analyse relative à l'éloignement s'attache à la prévisibilité raisonnable du préjudice réel subi par le demandeur. La perte en l'espèce, qui découlait du défaut du vérificateur de respecter l'engagement précis qu'il avait pris envers L inc., était raisonnablement prévisible. Il s'ensuit que l'éloignement n'était pas un obstacle à l'indemnisation de L inc. Le dossier permettait d'affirmer que les actionnaires auraient demandé à la direction de rendre des comptes s'ils avaient reçu un rapport non entaché de négligence. La réponse de L inc., lorsqu'elle a reçu un rapport prudemment préparé en 1998, était éloquente et contredisait toute prétention qu'un examen attentif par des actionnaires informés aurait permis à L inc. d'agir autrement que de la manière attendue. Toute hypothèse suivant laquelle les actionnaires de L inc. auraient pu ne rien faire devant une fraude patente était tout simplement insoutenable.

Bien que le vérificateur n'ait pas conseillé L inc. concernant ses décisions d'affaires, il [TRADUCTION] « assumait une responsabilité » de fournir des renseignements exacts auxquels les actionnaires pourraient se fier pour examiner en détail la conduite de la direction. Le vérificateur n'échappait pas à sa responsabilité tout simplement parce qu'une vérification entachée de négligence ne pouvait en soi causer un préjudice financier. Ce n'est que si quelqu'un s'y fie à son détriment qu'il entraîne des conséquences tangibles. Il ne fallait pas sous-estimer qu'exclure ce préjudice, lequel est une conséquence raisonnablement prévisible d'une vérification entachée de négligence, mettrait à mal un objectif principal de la vérification exigée par la loi et, ainsi, dégagerait les vérificateurs de responsabilité pour tout acte négligent compromettant la surveillance de l'entreprise.

Invoquer le principe qu'on peut appeler le « principe SAAMCO » tiré d'un arrêt de la Chambre des lords (*South Australia Asset Management Corp. c. York Montague Ltd.*) était une erreur pour la même raison que d'invoquer la dichotomie entre les renseignements et les conseils était une erreur. Lorsque le vérificateur a assumé la responsabilité d'aider les actionnaires à surveiller la gestion, il a effectivement assumé la responsabilité des préjudices découlant de cette surveillance compromise. Le principe rejette toute responsabilité lorsqu'une cause subsidiaire étrangère à la négligence du défendeur est la source véritable du préjudice subi par le demandeur. Les pertes commerciales de L inc. n'étaient pas une cause subsidiaire et étrangère au préjudice qu'elle a subi. La capacité des actionnaires à surveiller la conduite des affaires de L inc. dépendait entièrement du rapport d'évaluation exigé par la loi. Le principe SAAMCO ne limitait pas la responsabilité du vérificateur pour ce qui est du rapport de 1997. Le principe SAAMCO, du moins de la façon dont la Juge en chef McLachlin l'a appliqué en l'espèce, était contraire à la jurisprudence canadienne. Le juge de première instance a déjà pris en compte ces autres causes hypothétiques en réduisant les dommages de 25 pour cent. En ce qui concerne la question de savoir si L inc. n'a pas réussi à prouver que d'autres causes hypothétiques n'ont pas causé le 75 pour cent des dommages restants, c'était au vérificateur, et non à L inc., qu'il incombat de prouver que la responsabilité devrait être limitée de cette façon.

L'illégalité invoquée comme moyen de défense et la faute contributoire étaient fondées sur l'applicabilité de la doctrine de l'identification à la société. La seule conduite illégale ou fautive a été commise par les administrateurs de L inc., D et G, et par certains de ses dirigeants. Ainsi, pour que le vérificateur puisse invoquer la défense d'illégalité, il doit pouvoir attribuer la « conduite illégale ou fautive » de certains administrateurs et dirigeants à L inc. elle-même. La doctrine n'en est qu'une de nécessité juridique, et lorsque son application ne protégerait aucun intérêt de la collectivité ou ne favoriserait pas l'ordre public, la règle n'aurait plus de raison d'être. Refuser d'imputer la responsabilité à la société au motif qu'un de ses employés a commis les actes mêmes contre lesquels le vérificateur a été retenu pour protéger la société reviendrait donc à vider de son sens la vérification exigée par la loi. Il serait illogique de refuser de tenir responsable le vérificateur qui a omis par négligence de détecter une fraude lorsqu'il est probable que le préjudice de la société se produira et qu'il sera vraisemblablement très grave. Les tribunaux conservent le pouvoir discrétionnaire de s'abstenir d'appliquer la doctrine lorsque, dans les circonstances de l'espèce, il ne serait pas dans l'intérêt public de le faire. Et lorsque, comme en l'espèce, l'application de ce principe viderait de son sens la raison même pour laquelle l'obligation de diligence a été reconnue, il sera rarement dans l'intérêt public de l'appliquer.

Pour que le vérificateur puisse invoquer la défense d'illégalité, il devait pouvoir attribuer la conduite de certains administrateurs et dirigeants à L inc. elle-même. La Loi sur le partage de la responsabilité exige qu'il soit tenu compte de la faute du demandeur dans la répartition des dommages-intérêts. Or, l'identification à la société était une condition préalable à l'imputation d'une faute

à la demanderesse L inc. L'argument avancé par le vérificateur que l'art. 3 de la Loi sur le partage de la responsabilité exigeait que L inc. supporte sa part de la faute présupposait l'identification à la société. La Loi sur le partage de la responsabilité rend seulement obligatoire la contribution du demandeur négligent; elle ne rend pas obligatoire l'attribution d'une négligence au demandeur. Bien que le vérificateur ait décidé de ne pas demander que les parties coupables, D et G, soient mises en cause, la possibilité de mettre en cause un administrateur frauduleux jouait en défaveur de l'application de la doctrine de l'identification à la société.

Le juge de première instance et la Cour d'appel ont eu tort de conclure que la négligence dont le vérificateur avait fait preuve en ce qui concerne le communiqué de presse et la lettre de confort avait causé des préjudices qui étaient raisonnablement prévisibles compte tenu du lien de proximité qu'il y avait entre les parties. À l'époque, les services du vérificateur avaient été retenus afin de solliciter des investissements, non pas afin de faciliter la surveillance de la gestion de l'entreprise. Comme les pertes de L inc. ne découlaient pas d'un défaut de solliciter des investissements, il fallait refuser l'indemnisation pour l'accroissement du déficit de liquidation de L inc. à compter de l'automne 1997. Le vérificateur n'aurait pas dû approuver le rapport de 1997 et l'augmentation consécutive du déficit de liquidation de L inc. relevait de l'obligation de diligence à laquelle le vérificateur était tenu envers L inc. quant à la préparation d'une vérification exigée par la loi, laquelle visait expressément à aider L inc. à surveiller la gestion de l'entreprise. Le juge de première instance a évalué les dommages subis par L inc. après le rapport de 1997 à 53 900 000 \$. Si l'on appliquait à cette somme la réduction pour éventualités de 25 pour cent ordonnée par le juge de première instance, on obtiendrait la somme de 40 425 000 \$ et c'était là la somme dont le vérificateur était responsable. On a d'abord considéré qu'il s'agissait principalement d'une poursuite fondée sur la négligence. Le juge de première instance a conclu que la demande fondée sur le contrat était accueillie pour les mêmes raisons qu'il accueillait la demande fondée sur la prestation négligente d'un service, et que les éléments de la demande fondée sur le contrat étaient incorporés par renvoi à la conclusion relative à la « négligence ». Compte tel, il fallait imposer dans le présent dossier une responsabilité dans la même mesure pour la demande concurrente fondée sur la violation de contrat. La somme de 84 750 000 \$ accordée en première instance a été réduite à 40 425 000 \$.

McLachlin, J.C.C. (dissidente en partie) (Wagner, Côté, JJ., souscrivant à son opinion) : Le pourvoi devrait être accueilli. Le vérificateur avait une obligation de diligence envers L inc., obligation à laquelle il a manqué lorsqu'il n'a pas détecté et dénoncé la fraude commise par L inc. dans les états financiers vérifiés qu'il a préparés. Cependant, le vérificateur n'était pas responsable de pratiquement toutes les pertes qu'a subies L inc. alors qu'elle sombrait rapidement dans l'insolvabilité en raison d'investissements voués à l'échec. Lorsqu'un vérificateur déclare faussement ou à tort que les états financiers vérifiés sont valables et peuvent donc être utilisés pour les fins auxquelles ils sont destinés, cela constitue de la négligence ou un acte fautif. La perte économique liée à cet acte fautif précis est indemnisable; les autres pertes ne le sont pas. Pour répondre à la question de savoir quelle était l'étendue de l'obligation de diligence du vérificateur envers L inc., il fallait savoir à quelles fins le vérificateur a préparé les déclarations, ce qui définirait l'acte fautif, soit l'omission par négligence de fournir les renseignements exacts pour les fins visées. On pouvait discerner trois fins : (1) présenter un état exact de la situation financière et fournir des opinions pouvant être utilisées pour attirer des investissements; (2) découvrir des erreurs ou des actes fautifs afin de permettre de corriger cette faute ou de prendre des mesures à cet égard; et (3) fournir des rapports de vérification qui serviraient à la surveillance de la gestion de l'entreprise par les actionnaires. L inc. avait le droit d'être indemnisée pour les pertes occasionnées par le fait qu'elle-même et ses actionnaires se sont fiés aux rapports de vérification du vérificateur à ces fins.

L inc. n'invoquait pas l'argument fondé sur la possibilité d'attirer des capitaux d'investissement; en fait, elle a attiré beaucoup de capitaux grâce aux déclarations du vérificateur. Il s'agissait là de l'essence de sa plainte — si elle n'avait pas réussi à attirer ces capitaux, elle n'aurait pas pu les dépenser dans de nouveaux spectacles, qui se sont avérés des échecs et qui ont diminué la valeur de L inc. L'actif de l'entreprise n'a pas été diminué par son incapacité à attirer des investissements, mais plutôt par la gestion inconsidérée de ces investissements par L inc. La possibilité que l'acte fautif ait empêché L inc. de déceler dans la gestion de l'entreprise la faute que les dirigeants de L inc. auraient corrigée ne correspondait pas à la situation de L inc. Celle-ci n'a présenté aucune preuve que ses dirigeants n'étaient pas au courant de la faute commise par D et G et, de fait, elle n'aurait probablement pas pu le faire. D et G, les fraudeurs, étaient eux-mêmes les dirigeants. D et G savaient que les rapports du vérificateur étaient inexacts. Rien ne prouvait que quiconque occupant un poste à un échelon inférieur de la direction de L inc. aurait dénoncé la fraude si les déclarations de L inc. l'avaient révélée plus tôt.

La proposition selon laquelle toutes les pertes que la surveillance par les actionnaires aurait pu permettre d'éviter étaient indemnifiables, y compris la diminution de la valeur de l'entreprise, présentait deux difficultés. La première était qu'il n'y avait pas de preuve de la responsabilité fondée sur le fait que la surveillance des actionnaires était compromise. L inc. n'a pas prouvé,

et le juge de première instance n'a pas conclu, que les actionnaires de L inc. s'étaient fiés aux états financiers vérifiés de façon négligente par le vérificateur, ou que s'ils avaient reçu des états financiers exacts et s'y étaient fiés, ils auraient agi d'une façon qui aurait empêché L inc. de poursuivre ses activités et de diminuer ses actifs au cours de la période entre la production des états financiers en cause et l'insolvabilité de L inc. En raison de l'interprétation large de l'obligation de diligence adoptée par L inc. et acceptée par le juge de première instance, ce dernier a omis de tenir compte des paramètres de la confiance raisonnable et prévisible des actionnaires, comme l'exigeait larrêt *Hercules* lorsqu'il a défini l'étendue de l'obligation de diligence en ce qui a trait aux pertes découlant du fait que la surveillance des actionnaires soit compromise. Un point essentiel toutefois, le juge de première instance ne s'est pas demandé si les actionnaires s'étaient effectivement fiés aux états financiers vérifiés — un élément crucial pour la cause d'action. Il ne s'est pas demandé si, dans le cas où les actionnaires s'étaient fiés à ces états financiers, cette confiance les avait empêchés de prendre des mesures pour remplacer les administrateurs ou les dirigeants ou changer les choses autrement. Il ne s'est pas demandé si cela aurait inclus la cessation des activités de L inc. plus tôt. Finalement, il ne s'est pas demandé si ces mesures auraient empêché les pertes que L inc. a accumulées pendant la période en question. Si le juge de première instance avait posé ces questions, il aurait été tenu d'y répondre par la négative, puisque L inc. n'a présenté aucune preuve à l'appui de réponses affirmatives. La deuxième difficulté était une considération de politique générale connexe : permettre l'indemnisation en l'absence de la preuve nécessaire reviendrait à ouvrir la porte à l'indemnisation indéterminée. La position de L inc., selon laquelle le vérificateur était responsable de toutes les pertes sans qu'il soit nécessaire de prouver les éléments requis pour présenter une thèse fondée sur le fait que la surveillance des actionnaires soit compromise, donnerait lieu à une attribution inéquitable de la perte, ainsi qu'à un montant indéterminé de dommages-intérêts. Faire en sorte que le vérificateur soit pratiquement garant de tout ce que ferait par la suite L inc., et non les actionnaires collectivement, ne constituerait pas une attribution équitable de la responsabilité. Les vérificateurs seraient incapables de prévoir raisonnablement quelle serait leur responsabilité ultime lorsqu'ils fournissent des services à des clients.

Il n'a pas été démontré que les pertes en question étaient visées par l'obligation de diligence du vérificateur. La première étape du critère énoncé dans *Anns* n'a pas été franchie. Il n'était pas nécessaire de se demander si des considérations de politique générale non liées à la relation entre les parties annihilaient la responsabilité prima facie. Cependant, s'il était nécessaire de le faire, les considérations de politique générale que sont l'attribution inéquitable de la perte et l'indétermination empêcheraient que le vérificateur soit tenu responsable. La jurisprudence aura à préciser les limites de la responsabilité d'un vérificateur du fait que la surveillance des actionnaires est compromise. Le défaut de L inc. de prouver que toute perte subie pouvait être attribuée au fait que les actionnaires s'étaient fiés au rapport de vérification de fin d'exercice pour 1997 entaché de négligence aux fins de la surveillance de l'entreprise constituait un fondement suffisant pour accueillir le pourvoi dans sa totalité.

Mais la thèse de la surveillance par les actionnaires que L inc. voulait maintenant invoquer comportait un autre aspect qui posait problème. Il s'agissait d'une question de principe. Le rapport annuel du vérificateur vise à éclairer la prise de décisions par les actionnaires, et non à dicter leurs décisions. Le vérificateur ne peut être tenu responsable du montant indéterminé de la perte susceptible de résulter des actes ou de l'inaction des actionnaires. Une perte qui ne peut être attribuée au manquement du vérificateur est trop éloignée pour être indemnisable. La notion de privation d'une occasion n'était pas utile. Il fallait déterminer dans quelle mesure la perte que cela a effectivement entraînée peut être attribuée à l'inexactitude (c.-à-d. le caractère délictuel) des renseignements fournis. Il ressortait des conclusions du juge de première instance que le vérificateur n'a jamais assumé la responsabilité des décisions pouvant être considérées comme ayant causé la perte subie par L inc. Il fallait établir l'existence d'un lien étroit et immédiat entre l'acte fautif et la perte alléguée. L inc. ne pouvait recouvrer du vérificateur les pertes alléguées. L'action en responsabilité délictuelle devait être rejetée. L'action en responsabilité contractuelle de L inc. aboutissait au même résultat; dans ce cas également, les pertes seraient trop éloignées. Vu la décision du juge de première instance suivant laquelle les éléments de l'action en responsabilité contractuelle étaient identiques à ceux de l'action en responsabilité délictuelle, il s'ensuit que le juge a commis une erreur en concluant à l'existence d'une violation du contrat.

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*Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.* (1993), [1993] 8 W.W.R. 129, 11 B.L.R. (2d) 101, 12 C.L.R. (2d) 161, (sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.*) 83 B.C.L.R. (2d) 145, (sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.*) 157 N.R. 241, (sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.*) 32 B.C.A.C. 221, (sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.*) 53 W.A.C. 221, (sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.*) [1993] 3 S.C.R. 206, 17 C.C.L.T. (2d) 101, (sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.*) 107 D.L.R. (4th) 169, 1993 CarswellBC 237, 1993 CarswellBC 1264 (S.C.C.) — referred to

*Edwards v. Law Society of Upper Canada* (2001), 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, 34 Admin. L.R. (3d) 38, 206 D.L.R. (4th) 211, 277 N.R. 145, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2)*) 56 O.R. (3d) 456 (headnote only), 153 O.A.C. 388, [2001] 3 S.C.R. 562, 2001 CSC 80, 56 O.R. (3d) 456, 56 O.R. (3d) 456 (note), [2001] O.T.C. 325 (S.C.C.) — followed

*Followka v. Royal Oak Ventures Inc.* (2010), 2010 SCC 5, 2010 CarswellNWT 9, 2010 CarswellNWT 10, 71 C.C.L.T. (3d) 1, [2010] 4 W.W.R. 35, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) 398 N.R. 20, 315 D.L.R. (4th) 577, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) 474 A.R. 1, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) 479 W.A.C. 1, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) [2010] 1 S.C.R. 132, 80 C.C.E.L. (3d) 1 (S.C.C.) — considered

*Glanzer v. Shepard* (1922), 135 N.E. 275, 233 N.Y. 236, 23 A.L.R. 1425 (U.S. N.Y. Ct. App.) — considered

*Gross v. Great-West Life Assurance Co.* (2002), 2002 ABCA 37, 2002 CarswellAlta 209, [2002] 4 W.W.R. 421, 21 B.L.R. (3d) 159, 99 Alta. L.R. (3d) 207, 299 A.R. 142, 266 W.A.C. 142 (Alta. C.A.) — considered

*Haig v. Bamford* (1976), [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68, 9 N.R. 43, 27 C.P.R. (2d) 149, [1976] 3 W.W.R. 331, 1976 CarswellSask 116, 1976 CarswellSask 112 (S.C.C.) — considered

*Hall v. Hebert* (1993), [1993] 4 W.W.R. 113, 152 N.R. 321, 15 C.C.L.T. (2d) 93, 101 D.L.R. (4th) 129, 45 M.V.R. (2d) 1, [1993] 2 S.C.R. 159, 26 B.C.A.C. 161, 44 W.A.C. 161, 78 B.C.L.R. (2d) 113, 1993 CarswellBC 92, 1993 CarswellBC 1260 (S.C.C.) — followed

*Hart Building Supplies Ltd. v. Deloitte & Touche* (2004), 2004 BCSC 55, 2004 CarswellBC 51, 41 C.C.L.T. (3d) 240 (B.C. S.C. [In Chambers]) — distinguished

*Hercules Management Ltd. v. Ernst & Young* (1997), 1997 CarswellMan 198, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Management Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.) — followed

*Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board* (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 50 C.C.L.T. (3d) 1, 50 C.R. (6th) 279, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 285 D.L.R. (4th) 620, 64 Admin. L.R. (4th) 163, 230 O.A.C. 253, 368 N.R. 1, [2007] 3 S.C.R. 129, [2007] R.R.A. 817 (S.C.C.) — considered

*Hughes-Holland v. BPE Solicitors* (2017), [2017] W.L.R. 1029, [2017] UKSC 21 (U.K. S.C.) — considered

*Jetivia SA v. Bilita (U.K.) Ltd. (In Liquidation)* (2015), [2015] 2 W.L.R. 1168, 2015 UKSC 23, [2016] A.C. 1, [2015] B.C.C. 343, [2015] 1 B.C.L.C. 443, [2015] 2 E.R. 1083, [2015] 2 All E.R. (Comm) 281, [2015] 2 Lloyd's Rep. 61, [2015] B.V.C. 20 (U.K. S.C.) — referred to

*McAlister (Donoghue) v. Stevenson* (1932), [1932] A.C. 562, [1932] All E.R. Rep. 1, 101 L.J.P.C. 119, 147 L.T. 281, 37 Com. Cas. 850, [1932] UKHL 100 (U.K. H.L.) — considered

*Mustapha v. Culligan of Canada Ltd.* (2008), 2008 SCC 27, 2008 CarswellOnt 2824, 2008 CarswellOnt 2825, 55 C.C.L.T. (3d) 36, 293 D.L.R. (4th) 29, 375 N.R. 81, 238 O.A.C. 130, [2008] 2 S.C.R. 114, 92 O.R. (3d) 799 (note) (S.C.C.) — followed

*Nielsen v. Kamloops (City)* (1984), [1984] 5 W.W.R. 1, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 66 B.C.L.R. 273, 1984 CarswellBC 476, 1984 CarswellBC 821 (S.C.C.) — followed

*Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd.* (1997), [1997] 1 W.L.R. 1627, [1998] 1 All E.R. 305, [1998] C.L.C. 116, [1998] 1 Costs L.R. 108, [1997] 1 P.N.L.R. 197, [1998] 1 E.G.L.R. 99, [1998] 5 E.G. 150, 142 S.J.L.B. 29 (Eng. H.L.) — referred to

*Odhayji Estate v. Woodhouse* (2003), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 70 O.R. (3d) 253 (note), [2004] R.R.A. 1, 2003 CSC 69 (S.C.C.) — considered

*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.* (1961), [1961] 1 All E.R. 404, [1961] A.C. 388, [1961] 2 W.L.R. 126 (New South Wales P.C.) — considered

*Platform Home Loans Ltd. v. Oyston Shipways Ltd.* (1999), [1999] 2 W.L.R. 518, [1999] 1 All E.R. 833, [2000] 2 A.C. 190 (Eng. H.L.) — referred to

*R. v. McNamara* (1985), 45 C.R. (3d) 289, (sub nom. *Canadian Dredge & Dock Co. v. R.*) 9 O.A.C. 321, (sub nom. *Canadian Dredge & Dock Co. v. R.*) 19 C.C.C. (3d) 1, (sub nom. *Canadian Dredge & Dock Co. v. R.*) 19 D.L.R. (4th) 314, (sub nom. *Canadian Dredge & Dock Co. v. R.*) 59 N.R. 241, (sub nom. *R. v. Canadian Dredge & Dock Co.*) [1985] 1 S.C.R. 662, 1985 CarswellOnt 939, 1985 CarswellOnt 96 (S.C.C.) — distinguished

*Rainbow Industrial Caterers Ltd. v. Canadian National Railway* (1991), 8 C.C.L.T. (2d) 225, 59 B.C.L.R. (2d) 129, [1991] 6 W.W.R. 385, 84 D.L.R. (4th) 291, 126 N.R. 354, 3 B.C.A.C. 1, 7 W.A.C. 1, [1991] 3 S.C.R. 3, [1991] R.R.A. 850, 1991 CarswellBC 214, 1991 CarswellBC 921, 1991 SCC 27 (S.C.C.) — followed

*Saadati v. Moorhead* (2017), 2017 SCC 28, 2017 CSC 28, 2017 CarswellBC 1446, 2017 CarswellBC 1447, [2017] 6 W.W.R. 431, 96 B.C.L.R. (5th) 1, 409 D.L.R. (4th) 395, 37 C.C.L.T. (4th) 1, [2017] 1 S.C.R. 543 (S.C.C.) — followed

*Stone & Rolls Ltd. v. Moore Stephens Ltd.* (2009), [2009] UKHL 39, [2009] 3 W.L.R. 455, [2009] 1 A.C. 1391 (U.K. H.L.) — considered

*Ultramares Corp. v. Touche* (1931), 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (U.S. N.Y. Ct. App.) — considered

*Yeu v. Hong Kong (Attorney-General)* (1987), [1988] 1 A.C. 175, [1987] 2 All E.R. 705, [1987] 3 W.L.R. 776, [1987] UKPC 16 (Hong Kong P.C.) — referred to

*373409 Alberta Ltd. (Receiver of) v. Bank of Montreal* (2002), 2002 SCC 81, 2002 CarswellAlta 1573, 2002 CarswellAlta 1574, [2003] 2 W.W.R. 1, 29 B.L.R. (3d) 1, (sub nom. *Bank of Montreal v. Ernst & Young Inc.*) 220 D.L.R. (4th) 193, (sub nom. *373409 Alberta Ltd. v. Bank of Montreal*) 296 N.R. 244, 8 Alta. L.R. (4th) 199, 317 A.R. 349, 284 W.A.C. 349, [2002] 4 S.C.R. 312, [2003] R.R.A. 1, 2002 CSC 81 (S.C.C.) — referred to

Cases considered by *McLachlin C.J.C.*:

*Aneco Reinsurance Underwriting Ltd. v. Johnson & Higgins Ltd.* (2001), [2001] UKHL 51, [2002] Lloyd's Rep. 157, [2001] 2 All E.R. (Comm) 929 (U.K. H.L.) — referred to in a minority or dissenting opinion

*Ann v. Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 W.L.R. 1024, (sub nom. *Ann v. London Borough of Merton*) [1977] 2 All E.R. 492, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — considered in a minority or dissenting opinion

*BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10, 1993 CarswellBC 1254 (S.C.C.) — considered in a minority or dissenting opinion

*Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co.* (1996), [1997] A.C. 191, (sub nom. *South Australia Asset Management Corp. v. York Montague Ltd.*) [1996] 3 W.L.R. 87, (sub nom. *South Australia Asset Management Corp. v. York Montague Ltd.*) [1996] 3 All E.R. 365, [1996] UKHL 10 (U.K. H.L.) — considered in a minority or dissenting opinion

*Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, (sub nom. *Asamer Oil Corp. v. Sea Oil & General Corp.*) 89 D.L.R. (3d) 1, (sub nom. *Asamer Oil Corp. v. Sea Oil & General Corp.*) 23 N.R. 181, 12 A.R. 271, 5 B.L.R. 225, 1978 CarswellAlta 268, 1978 CarswellAlta 302 (S.C.C.) — referred to in a minority or dissenting opinion

*Burns v. Homer Street Development Limited Partnership* (2016), 2016 BCCA 371, 2016 CarswellBC 2537, 73 R.P.R. (5th) 6, 91 B.C.L.R. (5th) 383, 404 D.L.R. (4th) 699, 36 C.C.L.T. (4th) 249 (B.C. C.A.) — considered in a minority or dissenting opinion

*Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2016), 2016 ONCA 922, 2016 CarswellOnt 19133, 32 C.C.L.T. (4th) 229, 404 D.L.R. (4th) 534, 133 O.R. (3d) 561 (Ont. C.A.) — referred to in a minority or dissenting opinion

*Canadian National Railway v. Norsk Pacific Steamship Co.* (1992), 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289, 137 N.R. 241, (sub nom. *Norsk Pacific Steamship Co. c. Cie des Chemins de Fer nationaux du Canada*) [1991] R.R.A. 370, [1992] 1 S.C.R. 1021, 1992 CarswellNat 168, 53 F.T.R. 79, 1992 CarswellNat 655, 1992 A.M.C. 1910, 228 W.A.C. 70, 11 C.C.L.T. (2d) 14 (S.C.C.) — considered in a minority or dissenting opinion

*Candler v. Crane, Christmas & Co.* (1951), [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (Eng. C.A.) — referred to in a minority or dissenting opinion

*Caparo Industries plc v. Dickman* (1990), [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358, [1990] 2 A.C. 605 (U.K. H.L.) — considered in a minority or dissenting opinion

*Cooper v. Hobart* (2001), 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, [2002] 1 W.W.R. 221, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 277 N.R. 113, 8 C.C.L.T. (3d) 26, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 261 W.A.C. 268, [2001] 3 S.C.R. 537, [2001] B.C.T.C. 215, 2001 CSC 79 (S.C.C.) — considered in a minority or dissenting opinion

*D'Amato v. Badger* (1996), [1996] 8 W.W.R. 390, 22 B.C.L.R. (3d) 218, 31 C.C.L.T. (2d) 1, 137 D.L.R. (4th) 129, 199 N.R. 341, 79 B.C.A.C. 110, 129 W.A.C. 110, [1996] 2 S.C.R. 1071, 1996 CarswellBC 2303, 1996 CarswellBC 2304 (S.C.C.) — considered in a minority or dissenting opinion

*Hercules Management Ltd. v. Ernst & Young* (1997), 1997 CarswellMan 198, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.) — considered in a minority or dissenting opinion

*Hofstrand Farms Ltd. v. British Columbia* (1986), [1986] 1 S.C.R. 228, 26 D.L.R. (4th) 1, (sub nom. *Hofstrand Farms Ltd. v. B.D.C. Ltd.*) 65 N.R. 261, [1986] 3 W.W.R. 216, 1 B.C.L.R. (2d) 324, 33 B.L.R. 293, 36 C.C.L.T. 87, 1986 CarswellBC 70, 1986 CarswellBC 754 (S.C.C.) — referred to in a minority or dissenting opinion

*Hogarth v. Rocky Mountain Slate Inc.* (2013), 2013 ABCA 57, 2013 CarswellAlta 189, 75 Alta. L.R. (5th) 295, [2013] 5 W.W.R. 457, 542 A.R. 289, 566 W.A.C. 289, 360 D.L.R. (4th) 119 (Alta. C.A.) — considered in a minority or dissenting opinion

*Hughes-Holland v. BPE Solicitors* (2017), [2017] W.L.R. 1029, [2017] UKSC 21 (U.K. S.C.) — considered in a minority or dissenting opinion

*Knight v. Imperial Tobacco Canada Ltd.* (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v.*

*Imperial Tobacco Canada Ltd.*) 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered in a minority or dissenting opinion

*Mustapha v. Culligan of Canada Ltd.* (2008), 2008 SCC 27, 2008 CarswellOnt 2824, 2008 CarswellOnt 2825, 55 C.C.L.T. (3d) 36, 293 D.L.R. (4th) 29, 375 N.R. 81, 238 O.A.C. 130, [2008] 2 S.C.R. 114, 92 O.R. (3d) 799 (note) (S.C.C.) — considered in a minority or dissenting opinion

*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.* (1961), [1961] 1 All E.R. 404, [1961] A.C. 388, [1961] 2 W.L.R. 126 (New South Wales P.C.) — referred to in a minority or dissenting opinion

*Platform Home Loans Ltd. v. Oyston Shipways Ltd.* (1999), [1999] 2 W.L.R. 518, [1999] 1 All E.R. 833, [2000] 2 A.C. 190 (Eng. H.L.) — referred to in a minority or dissenting opinion

*Rossy c. Westmount (Ville)* (2012), 2012 SCC 30, 2012 CarswellQue 5524, 2012 CarswellQue 5525, (sub nom. *Rossy v. Westmount (Ville de)*) 346 D.L.R. (4th) 1, [2012] I.L.R. I-5301, 31 M.V.R. (6th) 1, (sub nom. *Rossy v. Westmount (City)*) 431 N.R. 43, 95 C.C.L.T. (3d) 1, 10 C.C.L.I. (5th) 171, (sub nom. *Westmount (City) v. Rossy*) [2012] 2 S.C.R. 136 (S.C.C.) — considered in a minority or dissenting opinion

*Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1, 157 C.L.R. 424, 59 A.L.J.R. 564 (Australia H.C.) — referred to in a minority or dissenting opinion

*Temseel Holdings Ltd. v. Beaumonts Chartered Accountants* (2002), [2002] EWHC 2642, [2003] P.N.L.R. 27 (Eng. Comm. Ct.) — referred to in a minority or dissenting opinion

*Vytlingam (Litigation Guardian of) v. Farmer* (2007), 2007 SCC 46, 2007 CarswellOnt 6626, 2007 CarswellOnt 6627, 53 C.C.L.I. (4th) 1, 52 M.V.R. (5th) 1, (sub nom. *Citadel General Assurance Co. v. Vytlingam*) [2007] I.L.R. I-4645, 87 O.R. (3d) 400 (note), (sub nom. *Vytlingam v. Farmer*) 230 O.A.C. 364, (sub nom. *Vytlingam v. Farmer*) 368 N.R. 251, 286 D.L.R. (4th) 577, (sub nom. *Citadel General Assurance Co. v. Vytlingam*) [2007] 3 S.C.R. 373, [2007] R.R.A. 825 (S.C.C.) — considered in a minority or dissenting opinion

*Widdrington Estate c. Wightman* (2013), 2013 QCCA 1187, 2013 CarswellQue 6529, 2013 CarswellQue 11250, [2013] R.J.Q. 1054, 8 C.C.L.T. (4th) 185 (C.A. Que.) — referred to in a minority or dissenting opinion

**Statutes considered by Gascon, Brown JJ.:**

*Business Corporations Act*, R.S.O. 1990, c. B.16

Generally — referred to

s. 153 — considered

s. 154 — considered

*Corporations Act*, R.S.M. 1987, c. C225

Generally — referred to

*Negligence Act*, R.S.O. 1990, c. N.1

Generally — referred to

s. 3 — considered

**Statutes considered by McLachlin C.J.C.:**

*Business Corporations Act*, R.S.O. 1990, c. B.16

Pt. XII — referred to

**Words and phrases considered:**

**indeterminate liability**

[Per Gascon and Brown JJ. (Karakatsanis and Rowe JJ. concurring):] Indeterminate liability is liability of a specific *character*, not of a specific *amount*. In particular, indeterminate liability should not be confused with significant liability (*Gross v. Great-West Life Assurance Co.*, 2002 ABCA 37, 299 A.R. 142, at para. 38). . . . liability is truly "indeterminate" if "the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy — are insufficient to

resolve the question" (M. V. Tushnet, "Defending the Indeterminacy Thesis", in B. Bix, ed., *Analyzing Law: New Essays in Legal Theory* (1998), 223, at pp. 224-25).

### **residual policy considerations**

[Per Gascon and Brown JJ. (Karakatsanis and Rowe JJ. concurring):] Where a *prima facie* duty of care is recognized on the basis of proximity and reasonable foreseeability, the analysis advances to stage two of the *Anns/Cooper* framework [*Anns v. London Borough of Merton*, [1977] 2 All E.R. 492; *Cooper v. Hobart*, 2001 SCC 79]. Here, the question is whether there are "residual policy considerations" outside the relationship of the parties that may negate the imposition of a duty of care (*Cooper*, at para. 30; *Edwards* [*Edwards v. Law Society of Upper Canada*, 2001 SCC 80], at para. 10; *Odhayji* [*Odhayji Estate v. Woodhouse*, 2003 SCC 69], at para. 51).

By "residual", we mean that such considerations "are not concerned with the relationship between the parties [already considered at stage one], but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37; see also *Edwards*, at para. 10).

#### **Termes et locutions cités:**

#### **considérations de politique résiduelles**

Lorsque l'existence d'une obligation de diligence *prima facie* est établie sur le fondement du lien de proximité et de la prévisibilité raisonnable, l'analyse passe au deuxième volet du cadre établi dans les arrêts *Anns* et *Cooper*. Il s'agit alors de déterminer si « des considérations de politique résiduelles » étrangères au lien existant entre les parties sont susceptibles d'écartier l'imposition d'une obligation de diligence (*Cooper*, par. 30; *Edwards*, par. 10; *Odhayji*, par. 51).

[...]

Par « résiduelles », nous voulons dire que ces considérations « ne portent pas sur le lien existant entre les parties [qui a déjà été examiné au premier volet du critère], mais sur l'effet que la reconnaissance d'une obligation de diligence aurait sur les autres obligations légales, sur le système juridique et sur la société en général » (*Cooper*, par. 37; voir aussi *Edwards*, par. 10).

#### **responsabilité indéterminée**

La responsabilité indéterminée est une responsabilité de *nature* particulière et non d'une *importance* particulière. Plus précisément, il ne faut pas confondre responsabilité indéterminée et lourde responsabilité (*Gross c. Great-West Life Assurance Co.*, 2002 ABCA 37, 299 A.R. 142, par. 38). (...) [L]a responsabilité est réellement « indéterminée » si [TRADUCTION] « les sources de droit reconnues et leurs méthodes d'application reconnues, telles la déduction et l'analogie -- ne permettent pas de trancher la question » (M. V. Tushnet, « Defending the Indeterminacy Thesis », dans B. Bix, dir., *Analyzing Law : New Essays in Legal Theory* (1998), 223, 224-225).

APPEAL by auditor from judgment reported at *Livent Inc. (Receiver of) v. Deloitte & Touche* (2016), 2016 ONCA 11, 2016 CarswellOnt 122, 31 C.B.R. (6th) 205, 24 C.C.L.T. (4th) 177, 128 O.R. (3d) 225, 393 D.L.R. (4th) 1, 342 O.A.C. 201, 52 B.L.R. (5th) 225, [2016] O.J. No. 51 (Ont. C.A.), dismissing appeal and cross-appeal from judgment allowing action in tort and contract.

POURVOI formé par un vérificateur à l'encontre d'un jugement publié à *Livent Inc. (Receiver of) v. Deloitte & Touche* (2016), 2016 ONCA 11, 2016 CarswellOnt 122, 31 C.B.R. (6th) 205, 24 C.C.L.T. (4th) 177, 128 O.R. (3d) 225, 393 D.L.R. (4th) 1, 342 O.A.C. 201, 52 B.L.R. (5th) 225, [2016] O.J. No. 51 (Ont. C.A.), ayant rejeté l'appel et l'appel incident interjetés à l'encontre d'une décision accueillant une action en responsabilité délictuelle et contractuelle.

#### **Gascon, Brown JJ. (Karakatsanis, Rowe JJ. concurring):**

#### **I. Introduction**

1 This appeal provides the Court with an opportunity to affirm the analytical framework by which liability may be imposed in cases of negligent misrepresentation or performance of a service by an auditor.

2 There is substantial agreement between us and the Chief Justice. We agree on the general analytical framework governing negligent misrepresentation claims (Chief Justice's reasons, at paras. 146-147). And we agree that Deloitte & Touche (now Deloitte LLP) should not be liable for its corporate client Livent Inc.'s increase in liquidation deficit which followed Deloitte's provision of negligent services in relation to the solicitation of investment.

3 We conclude, however, that Deloitte should be liable for the increase in Livent's liquidation deficit which followed the statutory audit. In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), this Court recognized that a statutory audit is prepared to allow shareholders to collectively "supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporatio[n]" which permits "the shareholders, acting as a group, to safeguard the interests of the corporatio[n]" (para. 56 (emphasis deleted)). This describes precisely the function which Livent's shareholders were unable to discharge by reason of Deloitte's negligence. As a consequence, Livent's corporate life was artificially prolonged, resulting in the interim deterioration of its finances. There was a sufficient evidentiary basis for liability based on impaired shareholder supervision. Application of the *Anns/Cooper* framework, coupled with the basis for auditor liability specifically identified by this Court in *Hercules*, would lead us to uphold the trial judge's finding of liability in relation to the negligently prepared statutory audit.

4 As a result, we would allow the appeal from the decision of the Ontario Court of Appeal, 2016 ONCA 11, 128 O.R. (3d) 225 (Ont. C.A.), but only in part.

## **II. Facts and Judicial History**

5 We generally agree with the facts and judicial history set out by the Chief Justice in her reasons. In particular, she correctly identifies the trial judge's core finding that Deloitte's conduct fell below the standard of care on two occasions: "... either when it failed to discover the fraud and act on that discovery in August 1997, or when it signed off on Livent's 1997 financial statements in April 1998" (Chief Justice's reasons, at para. 127; trial reasons, 2014 ONSC 2176, 10 C.C.L.T. (4th) 182 (Ont. S.C.J. [Commercial List]), at paras. 241-42). We, like the Chief Justice, do not dispute these core findings. Some further elaboration upon them is, however, helpful.

6 The trial judge's findings of negligence can be divided into two separate events: (1) Deloitte's approval of a 1997 press release ("Press Release") and provision of a comfort letter ("Comfort Letter"); and (2) Deloitte's preparation and approval of the 1997 clean audit opinion ("1997 Audit"). We would not label all of these documents "audit statements". Indeed, collapsing the distinctions between these documents obfuscates a proper duty of care analysis.

7 Livent asserts that it detrimentally relied on Deloitte in each of these events, which impaired its ability to oversee its operations. Specifically, Livent says that, had Deloitte been prudent in relation to these representations, Livent's life would not have been artificially extended and that, in turn, it would have suffered less corporate loss (calculated as the increase in the deficit between its liabilities and assets at the time of its liquidation): trial reasons, at paras. 23-25, citing Livent's amended statement of claim, at paras. 210 and 212. A detailed recounting of the events pertaining to these two representations is, therefore, critical to the negligence analysis in this case.

### **A. Primary Negligence Finding: The Press Release and Comfort Letter (August to October 1997)**

8 Chronologically, the first representations found by the trial judge to be negligence causing compensable harm were the Press Release and Comfort Letter.

9 The Comfort Letter pertains to an agreement whereby Dundee Realty Corp. sought to purchase the air rights above Livent's Pantages Theatre and adjacent lands ("Air Rights Agreement"). Deloitte audited the accounting and reporting relating to that purchase, and identified irregularities in the accounting for the reporting of profit. Ultimately, Livent and Deloitte

disagreed about the irregularities, which left Deloitte with a choice between resigning (and reporting those irregularities to regulatory authorities and the next auditor), and remaining (thereby effectively capitulating to Livent's views on how the irregularities should be reported). Deloitte, negligently, chose the latter route. It did not resign or inform anyone of the accounting irregularities. Instead, it helped prepare, and approved, the Press Release of September 2, 1997, which misrepresented the basis for the reporting of profit arising from the Air Rights Agreement.

10 Further, that Press Release was issued "on the eve of a public offering for which [Deloitte] was going to have to provide a comfort letter" (trial reasons, at para. 193). As a result, Deloitte — again, negligently — provided the Comfort Letter on October 10, 1997, in support of the U.S. \$125 million debenture underwriting. The purpose underlying the Press Release and the Comfort Letter is critical. It was not to inform *Livent* of its own financial position, but rather, to inform *investors* of Livent's financial position, furnishing "comfort" in respect of their investment (despite one of Deloitte's senior partners' express acknowledgment that Deloitte was in no position "to provide *any comfort* to any regulators, underwriters or audit committee members as to the interim financial statement's conformity with GAAP") (trial reasons, at para. 178 (emphasis added; emphasis in original deleted)). Casting "professional skepticism, if not GAAS, aside" (para. 209), Deloitte approved the Press Release and Comfort Letter — all, seemingly, to maintain its profitable relationship with Livent.

11 Given the foregoing, the trial judge assessed Livent's injury as of a "measurement date" of August 31, 1997, i.e., the date on which Deloitte would, acting reasonably, have resigned. The trial judge also reduced Livent's damages by 25 percent, however, for "contingencies" said to represent the amount Livent would have lost, even without Deloitte's negligence.

12 Deloitte appeals the trial judge's award of damages, which amounts to the measure of damages (75 percent of damages overall) that he estimated to have arisen after the date on which Deloitte should have resigned.

#### ***B. Alternative Negligence Finding: The 1997 Audit (April 1998)***

13 In the alternative, the trial judge held that, if Deloitte reasonably refrained from resigning in August or September of 1997, it was negligent in preparing the 1997 Audit which was finalized in April 1998. That audit, which lacked "independent thought", essentially tracked the statutory audit for 1996 ("1996 Audit"), despite (1) Livent now presenting inordinate risk given its "more than ... modest history of aggressive, if not questionable, accounting practices" (trial reasons, at para. 211); and (2) Deloitte discovering, before the audit was completed, that Livent had intentionally deceived it as to the nature of its contractual dealings underlying the Air Rights Agreement. Somehow, this latter discovery of deliberate deception — after which "all hell broke loose" (para. 213) — was not enough to persuade Deloitte to terminate its engagement with Livent, despite all of its testifying senior partners acknowledging that "their collective professional skepticism would have been at the highest level" at this time (para. 214), and despite Livent's after-the-fact explanation for this deception "ma[king] no sense, whatsoever" (para. 234(5)). Deloitte's willingness to succumb to Livent's transparently fraudulent demands left the trial judge "breathless" (para. 238) and was "beyond [his] comprehension" (para. 239).

14 Given the foregoing, the trial judge also assessed Livent's injury as of an "alternative" measurement date of March 31, 1998, i.e., the date on which Deloitte would, acting reasonably, have provided a prudent audit opinion (trial reasons, at para. 306, fn. 188, and para. 369, fn. 228).

15 We reiterate that the *purpose* of the representation is critical. Unlike the Press Release and Comfort Letter (which were intended to inform *investors* of Livent's financial position), the 1997 Audit was intended to inform *Livent* of its own financial position for various purposes, including, most importantly, shareholder oversight of management.

### **III. Analysis**

#### ***A. Duty of Care***

16 Traditionally, the test from *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (U.K. H.L.), governed the duty analysis in decisions of this Court addressing claims for pure economic loss (*Hercules Management Ltd.; Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.); *Canadian National Railway v. Norsk Pacific*

*Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.). Significantly, however, the *Anns* test for establishing tort liability in Canada has since been refined. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), this Court provided greater certainty to the law of tort by clarifying the factors which may be considered at each stage of the *Anns* test. While the resulting *Anns/Cooper* framework has yet to be applied by this Court in a case of auditor's negligence, we adopt this statement of La Forest J. for the Court in *Hercules*: "... to create a 'pocket' of negligent misrepresentation cases ... in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect" (para. 21).

17 We turn, therefore, to consider the test for establishing tort liability, beginning with this Court's decision in *Hercules*, and the proper application of the general *Anns/Cooper* framework to cases of auditors' liability.

#### (I) *Hercules*: The *Anns* Test

18 In *Hercules*, this Court recognized a duty owed by an auditor in preparing a statutory audit of its corporate client. While the Court dismissed the plaintiff shareholders' claim for lost personal investments, it consistently maintained that a claim by the corporation itself for its own losses resulting from a negligent statutory audit could have succeeded (paras. 58-59; see also paras. 1 and 60-64):

All the participants in this appeal ... 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 ....

... 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.

19 The duty analysis in *Hercules* entailed applying the then-current test for recognizing a duty of care in Canadian negligence law: the *Anns* test. Comprising two stages, the *Anns* test asked (1) whether a *prima facie* duty of care exists between the parties; and (2) if so, whether there are any residual policy considerations which should negate or limit the scope of the duty, the class of persons to whom it is owed or the damages to which a breach of it may give rise (*Hercules*, at para. 20; *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), at pp. 10-11; *Norsk*, at p. 1155; *Bow Valley*, at para. 47).

20 Under the *Anns* test, a *prima facie* duty of care is recognized where a "sufficiently close relationship between the plaintiff and the defendant" exists such that "in the reasonable contemplation of the [defendant], carelessness on its part may cause damage to the [plaintiff]" (*Hercules*, at para. 22; *Kamloops (City)*, at p. 10). In other words, where injury to the plaintiff is a reasonably foreseeable consequence of the defendant's negligence, a duty of care would, *prima facie*, arise. This relationship, where present, was labelled one of "proximity" (*ibid.*). In *Hercules*, the Court provided greater particularity to the test of reasonable foreseeability which established proximity under the *Anns* test in the context of claims for pure economic loss arising from negligent misrepresentation or performance of a service. Specifically, it stated that proximity would inhere in a relationship where two criteria are met: (1) that the defendant should reasonably foresee that the plaintiff will rely on his or her representation; and (2) that the plaintiff's reliance would, in the circumstances of the case, be reasonable. The Court explained that considering the plaintiff's *reliance* within the test for the reasonable foreseeability of injury did not "abandon the basic tenets underlying the [*Anns*] formula" (para. 25). Rather, as the plaintiff's injury in cases of pure economic loss arising from negligent misrepresentation or performance of a service stems from his or her detrimental reliance, the reasonableness of that reliance informs the determination of whether his or her injury is reasonably foreseeable (paras. 25-26). Where, therefore, the *Anns* test was applied to cases of negligent misrepresentation, reasonable foreseeability of injury alone, as arising from reasonable reliance, was sufficient to establish a proximate relationship supporting a *prima facie* duty of care (*Hercules*, at paras. 25 and 27; *Norsk*, at p. 1154; *Bow Valley (Bermuda) Ltd.*, at para. 61).

21 The *Anns* test thereby set a low threshold at the first stage, imposing duties in relation to a nearly limitless class of persons who might rely on representations for nearly limitless purposes. Indeed, as this Court stated in *Hercules*, "[i]n 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" (para. 32). For that reason — that is, because of the low "foreseeability" threshold for establishing a *prima facie* duty of care at the first stage of the *Anns* test — the Court looked to the second stage of the *Anns* test to negate or narrow the duty on the basis of the "policy consideration" of indeterminacy. It was here that the Court looked to the identity of the plaintiffs and the purpose of the audit opinion to deny liability for investment and devaluation losses of individual shareholders (paras. 27-28; see also *Haig v. Bamford* (1976), [1977] 1 S.C.R. 466 (S.C.C.)). Specifically, the Court found that one of the purposes of a statutory audit — that is, to "allo[w] shareholders, as a group, to supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporatio[n]" (para. 56 (emphasis in original)) — would have permitted the corporate client to recover its own losses at the time of receivership had the claim been brought in the corporation's name. As we will explain, Livent's injury following the 1997 Audit is precisely the type of injury described in *Hercules* as being compensable.

## (2) *Cooper*: Refining the *Anns* Test

22 While this Court's holding in *Hercules* remains binding authority governing an auditor's duty of care in relation to a statutory audit, the framework by which that duty is imposed has since been refined. In the companion cases of *Cooper* and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.), this Court revised the *Anns* test by distinguishing more clearly between foreseeability and proximity, and by placing greater emphasis on a more demanding first stage of the two-stage analysis (*Cooper*, at para. 30). While, therefore, we rely on *Hercules* for the general proposition that an auditor may owe its client a duty of care in relation to a particular undertaking, it is the *Anns/Cooper* framework to which we must have reference in identifying a principled basis for imposing liability. And, properly applied, that framework will rarely, if ever, give rise to a *prima facie* duty of care that could result in indeterminate liability. Accordingly, and with great respect for contrary views, there is no reason to resort to the second stage in order to negate all liability in this case.

### (a) Stage One: Prima Facie Duty of Care

23 In *Cooper*, this Court recognized that "foreseeability alone" is not enough to establish a *prima facie* duty of care (para. 22; see also *Edwards*, at para. 9). In doing so, it signalled a shift from the *Anns* test, which had grounded the recognition of a *prima facie* duty upon mere foreseeability of injury (*Hercules*, at paras. 25 and 27; *Norsk*, at p. 1154; *Bow Valley*, at para. 61). After *Cooper*, the first stage of the *Anns/Cooper* framework would require "something more" (*Cooper*, at para. 29). That "something more" is *proximity* (*Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at paras. 47-48; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 12; *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at para. 23; and *Followka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 18).

24 In *Cooper*, the Court did not indicate whether proximity or reasonable foreseeability should be assessed first. In cases of negligent misrepresentation or performance of a service, however, proximity will be more usefully considered before foreseeability. What the defendant reasonably foresees as flowing from his or her negligence depends upon the characteristics of his or her relationship with the plaintiff, and specifically, in such cases, the purpose of the defendant's undertaking. That said, both proximity and foreseeability of injury merit further reflection.

#### (i) Proximity

25 Assessing proximity in the *prima facie* duty of care analysis entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Cooper*, at paras. 32 and 34).

26 Under the *Anns* test, proximity did not, "in and of itself, provide a principled basis on which to make a legal determination" (*Hercules*, at para. 23). Rather, proximity was a "label" which expressed nothing more than a "result, judgment or conclusion" (*ibid.*), where mere reasonable foreseeability of injury could be shown. While, under the *Anns/Cooper* framework, the proximity analysis has become more analytically robust, this descriptive component remains. By this, we mean that the term "proximity" is still used, in part, as a shorthand description of those categories of relationships in which proximity has already

been found to exist (*Cooper*, at para. 23). If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown. So long, then, as a risk of reasonably foreseeable injury can also be shown — or has already been shown through an analogous precedent — the first stage of the *Anns/Cooper* framework is complete and a duty of care may be identified (*ibid.*, at para. 36). In such circumstances, the second stage of the *Anns/Cooper* framework will seldom be engaged because any residual policy considerations will have already been taken into account when the proximate relationship was first identified (*ibid.*, at para. 39; *Edwards*, at para. 10).

27 This Court has on occasion defined previously established categories of proximity in broad terms. In *Hill*, for example, the Court listed "[t]he duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client" (para. 25). Proximate relationships will not always, however, be identified so generally. In particular, whether proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions, will depend upon the nature of the particular relationship at issue (*ibid.*, at para. 27; *Haig*, at p. 479). Indeed, and as we explain below, factors which support recognizing "novel" proximate relationships do so based upon the characteristics of the parties' relationship and the circumstances of each particular case (*Cooper*, at paras. 34-35).

28 It follows that, where a party seeks to base a finding of proximity upon a previously established or analogous category, a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, courts should avoid identifying established categories in an overly broad manner because, again, residual policy considerations are not considered where proximity is found on the basis of an established category (*Cooper*, at para. 39). Analytically, this makes sense. For a court to have previously recognized a proximate relationship, second-stage residual policy considerations must already have been taken into account. When, therefore, a court relies on an established category of proximity, it follows "that there are no overriding policy considerations that would [negate] the duty of care" (*ibid.*). A consequence of this approach, however, is that a finding of proximity based upon a previously established or analogous category must be grounded not merely upon the identity of the parties, but upon examination of the particular relationship at issue in each case. Otherwise, courts risk recognizing *prima facie* duties of care without any examination of pertinent second-stage residual policy considerations.

29 Where an established proximate relationship cannot be found, courts must undertake a full proximity analysis. To determine whether the "'close and direct' relationship which is the hallmark of the common law duty of care" exists (*Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 (S.C.C.), at para. 24, citing *Cooper*, at para. 32, and *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), at pp. 580-81), courts must examine all relevant "factors arising from the relationship between the plaintiff and the defendant" (*Cooper*, at para. 30 (emphasis in original); *Edwards*, at para. 9; *Childs*, at para. 24; *Odhavji Estate*, at para. 50; *Hill*, at para. 24; *Followka*, at para. 26; *Saadati*, at para. 24). While these factors are diverse and depend on the circumstances of each case (*Cooper*, at para. 35), this Court has maintained that they include "expectations, representations, reliance, and the property or other interests involved" (*ibid.*, at para. 34; *Odhavji*, at para. 50; *Followka*, at para. 26) as well as any statutory obligations (*Cooper*, at para. 38; *Edwards*, at paras. 9 and 13; *Odhavji Estate*, at para. 56).

30 In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so (W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 *Yale L.J.* 16, at pp. 49-50). These corollary rights and obligations create a relationship of proximity (*Haig*, at p. 477; *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.), at pp. 637-38; *Glanzer v. Shepard*, 135 N.E. 275 (U.S. N.Y. Ct. App. 1922) at pp. 275-76; *Ultramarine Corp. v. Touche*, 174 N.E. 441 (U.S. N.Y. Ct. App. 1931), at pp. 445-46; E. J. Weinrib, "The Disintegration of Duty" (2006), 31 *Adv. Q.* 212, at p. 230).

31 Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility — that is, of the purpose for which the representation was made or the service was undertaken — necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care (Weinrib; A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 293-94). This principle, also referred to as the

"end and aim" rule, properly limits liability on the basis that the defendant cannot be liable for a risk of injury against which he did not undertake to protect (*Glanzer*, at pp. 275 and 277; *Ultramarine Corp.*, at pp. 445-46; *Haig*, at p. 482). By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Followka*, at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence.

#### **(ii) Reasonable Foreseeability**

32 Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).

33 Broadly speaking, reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence (*Donoghue*, at p. 580). This inquiry is not amenable to, and does not require, actuarial precision. The jurisprudence gives content, however, to the foreseeability inquiry, providing courts with guidance. In the abstract, a defendant's negligent misrepresentation or performance of a service could potentially give rise to innumerable injuries tangentially cascading from the originally contemplated service. This was so in *Hercules*, where the Court recognized that an auditor's statement could be relied upon by a potentially limitless number of individuals (e.g., shareholders or takeover bidders), for a potentially limitless array of purposes (e.g., investments or takeover bids), any of which could result in various foreseeable injuries.

34 As we have already observed, however, reasonable foreseeability of injury is no longer the sole consideration at the first stage of the *Anns/Cooper* framework. Since *Cooper*, both reasonable foreseeability *and proximity* — the latter expressed in *Cooper* as a distinct and more demanding hurdle than reasonable foreseeability — must be proven in order to establish a *prima facie* duty of care. And, in cases of negligent misrepresentation or performance of a service, the proximate relationship — grounded in the defendant's undertaking and the plaintiff's reliance — informs the foreseeability inquiry. Meaning, the purpose underlying that undertaking and that corresponding reliance limits the type of injury which could be reasonably foreseen to result from the defendant's negligence.

35 As a matter of first principles, it must be borne in mind that an injury to the plaintiff in this sort of case flows from the fact that he or she detrimentally relied on the defendant's undertaking, whether it take the form of a representation or the performance of a service. It follows that an injury to the plaintiff will be reasonably foreseeable if (1) the defendant should have reasonably foreseen that the plaintiff would rely on his or her representation; and (2) such reliance would, in the particular circumstances of the case, be reasonable (*Hercules*, at para. 27). Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties; a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable.

36 We add this. Under the *Anns* test, the Court recognized that auditors may owe a *prima facie* duty of care to an innumerable number of parties on the basis of reasonable foreseeability alone (*Hercules*, at para. 32). We acknowledge that the *Anns/Cooper* framework, when applied to cases of negligent misrepresentation, will give rise to a far narrower scope of reasonably foreseeable injuries and, therefore, a narrower range of *prima facie* duties of care. This is no indictment of the *Anns/Cooper* analysis. Rather, it was the very purpose and effect of this Court's instruction in *Cooper* that "something more" than mere foreseeability is required at the first stage of the *Anns/Cooper* framework. By requiring examination of the relationship between the parties as we have just discussed, *Cooper* gave Canadian courts a more complete array of legal tools to determine whether it is "just and fair" to impose a *prima facie* duty of care.

#### **(b) Stage Two: Residual Policy Considerations**

37 Where a *prima facie* duty of care is recognized on the basis of proximity and reasonable foreseeability, the analysis advances to stage two of the *Anns/Cooper* framework. Here, the question is whether there are "residual policy considerations" outside the relationship of the parties that may negate the imposition of a duty of care (*Cooper*, at para. 30; *Edwards*, at para. 10; *Odhavji*, at para. 51).

38 By "residual", we mean that such considerations "are not concerned with the relationship between the parties [already considered at stage one], but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37; see also *Edwards*, at para. 10). To the extent, therefore, that stage one of the *prima facie* duty of care is said to engage "policy" considerations arising from the relationship between the parties — i.e., the recognition that it is sound "policy" to only hold defendants liable for negligence when they are in a proximate relationship with the plaintiff and when the injury suffered was reasonably foreseeable (see *Cooper*, at para. 25) — such "policy" considerations are not revisited at stage two (*ibid.*, at para. 28). Indeed such reconsideration would be both redundant and analytically confusing (*ibid.*, at para. 29).

39 *Cooper*, and in particular, its strict delineation between "factors arising from the *relationship* [between the parties]" (para. 30 (emphasis in original)) and factors that "are not concerned with the relationship between the parties" (para. 37) has impacted the stage at which certain factors are considered within the *Anns/Cooper* framework. For example, principles that were traditionally considered at the second stage of the *Anns* test in cases of negligent misrepresentation, such as (1) whether the defendant knew the identity of the plaintiff or the class of plaintiffs who would rely on its representation; and (2) whether the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made (*Hercules*, at paras. 27 and 40; *Bow Valley*, at paras. 55-56), are no longer considered at the second stage. This is because, as we have explained, these factors arise from the *relationship* between the parties and are, therefore, properly accounted for under the first stage proximity and reasonable foreseeability analysis.

40 What, then, remains to be considered at the second stage of the *Anns/Cooper* framework? In *Cooper*, this Court identified factors which are external to the relationship between the parties, including (1) whether the law already provides a remedy; (2) whether recognition of the duty of care creates "the spectre of unlimited liability to an unlimited class"; and (3) whether there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In this way, the residual policy inquiry is a normative inquiry. It asks whether it would be better, for reasons relating to legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case.

41 The place within the *Anns/Cooper* framework of this policy inquiry is significant. It follows the proximity and foreseeability inquiries. The policy inquiry assesses whether, *despite* the proximate relationship between the parties, and *despite* the reasonably foreseeable quality of the plaintiff's injury, the defendant should nonetheless be insulated from liability (*Cooper*, at para. 30; *Odhavji Estate*, at para. 51). That it would limit liability in the face of findings of both proximity and reasonable foreseeability makes plain how narrowly it should be relied upon (*Cooper*, at para. 30, citing *Yeu v. Hong Kong (Attorney-General)* (1987), [1988] 1 A.C. 175 (Hong Kong P.C.); *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206 (S.C.C.), at p. 218). Only in rare cases — such as those concerning decisions of governmental policy (*Cooper*, at paras. 38 and 53) or quasi-judicial bodies (*ibid.*, at para. 52; *Edwards*, at para. 19) — should liability be denied when a defendant's negligence causes reasonably foreseeable injury to a plaintiff with whom he or she shares a close and direct relationship. In light of the above, the stage at which certain factors are considered in the *Anns/Cooper* framework is material.

42 In this case, the Chief Justice finds that, if it were necessary to proceed to the second stage of the *Anns/Cooper* framework, she would insulate Deloitte from liability based on the residual policy consideration of indeterminacy (para. 166). We concede that indeterminate liability may, in some cases, be a legitimate residual policy consideration (*Cooper*, at paras. 37 and 54; *Hercules*, at para. 31). In our view, however, rarely, if ever, should a concern for indeterminate liability persist after a properly applied proximity and foreseeability analysis (*Saadati*, at para. 34; *Fullowka*, at para. 70). Robust application of stage one of the *Anns/Cooper* framework should almost always obviate concerns for indeterminate liability. This follows from an appreciation of what indeterminate liability, as a concept, actually means.

43 Indeterminate liability is liability of a specific *character*, not of a specific *amount*. In particular, indeterminate liability should not be confused with significant liability (*Gross v. Great-West Life Assurance Co.*, 2002 ABCA 37, 299 A.R. 142 (Alta. C.A.), at para. 38). Certain activities — like flying commercial aircraft, manufacturing pharmaceutical drugs, or auditing a large corporation — may well give rise to significant liability. But such liability arises from the nature of the defendant's undertakings and of the severe but reasonably foreseeable scale of injury that can result where such undertakings are negligently performed. This explains the significant compensation which these high risk undertakings typically attract. It also explains why contractual disclaimers limiting liability may often be warranted (*Edgeworth Construction Ltd.*, at p. 220). In contrast, the liability arising from these "high risk" undertakings may only be characterized as "indeterminate" if the scope of such liability is impossible to ascertain (*Black's Law Dictionary* (10th ed. 2014), *sub verbo* "indeterminate"). In other words, liability is truly "indeterminate" if "the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy — are insufficient to resolve the question" (M. V. Tushnet, "Defending the Indeterminacy Thesis", in B. Bix, ed., *Analyzing Law: New Essays in Legal Theory* (1998), 223, at pp. 224-25). More specifically, there are three pertinent aspects to so-called "indeterminacy" in these cases: (1) value indeterminacy ("liability in an indeterminate amount"); (2) temporal indeterminacy ("liability ... for an indeterminate time"); and (3) claimant indeterminacy ("liability ... to an indeterminate class"): *Hercules*, at para. 31, citing *Ultramares Corp.*, at p. 444. Naturally, when a claim has value, temporal, and claimant indeterminacy, our legal tools are insufficient to resolve the quantum of infinite damages that will flow from such a claim.

44 All this said, it would be very difficult for liability of an indeterminate character, so understood, to survive a robust analysis of proximity and foreseeability at the first stage of the *Anns/Cooper* framework. In cases of negligent misrepresentation or performance of a service, the requisite proximity analysis will address claimant indeterminacy because the class of claimants is *determinate*, including only those in respect of whom the defendant undertook to act. Likewise, foreseeability, which is constrained by the purpose of the undertaking in question, should address concerns about value indeterminacy, because the value of damages is limited — that is, *determined* — by the reasonably foreseeable quality of the injury (*Hercules*, at para. 32). Finally, proximity and foreseeability should both address temporal indeterminacy since the longer the period of time over which injury is said to have occurred, the less likely the defendant undertook to protect against it and the less foreseeable the injury, taken as a whole. Hence Cardozo C.J.'s statement in the oft-cited *Ultramares Corp.* decision that a duty which gives rise to indeterminacy "enkindle[s] doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences" (p. 444; see also Weinrib, at p. 231; Beever, at p. 275). In other words, a finding of indeterminate liability at the damages stage strongly suggests that a legal error occurred at the duty stage, since a finding of a *prima facie* duty of indeterminate scope underlies the resulting indeterminate liability.

45 We would add one final point. Indeterminate liability is a residual policy consideration, nothing more. The presence of indeterminacy need not be dispositive of liability in all cases. To approach the analysis otherwise would transform indeterminate liability from a policy *consideration* into a policy *veto*. While indeterminacy may militate against liability, other policy considerations — such as the immense profit margins that "high risk" actors often benefit from, or the extent to which "high risk" actors voluntarily assume the risk of indeterminate liability — may ultimately justify maintaining that liability, despite its indeterminacy (Beever, at p. 293). Even, therefore, in the rare case where indeterminate liability survives the proximity and foreseeability inquiries, it is not automatic that such indeterminacy will necessarily govern (*Followka*, at para. 70). Indeed, any so-called "indeterminate liability" which survives stage one of the *Anns/Cooper* framework presumably arises from the risk against which the defendant voluntarily undertook to protect the plaintiff and, therefore, may justly and fairly result in liability.

## B. Application

46 Having set out the proper legal framework for establishing liability in cases of pure economic loss arising from negligent misrepresentation or performance of a service, we turn now to apply that framework to the trial judge's two findings of negligence in this case.

47 In summary, at the first stage of the *Anns/Cooper* framework, a duty of care is established where proximity and reasonably foreseeability of injury are found. In our view, Deloitte's undertakings in relation to soliciting investment, and the 1997 Audit, gave rise to proximate relationships. The purpose of those undertakings, in turn, determines the type of injury that was reasonably

foreseeable as a result of Livent's reliance. Livent relied on the 1997 Audit for the purpose it was provided. Thus, a resulting injury was reasonably foreseeable. The same cannot be said, however, in respect of Deloitte's negligent assistance in soliciting investment.

48 At the second stage of the *Anns/Cooper* framework, residual policy considerations may negate Deloitte's duty of care. But none apply to the negligent provision of the 1997 Audit.

*(1) Solicitation of Investment (August to October 1997)*

**(a) Prima Facie Duty of Care**

*(i) Proximity*

49 The proximity analysis first asks whether the relationship at issue falls within, or is analogous to, a previously recognized category of proximity (*Cooper*, at para. 36; *Edwards*, at para. 9).

50 In *Hercules*, this Court found that an auditor may be in a proximate relationship with its corporate client sufficient to give rise to a duty of care. That proximate relationship was not, however, between an auditor and its client at large. Rather, the recognized relationship was limited to the preparation of a statutory audit (para. 14).

51 In this case, the asserted proximate relationship is not so narrow in scope. Livent claims that Deloitte owed it a duty of care in relation both to (1) the preparation of the 1997 Audit; and (2) the approval of the Press Release and preparation of the Comfort Letter. We see it as vital to the resolution of this case to distinguish between these two sets of documents.

52 The mere fact that proximity has been recognized as existing between an auditor and its client for *one* purpose is insufficient to conclude that proximity exists between the same parties for *all* purposes. As discussed above, an overly broad characterization of an established category of proximity which fails to consider the scope of activity in respect of which proximity was previously recognized, risks a premature imposition of a *prima facie* duty of care. In our respectful view, this very error impairs the reasons of the trial judge and the Court of Appeal. This approach is fundamentally inconsistent with the framework set out by this Court in *Cooper*. For this reason, we do not agree that this Court has previously established a proximate relationship as between an auditor and its client for the purposes of soliciting investment. In these circumstances, we must undertake a full proximity analysis.

53 As we have indicated above, the full proximity analysis in cases of negligent misrepresentation is focussed upon the purpose of the defendant's undertaking and the plaintiff's reliance. From August to October of 1997, the services which Deloitte provided to Livent — particularly its ongoing assistance in relation to the Press Release and the provision of the Comfort Letter — were undertaken for the purpose of helping Livent to solicit investment. Given this undertaking, Livent was entitled to rely upon Deloitte to carry out these services with reasonable care. From this, it follows that a relationship of proximity arose *in respect of the content of Deloitte's undertaking*. Deloitte's undertaking did *not* entitle Livent to rely on Deloitte's services and representations for *all* possible purposes. Rather, the "close and direct" relationship which obligated Deloitte to act with reasonable care was limited to the purpose for which Deloitte undertook to act. In this regard, we agree with the Chief Justice that "[l]oss that results from [Livent's] inability to attract investment ... may fall within the scope of Deloitte's duty of care", though only in relation to the Press Release and Comfort Letter (para. 153).

*(ii) Reasonable Foreseeability*

54 Having established a relationship of proximity for the purpose of soliciting investment, Livent asserts that the increase in its liquidation deficit beginning in the fall of 1997 was a reasonably foreseeable consequence of Deloitte's negligence, because "[t]he false financial picture that ought not to have been certified by Deloitte" was relied upon by Livent to artificially extend its solvency (R.F., at para. 108). In other words, had Deloitte resigned rather than continued to assist Livent in soliciting investment, Livent would have known its actual finances and avoided their interim deterioration. In our view, however, this type of injury was not a reasonably foreseeable consequence of Deloitte's negligent assistance in soliciting investment. This follows from our

earlier observations about how the scope of the parties' proximate relationship limits the type of injuries that are reasonably foreseeable.

55 In cases of negligent misrepresentation or performance of a service, a plaintiff's injury will be reasonably foreseeable where (1) the defendant should reasonably foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable (*Hercules*, at para. 27). Whether reliance is reasonable and reasonably foreseeable will turn on whether the plaintiff had a right to rely on the defendant *for that purpose*. Here, Livent argues that it detrimentally relied on Deloitte's services and representations to artificially extend the life of the corporation. This reliance is not, however, tied to the solicitation of investment, but was a matter of oversight of management. Phrased in terms of Deloitte's undertaking, during the fall of 1997 Deloitte undertook to assist Livent in soliciting investment, not in oversight of management. Losses related to this undertaking — for example, an inability to solicit investment because of Deloitte's negligence — may be recoverable from Deloitte. But losses outside the scope of this undertaking, including those claimed here relating to a lack of oversight of management extending Livent's solvency, are not recoverable from Deloitte. Simply put, Deloitte never undertook, in preparing the Comfort Letter, to assist Livent's shareholders in overseeing management; it cannot therefore be held liable for failing to take reasonable care to assist such oversight. And, given that Livent had no right to rely on Deloitte's representations for a purpose other than that for which Deloitte undertook to act, Livent's reliance was neither reasonable nor reasonably foreseeable. Consequently, the increase in Livent's liquidation deficit which arose from its reliance on the Press Release and Comfort Letter was not a reasonably foreseeable injury.

56 This is not to say that Livent had no resources for oversight at the time Deloitte assisted in soliciting investment. Indeed, for internal oversight purposes, Livent could reasonably rely on Deloitte's 1996 Audit. Unlike the Comfort Letter, the 1996 Audit was prepared for the purpose of assisting shareholder oversight of management. As a consequence, its negligent preparation could result in reasonably foreseeable injury flowing from the shareholders' inability to oversee management. The trial judge, however, made a finding of fact that any negligence in Deloitte's preparation of the 1996 Audit caused no injury to Livent. As this finding has not been cross-appealed by Livent, we make no further comment on it.

## **(b) Residual Policy Considerations**

57 Having concluded that no *prima facie* duty of care arose in respect of Deloitte's assistance in soliciting investment and the resulting increase in Livent's liquidation deficit, there is no need to consider residual policy considerations.

### *(2) 1997 Clean Audit Opinion (April 1998)*

#### **(a) Prima Facie Duty of Care**

##### *(i) Proximity*

58 This Court has previously established that an auditor owes its corporate client a duty of care in the preparation of a statutory audit. It follows that the established proximate relationship in *Hercules* will be dispositive of the existence of a duty of care in this case, unless the purpose of Deloitte's undertaking to prepare such an audit in this case can be distinguished from the undertaking in *Hercules Management Ltd.*. As we will show, it cannot.

59 In *Hercules*, at para. 48, this Court cited Lord Oliver's statement in *Caparo Industries plc*, at p. 583, identifying the purposes of a statutory audit:

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; emphasis in original deleted.]

60 These purposes, according to La Forest J., were no different under the statutory audit provisions in Manitoba's *Corporations Act*, R.S.M. 1987, c. C225, which were at issue in *Hercules*. Regarding the second purpose, this Court stated that a statutory audit was necessary 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" (*Hercules*, at para. 49). The purpose of the audited reports then "was, precisely, to assist the collectivity of shareholders of the audited companies in their task of overseeing management" (*ibid.*).

61 No party before us has suggested that the purposes for which a statutory audit is prepared, and which have been recognized in Canadian law for 20 years, have changed. These purposes are consistent with the governing statute in this case: Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"). In particular, ss. 153 and 154 of the *OBCA* require Deloitte, as Livent's auditor, to examine Livent's financial statements in order for Livent's directors to fulfill their obligation to place a yearly statutory audit before its shareholders at the annual general meeting. And, while the engagement letters between Deloitte and Livent indicated that the detection of fraud was not guaranteed even where Deloitte acted with all reasonable care, they did not disclaim liability for negligently failing to uncover fraud. Thus, in our view, Deloitte did not alter the purpose for which it undertook to provide the 1997 Audit or disclaim liability in relation to that purpose.

62 Given the foregoing, no basis exists for distinguishing the purpose of the statutory audit in this case from the purpose which underlay the statutory audit in *Hercules*. It follows that proximity is established between Livent and Deloitte in relation to the statutory audit, on the basis of the previously recognized proximate relationship identified by this Court.

#### **(ii) Reasonable Foreseeability**

63 Livent says that the increase in its liquidation deficit was a reasonably foreseeable consequence of Deloitte's negligent audit, because the audit preserved a false financial picture upon which Livent relied to artificially extend its solvency and delay filing for bankruptcy. In other words, if Deloitte had taken reasonable care in auditing Livent, then Livent would have discovered the fraud and avoided the interim deterioration of its assets.

64 In our view, this type of injury was a reasonably foreseeable consequence of Deloitte's negligent audit. The purpose of the 1997 Audit was, as this Court described in *Hercules*, two-fold: (1) to protect the company from the consequences of undetected errors and wrongdoing; and (2) to provide shareholders with reliable intelligence enabling oversight (para. 48, citing *Caparo Industries plc*, at p. 583). Those purposes, as we have already described in our discussion of proximity generally, inform the scope of reasonably foreseeable injury. Specifically, at the time Deloitte undertook to provide the 1997 Audit, Livent was entitled to rely on Deloitte to take reasonable care in doing so for these recognized purposes. Livent's reliance on Deloitte for the purpose of overseeing the conduct of management was therefore both reasonable and reasonably foreseeable. And, as Livent's injury arises from its detrimental reliance, the injury linked to that reliance is itself reasonably foreseeable.

65 It follows that the type of injury Livent suffered here was a reasonably foreseeable consequence of Deloitte's negligence. Through the 1997 Audit, Deloitte undertook to assist Livent's shareholders in scrutinizing management conduct. By negligently conducting the audit, and impairing Livent's shareholders' ability to oversee management, Deloitte exposed Livent to reasonably foreseeable risks, including "business losses" that would have been avoided with a proper audit. Indeed, the risk of injury flowing from undetected fraud is *precisely* the type of injury statutory audits seek to avoid.

66 We add one final point in this regard. In *Hercules* (at para. 48), this Court cited *Caparo Industries plc* for the proposition that statutory audits are conducted, in part, "to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs". If subsequent business decisions that would not have survived such scrutiny do not fall within the scope of an auditor's duty of care, one wonders what injury, if any, could result in liability for a negligent audit with respect to this recognized auditing purpose. Corporate scrutiny connotes both *knowledge* of problems within the corporation, and *decisions* reflecting an appreciation of those problems. Indeed, it is only by acting on the knowledge contained in an audit that is the product of reasonable care that corporation's avoid losses that would have otherwise occurred without that audit.

## (b) Residual Policy Considerations

67 Having found a proximate relationship based on a previously recognized category, we need not consider residual policy considerations to negate or limit the scope of the duty of care (*Cooper*, at para. 39). Nonetheless, as the Chief Justice finds, in the alternative, that the policy consideration of indeterminate liability would deny recovery in this case (paras. 165-166), it is useful to examine how the established proximate relationship engaged in this case precludes indeterminate liability.

68 As discussed, the character of indeterminacy in these cases has three pertinent aspects: (1) temporal; (2) claimant; and (3) value (*Hercules*, at para. 31, citing *Ultramarine Corp.*, at p. 444). None of them arise here, consistent with our earlier observation that a robust application of the *Anns/Cooper* framework will usually, if not always, preclude the imposition of liability that is in any way indeterminate (*Saadati*, at para. 34; *Fellowka*, at para. 70).

69 Here, as to temporal indeterminacy, any suggestion that Livent could recover indefinitely from the negligent preparation of the 1997 Audit fundamentally mischaracterizes the scope of *annual* statutory audits. The injury flowing from the 1997 Audit could not be assessed over an *indeterminate* time window. Rather, statutory audits must occur annually (*OBCA*, s. 154). As a result, the liability that could attach to one year's negligent audit could not extend beyond the following year's audit, which would effectively supersede the prior year's audit as the factual and legal cause of the injury alleged. Put simply, the time window during which liability might flow from a single negligent statutory audit is not indeterminate. It is one year.

70 Regarding claimant indeterminacy, the class of claimants here could not be further from *indeterminate*: it represents one single claimant — Livent. In *Hercules*, this Court noted that "audit reports will be relied on by many different people (e.g., shareholders, creditors, potential take-over bidders, investors, etc.)" (para. 32). That claim gave rise to indeterminate liability because the class of claimants (the "many different people") was indeterminate. For example, any number of investors could rely on an audit to inform their investment decisions. This case, in contrast, is entirely distinguishable. The fact of a single potential claimant raises no concern of claimant indeterminacy.

71 We note, parenthetically, that Deloitte characterizes Livent's claim as, in reality (that is, in light of its insolvency), a claim by its various stakeholders. But this submission conflates the plaintiff, Livent, with the stakeholders who may benefit from the success of Livent's claim, thereby disregarding Livent's separate corporate personality. More importantly, it directly contradicts this Court's holding in *Hercules* that a derivative action — which, too, could benefit various stakeholders — is the appropriate vehicle for a claim regarding a negligent statutory audit (paras. 1 and 58-64).

72 The absence of temporal and claimant indeterminacy in turn explains the absence of value indeterminacy in this case. Here, Livent's improvident use of investment funds could not result in liability of an *indeterminate* value. Rather, the liability in this case could not exceed the losses of a single corporation. When undertaking to audit Livent, Deloitte must have known that Livent was a substantial corporation, and in turn, that it could suffer large financial losses if misinformed by its auditor. But *significant* liability is distinct from *indeterminate* liability (*Gross*, at para. 38). Put differently, Deloitte was, indeed, "able to gauge the scale of its potential liability" before undertaking the 1997 Audit (Chief Justice's reasons, at para. 176). This is a far cry from the limitless potential quantum of lost investments by innumerable third parties relying on audit statements for their own investment decisions (see *Hercules*, at para. 32). The concern that Deloitte did not know "the scope of [its] liability at the time [it took] on [its] engagement" with Livent (Chief Justice's reasons, at para. 176) conflates *indeterminate* liability with *undetermined* liability.

73 The Chief Justice describes the liability sought to be imposed here as "indeterminate" because Livent's reliance purportedly fell outside the scope of Deloitte's undertaking (para. 170). We disagree. To the contrary, value indeterminacy is limited by the purposes for which the audit was prepared, and Livent's reliance fell squarely within that purpose. In *Hercules*, this Court rejected a claim by investors because they might use audit reports for a "collateral or unintended purpose" (para. 38), thereby giving rise to indeterminate liability (since the variety of purposes to which an audit may be put is potentially limitless). But that is not the case here. The 1997 Audit was prepared for the express purpose of oversight of management by Livent's shareholders, and the loss at issue flowed from those shareholders' inability to conduct that oversight. It follows that the purposes underlying

the 1997 Audit — of which, as we have explained, there are only two — do not give rise to potential indeterminacy, and by corollary, relate to potential losses that, too, are not indeterminate. This is not a case where, for example, an unknown third-party relied on an audit to launch a takeover bid — a purpose outside the scope of the audit (*Hercules*, at para. 32). Rather, this is a case in which an established purpose of the audit was undermined, and where losses predictably flowed from that failed purpose (*Haig*, at pp. 478-79).

74 Here, *one* claimant (Livent) is suing Deloitte for failing to satisfy one of *two* auditing purposes (oversight of management) which would have been superseded by an audit *one* year later. No indeterminate liability arises in this context. In this regard, La Forest J.'s remarks for this Court in *Hercules* (at para. 37) are apposite:

... 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.

75 The lack of indeterminacy here between Deloitte (an auditor) and Livent (its corporate client) is unsurprising given (1) this Court's recognition in *Hercules* that a duty of care exists between an auditor and its corporate client in relation to a statutory audit; and (2) this Court's direction in *Cooper* that the second stage of the *Anns/Cooper* framework need not be considered where a previously recognized proximate relationship exists.

### **(c) Remoteness**

76 The Chief Justice says that Deloitte's complete immunity from liability would similarly flow from a remoteness analysis (para. 173). We disagree.

77 In a successful negligence action, a plaintiff must demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 3; *Saadati*, at para. 13). The principle of remoteness, or legal causation, examines whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha*, at para. 12, citing A.M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 360; see also *Saadati*, at para. 34). It is trite law that "it is the foresight of the reasonable man which alone can determine responsibility" (*Mustapha*, at paras. 11-13, citing *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (New South Wales P.C.), at p. 424). Therefore, injury will be sufficiently related to the wrongful conduct if it is a reasonably foreseeable consequence of that conduct.

78 We acknowledge that remoteness, so understood, overlaps conceptually with the reasonable foreseeability analysis conducted in the *prima facie* duty of care analysis (*Mustapha*, at para. 15). But the two are distinct: the duty analysis is concerned with *the type of injury* that is reasonably foreseeable as flowing from the defendant's conduct, whereas the remoteness analysis is concerned with the reasonable foreseeability of *the actual injury* suffered by the plaintiff (L. N. Klar and C. S. G. Jefferies, *Tort Law*, (6th ed. 2017), at p. 565: "Remoteness questions deal with how far liability should extend in reference to *injuries caused to the plaintiff*, once a duty relationship ...[has] been established" (emphasis added)).

79 Remoteness, at its core, turns on the reasonable foreseeability of the actual injury suffered by the plaintiff. But, and as we have explained, the loss here — stemming from Deloitte's failure to fulfill the specific undertaking it made to Livent — *was* reasonably foreseeable. It follows that remoteness is not a bar to Livent's recovery.

80 Nonetheless, the Chief Justice holds that Livent's loss is too remote because it cannot be attributed to its shareholders' reliance on the 1997 Audit for the purpose of overseeing management. Specifically, she says that "Livent did not prove and the trial judge did not find that Livent's shareholders relied on Deloitte's negligent audit statements, or that had they received and relied on accurate statements, they would have acted in a way that would have prevented Livent from carrying on business and diminishing its assets" (para. 159). With respect, we see the matter differently. In its amended statement of claim, Livent advanced its theory of impaired shareholder reliance (A.R., vol. III, at p. 112):

As a consequence of the Auditors' breaches of duty, they missed repeated opportunities to uncover and reveal the accounting irregularities and errors being orchestrated by Drabinsky and Gottlieb. Consequently, the Livent Stakeholders were deprived of the opportunity to exercise their collective will by, inter alia, ousting Drabinsky and Gottlieb thereby avoiding further losses, damages and liabilities incurred by Livent and the Livent Stakeholders.

[Emphasis added.]

81 Similarly, when the trial judge summarized Livent's position at trial, he wrote (at para. 23):

[Deloitte's] alleged negligent issuance of unqualified opinions, in turn, deprived the honest directors and shareholders of the opportunity to put a stop to the fraud, and the losses eventually caused to the company by the fraud, at an earlier date.

[Emphasis added.]

82 The trial judge accepted this theory: "I believe that the honest directors and innocent shareholders in this case were entitled to rely on Deloitte's audits to discharge their supervisory task" (para. 341). Nonetheless, the Chief Justice would deny liability because, in her view, "Livent offered no proof to support" the assertion that its shareholders would have called management to account had they received a non-negligent audit in March of 1998 (para. 161). But this is *precisely* what the record shows. On November 18, 1998, Livent received a prudently prepared audit of its restated 1997 financial statements. This prudent audit disclosed a "significant, if not staggering" difference in reported income (trial reasons, at para. 15). Specifically, the prudent audit uncovered an additional loss of over \$50 million during the 1997 fiscal year.

83 Livent's response upon receipt of this audit report is telling and, in our view, belies any suggestion that informed shareholder scrutiny would have permitted Livent to act in any manner other than expected. *That same day*, "Drabinsky and Gottlieb were dismissed for cause ... and Livent voluntarily made a petition for bankruptcy protection" in the United States (trial reasons, at para. 16). *The next day*, "Livent filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 in Canada" (*ibid.*). It is difficult to conceive of a clearer demonstration of when and how Livent's shareholders would have "prevented Livent from carrying on business and diminishing its assets" had Deloitte prepared a prudent audit in March of 1998 (Chief Justice's reasons, at para. 159).

84 On this record, any speculation that Livent's shareholders might have done nothing in response to rampant fraud is simply unsustainable. Indeed, the similarly speculative claim that Livent's shareholders might have done nothing when confronted with a notional liquidation deficit of approximately \$365 million in early April 1998 (when we know that the actual liquidation deficit of \$413.83 million in mid-November 1998 prompted Livent's immediate petition into bankruptcy) is — also in light of this record — equally improbable.

85 The Chief Justice, however, advances one additional basis upon which to deny Deloitte's liability: that Deloitte should be liable "only for the information" it provided (the audit opinion), not "for the decision[s] to be informed by it" (para. 171). This proposition does not preclude Deloitte's liability here.

#### **(d) Additional Basis for Limiting Liability: Information, Advice and the "SAAMCO Principle"**

86 The Chief Justice seeks to limit Deloitte's liability because it merely provided "information" to Livent, not "advice", and, as a consequence, did not "assume responsibility for what the shareholders decide[d] to do with that information" (para. 170). In this regard, she cites (at para. 149) the following passage from *Hughes-Holland v. BPE Solicitors*, [2017] UKSC 21, [2017] 2 W.L.R. 1029 (U.K. S.C.), at para. 44:

A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann [in *SAAMCO*] called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to

be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated.

87 It is true that Deloitte, as auditor, did not advise Livent on its business decisions. But it nevertheless "assumed responsibility" over providing accurate information upon which the shareholders could rely to scrutinize management conduct. Deloitte does not escape liability simply because a negligent audit, in itself, cannot cause financial harm. Audits never, in themselves, cause harm. It is only when they are detrimentally relied upon that tangible consequences ensue.

88 The consequences of this line of reasoning should not be understated. By effectively limiting an auditor's liability to the harms inherent in the negligent audit, while excluding those harms which are a reasonably foreseeable consequence of that negligent audit (i.e., an inability to oversee management), a central purpose for which a statutory audit is prepared is undercut, thereby immunizing auditors from liability for any act of negligence impairing oversight. This holding is inconsistent with the Court's jurisprudence (which prescribes recovery for reasonably foreseeable injury, even if that injury is not technically immediate) and is in tension with *Hercules* (which sought to limit auditors' liability for statutory audits to determinate corporate claims rather than indeterminate stakeholder claims, not to insulate auditors from virtually all liability).

89 The Chief Justice's reliance on the so-called "SAAMCO principle" — derived from the House of Lords' decision in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. (1996), (sub nom. South Australia Asset Management Corp. v. York Montague Ltd.) [1997] A.C. 191* (U.K. H.L.) ("SAAMCO"); see also *Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd., [1997] 1 W.L.R. 1627* (Eng. H.L.); *Platform Home Loans Ltd. v. Oyston Shipways Ltd. (1999), [2000] 2 A.C. 190* (Eng. H.L.)); and *BPE Solicitors* — is in our respectful view mistaken for the same reason as her reliance on the dichotomy between information and advice as described in *BPE Solicitors*. Her reliance on both U.K. decisions is premised on how Deloitte never assumed responsibility for injuries resulting from Livent's operations — either because those injuries were not caused by the mere information contained in the 1997 Audit (*BPE Solicitors*), or because those injuries did not flow from what was incorrect in the 1997 Audit (*SAAMCO*). But, in assuming responsibility for informing shareholder scrutiny of management, Deloitte *did* assume responsibility for injuries flowing from that impaired scrutiny.

90 In simple terms, the *SAAMCO* principle denies recovery for pure economic loss where the plaintiff's injury would still have occurred even if the defendant's negligent misrepresentation were factually true. Rephrased as a test, the principle denies liability where an *alternate* cause that is *unrelated* to the defendant's negligence is the true source of the plaintiff's injury. This alternate and unrelated cause explains why the truth of the negligent misstatement has no bearing on the plaintiff's ultimate injury (i.e., because, even with that truth, the injury would have flowed as a result of the alternate cause). Or, framed from the perspective of the duty of care, the defendant could not have undertaken to protect against injuries that would have been caused by alternate and unrelated sources. In *SAAMCO*, the House of Lords explained the principle with the commendably Albertan example of a mountaineer:

A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee. [p. 213]

91 In this example, the doctor's negligent misrepresentation (the positive knee diagnosis) is a cause that is alternate and unrelated to the cause of the mountaineer's injury (a mountaineering accident unrelated to the knee, for example, an avalanche). As a result, even had the doctor's negligent misrepresentation been true (i.e., even if the mountaineer's knee had been fit), the injury would still have occurred, since the fitness of his knee would not have prevented the injury caused by the avalanche. In other words, the doctor could not have undertaken to protect against an avalanche, which is unrelated to his or her diagnosis.

92 Deloitte is unlike the doctor. Deloitte's negligence related to a statutory audit, a purpose of which is management oversight by shareholders. That oversight, in turn, informs (or is related to) subsequent business decisions by the corporation. It follows that Livent's trading losses were not an alternate and unrelated cause of Livent's injury. To the contrary, the shareholders' capacity to oversee the conduct of Livent's business was entirely dependent upon the statutory audit preceding that oversight.

In particular, the shareholders' reliance on that audit and the audit's portrayal of the directors and their business ventures was a critical component of their oversight of management — which, we reiterate, was the very purpose in respect of which Deloitte undertook to act with reasonable care.

93 It therefore follows from a proper understanding of the *SAAMCO* principle that it does not limit Deloitte's liability in respect of the 1997 Audit.

94 We add, however, that a full consideration of *SAAMCO*'s application in Canadian law by this Court should await future cases, with greater consideration of the principle by lower courts, more comprehensive submissions by counsel, and critically, with facts more analogous to those in the *SAAMCO* jurisprudence. *SAAMCO* addressed whether a negligent valuator should be liable, not only for the difference between their valuation and a prudent valuation, but also for a subsequent drop in the market which exacerbated the lenders' losses. In this specific context, the loss attributable to the negligent valuation is easily extricable; it is the difference between the negligent valuation and a prudent valuation. But the same cannot be said in the context of statutory audits, where the "cause" of future losses flowing from future commercial activity is far more complex to isolate. Indeed, as Lord Sumption noted in *BPE Solicitors* (at para. 46):

Where the loss arises from a variety of commercial factors which it was for the claimant to identify and assess, it will commonly be difficult or impossible as well as unnecessary to quantify and strip out the financial impact of each one of them.

95 In any event, the *SAAMCO* principle, at least in the manner the Chief Justice applies it here, conflicts with Canadian jurisprudence. Under established Canadian tort law, a defendant is liable if the plaintiff proves — in respect of causation — that the defendant caused the plaintiff's injury in fact (*Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 (S.C.C.), at para. 8) and in law (*Mustapha*, at paras. 12-13). As we have already explained, Livent proved both in respect of its injuries after the 1997 Audit. It follows that Deloitte is liable for Livent's injuries following that audit. Admittedly, a defendant may limit its liability, even if the plaintiff proves legal and factual causation, where the defendant proves that some of the plaintiff's injury would have still occurred without the defendant's negligence because of alternate hypothetical causes (*Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1991] 3 S.C.R. 3 (S.C.C.), at pp. 15-16). But those alternate hypothetical causes were already accounted for in the trial judge's 25 percent reduction in damages (trial reasons, at paras. 324-26). And, in so far as the Chief Justice holds that Livent failed to prove that alternate hypothetical causes did not cause the remaining 75 percent of damages, she disregards that it is Deloitte, not Livent, who bears the burden of proving that liability should be limited in this fashion (*Rainbow Industrial Caterers Ltd.*, at pp. 15-16).

### **C. Defences**

96 Finally, having concluded that we would uphold the trial judge's finding that Deloitte is liable for its negligence in relation to the statutory audit, we must consider the two defences Deloitte advanced before this Court. First, Deloitte submits that both lower courts erred in failing to find that Livent's action was not barred by the defence of illegality. Secondly, Deloitte submits that, even had Livent's action not been barred for illegality, Deloitte should only be liable for part of the injury due to Livent's contributory fault.

97 Both defences rely on the applicability of the doctrine of corporate identification. As the wrongdoing at issue was not that of Livent's but of its directors Drabinsky and Gottlieb, Deloitte cannot succeed on either defence unless it can show that the fraudulent acts of Livent's employees should be attributed to the corporation. The corporate identification doctrine is not, however, a standalone principle; rather, it is a means by which acts may be attributed to a corporation for the particular purpose or defence at issue. It follows that corporate identification must be analyzed independently for each defence.

#### **(1) Illegality**

98 The defence of illegality bars an otherwise valid action in tort on the basis that the plaintiff has engaged in illegal or immoral conduct and, therefore, should not recover (*Hall v. Hebert*, [1993] 2 S.C.R. 159 (S.C.C.), at p. 169; *British Columbia v. Zastowny*, 2008 SCC 4, [2008] 1 S.C.R. 27 (S.C.C.), at para. 20). Grounded in public policy, it is available in very "limited"

circumstances, only where it is necessary to preserve the "integrity of the justice system" (*Hall*, at pp. 179-80). And, the integrity of the justice system will only be compromised where a "damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law" (*Hall*, at p. 169; *Zastowny*, at para. 3).

99 Here, the only illegal or wrongful conduct was committed by Livent's directors, Drabinsky and Gottlieb, and portions of management. It follows that, for Deloitte to rely on the defence of illegality, it must be able to attribute the "illegal or wrongful conduct" of certain directors and managers to Livent itself, the plaintiff in this case.

100 The test for corporate attribution was set out by this Court in *R. v. McNamara*, (*sub nom. R. v. Canadian Dredge & Dock Co.*) [1985] 1 S.C.R. 662 (S.C.C.) [hereinafter *Canadian Dredge*]. To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation (pp. 681-82 and 712-13).

101 At first glance, these conditions might seem to be satisfied in this case. Drabinsky and Gottlieb were directing minds, acting within the sector of corporate operations assigned to them, whose fraud was genuinely designed and executed in an attempt to assist Livent through the artificial extension of its life. Indeed, the application of the doctrine in this case would be consistent with the factually analogous decision in *Hart Building Supplies Ltd. v. Deloitte & Touche*, 2004 BCSC 55, 41 C.C.L.T. (3d) 240 (B.C. S.C. [In Chambers]). There, the test laid down by this Court in *Canadian Dredge* was strictly applied in the context of a civil claim for auditor's negligence and was satisfied. The court attributed the fraudulent acts of the "alter ego and directing mind" to the auditor's corporate client and barred recovery for the auditor's negligent preparation of a statutory audit.

102 In our view, however, a strict application of this Court's decision in *Canadian Dredge* was not warranted in *Hart*, and is not warranted here. It must be recalled that *Canadian Dredge* was decided in the context of criminal liability. Accordingly, the underlying question there was who should bear the responsibility for the criminal actions of a corporation's directing mind. Consequently, the policy factors identified therein which weigh in favour of imputing a corporation with the illegality or wrongdoing of its directing mind flow from the "social purpose" of holding a corporation responsible for the *criminal* acts of its employees where those acts are designed and carried out, at least in part, to benefit the corporation (*Canadian Dredge*, at p. 704).

103 However, as Estey J. himself recognized, the doctrine is only one of "judicial necessity" and where its application "would not provide protection of any interest in the community" or "would not advantage society by advancing law and order", the rationale for its application "fades away" (*Canadian Dredge*, at pp. 707-8 and 718-19). While public policy and judicial necessity may favour imputing the corporation with the actions of its directing minds in certain criminal prosecutions, the same cannot be said of attributing the actions of a directing mind for the purposes of a civil suit in the context of an auditor's negligent preparation of a statutory audit. As indicated above, the very purpose of a statutory audit is to provide a means by which fraud and wrongdoing may be discovered. It follows that denying liability on the basis that an individual within the corporation has engaged in the very action that the auditor was enlisted to protect against would render the statutory audit meaningless (D. L. MacPherson, "*Emaciating the Statutory Audit — A Comment on Hart Building Supplies Ltd. v. Deloitte & Touche*" (2005), 41 *Can. Bus. L.J.* 471). As Livent submitted, it would be perverse to deny auditor's liability for negligently failing to detect fraud "where the harm [to the corporation] is likely to occur and likely to be most serious" (R.F., at para. 94).

104 While, therefore, this Court's decision in *Canadian Dredge* remains the authoritative test for the application of the corporate identification doctrine, we would reaffirm one qualification. The principles set out in *Canadian Dredge* provide a *sufficient* basis to find that the actions of a directing mind be attributed to a corporation, not a *necessary* one (pp. 681-82). As a principle that is grounded in policy, and which only serves as a means to hold a corporation criminally responsible or to deny civil liability, courts retain the discretion to refrain from applying it where, in the circumstances of the case, it would not be in the public interest to do so. And where, as here, its application would render meaningless the very purpose for which a duty of care was recognized, such application will rarely be in the public interest. If a professional undertakes to provide a service to

detect wrongdoing, the existence of that wrongdoing will not normally weigh in favour of barring civil liability for negligence through the corporate identification doctrine. (That said, we leave for another day the question of whether the same is true in the context of a "one man" corporation, where the sole director and shareholder hires the auditor to uncover the wrongful action which he, himself, carries out: *Stone & Rolls Ltd. v. Moore Stephens Ltd.*, [2009] UKHL 39, [2009] 1 A.C. 1391 (U.K. H.L.); see also *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81, [2002] 4 S.C.R. 312 (S.C.C.), at para. 22; *Jetivia SA v. Bilita (U.K.) Ltd. (In Liquidation)*, [2015] UKSC 23, [2016] A.C. 1 (U.K. S.C.), at para. 30.)

105 Finally, given the limited application of the defence of illegality, as recognized by this Court in *Hall* and *Zastowny*, we find no further compelling reason to justify the use of the corporate identification doctrine in these circumstances.

## *(2) Contributory Fault*

106 In the alternative, Deloitte submits that the Court of Appeal erred in holding Deloitte liable for the entirety of the proven loss, and specifically that Livent should have been found contributorily at fault in accordance with s. 3 of the *Negligence Act*, R.S.O. 1990, c. N.1:

In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

107 Again, the only conduct implicating Livent in this case was committed by Livent's directors, Drabinsky and Gottlieb, and portions of management. It follows that, for Deloitte to rely on the defence of contributory fault, it must be able to attribute the conduct of certain directors and managers to Livent itself.

108 Unlike the discretionary illegality doctrine, Deloitte notes that s. 3 of the *Negligence Act* is mandatory ("... the court *shall* apportion the damages ..."), and argues that corporate identification *must* be permitted because "the application of the corporate identification doctrine must be tailored to the terms of the particular substantive rule it serves" (A.F., at para. 132, citing C.A. reasons, at para. 157). This argument, however, misunderstands what the *Negligence Act* actually makes mandatory. The *Negligence Act* requires that a plaintiff's fault be factored into the apportionment of damages. But corporate identification is a prerequisite to the plaintiff, Livent, being at fault. In other words, Deloitte's claim that s. 3 of the *Negligence Act* requires that Livent bear its share of the fault presupposes corporate identification, in effect, putting the cart before the horse. The *Negligence Act* only makes contribution by a negligent plaintiff mandatory; it does not make attribution of negligence to a plaintiff mandatory.

109 In any event, we repeat our earlier conclusion that where, as here, the use of the corporate identification doctrine would undermine the very purpose of establishing a duty of care, it will rarely be in the public interest to apply it. A negligent auditor cannot limit liability for its own negligence by attributing to the corporation the wrongful acts of its employees, such acts being the very conduct that the auditor undertook to uncover. Additionally, had Deloitte sought to limit its liability through apportionment, it need not have relied on the doctrine of corporate identification at all. Specifically, Deloitte could have brought third party claims against the guilty parties, Drabinsky and Gottlieb, for their wrongful actions. For whatever reason, it chose not to do so. Nonetheless, the availability of a third party claim against a fraudulent director weighs against the application of the doctrine. In this case, it is not in the public interest to undermine separate legal personality where the wrongdoer could have been properly named as a third party.

## **D. Conclusion**

110 It follows from the foregoing that we would allow the appeal, but only in part.

111 In our view, the trial judge and Court of Appeal erred in finding that Deloitte's negligence in relation to the Press Release and Comfort Letter resulted in injuries that were reasonably foreseeable in light of the proximate relationship between the parties. At that time, Deloitte's services were engaged for the purpose of soliciting investment, not management oversight. As

Livent's losses did not flow from a failure to solicit investment, we would deny recovery for the increase in Livent's liquidation deficit beginning in the fall of 1997.

112 We would, however, allow recovery for the increase in Livent's liquidation deficit which followed the 1997 Audit. We agree with the trial judge that "Deloitte should not have signed off on the 1997 Audit in early April 1998" (para. 242) and that the increase in Livent's liquidation deficit which followed fell within the duty of care owed by Deloitte to Livent in relation to the preparation of a statutory audit, the express purpose of which was to assist Livent in management oversight.

113 The trial judge assessed Livent's damages following the 1997 Audit at \$53.9 million (para. 306, fn. 188, and para. 369, fn. 228). Applying the trial judge's 25 percent contingency reduction to this amount results in a final damages assessment of \$40,425,000. This is the amount for which Deloitte is liable.

114 Throughout these proceedings, the parties have primarily framed this dispute as one in negligence. Indeed, this was noted by the trial judge (at para. 47). At trial, Livent conceded that its losses for negligent performance of a service or breach of contract would be identical (*ibid.*). The trial judge agreed, finding that Livent's claim in contract "succeed[ed] ... for the [same] reasons" as its claim of negligent performance of a service and that the elements of its claim in contract were "incorporated by reference to the finding of 'negligence'" (para. 243). Given the above, we would impose the same quantum of liability on Deloitte for the concurrent claim in breach of contract.

115 Accordingly, the appeal is allowed in part. The amount of the trial award is reduced from \$84,750,000 to \$40,425,000. Livent shall have its costs throughout.

***McLachlin C.J.C. (dissenting in part) (Wagner, Côté JJ. concurring):***

116 Garth Drabinsky and Myron Gottlieb built a North American theatre empire that came to be known as Livent Inc. Seeking ever more spectacular success, they resorted to manipulating the company's financial records. When the scheme came to light, Livent collapsed. Its assets were liquidated. Drabinsky and Gottlieb went to jail.

117 This is among the many lawsuits that followed. The courts below held that Deloitte & Touche, a firm of accountants and Livent's auditor, breached the duty of care it owed to Livent in failing to detect and expose Livent's fraud, as a result of which Livent was able to continue operations and continue losing money — money it now claims from Deloitte.

118 I agree with the courts below that Deloitte owed a duty of care to Livent, which it breached when it failed to discover and expose Livent's fraud in the audited statements it prepared. However, I do not agree that Deloitte is liable for virtually all the loss that befell Livent as it pursued its precipitous decline into insolvency through doomed investments. I would allow the appeal.

**I. Facts**

119 The saga that led to these proceedings began in 1989 when two would-be entertainment moguls, Drabinsky and Gottlieb, launched a takeover bid of their employer, Cineplex Odeon Corporation. When the bid failed, the pair formed MyGar Partnership, which purchased all of the assets and some of the liabilities of Cineplex's live entertainment division. These included Toronto's Pantages Theatre and the rights to a wildly successful show, *The Phantom of the Opera*. MyGar carried on business through its nominee corporation, Live Entertainment Corporation of Canada Inc., and both entities were rolled into Live Entertainment of Canada Inc., or Livent Inc., in 1993. Livent made its debut in Canada's equity market with an initial public offering that year. By the end of 1995, Livent's shares were also listed on New York's NASDAQ exchange.

120 Deloitte & Touche (now Deloitte LLP) became MyGar's auditor in 1989 and continued as auditors for MyGar and its successor Livent until 1998.

121 Livent's strategy was vertical integration. Unlike other players in the live entertainment industry, it brought the entire enterprise, from production to performance, under one roof — a roof that Livent, as a proprietor of theatre properties, also owned. This was an immensely costly and risky undertaking. Livent invested in real estate in Toronto, Vancouver, New York,

and Chicago. It produced and presented a string of spectacular (and therefore expensive) musicals. When its shows succeeded, Livent reaped all the rewards. When they did not, it bore the losses alone.

122 Drabinsky and Gottlieb were determined to prove that their business model worked. To be sure it did, they and their associates cooked the books. They did so in four ways:

- i. Drabinsky and Gottlieb pocketed some \$7.5 million in kickbacks in the two years before Livent's initial public offering. These they secured by causing MyGar to pay false or inflated invoices to various contractors, who in turn directed funds to Drabinsky and Gottlieb personally or to another company they controlled. A substantial portion of the falsified expenses were booked as assets. Drabinsky and Gottlieb's balance sheets were thus infused with fantasy as early as 1991.
- ii. Livent officers and employees distorted the company's financial records by shifting expenses between accounting periods and from one activity or production to another. They doctored Livent's accounting software to permit and conceal these manipulations.
- iii. Livent overstated its bottom line by extending the time over which it amortized the costs of putting on its productions and, in some periods, by avoiding amortization altogether. This it did by transferring millions of dollars of "pre-production costs" from shows to fixed assets or from one show to another, and particularly to shows that had not yet opened.
- iv. The company recorded imaginary revenue by entering into loan or financing agreements that it camouflaged as asset sales. Livent purported to sell various rights related to its productions and properties, but simultaneously entered into secret side agreements permitting purchasers to recover what they had paid. The revenue booked from such transactions ran well into the millions of dollars.

123 Livent not only misled the markets, it also fooled its auditor. Deloitte never uncovered the company's schemes. Livent continued to raise investment capital and reinvest it in unprofitable theatre enterprises. Deloitte's auditors report for Livent's Fiscal Year 1997 did not disclose the fraud and, although Deloitte objected when Gottlieb presented a misleading quarterly financial statement to the Audit Committee in August 1997, it did not resign.

124 The truth came to light in 1998. New equity investors appointed new management, who discovered "irregularities". Deloitte retracted its audit opinions for 1996 and 1997. A subsequent investigation and re-audit resulted in restated financial reports. Drabinsky and Gottlieb were suspended, fired, and convicted of fraud.

125 Livent filed for insolvency protection in both Canada and the United States in November 1998 and sold its assets in August 1999. It went into receivership the following month. The trial judge found that Livent lost \$113,000,000 between the time of Deloitte's negligent failure to end its relationship with Livent and Livent's insolvency. He reduced that amount by 25 percent for contingencies and awarded \$84,750,000 in damages. Livent seeks to recover this loss from Deloitte.

## **II. Judicial History**

126 Livent sued Deloitte for \$450,000,000 and other relief. It advanced concurrent claims in tort and contract; the parties agreed that the damages under either head would be the same. Livent claimed that Deloitte was responsible for every dollar Livent lost from the date of Deloitte's breach of duty. Deloitte's defence was that most of the losses claimed were beyond the scope of Deloitte's legal responsibility. The courts below largely sided with Livent.

### **A. Ontario Superior Court of Justice (Commercial List) (*Gans J.*, 2014 ONSC 2176, 11 C.B.R. (6th) 12 (Ont. S.C.J. [Commercial List])**

127 The trial judge held that Deloitte owed a duty of care to provide accurate information to Livent's shareholders. He held that the standard of care under this duty required Deloitte to take steps that would have effectively cut off Livent's access to the capital markets and forced it into formal insolvency as early as 14 months before it ultimately filed for insolvency protection. The trial judge concluded that Deloitte failed to meet this standard of care, either when it failed to discover the fraud and act on that discovery in August 1997, or when it signed off on Livent's 1997 financial statements in April 1998.

128 The trial judge held that the measure of damages was the difference between Livent's value when the breach occurred, and Livent's value at the time of insolvency (\$113,000,000). He reduced this by 25 percent to account for "contingencies" or "trading losses" sustained as a result of Livent's "unprofitable but legitimate theatre business" (paras. 324-26), which he held were too remote to make Deloitte liable.

129 The trial judge also rejected Deloitte's submission that Livent's recovery should be either barred by the defence of illegality, or reduced on account of contributory fault pursuant to s. 3 of the *Negligence Act*, R.S.O. 1990, c. N.1.

130 The trial judge consequently awarded damages to Livent for breach of its duty of care, and alternatively for breach of contract, in the amount of \$84,750,000.

***B. Court of Appeal for Ontario (Strathy C.J. and Blair and Lauwers J.J.A.), 2016 ONCA 11, 128 O.R. (3d) 225 (Ont. C.A.)***

131 The Court of Appeal upheld the trial judge's award and dismissed both the appeal and cross-appeal.

**III. Analysis**

132 The only issue on this appeal is whether Deloitte is liable for the lion's share of the loss Livent sustained after it failed to detect the fraud of the company's principals and report it in its audit statements (the total loss less a 25% discount for contingencies and Livent's improvident investments). Livent claims that if Deloitte had reported the fraud when it should have, it would have been put out of business, which would have saved it from the loss that it suffered thereafter. Instead, it was able to continue to raise more capital and spend it in ways that decreased Livent's net worth. Deloitte argues that it is not liable for the full extent of Livent's pre-liquidation loss because this loss falls outside the scope of Deloitte's duty of care, or is too "remote" from the legal cause.

133 The law of negligent misstatement has limited recovery of pure economic (financial) loss for two reasons. The first reason is that it may be unfair to hold a person who makes a negligent misstatement liable for all loss incurred thereafter, where other decisions and acts contributed to that loss. This is referred to as the fair allocation of loss principle. The second reason is to avoid the spectre of indeterminate liability, which the law of negligence has never countenanced.

134 These two reasons — one of principle and the other of policy — are complementary. They work together to ensure fair outcomes and promote predictability in the law.

135 As Lord Bridge observed in *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.), at p. 576:

To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J., to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" ([*Ultramare Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444]), it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.

See also *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 (S.C.C.), at para. 18; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at para. 31; *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at p. 1137, per McLachlin J.; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 99, quoting *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), at para. 54.

136 For these reasons, common law courts have rejected a simple "but for" test for recovery of economic loss for negligent misstatement: *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), at p. 44; *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co.*, (*sub nom. South Australia Asset Management Corp. v. York Montague Ltd.*) [1996] 3 All E.R. 365 (U.K. H.L.) ("SAAMCO"), at pp. 369-72, per Lord Hoffmann; *Hughes-Holland v. BPE Solicitors*, [2017] UKSC 21, [2017] 2 W.L.R. 1029 (U.K. S.C.), at para. 38, per Lord Sumption; *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 57, 542 A.R. 289 (Alta. C.A.), at paras. 37-38, per Slatter J.A.

137 A "but for" test, which asks only whether the loss would not have been incurred if the wrongful act had not been committed, casts the net of liability too widely. It would make auditors or advisors retained for limited purposes the insurers of the entire venture and all that flows from it. It would not matter that the loss would not have occurred but for other decisions (like Livent's ill-judged investment decisions in this case). Nor would it matter that the loss was the result of a complex web of decision making, months and years after the negligent misstatement was produced. All that would be required to recover all subsequent loss from the auditors would be to show that their misstatement played a role in launching the saga of subsequent loss. This is not fair; a person giving advice for one purpose should not be held liable for how other people use that information for other purposes, or be made to carry the entire loss. And, it would lead to indeterminate liability. An auditor giving advice would never know what its exposure might be, or whether its fee is adequate to cover the risk to which it exposes itself.

138 Rejection of a "but for" test for assessing recovery of economic loss is cemented in the common law. But it is worth noting that Quebec civil law also recognizes the need to limit recovery of economic loss to losses that bear a sufficient connection to the wrongful feature of the defendant's conduct: see *Widdrington Estate c. Wightman*, 2013 QCCA 1187 (C.A. Que.), at paras. 229-31 and 243-46 (CanLII); see also D. Jutras, "[Civil Law and Pure Economic Loss: What Are We Missing?](#)" (1987), 12 *Can. Bus. L.J.* 295, at pp. 308-9.

139 Courts have given two doctrinal explanations for limiting recovery of economic loss following from a negligent misstatement. The first is to say that the *scope of the duty of care* of the advice-giver does not cover the loss claimed. The second is to say that the loss is *too remote* from the negligent act and thus was not legally caused by that act.

140 While lawyers may argue over which approach is preferable, the fact once again is that they are complementary — two sides of the same coin. In fact, the inquiry into the duty of care and the inquiry into remoteness invoke similar considerations.

141 The "scope of the duty of care" inquiry looks to the relationship between the defendant's advice and the plaintiff's loss. It asks if that relationship was "proximate". In cases of economic loss, it inquires into the purpose for which the advice was given and asks whether a reasonable person would have expected, or "foreseen", that negligent advice would lead to the loss in question by virtue of the plaintiff's reliance on the advice: *Hercules*, at paras. 24 and 41. Put simply: Did the loss flow from the advice, or from subsequent decisions and circumstances? Thus in *Caparo Industries plc*, at p. 581, Lord Bridge confirmed that the scope of the tort determines the extent of the remedy to which the injured party is entitled. See also *Platform Home Loans Ltd. v. Oyston Shipways Ltd.*, [1999] 1 All E.R. 833 (Eng. H.L.), at p. 847, per Lord Hobhouse.

142 The "remoteness" approach looks at similar factors to the "scope of the duty of care" approach — all pointing to the wrongdoing and its proximity to the loss claimed. The factors to be considered are not closed. The advice-giver's knowledge of the claimant's circumstances, the reasonable expectations arising from the relationship, and the presence of intervening factors that led to the loss may figure in the analysis: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at paras. 12 and 14-16; *Vytlilingam (Litigation Guardian of) v. Farmer*, 2007 SCC 46, [2007] 3 S.C.R. 373 (S.C.C.), at para. 31; *Rossy c. Westmount (Ville)*, 2012 SCC 30, [2012] 2 S.C.R. 136 (S.C.C.), at para. 48.

143 I agree with Lord Sumption's observation in *BPE Solicitors*, a recent decision from the United Kingdom Supreme Court, that however one looks at the matter — from the perspective of the scope of the duty of care or from the perspective of remoteness — one arrives at the same point. In his Lordship's words, "[w]hether one describes the principle ... as turning on the scope of the duty or the extent of the liability for breach of it does not alter the way in which the principle applies": para. 38; see also L. N. Klar and C.S.G. Jefferies, *Tort Law* (6th ed. 2017), at pp. 565-66.

144 For the purposes of these reasons, I will first consider whether the losses at issue fall within the scope of Deloitte's duty of care. This inquiry takes us to the two-part analysis for determining the existence of a duty of care and its scope prescribed in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (U.K. H.L.) — does the relationship between the parties give rise to a *prima facie* duty of care to avoid the type of loss claimed, and, if so, is that duty negated by policy considerations?

145 Courts in the United Kingdom have resiled from a two-step *Anns* test, but continue to insist that the scope of the duty of care must be carefully limited having regard to the relationship between the defendant's conduct and the plaintiff's injuries,

context and policy. They have insisted that there is no such thing as a duty of care in the abstract; the duty is always defined by its scope. As Lord Bridge stated in *Caparo Industries plc*, at p. 581, "[i]t is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless": see also *BPE Solicitors*, at paras. 21-23; *Sutherland Shire Council v. Heyman (1985)*, 60 A.L.R. 1 (Australia H.C.), at p. 40, per Brennan J.; *Platform Home Loans Ltd.*, at p. 847, per Lord Hobhouse, quoting *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (New South Wales P.C.) ("The Wagon Mound No. 1") at p. 425; *Candler v. Crane, Christmas & Co.*, [1951] 1 All E.R. 426 (Eng. C.A.), at p. 436, per Denning L.J., dissenting.

146 The first step of the *Anns* test asks whether there is proximity, or a sufficiently close relationship, between the parties. It focuses on the connection between the defendant's undertaking (the breach of which is the wrongful act) and the loss claimed. Did the defendant owe the plaintiff a *prima facie* duty of care to prevent the loss, having regard to, on one hand, the reasonably foreseeable consequences of the defendant's conduct given the proximity of the parties and, on the other hand, factors concerning the relationship between the parties that negate tort liability? (see *Cooper*, at paras. 30 and 34). Questions of policy relating to the relationship between the parties should be considered at this step of the *Anns* analysis: *Cooper*, at para. 37.

147 The purpose for which the statement was made (the undertaking) is pivotal in determining whether a particular type of economic loss was the reasonably foreseeable consequence of the negligence: *Hercules*, at paras. 37-40. Was it made to enable the company to raise capital? If so, a loss due to failure to raise capital may be recoverable. Was it made for the purpose of permitting shareholders to review the management of the company? If so, shareholders may recover for loss due to their inability to hold the company to account: *Hercules*, at paras. 51-57. In each case, one must determine the purpose for which the statement was made, and ask whether the loss in question is proximate, or closely connected to the failure of the defendant to fulfill that purpose.

148 Where an auditor falsely or wrongfully represents that the audit statements are sound and can therefore be used for their intended purpose, this constitutes negligence, or wrongdoing. Economic loss tied to that particular wrongdoing is recoverable; other loss is not. Whether in the United Kingdom, Quebec or the common law provinces of Canada, courts focus on the precise nature of the wrongdoing to determine what loss is recoverable. As Lord Sumption explained in *BPE Solicitors*, to be a reasonably foreseeable consequence of the defendant's wrongdoing, the economic loss claimed must have "flowed from the right thing, i.e. from the particular feature of the defendant's conduct which made it wrongful": para. 38. Or as Lord Hoffmann said in *SAAMCO*, at p. 371:

Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

See also: *Burns v. Homer Street Development Limited Partnership*, 2016 BCCA 371, 91 B.C.L.R. (5th) 383 (B.C. C.A.), at para. 106; *Hogarth*, at paras. 37-38, per Slatter J.A.

149 Lord Sumption pointed out in *BPE Solicitors*, at para. 44, that the scope of the duty of care and the extent of the defendant's responsibility turns on the specific circumstances that inform the purpose for which the statement was prepared:

A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann [in *SAAMCO*] called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated.

See also *Aneco Reinsurance Underwriting Ltd. v. Johnson & Higgins Ltd.*, [2001] UKHL 51, [2001] All E.R. (Comm) 929 (U.K. H.L.), at paras. 40-41, per Lord Steyn, and para. 66, per Lord Millett; *Canadian Imperial Bank of Commerce v. Deloitte*

& Touche, 2016 ONCA 922, 133 O.R. (3d) 561 (Ont. C.A.), at paras. 46-47 and 69-71; *Temseel Holdings Ltd. v. Beaumonts Chartered Accountants*, [2002] EWHC 2642, [2003] P.N.L.R. 27 (Eng. Comm. Ct.), at paras. 22-29 and 57-62.

150 The purpose for which the audit report is provided is a matter of fact based on the evidence adduced at trial: *BPE Solicitors*, at para. 44; *Aneco Reinsurance Underwriting Ltd.*, at paras. 40-41, per Lord Steyn, and para. 66, per Lord Millett; *Canadian Imperial Bank of Commerce*, at para. 47; *Temseel Holdings Ltd.*, at paras. 57-62. Legal obligations imposed by statute may be relevant: *Hercules*, at para. 49.

151 Against this background, I turn to the question at hand: What was the scope of the duty of care owed by Deloitte to Livent? The key to answering this question is the purpose for which Deloitte prepared the statements, which in turn defines the wrongful act — the negligent failure to provide the correct information for the intended purpose.

152 In this case, three purposes of Livent's audit statements are discernable: (1) to report accurately on Livent's finances and provide it with audit opinions on which it could rely for the purpose of attracting investment; (2) to uncover heretofore undetected errors or wrongdoing by Livent or its personnel for the purpose of enabling Livent itself to correct or otherwise respond to the misfeasance; and (3) to provide audit reports on which Livent's shareholders could rely to supervise the company's management (see e.g. Part XII, *Business Corporations Act*, R.S.O. 1990, c. B.16; trial reasons, at paras. 89-96 and 280). Livent was entitled to recover for losses occasioned by its own or its shareholders' reliance on Deloitte's audit work for these purposes.

153 The scope of Deloitte's duty of care is defined solely by these purposes. Did its negligence prevent Livent from attracting investment? Did its negligence prevent Livent from uncovering undetected wrongdoing for the purpose of allowing Livent to correct the misfeasance? Finally, did its negligence prevent shareholders from supervising the company's management? Loss that results from inability to attract investment, from inability of Livent to correct undetected wrongdoing, or from inability of the shareholders to exercise their supervisory authority, may fall within the scope of Deloitte's duty of care.

154 The first possibility is that Deloitte's wrongful act deprived Livent of the ability to attract investment capital. Livent does not rely on this; in fact, Livent attracted a great deal of capital on the strength of Deloitte's statements. Indeed, that is the essence of its complaint — if it had not been able to attract this money, it would not have been able to spend it on new theatre ventures that failed and decreased Livent's worth. The company's assets were not diminished by an inability to attract investment, but by Livent's improvident management of those investments, revealed only on insolvency.

155 The second possibility is that the wrongful act prevented Livent — the company itself — from detecting misfeasance in the company's management which Livent's officials would have corrected if they had known the true state of affairs. This possibility envisions the situation where a company's management, acting honestly and diligently, is unable to deal with internal misfeasance because the auditors negligently failed to reveal it.

156 This is not Livent's situation. Livent led no evidence that its management did not know of Drabinsky's and Gottlieb's misfeasance; indeed, it likely could not have done so. Drabinsky and Gottlieb, the fraudsters, were themselves the management. Far from relying on the audited statements as assurance that everything was well with the company, Drabinsky and Gottlieb knew the audit reports were inaccurate. There is no evidence that anyone at a lower level of Livent management would have blown the whistle if Livent's statements had revealed the fraud at an earlier date.

157 The third possibility is that Deloitte's wrongdoing prevented Livent's shareholders from exercising shareholder supervision in a manner that would have ended the corporation's loss-creating activities at an earlier date. Livent argues (and my colleagues Gascon and Brown JJ. accept) that it relied on Deloitte to produce a report on the basis of which its shareholders could discharge their supervisory function, which all agree was one of the purposes for which the audited statements were prepared. Livent argues, and my colleagues conclude, that all loss that shareholder supervision might have avoided is recoverable — including the decline in the value of the company.

158 This proposition faces two difficulties. The first is that Livent never proved, nor did the trial judge find, the elements necessary to establish it. The second is a related policy concern: to allow recovery in the absence of the required proof would be to open the door to indeterminate recovery. I will consider each of these difficulties in turn.

159 First, although the trial judge's reasons refer to Deloitte's duty to Livent's shareholders as established in *Hercules*, the factual basis for liability based on impaired shareholder supervision was lacking. Livent's theory of the case was simply that all loss as a result of improvident investments after the negligent audits was compensable, on a "but for" basis. Livent did not prove and the trial judge did not find that Livent's shareholders relied on Deloitte's negligent audit statements, or that had they received and relied on accurate statements, they would have acted in a way that would have prevented Livent from carrying on business and diminishing its assets in the period between the issuance of the relevant statements and Livent's insolvency.

160 The trial judge, accepting Livent's theory of the case, held that the duty of care must be broad enough to catch all losses that would be captured by a "but for" test. He stated the following:

In my view, the ultimate issuance or withholding of a clean opinion is but one aspect of conducting an audit in accordance with [generally accepted auditing standards]. It is not close to being the complete embodiment of the duty of care. Indeed, if [the plaintiff's] argument were accepted, it would preclude the applicability of the "but for" test. Instead of asking whether damages would have been sustained but for the negligent failure to detect certain errors or fraud, one would be restricted to asking whether or not damages would have been sustained but for the provision of a clean opinion.

[Emphasis added; para. 285.]

161 The broad view of the duty of care taken by Livent, and accepted by the trial judge meant that the trial judge failed to consider the parameters of the shareholders' reasonable and foreseeable reliance as required in *Hercules* when defining the scope of the duty of care with respect to losses stemming from impaired shareholder supervision. My colleagues conclude otherwise, noting that the trial judge believed that the shareholders were entitled to rely on Deloitte's negligent audits as an indication of Livent's health. Crucially, however, the trial judge did not ask whether the shareholders had in fact relied on the audits — a critical element to the cause of action. He did not ask whether, if they had relied, this reliance prevented them from taking steps to replace directors or officers or otherwise alter course. He did not ask whether this would have included shutting down Livent on March 31st, 1998 (or at least earlier than when it was shut down in November 1998). Finally, he did not ask whether these actions, had they been taken, would have prevented the losses that Livent built up during the seven-month period in question. If the trial judge had asked these questions, he would have been obliged to answer them in the negative, since Livent offered no proof to support affirmative answers.

162 I leave aside for the purposes of this case the difficulty that the shareholders, unlike in *Hercules*, are not parties to the claim or the action. Assuming this would not pose a problem, it is possible to speculate that the necessary facts could have been proven (although given the short time period, it seems unlikely). But the more fundamental point is that Livent did not prove these matters, and that as a result, the factual basis for establishing loss on the basis of shareholder supervision was entirely lacking. The hypothetical chain of events required to establish liability on this ground completely bypasses the complexity of shareholder decision making.

163 Livent's position and the trial judge's approach collapse the distinction between shareholder decision making, for which an auditor provides information for one purpose — holding management accountable with a view to the best interest of the company — with management decision making, for which the auditor provides information for a different purpose — responding to error and wrongdoing. Conceiving liability in this way creates a misalignment between the scope of the duty of care, the type of loss that is therein contemplated, and the actual elements that must be proven in order to make a successful claim.

164 The second and related difficulty the shareholder supervision argument faces in this case is that it would lead to unfair allocation of loss and indeterminate liability for auditors' statements, negating the duty of care: *Hercules*, at paras. 36-37.

165 Livent's position — that Deloitte is liable for all loss without proof of the elements required to advance a case based on impaired shareholder supervision — would result in an unfair allocation of loss as well as indeterminacy of damages. On the shareholder supervision theory advanced by Livent, breach of a duty owed primarily to the collectivity of shareholders (who do not advance a claim) and only derivatively to the corporation, would result in liability for every dollar that Livent spent after the point in time the shareholders became entitled to rely on the statements. The auditor would be the virtual guarantor of

everything Livent — not the collectivity of shareholders to which the duty was owed — did thereafter. This would not be a fair allocation of responsibility. The same scenario would raise the spectre of indeterminate liability. Auditors would be unable to reasonably predict when they are providing services to clients what their ultimate liability would be. It would be out of their control. No matter how bad the decisions made by the client thereafter, no matter how complex the web of dealings that led to the ultimate loss — things that cannot be foreseen in advance — the auditor would be liable for the total loss, on the basis that it would not have occurred "but for" the negligent act.

166 For the foregoing reasons, I conclude that the losses at issue have not been shown to fall within the scope of Deloitte's duty of care. The first step of the *Anns* test is not established. It is unnecessary to go on to ask whether *prima facie* liability is negated by policy considerations unrelated to the relationship between the parties. However, were it necessary to do so, the policy considerations of unfair allocation of loss and indeterminacy would preclude imposing liability on Deloitte.

167 I add a doctrinal side-note at this point. In *Hercules*, this Court, per La Forest J., held that the spectre of indeterminate loss might be a policy consideration negating liability of certain loss at the second step of the *Anns* test. However, since *Cooper* it has been clear that policy considerations relating to the relationship between the parties fall to be considered at the first step of *Anns*. It may not therefore be necessary to resort to the second step to consider the implications of indeterminate liability: see J. Blom, "Do We Really Need the *Anns* Test for Duty of Care in Negligence?" (2016), 53 *Alta. L. Rev.* 895, at pp. 906 and 908.

168 It remains for future cases to explore the limits of an auditor's liability for impaired shareholder supervision. Short of finding that an auditor who provides information on which shareholders will exercise their oversight powers assumes responsibility for all of the potential consequences of carrying on business, the facts as found by the trial judge do not enable us to do so here.

169 Livent's failure to prove that any of the loss it suffered can be attributed to its shareholders' reliance on the negligent 1997 year-end audit report for the purpose of corporate oversight is a sufficient basis on which to allow the appeal in its entirety. But there is further problematic aspect of the shareholder supervision theory on which Livent now seeks to rely. It is one of principle.

170 As explained above, an auditor that provides a year-end report for the purpose of enabling a company's shareholders to supervise management does not, absent proof, assume responsibility for what the shareholders decide to do with that information. The purpose of an annual audit report is to inform shareholder decision making, not to govern it. The auditor does not underwrite the entire risk associated with the shareholders' exercise of business judgment; it is liable only for exposing shareholders to the risk of the information it has provided being wrong. Even if the whole loss would have been avoided if the auditor had met the standard of care, the company may recover in damages only that part of the loss that may be attributed to the auditor's breach of its duty of care, which is restricted by the purpose or purposes for which it provided its opinion. The auditor is not liable for the indeterminate quantum of loss that the shareholders' course of action (or inaction) may trigger, since determining that course of action is beyond the auditor's undertaking of responsibility, and thus outside the scope of its duty of care. Similarly, loss that cannot be attributed to the auditor's breach will be too remote to recover.

171 For this reason, the language of lost opportunity is unavailing. In any case concerned with the tortious provision of information, the plaintiff may claim that, had it only known the truth, it would have had the chance to make different choices than it ultimately did. Unless the provider of information has assumed responsibility not only for the information but also for the decision to be informed by it, what the plaintiff would have done differently if it had been provided with different information is immaterial. Rather, the question is the extent to which the loss that in fact resulted may be attributed to the wrongness (i.e., the tortious quality) of the information provided.

172 On the trial judge's findings, Deloitte never assumed responsibility for any of the decisions — whether of Livent's management or of its shareholders collectively — that may be said to have occasioned Livent's loss. What Livent proved is that it relied on Deloitte's clean opinions to raise funds from third parties, and that it was successful in doing so. Deloitte is not liable to Livent for loss arising from Livent's use of these funds, even if certain of Deloitte's opinions were prepared for the purpose of *attracting* them, because Livent did not prove that Deloitte undertook responsibility for how Livent *spent* them.

173 The foregoing analysis is based on the scope of Deloitte's duty of care. The same result would follow on a remoteness approach to the question of liability for economic loss as a result of negligent misstatement. The question on this approach is whether the loss claimed is too remote from the wrongful act for the act to be the "legal cause" of the loss. The basic question is whether the loss is reasonably foreseeable, having regard to a variety of factors, including the relationship between the parties and the expectations that flow from it, the circumstances of the case, and other factors bearing on the connection between the wrongful act and the loss claimed including external or intervening influences. In the end, a close and proximate connection between wrongful act and the loss claimed must be established, having regard to all these things and to the purpose for which the information was furnished.

174 It follows that Livent cannot recover the losses it claims against Deloitte. The claim in tort must be dismissed. The result is the same with respect to Livent's action in contract; here too the losses would be too remote: see *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228 (S.C.C.), at pp. 243-44, citing *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.); S. M. Waddams, *The Law of Damages* (5th ed. 2012), at §14.720. Given the trial judge's determination, at para. 243, that the elements of the action in contract were identical to the elements of the action in tort, it follows that the trial judge's conclusion that there was a breach in contract is erroneous.

175 Although in many respects I agree with Gascon and Brown JJ.'s articulation of the general framework that governs this matter, I part company with my colleagues in two key respects. First, I take the view that, for Livent to make out its claim, it must prove on the evidence the elements required to establish Deloitte's liability on the basis of impaired shareholder supervision. My colleagues suggest that, had Deloitte provided sound audit reports, Livent's shareholders and management may have made decisions that would have limited the company's losses. While this may be true, it is not enough to rely on unproven assertions to define the scope of the duty of care and to subsequently demonstrate causation. My colleagues' approach suggests that an auditor will generally become the underwriter for any losses suffered by a client following a negligent audit report. This, notwithstanding subsequent decisions — reliant or capricious — made by the client's shareholders. I conclude, in contrast, that reliance cannot be presumed, but must be proved.

176 Second, I take a different view of indeterminate liability than my colleagues. They assert that liability is not indeterminate where a reviewing court can set a value or time frame for a plaintiff's claimed loss *ex post facto*. However, the common law's policy against indeterminacy is directed at ensuring that auditors and other advisors can determine the scope of their liability at the time they take on an engagement and render their services. The question is whether an auditor or other advisor was able to gauge the scale of its potential liability — in terms of the types of losses for which it undertook responsibility — before embarking on a course of conduct. Although Deloitte might have been in a position to identify the total net value of Livent, Livent has not proved that Deloitte bore responsibility for the myriad ways that Livent could have gone about depleting its value after receiving the auditor's statements. This is what makes the liability identified by my colleagues indeterminate and therefore outside the scope of the duty of care.

177 Having concluded that Deloitte is not liable for the losses claimed, it is not necessary to consider the apportionment of damages under s. 3 of the *Negligence Act*, nor is it necessary to consider whether Deloitte can raise the defence of illegality against Livent.

#### **IV. Disposition**

178 I would allow the appeal, with costs to Deloitte.

*Appeal allowed in part.*

*Pourvoi accueilli en partie.*

**TAB 13**

**Most Negative Treatment:** Leave to appeal allowed

**Most Recent Leave to appeal allowed:** [Dobbie v. Arctic Glacier Income Fund](#) | 2012 ONSC 773, 2012 CarswellOnt 886, 211 A.C.W.S. (3d) 480, 109 O.R. (3d) 607 | (Ont. S.C.J., Feb 1, 2012)

2011 ONSC 25

Ontario Superior Court of Justice

Dobbie v. Arctic Glacier Income Fund

2011 CarswellOnt 1301, 2011 ONSC 25, [2011] O.J. No. 932, 199 A.C.W.S. (3d) 1012, 3 C.P.C. (7th) 261

**Alexander Dobbie and Michael Benson, Plaintiffs and Arctic Glacier Income Fund, Arctic Glacier Inc., Richard L. Johnson, Keith W. McMahon, Douglas A. Bailey, and, In Their Personal Capacities and as Trustees of Arctic Glacier Income Fund, James E. Clark, Robert J. Nagy, Gary a Filmon, and David R. Swaine, Defendants**

Tausendfreund J.

Heard: October 4-8, 2010

Judgment: March 1, 2011

Docket: 59725

Counsel: A. Dimitri Lascaris, Michael G. Robb, Daniel E.H. Bach, for Plaintiffs

R. Paul Steep, Dana M. Peebles, for Defendants

Nigel Campbell, Andrew McLachlin, for Proposed Defendant, Gary Cooley

Jeffery S. Leon, Eric R. Hoaken, Jonathan G. Bell, for Proposed Defendant, Frank Larson

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

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.B Identifiable class

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.C Common issue or interest

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.D Preferable procedure

Civil practice and procedure

**X Pleadings**

**X.2 Statement of claim**

**X.2.f Striking out for absence of reasonable cause of action**

**X.2.f.ii Plain and obvious**

Securities

**III Trading in securities**

**III.4 Prospectus**

**III.4.c Misrepresentation**

Torts

**XVI Negligence**

**XVI.2 Duty and standard of care**

**XVI.2.a Duty of care**

**Headnote**

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action —

Plain and obvious

Plaintiffs purchased units in A Inc.'s unincorporated mutual fund that only owned shares of packaged ice producer A Inc. — Fund's public disclosures between 2002 and 2008 claimed competitiveness of ice industry and lawful conduct by fund and A Inc. — Fund units lost significant value in 2008 during U.S. investigation that led to A Inc.'s 2009 guilty plea to anti-competitive conspiracy — Plaintiffs brought class action against fund, A Inc. and certain officers, directors, or trustees of A Inc. or fund — Defendants brought motion to strike portions of statement of claim; plaintiffs brought motions for leave to pursue secondary market misrepresentations and for certification of action — Defendants' motion granted in part; plaintiffs' motions granted — Common law causes of action pleaded against fund would be struck, as it lacked legal personality, but plaintiffs had claim under s. 130 of Ontario Securities Act against fund as "issuer" of misrepresentative prospectus — Lack of details in pleading of anti-trust conspiracy did not warrant its striking but rather demand for particulars — Plaintiffs granted leave to amend statement of claim to plead provisions of securities acts of other provinces, and to comply with limitation period in s. 138.14(b)(ii) of Act — Act's requirement of material disclosure in prospectus informed and did not replace common law duty of care, and s. 130 of Act did not subsume common law claims — It was not plain and obvious that pleading of negligence or negligent misrepresentation against directors of A Inc. and trustees of fund would fail, and those claims raised separate causes of action.

Securities --- Trading in securities — Prospectus — Misrepresentation

Plaintiffs purchased units in A Inc.'s unincorporated mutual fund that only owned shares of packaged ice producer A Inc. — Fund's public disclosures between 2002 and 2008 claimed competitiveness of ice industry and lawful conduct by fund and A Inc. — Fund units lost significant value in 2008 during U.S. investigation that led to A Inc.'s 2009 guilty plea to anti-competitive conspiracy — Plaintiffs brought class action against fund, A Inc. and certain officers, directors, or trustees of A Inc. or fund — Defendants brought motion to strike portions of statement of claim; plaintiffs brought motions for leave to pursue secondary market misrepresentations and for certification of action — Defendants' motion granted in part; plaintiffs' motions granted — Plaintiff met leave test under s. 138.8 of Securities Act for pursuing claim for misrepresentation in secondary market — Plaintiffs could rely on disclosure documents from 2002, when Part XXIII.1 of Act was not in force, as alleged misrepresentations repeated from that date formed one continuing fact situation — Plaintiffs had good faith intentions in seeking leave, given financial interest, intent to hold defendants accountable and deter others, and sufficient objective evidence of defendants' possible liability — As "promoter", A Inc. was "influential person" under s. 138.3(1)(d) who knowingly influenced release of impugned documents — Plaintiffs established reasonable chance of successfully proving liability of A Inc., of actual or de facto officers or directors M, B, J, L and C and, as "influential persons", of each defendant trustee of fund — Plaintiffs established reasonable possibility that defendants were aware of anti-competitive conduct.

Torts --- Negligence — Duty and standard of care — Duty of care

Plaintiffs purchased units in A Inc.'s unincorporated mutual fund that only owned shares of packaged ice producer A Inc. — Fund's public disclosures between 2002 and 2008 claimed competitiveness of ice industry and lawful conduct by fund and A Inc. — Fund units lost significant value in 2008 during U.S. investigation that led to A Inc.'s 2009 guilty plea to anti-competitive conspiracy — Plaintiffs brought class action against fund, A Inc. and certain officers, directors, or trustees of A Inc. or fund — Defendants brought motion to strike certain portions of statement of claim; plaintiffs brought motions for leave to pursue

secondary market misrepresentations and for certification of action — Defendants' motion granted in part; plaintiffs' motions granted — Defendants' claim that imposing common law duty of care would create requirements beyond those codified in Securities Act should be left to trial, as plaintiffs made out *prima facie* duty of care to secondary market outside Ontario — Defendant argued that recognizing *prima facie* duty of care to entire secondary market raised spectre of indeterminate liability — Defendants knew class of persons who would rely on continuous disclosure documents that defendants prepared to attract investments from members of investing public — Act's remedy did not negate duty of care — It was not plain and obvious that proposed common law duty of care would create insurance scheme for short-term unit-holders or have negative chilling effect on business sector — Harmonization with laws of foreign jurisdiction could not trump well-settled Canadian principles for evaluating existence of common law duty of care.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiffs purchased units in A Inc.'s unincorporated mutual fund that only owned shares of packaged ice producer A Inc. — Fund's public disclosures between 2002 and 2008 claimed competitiveness of ice industry and lawful conduct by fund and A Inc. — Fund units lost significant value in 2008 during U.S. investigation that led to A Inc.'s 2009 guilty plea to anti-competitive conspiracy — Plaintiffs brought class action against fund, A Inc. and certain officers, directors, or trustees of A Inc. or fund — Defendants brought motion to strike certain portions of statement of claim; plaintiffs brought motions for leave to pursue secondary market misrepresentations and for certification of action — Defendants' motion granted in part; plaintiffs' motions granted — Pleadings disclosed causes of action, including under s. 130 of Securities Act, negligence, negligent misrepresentation and breach of trust — Proposed class of persons and entities who acquired units of fund during class period met requirements for identifiable class.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiffs purchased units in A Inc.'s unincorporated mutual fund that only owned shares of packaged ice producer A Inc. — Fund's public disclosures between 2002 and 2008 claimed competitiveness of ice industry and lawful conduct by fund and A Inc. — Fund units lost significant value in 2008 during U.S. investigation that led to A Inc.'s 2009 guilty plea to anti-competitive conspiracy — Plaintiffs brought class action against fund, A Inc. and certain officers, directors, or trustees of A Inc. or fund — Defendants brought motion to strike certain portions of statement of claim; plaintiffs brought motions for leave to pursue secondary market misrepresentations and for certification of action — Defendants' motion granted in part; plaintiffs' motions granted — Pleadings disclosed causes of action, including under s. 130 of Securities Act, negligence, negligent misrepresentation and breach of trust — Proposed class of persons and entities who acquired units of fund during class period met requirements for identifiable class — Defendants challenged proposed common issues relating to negligence, which cause of action they had unsuccessfully sought to strike from pleadings — Issues relating to existence and breach of duty of care were common, as was damage caused to class members — Cause of action in negligent misrepresentation required proof of reliance, which sometimes meant that such claims were unsuitable for certification — Alleged misrepresentations here were consistent and repetitive, such that they could be essentially treated as one and readily managed as common issue — Claim for punitive damages could proceed as common issue.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiffs purchased units in A Inc.'s unincorporated mutual fund that only owned shares of packaged ice producer A Inc. — Fund's public disclosures between 2002 and 2008 claimed competitiveness of ice industry and lawful conduct by fund and A Inc. — Fund units lost significant value in 2008 during U.S. investigation that led to A Inc.'s 2009 guilty plea to anti-competitive conspiracy — Plaintiffs brought class action against fund, A Inc. and certain officers, directors, or trustees of A Inc. or fund — Defendants brought motion to strike certain portions of statement of claim; plaintiffs brought motions for leave to pursue secondary market misrepresentations and for certification of action — Defendants' motion granted in part; plaintiffs' motions granted — Pleadings disclosed causes of action, including under s. 130 of Securities Act, negligence, negligent misrepresentation and breach of trust — Proposed class of persons and entities who acquired units of fund during class period met requirements for identifiable class — There was no evidence of alternate procedure for redress for class members whose securities lost value due to alleged misrepresentation — Certification here clearly advanced interests of access to justice, as U.S. investigation into illegal activity was not appropriate substitute — Action here was brought to seek compensation for failure

to disclose anti-competitive conduct, rather than for such conduct itself — Class action was preferable procedure — Plaintiffs were appropriate representative plaintiffs, and litigation plan was sufficient.

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**Statutes considered:**

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Generally — referred to

s. 1 "common issues" — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 5(5) — considered

s. 6 — considered

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Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 1(1) "issuer" — considered

s. 1(1) "material fact" — considered

s. 1(1) "misrepresentation" — considered

s. 1(1) "officer" — considered

s. 1(1) "officer" (a) — considered

s. 1(1) "officer" (c) — considered

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s. 1(1) "promoter" (a) — considered

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s. 1(1) "reporting issuer" (e)(i) — considered

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s. 130 — considered

s. 130(1) — considered

s. 130(1)(e) — considered

s. 130(10) — considered

s. 138.1 "expert" [en. 2002, c. 22, s. 185] — considered

s. 138.1 "influential person" [en. 2002, c. 22, s. 185] — considered

s. 138.1 "influential person" (b) [en. 2002, c. 22, s. 185] — considered

s. 138.1 "responsible issuer" [en. 2002, c. 22, s. 185] — considered

s. 138.3 [en. 2002, c. 22, s. 185] — considered

s. 138.3(1) [en. 2002, c. 22, s. 185] — considered

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- s. 138.3(1)(e) [en. 2002, c. 22, s. 185] — considered
- s. 138.3(1)(e)(iii) [en. 2002, c. 22, s. 185] — considered
- s. 138.3(6) [en. 2002, c. 22, s. 185] — considered
- s. 138.8 [en. 2002, c. 22, s. 185] — considered
- s. 138.8(1) [en. 2002, c. 22, s. 185] — considered
- s. 138.8(1)(a) [en. 2002, c. 22, s. 185] — considered
- s. 138.8(1)(b) [en. 2002, c. 22, s. 185] — referred to
- s. 138.8(2) [en. 2002, c. 22, s. 185] — considered
- s. 138.13 [en. 2002, c. 22, s. 185] — considered
- s. 138.14 [en. 2002, c. 22, s. 185] — considered
- s. 138.14(b)(ii) [en. 2002, c. 22, s. 185] — considered

**Rules considered:**

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R. 9.01(1) — considered

R. 21 — considered

R. 21.01 — referred to

R. 21.01(1) — considered

R. 21.01(1)(b) — considered

R. 25 — considered

R. 25.11 — considered

MOTION by defendants to strike portions of plaintiffs' statement of claim; MOTIONS by plaintiffs for leave to pursue secondary market misrepresentations and for certification of class action.

**Tausendfreund J.:**

**Overview**

1 The plaintiffs have commenced a proposed class proceeding. They claim that the defendants published misrepresentations relating to the sale of publicly traded securities in both the primary and secondary market. These securities experienced a substantial market value decline which the plaintiffs seek to recoup for the proposed class. This action is at the procedural infancy stage. To date, only the Statement of Claim has been filed. The parties have brought the following motions:

(a) The defendants seek an order that certain portions of the Amended Amended Statement of Claim dated September 3, 2010 ("Statement of Claim") advancing the plaintiffs' common law and statutory causes of action be struck, under Rule 21.01, and/or as improperly pleaded under Rule 25 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

(b) The plaintiffs seek:

(i) leave to pursue the alleged secondary market misrepresentations (the "Part XXIII.1 claim") under to s. 138.8(1) of Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "OSA").

(ii) certification of the proposed class action pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA").

## Facts

2 The plaintiffs are residents of Ontario. Each purchased units of the defendant, Arctic Glacier Income Fund ("Income Fund") over the Toronto Stock Exchange during the class period.

3 The defendant, Arctic Glacier Inc. ("Arctic"), is a producer, marketer and distributor of packaged ice to consumers in Canada and the United States. Arctic is incorporated under the laws of Alberta and is headquartered in Winnipeg, Manitoba.

4 The Income Fund is an unincorporated mutual fund trust and is a reporting issuer in ten provinces, including Ontario. The other defendants are certain Officers, Directors and/or Trustees of Arctic and/or the Income Fund ("the Individual Defendants").

5 The Income Fund's purpose is to market Arctic as an Income Fund for public trading on the TSX.

6 When it was created, the Income Fund's sole assets were all the shares of Arctic. As such, the trading value of the Income Fund's units is based entirely on the financial and business results of Arctic. Facts and changes that are material to Arctic's business are facts and changes material to the value of the Income Fund's units.

7 Arctic Glacier International Inc. ("Arctic International"), a company incorporated in the State of Delaware in the United States, is a wholly-owned direct subsidiary of Arctic, and is the principal operating subsidiary of the Income Fund and Arctic in the United States.

8 In 2007, approximately 82% of the Income Fund's sales were generated in the United States and the balance in Canada.

9 Between 2002 and 2008, the Income Fund stated in public disclosures, including prospectuses, that the packaged ice industry was very competitive. The defendants also represented in these documents that the Income Fund and its subsidiaries were good corporate citizens operating lawfully in a very competitive market.

10 In March 2008, the Income Fund announced that it had become aware that the United States Department of Justice ("the DoJ") was conducting an anti-trust investigation of the packaged ice industry and that it was cooperating fully with the DoJ in this regard. Arctic's news release of March 9, 2008 included the following:

Arctic Glacier is a good corporate citizen with strong, institutionalized internal policies and controls. We have always followed best practices in corporate governance and public disclosure, and we will continue to do so.

11 In September 2008, the Income Fund announced that it was suspending its income trust distributions, due, at least in part, to the cost of responding to the DoJ investigation.

12 In 2009, Arctic International pleaded guilty to a charge of participating, during the proposed Class Period, in a criminal, anti-competitive conspiracy in the United States. Under the terms of the plea agreement, Arctic International agreed to pay a fine of US \$9 million, payable in installments over five years. In the U.S. plea agreement, Arctic International admitted that:

Beginning January 1, 2001 and continuing until at least July 17, 2007, the defendant (Arctic International) and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in Southeastern Michigan and the Detroit, Michigan Metropolitan area. The charged conspiracy unreasonably restrained inter-state trade and commerce, in violation of s. 1 of the Sherman Act...

13 The trading price of the Income Fund units lost significant value during the March-September 2008 period.

14 The plaintiffs plead a proposed class period from March 13, 2002 to September 16, 2008. They commenced this proposed class action on September 25, 2008.

15 I will now address each of the three motions sequentially.

#### A. Defendants' Motion to Strike

16 The defendants move under Rule 21.01(1) and Rule 25.11 of the *Rules of Civil Procedure* to strike certain parts of the Statement of Claim. The relevant parts of the rules are:

**21.01(1)** A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

**25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of the process of the court.

17 As one would expect, the defendants have yet to file a statement of defence. Accordingly, I must read the Statement of Claim generously and be guided by the test applicable to Rule 21.01(1)(b) that a pleading should not be struck unless it is "plain and obvious" that the existence of the cause of action could not be established at trial. However, the "plain and obvious" test does not absolve the plaintiffs from their obligation to observe the rules of pleadings and should not be seen as encouraging them to neglect such obligations: *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.) and *Williams v. Canada (Attorney General)* (2005), 76 O.R. (3d) 763 (Ont. S.C.J.) at paras. 15 and 17.

18 With respect to the application of Rule 25.11, I am guided by the principles summarized by Nordheimer J. in *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.J. No. 1068 (Ont. S.C.J.) at para. 21:

**21.** The defendants claim that the amended statement of claim is prolix, pleads evidence, will prejudice or delay the fair trial of the action and is scandalous, frivolous or vexatious. Various paragraphs of the amended statement of claim are challenged on this basis... it is worthwhile to set out the principles that should be applied to this aspect of the motion. Those principles include:

- (a) motions under rule 25.11 should only be granted in the "clearest of cases";
- (b) any fact which can effect [sic] the determination of the rights of the parties can be pleaded but the court will not allow facts to be alleged that are immaterial or irrelevant to the issues in the action;
- (c) portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous;
- (d) facts may be pleaded but not the evidence by which those facts are to be proved;
- (e) similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value. [Citations omitted]

19 It is now settled that pleadings in actions under the *CPA* not only have to follow the usual rules, but must demonstrate a proper cause of action against each defendant: *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (Ont. S.C.J.) at para. 5; *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) at para. 84.

### ***The Pleadings at Issue***

20 Under Rules 21 and 25, the defendants challenge various causes of action and remedies sought in the Statement of Claim:

- (i) the common law pleading against the Income Fund;
- (ii) the pleading of an underlying Anti-Trust Conspiracy;
- (iii) the pleading under s. 130 of the *Securities Act*;
- (iv) the pleading of negligence; and
- (v) the pleading of negligent misrepresentation.

### ***The Common Law Pleading Against the Income Fund***

21 The plaintiffs assert both statutory and common law causes of action against the Income Fund. These will be discussed separately.

22 The statutory causes of action against the Income Fund are asserted under ss. 130 and 138.3 of the *OSA*. The claim under s. 138.3 may only be pursued with leave. This will be discussed in more detail.

23 In para. 13 of the Statement of Claim, the plaintiffs describe the Income Fund as an unincorporated, open-ended mutual trust fund. Rule 9.01 of the *Rules of Civil Procedure* provides:

- 9.01(1) a proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties.

24 In *Whiting v. Menu Foods Operating Ltd.* (2007), 53 C.P.C. (6th) 124 (Ont. S.C.J.), Lax J. relied on Rule 9.01(1) to determine that the proper parties in an action against a trust are the trustees (para. 25) and that a trust is an entity that is not capable of being sued in Ontario (para. 29).

25 The defendants assert that the plaintiffs cannot name the Income Fund as a defendant to the common law causes of action, as it lacks legal personality. Strathy J. affirmed this principle in *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486 (Ont. S.C.J.) at paras. 64-66:

- 64.** The trust is, however, most correctly described as a relationship. Waters quotes at p. 3 from G.W. Jeeton and L.A. Sheridan, *The Law of Trusts*, 10<sup>th</sup> ed...:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

- 65.** It is well-established that a trust itself does not have legal personality - it operates through its trustees... It is also held accountable through its trustees.

**66.** The trustee derives his, her or its powers from the trust instrument ... Where a third party suffers an injury as a result of the use of the trust funds, or as a result of actions of the trustee ... then the third party is entitled ... to look to the trustee for redress ... It is through the trustee that compensation is obtained.

26 I find that there is no common law right of action against the Income Fund. The pleadings in the Statement of Claim alleging negligence, negligent misrepresentation and breach of trust are struck as against the Income Fund.

27 The claim against the Income Fund under s. 130 of the *OSA* creates a statutory right of action for misrepresentations contained in a prospectus. Where a person has purchased securities in an offering made through the prospectus, that right of action is available against an "issuer." The *OSA* defines an "issuer" as a person or company who has outstanding, issues or proposes to issue, a security. The *OSA* defines a "person" to include "a trust."

28 I find that the plaintiffs have a statutory claim against the Income Fund under s. 130 of the *OSA*. Pleadings with respect to it will stand. As stated, the claim under s. 138.3 of the *OSA* will be reviewed below.

#### ***Pleading of an Underlying Anti-Trust Conspiracy***

29 The plaintiffs have pleaded that Arctic was engaged in an anti-trust conspiracy. However, that allegation is not advanced as a cause of action. The Statement of Claim alleges a course of illegal conduct by the defendants, or some of them. In their pleadings, the plaintiffs point to the defendants' alleged failure to disclose illegal activity and their allegedly false and materially misleading statements with respect to the nature and legality of their business activities as the foundation for the claims. The plaintiffs give that course of conduct the collective moniker of "Anti-Competitive Conspiracy."

30 The defendants state that to plead this conspiracy as the factual foundation for the claims advanced, the plaintiffs must plead all the requisite elements of the tort of conspiracy. This, the plaintiffs have not done. These elements are summarized in *Apotex Inc. v. Plantex USA Inc.* (2005), 5 B.L.R. (4th) 116 (Ont. S.C.J.) at para. 56:

The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreements between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed [sic] to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

31 In support of their position that all of the requisite elements of the tort of conspiracy must be pleaded, the defendants rely on *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331 (Ont. S.C.J.) and *Sudbury Downs v. Ontario Harness Horse Assn.* (2003), [2002] O.J. No. 5505 (Ont. S.C.J.). In my view, both of these cases must be distinguished from the present case, as both pleaded conspiracy as a cause of action, which is not advanced here.

32 I find that the pleading of the anti-trust conspiracy may stand. If the defendants should require further details, the appropriate recourse is a demand for particulars.

#### ***Pleading Under Section 130 of the OSA***

33 The plaintiffs plead that the prospectuses of the Income Fund issued during the class period contained misrepresentations which are actionable under s. 130 of the *OSA*.

34 The defendants assert two deficiencies with the s. 130 *OSA* pleading:

(a) They state that neither plaintiff can advance this personal cause of action since neither purchased their units in the primary market; and

(b) This pleading must be limited to:

- (i) persons who purchased in Ontario; and
- (ii) reliance on those fund prospectuses should be within three years of the issuance of the Notice of Action in this matter on September 25, 2008, as contemplated by the limitation period set out in s. 138.14(b)(ii) of the *OSA*.

*(a) Representative Plaintiffs*

35 The plaintiffs concede that neither of them was a prospectus purchaser on the primary market. The defendants state that this is fatal to the plaintiffs' claim under s. 130(1) of the *OSA*.

36 It is well settled that for each defendant named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant: See *Hughes v. Sunbeam Corp. (Canada) Ltd.*, [2002] O.J. No. 3457 (Ont. C.A.) at para. 15. Each of the plaintiffs in this case has pleaded at least one cause of action against each of the defendants.

37 On this issue, I am guided by *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 1374 (Ont. Div. Ct.) at para. 41, which states that plaintiffs may assert causes of action which are not their personal causes of action but which are asserted by them on behalf of class members.

*(b) Territorial Restrictions and Limitation Period*

38 The defendants assert that the class must be limited to those persons who purchased securities in Ontario, as each province has different securities legislation. In Ontario there appear to be two divergent lines of authority on this point. Both are 2010 decisions, released just two days apart. In *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 (Ont. S.C.J.), Perell J. considered the objection of the defendants that the plaintiffs proposed a national class, yet pleaded only s. 130 of the *OSA*. The defendants in that case proposed that the class be limited to purchasers who acquired common shares pursuant to the prospectus as a result of a distribution in Ontario. Perell J. agreed with the position of the defendants and held:

**146.** The fundamental point is that persons who cannot rely on s. 130 of the Ontario *Securities Act* must rely, if at all, on the securities legislation of other provinces, but this legislation has not been pleaded in the case at bar...

**147.** ...while the Defendants do not object to a national class, they do object to the class definition including persons who do not have a claim under s. 130 of the *OSA*. They argue that the class definition is too broad because it includes purchasers who would not have a claim against the underwriters pursuant to s. 130 of the Ontario *Securities Act*.

**148.** I agree with the Defendants' argument...

39 The plaintiffs rely on *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 (Ont. S.C.J.), the decision released two days before *Coulson*. Strathy J. in *Gammon Gold Inc.* followed *Silver v. Imax Corp.* (2009), 86 C.P.C. (6th) 273 (Ont. S.C.J.) ("Imax") and held:

**117.** Like Van Rensburg J. in *Silver v. Imax - Certification*, I do not find it necessary at this stage to make a determination of the law applicable to the claims of non-resident members of the class who purchased their securities from underwriters in other provinces. Given the similarity between s. 130 of the *Securities Act* and the securities law of other provinces of Canada, this may not be an issue with respect to Class Members from other provinces.

40 I am reminded that on a motion to strike, which is before me, I must afford the claim a generous interpretation. I prefer the more permissive and less technical approach taken by Strathy J. in *Gammon Gold*, *supra*. However, relying on *Boulanger v. Johnson & Johnson Corp.*, *supra* at paras. 54 and 55, to permit this claim for a national class to stand, I will require the plaintiffs to amend the Statement of Claim to plead the relevant provisions of the securities acts of those other provinces which the plaintiffs propose to have included in this class proceeding. For that purpose, leave to further amend is granted.

41 The defendant, Johnson, is not a trustee of the fund. Accordingly, the claim under s. 130 of the *OSA* as against the defendant, Johnson, is struck.

42 The limitation period in s. 138.14(b)(ii) of the *OSA* limits the plaintiffs' cause of action under s. 130 of the *OSA* to the two fund prospectuses issued after September 26, 2005. Each Statement of Claim must be amended to that end.

**Pleading of Negligence Simpliciter**

43 The plaintiffs advance a cause of action in negligence *simpliciter* based on Income Fund representations to the primary market during the class period through the four Fund prospectuses published prior to the s. 138.14 *OSA* limitation period and the two published afterwards. The Statement of Claim includes the following pleading:

**92.** ... each of the Defendants ... ought to have known that the Income Fund's Class Period prospectuses were materially misleading as detailed above. Accordingly, the Defendants have violated their duties to the Class Members.

**93.** The reasonable standard of care expected in the circumstances required the Defendants ... to act fairly, reasonably, honestly, candidly and with due care in the course of compiling and disseminating the Income Fund's prospectuses.

**94.** The Defendants ... failed to meet the standard of care required by issuing prospectuses during the Class Period that were materially false and/or misleading as described above.

**96.** The negligence of the Defendants ... resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants ... complied with their duty of care ... then the Units offered by such prospectuses either would not have been offered to and purchased by the Class Members or, alternatively, such Units would have been offered at prices that corresponded to their true value...

**97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss...

44 The defendants state that there is no common law duty of care owed by public issuers and their officers, directors and/or trustees through the publication of their prospectuses and seek to have those pleadings struck. The defendants state that the plaintiffs' duty of care analysis is flawed for three separate reasons:

- (a) There is no such duty of care owed by the Income Fund at common law. It has been replaced by s. 130 of the *OSA*.
- (b) The duty of care owed by the directors and trustees is to the Income Fund and not to the unitholders; and
- (c) In any event, the claim of negligence is subsumed by the pleading of negligent misrepresentation and is therefore duplicative.

*(a) Has section 130 of the OSA replaced the common law duty of care?*

45 Section 130 of the *OSA* states:

**130(1)** Where a prospectus ... contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against:

- (a) the issuer ...
- (b) each underwriter ...
- (c) every director of the issuer ...

46 Section 1 of the *OSA* defines a "misrepresentation" as:

- (a) an untrue statement of material fact, or
- (b) an omission to state a material fact ...

47 In s. 1 of the *OSA*, a "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.

48 The defendant relies on *Menegon v. Philip Services Corp.* (2001), 23 B.L.R. (3d) 151 (Ont. S.C.J.). This was a proposed class action regarding prospectus misrepresentations in which the plaintiffs intended to assert a common law duty of care said to be owed to a class of investors by the underwriters.

49 On motion by the defendants, the Court in *Menegon* struck out that portion of the claim. I find that *Menegon* is to be distinguished from the present case, at least on the basis that in *Menegon* the proposed defendants were underwriters who do not stand in the same relationship of proximity to shareholders as do directors and officers of the corporation in which those shareholders have invested.

50 In my view, s. 130 of the *OSA* does not create a duty, rather it provides a remedy. The statutory duty is found in s. 56 of the *OSA* which provides:

**56(1)** A prospectus shall provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed and shall comply with the requirements of Ontario securities law.

51 Rather than replacing the common law duty of care, s. 56(1) of the *OSA* informs of that duty. This concept was recognized in *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.) and *Haskett v. Trans Union of Canada Inc.*, [2003] O.J. No. 771 (Ont. C.A.) at para. 25.

52 I find that s. 130 of the *OSA* does not subsume common law claims, but preserves them. In that regard, I am also guided by s. 130(10) of the *OSA* which states:

**(10)** The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

*(b) Do directors and trustees owe a duty of care to investors?*

53 The defendants state that the cause of action in negligence against the directors and trustees must be struck, as it creates an untenable conflict of interest for those individuals. The defendants rely on *Alvi v. Misir* (2004), 73 O.R. (3d) 566 (Ont. S.C.J. [Commercial List]), in which a claim was brought by shareholders against directors of a corporation for their activities as directors. The Court in that case held at para. 57:

**57.** In view of the fact that the statutory duties of good faith, loyalty and care are owed to the corporation, the directors cannot have separate duties of the same nature owing to the shareholders. Such parallel duties would create untenable and unrealistic conflicts...

54 I distinguish *Alvi* from the facts before me. Here, the plaintiffs assert a cause of action on behalf of the proposed class at a time when they were not shareholders, but chose to purchase Income Fund units and thereby became "shareholders." Those decisions to purchase units resulted in damage to Class Members, as pleaded in paras. 96 & 97 of the Statement of Claim:

**96.** The negligence of the Defendants resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants complied with their duty of care by conducting reasonable due diligence into the Income Fund's business and affairs prior to the issuance of each of the Income Fund's Class Period prospectuses, then the Units offered by such prospectuses either would not have been offered to and purchased by the Class Members or, alternatively, such Units

would have been offered at prices that corresponded to their true value. When the Anti-Competitive Conspiracy and the participation of Arctic and its affiliates therein were disclosed, the artificial inflation in the price of the Units was removed, and the trading price of the Units was corrected to reflect the true state of Arctic's business, affairs and financial position.

**97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss upon the disclosure of the Anti-Competitive Conspiracy and the participation of Arctic and its affiliates therein.

55 The plaintiffs assert that the duties of the named trustees are owed specifically to the beneficiaries of the trust, namely the unit-holding plaintiffs. An assertion that the trustees of the Income Fund do not owe fiduciary duties to those beneficiaries ignores the essential nature of a trust.

56 In any event, I find that at this stage of the proposed class proceeding, it is not "plain and obvious" that the pleading of negligence against the directors of the company and the trustees of the Fund will fail.

(c) *Are the claims in negligence and negligent misrepresentation duplicative?*

57 The defendants state that the pleadings in negligence and negligent misrepresentation rely on the same duty of care. In support of their position that the claim of negligence is subsumed by the pleading of negligent misrepresentation and should therefore be struck, the defendants rely on *Deep v. M.D. Management* (2007), 35 B.L.R. (4th) 86 (Ont. S.C.J.) and *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.).

58 In *Deep* the Court struck the plaintiff's pleading in negligence in part because it failed to raise a cause of action separate from the cause of action for negligent misrepresentation. In like manner, the motions judge in *Imax* struck out the pleading of negligence, finding that the negligence pleading in that case was in substance a pleading of negligent misrepresentation. Justice van Rensburg stated at para. 88 in *Imax*:

**88.** The negligence pleading in this case is in substance a pleading of negligent misrepresentation without the ingredient of reliance. There is also no pleading that the alleged negligence caused damage to the plaintiffs and no separate claim for a remedy based on negligence. Accordingly, the claims sounding in negligence *simpliciter* ... will not be permitted to proceed and the claim shall be amended accordingly.

59 A review of the pleadings in the case before me indicates that unlike *Deep* and *Imax*, the claims of negligence and negligent misrepresentation are pleaded quite differently and raise separate causes of action. The negligence *simpliciter* claim asserts that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants. The negligent misrepresentation pleading, on the other hand, points to a number of misrepresentations contained in various prospectuses and public disclosures.

60 To further distinguish these pleadings of negligence *simpliciter* from those considered by Justice van Rensburg in *Imax* in para. 88 above, I note para. 97 of the Statement of Claim in this action which states, referring to the allegations of negligence:

**97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss ...

61 Materially identical pleadings in negligence and negligent misrepresentation were sustained in *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (Ont. S.C.J.), *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 260 (Ont. S.C.J.) and *Metzler Investment GmbH v. Gildan Activewear Inc.*, [2009] O.J. No. 5695 (Ont. S.C.J.).

62 In finding that the claim of negligence *simpliciter* advanced here focuses specifically on the theory that the prospectuses would not have been issued, or would have been issued showing a reduced offering price for the units, but for the negligence of the defendants, and that it therefore relies on a materially different theory than a negligent misrepresentation allegation, I also have regard to the B.C. Court of Appeal decision of *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381 (B.C. C.A.). In that case, the appellant sought damages for losses on units of two mortgages he purchased. The appellant alleged that

the respondents breached due diligence obligations regarding the mortgage investments before offering the units for sale. On the issue of whether individual reliance must be shown, the Court stated at paras. 33 & 34:

**33.** The respondents submit that the investors cannot succeed without proof of reliance on the misrepresentation by each investor individually, particularly with respect to the claims for negligent misrepresentation. The chambers judge concluded that proof of reliance was required for the claims in tort but not in contract.

**34.** The reason for insistence on reliance is to establish causation. If causation can be established otherwise, then reliance is not required: see *Henderson, supra*, per Lord Goff at 776, and *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd. (1986)*, 24 D.L.R. (4<sup>th</sup>) 140 at 145-47, 69 B.C.L.R. 357 at 354-55, 22 E.T.R. 96 (S.C.) per McLachlin J. Here if the mortgage units had not passed the due diligence test they would not have been offered for sale by the respondents to any clients. Causation is therefore established between a breach of due diligence duty and the investors' loss, independently of proof of individual reliance. In my view, proof of reliance does not present an obstacle to the appellant's case as framed. The appellant's case adequately links a breach of duty causally to the investors' losses.

63 I also note that the claim of negligence is limited to primary market purchasers while the negligent misrepresentation claim focuses on secondary market purchasers.

64 For reasons noted, I decline to strike the plaintiffs' claim of negligence *simpliciter*.

#### ***The Pleading of Negligent Misrepresentation***

65 The plaintiffs advance a cause of action in negligent misrepresentation, based on the Income Fund's public disclosures in both the primary and the secondary markets. Relevant parts of these pleadings in the Statement of Claim are:

**98.** On behalf of all Class Members, the Plaintiffs plead negligent misrepresentation.

**99.** The Income Fund's disclosure documents referenced above were prepared, at least in part, for the purpose of attracting investments and with the intention that Class Members would rely upon the documents in making the decision to purchase Units. The Defendants ... knew or ought to have known that the Plaintiffs and the Class Members would rely upon those disclosure documents in making their decision to purchase the Units, and the Defendants ... intended that the Plaintiffs and the Class Members so rely.

**100.** The Individual Defendants and Arctic made those omissions and the Misrepresentation and the related misrepresentations alleged herein by authorizing, permitting and/or acquiescing in the drafting and issuance of the disclosure documents referenced above, and/or by signing them.

**101.** The Defendants ... made the omissions, the Misrepresentation, and the related misrepresentations alleged herein negligently, intending that the Plaintiffs and the other Class Members would rely upon them, which the Class Members did to their detriment.

**102.** The Plaintiffs and each other Class Member relied upon the Defendants' ... omissions, the Misrepresentation, and the related misrepresentations alleged herein by reading and acting upon disclosure documents containing the omissions, the Misrepresentation, and the related misrepresentations alleged herein, or alternatively, by reading and acting upon documents that contained information derived from the omissions, the Misrepresentation, and the related misrepresentations.

**103.** Further, given the relationship as pleaded below between the Income Fund's disclosures and the price of the Units, the Plaintiffs and each other Class Member relied upon the said omissions, the Misrepresentations and the related misrepresentations by the act of purchasing or acquiring Units in the open market.

**104.** The Plaintiffs and each other Class Member suffered damages and loss, as particularized below, as a result of such reliance.

66 To establish the tort of negligent misrepresentation, the plaintiffs must establish the required elements recited by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at p. 110:

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.

67 To identify the existence and scope of a duty of care in a claim of negligent misrepresentation, in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 20 the Supreme Court of Canada applied what has become known as the two-stage *Anns* test (see *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.)). The first stage of the *Anns* test requires that there be a relationship between the parties justifying the imposition of a duty of care. It calls for considerations of foreseeability, proximity and policy. At the second stage of the *Anns* test, the court should consider whether there are any residual policy considerations militating against the recognition of a duty of care.

68 The defendants state that no duty of care can exist as pleaded by the plaintiffs. Accordingly, I must review in detail the application of the two-stage *Anns* test.

#### *Relationship of Proximity*

69 The defendants assert that the plaintiffs failed to plead the material facts necessary to demonstrate a special relationship of proximity, as neither reasonable foreseeability nor reasonable reliance was pleaded. The plaintiffs have asserted that a duty of care was owed to class members. The defendants in response submit that this pleading lacks the necessary relational proximity. The defendants rely on *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (Ont. C.A.) at para. 68 for the assertion that a duty of care cannot be owed only to the class members who purchased units, as opposed to the general public in this type of transaction. In my view, *Attis* does not assist the defendants. That decision focuses on the relationship between the government, policy decisions and members of the public. Further, the Court specifically states at para. 68 that relational proximity was not pleaded, contrary to the present case.

70 The defendants state that there is no direct causal proximity between the defendants' release of the documents and the plaintiffs' loss. They state that the decline in the price of the units of the Income Fund on the open market is the result of numerous forces and events. They state that this type of indirect relationship between the defendants' conduct and the proposed class members' losses is insufficient to ground a finding of proximity. They rely on *Paxton v. Ramji*, 2008 ONCA 697 (Ont. C.A.) at para. 71 in support of that position. In *Paxton*, the Ontario Court of Appeal considered whether a physician treating a female for acne, simultaneously owed a duty to a child then neither planned nor conceived, but subsequently born to that female person. The "indirect relationship" reviewed in para. 71 of *Paxton* related specifically to that fact situation and, in my view, has no application to the present case.

71 The defendants further rely on *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38 (S.C.C.) at para. 27, stating that the proximity analysis must be grounded in the statutory scheme, where one exists. Yet, similarly to s. 130(10), s. 138.13 of the OSA provides,

**138.13** The right of action for damages and the defences to an action under s. 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.

I am also guided by Justice van Rensburg's analysis of this issue in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.):

**40** While there are no reported cases in Ontario where a common law claim of misrepresentation in the secondary market has been considered at trial, such claims have been permitted to proceed under a Rule 21 or class proceeding certification motion in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.); *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.), *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.) and *McCann v. CP Ships Limited*, [2009] O.J. No. 5182...

**47** The present case is similar to *Mondor* and can be distinguished from *Menegon*. The Claim concerns representations made as part of a reporting issuer's continuous disclosure obligations, and not, as in *Menegon*, representations intended for the primary market that were made in a prospectus. The continuous disclosure obligations of a reporting issuer are prescribed by and under the *OSA*, and the intended recipients of such disclosure are the investing public.

**48** Section 138.3 of the *OSA* provides for liability of issuers, their directors and in certain circumstances their officers and intermediaries to persons who acquired or disposed of an issuer's securities between the time a material misrepresentation in secondary market disclosure was made and its correction. While there is a specific statutory remedy, s. 138.13 of the *OSA* provides that the statutory right of action for damages and the defences to an action "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."

**49** There is no inconsistency or conflict between the pursuit of a statutory remedy for secondary market misrepresentation that imposes liability without proof of reliance but subject to a damages cap and other limitations, and a claim alleging a common law duty of care for negligent misrepresentation arising out of the same circumstances, where reliance is an element of the tort. The public policy concern of conflict with an existing statutory regime or remedy does not arise in this case.

**72** In my view, the position advanced by the defendants that imposing a duty of care at common law could create requirements above and beyond those codified in the *OSA* should be left for trial and should not be resolved at this embryonic stage of the action. I find that the plaintiffs have made out a *prima facie* duty of care for pleading purposes. That takes me to the second stage of the *Anns* test.

#### *Residual Policy Considerations*

**73** The defendants assert that recognizing a *prima facie* duty of care to the entire secondary market would raise the spectre of indeterminate liability as the entire investing public is not a limited class. They rely on *Hercules, supra*, in which the Supreme Court addressed certain policy considerations to limit or constrain the scope of possible unlimited liability. These comments of the Court are of note:

**41.** 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.

**74** The Supreme Court also noted at para. 46 that indeterminate liability would not inhere on the specific facts of those cases where:

**46.** ... 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.

[Emphasis added.]

*Did the defendants know the identity of the plaintiffs?*

75 The defendants rely on *Haig v. Bamford* (1976), [1977] 1 S.C.R. 466 (S.C.C.) and *NPV Management Ltd. v. Anthony* (2003), 231 D.L.R. (4th) 681 (N.L. C.A.) for the proposition that the investing public is not a limited class.

76 The plaintiffs in this case have pleaded:

**99.** The Income Fund's disclosure documents ... were prepared, at least in part, for the purpose of attracting investment and with the intention that Class Members would rely upon the documents in making the decision to purchase Units. The Defendants ... knew or ought to have known that the Plaintiffs and the Class Members would rely upon those disclosure documents in making their decision to purchase the Units, and the Defendants ... intended that the Plaintiffs and the Class Members so rely.

77 I return to *Hercules*, *supra*, and note that the Court, in para. 46 of that decision, included "a class of plaintiffs" when it stated at para. 37:

**37.** ... 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.

[Emphasis added.]

78 *Haig*, *supra* did not involve a public company. In that case, accountants prepared reports for a client with the knowledge that the documents were to be used to seek investments from a circumscribed class of investors. While the class of potential investors in this case is larger, the defendants here knew the class of persons who would rely on the continuous disclosure documents which the defendants prepared "for the purpose of attracting investments and with the intention that Class Members would rely upon the documents in making the decision to purchase Units."

79 *NPV*, *supra* must be distinguished on the basis that the pleadings in the present case allege that the impugned statements were made to attract investments. In *NPV*, the statements at issue were made to satisfy reporting and disclosure requirements.

80 I am also guided by the finding of Justice van Rensburg in *Imax*, *supra*. She held that the pleadings in *Imax*, which in this regard are materially similar to the pleadings in the present case, rendered *NPV* inapplicable.

81 The defendants' claim that the continuous disclosures made by the Income Fund were primarily for the purpose of fulfilling statutory requirements is to suggest that a securities issuer exists for the purpose of fulfilling statutory obligations. That ignores the obvious focus of these disclosures which is to attract investors. The intended recipients of such disclosure documents are members of the investing public, as pleaded in para. 97 of the Statement of Claim.

#### *The Effect of Recognizing a Duty of Care*

82 The defendants raise a number of residual policy considerations which do not address the relationship between the parties, but the effect of recognizing a duty of care on other legal obligations: see *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.), at 554.

83 First, they state that a *prima facie* duty of care may be negated when other causes of action provide remedies for the impugned conduct. They assert that the *OSA* provides such a remedy. As I stated above and as noted in *Imax*, *supra* at paras. 47 and 48, the specific statutory remedy of s. 138.13 of the *OSA* is "in addition to and without derogation from any other rights or defences..."

84 The second concern raised by the defendants is that establishing the proposed common law duty of care would have a negative effect upon long-term unitholders by effectively creating an insurance scheme for short-term unitholders. In addition, the defendants say, it would have a negative chilling effect on the Canadian business sector. However, the plaintiffs assert that

refusing to require corporate directors and officers to disclose the truth to the investing public would also have a negative effect on society. I am not persuaded at this early stage in the proceedings that it is plain and obvious that the claim of negligent misrepresentation will fail on this issue.

85 Third, the defendants argue that Canadian common law duties should be harmonized on this issue with those determined by American courts. In my view, harmonization with the laws of a foreign jurisdiction cannot trump well-settled Canadian principles for evaluating the existence of a duty of care at common law. Canadian and American laws differ in many respects. It is not the role of this court to seek uniformity for its own sake with the laws of a foreign jurisdiction.

*Actual Pleading of Detrimental Reliance*

86 Relying on *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.) at para. 30, the defendants state that to plead reliance, the Statement of Claim must contain assertions that the plaintiffs altered their position by relying on the misrepresentation which resulted in a loss. The plaintiffs plead, although in a very general way:

**102.** The Plaintiffs and each other Class Member relied upon the Defendants' ... omissions, the Misrepresentation, and the related misrepresentations alleged herein by reading and acting upon disclosure documents containing the omissions, the misrepresentations...

**103.** ... the Plaintiffs and each other Class Member relied upon the said omissions, the Misrepresentation and the related misrepresentations by the act of purchasing or acquiring Units in the open market.

**104.** ... the Plaintiffs and each other Class Member suffered damages and loss, as particularized below, as a result of such reliance.

87 In my view, the appropriate remedy here is that of a demand for particulars.

88 The plaintiffs assert that reliance can be inferred from the act of purchasing units on the secondary market. The defendants state that reliance on such an inference is indistinguishable from the American doctrine of "fraud on the market." This theory was canvassed by Cumming J. in *Mondor, supra*:

**59.** The "fraud on the market theory" is an implied statutory cause of action arising from Rule 10b-5 of the United States Securities and Exchange Commission. ... The theory results in deemed reliance where an actionable misrepresentation is established on the part of a company and there has been the purchase of its shares by an investor in the secondary market. This statutory cause of action was described by the United States Supreme Court in *Basic Incorporated v. Max L. Levinson*, 485 U.S. 224(1988) at 241 as follows:

[It] is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements... The causal connection between the defendants' fraud and the plaintiffs' purchase of each stock in such a case is not less significant than in a case of direct reliance on misrepresentations.

**60.** The theory negates the necessity of requiring proof of subjective reliance from each member of the proposed plaintiff class. The theory has been described as a legal fiction which has the effect of overcoming the need to prove reliance...

**61.** The "fraud on the market theory" has been expressly rejected by Canadian courts because, *inter alia*, Canadian securities legislation does not include a similar concept, and that actual reliance is a necessary component under Canadian law concerning negligent and fraudulent misrepresentation.

89 In *Mondor* at paras. 65-67, Cumming J. held that actual reliance on a misrepresentation is a question of fact which may be inferred from all the circumstances. He then stated at para. 69:

**69.** To foreclose the consideration of an arguable issue past the pleading stage, a moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected: *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463. Had the plaintiffs simply pleaded the "fraud on the market theory" I would have foreclosed that consideration. Given, however, that the case law recognizes that a person's reliance upon a representation may be inferred from all the circumstances, in my view it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage.

90 This reasoning applies to the facts of this case. I am also guided on this issue by the comments of Rady J. in *McCann*, *supra* at para. 59:

**59.** It seems to me that the case law is in a state of evolution and the court, in certain circumstances, is prepared to relax the otherwise strict requirement to establish individual reliance. I think it would be an error to conclude, at this stage of the proceedings, that the plaintiff cannot possibly succeed in a claim for negligent misrepresentation. I would adopt the language of Justice Rooke in the *Eaton* case at para. 91 that "it is simply too early to determine whether, and to what extent, individual reliance will need to be examined in this case. A trial on the common issues will determine this need..."

91 For these reasons, the pleading of negligent misrepresentation may proceed to trial.

## B. Plaintiffs' Motion for Leave Pursuant to Part XXIII.1 of the OSA

### *Overview*

92 Part XXIII.1 of the *OSA* became law on December 31, 2005. Prior to its promulgation, Canadian securities class actions were based essentially upon the common law, in particular, the tort of negligent/fraudulent misrepresentation. The intent of the legislation is described by Lax J. in *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (Ont. S.C.J.) at para. 9:

...to create a system of statutory liability that would contain enough checks and balances ... so that issuers and their directors would be deterred from inadequate or untimely disclosure...

93 The two seminal parts of this legislation are:

**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 the 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...
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
  - (i) 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; ...

**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.

(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.

94 In attempting to interpret this legislation and to apply it to the facts of this motion, I am guided by the approach proposed by E.A. Driedger and adopted by the Supreme Court of Canada in numerous cases, including *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727 (S.C.C.) at para. 25:

**25.** ...the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

95 As already noted, the defendants on the above motion to strike and on this leave motion have chosen not to file any responding material. The plaintiffs suggest that this alone should be fatal to the defendants' opposition to the plaintiffs' motion to seek leave. The plaintiffs rely on s. 138.8(2) which states that each side "shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely." The plaintiffs also rely on the comments by van Rensburg J. in *Silver v. Imax Corp.*, [2008] O.J. No. 1844 (Ont. S.C.J.):

**17.** The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information ... and that specifically authorizes examination on such information ...

**19.** We are left with what the statute prescribes - a mandatory requirement for each plaintiff and each proposed defendant to set out facts by affidavit, with a right to cross-examine the deponents of such affidavits.

96 However, these comments should be put into context by noting that they were made by van Rensburg J. on a motion to compel answers to questions refused during cross-examinations on a pending motion. Lax J. in *Ainslie, supra*, like Justice van Rensburg in *Imax Corp., supra*, was one of the first to consider an action brought under Part XXIII.1 of the *OSA*. In *Ainslie*, Justice Lax considered a motion by the plaintiffs to compel the defendants to file and serve an affidavit under s 138.8(2) of the *OSA*. I particularly note paras. 23 and 25 of that decision:

**23.** I respectfully suggest that these comments should be confined to the facts and circumstances at issue in *IMAX*. These comments were made in *obiter* in resolving a refusals motion in circumstances where the defendants had filed affidavit material. It is important to recognize that in *IMAX*, the court was not addressing the interpretation of s. 138.8(2).

**25.** Properly interpreted, the ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

97 I subscribe to this view advanced in *Ainslie* that the ruling in *IMAX* should be confined to the special facts of the refusals motion before the court. I find that the defendants, in opposing the plaintiffs' "leave" motion, may do so in the absence of filing any material.

#### **Limitation Period**

98 As a further preliminary matter, I must address the limitation period, as it applies to a claim under Part XXIII.1 of the *OSA*. The class period proposed by the plaintiffs is March 13, 2002 to September 18, 2008. Part XXIII.1 of the *OSA* did not come into force until December 31, 2005. Section 138.14 of the *OSA* provides:

**138.14** No action shall be commenced under s. 138.3,

(a) in the case of a 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...

99 It is common ground that a three-year limitation period applies. What is at issue is the retrospective effect, if any, of Part XXIII.1 of the *OSA*.

100 The plaintiffs issued the Notice of Action on September 25, 2008. The defendants state that Part XXIII.1 is not retroactive and therefore the limitation period in s. 138.14 precludes the plaintiffs from relying on any core documents prior to September 26, 2005.

101 The plaintiffs state that Part XXIII.1 should be applied prospectively to an ongoing factual matrix. They rely on *Union des consommateurs c. Dell Computer Corp.*, [2007] 2 S.C.R. 801 (S.C.C.) at paras. 113-15:

**113.** Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". He adds that: "[a] statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153). A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact.

**115.** Can the facts of the case at bar be characterized as those of an ongoing legal situation? If they can, the new legislation applies. If all the effects of the situation have occurred, the new legislation will not apply to the facts.

102 The retrospective application of a statute to a series of events that occurred both before and after that legislation came into force was addressed by the Supreme Court in *Épiciers unis Métro-Richelieu inc., division "Econogros" c. Collin*, [2004] 3 S.C.R. 257 (S.C.C.) at p. 280-81:

**46.** The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. **New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force** (Côté, *supra*, at p. 175). If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, *supra*, at pp. 152 *et seq.*). If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. **According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date** (Côté, *supra*, at pp. 133 *et seq.* and pp. 194 *et seq.*). When new legislation modifies those prior effects, its effect is retroactive (Côté, *supra*, at pp. 133 *et seq.*). Professor Driedger gave a good explanation of this distinction between retroactive and retrospective effect:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. **A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted.** A retrospective statute changes the law from what it was; **a retrospective statute changes the law from what it otherwise would be with respect to a prior event.**

(E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69)

[Emphasis added.]

103 The Statement of Claim details a series of 53 documents disseminated by the Income Fund for public consumption between March 13, 2002 and June 30, 2008. In many of these documents, the Income Fund repeatedly asserts that it is a good corporate citizen operating lawfully in a competitive industry. The plaintiffs allege that this repeated assertion is a misrepresentation. Whether that is so is an issue to be left to the trial judge, assuming leave is granted. What I find at this

stage of the proceedings is that this repeated misrepresentation is one continuing fact situation: *Canada (Attorney General) v. Confederation Trust Co.*, [2003] O.J. No. 2754 (Ont. S.C.J.) at paras. 26-28. As such, commencing with the Income Fund Prospectus of March 13, 2002, the plaintiffs may rely on the disclosure documents in support of their position that these documents contain misrepresentations.

104 I also rely on s. 138.3(6) of the *OSA* to find that these representations made by the Income Fund, if found to be misrepresentations, may be treated and relied upon by the plaintiffs as a single misrepresentation.

#### ***The Statutory Leave Procedure***

105 Section 138.8(1) of the *OSA* requires that any action claiming secondary market misrepresentation must have leave of the court. The section provides as follows:

**138.8(1)** No action may be commenced under s. 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.

106 Regarding the purpose of the leave test, I adopt these comments of van Rensburg J. in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.):

**293.** The statutory cause of action for secondary market misrepresentation also serves a dual purpose, of permitting the recovery of damages by a shareholder, and as a deterrent to breach of a reporting issuer's continuous disclosure obligations under the *OSA*.

**294.** Similarly, the statutory cause of action was introduced as remedial legislation; that is, in recognition of the obstacles to pursuing claims for secondary market misrepresentation under common law. Accordingly, the leave test prescribed by the legislature should be interpreted so as to permit access to the courts by shareholders with legitimate claims.

#### ***Leave Test - Part I: Is the action brought in good faith?***

107 The first test under s. 138.8 is whether the action is brought in good faith. This is not to be presumed and must be established by the plaintiffs on a balance of probabilities: see *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.) at para. 295.

108 Each of the plaintiffs in their affidavits state:

I have also commenced this action to ensure that the defendants are held accountable for their behaviour and to deter similar conduct by others. I have no ulterior motive, nor any improper or collateral purpose in commencing this action.

109 The plaintiffs also note that the proposed defendants, Gary D. Cooley ("Cooley") and Frank Larson ("Larson") pleaded guilty in the U.S. to conspiracy of a commercial nature involving some of these corporate defendants. The plaintiffs rely on these guilty pleas as evidence of their belief that they have a chance of success against Larson and Cooley in this proposed class action. The plaintiffs have a financial interest in the action, as they acquired units during the Class Period. They also note that there is no evidence:

- (a) that they have brought this motion for an improper purpose;
- (b) of malice, bad faith or dishonesty;
- (c) of a prior conflict between the parties; or

(d) an intention to seek an improper advantage.

110 Neither the defendants nor the proposed defendant Larson dispute a finding that the plaintiffs are acting in good faith. That leaves the proposed defendant Cooley. He states that there is no evidence that he knowingly influenced the Income Fund with respect to the alleged misrepresentations and that accordingly there is no evidence from which the plaintiffs can establish good faith with regards to the claims they advance against Cooley.

111 To determine whether the plaintiffs' claim against Cooley has been brought in good faith in the context of s. 138.8, I have regard to the definition of "good faith" in *Black's Law Dictionary*, 9<sup>th</sup> ed., B. Garner, Ed. (St. Paul: Thomson Reuters, 2009):

A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

112 I am also guided by the analysis of van Rensburg J. in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.):

**308.** I interpret "good faith" in the context of s. 138.8, to require the plaintiffs to 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. "Good faith" involves a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined by considering the objective evidence.

113 The good faith inquiry with regards to Cooley involves an analysis of the objective evidence within the context of the legislative scheme. For liability to accrue under s. 138.3, an individual must be a responsible issuer, a director or officer of a responsible issuer or an influential person at the time the impugned document was released. The plaintiffs allege that at the relevant time Cooley was either an officer or an influential person.

114 Section 1(1) of the *OSA* defines "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).

115 It is admitted that Cooley was a vice-president of Sales and Marketing of Arctic and Arctic International, Inc. Although he was not a director or trustee of the Income Fund, it should be noted that Arctic International is wholly-owned by Arctic Glacier Inc. which, in turn, is wholly-owned by the Income Fund.

116 As per s. 1(1)(a) of the above definition in the *OSA*, a vice-president of an issuer is an officer for purposes of s. 138.8. Having determined that Cooley was a vice-president, it is necessary to determine whether he was a vice-president of a responsible issuer. To answer this question at this stage of the analysis, I must only determine that there is enough objective evidence for the plaintiffs to support their good faith intentions in seeking leave to advance their s. 138.3 claims.

117 The definition of a "responsible issuer" is found in s. 138.1:

"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;

A "reporting issuer" is defined in s. 1(1) of the *OSA*. Of particular note is subsection (e):

"reporting issuer" means an issuer ...

(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 ...

where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months

118 When the Income Fund was created, securities were exchanged so that the Income Fund became the holder of all the issued common shares of Arctic. At that time, Arctic Group, the predecessor of Arctic, had been in existence for more than 12 months.

119 I find that there is sufficient objective evidence for the purposes of the good faith determination to find that Cooley was an officer of a responsible issuer and might be liable under s. 138.3 through his acquiescence to the release of the misrepresentational documents.

120 As stated, the remaining defendants and the proposed defendant Larson do not challenge the assertion that the plaintiffs have brought this action in good faith. With respect to them and the proposed defendant Cooley, I note that the plaintiffs have a personal financial interest in the action as well as a stated intent in starting this action to hold the defendants accountable for their behaviour and to deter similar conduct by others. There is no evidence of ulterior motive or conflict of interest. Accordingly, I find that the plaintiffs have met the "good faith" test under s. 138.8(1)(a) of the *OSA*.

#### ***Part II of the Statutory Leave Test: Is there a reasonable possibility that the plaintiffs will succeed at trial?***

121 To be granted leave on this motion, the plaintiffs must demonstrate at least a reasonable possibility of success at trial, assuming a finding that the action has been brought in good faith: see s. 138.8(1)(a) and (b) of the *OSA*. As stated in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.) at para. 330:

**330.** The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

122 The legislative history of Part XXIII.1 of the *OSA* was extensively reviewed by van Rensburg J. in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.) and by Lax J. in *Ainslie*, *supra*. Drawing on these reviews, I am satisfied that Part XXIII.1 is on the one hand remedial, while on the other, it seeks "to protect defendants from coercive litigation and to reduce their exposure to costly proceedings." (*Ainslie*, *supra* at para. 15). It is this latter aim that the test in s. 138.8(1)(b) seeks to address. Having found that the plaintiffs brought this action in good faith, I must now decide whether "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff[s]."

123 The task here is to attempt to bring clarity to the meaning of "reasonable possibility," as that phrase relates to these facts.

124 In the context of a dangerous offender application brought by the Crown in *R. v. E. (E.)*, [2003] O.J. No. 1518 (Ont. S.C.J.), the defence sought to show that there was a reasonable possibility of eventual control of the accused in the community. In attempting to bring meaning to those words, the court stated:

**41.** ... it is important to underline the word reasonable. It is not a mere possibility, or any possibility, but one that is reasonable. Clearly, that means a possibility that has a reasonable possibility of success, in the mind of the Court.

42. The "possibility" must have an air of reality, and have more substance than simply faith or hope.

125 As already noted, statutory language should be read in its grammatical and ordinary sense. A review of dictionary meanings of these words indicates the following: *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) defines "reasonable" as:

1. Having sound judgment; moderate; ready to listen to reason.
2. In accordance with reason; not absurd.
3. Within the limits of reason; fair, moderate ...

126 *Black's Law Dictionary*, *supra*, defines "reasonable" as:

1. Fair, proper, or moderate under the circumstances.
2. According to reason.

127 The *Canadian Oxford Dictionary*, *supra*, defines "possibility" as:

1. The state or fact of being possible, or an occurrence of this.
2. A thing that may exist or happen ...

128 *Black's Law Dictionary*, *supra*, defines "possibility" as:

1. An event that may or may not happen ...

129 Van Rensburg J. in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.) at paras. 313-346, considered the language of s. 138.8(1)(b). I find no reason to depart from her analysis. In particular, I note the following paras:

**324.** "Reasonable" is used instead of "mere" to denote that there must be something more than a *de minimis* possibility or chance that the plaintiff will succeed at trial. The adjective "reasonable" also reminds the court that the conclusion that a plaintiff has a reasonable possibility of success at trial must be based on a reasoned consideration of the evidence.

**326.** In undertaking this evaluation the court must keep in mind that there are limitations on the ability of the parties to fully address the merits because of the motion procedure. There is no exchange of affidavits of documents, no discovery (although affiants may be cross-examined) and witnesses cannot be summoned. The credibility of a witness' evidence given by affidavit in a motion, irrespective of how searching an out-of-court cross-examination may be, can only be fully determined when it is tested in open court.

**330.** The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

130 In my view, in assessing the existence of a reasonable possibility of success at trial, I must consider the relevant evidence, within the context of this motion. The applicable standard is more than a mere possibility of success, but is a lower threshold than a probability.

### **Section 138.3 — Elements to be Proven**

131 The plaintiffs have limited their claim to rely only on core documents. For the purposes of this motion, the defendants do not oppose the following aspects of the pleaded s. 138.3 offences regarding the core documents, namely that:

- the Fund is a "responsible issuer";

- the Fund documents are "documents" that were released by the Fund;
- the Fund documents contain a "misrepresentation";
- the Plaintiffs acquired the Fund's securities during the Class period;
- the Trustees of the Fund, namely Clark, Nagy, Filmon and Swaine, are "directors" of the Fund;
- McMahon was a *de facto* "officer" of the Fund in his roles as CEO and CFO of Arctic Glacier Inc.;
- Bailey became *de facto* "officer" of the Fund as of December 29, 2006 ... when he became CFO of Arctic Glacier Inc.; and
- Johnson, as a director, and McMahon and Bailey as officers of Arctic Glacier Inc., are "influential persons" of the Fund because they are "directors" and "officers" of a subsidiary of the Fund.

132 To demonstrate that they have a reasonable possibility of success at trial, the plaintiffs must do so with each element of s. 138.3 and with each defendant: *Imax, supra*, at paras. 334-336.

133 Based on the admissions by the defendants, I find that the elements of the cause of action in s. 138.3 have been met for the purposes of this motion as against the Income Fund. Accordingly, leave under s. 138.8 is granted as against the Fund.

134 The defendants dispute, however, that there is a reasonable possibility of success at trial with respect to Arctic as a responsible issuer or an influential person. The defendants assert that Arctic is not an "influential person" because it is not a "promoter" or an "insider" of the Fund. Consequently, the defendants argue that Arctic's directors and officers are not directors and officers of a "responsible issuer" or an "influential person."

135 The defendants also dispute that the trustees of the Fund can be characterized as "influential persons" of the Fund, because they are not "promoters." Finally, the defendants allege that Bailey was not an "officer" of Arctic before December 29, 2006 and that he was not an "expert" of the Fund.

#### ***The Trustees***

136 The defendants admit that the defendants Clark, Nagy, Filmon and Swaine, as trustees of the Income Fund, are "directors" of the Income Fund, under s. 138.3(1)(b) of the *OSA*. As directors of a responsible issuer, namely the Income Fund, liability accrues to the trustees under s. 138.3(1)(b), subject to any statutory defences.

137 The plaintiffs also state that these defendants Clark, Nagy, Filmon and Swaine are liable under s. 138.3(1)(b) of the *OSA* as "influential persons" within the meaning of 138.3(1)(d) of the *OSA*. An "influential person" is defined in s. 138.1 of the *OSA*:

"influential person" means, in respect of a responsible issuer...

(a) a promoter...

"Promoter" is defined in s. 1(1) of the *OSA*:

"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 ...

These defendants, as trustees of the Income Fund, were directly involved in the formation of the Income Fund, which the defendants have conceded is "an issuer." Each trustee, as an "influential person" acting as the controlling mind of the Income Fund, would knowingly have influenced the Income Fund as the responsible issuer to release the core documents in question.

Accordingly, I find that there is a reasonable chance of success at trial against the defendants Clark, Nagy, Filmon and Swaine under s. 138.3 as "directors" and as "influential persons."

### **Arctic Glacier Inc.**

138 The plaintiffs assert that Arctic is liable under s. 138.3 as an "influential person" of the Income Fund. "Influential person" is defined in s. 138.1 of the *OSA*:

"influential person" means, in respect of a responsible issuer...

(a) a promoter...

139 The defendants have conceded that the Fund is a "responsible issuer" under the *OSA*. The plaintiffs assert that Arctic is a "promoter" of the Income Fund. "Promoter" is defined in s. 1(1) of the *OSA*:

"promoter" means,

(a) a person or company who ... takes the initiative in founding, organizing ... the business of an issuer, or ...

The plaintiffs submit that Arctic is a promoter, as it was involved in the formation of the Fund. The defendants dispute this characterization, stating that there is no evidence to support the finding that Arctic took the "initiative in founding or organizing" the business of the Income Fund. In support of their position, the plaintiffs point to the 2003 Renewal Annual Information Form issued by Arctic which states in part:

### **Recent Developments**

The Arctic Group Inc. ("Arctic Group"), the predecessor corporation to Arctic Glacier Inc. was incorporated in 1996. In November 2001, the board of directors and management of Arctic Group considered several alternatives to enhance shareholder value ... The board of directors of Arctic Group concluded that the best alternative to accomplish these goals would be to convert Arctic Group into an income trust fund.

### **Arrangement Agreement**

On January 31, 2002, Arctic Glacier, Arctic Group and the Fund entered into the Arrangement Agreement which provided for implementation of the Arrangement pursuant to Section 193 of the ABCA. ... The Arrangement became effective on March 22, 2002. On the Effective Date, each of the events below occurred in the following sequence:

(a) all of the right, title and interest of Arctic Group securityholders in the Arctic Group securities was transferred to Arctic Glacier in exchange for Subordinated Notes ...

(d) Arctic Glacier and Arctic Group were amalgamated and continued as one corporation and:

(i) all of the issued and outstanding Arctic Group securities, all of which were then held by Arctic Glacier, were cancelled without any repayment of capital; and

(ii) the name of the amalgamated corporation became "Arctic Glacier Inc." ...

Upon completion of the Arrangement, the Fund became the holder of all of the issued and outstanding Common Shares and Subordinated Notes.

140 I find that Arctic and its predecessor, Arctic Group Inc., were "at the very heart of the ... reorganization of the company" and that Arctic is thus a "promoter": see *Gordian Financial Group Inc., Re* (1995), 4 A.S.C.S. 1690 (Alta. Securities Comm.) at para. 34.

141 As a "promoter," Arctic is an "influential person." For liability to accrue to Arctic as an "influential person" under s. 138.3(1)(d), the plaintiffs must show that Arctic as an influential person, 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 ...

The Income Fund has no separate business and is entirely dependent upon the operations of Arctic. The documents at issue are reports of the business of Arctic. Additionally, these reports were signed by Arctic's officers. It follows that Arctic must have influenced the release of the impugned documents.

142 I find that Arctic, as an "influential person," knowingly influenced the release of the impugned documents. Accordingly, I find that the plaintiffs have a reasonable possibility of success at trial against Arctic as "an influential person."

143 The plaintiffs submit that Arctic can also be characterized as a "responsible issuer" as it is a "reporting issuer." A responsible issuer is defined in s. 138.1 as a "reporting issuer." This term is defined in s. 1(1) of the *OSA*:

"reporting issuer" means an issuer...

(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...

where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months...

Referencing the 2003 Renewal Annual Information Form, the plaintiffs assert that as Arctic Group completed its initial public offering on March 25, 1997, it was in existence for at least 12 months prior to the amalgamation and was thus a "reporting issuer."

144 The defendants assert that Arctic is not a "reporting issuer." They state that on March 22, 2002, after Arctic Group was amalgamated into the new Income Fund, the common shares of Arctic were de-listed from the TSX when units of the Fund commenced trading. The Alberta Securities Commission followed with a decision on September 30, 2002 deeming Arctic to no longer be a reporting issuer under the securities legislation of Alberta, Saskatchewan, Manitoba, Ontario and Quebec. Accordingly, the defendants state Arctic has not been a "reporting issuer" as of March 22, 2002. I agree.

145 I find that Arctic is not a "responsible issuer."

#### ***Defendant McMahon***

146 McMahon was the Executive Vice President of Arctic from April 2003 until December 2006, and Chief Financial Officer from April 2001 until December 2006. He became a director of Arctic September 21, 2007 and was the Chief Executive Officer of the Income Fund from December 2006 onwards. The defendants have admitted that McMahon, as CFO and CEO of Arctic was a *de facto* "officer" of the Income Fund for the entire Class Period.

147 The term "officer" is defined in s. 1(1) of the *OSA*:

An officer, with respect to an issuer... means,

(a) a chair or vice-chair of the board of directors, 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...

(c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a)

148 The Income Fund performs its operations entirely through Arctic whose officers perform the role which officers of the Income Fund would, if the Income Fund had officers. It apparently does not. The various documents filed by the plaintiffs on this motion appear to indicate that the officers of Arctic held themselves out to be officers of the Income Fund, at least in the core documents.

149 Under s. 138.3(1)(c) of the *OSA*, officers of responsible issuers are liable if they "authorized, permitted or acquiesced in the release of the document."

150 Throughout the Class Period, McMahon signed Form 52-109FT2. Therein he certified that he reviewed the annual or interim filings of the fund and with respect to each such document that they "do not contain any untrue statement of 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." Initially, McMahon signed some annual filings directly.

151 I find that during the Class Period, McMahon was an officer of the Income Fund and that, as such, the plaintiffs have a reasonable chance of successfully proving his liability under s. 138.3(1)(c) of the *OSA* at trial.

#### ***Defendant Bailey***

152 Bailey was CFO of Arctic as of December 29, 2006 and continued to hold that position at least for the balance of the Class Period. Prior to that date, from October 6, 2003 to December 29, 2006, Bailey was the Vice President of Accounting and Corporate Comptroller of Arctic. The defendants have admitted for purposes of this motion that Bailey was a *de facto* officer of the Income Fund. As did McMahon, Bailey signed Form 52-109FT2 throughout the Class Period certifying that he reviewed the impugned documents and that they did not contain any untrue statements. He also signed some of the impugned documents directly. As is the case with McMahon, I find that the plaintiffs have established at least a reasonable possibility of success at trial as against Bailey as an officer of the Income Fund for the class period starting December 29, 2006.

153 For the period prior to December 29, 2006, when Bailey held the position of the VP of Accounting and Corporate Comptroller of Arctic, the plaintiffs characterize this position as an "officer" of the Income Fund. They rely on *Momentas Corp., Re 2006 LNONOSC 778* at para. 101 where the Ontario Securities Commission ("OSC") articulated the test for determining if a person is a *de facto* director or officer. The OSC found that if a person is "an integral part of the mind and management of the company," then that person is a *de facto* director or officer. The defendants dispute this characterization and the application of the *Momentas Corp.* test to these facts. They state that the only evidence with respect to Bailey's role in Arctic prior to December 29, 2006, is a reference to Bailey, as one of the officers of Arctic, as senior management of the Income Fund. The defendants state that this is insufficient. I agree.

154 The plaintiffs plead that Bailey is liable as an "expert," as per s. 138.3(1)(e) of the *OSA* in his role as an officer of Arctic prior to December 29, 2006. "Expert" is defined in s. 138.1 of the *OSA*:

"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...

Prior to December 2006, Bailey was the VP of Accounting at Arctic. However, there is no evidence that statements, opinions or reports in the core documents made by Bailey prior to that date were made in his capacity as an "expert" (rather than as an officer of Arctic.) Further, there is no evidence that Bailey consented to being an "expert" as required by section 138.3(1)(e) (iii). I find that there is no reasonable possibility of establishing at trial that Bailey is an "expert" of the Fund.

155 The defendants have admitted that Bailey, as an officer of Arctic, is an "influential person" of the Fund from December 2006 onwards and I so find.

**Defendant Johnson**

156 The defendants have admitted that during the Class Period, Johnson was a director of Arctic. I have found that Arctic is an "influential person" as defined in s. 138.1 of the *OSA*. For purposes only of this motion, the defendants admit that Johnson, as a director of Arctic is an "influential person" of the Income Fund, as a "director" of Arctic, a subsidiary of the Income Fund.

157 I find that there is a reasonable possibility that the plaintiffs will succeed at trial against Johnson as an "influential person" of the Income Fund under s. 138.3(1)(d). In my view, a sufficiently strong inference can be drawn that Johnson as a director of a subsidiary of the Income Fund was in a position to knowingly influence the Income Fund to release the impugned documents.

**Proposed Defendant Larson**

158 The parties agree that during the Class Period, Larson was a senior Vice President, and from 2003 onwards, the Executive Vice-President of Arctic, although a resident and citizen of the United States. Based on my finding above, as an officer of Arctic, he was a *de facto* officer of the Income Fund.

159 As an officer of the Income Fund, liability would accrue against him if he authorized, permitted or acquiesced to the release of the impugned documents.

160 That leads me to the interpretation of the "acquiescence" threshold. The plaintiffs state that "acquiescence" is a low threshold which is met by Larson's position as Executive Vice-President of Arctic. They rely on *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (Ont. C.A.), in which the Court, at para. 47, stated that: "[t]o acquiesce' is to agree tacitly, silently or passively to something ... acquiescence implies unstated consent."

161 Both Cooley and Larson have admitted their involvement in certain anti-competitive conduct by Arctic in the U.S. through its American subsidiary, Arctic International.

162 The defendants rely on *JLL Patheon Holdings, LLC v. Patheon Inc.* (2009), 64 B.L.R. (4th) 98 (Ont. S.C.J.). In the context of a third-party proxy solicitation, the Court held at para. 49:

... the ordinary meaning of "acquiescence" upon which JLL relies carries with it the correlative that the party has at least some element of control over the act in question in the sense of being able to oppose successfully the occurrence of the legal consequences that flow from "acquiescence." This is captured by the reference to "implied consent" in the definition of "acquiesce" in Black's Law Dictionary 7<sup>th</sup> ed., which reads as follows: "To accept tacitly or passively; to give implied consent to (an act)." That concept is also present in the definition in the *Katsigiannis* decision.

163 As Larson (and as did Cooley), by virtue of his guilty plea, admitted his involvement in anti-competitive conduct in the United States, it is clear that he, as an officer of the Income Fund (which was a responsible issuer), was probably aware that at least certain of the core documents in question contained misrepresentations. That is sufficient, in my view, to find that there is a reasonable possibility that the plaintiffs will succeed at trial against Larson as a *de facto* officer of the Income Fund.

164 The plaintiffs have also asserted that Larson was "an influential person" who would have liability if he "knowingly influenced the release of the impugned documents." Though I am satisfied that the plaintiffs have met the test with respect to "acquiesce," I am not satisfied that they have done so with respect to "knowingly influenced the release of the documents." Accordingly, I find that the plaintiffs do not have a reasonable possibility of proving at trial that Larson is an "influential person" under s. 138.3 of the *OSA*.

**Proposed Defendant Cooley**

165 Cooley became Vice President, Sales and Marketing of Arctic prior to the filing of the third quarter 2005 Report. The plaintiffs claim no prior liability as against Cooley. Both Cooley and Larson are listed in the Income Fund's 2006 Annual Report as senior management.

166 The same reasoning as applied to Larson also applies to this proposed defendant. I find that the plaintiffs have a reasonable possibility of success against Cooley as a *de facto* officer of the Income Fund, a responsible issuer, under s. 138.3(1)(c), but not as an "influential person."

#### ***Evidence of Anti-Competitive Conduct***

167 To be granted leave, the plaintiffs must show that the evidence would support a finding, at least of a "reasonable possibility" that the Income Fund knew of or acquiesced in certain anti-competitive behaviour by one or more of its subsidiaries. To that end, the plaintiffs rely on two time periods, namely March 2002 to December 2004 and December 2004 to September 2008.

#### *March 2002 to December 2004*

168 During the period of 2002 - 2004, the plaintiffs allege that Arctic was engaged in unlawful, anti-competitive conduct in Alberta, as evidenced by an action filed by a competitor of Arctic, namely Polar Ice Express Inc. In this case, *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2007 ABQB 717 (Alta. Q.B.), released December 3, 2007, Polar Ice contended that Arctic unlawfully interfered with Polar Ice's contractual relations and commercial interests in 2002. The plaintiffs in the present case point to the following findings made by the trial judge:

- (a) In 2002, Arctic's sales manager for the Edmonton Region offered a \$10,000 bribe to an employee of a customer, to grant Arctic an exclusive contract to supply ice;
- (b) Arctic targeted stores approached by Polar and cut its price only to those stores;
- (c) Arctic made other offers to liquor outlets and to Sobeys to match or even undercut Polar's price as a direct and deliberate attempt to induce those businesses to breach their contracts with Polar;
- (d) The conduct of Arctic to that end was egregious which ordinarily would call for punitive damages;
- (e) The trial judge did not award punitive damages but awarded damages in the amount of \$50,000.

169 The plaintiffs state that this conduct was not disclosed during the class period, during which the defendants continued to represent themselves as "good corporate citizens."

170 In response, the defendants state:

- (a) It is unclear when the impugned activity became known to Arctic. As the decision was not released until December 2007, Arctic could not have been aware of those findings prior to that date.
- (b) The trial judge did not make a finding of systemic corporate wrongdoing.
- (c) This Alberta decision is not sufficient evidence to support a finding that the plaintiffs have a reasonable possibility of success at trial with regard to the 2002 - 2004 period.

171 The question is whether the defendants had knowledge of the conduct or Polar's allegations in that action prior to the release of that decision in December 2007. In my view, it is at least reasonably possible that the defendants were aware of the conduct or allegations raised in that action. Accordingly, I find that the plaintiffs have a reasonable possibility of success at trial with regard to the 2002 - 2004 period.

#### *December 2004 to September 2008*

172 In December 2004, Arctic International, a wholly-owned subsidiary of Arctic, and consequently the Income Fund, acquired the Party Time Ice group of companies ("Party Time") based in Michigan. Party Time was then the largest ice business in Michigan, serving a population base of ten million people.

173 In 2009, Arctic International admitted to its participation in an anti-competitive conspiracy in Michigan during the period of January 1, 2001 to at least July 17, 2007. Arctic International pleaded guilty to a charge of participating in a criminal, anti-competitive conspiracy in the United States. Under the terms of the plea agreement, Arctic International agreed to pay a fine of \$9 million U.S. Under the terms of the plea agreement, Arctic International admitted that:

Beginning January 1<sup>st</sup>, 2001, and continuing until at least July 17<sup>th</sup>, 2007, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, Michigan, metropolitan area. The charged conspiracy unreasonably restrained interstate trade and commerce, in violation of Section 1 of the Sherman Act...

174 Canadian counsel for the Income Fund and the Corporate Secretary testified under oath that Arctic International had participated in the conspiracy.

175 The plaintiffs state that from the acquisition of Party Time in December 2004 until the end of the Class Period, there should be no doubt that the Income Fund's subsidiary, Arctic International, was not a "good corporate citizen operating lawfully in a very competitive market," contrary to the representations in the defendant company's core documents.

176 The defendants state that the U.S. Department of Justice charges were not laid within the Class Period and there is no evidence that the defendants knew or ought to have known about the anti-competitive activities in Michigan.

177 Although the evidentiary trail at this stage is not perfect, I nevertheless conclude that the plaintiffs have demonstrated at least a 'reasonable possibility' of success at trial with respect to the period of December 2004 to the end of the Class Period.

178 In the context of this leave motion, the defendants, as they did in the motion to strike, raised the concern that the plaintiffs failed to adequately plead an "anti-competitive conspiracy." As I did in the strike motion and based on the same reasoning, I find that the pleading of an anti-competitive conspiracy may stand.

### **Conclusion**

179 For reasons noted, I find that the plaintiffs have met the "leave test" under s. 138.8 of the *OSA*. The plaintiffs may pursue a statutory claim for misrepresentation in the secondary market under s. 138.3(1) of the *OSA* against the defendants, and the proposed defendants Cooley and Larson, subject to my findings in these reasons. An order may go granting the plaintiffs' leave to plead the causes of action in Part XXIII.1 of the *OSA*, and that the proposed defendants, Cooley and Larson may be added as party defendants.

### **C. Certification Motion**

180 The plaintiffs, by motion, seek an order certifying this action as a class proceeding.

181 Section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") articulates the test for 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.

182 Certification of a class proceeding is mandatory if all five of the s. 5(1) requirements are met.

183 In considering the requirements detailed in s. 5(1) of the *CPA*, I remain mindful of these additional provisions in the *CPA*:

5(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

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.

184 The test for certification is a procedural endeavour. It is not meant to be a test of the merits of the action. The question at a certification stage is not whether the plaintiffs' claims are likely to succeed on the merits, but whether the action can be appropriately prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

185 This point was further developed by the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 50:

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

186 I also note this general observation on class proceedings by van Rensburg J. in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 10:

**10.** Class actions offer three important advantages. They serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. By allowing fixed litigation costs to be divided over a large number of plaintiffs, access to justice is improved by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public (this is the "behaviour modification" element) (*Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, paras. 27-29). See also *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 14-16.

**Section 5(1)(a) CPA: Do the pleadings disclose a cause of action?**

187 Section 5(1)(a) articulates the same test I addressed above in the defendants' motion to strike.

188 The *CPA* is remedial and should be given a broad and liberal interpretation, as affirmed by McLachlin C.J.C. in *Hollick*, *supra* at paras. 14-16:

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

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

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

**15.** The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class members would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

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

motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.

189 I also note the principles applicable to a s. 5(1)(a) determination articulated by Cumming J. in *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 17:

- (a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
- (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
- (d) the novelty of the cause of action will not militate against the plaintiff;
- (e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
- (f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information: *Hunt v. T & N plc* [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.), at pp. 990-91 S.C.R.; *Anderson v. Wilson* 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R.; *Hollick, supra*, at para. 25; *M.C.C. v. Canada (Attorney General)* [2004] O.J. No. 4924, 247 D.L.R. (4<sup>th</sup>) 667 (C.A.), at para. 41.

190 The plaintiffs assert that the pleadings disclose at least four valid causes of action:

*(i) Section 130 of the OSA*

191 Within the three year limitation period from September 25, 2005 to September 25, 2008, the plaintiffs allege that their pleadings disclose a valid cause of action under s. 130 of the *OSA*. This section creates primary market remedies by assigning liability to issuers and associated persons when misrepresentations are published in prospectuses. As the plaintiffs' pleadings claim that the prospectuses issued May 17, 2006 and January 25, 2007 contained misrepresentations, the Statement of Claim discloses a valid cause of action under s. 130 of the *OSA*.

192 The plaintiffs also advance a claim under s. 130 of the *OSA* as against the Income Fund and its trustees: Clark, Nagy, Filmon and Swaine. Section 130(1)(e) of the *OSA* assigns liability to those who signed the prospectuses. In addition to the trustees, the defendant McMahon signed both prospectuses and the defendant Bailey signed the prospectus issued January 25, 2007.

193 On the defendants' motion to strike, I ruled that the plaintiffs' claim under s. 130 of the *OSA* may stand subject to proposed amendments to the Statement of Claim for which I granted leave to amend.

*(ii) Negligence Simpliciter*

194 On the defendants' motion to strike, I ruled that the plaintiffs' claim of negligence simpliciter may stand.

*(iii) Negligent Misrepresentation*

195 On this cause of action I have ruled, in response to the defendants' motion to strike, that this pleading may stand.

*(iv) Breach of Trust*

196 The plaintiffs plead a breach of trust against the trustees of the Income Fund, namely Clark, Nagy, Filmon and Swaine. This claim is not contested by the defendants.

197 Accordingly, I find that the pleadings disclose a cause of action as required by s. 5(1)(a).

**Section 5(1)(b) CPA: Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?**

198 The plaintiffs have defined the proposed class as follows:

All persons and entities, wherever they may reside or be domiciled, other than Excluded Persons, who acquired Units of [the Income Fund] during the period from March 13, 2002 to September 16, 2008.

199 This portion of the certification test is meant to address three jurisprudential principles, noted in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10 and in *Hollick, supra* at para. 17:

- (a) Identifying those persons who have a potential claim for relief against the defendants;
- (b) Defining the parameters of the lawsuit so as to identify those persons who are bound by the result; and
- (c) Describing who is entitled to notice pursuant to the Act.

200 McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) ("WCSC"), an appeal arising from the Alberta class action legislation with a test for certification similar to the CPA, stated at para. 38:

**38.** The [class] 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.

201 In analyzing this step of the certification test, I am also guided by these comments in *Hollick, supra* at para. 21:

**21.** The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended...

202 I note that the lack of territorial limitations to the proposed class is not a barrier to certification: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 129 and *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 (Ont. S.C.J.) at paras. 13-19.

203 The defendants state that the class as proposed is too large. They say that it is unworkable, as it includes all those who purchased units during the Class Period and not just those who still held units at the end of the Class Period in September 2008. These unitholders, the defendants state, were unaffected by the alleged misrepresentations, as they sold prior to the fall in the market price triggered by the DoJ investigation.

204 It may well be that individual issues may arise and that certain subclasses in due course may need to be identified. That issue would appear to be addressed by s. 6 of the CPA. I am also guided by these comments in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at paras. 106 and 107:

**106.** In any event, a proposed class will not be overbroad simply because it may include persons who ultimately will not have a claim against the defendants...

**107.** The submission by the defendants in this case that the class is overbroad because some of the class members may not have claims depends on their contention that there will be individual issues (such as reliance and damages) to be decided after the common issues have been determined. While the plaintiffs assert that reliance (based on the efficient market theory) and damages (contending that an aggregate assessment will be appropriate) will not be individual issues

in this case, even if they are wrong and individual issues remain after the determination of the common issues, this is not an impediment to certification. As Cullity J. noted in *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (S.C.), at para. 69, "whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant's liability, it will always be possible — and invariably likely — that an acceptable class will include persons who will not have valid claims".

205 Although "early sellers" may eventually be found not to have suffered a loss as a result of the alleged misrepresentations, it is arbitrary at this stage to so conclude and this issue should be left for trial: *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.) at para. 122.

206 I am also guided by these comments of the Supreme Court of Canada in *WCSC*, *supra* at para. 39:

**39.** ...there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.

207 In my view, any possible individual issues which may arise pale in comparison to the issues of the proposed class. Any such individual issues can and should be addressed by the trial judge and should not stand in the way of certification.

208 I find that the proposed class meets the requirements for an identifiable class under s. 5(1)(b).

#### ***Section 5(1)(c) CPA: Do the claims raise common issues?***

209 The term "common issue" is defined in the *CPA*:

1. "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;

210 Cumming J. in *Ford*, *supra* at para. 33 summarized the law regarding this step of the certification test:

**33.** The definition of "common issues" in s. 1 of the *CPA* "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high". The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim ... is not required." This requirement has been described by the Court of Appeal "as a low bar". The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis". The common issues question should be approached purposively: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), at pp. 248-49 O.R.; *M.C.C. v. Canada*, *supra*, at para. 52; *Western Canadian Shopping Centres*, *supra*, at para. 39; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, at para. 29.

211 The underlying question, as held by the Supreme Court of Canada, is "whether allowing the suit to proceed as a representative one would avoid duplication of fact-finding or legal analysis": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 29.

212 The plaintiffs have proposed this list of common issues:

[1] Did some or all of the following disclosure documents of the Income Fund contain a misrepresentation?

(The plaintiffs provide a detailed list of core documents issued by the Income Fund between March 13, 2002 and September 2008.)

[2] If the answer to [1] is yes, are the defendants or some of them liable to Class Members pursuant to Section 138.3 of the *Securities Act*?

[3] If the answer to [2] is yes, what damages are payable by each defendant in respect of that liability?

[4] If the answer to [1] regarding the prospectus of May 17, 2006 and of January 25, 2007 is yes, are the defendants or some of them liable to Class Members or some of them pursuant to s. 130 of the *Securities Act*?

[5] If the answer to [4] is yes, what damages are payable by each defendant in respect of that liability?

[6] Did the defendants, or any of them, owe the Class Members a duty of care? If so, which defendants owed what duty and to whom?

[7] If the answer to [6] is yes, did any or all of the defendants breach their duty of care? If so, which defendants breached their duty and how?

[8] If the answer to [7] is yes, did the defendants' breach of their duty of care cause damage to those Class Members? If so, what is the appropriate measure of that damage?

[9] In respect of the Class Members' negligent misrepresentation claim, what is the procedure whereby class members must demonstrate their individual reliance upon the defendants' misrepresentations?

[10] Did the trustees or some of them commit a breach of trust?

[11] If so, what damages are payable by the Trustees to the Class Members in respect of their breach of trust?

[12] Is the Income Fund vicariously liable or otherwise responsible for the acts of the other defendants?

[13] Is Arctic Glacier Inc. vicariously liable or otherwise responsible for the acts of the other defendants?

[14] Should one or more defendants pay punitive damages to the Class? If so, who, in what amount, and to whom?

[15] Should the defendants pay the cost of administering and distributing the recovery? If so, which defendants should pay, and how much?

213 The plaintiffs assert that these claims will substantially advance the case on behalf of the Class. They have characterized the misrepresentations throughout the class period as a single ongoing misrepresentation and assert that the unit prices reflected that misrepresentation. As such, the plaintiffs state, the effect of the misrepresentation on the unit prices over time is an issue common to every Class Member.

214 The defendants concede all but five of the proposed common issues. The defendants challenge common issues 6, 7, 8, 9 and 14. The defendants raise these questions:

[6] Did the defendants or any of them, owe the Class Members a duty of care?

215 On the defendants' motion to strike the claim of negligence simpliciter, I declined to strike that claim. I noted that the pleadings with respect to that claim assert that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants.

216 Paragraph 97 of the Statement of Claim, referring to the allegations of negligence, reads:

97. As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices and suffered a corresponding loss...

217 I find that this is a common issue.

[7] If the answer to [6] is yes, did any or all of the defendants breach their duty of care?

218 Although the alleged breach, namely the misrepresentations, took place over a period of about six years, these alleged misrepresentations repeated themselves and differed very little, if any, in substance from one to the other. In my view, these representations can be viewed as a single misrepresentation. Accordingly, I find that this purported breach would likely not require individual assessment and thus qualifies as a common issue.

[8] If the answer to [7] is yes, did the defendants' breach of their duty of care cause damage to those Class Members?

219 The pleaded damage to the Class Members is either a loss of value of their securities or their purchase of them at inflated values. These, in my view, are common issues.

220 In arriving at that view, I am guided, in part, by these comments of van Rensburg J. in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 182:

**182.** Ultimately, the question when determining the common issues is to distinguish between issues that might be common to the class (or a subclass) and individual issues, and to ensure that issues that will require individual determinations are not included in the list of common issues. The fact that not all members of the class may be affected in the same way by the determination does not prevent the issue from being included as a common issue. Again, the cases emphasize that a common issue is not necessarily one where success for one member of the class necessarily results in success for all members.

***[9] In respect of the Class Members' negligent misrepresentation claim, can class members' reliance be adequately demonstrated as a common issue?***

221 The defendants assert that reliance is inherently individual and thus cannot be a common issue. They state that the individual nature of the reliance requirement is such that it would overwhelm the other common issues. The defendants rely in part on *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (Ont. S.C.J.). In that case, Cumming J. refused to certify a negligent misrepresentation claim, as the outcome of such cases would depend on a "myriad of individual evidentiary factors." He stated at para. 39: "[a] common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant."

222 The plaintiffs suggest that reliance can be inferred using the efficient market theory which presumes that misrepresentations to the market are reflected in the unit price. Thus, any purchaser can be deemed or inferred to have relied on such statements through the act of purchasing units.

223 It is generally accepted that a cause of action in negligent misrepresentation requires proof of reliance. For that reason, courts have concluded that negligent misrepresentation claims are unsuitable for certification: *McKenna v. Gammon Gold Inc.*, *supra* at para. 135.

224 As found by Strathy J. in *Gammon Gold*, *ibid.* at paras. 136 and 137:

**136.** Issues of reasonable reliance have usually been considered to be individual issues that are not capable of being resolved on a common basis: *Lacroix v. Canada Mortgage and Housing Corp.*, [2009] O.J. No. 316, 68 C.P.C. (6<sup>th</sup>) 111 (S.C.J.) at para. 97; *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6<sup>th</sup>) 41, [2006] O.J. No. 3748 (S.C.J.), at paras. 91-93; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 57; *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.) at paras. 57-60.

**137.** Exceptions may be made where there is a single representation made to all members of the class or there are limited number of representations that have a common import: see, for example, *Hickey-Button v. Loyalist College of Applied Arts and Technology*, 211 O.A.C. 301, [2006] O.J. No. 2393.

225 Proof of reliance in a case of negligent misrepresentation can be made by inference, as opposed to direct evidence: *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.) and *Lawrence v. Atlas Cold Storage Holdings Inc.* (2006), 34 C.P.C. (6th) 41 (Ont. S.C.J.). Two recent actions were certified in the face of claims of negligent misrepresentation: see *McCann v. CP Ships*, *supra* and *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.).

226 Strathy J. in *Gammon Gold*, *supra* came to a different conclusion. He described the misrepresentations before him at paras. 160-161:

**160.** In this case, multiple misrepresentations are alleged ... in press releases, regulatory filings, conference calls, annual reports and a multitude of other written and oral forms. The alleged misrepresentations relate to a variety of complaints, not simply the level of gold production. The plaintiff complains of undisclosed equipment failures, contracts with insiders, stock option expenses, non-compliant financial statements and inadequate disclosure controls. Individual inquiries would have to be made into what alleged misrepresentations were made to each class member and whether he or she relied upon any of those representations...

**161.** There is no basis on which reliance could be resolved as a common issue. The need to determine the issue individually would give rise to a multitude of questions in each case concerning the representations communicated to a particular investor, the experience and sophistication of the investor, other information or recommendations made to the investor and whether there was a causal connection between the misrepresentation(s) and the acquisition of the security...

227 It appears, as stated by Rady J. in *McCann*, *supra* at para. 59 that the case law on this issue is "in a state of evolution." I recognize that depending on the type and number of alleged misrepresentations in a particular case, these could in certain circumstances overwhelm the common issues and would, as such, not be suitable to be resolved as a class proceeding. I find that the alleged misrepresentations made in this case in core documents are consistent and repetitive and can essentially be treated as one. As such, I distinguish these misrepresentations factually from those detailed in para. 160 in *Gammon Gold*, *supra*.

228 In my view, the alleged misrepresentations here can be readily managed as a common issue and may proceed as such.

[14] Should one or more defendants pay punitive damages to the Class? If so, who, in what amount, and to whom?

229 I am guided by and accept the reasoning on this issue by Strathy J. in *Gammon Gold*, *supra*. He distinguished *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.) but accepted Perell J.'s reasoning on the question of whether a claim for punitive damages is appropriate for certification. Strathy J. held at para. 170:

**170.** Applying Justice Perell's test to the case presently before me, I find that the requirements for the certification of punitive damages as a common issue have been met. The nature of the present securities class action, as opposed to the product liability action before Perell J., makes the degree of misconduct, causation, harm, and the quantification of compensatory damages determinable by the common issues judge. There is no need for individual proof of loss to enable a common issues judge to assess punitive damages.

230 I agree. The claim for punitive damages may proceed as a common issue.

**Section 5(1)(d) CPA: Would a class proceeding be the preferable procedure for resolution of the common issues?**

231 In assessing this question, one should start with *Hollick*, *supra* at paras. 27-31. The Ontario Court of Appeal in *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 (Ont. C.A.) summarized the principles set out in *Hollick* as follows (para. 69):

1. The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
2. "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
3. The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

232 The plaintiffs state that in view of the large number of potential class members, certification of this action would enhance judicial economy, even if it would not resolve the claims of every class member. This was the finding in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at para. 58: "[c]ertification can be the preferable procedure in situations far short of final resolution of the lawsuit."

233 The plaintiffs also rely on *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 38:

**38.** ...[T]here is no reasonably available alternative procedure to a class proceeding which is preferable, since the decision in one action will not bind the defendants with respect to the common issues. Given these facts, a class proceeding will promote the objective of judicial economy.

234 The defendants interpret "judicial economy" differently. They state that as the DoJ in the United States has already completed a full investigation and charged culpable individuals and entities, a further judicial inquiry would not serve the goal of judicial economy. They state that this proposed litigation would impose crippling investigation-related costs on existing security-holders for a second time. However, the DoJ investigation was in relation to illegal acts in the United States and had no bearing on possible losses suffered by individual investors for whom compensation is sought in this proposed class action. In my view, in a judicial economy inquiry, the focus should be on the preferable procedure for hearing specific claims, not on whether litigating a specific issue would be economical for the defendant corporation.

235 The defendants have not advanced any evidence to suggest an alternate procedure for redress for Class Members whose securities have lost value as a result of the alleged misrepresentation: see *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, [2002] O.J. No. 4781 (Ont. S.C.J.) at para. 27:

**27.** ...it would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test cases or similar proceedings are preferable to a class proceeding. This is a simple shopping list of procedures that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred. The defendant must support the contention that another procedure is to be preferred with an evidentiary foundation. As stated in *Hollick* [at para. 22]:

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.

236 The plaintiffs urge that certification will enhance access to justice for Class Members, as the cost of litigating the matter individually would be far greater than the particular loss at issue. In my view, certification here clearly advances the interests of

access to justice. The claims of the Class Members have yet to be investigated by any Canadian judicial body and the American DoJ investigation into illegal activity is not an appropriate substitute.

237 As noted in *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.) at para. 99, "the objective of behaviour modification is to ensure that actual and potential wrongdoers do not ignore their obligations to the public." The defendants submit that the fines imposed as a result of the guilty pleas in the United States have already achieved the objective of behaviour modification. However, as noted by the plaintiffs, this action is not brought to seek compensation for anti-competitive behaviour, but for the failure to disclose such anti-competitive behaviour, a wrong not addressed by those guilty pleas.

238 In finding that the plaintiffs have met the s. 5(1)(d) requirement, I also rely on these comments by Leitch J. in *Metzler Investment GmbH v. Gildan Activewear Inc.* (September 24, 2010), Doc. 58574CP (Ont. S.C.J.) at para. 11:

**11.** ...the costs of pursuing this action on an individual basis would be prohibitive and uneconomical for any Class Member thereby reducing access to justice and insulating the defendants from these claims. In addition, a class proceeding allows a single determination of the significant legal issues in this case thus eliminating the prospect of a multiplicity of proceedings. Finally, as noted by the plaintiff, its ability to access the courts to prosecute claims against violators of securities law is an important means of enhancing investor protection and restoring investor confidence, while creating an incentive for public corporations to take precautions which will protect market integrity.

***Section 5(1)(e): Is there a representative plaintiff who:***

- i. *will fairly and adequately represent the interests of the class?*
- ii. *has produced a workable litigation and notification plan?*
- iii. *does not have conflicts of interest with other class members on the common issues?*

239 In assessing adequate and fair representation of class interests, the Supreme Court in *WCSC, supra* noted at para. 41:

**41.** In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class...

240 The plaintiffs note that both representative plaintiffs indicated their intention to prosecute the claims with the view to advancing the best interests of the Class Members. There is no evidence to suggest otherwise.

241 The plaintiffs have prepared a litigation plan. As stated in *Fakhri v. Alfalfa's Canada Inc.*, [2003] B.C.J. No. 2618 (B.C. S.C.) at para. 77:

**77.** The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issue are demonstrated by the class members.

242 The defendants have not refuted the sufficiency of the plaintiffs' litigation plan.

243 Any conflicts of interest must be actual and current to disqualify the proposed representative plaintiffs: *Eaton v. HMS Financial Inc.*, [2008] A.J. No. 1127 (Alta. Q.B.) at paras. 186-187. The defendants' suggestion that the representative plaintiffs may have a conflict of interest is but speculative. There is nothing before me to support a finding of an actual conflict.

244 I find that the plaintiffs have met the s. 5(1)(e) requirement.

245 I am satisfied that this action should be certified.

246 For a summary of my findings on the three motions addressed above, see Schedule A, attached.

247 If required, counsel may bring the matter of costs before me within 60 days.

#### Schedule A — Table of Findings

##### ***Motion to Strike Pleadings***

	<b><i>Finding</i></b>
a. Common law claims against the Income Fund	Motion to strike granted
b. "Anti-Trust Conspiracy"	Motion to strike dismissed
c. Section 130 of the <i>OSA</i>	Motion to strike dismissed{ <sup>*</sup> }
d. Common law claim in negligence	Motion to strike dismissed
e. Common law claim in negligent misrepresentation	Motion to strike dismissed

**Notes:** \* However, plaintiffs must amend Statement of Claim to plead all provincial securities acts upon which they wish to rely. In addition, the s. 130 claim is struck as against the defendant Johnson.

##### ***Motion for Leave***

	<b><i>Finding</i></b>
Is the failure to file evidence fatal to the defendants' case?	No
Does s. 138.3 apply prospectively?	Yes
The test for leave (s. 138.8)	Yes
a. Is the action brought in good faith?	Yes
b. Is there a reasonable possibility of success at trial...	Yes - leave granted
i. Against the Income Fund?	No - leave denied
ii. Against Arctic as a "responsible issuer"?	Yes - leave granted
iii. Against Arctic as an "influential person"?	Yes - leave granted
iv. Against trustees as "directors"?	Yes - leave granted
v. Against trustees as influential persons"?	Yes - leave granted
vi. Against McMahon as an "officer"	Yes - leave granted
vii. Against Bailey as an "officer" from Dec. 29, 2006 onwards?	Yes - leave granted
viii. Against Bailey as an "officer" prior to Dec. 29, 2006?	No - leave denied
ix. Against Bailey as an "expert"?	No - leave denied
x. Against Bailey as an "influential person" from Dec. 29, 2006 onwards?	Yes - leave granted
xi. Against Johnson as a "director"?	Yes - leave granted
xii. Against Johnson as an "influential person"?	Yes - leave granted
xiii. Against Larson as an "officer"?	Yes - leave granted
xiv. Against Larson as an "influential person"?	No - leave denied
xv. Against Cooley as an "officer"?	Yes - leave granted
xvi. Against Cooley as an "influential person"?	No - leave denied
xvii. That the Income Fund knew or acquiesced to the anti-competitive conduct from 2002-2004?	Yes - leave granted
xviii. That the Income Fund knew or acquiesced to the anti-competitive conduct from 2004-2008?	Yes - leave granted

***Motion for Certification***

	<b><i>Finding</i></b>
Section 5(1)(a): Do the pleadings disclose a cause of action?	Yes
Section 5(1)(b): Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?	Yes
Section 5(1)(c): Do the claims raise common issues? The defendants concede all but the following proposed common issues:	
a. Common issues #6, #7 and #8?	Yes
b. Common issue #9?	Yes
c. Common issue #14 common?	Yes
Section 5(1)(d): Is a class proceeding the preferable procedure for resolution of the common issues?	Yes
Section 5(1)(e): Is there a representative plaintiff who...	
a. Will fairly and adequately represent the interests of the class?	Yes
b. Has produced a workable litigation and notification plan?	Yes
c. Does not have conflicts of interest with other class members on the common issues	Yes

*Defendants' motion granted in part; plaintiffs' motions granted.*

# **TAB 14**

**Most Negative Treatment:** Check subsequent history and related treatments.

2014 ONSC 4118  
Ontario Superior Court of Justice

Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP

2014 CarswellOnt 9299, 2014 ONSC 4118, 242 A.C.W.S. (3d) 776, 31 B.L.R. (5th) 46

**Excalibur Special Opportunities LP, Plaintiff  
and Schwartz Levitsky Feldman LLP, Defendant**

Perell J.

Heard: June 26-27, 2014

Judgment: July 8, 2014

Docket: CV-12-466694-00CP

Proceedings: additional reasons at *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP (2014)*, 2014 CarswellOnt 11111, 2014 ONSC 4751, Perell J. (Ont. S.C.J.)

Counsel: Margaret L. Waddell, Nasha Nijhawan, for Plaintiff  
Tim Farrell, Jordan Page, for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; International; Securities; Torts

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiffs brought motion for certification — Motion dismissed — Although defendant had strong argument that it owed investors no duty of care, it was not plain and obvious that pleaded cause of action for negligence could not succeed — Plaintiff's case was not built on any falsity in financial statement but rather on notion that defendant was not in position to opine given producer's lack of financial controls and so should not have issued clean audit report — It would be for trial judge to determine whether novel claim was within range of exceptions to general principles limiting recoveries for pure economic losses in negligence-based torts — It was not plain and obvious that negligent misrepresentation claim was legally untenable.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiffs brought motion for certification — Motion dismissed — Identities of 57 members of proposed class of accredited investors were ascertainable so defining them by definition seemed to be mere technicality — Global class should not be certified in case at bar — It would not seem reasonable to proposed class members that their legal claims be found to have real and substantial connection to Ontario — Residence of defendant in Ontario was essentially only connection to Ontario — Investors were non-residents of Ontario making substantial investments in American dollars in American corporation in transaction governed by American corporate and securities law — While transaction included audit report from Ontario auditor, standard of care for that audit would be determined by American accounting standards under which report was provided — Ontario did not have substantial connection with this American financing and corporate reorganization.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiffs brought motion for certification — Motion dismissed — Theory of plaintiff's case was that defendant did not meet applicable accounting standards when it gave clean audit report — Plaintiff complained that audit report gave credence to financial statements that, even if they happened to correctly state assets, liabilities and accounts, could not be relied on due to producer's lack of financial controls — Pleadings, as revised, raised common issues as to whether defendant breached duty and standard of care and made misrepresentation by delivering audit report — Precedent establish that reasonable reliance, causation and ultimate liability questions did not raise common issues as they were dependent on individual findings of fact for each investor.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiffs brought motion for certification — Motion

dismissed — Plaintiff's claim for its almost \$1 million investment would justify taking on litigation risk, so it genuinely did not need class action — Plaintiff's claim could be joined to other top 10 investors in action without needing certification, and it would have heft of being claim for around \$3 million — There were no significant economic barriers to litigating by plaintiff or any other accredited investors — Common issues trial, dealing with existence of duty of care and of misrepresentations, would be manageable and would make substantial contribution to resolving claims of all class members — Class action as whole would achieve only modest judicial economy over individual actions or joinder because individual issue trials would be needed for reliance, causation, damages and any claims of contributory negligence — Joinder of claims would be preferable proceeding to class action.

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*Silver v. Imax Corp.* (2011), 2011 ONSC 1035, 80 B.L.R. (4th) 228, 2011 CarswellOnt 877, 105 O.R. (3d) 212 (Ont. S.C.J.) — considered

*Silver v. Imax Corp.* (2012), 2012 ONSC 1047, 2012 CarswellOnt 3621, (sub nom. *Silver v. IMAX Corp.*) 110 O.R. (3d) 425 (Ont. S.C.J.) — referred to

*Silver v. Imax Corp.* (2013), 2013 CarswellOnt 3202, 2013 ONSC 1667, 36 C.P.C. (7th) 254 (Ont. S.C.J.) — referred to

*Silver v. Imax Corp.* (2013), (sub nom. *Silver v. IMAX Corp.*) 117 O.R. (3d) 616, 2013 ONSC 6751, 2013 CarswellOnt 14979 (Ont. S.C.J.) — referred to

*Voutour v. Pfizer Canada Inc.* (2008), 2008 CarswellOnt 4673, 64 C.P.C. (6th) 136 (Ont. S.C.J.) — referred to

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

*Wilson v. Servier Canada Inc.* (2000), 2000 CarswellOnt 3257, 50 O.R. (3d) 219, 49 C.P.C. (4th) 233 (Ont. S.C.J.) — referred to

*Wuttunee v. Merck Frosst Canada Ltd.* (2009), 2009 SKCA 43, 2009 CarswellSask 191, 69 C.P.C. (6th) 60, 324 Sask. R. 210, 451 W.A.C. 210, [2009] 5 W.W.R. 228 (Sask. C.A.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, 2002 CarswellOnt 4272 (Ont. S.C.J.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2003), 2003 CarswellOnt 998, 169 O.A.C. 343, 64 O.R. (3d) 42 (Ont. Div. Ct.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 70 C.P.C. (6th) 27, 2009 CarswellOnt 2533, 96 O.R. (3d) 252, 250 O.A.C. 87 (Ont. Div. Ct.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2010), 100 O.R. (3d) 721, 87 C.P.C. (6th) 375, 320 D.L.R. (4th) 612, 265 O.A.C. 134, 2010 ONCA 466, 2010 CarswellOnt 4305 (Ont. C.A.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2011), 417 N.R. 397 (note), 2011 CarswellOnt 499, 2011 CarswellOnt 500, [2011] 1 S.C.R. x (note), 284 O.A.C. 396 (note) (S.C.C.) — referred to

**Statutes considered:**

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 6 — considered

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

*Negligence Act*, R.S.O. 1990, c. N.1

Generally — referred to

*Securities Act*, R.S.O. 1990, c. S.5

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

*Securities Act of 1933*, 15 U.S.C. 2A

Generally — referred to

*Securities Exchange Act of 1934*, 15 U.S.C. 2B; 48 Stat. 881

Generally — referred to

MOTION by plaintiff for certification of class action against defendant accounting firm, for negligence or negligent misrepresentation in production of clean audit report.

**Perell J.:**

**A. Introduction**

1 The Plaintiff, Excalibur Special Opportunities LP, is a Canadian investor. Under United States legislation, it was one of 57 "accredited investors" that invested in Southern China Livestock, a Chinese hog producer, whose American owners were reorganizing and financing operations with a reverse takeover and a private placement of common shares and warrants.

2 The class of investors was comprised of 50 Americans, five investors from around the world, and two Canadians.

3 In 2010, the American promoters and marketers of the private placement provided the accredited investors with a Private Placement Memorandum that indicated that the plan was to eventually go public under U.S. securities legislation. The Private Placement Memorandum included as an exhibit an Audit Report prepared by the Defendant, Schwartz Levitsky Feldman LLP

("SLF"), which is a Toronto and Montreal accounting firm that had a group that specialized in the audits of Chinese businesses and that was qualified to give an opinion in accordance with Generally Accepted Accounting Principles ("GAAP") and the standards of the Public Company Accounting Oversight Board (United States) ("PCAOB").

4 In this proposed class action against SLF, Excalibur says that SLF provided a "Clean Audit Report" and that without this Clean Audit Report, the private placement would never have gotten off the ground. Excalibur says that all the accredited investors relied on the Clean Audit Report in making their decision to invest in Southern China Livestock.

5 The 57 investors invested \$7,594,965, but within a year they learned that Southern China Livestock lacked financial controls over its all-cash-business. Excalibur says that "this shocking disclosure" was entirely at odds with a Clean Audit Report, because under generally accepted accounting principles, a Clean Audit Report is categorically not possible for an all-cash-business that lacks financial controls.

6 Following the shocking disclosure, within 22 months, Southern China Livestock went out of business, the investors lost their investment, and Excalibur commenced a class action on behalf of the accredited investors.

7 Excalibur sues SLF to recover the \$7,594,965 lost by the investors, and it now seeks to certify its action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

8 Excalibur submits that in providing a Clean Audit Report, SLF committed the torts of negligent misrepresentation and negligence causing the investors to lose their investment. In other words, Excalibur submits that in breach of a duty of care, SLF spoke falsely (negligent misrepresentation) and alternatively in breach of a duty of care, SLF ought not to have spoken at all (negligence).

9 SLF resists certification and submits that none of the certification criteria have been satisfied.

10 In particular, SLF submits that: (a) Excalibur has not pleaded a tenable cause of action for negligent misrepresentation and negligence; (b) the proposed class definition is overly broad; (c) a global class definition should not be certified; (d) the proposed common issues do not satisfy the test for common issues; (d) a class action is not the preferable procedure because Excalibur does not need a class action to obtain access to justice and the individual issues overwhelm the utility of a common issues trial; (e) Excalibur is not an appropriate Representative Plaintiff; and (f) Excalibur's litigation plan is deficient and unfair to SLF's procedural rights because 56 of the 57 Class Members are avoiding a non-residents' civil procedure obligation to post security for costs.

11 For the reasons that follow, I conclude that: (a) Excalibur has pleaded a tenable action for negligent misrepresentation and negligence, and, therefore, the first criterion for certification is satisfied; (b) subject to the issue of a global class definition, the class definition is not overly broad; (c) although a global class definition may be certified, Excalibur's action is not appropriate for a global class and, therefore, the second criterion for certification is not satisfied; (d) some of the proposed common issues satisfy the common issues criterion, and the third criterion for certification is satisfied; (e) the preferable procedure criterion is not satisfied in the case at bar; and (f) standing alone (i.e. on the assumption that the other criteria have been satisfied) the fifth criterion for certification is satisfied because Excalibur is an appropriate Representative Plaintiff and its litigation plan has no fatal deficiencies, but the plan and the notice of certification should specify that Class Members from outside of Ontario may be required to post security for costs for their individual issues trials.

12 In the result, the first criterion (cause of action), the third criterion (common issues) and the fifth criterion (representative plaintiff) are satisfied, but the second criterion (class definition) and the fourth criterion certification motion (preferable procedure) are not satisfied.

13 Since all of the criterion for certification must be satisfied, the motion for certification is dismissed.

## B. Factual Background

### 1. The Investment in Southern China Livestock and its Aftermath

14 Excalibur is a limited partnership organized under the laws of Manitoba operating as an investment fund based in Toronto. It is registered as an extra-provincial limited partnership in Ontario. It invests in small-cap private companies and small-cap publicly traded companies.

15 SLF is a firm of chartered accountants with offices in Toronto and Montreal. It is registered with the PCAOB and is licenced to audit companies listed in the United States.

16 SLF has a "China Group" led by Gerry Goldberg, a partner in its Toronto office. The firm holds itself out to be an expert in conducting financial due diligence and auditing services for companies based in China.

17 Southern China Livestock owned or operated 19 hog farms in China through subsidiary corporations. It itself was owned by American corporations.

18 On January 28, 2010, SLF issued an Audit Report with respect to Southern China Livestock's fiscal year-ends' September 30, 2008 and September 30, 2009. The single-page Audit Report was addressed to "the Shareholders of Southern China Livestock".

19 The Audit Report, which accompanied the financial statements, stated:

Schwartz Levitsky Feldman LLP

CHARTERED ACCOUNTANTS

LICENSED PUBLIC ACCOUNTANTS

TORONTO - MONTREAL

**REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM**

To the Shareholders of Southern China Livestock International Inc.

We have audited the consolidated balance sheets of Southern China Livestock International Inc. as at September 30, 2009 and 2008 and the consolidated statements of income and comprehensive income, stockholders' equity and cash flows for the years then ended. These consolidated financial statements are the responsibility of the management of Southern China Livestock International Inc. Our responsibility is to express an opinion on these consolidated financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the consolidated financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

The company is not required to have nor were we engaged to perform, an audit of its internal control over financial reporting. Our audit included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the company's internal controls over financing reporting. Accordingly, we express no such opinion.

In our opinion, these consolidated financial statements referred to above present fairly, in all material respects, the financial position of Southern China Livestock International Inc. as of September 30, 2009 and 2008 and the results of its operations and its cash flows for the years then ended in accordance with generally accepted accounting principles in the United States of America.

Toronto, Ontario, Canada

January 28, 2010

1167 Caledonia Road

Toronto, Ontario, M6A 2X1

Tel: 416 785 5353

Fax: 416 785 5663

20 Pausing here, it is an important point to note that in this proposed class action, Excalibur does not specify in what way, if at all, Southern China Livestock's consolidated financial statements did not present fairly, in all material respects, its financial position and the results of its operations and its cash flows in accordance with GAAP. Rather, as noted above, Excalibur alleges that given the lack of adequate financial controls, the financial statements were not able to present Southern China Livestock's financial position in accordance with GAAP.

21 Returning to the narrative, in March 2010, Rodman & Renshaw LLP of New York, U.S.A., acted as placement agents for a private placement to purchase shares and warrants in Southern China Livestock.

22 Concurrently, with the private placement, Southern China Livestock, which itself was a Nevada company incorporated in 2009, was being reorganized pursuant to a reverse takeover of Expedite, 4 Inc., a Delaware company incorporated in 2007.

23 Southern China Livestock sought to raise between USD \$5 million and USD \$10 million by the private placement. Its stated plan was to use the proceeds primarily to acquire hog farms (73%), to create a fertilizer production line (12%), and to finance general working capital (15%).

24 The private placement was offered to "accredited investors" under an exemption to the prospectus requirements of the U.S. *Securities Act of 1993*. Investors were offered investment Units at a price of USD \$10 per Unit. Each Unit was comprised of two common shares of Southern China Livestock, and one warrant to purchase an additional common share.

25 Excalibur became interested in Southern China Livestock's private placement.

26 Suresh Madan is Executive Vice President and portfolio manager for Excalibur. He is a chartered financial analyst and highly experienced in reading financial statements and offering memorandum. He has an MBA degree. He is familiar with the standards of the PCAOB. Mr. Madan communicated with a representative of Rodman & Renshaw LLP.

27 On March 12, 2010 Mr. Madan received a copy of the Private Placement Memorandum, which is 230 pages in length, including 154 pages of attached exhibits. Exhibit B was SLF's Audit Report and the consolidated financial statements of Southern China Livestock.

28 Mr. Madan read the Private Placement Memorandum, in his words "page for page, word for word." It took him three to four hours of close reading. He then spoke to William Hechter, the President of Excalibur, and they discussed the investment opportunity and its risks.

29 The Private Placement Memorandum was the only material that Excalibur considered before deciding to invest in Southern China Livestock.

30 Mr. Madan's evidence was:

We were taking certain risks, no doubt. But we were also aware that this company had a U.S. certified form of auditor who had looked at the financial statements and had given a clean audit. That reassured us that the financial statements are

correct. ... The main comfort was the clean audit opinion, even though in a far-off geography. The clean audit opinion from a Toronto-based company was [a] very significant factor in that comfort.

31 Excalibur states that in deciding to participate in the private placement, in addition to relying on SLF's Audit Report, it relied on SLF's reputation and expertise as a licenced auditor, and its advertised experience in auditing Chinese companies.

32 The Private Placement Memorandum indicated that after the reverse takeover, Southern China Livestock would seek registration of its shares with the United States Securities and Exchange Commission ("SEC") for a public offering of its shares.

33 The Private Placement Memorandum included the following statements about the nature of the investment and the associated risks [capitals in the original]:

THESE ARE SPECULATIVE SECURITIES WHICH INVOLVE A HIGH DEGREE OF RISK. ONLY THOSE INVESTORS WHO CAN BEAR THE LOSS OF THEIR ENTIRE INVESTMENT SHOULD INVEST IN THESE UNITS. SEE "RISK FACTORS".

AN INVESTOR MUST RELY ON ITS OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE RISKS INVOLVED. ... THERE IS NO MARKET FOR THE SECURITIES BEING OFFERED, AND THERE COULD BE NO ASSURANCE THAT ANY MARKET WILL DEVELOP. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISK OF AN INVESTMENT AND THE SECURITIES FOR AN INDEFINITE PERIOD OF TIME.

[Investors are] not to construe the contents of this Memorandum as legal or investment advice. Each prospective investor must consult with his own legal counsel, accountant, and financial advisor as to legal, tax, financial and related matters concerning the Company or an investment therein.

... [Investors] are urged to request from us any additional information that they may consider necessary to make an informed decision or to verify the information set forth in this Memorandum.

If less than \$10 million is raised [through the Offering], the Company may not have sufficient funds to move forward with its expansion and acquisition strategy.

34 The Private Placement Memorandum contained an 11-page section entitled "Risk Factors," which stated, among other things, that: (a) Southern China Livestock may not be able to comply with the *Securities Exchange Act's* Internal Control Reporting Requirements; (b) Southern China Livestock may not receive the auditor's attestation that it maintained effective internal control over financial reporting, which would be required in 2011; and (c) Southern China Livestock's revenue is dependent in large part on significant orders from a limited number of customers.

35 On March 15, 2010, Excalibur signed a Subscription Agreement to invest in Southern China Livestock.

36 The Subscription Agreement required an investor to represent that it was an "accredited investor;" i.e., Excalibur acknowledged that it had \$5 million of assets.

37 Here it may be noted that to be an accredited investor, individuals had to represent they had a net worth of at least \$1 million or two years of \$200,000 plus income.

38 The Subscription Agreement required each investor to acknowledge that:

2.6 Investment Purpose. [The] investment is not a liquid investment.

...

2.10 Information. ... the Subscriber and its advisors, if any, have been furnished with all materials relating to the business, finances and operations of the Company ... that have been requested by the Subscriber or its advisors ... [and that] the Subscriber and its advisors, if any, have been afforded the opportunity to ask questions of the Company.

2.11 Acknowledgement of Risk. The Subscriber agrees, acknowledges and understands that its investment in the Units involves a significant degree of risk, including, without limitation that (a) the Company is a development stage business with limited operating history and requires substantial funds in addition to the proceeds from the sale of the Units; (b) an investment in the Company is highly speculative and only subscribers who can afford the loss of their entire investment should consider investing in the Company and the Units; (c) the Subscriber may not be able to liquidate its investment; (d) transferability of the Securities (including the underlying Common Stock) is extremely limited; and (e) in the event of a disposition of the Securities (including the underlying Common Stock), the Subscriber can sustain the loss of its entire investment. The Subscriber agrees, acknowledges and understands that such risks are set forth in greater detail in the Memorandum, and further that Subscriber has carefully reviewed and considered the risk factors discussed in the "Risk Factors" section of the Memorandum.

...

2.11.2 Acknowledgements of Risk Associated with Investing in a PRC Entity. The [proposed investor] has been apprised that the Company conducts all of its business in the PRC. Accordingly, the Company is subject to laws and regulations applicable to foreign investments in China and, in particular, laws applicable to foreign-invested enterprises....

...

2.13 Transfer or Resale. The [proposed investor] may have to bear the risk of holding the securities for an indefinite period of time ....

39 On March 29, 2010, the reverse takeover was completed, and the investment offering closed. Two further closings were completed over the next 60 days. In total, \$7,594,965 was raised in the private placement.

40 To be more precise, the first closing raised \$5,340,000 from 48 investors, including Excalibur, which invested \$400,000. The closing book received by Excalibur included a copy of the signature page of the Subscription Agreement from every other participant in the first closing. In subsequent closings on April 30, 2010 and May 6, 2010, a further \$2,254,965 was raised from nine additional investors for a total of 57 investors.

41 Using information from the closing documents and the corporate filings, it appears that 57 accredited investors purchased units in Southern China Livestock. The residence of these investors is set out in the following chart:

<i>Number of Investors (57)</i>	<i>Residence</i>
10	New York
9	California
4	Connecticut
4	New Jersey
4	Pennsylvania
3	Florida
3	Illinois
3	Texas
2	Nevada
2	Ohio
2	Other U.S. States
1	British Columbia
1	Cayman Islands
1	Malaysia
1	North Carolina

1	Ontario
1	Samoa
1	Tennessee
1	Utah
1	United Kingdom
1	Unknown
1	Wisconsin

42 The Breakdown of the amount invested by the investor is as set out in the following chart:

<b>Number of Investors (57)</b>	<b>Amount Invested</b>
19	\$1 to \$49,000
12	\$50,000 to \$99,000
8	\$100,000 to \$199,000
7	\$200,000 to \$399,000
3	\$400,000 and over
8	[unclear]

43 From the proceeds of the private placement, SLF was paid \$45,000 for its services.

44 On May 27, 2010, Southern China Livestock filed a registration statement (preliminary prospectus), Form S-1 with the SEC with the intention of proceeding with an initial public offering including the Units sold to Excalibur and the other investors.

45 Included in the Form S-1 filing was the SLF Audit Report that had been included in the Private Placement Memorandum. Unlike the situation with the Private Placement Memorandum, SLF's consent to use its opinion was included in the filing.

46 On November 5, 2010, Excalibur purchased 50,000 additional Units from another investor who had participated in the First Closings, Gibralt Capital Corporation, for \$550,000. Thus, Excalibur invested \$950,000 in Southern China Livestock.

47 On December 23, 2010, Southern China Livestock filed its annual 10-K Report under American securities legislation that included a Management's Discussion and Analysis section. Management indicated that its cash transactions involved employees using their own bank accounts to deposit net transaction funds and to make purchases of supplies for the hog business.

48 The Form 10-K disclosed that: (a) the sale of hogs were primarily cash sales, handled by farm employees; (b) the employees maintained corporate funds in bank accounts that were in their own names; (c) Southern China Livestock had little or no control over the activities of these employees; (d) disclosure controls were ineffective; and (e) internal controls over financial reporting were not effective, including deficiencies in internal accounting staff's recording transactions.

49 As noted above, Excalibur describes this disclosure of information as a "shocking discovery." Excalibur says that the revelations contained in the Form 10-K cast doubt on the accuracy of private placement materials, and indicated to it for the first time that the Audit Report could not have fairly and fully represented the financial state of Southern China Livestock.

50 Six months' later, in June and July 2011, Southern China Livestock's North American directors resigned.

51 On August 15, 2011, Southern China Livestock withdrew its registration statement (preliminary prospectus), Form S-1 with the SEC, professedly because it had elected not to pursue the sale of its securities.

52 Southern China Livestock went dark, and its shares and warrants are now worthless.

53 SLF has never filed a formal withdrawal as auditors of Southern China Livestock, or advised through a filing with the SEC that its opinions can no longer be relied upon.

54 Excalibur filed an affidavit sworn by Matthew Medlin, a Certified Public Accountant and Managing Director of Duff & Phelps LLC in Washington, DC. Mr. Medlin did not provide any opinion as to whether the disclosed internal control situation should have caused SLF to withhold or qualify its audit opinion.

55 Rather, Mr. Medlin described the Generally Accepted Auditing Standards ("GAAS") of the PCAOB that would have been applicable in auditing Southern China Livestock's financial statements for 2008 and 2009 and the risks associated with an audit that could have had an impact on the audit procedures performed by SLF.

56 Mr. Medlin deposed as to what he would have expected SLF to do to address those risks, and he indicated that he would be able to opine on whether SLF complied with GAAS when auditing Southern China Livestock's consolidated financial statements from SLF's audit file if given access to the audit file.

## **2. The Proposed Class Action**

57 On October 31, 2012, Excalibur commenced a proposed class action. It seeks damages of USD \$7,594,965 on behalf of itself and the other investors for SLF's alleged negligence and negligent misrepresentations.

58 Excalibur proposes the following definition for Class Membership:

All persons or entities who purchased investment units ("Units") of Expedite 4, Inc. between March 29, 2010 and December 23, 2010, and who continued to hold any of the shares or warrants comprising the Units as of December 23, 2010, other than Excluded Parties, where the Excluded Parties are:

the Defendant, including its partners, employees, successors and assigns;

the officers, directors, employees, agents, legal representatives, subsidiaries, affiliates, predecessors, successors and assigns of Expedite 4, Inc., Southern China Livestock International Inc., or Southern China Livestock Inc., and any entity in which any of the foregoing have or had any legal or *de facto* controlling interest; and

Rodman & Renshaw LLC and Newbridge Securities Corporation (together the "Placement Agents"), including their officers, directors, senior management employees, predecessors, successors and assigns (the "Class").

59 Excalibur has actually ascertained the identity of the 57 investors. The 48 proposed Class Members who participated in the First Closings were identified in the closing documents. The identities of the additional nine proposed Class Members were disclosed in public filings.

60 Every member of the class is alleged to have received and relied upon the Clean Audit Report (the misrepresentation) and to have suffered a total loss of their investment as a result of the negligence and negligent misrepresentation of SLF.

61 Claims for negligence and negligent misrepresentation require a duty of care. Excalibur's pleaded allegation of a duty of care can be summarized as follows:

SLF held itself as capable of providing audit services to Chinese companies entering the U.S. capital markets. Southern China Livestock required an accredited auditor for this purpose, and it hired SLF to prepare an essential prerequisite Audit Report for inclusion in a Private Placement Memorandum. SLF knew that without an Auditor's Report from a PCAOB-registered firm, neither the reverse takeover nor the financing could be completed. SLF knew that the Private Placement Memorandum would be distributed to an exclusive group of qualified investors, like Excalibur, who would rely on the Audit Report in making an investment decision. SLF prepared the Audit Report to be relied on and consented to its inclusion in the Private Placement Memorandum. SLF knew that potential investors would be harmed if the information contained in the Auditor's Report was materially false, inaccurate or misleading. Therefore, SLF owed the investors a duty of care to exercise the care, skill and diligence of an auditor of public companies in planning and carrying out its audit and in preparing the Auditor's Report in accordance with GAAS and the rules and standards of the PCAOB.

62 A claim for negligent misrepresentation requires a misrepresentation. Excalibur's allegations of misrepresentation are found in paragraphs 56 and 57 of the Statement of Claim, which state:

56. Given the absence of proper internal controls, Southern China's irregular operational structure and the volume of cash transactions, Southern China's business was highly susceptible to theft and fraud. As a result, Southern China's ability to carry on business in the ordinary course and to continue as a going concern was tenuous. The Auditor's Report could not have fairly represented the true financial state of [Southern China Livestock].

57. In light of the true state of affairs regarding [Southern China Livestock's] operations in 2008 and 2009, and as described in detail below, SLF could not have obtained the degree of comfort and verification required under GAAS and the PCAOB standards to complete an audit of [Southern China Livestock] without significant reservations and qualifications, if SLF could complete any audit at all.

63 The pleaded allegation of misrepresentation can be summarized as follows:

In the Auditor's Report, SLF stated that it conducted the audits in accordance with PCAOB standards and it gave an unqualified "clean" opinion about Southern China Livestock's consolidated financial statements for the fiscal years ended September 30, 2008 and 2009. However, the Memorandum did not disclose Southern China Livestock's true state of affairs, which was that Southern China Livestock had little financial control over the revenue and expenses of its all cash business. Given these circumstances, the Auditor's Report could not have fairly represented the true financial state of the business.

64 It is an element of the tort of negligence that the defendant's breach of duty cause harm to the plaintiff. It is an element of the tort of negligent misrepresentation that the plaintiff suffers harm from having reasonably relied on the defendant's false statement. Excalibur's pleaded allegations of causation of harm and reasonable reliance causing harm for itself and for Class Members can be summarized as follows:

It was reasonable for prospective investors, including the Plaintiff and the Class Members, to rely on the Auditor's Report in deciding to invest in Southern China Livestock because it was prepared by SLF specifically for the Financing and in the ordinary course of SLF's business of providing accounting and audit services to Chinese companies in accordance with GAAS and PCAOB standards. Excalibur and all the Class Members relied on the representation of a clean Audit Report in deciding to invest in Southern China Livestock to their detriment. Excalibur and the Class would never have invested in the Units absent the assurance of a clean Audit Report by SLF.

65 A claim for negligence requires acts of negligence or breaches of the standard of care. Excalibur's pleaded allegation of negligence can be summarized as follows:

SLF was negligent: (a) in permitting the Auditor's Report to be included in the Private Placement Memorandum when it knew that the Class would rely upon SLF's reputation and expertise as auditors licenced by the PCAOB in deciding to invest in the Company and when it knew or ought to have known that it did not exercise the requisite care, skill and diligence of a reasonably competent auditor; (b) in failing to exercise the requisite care, skill and diligence of a reasonably competent auditor of a public company in carrying out its audit to ensure that the Auditor's Report accurately presented Southern China Livestock's financial condition and performance; (c) in failing to conduct its audits in accordance with GAAS and GAAP; (d) in failing to detect and to warn about significant weaknesses in [Southern China Livestock's] governance and internal controls; (e) in failing to plan and perform an audit as part of its audit obligations, SLF was required to plan and perform its audit in accordance with the standards of the PCAOB and GAAS to obtain reasonable assurance as to whether [Southern China Livestock's] consolidated financial statements were free from material misstatement.

66 In its reply factum, Excalibur describes its complaint and the negligence of SLF as follows:

The Plaintiff's complaint is that SLF was negligent in conducting the audits of [Southern China Livestock], as it could never have issued a clean Audit Report if it had done its job competently, and that the Audit Report, which said that the

audits had been conducted in accordance with the standards of the PCAOB, and opined that "these consolidated financial statements ... present fairly, in all material respects, the financial position of [Southern China Livestock] was materially false and misleading.

67 Pausing here to foreshadow the discussion and analysis later, it will be my opinion that Excalibur has combined its claim for negligent misrepresentation with its claim for negligence by alleging that that SLF's misrepresentation was speaking when it ought not to have spoken at all.

68 In my opinion, by pleading that the absence of proper internal controls for a cash business meant that SLF's Audit Report could not have fairly represented the true financial state of the business is to combine SLF's alleged misrepresentation with SLF's alleged negligence. As I will explain below, this combining of the torts creates analytical problems for the certification of Excalibur's action. It does not, however, mean that tenable causes of action were not pleaded.

69 Returning to the topic of Excalibur's proposed class action, the proposed common issues for the class action are set out later in this Decision, and I will leave the discussion of the common issues and also the discussion about the factual basis for the preferable procedure and representative plaintiff criteria until later in this Decision.

70 In the class action, SLF has delivered a Statement of Defence in which it denies liability.

71 In its Statement of Defence, SLF states that it did not make any misrepresentation in its Audit Report. It denies that it made any representation negligently. It denies a duty of care to the investors. It denies and states that it is not aware of any false statements in the financial statements. It states that it took all necessary steps to obtain sufficient audit evidence in performing the audit and that the audit was planned, performed, and completed in compliance with the applicable industry standards, including those established by PCAOB.

72 SLF denies that it caused the investors to lose their investment or that the losses had anything to do with what was stated in the Audit Report. It denies that any investor relied on the Audit Report and it pleads the *Negligence Act*, R.S.O. 1990, c. N.8 and states that if any investor lost its investment it was due to its own negligence.

73 SLF pleads contributory negligence and states that if Excalibur or any investor lost its investment, they have only their own negligence to blame.

## C. Discussion and Analysis

### 1. Introduction to Certification

74 Pursuant to s. 5(1) of the *Class Proceedings Act*, 1992, 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.

75 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: *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.).

76 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

77 The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions — providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers

to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 26 to 29; *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at paras. 15 and 16.

78 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: *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at paras. 28 and 29.

## **2. Cause of Action Criterion**

79 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*, [1990] 2 S.C.R. 959 (S.C.C.) 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.

80 Thus, 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: *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.); *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.).

81 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: *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at para. 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. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'd (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

82 Excalibur submits that it has satisfied the first criterion with its pleadings of negligence and of negligent misrepresentation.

83 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 by the defendant's breach; and, (5) the damages are not too remote in law. See *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) at para. 3.

84 The elements of a claim of negligent misrepresentation are: (1) 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. See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.); *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.).

85 The essence of Excalibur's negligence claim is that SLF breached a duty of care by issuing a Clean Audit Report and but for a Clean Audit Report the private placement would not have been able to proceed. Thus, SLF's negligence caused the investors loss. The essence of Excalibur's negligent misrepresentation claim is that the issuing of a Clean Audit Report in the circumstances of this case was a false statement made in breach of a duty of care.

86 Excalibur submits that if SLF had completed a proper audit, it would not have been able to issue a Clean Audit Report and Southern China Livestock would never have been able to proceed with the private placement and the investors would never have lost their investment.

87 Excalibur's claim in negligence and its claim in negligent misrepresentation are tort claims for pure economic losses. The law about pure economic loss claims against auditors and accountants has raised controversies in the case law about when auditors and accountants have a duty of care to persons with whom the auditors have no direct contractual or professional relationship. See: *Haig v. Bamford* (1976), [1977] 1 S.C.R. 466 (S.C.C.); *Caparo Industries plc v. Dickman*, [1990] 2 A.C. 605

(U.K. H.L.); *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.); *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2014 ONSC 2176 (Ont. S.C.J. [Commercial List]).

88 SLF submits that it is plain and obvious that the cause of action for negligence cannot succeed for two reasons: (1) the action is subsumed in the negligent misrepresentation pleading; the pleading of negligence is an attempt to indirectly advance a negligent misrepresentation allegation without the reliance and other constituent elements; and (2) to permit the negligence claim to be advanced independently would violate the prohibition against general negligence claims for pure economic loss.

89 I can understand why SLF might think that the negligence action is subsumed in the negligent misrepresentation action, because, as I foreshadowed above, and as I will discuss further below, Excalibur has combined misspeaking with the negligence of speaking at all, but it does not follow that it is plain and obvious that the pleaded cause of action for negligence cannot succeed. The situation rather is that SLF has a strong argument that it owed the investors no duty of care which argument will have to be tested at a trial or a summary judgment motion.

90 SLF's two-branched argument is similar to the argument that was made to and rejected by the late Justice Lax in *Robinson v. Rochester Financial Ltd.*, [2010] O.J. No. 187 (Ont. S.C.J.), leave to appeal ref'd 2010 ONSC 1899 (Ont. Div. Ct.). It is similar to the argument made to and rejected by me in *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 (Ont. S.C.J.), rev'd on other grounds 2013 ONCA 165 (Ont. C.A.).

91 In both *Robinson* and *Lipson*, the defendant law firms had prepared tax opinions for the promoters of the investment opportunity, and the investors anticipated receiving tax credits under the *Income Tax Act*. The investors alleged that the law firms' legal opinions were a necessary precondition to the marketing of the investments and that they had relied on the existence of the opinions as a factor in deciding whether to make the investment. In *Robinson*, Justice Lax disagreed with the law firm's argument that the investors' claim in negligence was a disguised negligent misrepresentation claim; rather, she viewed it as a discrete negligence claim pleading duty of care, standard of care, breach of the standard of care, causation, and damages. Justice Lax concluded that it was at least arguable that the lawyers ought to have foreseen that the tax opinion would be used to market the program and that the participants would suffer damages if the opinion was negligently prepared. Justice Lax appreciated that the negligence claim was a novel cause of action given that the investors were not the clients of the law firm and that the opinion had been prepared only for the promoter clients.

92 I followed the *Robinson* decision in my *Lipson* decision on the duty of care point of a negligence analysis, and noted that the facts for a duty of care in *Lipson* were stronger than in the *Robinson* case because the lawyer's wrote the legal opinion so that they might be relied on by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by this opinion while in *Robinson*, the opinion was just for the promoters, although it was foreseeable that they would use it to market the donation program to potential donors.

93 In the respective decisions, Justice Lax and I did not decide that the lawyers had a duty of care. We decided only that it was not plain and obvious that they did not have a duty of care in the circumstances of the respective cases. For whatever its worth, I regard the argument for a duty of care in the present case as weaker than the argument in *Robinson* but strong enough to meet the very low threshold of s. 5(1)(a) of the *Class Proceedings Act*, 1992.

94 I say that the argument is weaker in the immediate case because in both *Robinson* and *Lipson* the legal opinion was in fact incorrect, but in the case at bar, the audit opinion that the financial statements fairly represented the true financial state of Southern China Livestock may have been factually correct. As noted several times above, Excalibur's case, both in negligence and for negligent misrepresentation, is not built upon any falsity in the financial statement (none has yet been identified), but rather it is built on the notion that SLF was not in position to opine one way or the other and, therefore, ought not to have expressed a Clean Audit Report that it allegedly knew or ought to have known would be relied on and but for which the private placement and investments would not have proceeded.

95 It will be for a trial judge to determine whether Excalibur's novel claim is within the range of established or new exceptions to the general principles that limit recoveries for pure economic losses in negligence based torts. For present purposes, I am satisfied that it is not plain and obvious that Excalibur's negligence claim is legally untenable.

96 For present purposes, I am also satisfied that that it is not plain and obvious that Excalibur's negligent misrepresentation claim is legally untenable.

97 The law has recognized that there can be misrepresentations by express false statements and misrepresentations by silence, where the silence conveys a message. Excalibur's negligent misrepresentation claim suggests that there can be a misrepresentation by failing to be silent; i.e. there are circumstances where a speaker has a duty of care to make no comment because he or she knows that a comment will be relied upon.

98 Thus, Excalibur's allegation of misrepresentation is a novel claim, but it will be for another day to determine how the claim aligns with the line of cases that have addressed whether a corporation's auditors have a duty to care beyond the duties owed to the corporation.

99 In my opinion, the cause of action criterion is satisfied for both the negligence claim and the negligent misrepresentation claim.

### ***3. Identifiable Class Criterion***

100 I turn now to the second criterion for certification of a class action, the identifiable class criterion.

101 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: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

102 In defining Class Membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'd [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.).

103 The proposed definition of the class is set out earlier in this Decision, and SLF submits that the proposed class definition is too broad for three reasons: (1) there is no need to extend the class period beyond May 6, 2010, the date of the final round of the offering; (2) the description of the class should embrace only those who received the Representation; and (3) there should not be a global class.

104 The identities of the 57 members of the proposed class are already known or ascertainable and defining them by a definition seems a mere technicality.

105 SLF acknowledged that its first two objections to the class definition were technical and would make no difference to defining the class and identifying its members. Therefore, putting aside the matter of whether there should be a global class, I see no merit to SLF's criticism of the class definition, which otherwise would satisfy the second criterion for certification.

106 There is, however, in my opinion, merit in SLF's argument that a global class should not be certified in the case at bar and therefore, the identifiable class criterion is not satisfied.

107 I have no doubt that there is jurisdiction under the *Class Proceedings Act, 1992* to certify in Ontario national and global class actions where the Class Members will include persons and corporations from across Canada or from across the world.

108 National and global class actions have been certified in Ontario. See: *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Ont. Gen. Div.); *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.); *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), aff'd (1999), 46 O.R. (3d) 315 (Ont. Div. Ct.), rev'd on other grounds (2000), 51

O.R. (3d) 236 (Ont. C.A.); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.); *Brimner v. VIA Rail Canada Inc.* (2000), 50 O.R. (3d) 114 (Ont. S.C.J.); *Cheung v. Kings Land Developments Inc.* (2001), 55 O.R. (3d) 747 (Ont. S.C.J.), leave to appeal refused [2002] O.J. No. 336 (Ont. Div. Ct.); *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 466 (Ont. S.C.J.); *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (Ont. S.C.J.); *McCutcheon v. Cash Store Inc.* (2006), 80 O.R. (3d) 644 (Ont. S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal refused 2011 ONSC 1035 (Ont. S.C.J.); *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 (Ont. S.C.J.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.); *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. S.C.J.) at paras. 587-592, varied 2014 ONCA 90 (Ont. C.A.); *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 (Ont. S.C.J.).

109 In the immediate case, the question to be decided is not whether there can be a global class action, the question is when is it appropriate to certify a global class.

110 A review of the above cases reveals that whether an Ontario court will certify a national or global class is a matter of conflicts of law, which is to say, it is a matter of the law about the jurisdiction of an Ontario court over a case with a foreign element, be it events in a foreign land, foreign parties, foreign witnesses, foreign law, or foreign courts that have a connection or a better connection with the parties and the case.

111 A review of the case law reveals that the factors relevant to whether or not to certify a national or global class include: (a) whether the Ontario court has jurisdiction *simpliciter* over the defendant; (b) whether the Ontario court can assume jurisdiction over a non-resident Class Member, which assumption of jurisdiction largely depends upon whether Ontario has a real and substantial connection with the subject matter of the jurisdiction and on principles of order and fairness and comity between courts; (c) whether it would be reasonable for the non-resident Class Member to expect that his or her rights would be determined by what to him or her would be a foreign court; and (d) whether the non-resident plaintiff can be accorded procedural fairness including adequate notice and a meaningful opportunity to opt-out.

112 In *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, *supra*, the plaintiffs sued the defendant insurers and alleged that they had breached a statutory condition in their policies of automobile insurance concerning the calculation of salvage costs. Justice Haines concluded that the administration of justice would not be served by certifying a national class where: (1) the contract was made outside of Ontario pursuant to the laws of another jurisdiction; (2) the defendant was licenced under and subject to the laws of the other jurisdiction; (3) the alleged breach occurred outside Ontario; (4) the claimants resided outside of Ontario; (5) the events which gave rise to the claim occurred outside Ontario; and (6) the damages were sustained outside Ontario. Justice Haines concluded that there was a demonstrated absence of any real connection between the potential out-of-province Class Members and Ontario.

113 In *Ramdath v. George Brown College of Applied Arts & Technology*, *supra*, the Class Members were former students of George Brown College that claimed that the College's online and printed course calendars misrepresented that the completion of an academic program would entitle the students to three industry designations. The College is an Ontario community college, and the courses were taught in Toronto. There were 119 Class Members of which 78 were international students that the College had recruited from India (22), China (11), Japan, Turkey, Brazil, Russia, South Korea, Syria, Thailand, and Mexico. On the certification motion, the College did not dispute that the Ontario court had jurisdiction *simpliciter*, but it led evidence that the courts in India and China would not likely give preclusive effect to an Ontario judgment in a class action. In other words, the College submitted that if it was successful in the class action, the Ontario judgment would not preclude re-litigation in China or India because the foreign courts would not recognize the Ontario judgment as binding.

114 Justice Strathy, as he then was, certified the global class notwithstanding the objections of the College. He was satisfied that Ontario had a close connection to the subject matter of the litigation and that all the parties would have expected that claims arising from their relationship would be litigated in Ontario and nowhere else. He stated at paragraph 71 of his judgment:

71. In this case, looked at from the perspective of both the international students and George Brown, there would be every reason for both to expect that claims arising from their relationship would be litigated in Ontario. Given that George Brown is based in Ontario, the students came to college in Ontario and lived in Ontario, and the contract was performed in Ontario, it is hard to imagine that either party would have contemplated that George Brown would be sued in China, India or any one of the other foreign jurisdictions if the relationship broke down. There is, in any event, a real and substantial connection with Ontario and there is no such connection with any other single jurisdiction.

115 Justice Strathy was not impressed with the objection in to a global class in *Ramdath* that it was unlikely that the courts in India and China would preclude re-litigation should the College be successful in defending the Ontario action. He stated at paragraphs 84 and 87 of his judgment:

84 .... To echo the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, referred to above, at para. 28, if this court properly has jurisdiction over absent plaintiffs and the defendants, why should it decline to hear the case because another jurisdiction refuses to accede to the accepted norms of international law and, in particular, the principle of comity?

87. Applying the approach of *Vivendi*, it seems to me that the cumulative effect of these risks, while not zero, is insufficient to outweigh the many good reasons why the court can and should take jurisdiction, including the evidence that it is the only realistic way to provide access to justice for many international Class Members. Applying the approach of *Morguard*, *Wilson v. Servier*, and the International Bar Association Guidelines, as long as this Court follows international norms for taking jurisdiction, and is concerned for order and fairness, it is entitled to expect that other countries will recognize its orders. In this case, the jurisdictional factors almost exclusively point to Ontario, and it is unlikely that any Class Member would commence a proceeding in any other jurisdiction. It is appropriate for this Court to take jurisdiction over non-resident Class Members in these circumstances, particularly where the Class Members are as easily identifiable as in this case.

116 In the case at bar, there was some discussion during the argument of the certification motion about the significance, if any, to be given to the factor of the likelihood that an American court would recognize a judgment of the Ontario court dismissing Excalibur's action against an Ontario defendant. The proposition that was debated was that this was a relevant factor because it would not be fair to the defendant to have to go through a class proceeding only to have the Class Members re-litigate in another jurisdiction.

117 Upon reflection, it now strikes me that this discussion misses the point because the issue about whether there should be a global class is not so much whether a class proceeding procedure would be unfair to the defendant but more about whether including the foreigners in the Ontario proceeding would be fair to the foreigners. In that regard, the question of whether a foreign court would enforce the unfavourable foreign judgment begs the question because as noted by Justice Strathy in *Ramdath v. George Brown College of Applied Arts & Technology*, *supra*, it generally can be assumed that the foreign court will enforce the Ontario judgment if it was fair for the Ontario court to extend its jurisdiction to the foreign Class Members.

118 Thus, determining the likelihood of the enforceability of the Ontario judgment in a foreign court begs the question of whether the Ontario court should extend its jurisdiction to a foreigner represented by the Representative Plaintiff. I think, however, the discussion of the likely enforceability of the Ontario judgment is useful because it focusses attention on the issue of when would it be fair for an Ontario court to assume jurisdiction and bind a foreigner to its judgment.

119 The case law identifies one such circumstance when it would be fair to join foreign plaintiffs to an Ontario action; namely, when the foreigner would expect that his or her rights would be determined by what to him or her would be a foreign court.

120 This fairness factor in assuming jurisdiction was discussed by Justice Sharpe in *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.) [hereinafter Currie], where the Court of Appeal established the test for recognition by an Ontario court of a foreign judgment that had approved a class action settlement. Recognizing the foreign court's settlement approval would bar or preclude an action for the same relief in Ontario.

121 *Currie* involved the enforcement of a U.S. judgment approving a class action settlement that purported to bind Ontario residents. The plaintiff, Greg Currie, brought a proposed class action alleging wrongdoing in relation to promotional games offered to customers of McDonald's Restaurants of Canada Ltd. However, McDonald's Canada moved for a stay of the action because there had been a class action in Illinois that included the Canadian customers among the certified class of claimants. The Illinois court had certified the class action for settlement purposes and approved a notice plan in which notice was given in Canada by means of notice in Maclean's Magazine. Although, Mr. Currie did not participate in the Illinois proceedings, he did not opt out, and McDonald's Canada argued that he was bound by the settlement approved by the Illinois court.

122 In a judgment written by Justice Sharpe, the Court of Appeal concluded that the Ontario court should not recognize the Illinois class action judgment because the notice of the right to opt-out and the notice plan were inadequate to satisfy the principles of natural justice, and thus it was not fair to bind Mr. Currie and the other Canadians to bar them from pursuing their claims.

123 Justice Sharpe discussed the topic of national and international class actions and how the principles of conflicts of law should apply in circumstances where there were non-resident plaintiffs in a global class action. Justice Sharpe appreciated that the underlying issue was when should a domestic court assume jurisdiction over foreign plaintiffs and purport to bind them. He stated that in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" as the foundation of conflict of laws principles for a court assuming jurisdiction and for a court deciding whether to recognize a foreign court's judgment.

124 Justice Sharpe noted that embedded in the principle of order and fairness were the notions that courts should respect each other's role in dispensing justice in a global community, but courts should also exercise jurisdictional restraint.

125 Justice Sharpe noted that the real and substantial test was the overriding factor in the determination of jurisdiction, and he stated at paragraph 11 that the real and substantial connection test was a restraining factor; he stated:

The "real and substantial connection" test serves to control the assertion of jurisdiction. It is described variously in *Morguard*, at pp. 1104-9, as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action". The real and substantial connection test is a flexible one, "a term not yet fully defined" (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049), and there is no strict or rigid test to be applied. (*Hunt v. T & N plc.*, [1993] 4 S.C.R. 289 at 325).

126 At paragraph 12 of his judgment, Justice Sharpe noted that the real and substantial connection test requires a substantial connection between the cause of action and the court. He stated:

*Morguard* dealt with the recognition and enforcement of inter-provincial judgments. In *Beals*, those same principles were adapted and applied to international judgments. Writing for the majority, at para. 37, Major J. described real and substantial connection as "the overriding factor in the determination of jurisdiction." He stated at para. 32:

The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

127 Then, in a passage, that I think is particularly pertinent to the case at bar, Justice Sharpe identified the expectations of the party who would be bound by the foreign court as an important factor about how the principles of order and fairness should apply when a court is deciding whether to assume jurisdiction over a foreign plaintiff or in deciding whether to recognize a foreign judgment as binding on its domestic plaintiff. He stated in paragraph 18:

To determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought. In many cases, the actions of the non-resident Class Member will assist in determining jurisdiction. Take, for example, the case of an Ontario resident who orders goods from a foreign mail order merchant or who buys securities on a foreign stock exchange. The Ontario resident has engaged in a cross-border transaction with a foreign entity. The cause of action arises at least in part in the foreign jurisdiction. It would not be unreasonable, from the perspective of the Ontario resident, to expect that legal claims arising from the transaction could be properly litigated in the foreign jurisdiction. Nor is it unreasonable, whether from the perspective of the foreign defendant or from that of the Ontario plaintiff, to expect that class action litigation in the foreign jurisdiction should dispose finally of the Ontario plaintiff's claim.

128 I regard this passage as pertinent to the case at bar because from the perspective of all of the proposed Class Members, including Excalibur, the proposed Representative Plaintiff, it is hard to imagine a case where it would less reasonable to expect that his or her legal claims had a real and substantial connection to Ontario.

129 The residence of SLF in Ontario is essentially the only connection with Ontario and while that connection certainly gives the Ontario court jurisdiction over SLF and while Ontario courts would welcome foreigners to sue in Ontario that is a different thing from Ontario courts exercising the restraint required of them under the principles of order and fairness in assuming jurisdiction when the foreign plaintiff would have expected to pursue his or her rights in a court that did have a substantial connection with the subject matter of the litigation.

130 The investors in the case at bar were non-residents of Ontario making substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law. Although the transaction included an Audit Report from an Ontario auditor, the standard of care associated with that audit would largely be determined by the American accounting standards under which the Audit Report was provided. It would be to exercise no restraint at all to conclude that Ontario had a substantial connection with this American financing and corporate reorganization.

131 Here it may be noted that the fairness and propriety of assuming jurisdiction over foreign plaintiffs in a class action and the appropriateness of recognizing foreign judgments in a class action involve not only judgments that might favour the defendant but also judgments that arguably are not favourable enough for the Class Members. Justice Sharpe was also alert to this factor in *Parsons v. McDonald's Restaurants of Canada Ltd.*, *supra* where he stated at paragraph 17:

.... The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them. Henry Paul Monaghan, "[Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members](#)" (1998) 98 *Columbia Law Review* 1148 at 1155-56, warns of the need to guard against potential abuses by settling class action defendants who "welcome class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices." Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.

132 The case at bar may be used to illustrate the point. Assume the Ontario court approved a settlement in which the class recovered approximately 24 cents on the dollar; visualize 40% of \$7.6 million (\$3 million) less administration costs of (\$0.3 million) and less a 30% contingency fee of (\$0.9 million). Anecdotally, I would say that a 40% gross recovery is at the high end of settlements of securities actions, but any of the 56 Class Members that reside outside of Ontario might not think the settlement was fair and they would rue that they did not opt out and pursue claims in their own courts. Or assuming the disgruntled investor kept his or her eye on his or her domestic court's limitation periods, he or she might decide to wait and see what happens in Ontario and then resort to his or her domestic courts if unhappy with the outcome.

133 These observations provide a transition to a discussion to the global class that was certified in *Silver v. Imax Corp.*, *supra*. A review of this case supports my conclusion that it would not be appropriate to certify a global class in the immediate case.

134 In *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal refused 2011 ONSC 1035 (Ont. S.C.J.), the plaintiffs purchased IMAX shares on the TSX. They alleged that IMAX and certain of its officers and directors misrepresented the reporting of revenues and that IMAX's financial statements were not in compliance with GAAP. The plaintiffs alleged that IMAX, whose shares traded on both the TSX and NASDAQ, had made misrepresentations in its Form 10-K filed with the Ontario Securities Commission and the U.S. Securities and Exchange Commission. When there was a corrective disclosure, IMAX's share price dropped 40%. The plaintiffs sued IMAX for negligence, negligent misrepresentation, conspiracy, and for a statutory claim under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. c. S.5.

135 The plaintiffs proposed a global class of all persons (other than Excluded Persons) who acquired IMAX shares during the Class Period on the TSX and on NASDAQ and held some of those securities at the close of trading on August 9, 2006. The evidence was that approximately 15% of the proposed Class Members made their purchases on the TSX and approximately 85% made their purchases on NASDAQ. Thus, it appeared that 85% of class were non-residents. Justice van Rensburg certified the global class.

136 IMAX's main argument against the global class was that the global class should not be certified because given the nature of the claims being advanced, it was likely that the Ontario court would have to apply foreign law and this would make the Ontario proceedings unmanageable and not the preferable procedure. Justice van Rensburg concluded, however, that it was premature to decide what law applied and, in any event, the possible application of foreign law by itself would not stand against the certification of a global class.

137 I pause here to note that the parties have agreed that the question of what law applies to the Class Members' tort claims is not to be a factor that would get in the way of certifying a global class.

138 In opposing a global class in Ontario, IMAX also relied on the fact that there was a rival class action in the United States, but Justice van Rensburg concluded that the prospect that a similar proceeding might be certified in another jurisdiction was not sufficient to prevent the Ontario court from certifying a global class, if it was otherwise appropriate to do so.

139 Justice van Rensburg recognized that global classes had been certified in Ontario before, and that the precise issue was when (not whether) an Ontario could certify a national or global action. She stated at paragraph 120 of her judgment that the issue of certifying a global class involved whether Ontario had a real and substantial connection with the Class Members' claims and whether the assumption of jurisdiction would be consistent with the conflict of laws principles of order and fairness.

140 In *Silver v. Imax Corp.*, Justice van Rensburg was satisfied that Ontario had a real and substantial connection with the claims asserted on behalf of the non-resident members of the global class. She stated at paragraph 130:

Such connection exists in this case. IMAX is a CBCA corporation with its head office in Ontario. It is a reporting issuer under the OSA and its shares are traded on the TSX. The alleged Representation was made in Ontario through the issuance of the Company's Form 10-K and press releases from IMAX's Mississauga head office (although arguably it may have been made in IMAX's offices in New York as well). The alleged wrongful actions of the Individual Defendants in connection with the preparation and reporting of IMAX's financial statements are alleged to have taken place in Ontario as well as New York. The proposed common issues respecting liability that concern the conduct of the defendants accordingly have a substantial connection to this jurisdiction.

141 Justice van Rensburg felt that the concerns about order and fairness, which focussed on the fairness of involving non-residents in an Ontario action and potentially binding them to a judgment that their domestic court might recognize, could be addressed by paying careful attention to the notice and communications with non-resident members and to the potential needs for subclasses as the action proceeded. The notice procedure was particularly important because it informed Class Members about their right to opt out and about how the judgment might bind them if they did not opt out.

142 Thus, Justice van Rensburg certified the global class. She was very sensitive to the order and fairness concerns and especially sensitive to the fact that there was the parallel proceeding in the United States that were relevant to advising the Class

Members about their rights. She gave detailed reasons when approving the notice and the notice plan for the certification order and the notice made it clear that the Class Members did not have to opt out of the Ontario class action if they ultimately wished to participate in a settlement in the United States. See *Silver v. Imax Corp.*, 2012 ONSC 1047 (Ont. S.C.J.).

143 Ultimately, the United States action was certified for settlement purposes. The settlement was conditional on the Ontario court amending its class definition to exclude all persons who would be bound by the settlement of the U.S. Proceedings, which was concerned with purchasers on NASDAQ and not purchasers on the TSX. The idea was that IMAX was prepared to settle with the NASDAQ purchasers provided that they could not also participate in the Ontario action in which they had an overlapping claim.

144 Justice van Rensburg granted a motion to amend the class definition, which practically speaking substantially truncated if not eradicated the global class. Justice van Rensburg was prepared to recognize that the American court had a real and substantial connection to the matter and that its order should be respected by the Ontario court. See *Silver v. Imax Corp.*, 2013 ONSC 1667 (Ont. S.C.J.), leave to appeal to the Div. Ct. refused 2013 ONSC 6751 (Ont. S.C.J.).

145 Pausing here, to contrast the situation in *IMAX* with the situation in the case at bar. In *IMAX*, the non-residents constituted 85% of the class and in the case at bar, the non-residents constitute 98% of the class. Like IMAX, SLF is a resident of Ontario and does carry on business here, but the business that SLF carried on in the case at bar concerned: (a) an American company that owned a Chinese business; (b) an American corporate and financing transaction; (c) the American regulation of private placements in its marketplace for corporate securities; (d) the ownership of the shares, the promoting, and the marketing of them by Americans; (e) an American company's filings under American securities legislation; and (f) alleged non-compliance with the standards of the PCAOB (United States). Unlike in *Silver v. Imax Corp.*, in the case at bar the Canadian regulator (the OSC) was not involved.

146 I have no reason to doubt the correctness of Justice van Rensburg's decision certifying a global action in *Silver v. Imax Corp.*, but I do not think that her judgment supports a global class in the circumstances of the immediate case.

147 I think that the order and fairness concerns could be addressed in the immediate case, as they were in *Silver v. Imax Corp.* by a satisfactory notice plan, but recalling that the real and substantial connection test is to be exercised with restraint, I do not think that Ontario has a real and substantial connection with the claims of 56 of the 57 investors, and I think that Ontario's connection with the claim of Excalibur, a Manitoba partnership carrying on its investment business in Ontario, is modest if not trivial.

148 Ontario has a connection to the proposed class action but it is not a real and substantial connection.

149 I appreciate that unlike the situation in *Silver v. Imax Corp.*, the foreign investors do not have the alternative of a United States class action, but the existence or non-existence of a companion American class action, while relevant to the principles of order and fairness, would not infuse the Ontario court with a real and substantial connection with the investors claims against SLF.

150 And, the foreign investors who have been waiting and seeing what happens with the proposed Ontario class action now have their answer, and they may take whatever steps to sue SLF as they may be advised.

151 I conclude that Excalibur has not satisfied the second criterion for certification (class definition).

#### **4. Common Issues Criterion**

152 In the case at bar, the failure to satisfy the second criterion is irremediable and, therefore, the certification motion should be dismissed. However, given that appeals are virtually inevitable in proposed class actions, I will go on to consider the other certification criteria.

153 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: *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at paragraph 18.

154 With regard to the common issues, "success for one 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." That is, 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: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.) at para. 32; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.) at paras. 145-46 and 160; *McCracken v. Canadian National Railway* [2012 CarswellOnt 8010 (Ont. C.A.)], *supra*, at para. 183.

155 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: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.

156 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: *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, varied on other grounds (2004), 42 B.L.R. (3d) 161 (B.C. C.A.); *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.), varied 2011 ONSC 5882 (Ont. Div. Ct.).

157 The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52; 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.). 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: *Cloud v. Canada (Attorney General)* *supra*, at para. 53.

158 Excalibur proposes the following common issues:

1. Did the Defendant meet applicable GAAS and PCAOB standards in the preparation of its Auditor's Report for Southern China Livestock in respect of the consolidated financial statements for 2008 and 2009 (the "Auditor's Report")?
2. Did the Defendant owe the Class Members a duty of care in respect of the preparation of the Auditor's Report?
3. Did the Defendant owe the Class Members a duty of care in permitting the Auditors Report to be included as an exhibit to Expedite 4, Inc.'s Private Placement Memorandum?
4. What is the applicable standard of care owed by the Defendant to the Class Members?
5. Was the Defendant negligent in the manner in which it prepared the Auditor's Report?
6. Did the Defendant breach its duty of care owed to the Class Members by issuing an unqualified, clean audit opinion in the Auditor's Report that was included as an exhibit to the Private Placement Memorandum?
7. Was the information contained in the Auditor's Report materially false, inaccurate or misleading?
8. Was it reasonably foreseeable that the Class Members would rely on the representations made in the Auditor's Report in deciding whether or not to invest in Expedite 4, Inc. through the private placement, or at any time up until December 23, 2010?
9. Was it reasonable for the Class Members to have relied on the Auditor's Report in deciding whether or not to participate in the private placement, or in purchasing any Units at any time up until December 23, 2010?

10. Did the Defendant know or should it have known that the Class Members would be harmed if the information contained in the Auditor's Report was materially false, inaccurate or misleading?

11. Can the court infer on a class-wide basis that the Class Members relied on the representations made in the Auditors' Report when deciding to invest in Southern China Livestock?

12. Did the Class Members suffer the loss of their entire investment in Southern China Livestock, and if so, was the loss caused or contributed to by the negligence, including the negligent misrepresentations, of the Defendant?

13. If so, is the Defendant liable to the Class Members for the loss of their investment?

14. Did the Defendant fail to meet GAAS and PCAOB standards in its preparation of the Auditor's Report for Southern China Livestock for 2010 (the "2010 Auditors' Report")?

15. Was the Defendant negligent in the preparation of the 2010 Auditor's Report?

16. If so, did the Defendant's negligence cause or contribute to the loss of investment suffered by the Class Members?

17. Should the law of Ontario be applied by the trial judge in determining if the Defendant was negligent, or made a negligent misrepresentation in the Auditor's Report?

159 Questions 1 (as revised), 2, 3, 4, 7 (as revised), and 17 satisfy the test for certification as common issues.

160 In my opinion, Questions 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, and 16 should not be certified.

161 Question 1, as presently drafted, is unsatisfactory because it invites a fishing expedition about the auditing of financial statements that may be a perfectly accurate representation of the financial position of Southern China Livestock.

162 As explained above, the theory of Excalibur's case is much narrower than identified mistakes in the financial statements, and it is that SLF did not meet applicable GAAS and PCAOB standards when it gave a Clean Audit Report in circumstances when it could not do so. Excalibur's complaint is that the Audit Report gave credence to financial statements that could not be relied upon even if they happened to correctly state the assets and liabilities and accounts of Southern China Livestock.

163 Question 1 needs to be drafted to conform with Excalibur's action and not to encourage a fishing expedition to discover another theory of the case. Therefore, to be certified, Question 1 should be revised as follows:

1. Given the lack of financial controls for Southern China Livestock's business, did the Defendant meet applicable GAAS and PCAOB standards or breach a duty of care by delivering an Auditor's Report for Southern China Livestock International Inc. in respect of the consolidated financial statements for 2008 and 2009 (the "Auditor's Report")?

164 A similar criticism can be made of Question 5, which, in any event, is redundant once Question 1 is revised and certified.

165 Questions 6, 14, 15, and 16 are redundant and should not be certified.

166 Question 7 requires revision because it too encourages a fishing expedition for a different case of negligent misrepresentation, and Question 7 is not connected to the negligent misrepresentation action as it has been actually pleaded by Excalibur, which, as noted above, makes the misrepresentation the negligence of delivering a Clean Audit Report. (SLF's misrepresentation is speaking when it ought not to have spoken at all.) To be certified Question 7 should be revised as follows:

7. Given the lack of financial controls for Southern China Livestock's business, did the Defendant make a misrepresentation by delivering an Auditor's Report for Southern China Livestock International Inc. in respect of the consolidated financial statements for 2008 and 2009 (the "Auditor's Report")?

167 Questions 8 and 10 should not be certified, because they are redundant to Question 2 and conflate on the one hand a duty of care analysis, where the foreseeability of reliance is part of the analysis, with, on the other hand, the reasonable reliance element of the tort of negligent representation, which is a matter of fact or perhaps inferred fact.

168 Question 9 should not be certified because it wants for commonality. Whether it is reasonable for a Class Member to have relied on the Auditor's Report is an individual issue and it cannot be made a common issue by the act of pluralizing the question.

169 Questions 9, 11, 12, and 13 are the reliance, causation, and ultimate liability questions, and, as I will shortly explain, these questions do not satisfy the common issues criterion.

170 In any event, Question 11 would require revision to conform with the theory of Excalibur's case, which relies on the delivery of the Audit Report as a representation. As repeatedly noted, Excalibur's case is not about whether the investors relied on representations made in the Audit Report but on the Clean Audit Report being itself a misrepresentation. Thus, if Question 11 were certifiable, it should be revised as follows:

11. Can the court infer on a class-wide basis that the Class Members relied on the Defendant's Audit Report when deciding to invest in Southern China Livestock?

171 Similarly, if Question 12 were certifiable, it would require modest revision to change the word "misrepresentations" (plural) to "misrepresentation" (singular).

172 I return to *Lipson v. Cassels Brock & Blackwell LLP*, *supra*, to explain why Questions 9, 11, 12, and 13 do not satisfy the common issues criterion.

173 In *Lipson*, the lawyers were sued for negligence and negligent misrepresentation with respect to a legal opinion that was part of an investment offering. As noted above, it was not plain and obvious that there were not tenable causes of action.

174 On the matter of common issues, in *Lipson*, I held that the reasonable reliance element of the tort of negligent misrepresentation did not present a common issue. I also held that the causation element of the tort of negligence did not present a common issue. The Representative Plaintiff appealed my later ruling, and I was reversed by the Court of Appeal.

175 On the common issue criterion in the *Lipson* appeal, Justice Goudge stated at paragraphs 92-99 as follows:

**Did the motion judge err in finding that causation in simple negligence is not a proper common issue?**

92. The motion judge found that Mr. Lipson's pleading disclosed a cause of action in negligent misrepresentation and also in simple negligence, and that it was not plain and obvious that these claims would fail. He also found that, for both causes of action, whether Cassels Brock owed the class a duty of care and whether it had breached that duty were proper common issues.

93. However, the motion judge found that, for both causes of action, the question of whether Cassels Brock's breach caused the class damage was not a proper common issue but instead had to be answered on an individual basis for each Class Member.

94. Mr. Lipson contests this finding as it applies to his claim in simple negligence. He says that, for that cause of action, causation should be certified as a common issue.

95. For the following reasons, we agree.

96. In finding that Mr. Lipson's claim in simple negligence was properly disclosed by his pleading, the motion judge looked to Mr. Lipson's allegations that the Cassels Brock legal opinion was a necessary precondition for the marketing of the program, that Cassels Brock ought to have foreseen that for the promoters the opinion was fundamentally necessary for

the presentation of the program, and that those who then bought into the program would suffer damage if the opinion had been negligently prepared.

97 Thus, the claim in simple negligence is distinct from Mr. Lipson's claim in negligent misrepresentation, which required proof of reliance on the opinion by individual class members in deciding to participate in the program.

98. 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. In our view, this issue is common to the claims of all Class Members.

99. It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program. For example, there may be evidence that the promoters were satisfied to go to market without any legal opinion, or because of legal opinions other than those of Cassels Brock. However, that determination is for the trial. At this stage, there need only be some basis in fact supporting Mr. Lipson's simple negligence claim. That requirement was met here. In addition to Mr. Lipson's pleading that the legal opinion was a necessary precondition, there was evidence of the promoters' accountant who said as much.

176 Because I am bound by the Court of Appeal's judgment, I conclude that in the immediate case, Questions 11, 12, and 13 did not want for commonality.

177 I am also aware of authorities that hold that reliance need not always be treated as an individual issue in class actions, because depending on the nature of the misrepresentation class-wide reliance may be inferred from the facts. See: *O.P.S.E.U. v. Ontario*, 13 C.P.C. (6th) 178 (Ont. S.C.J.) at para. 68; *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.); *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (Ont. S.C.J.); *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (Ont. C.A.). *Cannon v. Funds for Canada Foundation*, 2012 ONSC 3009 (Ont. S.C.J.), leave to appeal denied 2012 ONSC 6101 (Ont. Div. Ct.); *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083 (Ont. S.C.J.), leave to appeal to Div. Ct. denied 2014 ONSC 1347 (Ont. Div. Ct.).

178 However, the finding that reliance may sometimes be inferred does not complete the analysis of the common issues criterion, because common issues cannot be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, *supra*; *Collette v. Great Pacific Management Co.*, *supra*; *McKenna v. Gammon Gold Inc.*, *supra*.

179 In the case at bar, not only does SLF challenge the fundamental premise that reliance and causation can be established from the external factor of the Audit Report allegedly being a prerequisite to the private placement being marketed, it pleads that the investors did not rely on the Audit Report and it pleads that the investors were contributorily negligent.

180 Thus, even if the court were to agree that reasonable reliance or causation in fact were established at the common issues trial by inference, the ultimate determination of SLF's liability and the amount of it would still be dependent upon individual findings of fact about reliance and about the contributory negligence of each individual investor. The case law establishes that even where the defendant is solely responsible for the damage suffered by a negligent misrepresentation, the plaintiff's damages will be reduced on the grounds of contributory negligence: *Grand Restaurants of Canada Ltd. v. Toronto (City)* (1981), 32 O.R. (2d) 757 (Ont. H.C.), affd. (1982), 39 O.R. (2d) 752 (Ont. C.A.); *Empire Life Insurance Co. v. Krystal Holdings Inc.*, [2008] O.J. No. 4661 (Ont. S.C.J.); *O'Connell v. Jackson* (1971), [1972] 1 Q.B. 270 (Eng. C.A.).

181 In *Avco Financial Services Realty Ltd. v. Norman* (2003), 64 O.R. (3d) 239 (Ont. C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 300 (S.C.C.), Justice Charron discussed the distinction between the reasonable reliance component of negligent misrepresentation and contributory negligence at para. 32:

32. On the question of contributory negligence, the focus is on the event that occasioned the loss. The injured party's conduct, in all the circumstances surrounding that event, must be considered in order to determine whether it acted

reasonably in its own interest or whether it contributed to the loss by its own fault. The circumstances surrounding the event that occasioned the loss, depending on the particular facts of the case, may be much wider in scope than the circumstances surrounding the negligent misrepresentation. Hence, at this stage of the inquiry, the reasonableness of the injured party's reliance on the misrepresentation must be assessed in the context of the event that occasioned the loss. According to the test for contributory negligence set out earlier at para. 26, the injured party will be found guilty of contributory negligence if it ought to have foreseen that it may harm itself by failing to act reasonably and prudently.

182 A class action is a procedural statute, and it does not take away SLF's right to prove that individual Class Members did not prove all of the constituent elements of negligence or negligent misrepresentation or that there were some Class Members that have only themselves or others to blame in whole or in part for investing in Southern China Livestock.

183 To use the metaphor sometimes used in this context, certifying the issue of inferred reliance as a common issue would move the forensic yardsticks but there would be no first down and instead there would be a third down punt to the defendant at an individual issues trial. Inferred reliance would not significantly advance the action, and certifying the issue would achieve no judicial economy, because, in any event, there will be individual issues trials to allow SLF to rebut the inference by evidence of how the 57 investors each went about making his, her, or its decision to invest in Southern China Livestock.

184 My analysis here is similar to that of the Court of Appeal in *Lacroix v. Canada Mortgage and Housing Corp.*, 2012 ONCA 243 (Ont. C.A.), where the Court upheld a decision of Justice Charbonneau not to certify as a common issue whether Canada Mortgage and Housing Corp. (CMHC) had made a misrepresentation about the Class Members' entitlements to pension plan benefits.

185 Justice Charbonneau found that there was no evidence of a common misrepresentation and no evidence for reliance to be inferred on a class-wide basis. The Court of Appeal held that while there might be cases where reliance could be inferred from the facts, Justice Charbonneau had reasonably found that reliance was very much an individual issue in the proposed class action.

186 Then, the court added a second reason for deciding that the reliance question was not a common issue; i.e., it was not a common issue, because the CMHC was entitled to defend the claim on the basis that individual members' decisions were unconnected to the misrepresentation. Justice Laskin writing for the court stated at para. 125:

The motion judge also reasonably held that even if CMHC had a "duty to notify the plan members that they had a right to share in an eventual distribution of surplus and that they would forgo that right if they left the plan", and that, therefore, its breach of this duty amounted to a mis-representation by omission, still class-wide reliance could not be inferred. CMHC would be entitled to defend the claim on the basis that individual members' decisions to leave the plan were unconnected to the misrepresentation: see *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.* (1994), 18 O.R. (3d) 663 (C.A.).

187 My conclusion that Questions 9, 11, 12, and 13 do not satisfy the common issues criterion does not by itself threaten the certification of Excalibur's action as a class action. Where there are other common issues that would justify certification, the action may be certified and reasonable reliance may be dealt with as an individual issue: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (Ont. C.A.) at paras. 97-104; *Carom v. Bre-X Minerals Ltd.* *supra* at paras. 252-255 (C.A.).

188 I conclude that Excalibur has satisfied the third criterion for certification for Questions 1 (as revised), 2, 3, 4, 7 (as revised), and 17.

##### **5. Preferable Procedure Criterion**

189 For the purposes of the following preferable procedure analysis, I will assume that there is a global class of 57 Class Members with claims in negligence and negligent misrepresentation with the certifiable common issues discussed above; namely: Questions 1 (as revised), 2, 3, 4, 7 (as revised), and 17.

190 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: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at paragraph 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, *supra*.

191 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.

192 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: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at paragraphs 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.).

193 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: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, *supra*.

194 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (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): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 16, aff'd (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.).

195 The Court must identify alternatives to the proposed class proceeding: *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at para. 35; *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at para. 28. 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: *Fischer v. IG Investment Management Ltd.*, *supra* at paras. 48-49.

196 In *Fischer v. IG Investment Management Ltd.*, *supra* at paras. 24 to 38, the Supreme Court of Canada reiterated 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 focusses 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.

197 In *Fischer v. IG Investment Management Ltd.*, Justice Cromwell pointed out that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiffs' 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? (5) How do the two proceedings compare?

198 In considering the preferable procedure criterion, one should consider the type or genre of class action, because in terms of access to justice, the needs of plaintiffs suffering personal injuries are different than the needs of plaintiffs suffering a purely economic loss, and the needs of those suffering economic losses are different depending upon whether the loss is a deprivation or a missed expected financial gain.

199 The type of remedy being sought be it declaratory, compensatory, or restitutionary may also make a difference to whether a class proceeding is the preferable procedure for the resolution of the Class Members' claims. Providing injured parties with access to justice cannot be divorced from ensuring that the ultimate remedy provides substantive justice where warranted: *Fischer v. IG Investment Management Ltd.*, *supra*, at para. 24; F. Iacobucci, "What Is Access to Justice in the Context of Class Actions?" in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17 at p. 20.

200 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 procedures. The importance of proportionality to access to justice was recently expressed by the Supreme Court of Canada in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) at paras. 1-2, 27, where the Court stated:

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. ... 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.

There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts 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 that alternative models of adjudication are no less legitimate than the conventional trial.

201 With all the relevant factors in mind, I begin the preferable procedure analysis for the immediate case by noting that the case at bar is quite far from the quintessential case where a class action has been held to be the preferable procedure to obtain access to justice, behavior modification, and judicial economy.

202 In the quintessential case of a class proceeding for a purely economic loss, the proposed Representative Plaintiff genuinely needs a class proceeding to obtain access to justice, rather than just wanting a class proceeding for its several advantages and the intense pressure it exerts on the Defendant to settle.

203 In the quintessential economic loss case, the Representative Plaintiff's individual claim would not justify suing the Defendant, and so an individual action is out of the question; only a class action will achieve access to justice. In the quintessential case, there is an economic barrier to access to justice because the individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. The modest individual recovery, the litigation expense, the forensic challenges of proving wrongdoing, and the risk of an adverse costs award make anything other than a class action prohibitive and unfeasible.

204 In the quintessential case for an economic loss, behaviour modification is genuinely achieved because but for a class action, the Defendant would have gotten away with its economic wrongdoing because those wronged as individuals would not be able to bring the Defendant to the seat of justice, unless they joined together as members of a class action. Financially, it would not make sense to pursue the Defendant and financially a Class Counsel would not be interested in prosecuting the case unless there was an appropriate upside for taking on the risks.

205 In the quintessential case, considerable judicial economy will be achieved by the common issues trial, which in the best case will be dispositive of the litigation and lead to a distribution of the proceeds in accordance with the considerable administrative resources of the *Class Proceedings Act, 1992*.

206 Unlike the quintessential case, in the case at bar, Excalibur has an almost \$1 million claim that would justify taking on the litigation risk. Excalibur itself does not genuinely need a class action to obtain access to justice. If Excalibur was joined by just the other top 10 investors in an action against SLF (which would not need to be certified and for which there would be no doubt about the court's jurisdiction *simpliciter*), the action would have the heft of being a claim for around USD \$3 million. There is ample here for a contingency fee, and Class Counsel would not be confronted with the risks associated with obtaining certification.

207 In other words, unlike the situation in *Fischer v. IG Investment Management Ltd.*, *supra*, which was an investor class action populated mainly by investors with claims that would not justify individual actions, there are no significant economic barriers to litigating that would need to be overcome by a class action procedure. The investors are known and any of them with claims that are uneconomical to litigate could be just as easily carried as co-plaintiffs without the formality and expense of a certification motion. There are also no psychological or social barriers, such as might be present in an employment or franchise class action, where the Class Members may be intimidated or reluctant to sue their boss or franchisor. There is no psychological or social barrier that presents itself and the forensic resources of the parties are about equal in terms of the availability of capable lawyers and qualified expert witnesses.

208 Perhaps, with a few exceptions, the Class Members also do not need a class action in order to obtain access to justice. The Class Members, even the smaller ones, are "accredited investors" which means they are, by definition, not without resources to litigate.

209 In the case at bar, it is debatable whether behaviour modification is needed beyond the behaviour modification that comes from an regular tort action. SLF did not rip off the investors who were strangers to it and with whom SLF had no retainer. All SLF got out of the refinancing of Southern China Livestock was \$45,000 for auditing statements for which there is no evidence that the statements are not accurate. Accidentally or coincidentally the statements might have been accurate at the time they were issued, but the allegation is that it was negligent for SLF to issue the Audit Report accurate or not. SLF is being sued in a novel action that may extend the liability of auditors. In any event, an unsuccessful defence of a \$1 million action will get the lesson out to the accounting profession that auditors are exposed to this type of liability.

210 In the case at bar, the common issues trial would be manageable and make a substantial contribution to resolving the claims of all of the Class Members, but the class action as a whole would achieve only modest judicial economy over individual actions or the joinder of claims, and the judicial economy it achieves is likely to be attenuated in the case at bar, because there would be individual issue trials because SLF has a right to advance its contributory negligence defence and damages cannot be determined in the aggregate.

211 That the case at bar is far from the quintessential economic loss class action, however, does not mean that it does not satisfy the preferable procedure criterion. Similar pure economic cases with self-sufficient representative plaintiffs have been certified; see: *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165 (Ont. C.A.) varying 2011 ONSC 6724 (Ont. S.C.J.); *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (Ont. S.C.J.), leave to appeal to Div. Ct. ref'd. 2012 ONSC 6101 (Ont. Div. Ct.); 2012 ONSC 399 (Ont. S.C.J.); *Robinson v. Rochester Financial Ltd.*, [2010] O.J. No. 187 (Ont. S.C.J.), leave to appeal ref'd 2010 ONSC 1899 (Ont. Div. Ct.); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No.

4622 (Ont. S.C.J.), *Delgrossio v. Paul* (1999), 45 O.R. (3d) 605 (Ont. Gen. Div.); *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429 (B.C. C.A.).

212 So the preferable procedure analysis must go forward to determine whether the case at bar although far from the quintessential economic loss case, nevertheless, is the preferable procedure for the Class Members' claims.

213 In making a preferable procedure analysis, it is necessary to consider the alternatives to a class action. The preferable procedure analysis recognizes that a class action is not the only way for a group to litigate.

214 As noted above in *Fischer v. IG Investment Management Ltd.*, *supra*, the Supreme Court stated that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights.

215 In the case at bar, the alternative of a joinder of claims would provide effective redress for Excalibur and another other investors who could join the action as co-plaintiffs. A joinder of claims would provide suitable procedural rights. A joinder of claims would have avoided a certification motion, although perhaps not a motion to challenge the jurisdiction of the Ontario court as forum *non conveniens* given that the United States would be the expected venue for all of the investors. In comparison to a class action, a joinder of claims would provide access to justice for those class members with meritorious claims, promote adequate behaviour modification of the defendant and provide a similar amount of judicial economy to that which would be achieved by a class action.

216 In my opinion, in the circumstances of the case at bar, a joinder of claims is preferable to a class action, which, although manageable would be and has shown itself to be more procedurally cumbersome and protracted than a regular action. With the benefit of hindsight, this almost two-year old action might be past discoveries and be ready to set down for trial if it had not been delayed by the pursuit of certification under the *Class Proceedings Act, 1992*.

217 Like all of the criterion for certification, the preferable procedure criterion sets a very low and easy to satisfy standard, but it is not so low that it is satisfied automatically because a representative plaintiff can form a group of claimants with manageable common issues, which is more or less all that Excalibur has done in the case at bar. And in the case at bar, the formation of a class is without showing that Ontario has a real and substantial connection to the investors' claims and is without showing that a class action is necessary to overcome any barriers to access to justice. In the case at bar, a class action is not necessary to achieve behaviour modification and a class action would not be particularly helpful in providing judicial economy.

218 In my opinion, the fourth criterion for certification (preferable procedure) is not satisfied in the case at bar.

## **6. Representative Plaintiff Criterion**

219 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.

220 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: *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.).

221 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: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No.

197 (Ont. S.C.J.), at paras. 71-77; *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.

222 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: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 41.

223 Assuming that all of the other criteria had been satisfied, then Excalibur would have satisfied the representative plaintiff criterion. There are no fatal flaws in their litigation plan.

224 Had I certified the action I would have made it clear that should the action proceed to individual issue trials, the non-resident Class Members (all of them except Excalibur) would be exposed to costs for the individual issues trial (this is normal) and with that exposure to costs, they would also be exposed to SLF bringing a motion for security for costs (also a normal incident of litigation involving non-residents).

#### **D. Conclusion**

225 For the above reasons, I dismiss the certification motion.

226 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with SLF's submissions within 30 days of the release of these Reasons for Decision followed by Excalibur's submissions within a further 30 days.

*Motion dismissed.*



**Most Negative Treatment:** Reversed

**Most Recent Reversed:** [Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP](#) | 2016 ONCA 916, 2016 CarswellOnt 19121, 66 B.L.R. (5th) 1, 406 D.L.R. (4th) 201, 95 C.P.C. (7th) 284, 273 A.C.W.S. (3d) 36, 135 O.R. (3d) 743 | (Ont. C.A., Dec 6, 2016)

2015 ONSC 1634

Ontario Superior Court of Justice (Divisional Court)

Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP

2015 CarswellOnt 8853, 2015 ONSC 1634, 254 A.C.W.S. (3d)  
32, 337 O.A.C. 123, 386 D.L.R. (4th) 313, 45 B.L.R. (5th) 46

## **Excalibur Special Opportunities LP, Plaintiff/Appellant and Schwartz Levitsky Feldman LLP, Defendant/Respondent**

Lederman, H. Sachs, Lederer JJ.

Heard: February 11, 2015

Judgment: June 15, 2015

Docket: Toronto 360/14

Proceedings: affirming [Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP \(2014\)](#), 31 B.L.R. (5th) 46, 2014 CarswellOnt 9299, 2014 ONSC 4118, Perell J. (Ont. S.C.J.); additional reasons at [Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP \(2014\)](#), 2014 CarswellOnt 11111, 2014 ONSC 4751, Perell J. (Ont. S.C.J.)

Counsel: Linda Rothstein, Margaret Waddell, Odette Soriano, for Plaintiff / Appellant  
Tim Farrell, Jordan Page, for Defendant / Respondent

Subject: Civil Practice and Procedure

### **Related Abridgment Classifications**

Civil practice and procedure

#### **V Class and representative proceedings**

[V.2 Representative or class proceedings under class proceedings legislation](#)

[V.2.b Certification](#)

[V.2.b.i Plaintiff's class proceeding](#)

[V.2.b.i.A Pleadings disclose cause of action](#)

Civil practice and procedure

#### **V Class and representative proceedings**

[V.2 Representative or class proceedings under class proceedings legislation](#)

[V.2.b Certification](#)

[V.2.b.i Plaintiff's class proceeding](#)

[V.2.b.i.B Identifiable class](#)

Civil practice and procedure

#### **V Class and representative proceedings**

[V.2 Representative or class proceedings under class proceedings legislation](#)

[V.2.b Certification](#)

[V.2.b.i Plaintiff's class proceeding](#)

[V.2.b.i.C Common issue or interest](#)

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.D Preferable procedure**

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff appealed; defendant brought motion for leave to cross-appeal — Prospective representative plaintiff was not one of many small investors, but rather size of its investment demonstrated that it did not need class action to make this economical, as it could proceed on its own — It was apparent that joinder was appropriate for problem and for process — Motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Class proceedings should be used when they were needed, not just because they could be made to apply and appeared convenient — Class action was directed by more public concerns: access to justice, behaviour modification and judicial economy.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff appealed; defendant brought motion for leave to cross-appeal — Prospective representative plaintiff was not one of many small investors, but rather size of its investment demonstrated that it did not need class action to make this economical, as it could proceed on its own — It was apparent that joinder was appropriate for problem and for process — Motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Class proceedings should be used when they were needed, not just because they could be made to apply and appeared convenient — Class action was directed by more public concerns: access to justice, behaviour modification and judicial economy.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff appealed; defendant brought motion for leave to cross-appeal — Prospective representative plaintiff was not one of many small investors, but rather size of its investment demonstrated that it did not need class action to make this economical, as it could proceed on its own — It was apparent that joinder was appropriate for problem and for process — Motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Class proceedings should be used when they were needed, not just

because they could be made to apply and appeared convenient — Class action was directed by more public concerns: access to justice, behaviour modification and judicial economy.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiff was Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiffs unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiffs appealed; defendant brought motion for leave to cross-appeal — Prospective representative plaintiff was not one of many small investors, but rather size of its investment demonstrated that it did not need class action to make this economical, as it could proceed on its own — It was apparent that joinder was appropriate for problem and for process — Motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Class proceedings should be used when they were needed, not just because they could be made to apply and appeared convenient — Class action was directed by more public concerns: access to justice, behaviour modification and judicial economy.

The plaintiff was a Canadian investor, who was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China. Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm. Accredited investors invested some \$7.5 million before learning that the producer lacked financial controls over its all-cash-business. The producer went out of business. The plaintiff brought a class action against the defendant for negligence and negligent misrepresentation. The plaintiff unsuccessfully brought a motion for certification. Motion judge found that it was unreasonable to anticipate that the members of the prospective class could expect that claims had real and substantial connection to Ontario. The plaintiff appealed. The defendant brought motion for leave to cross-appeal.

**Held:** The appeal was dismissed; the motion for leave to cross-appeal was dismissed.

Per Lederer J. (Lederman J. concurring): The prospective representative plaintiff was not one of many small investors, but rather the size of its investment demonstrated that plaintiff did not need class action to make this economical, as plaintiff was able to proceed on its own. It was apparent that joinder was appropriate for the problem and for the process. The motion judge's ruling in respect of the preferable procedure should stand because joinder could respond to plaintiff's issues without additional steps that accompany class proceeding. Class proceedings should be used when they were needed, not just because they could be made to apply and appeared to be convenient. A class action was directed by more to public concerns, such as access to justice, behaviour modification and judicial economy.

Per Sachs J. (dissenting): The class action should be certified and the appeal allowed. The key to the motion judge's assessment of the global issue was his finding that the action did not have a real and substantial connection to Ontario. In this case, three of the four presumptive connection factors existed that entitled a court to assume jurisdiction over the dispute. The action was an action for negligence and negligent misrepresentation against a defendant who resided in Ontario, carried on business in Ontario, and performed the work at issue out of its Toronto office. The plaintiff's action was a claim against a firm of accountants that resided in Ontario, and actively conducted business here, in relation to an audit that the firm performed in Ontario. Conceived in this way, it could not be said that the action did not have real and substantial connection with Ontario. The unnamed class members were all easily identifiable. The proposed class action satisfied the preferable procedure criterion. The motion judge erred in finding that joinder was an available procedure in the absence of any evidence that the other class members would be prepared to assume the burdens, risks and responsibilities of commencing their own claim, that they would be able to or would want to retain the same counsel, or that the defendant would retain the same counsel.

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- Carom v. Bre-X Minerals Ltd.* (1999), 46 O.R. (3d) 315, 1999 CarswellOnt 4716, 6 B.L.R. (3d) 82, 1 C.P.C. (5th) 82 (Ont. Div. Ct.) — referred to
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*Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 70 O.R. (3d) 255 (note), [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 2004 CSC 9 (S.C.C.) — referred to

*Hollick v. Metropolitan Toronto (Municipality)* (2001), 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, 2001 CSC 68 (S.C.C.) — referred to

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

*Hryniak v. Mauldin* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin*) 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, (sub nom. *Hryniak v. Mauldin*) [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

*Hudson v. Austin* (2010), 2010 ONSC 2789, 2010 CarswellOnt 3211, 96 C.P.C. (6th) 121 (Ont. S.C.J.) — considered

*Jaikaran v. Austin* (2011), 2011 ONSC 6336, 2011 CarswellOnt 11708, 38 C.P.C. (7th) 128 (Ont. S.C.J.) — referred to

*Kafka v. Allstate Insurance Co. of Canada* (2012), 2012 ONSC 1035, 2012 CarswellOnt 4089, 98 C.C.E.L. (3d) 53, 289 O.A.C. 292, 2012 C.L.L.C. 210-034, 23 C.P.C. (7th) 400 (Ont. Div. Ct.) — referred to

*Markson v. MBNA Canada Bank* (2007), 2007 ONCA 334, 2007 CarswellOnt 2716, 85 O.R. (3d) 321, 224 O.A.C. 71, 43 C.P.C. (6th) 10, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273 (Ont. C.A.) — referred to

*Markson v. MBNA Canada Bank* (2007), 2007 CarswellOnt 7420, 2007 CarswellOnt 7421, [2007] 3 S.C.R. xii (note), 383 N.R. 381, 248 O.A.C. 396 (note) (S.C.C.) — referred to

*McCutcheon v. Cash Store Inc.* (2006), 2006 CarswellOnt 2973, 27 C.P.C. (6th) 293, 80 O.R. (3d) 644 (Ont. S.C.J.) — referred to

*McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 2003 CarswellOnt 3181, [2003] I.L.R. I-4249, 66 O.R. (3d) 466, 10 C.C.L.I. (4th) 258, 47 C.P.C. (5th) 370 (Ont. S.C.J.) — referred to

*New Brunswick (Board of Management) v. Dunsmuir* (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65, 2008 CSC 9 (S.C.C.) — followed

*Oakley & Oakley Professional Corp. v. Aitken* (2011), 2011 ONSC 5613, 2011 CarswellOnt 12301 (Ont. S.C.J.) — referred to

*Pysznyj v. Orsu Metals Corp.* (2010), 2010 ONSC 1151, 2010 CarswellOnt 17912 (Ont. S.C.J.) — referred to

*Ramdath v. George Brown College of Applied Arts & Technology* (2010), 2010 ONSC 2019, 2010 CarswellOnt 2038, 93 C.P.C. (6th) 106 (Ont. S.C.J.) — referred to

*Robertson v. Thomson Corp.* (1999), 1999 CarswellOnt 301, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 43 O.R. (3d) 161, 30 C.P.C. (4th) 182, 86 O.T.C. 226 (Ont. Gen. Div.) — referred to

*Silver v. Imax Corp.* (2009), 2009 CarswellOnt 7873, 86 C.P.C. (6th) 273 (Ont. S.C.J.) — referred to

*Silver v. Imax Corp.* (2011), 2011 CarswellOnt 877, 2011 ONSC 1035, 80 B.L.R. (4th) 228, 105 O.R. (3d) 212 (Ont. S.C.J.) — referred to

*Van Damme v. Gelber* (2013), 2013 ONCA 388, 2013 CarswellOnt 7839, 115 O.R. (3d) 470, 307 O.A.C. 81, 42 C.P.C. (7th) 100, 363 D.L.R. (4th) 250 (Ont. C.A.) — referred to

*Wilson v. Servier Canada Inc.* (2000), 2000 CarswellOnt 3257, 50 O.R. (3d) 219, 49 C.P.C. (4th) 233, 24 C.P.C. (5th) 175 (Ont. S.C.J.) — referred to

**Cases considered by H. Sachs J. (dissenting):**

*Cannon v. Funds for Canada Foundation* (2012), 2012 ONSC 399, 2012 CarswellOnt 503, 13 C.P.C. (7th) 250, [2012] 3 C.T.C. 132 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Cannon v. Funds for Canada Foundation* (2012), 2012 ONSC 6101, 2012 CarswellOnt 13625, 112 O.R. (3d) 641 (Ont. Div. Ct.) — referred to in a minority or dissenting opinion

*Dugal v. Manulife Financial Corp.* (2014), 2014 ONSC 1347, 2014 CarswellOnt 2640, 317 O.A.C. 384 (Ont. Div. Ct.) — referred to in a minority or dissenting opinion

*Fischer v. IG Investment Management Ltd.* (2013), 2013 SCC 69, 2013 CarswellOnt 17258, 2013 CarswellOnt 17259, 45 C.P.C. (7th) 227, 366 D.L.R. (4th) 1, 312 O.A.C. 128, 482 N.R. 80, (sub nom. *AIC Limited v. Fischer*) [2013] 3 S.C.R. 949 (S.C.C.) — considered in a minority or dissenting opinion

*Green v. Canadian Imperial Bank of Commerce* (2014), 2014 ONCA 90, 2014 CarswellOnt 1143, (sub nom. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*) 118 O.R. (3d) 641, 314 O.A.C. 315, 50 C.P.C. (7th) 113, 370 D.L.R. (4th) 402 (Ont. C.A.) — referred to in a minority or dissenting opinion

*Hercules Management Ltd. v. Ernst & Young* (1997), 1997 CarswellMan 198, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.) — considered in a minority or dissenting opinion

*Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.* (2013), 2013 ONSC 4083, 2013 CarswellOnt 10277, 44 C.P.C. (7th) 80 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Lipson v. Cassels Brock & Blackwell LLP* (2011), 2011 ONSC 6724, 2011 CarswellOnt 12642, [2012] 2 C.T.C. 144, 12 C.P.C. (7th) 328, 108 O.R. (3d) 681 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Lipson v. Cassels Brock & Blackwell LLP* (2013), 2013 ONCA 165, 2013 CarswellOnt 2953, 31 C.P.C. (7th) 128, 114 O.R. (3d) 481, [2013] 4 C.T.C. 116, 303 O.A.C. 124, 360 D.L.R. (4th) 577 (Ont. C.A.) — referred to in a minority or dissenting opinion

*Murphy v. BDO Dunwoody LLP* (2006), 2006 CarswellOnt 4127, 32 C.P.C. (6th) 358 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 2005 CarswellOnt 544, 7 C.P.C. (6th) 60, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 250 D.L.R. (4th) 224, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 195 O.A.C. 244, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 74 O.R. (3d) 321 (Ont. C.A.) — considered in a minority or dissenting opinion

*Quinte v. Eastwood Mall Inc.* (2014), 2014 ONSC 249, 2014 CarswellOnt 1826, 59 C.P.C. (7th) 301 (Ont. S.C.J.) — considered in a minority or dissenting opinion

*Robinson v. Rochester Financial Ltd.* (2010), 2010 ONSC 463, 2010 CarswellOnt 206, 89 C.P.C. (6th) 91 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Robinson v. Rochester Financial Ltd.* (2010), 2010 ONSC 1899, 2010 CarswellOnt 2153, 262 O.A.C. 148, 89 C.P.C. (6th) 118 (Ont. Div. Ct.) — referred to in a minority or dissenting opinion

*Silver v. Imax Corp.* (2009), 2009 CarswellOnt 7873, 86 C.P.C. (6th) 273 (Ont. S.C.J.) — considered in a minority or dissenting opinion

*Silver v. Imax Corp.* (2011), 2011 CarswellOnt 877, 2011 ONSC 1035, 80 B.L.R. (4th) 228, 105 O.R. (3d) 212 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Tolofson v. Jensen* (1994), [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 100 B.C.L.R. (2d) 1, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 26 C.C.L.I. (2d) 1, 175 N.R. 161, 120 D.L.R. (4th) 289, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon*) [1994] 3 S.C.R. 1022, 77 O.A.C. 81, 51 B.C.A.C. 241, 84 W.A.C. 241, 1994 CarswellBC 1, 1994 CarswellBC 2578 (S.C.C.) — considered in a minority or dissenting opinion

*Van Breda v. Village Resorts Ltd.* (2012), 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 343 D.L.R. (4th) 577, 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda*) [2012] 1 S.C.R. 572, (sub nom. *Charron Estate v. Village Resorts Ltd.*) 114 O.R. (3d) 79 (note) (S.C.C.) — considered in a minority or dissenting opinion

**Statutes considered by Lederer J.:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 19 — referred to

**Statutes considered by H. Sachs J. (dissenting):**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

**Rules considered by Lederer J.:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 1.04(1.1) [en. O. Reg. 438] — considered

APPEAL by plaintiff from judgment reported at *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* (2014), 2014 ONSC 4118, 2014 CarswellOnt 9299, 31 B.L.R. (5th) 46 (Ont. S.C.J.), dismissing motion for class action certification and MOTION by defendant for leave to cross-appeal.

**Lederer J.:**

**Introduction**

1 This is an appeal. The appellant commenced a class action. A motion to certify it as a class proceeding was heard by Mr. Justice Perell. He found that the pleadings disclosed causes of action both in negligence and negligent misrepresentation, but that it would be unreasonable to anticipate that members of the prospective class (including the proposed representative plaintiff) would expect that the claims had a real and substantial connection to Ontario. Thus, Mr. Justice Perell found there was no class (in this case, a global class, one that included members beyond the boundaries of Canada and around the world) that could be established. Moreover, the motion judge concluded that a class proceeding was not the "preferable procedure" for resolution of the common issues.<sup>1</sup> A joinder of claims would provide "effective redress" and "suitable procedural rights".<sup>2</sup> The motion was dismissed. This is the order that is being appealed. It was a final order. Accordingly, the appeal is as of right.<sup>3</sup>

2 The defendant brought what it referred to as a cross-appeal. Among the questions to be considered on any motion to certify a class action is the identification of the issues common to the members of the prospective class.<sup>4</sup> Mr. Justice Perell noted that the failure to identify a proper class was "irremediable" but, upon observing that appeals were "virtually inevitable in proposed class actions"<sup>5</sup>, went on to consider the other certification criteria, including the defining of common issues. It is this part of the reasons of Mr. Justice Perell that the defendant seeks to cross-appeal. The plaintiff takes the position that, as a cross-appeal, this is a nullity. First, an appeal is from an order, not from the reasons which support the order. In this case, the order issued did nothing other than dismiss the motion and provide for submissions as to costs. As part of an order, the identification of common issues would not be final. Even if the findings of the motion judge, in identifying common issues, were subject to appeal, leave would be required. Counsel for the plaintiff submitted this part of the proceeding brought before this court should not be heard, at least not as a cross-appeal. As will become apparent, the appeal is to be dismissed. This being so, the propriety of the "cross-appeal" does not matter. Nonetheless, it may be as well that I make some brief comment.

3 Clearly, it would make little, if any, sense to hear the appeal and then, if successful, require the defendant to obtain leave and proceed with the "cross-appeal" as to the defining of common issues on another day. In the same vein, it would unnecessarily complicate the process to adjourn the appeal, or require that it not be heard until after a motion seeking leave to bring a proposed cross-appeal had been dealt with. The better view, as suggested by counsel for the plaintiff and consistent with the proposition that it is orders and not reasons that are appealed, would be to recognize that concerns for the appropriateness of any identified

common issues is not properly seen as the subject of a cross-appeal but, rather, intrinsic to the appeal itself. The definition of common issues is, after all, one of the constituent requirements of a determination whether or not to certify a class proceeding. A question to be answered would concern the impact any identified common issues may have on whether the class action should be certified. In this case, an issue raised was whether Mr. Justice Perell was correct in finding that it was not plain and obvious that a separate cause of action for negligence (as opposed to negligent misrepresentation) would not succeed. Any submission that the motion judge was in error could bear upon the fundamental question of whether the class proceeding should be certified.

4 There is a further subsidiary appeal. It concerns the award of costs made following separate submissions that addressed the issue. As part of its response to the motion to certify the class action, the defendant retained and produced two affidavits in the name of J. Peter Coll, described by the motions judge as a senior lawyer with a New York firm with expertise in American securities law.<sup>6</sup> His firm submitted an account in the amount of \$107,660.25 USD. This was included in the costs award made by Mr. Justice Perell against the plaintiff in favour of the defendant. If the plaintiff is unsuccessful in its appeal, that is, if the decision to dismiss the certification of this proceeding as a class action is upheld, the plaintiff seeks leave to appeal the finding that the costs associated with the participation of J. Peter Coll should be paid by the plaintiff to the defendant. Typically, one would expect an appellant to appeal a determination of the costs to be awarded where its appeal as to the merits is successful. The appellant before this court (the plaintiff in the action) seeks to vary the award as to costs if it is unsuccessful on its appeal. I will return to this later in these reasons.

## Background

5 The facts are not controversial. South China Livestock was a Chinese hog producer. In 2009, it began the process of entering the North American capital markets through a reverse takeover and a private placement financing. The defendant, Schwartz Levitsky Feldman LLP ("SLF"), is a Toronto and Montreal accounting firm. It audits American, Canadian and international public companies. It had (and may still have)<sup>7</sup> a group that specialized in the audits of Chinese businesses. In 2010, the American promoters and marketers of the private placement provided accredited investors with a Private Placement Memorandum. It included, as an exhibit, an Audit Report prepared by SLF. The audit report is described as being "clean", which I understand to mean that it would not have raised any concerns in the minds of potential investors as they reviewed the Private Placement Memorandum. The plaintiff, Excalibur Special Opportunities LP ("Excalibur"), is a limited partnership investment fund based in Toronto. It was one of 57 investors who, in response to the Private Placement Memorandum, invested a total of \$7,594,965. Within a year, it became apparent that South China Livestock operated without financial control over what was an all-cash business. The plaintiff says that this is entirely at odds with the clean Audit Report. In such circumstances, under generally accepted accounting principles, such a report is not possible. In short order, South China Livestock went out of business, the investors lost their investment, and the plaintiff commenced this class action on behalf of the investors. The plaintiff says it relied on the Audit Report when it decided to invest. In its claim, the plaintiff alleges that SLF was negligent in conducting its audit and that the Audit Report contains misrepresentations. The action it commenced is founded on these allegations.

## Class Actions

6 In considering this appeal, it may be worthwhile to give some consideration to the substance of, and policy foundation for, class actions. The *Class Proceedings Act* is a procedural statute. Proceeding under its ambit does not affect the cause or substance of the action. Nothing which is not negligence within a more typical proceeding suddenly becomes negligence just because the case is framed as a class proceeding. The legislation presents a means to conduct litigation. It does not apply every time a "person", individual or group that finds herself, himself or itself harmed or damaged in common with others. There is no inherent right to proceed on a class basis. The procedure offered by the legislation is in furtherance of understood policy objectives: (1) access to justice; (2) behaviour modification; and, (3) judicial economy. This was reviewed by Mr. Justice Perell, as follows:

In the quintessential economic loss case, the Representative Plaintiff's individual claim would not justify suing the Defendant, and so an individual action is out of the question; only a class action will achieve access to justice. In the quintessential case, there is an economic barrier to access to justice because the individual cannot bring forward a claim

because of the high cost that litigation would entail in comparison to the modest value of the claim. The modest individual recovery, the litigation expense, the forensic challenges of proving wrongdoing, and the risk of an adverse costs award make anything other than a class action prohibitive and unfeasible.

In the quintessential case for an economic loss, behaviour modification is genuinely achieved because but for a class action, the Defendant would have gotten away with its economic wrongdoing because those wronged as individuals would not be able to bring the Defendant to the seat of justice, unless they joined together as members of a class action. Financially, it would not make sense to pursue the Defendant and financially a Class Counsel would not be interested in prosecuting the case unless there was an appropriate upside for taking on the risks.

In the quintessential case, considerable judicial economy will be achieved by the common issues trial, which in the best case will be dispositive of the litigation and lead to a distribution of the proceeds in accordance with the considerable administrative resources of the *Class Proceedings Act, 1992*.<sup>8</sup>

## Standard of Review

7 Generally, the standard of review can be summarized as one of correctness with respect to issues of law or legal principle. The standard of review for findings of fact is such that findings cannot be reversed unless there is a palpable and overriding error. Questions of mixed fact and law are on a spectrum depending on the nature of the issue under review. If the issue is one that is particular to the case at hand without any impact beyond the decision to be made, it will tend to the palpable and overriding error (reasonableness)<sup>9</sup> end of the spectrum. If it has a broader impact beyond the specific case, into the general law with precedential value, it will tend to the correctness side.<sup>10</sup>

8 Appellate courts have acknowledged that class actions are a highly technical area of the law and recognized the special expertise of judges who deal regularly with these matters. Substantial deference is owed on certification decisions.<sup>11</sup>

## Analysis

### (a) Preferable Procedure

9 Central to the idea that class proceedings respond to the three policy directives is the requirement that the court, in considering whether to certify a class action, determine that proceeding pursuant to the *Class Proceedings Act* would be the "...preferable procedure for the resolution of the common issues".<sup>12</sup> Mr. Justice Perell began by reviewing what goes into a consideration of the issue.

10 To be the preferable procedure, a class proceeding must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving claims.<sup>13</sup> Whether a class proceeding is the preferable procedure is measured by reference to the underlying policy objectives (access to justice, behaviour modification and judicial economy)<sup>14</sup> and the extent to which certification furthers those objectives.<sup>15</sup> In considering an alternative to a class proceeding, the court should examine whether that option could provide suitable procedural protections and effective redress for the claims being made.<sup>16</sup> Mr. Justice Perell went further. He added to the factors to be considered in assessing and identifying the preferable procedure. He included, as a consideration, "... the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures".<sup>17</sup> Counsel for the plaintiff noted that, for a preferable procedure analysis, this was a new criteria, but acknowledged that it is part of such an examination "since it encompasses the concept of judicial economy".<sup>18</sup>

11 Mr. Justice Perell concluded that a class proceeding was not the preferable procedure. In the circumstances, joinder was available, appropriate and preferable. Counsel for the plaintiff objected to this determination. She began by pointing out that the potential for joinder as the preferable process was not raised by counsel in the submissions that were made. This was an idea that

found its origins in the mind of the judge and found favour with him in the absence of comment from the parties. In submitting that this was improper and a ground for setting aside the order, counsel relied on *Cavanaugh v. Grenville Christian College*.<sup>19</sup>

12 Five students of a private school sought to certify a class action against the school, its administration and the local Anglican Diocese. The action against the Diocese was dismissed. This was appealed to the Court of Appeal and the ruling upheld. The action against the school and the administration was not dismissed but, at the same time, was not certified. There was a preferable procedure. The motion judge, as here, was Mr. Justice Perell. This part of his decision was appealed to the Divisional Court, which set aside his finding and certified the class. The Court determined that the motion judge "...made a palpable and overriding error in the analysis and the decision of the preferable procedure"<sup>20</sup> and, then, went on to observe that the motion judge "...had imposed a procedure not advocated by the defendants and for which he heard no submissions from either party."<sup>21</sup> The plaintiff submitted that, in this case, the same mistake was made. To my mind, this idea needs to be examined more carefully.

13 I begin by returning to the understanding that the *Class Proceedings Act* is a procedural statute. There is responsibility left with the court to find the "preferable procedure".<sup>22</sup> It cannot have been intended that, if a defendant fails to rise to the challenge, the court is left with no option but to allow a proceeding to move forward as a class action even if that procedure is unsuitable. It has been held that it is the party seeking certification of a class action that bears the burden of showing some basis in fact for each of the certification criterion. This includes a requirement that the plaintiff show that a class action would be preferable to any other reasonably available means of resolving the claims of the class members.<sup>23</sup> It is worth remembering that the report of the Law Reform Commission of Ontario, which resulted in the present *Class Proceedings Act*, begins its review by noting and repeating that "joinder" or "compulsory joinder" did not appropriately address the concerns to which class actions could respond.<sup>24</sup> Joinder is not simply an alternative, it is the default position in considering whether a class proceeding is or is not the preferable procedure. Mr. Justice Perell did not impose joinder on the plaintiff, he simply pointed out that joinder "...would provide effective redress for Excalibur and... other investors could join the action as co-plaintiffs".<sup>25</sup>

14 The circumstances in *Cavanaugh v. Grenville Christian College* were quite different. Having said that an alternative procedure had been imposed by Mr. Justice Perell, the Divisional Court went on to explain:

The procedure arose in the context of a factually different case, a medical malpractice claim which had its origins as a proposed class action but which was discontinued after the parties agreed to ask Justice Perell to case manage the proceedings.<sup>26</sup>

15 In *Cavanaugh v. Grenville Christian College*, Mr. Justice Perell went beyond offering that joinder could be an effective alternative. Having concluded that the case he was considering was ill-suited to a class proceeding, Mr. Justice Perell observed that there was a preferable procedure. He referred to three cases, all of which were related, and reviewed one of them in detail.<sup>27</sup>

*Hudson v. Austin*<sup>28</sup> began as a class proceeding. It was a malpractice action brought on behalf of 99 patients of one doctor. Mr. Justice Perell agreed to case manage the action. The representative plaintiff was granted leave to discontinue her proposed class action. Ninety-nine individual claims were brought against the defendant doctor. The plaintiffs in those actions were represented by a team of lawyers. The defendant was represented by the same lawyers in all of the actions. Contingency fee arrangements were made in respect of each of the plaintiffs. Some of the cases were set down for trial, 19 of the plaintiffs moved for summary judgment and made settlement offers which were accepted by the defendant. The balance of the actions settled. In *Cavanaugh v. Grenville Christian College*, Mr. Justice Perell noted that the procedure adopted in *Hudson v. Austin* served the parties well and responded to the policy directives which inform class proceedings: access to justice, judicial economy and behaviour modification.<sup>29</sup> It is this process which the Divisional Court took to have been imposed by Mr. Justice Perell without submissions and without input from the parties. To my mind, this has little, if any, application here. In this case, Mr. Justice Perell has done nothing other than observe that the traditional procedures which, absent a class proceeding, are in place to deal with situations like this, remain and are available. This was not, as counsel for the plaintiff would have it, a reprise of the "preferability analysis" undertaken by, Mr. Justice Perell in *Cavanaugh v. Grenville Christian College*.<sup>30</sup>

16 There is no error of law or otherwise in the consideration given by Mr. Justice Perell to the applicability of joinder to the situation presented by this case.

17 I turn to the question of the merits of the decision of Mr. Justice Perell as it addressed the question of the preferable procedure. It has been established that, for the preferable procedure criterion, particular deference should be paid to the decision of the motion judge.<sup>31</sup>

18 Much of the submissions made with respect to this issue reflected on the economics of the action. This speaks to the idea that where there are many people who have been harmed, each in small amounts, that would not support going to court but, where the numbers involved have the effect of generating significant, if undeserved, rewards for the wrong-doer, a class proceeding can be an effective tool. The plaintiff believes this logic applies in this case.

19 It was submitted on behalf of the plaintiff that Mr. Justice Perell made his decision "...because he concluded that the plaintiff and the class were sufficiently wealthy to pursue claims on an individual basis."<sup>32</sup> It is true that Mr. Justice Perell noted that all the members of the prospective class were accredited investors "...which means that that they are, by definition, not without resources to litigate".<sup>33</sup> However, this was not the foundation of his decision as to the preferable procedure. It is not the basis of his analysis of the economics of the lawsuit.

20 This is not a case where there is a large class, many of whom have not been identified. The class is made up of 57 investors, all of whom have been identified, all but one of whom have been contacted by mail or e-mail. One letter was returned as undeliverable<sup>34</sup>. Relying on a chart found in the decision of Mr. Justice Perell,<sup>35</sup> counsel for the plaintiff pointed out that, of the 57 investors, 39 placed funds valued at less than \$200,000 (19 put in from \$1 to \$49,000, 12 put in \$50,000 to \$99,000 and 8 put in \$100,000 to \$199,000). The proposed representative plaintiff (Excalibur) invested \$950,000. Counsel for the plaintiff, as part of her oral submissions, suggested that for anyone with an interest of less than \$100,000, it would not be economical to pursue a remedy, certainly not in court. The issues are complex. Individual actions would not be sustainable. Thus, the circumstances are ripe for certification as a class proceeding.

21 This is not how Mr. Justice Perell saw or dealt with the issue:

...unlike the situation in *AIC Limited, supra*, which was an investor class action populated mainly by investors with claims that would not justify individual actions, there are no significant economic barriers to litigating that would need to be overcome, by a class action procedure. The investors are known and any of them with claims and that are uneconomical to litigate could be just as easily carried as co-plaintiffs without the formality and expense of a certification motion. There are no psychological or social barriers, such as might be present in an employment or franchise class action, where the Class Members may be intimidated or reluctant to sue their boss or franchisor. There is no psychological or social barrier that presents itself and the forensic resource of the parties are about equal in terms of the availability of capable lawyers and qualified expert witnesses.<sup>36</sup>

22 In this case, the prospective representative plaintiff (Excalibur) is not one of many small investors. The size of its investment (\$950,000) demonstrates that it does not need a class action to make this economical. It could proceed on its own. As noted by Mr. Justice Perell:

...in the case at bar, Excalibur has almost \$1 million claim that would justify taking on the litigation risk. Excalibur itself does not genuinely need a class action to obtain access to justice. If Excalibur was joined by just the other top 10 investors in an action against SLF (which would not need to be certified and for which there would be no doubt about the court's jurisdiction *simpliciter*), the action would have the heft of being a claim for around USD \$3 million. There is ample here for a contingency fee, and Class Counsel would not be confronted with the risks associated with obtaining certification.<sup>37</sup>

23 Counsel for the plaintiff expressed concern that, in considering whether a class proceeding was the preferable procedure, Mr. Justice Perell was required, and failed, to consider five questions identified in *Fischer v. IG Investment Management Ltd.*<sup>38</sup> to be answered when considering whether alternatives to a class action would achieve access to justice. They are listed by Mr. Justice Perell in his reasons.<sup>39</sup> Each is considered by him, albeit not under a listed heading or within a discrete paragraph. However, these questions are not to be "...considered in isolation or in a specific order, but should inform the overall comparative analysis".<sup>40</sup> In the decision of Mr. Justice Perell, some are specifically dealt with and the answers to others are infused as part of and found throughout the discussion of the preferable procedure criterion as follows:

- Question 1: (Are there economic, psychological, social or procedural barriers to access to justice in this case?) see *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, supra*, (fn. 2) (Perell J.), at paras. 206 and 207, quoted herein respectively, at paras. 22 and 21;
- Question 2: (What is the potential of the class proceeding to address those barriers?) at *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, supra*, (fn. 2) (Perell J.), at paras. 206 and 207 there are no barriers and, thus, no concern for whether they can be addressed;
- Question 3: (What are the alternatives to class proceedings?) joinder;
- Question 4: (To what extent do the alternatives address the relevant barriers?) There are no barriers, as with question 2, there is nothing to address; and,
- Question 5: (How do the two proceedings compare?) at *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, supra*, (fn. 2) (Perell J.), at paras. 189 to 218 this is the substance of the review, undertaken by Mr. Justice Perell, as a whole.

24 I pause to recall the particular deference that is to be paid to the motion judge when it comes to the issue of whether a class proceeding is the preferable procedure. The question is whether by failing to respond to the direction of past cases or to respond to them in an appropriate way the motion judge has acted in a fashion that is demonstrative of an error of principle that would amount to a palpable and overriding error. It is not a question of whether a court reviewing this situation would answer these questions differently.

25 With this understanding, it becomes apparent that joinder is appropriate to the problem and the process and that the ruling of the motion judge in respect of the preferable procedure should stand. Joinder can respond to the issues without the additional steps (certification motion, identification of common issues and separation to deal with individual issues) that accompany a class proceeding. There is no reason to suggest that it cannot accommodate the needs of all those who wish to take part, each with an eye to the nature and value of their involvement. "A common procedural barrier is that there is no other procedure [other than a class proceeding] to afford meaningful redress."<sup>41</sup> Here there is joinder. There is no error of principle in the determination made by Mr. Justice Perell. In any event, to the extent that this part of his decision represents an issue of mixed fact and law (the application of the specific facts to the legal principles applicable to selecting a preferable procedure); it is particular to the facts of this case. Unlike the finding in *Cavanaugh v. Grenville Christian College*, there is no palpable and overriding error. In short, the deference owed to the motion judge dictates that his decision on this issue should be sustained.

26 There are additional concerns to be borne in mind. A class action occupies an unusual place in our civil justice system. Typically, litigation is between two (or more) identified parties. There is a *lis inter partes*. The parties play an immediate role and take a direct responsibility for the carriage of the action. A class action is directed by more public concerns: access to justice, behaviour modification and judicial economy. These broader concerns are the purpose behind the process. They change the role of the immediate parties and the general purpose of litigation, which is to resolve disputes between members of our society. We should be careful to use class proceedings when they are needed, not just because they can be made to apply and appear convenient. The decision of Mr. Justice Perell, where it considers the preferable procedure, reflects this concern. He found that in this case, the action can be carried forward in a way that does not impinge on any of the three underlying policy concerns

and without the added procedural requirements of a class proceeding. It may be, as the report of the Law Reform Commission suggested, that joinder will not always be an appropriate means of proceeding; that does not mean it never is. In this case, the motion judge found it both viable and appropriate. It can do the job.

27 The determination of Mr. Justice Perell that a class proceeding is not the preferable procedure is sustained. This being so, the class proceeding will not be certified. There is not much point in going further. Nonetheless, I should say a little more.

**(b) The Class**

28 Much of the submissions made by counsel concerned the requirement that there be "...an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;..."<sup>42</sup>

29 The identities of the 57 members of the proposed class were already known. They subscribed to the private placement. As noted by Mr. Justice Perell, providing for a definition of the class "...seems a mere technicality".<sup>43</sup>

30 The plaintiff sought to certify a "global class". For certification in Ontario, this was essential. The prospective representative plaintiff, Excalibur, was the only class member identified as resident in Ontario. With only one "member", the action would not qualify for certification. This confirms the observation and suggests the possibility that Excalibur could proceed on its own, joined by whatever other plaintiffs wished to take part, having made the appropriate arrangements. Having said this, there are a number of cases that demonstrate the willingness of the courts in Ontario to take jurisdiction and certify a global class. In his reasons, Mr. Justice Perell referred to a number of them.<sup>44</sup>

31 In this case, the issue of whether a global class could be certified centred on whether "...Ontario has a real and substantial connection with the subject matter of the jurisdiction and on principles..." and "...whether it would be reasonable for the non-resident Class Member to expect that his or her rights would be determined by what to him or her would be a foreign court."<sup>45</sup>

32 With respect to the latter, it was pointed out that, of the 55 prospective class members who were known to have received communication from class counsel (this would exclude Excalibur and the party where the letter was returned), 9 class members and 3 brokers, whose clients participated in the private placement, had made it known that they or their clients were interested in participating in the proposed class proceedings and had no objection to the litigation going forward in Ontario.<sup>46</sup> Counsel for the plaintiff noted that this demonstrated that 20% of the class was content that the action go forward as a class proceeding in Ontario. This is not an objective exercise, where 12 (or 20%) would be enough but 11 (or 19%) would not. This should be the result of a subjective analysis taking into account all of the relevant factors.

33 With respect to the former, Mr. Justice Perell and counsel for the plaintiff see the circumstances of this case quite differently. For the judge, the case is founded on the financing of an American corporation. It concerns investors, not resident in Ontario, making substantial investments in American dollars in that corporation.<sup>47</sup> For counsel, the case is about an audit done in Ontario by an auditor whose business is located in Toronto and Montreal. The proposition is that, if the perspective of the judge is correct, there is no real and substantial connection to Ontario but, if counsel is right, there is.

34 The resolution of these questions is dependent upon the particular facts of the case at hand. Given the determination that the decision of Mr. Justice Perell with respect to the preferable procedure is to be sustained, there is nothing to be gained by addressing them in these reasons.

35 Having said this it is apparent that the motion judge bore this in mind in his assessment of the matter as it was placed before him:

The investors in the case at bar were non-residents of Ontario making substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law. Although the transaction included an Audit Report from an Ontario auditor, the standard of care associated with that audit would largely be determined by the American accounting standards under which the Audit Report was provided. It would be to

exercise no restraint at all to conclude that Ontario had a substantial connection with this American financing and corporate reorganization.<sup>48</sup>

36 The motion judge did not forget that this was an action against a Canadian-based accounting firm. He determined, looking at the facts as a whole, that this was not sufficient to demonstrate a real and substantial connection to Ontario. Deference would suggest that this finding should be left to stand.

### **(c) The Appeal as to Costs**

37 The plaintiff's appeal has failed. It is in these circumstances that it seeks leave to appeal the inclusion of the accounts submitted by J. Peter Coll in the award of costs made by Mr. Justice Perell. The parties agreed as to costs, save for the matter of the disbursement in relation to the two affidavits sworn by J. Peter Coll.<sup>49</sup>

38 Appeals as to costs are rare. Costs are a matter of discretion. The judge hearing the matter is accorded a high degree of deference. 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.<sup>50</sup> The determination of the appropriate award of costs is best left to the judge (or court) that heard the proceeding which is the basis for the award. There must be an error in principle.

39 Being ready for an appearance in court may dictate the preparation of evidence that, in the end, is not required. At the argument of a preliminary motion, it may turn out to be irrelevant and yet, without the benefit of being able to look back, have been appropriate, not premature and something the other side should have anticipated.

40 This is the essence of the determination made by Mr. Justice Perell when he concluded that "...in the context of defending a proposed action that involved an overwhelming number of American investors, it was within the reasonable expectation of Excalibur that SLF would obtain expert advice about the potential application of American law and how it might influence the proposed class action".<sup>51</sup> There is no error in principle in the award made by Mr. Justice Perell, in particular as to the accounts of J. Peter Coll.

41 Leave to appeal is refused.

## **Conclusion**

42 Both the appeal and the motion for leave to appeal are dismissed.

## **Costs**

43 If the parties are unable to agree as to costs, the court will consider written submissions on the following terms:

1. On behalf of the defendant, within 15 days after the release of these reasons, such submissions are to be no longer than 4 pages, double-spaced, excluding any Costs Outline, Bill of Costs or case law that may be included;
2. On behalf of the plaintiff, within 10 days, such submissions are to be no longer than 4 pages, double-spaced, excluding any Costs Outline, Bill of Costs or case law that may be included;
3. On behalf of the defendant, if necessary in reply, such submissions are to be no longer than 2 pages, double-spaced.

## **H. Sachs J. (dissenting):**

### **Overview**

44 I have had the benefit of reading the reasons of Lederer J. and agree with his summary of the issues raised on this appeal, his summary of the background giving rise to this proceeding and his analysis regarding the standard of review that

is applicable to the motion judge's decision. I also agree with his view that the issues raised in the cross-appeal are properly dealt with as part of the appeal.

45 As summarized by Lederer J., the motion judge found that the plaintiff's claim failed to meet two of the criteria for certification - namely, the identifiable class criterion and the preferable procedure criterion. Additionally, while he concluded that the claim satisfied the cause of action criterion in respect of negligence and negligent misrepresentation, he recast the plaintiff's claim for negligence and concluded that more than half of the common issues proposed by the plaintiff should not be certified.

46 On this appeal, the plaintiff argues that the motion judge erred in his analysis of the identifiable class criterion, the preferable procedure criterion and in his failure to certify all of the common issues it proposed.

47 The parties asked the certification judge to address one issue as to costs, a disbursement in relation to two affidavits that were submitted by the defendant. The plaintiff submits that the motion judge erred in ordering it to pay the defendant for this disbursement.

48 In its cross-appeal, the defendant argues that the motion judge erred in finding that the plaintiff's claim disclosed a cause of action in negligence that could be distinguished from its claim for negligent misrepresentation.

49 For the reasons that follow, I would allow the appeal, set aside the order of the motion judge and certify the action, including most, if not all, of the common issues proposed by the plaintiff. Given my view as to the merits of the appeal, I would also allow the appeal with respect to costs.

#### **The Identifiable Class Criterion — Should the motion judge have certified a global class?**

50 The motion judge agreed that the plaintiff was proposing a class of 57 members whose identities were known or could be readily ascertained. However, because the plaintiff was the only class member who resided in Ontario, the motion judge properly asked himself whether Ontario should take jurisdiction over the foreign class members. In answering this question, he correctly identified that the Ontario court does have jurisdiction to certify a global class.

51 The motion judge found that Ontario had only a "modest if not trivial" connection to the representative plaintiff's claim, and an even weaker connection to the other 56 non-resident investors' claims. As such, according to the motion judge, it would not have been contemplated by the class that their rights arising out of the investment they made would be adjudicated in Ontario. Therefore, order and fairness dictated that the foreign class members not be included in an Ontario class proceeding. As put by the motion judge, at paras. 129 and 130 of his reasons:

[129] The residence of [the defendant] in Ontario is essentially the only connection with Ontario and while that connection certainly gives the Ontario court jurisdiction over [the defendant] and while Ontario courts would welcome foreigners to sue in Ontario that is a different thing from Ontario courts exercising the restraint required of them under the principles of order and fairness in assuming jurisdiction when the foreign plaintiff would have expected to pursue his or her rights in a court that did have a substantial connection with the subject matter of the litigation.

[130] The investors in the case at bar were non-residents of Ontario making substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law. Although the transaction included an Audit Report from an Ontario auditor, the standard of care associated with that audit would largely be determined by the American accounting standards under which the Audit Report was provided. It would be to exercise no restraint at all to conclude that Ontario had a substantial connection with this American financing and corporate reorganization.

52 In assessing the motion judge's reasoning on this issue, it is important to recognize several key points. The proposed class action is an action against a firm of accountants that is resident in Ontario and actively carries on business here. Its only other office is in Montreal. It has no assets in the United States.

53 The subject of the action is the audit work done in Ontario by this accounting firm. The partner who did the work is a partner in the firm's Toronto office.

54 The proposed representative plaintiff is a Toronto-based investment fund that is registered in Manitoba. The investment in question was made out of their Toronto office.

55 Key to the motion judge's assessment of the global class issue was his finding that the action did not have a real and substantial connection to Ontario (motion judge's reasons, para. 148).

56 In *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.), at para. 90, the Supreme Court outlined the factors that are "presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute" in a tort case. They are: "(a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province."

57 If the plaintiff establishes that one or more of these factors exist, "the court might presume, absent indications to the contrary, that the claim is properly before it under the conflict rules" (*Van Breda*, at para. 80).

58 In this case, three of the four presumptive factors exist. The action is an action for negligence and negligence misrepresentation (both torts) against a defendant who resides in Ontario, carries on business in Ontario and did the work at issue out of its Toronto office.

59 In this case, the motion judge felt that the action concerned a matter involving investors, 98% of whom were not resident in Ontario and who made "substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law" (motion judge's reasons, para. 130). Therefore, according to the motion judge, the relationship between Ontario and the proposed action was a weak one.

60 If the action was against the people who were in charge of arranging or promoting the financing for the American corporation that made the investment in question, I would agree with the motion judge's assessment of the connection between Ontario and the proposed action. However, this is not the action that the representative plaintiff is proposing to pursue. Its action is a claim against a firm of accountants that resides in Ontario and actively conducts business here in relation to an audit that the firm performed in Ontario. Conceived of in this way, it cannot be said that the action does not have a real and substantial connection with Ontario.

61 It may be that in order to determine liability, reference will have to be had to the American accounting standards under which the Audit Report was provided. However, as the motion judge noted, "the parties have agreed that the question of what law applies to the Class Members' tort claims is not to be a factor that would get in the way of certifying a global class" (motion judge's reasons, para. 137).

62 Thus, while I agree that substantial deference is owed to a motion judge's assessment, particularly in the area of fact-finding, I find that that deference must yield in the face of what I find to be an analysis on the identifiable class criterion that was driven by a mischaracterization of the plaintiff's action.

63 Once a real and substantial connection has been established, the court cannot decline to exercise jurisdiction in a non-class action case unless the defendant invokes *forum non conveniens* (*Van Breda*, at para. 102). When doing so, "The defendant must identify another forum that has an appropriate connection under the conflict rules and that should be allowed to dispose of the action" (*Van Breda*, at para. 103).

64 In this case, the defendant has not identified another jurisdiction that is seeking to assert jurisdiction over this action. The defendant has never said that it will attorn to the jurisdiction of any other court. Thus, if this action is to be pursued, the choice in practical terms is Ontario or nowhere.

65 In class actions, as the motion judge correctly identified, assuming jurisdiction over unnamed foreign plaintiffs does involve additional considerations of "order and fairness". In his analysis on jurisdiction, the motion judge found that one of the factors to be considered in deciding whether or not to certify a global class was "whether it would be reasonable for the non-resident Class Member to expect that his or her rights would be determined by what to him or her would be a foreign court" (para. 111).

66 In discussing the question of "when it would be fair to join foreign plaintiffs to an Ontario action; namely, when the foreigner would expect that his or her rights would be determined by what to him or her would be a foreign court" (motion judge's reasons, para. 119), the motion judge refers to the discussion by Sharpe J., in *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.) [hereinafter *Currie*].

67 In *Currie*, Sharpe J. was dealing with the question of whether an Ontario court should recognize and enforce a foreign judgment in a class action proceeding that purported to bind Canadian class members. In dealing with this issue, Sharpe J. refers to the "principles of order and fairness" and the notion of "judicial restraint", but does so with reference to the need for the court to ask whether the court that issued the judgment properly assumed jurisdiction, and whether there were adequate procedural rights afforded to the unnamed non-resident class members.

68 In the course of his reasons, Sharpe J.A. states that "[t]o determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought" (para. 18). In that case, the unnamed Canadian class members, who were all McDonald's customers, had done nothing to invoke the jurisdiction of the Illinois court. Therefore, in addressing the concerns of "fairness", it was necessary to consider the adequacy of the procedural rights afforded to those plaintiffs.

69 In the context of those procedural rights, Sharpe J.A. finds that it is first necessary to conclude that the representative plaintiff will adequately represent the rights of the unnamed plaintiffs. It is then important that the unnamed plaintiffs be given adequate notice of the claim, including notice of the fact that if they did not opt out, their rights could be affected by the foreign proceeding. Finally, it is important that the unnamed plaintiffs be given an adequate opportunity to opt out of the proceeding.

70 In *Silver v. Imax Corp.* [2009 CarswellOnt 7873 (Ont. S.C.J.)], 2009 CanLII 72334, leave to appeal denied 2011 ONSC 1035 (Ont. S.C.J.), van Rensburg J. uses the following quote to explain the meaning of the "order and fairness" requirement in the context of class actions with foreign plaintiffs:

[162] As Jones and Baxter have observed:

When asserting jurisdiction over a defendant, either in an individual or class proceeding, 'order and fairness' will usually be satisfied by the demonstration of a 'real and substantial' connection with the forum. But in the interjurisdictional class action context, 'order and fairness' towards foreign plaintiffs imports further requirements. Just as defendants cannot be bound by a court's process and decision unless served and given an opportunity to answer the case against them, so too plaintiffs cannot be bound unless they also have an opportunity to 'participate', at least as that word is understood in the world of opt-out class actions; that is, that there be notice adequate to serve the interests of justice.

71 This connection between the reasonable expectations of unnamed plaintiffs, who have done nothing to invoke a court's jurisdiction, and the consequent need for heightened procedural concerns meets the criticisms of La Forest J., in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), about the inappropriateness of developing choice of law rules that focus on "somewhat fictional" concepts such as the expectations of the parties. As put by La Forest J., at para. 35:

What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be

based on the expectations of the parties, a somewhat fictional concept, or a sense of 'fairness' about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties, or what it thinks is fair, **without engaging in further probing about what it means by this**, does not bear the hallmarks of a rational system of law.

[Emphasis added]

72 In this case, there is no concern about the representative plaintiff adequately representing the interests of the unnamed plaintiffs. The unnamed class members are all easily identifiable. Thus, arrangements can be made to contact them, tell them about the class action and clearly bring home to them the fact that their rights could be affected by the proceeding if they do not opt out. In this way, any order and fairness concerns could be alleviated.

73 Given the fact that Ontario does have a real and substantial connection to the proposed class action, that the defendant is not asserting that another jurisdiction is the more appropriate one in which to adjudicate the action and that the necessary procedural protections can be put in place to notify the unnamed foreign plaintiffs of how their rights could be affected if they do not opt out of the action, there is no principled reason why this action is not appropriate for the certification of a global class.

### The Preferable Procedure Criterion

74 The motion judge concluded that a class action was not the preferable procedure for the determination of the proposed claims. He determined that joinder was a fairer, more efficient and manageable way of resolving the plaintiff's claim. His reasons for this finding may be summarized as follows:

- (a) The named plaintiff, Excalibur, has an almost one million dollar claim that "would justify taking on the litigation risk. Excalibur itself does not genuinely need a class action to obtain access to justice. If Excalibur was joined by just the other top 10 investors in an action against [the defendant] (which would not need to be certified and for which there would be no doubt about the court's jurisdiction *simpliciter*), the action would have the heft of being a claim for around USD \$3 million. There is ample here for a contingency fee, and Class Counsel would not be confronted with the risks associated with obtaining certification" (motion judge's reasons, para. 206).
- (b) In some cases there are psychological or social barriers that would prevent individuals from bringing legal proceedings on their own. There are no such barriers in this case (motion judge's reasons, para. 207).
- (c) The "forensic resources of the parties are about equal in terms of the availability of capable lawyers and qualified expert witnesses" (motion judge's reasons, para. 207). As 'accredited' investors, all of the class members have the resources to litigate (motion judge's reasons, para. 208).
- (d) Any behaviour modification that is needed can be achieved through an individual tort action (motion judge's reasons, para. 209).
- (e) While the determination of the common issues would "make a substantial contribution to resolving the claims of all the Class Members", there would have to be individual issue trials to determine issues such as damages and whether or not there was contributory negligence (motion judge's reasons, para. 210).
- (f) In this case a joinder of claims is preferable to a class action. While a class action would be manageable in this case, it is procedurally more cumbersome than a regular action and joinder "would provide access to justice to those class members with meritorious claims, promote adequate behaviour modification of the defendant and provide a similar amount of judicial economy to that which would be achieved by a class action" (motion judge's reasons, para. 215).

75 In his analysis on preferable procedure, the motion judge focuses on the fact that this action is not the "quintessential economic loss class action", as the representative plaintiff's claim is large enough to justify suing the defendant and all of the

class members have the resources to participate in individual litigation. According to the plaintiff, the motion judge erred in principle by grafting on a "means-based test" onto the preferable procedure criterion.

76 I do not see the motion judge's analysis as going that far. In para. 211, he specifically recognizes that economic loss cases where the amounts being claimed are larger and the proposed class members are "self-sufficient" have been certified. Thus, he went on to consider whether, in spite of the fact that the claim was "far from the quintessential economic loss case, nevertheless [a class action] is the preferable procedure for the Class Members' claims" (motion judge's reasons, para. 212).

77 It is at this point that he considers joinder and it is in this aspect of his reasons that I find that his analysis fell into error and that it did so because of his erroneous view that the action as a whole did not have a real and substantial connection with Ontario. This becomes clear at para. 217 of his reasons where he states:

Like all of the criterion for certification, the preferable procedure criterion sets a very low and easy to satisfy standard, but it is not so low that it is satisfied automatically because a representative plaintiff can form a group of claimants with manageable common issues, which is more or less all that Excalibur has done in the case at bar. And in the case at bar, **the formation of the class is without showing that Ontario has a real and substantial connection to the investors' claims** and is without showing that a class action is necessary to overcome any barriers to access to justice. In the case at bar, a class action is not necessary to achieve behaviour modification and a class action would not be particularly helpful in providing judicial economy.

[Emphasis added]

78 If the motion judge had conducted the access to justice analysis mandated by the Supreme Court of Canada, in *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.), through a lens that accepted that Ontario did have a real and substantial connection to all of the investors' claims, he could not have concluded that joinder was a preferable mechanism for pursuing those claims.

79 I first note that there was no evidence before the motion judge that joinder was available as an alternative procedure. In particular, there was no evidence that the other class members would be prepared to assume the burdens, risks and responsibilities of commencing their own claim, that they would be able to or would want to retain the same counsel, or that the defendant would retain the same counsel to defend these theoretical actions.

80 *Fischer v. IG Investment Management Ltd.* requires the court to first identify what the barriers are to access to justice. In this case, the motion judge found that there were no such barriers, given the size of the representative plaintiff's claim (\$950,000) and the fact that all of the class members were accredited investors.

81 At para. 27 of *Fischer v. IG Investment Management Ltd.*, the Supreme Court states that:

The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim.

82 In the case at bar, 19 of the proposed class members' claims are for \$1-\$50,000, and 12 claims are for \$50,000-\$99,000. The cost of pursuing these claims individually would dwarf the potential recovery for these investors.

83 The defendant has also asserted that it will bring a motion for security for costs against the foreign plaintiffs. This will present another economic barrier. If the action were certified as a class proceeding, these motions would be brought after the resolution of the most expensive part of the proceeding (the common issues) and the exposure for security for costs would be much more limited.

84 The risk of an adverse costs award is also a real economic barrier, especially for the smaller claims. In this regard, it is important to note that there is no evidence that the Class members are a cohesive group who would or could agree upon a form of joint retainer and the allocation of the costs of the litigation.

85 If the actions were successfully pursued individually by the foreign Class members in jurisdictions other than Ontario, they would then be put to the further expense and delay of bringing a proceeding to enforce a foreign judgment against the defendant in Ontario. Since the defendant has not acknowledged its willingness to attorn to any jurisdiction, any proceeding to enforce a foreign judgment could be met by further jurisdictional challenges.

86 *Fischer v. IG Investment Management Ltd.* next requires the court to look at the potential of a proposed class action to address the barriers to access to justice. First, a proposed class action will allow the members with smaller claims to have the most contentious and costly part of their claims determined in the common issues trial. As the motion judge acknowledged, the resolution of the common issues would "make a substantial contribution" to resolving their claims (motion judge's reasons, para. 210). Further, they will be able to do so without exposing themselves to the risk of an adverse costs award. If their actions are successful, they will have an Ontario judgment that they will be able to enforce in Ontario against a defendant who is a resident in Ontario.

87 The third part of the *Fischer v. IG Investment Management Ltd.* analysis asks the motion judge to identify the alternative to the proposed class proceeding. In this case, the alternative identified was joinder.

88 The fourth and fifth questions that are part of the *Fischer v. IG Investment Management Ltd.* framework mandate that the court address the extent to which the proposed alternative will address the relevant barriers and to compare the two proceedings.

89 The frailties of consolidation and joinder as alternative procedures were recognized by the Law Reform Commission in its 1982 *Report on Class Actions, Vol. 1*, Ministry of the Attorney General, pp. 82-86:

... Joinder and consolidation, as means of securing relief for the victims of a mass wrong, suffer from many of the same disadvantages as individual proceedings. Clearly, joinder and consolidation will be of minimal assistance to individuals with small claims. While some small claims may be transformed by joinder or consolidation into claims that are individually recoverable - because the cost of proving certain issues can be shared - most such claims will continue to be individually nonrecoverable. The reasons for this are quite straightforward. The individual litigant will be liable to pay his own lawyer's fees, whether the action succeeds or fails. Moreover, if the action fails, he will likely be ordered to pay a portion of the defendant's costs. Consequently, most small claims, even though they be aggregated will remain individually nonrecoverable.

Even in the case of claims that are individually recoverable, joinder and consolidation may not be the most expeditious or economical method of disposing of the claims. For example, in the case of joinder or consolidation, the defendant in the action would be free to examine for discovery all the named plaintiffs with respect to the issue of liability, even though such discovery might be repetitious an [sic] unnecessary...

Joinder and consolidation, as procedural alternatives in the mass wrongs context, suffer from one other major drawback. If the victims of a mass wrong are a less than cohesive group, all are unlikely to be joined in one action. ... the result will be a multiplicity of proceedings, with the concomitant risk of inconsistent verdicts, additional expense for the parties and a greater burden on the courts.

90 In the present case, there is no evidence that would suggest that these identified frailties would not exist.

91 Thus, from an access to justice perspective, if one accepts that the smaller claims do have a real and substantial connection to Ontario, it cannot be said that joinder is preferable to a class action as a route to pursuing those claims.

92 Further, in terms of judicial economy, while class actions require certification motions, joinder requires that each plaintiff be subject to extensive discovery obligations on all the issues, which can be costly, can delay the action and give rise to additional interlocutory attendances.

93 In this case, a class action will also promote judicial economy by resolving the common issues in one proceeding, thereby avoiding a multiplicity of actions. If the individual issues require individual determinations, the flexible procedures available to

the court under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, for the adjudication of these issues allow for the real possibility that these issues will be determined in an efficient manner, substantially reducing the burden the court would bear if all 57 members were required to bring separate proceedings.

94 With respect to the third goal of class actions, behaviour modification, class actions have been recognized as having a greater effect than individual actions when it comes to supplementing and enhancing the regulatory oversight of companies seeking to raise capital, thereby promoting confidence in the capital markets (*Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (Ont. C.A.), at paras. 35-36). In this case, the action could have the salutary effect of discouraging the defendant from conducting audits of foreign public companies without ensuring that proper plans and checks, and adequate qualified supervision is in place to ensure compliance with the governing standards.

95 Again, while I recognize that a motion judge's finding with respect to the preferable procedure criterion is the one to which the most deference is owed, I find that, in this instance, the motion judge's analysis cannot stand as his analysis was driven by his error in finding that Ontario was not the proper forum for the adjudication of the foreign class members' claims.

96 For the reasons given above, I would allow the appeal on this point and find that the proposed class action does satisfy the preferable procedure criterion.

### Cause of Action Criterion

97 In its cross-appeal, the defendant asserts that the motion judge erred in finding that the plaintiff has a tenable cause of action in negligence that is distinct from negligent misrepresentation. According to the defendant, central to the plaintiff's claim in negligence is the fact that the audit report was "clean" and that, according to the plaintiff, it ought not to have been. In essence, the defendant argues, this is a misrepresentation.

98 In making this submission, the defendant points to the Supreme Court of Canada decision, in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), and submits that, in *Hercules*, the Supreme Court of Canada expressed a concern that auditor's liability not "go unchecked".

99 *Hercules* was a negligent misrepresentation action. There is nothing, in *Hercules*, that excludes claims in negligence *simpliciter* from being brought against auditors.

100 In this case, the plaintiff is alleging that the defendant failed to exercise the requisite degree of care, skill and diligence of a reasonably competent auditor of a public company in carrying out its audit of the company's financial statements and in failing to prepare the SLF Audit Report in accordance with the U.S. Generally Accepted Auditing Standards ("GAAS") and the rules and standards of the Public Company Accounting Oversight Board (the "PCAOB"). According to the plaintiff, if the defendant had prepared a proper audit, it would not have been able to issue a clean report and the company would never have been able to proceed with the private placement. This is a negligence claim.

101 There are several instances where the court has recognized and certified actions asserting claims in both negligence and negligent misrepresentation where a professional opinion is alleged to have been rendered negligently and both (a) the opinion is alleged to be a necessary precondition to the marketing of a particular scheme or product; and (b) the class is said to have reasonably relied on the opinion to their detriment: see *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463 (Ont. S.C.J.), leave to appeal denied 2010 ONSC 1899 (Ont. Div. Ct.); *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 (Ont. S.C.J.), rev'd in part, 2013 ONCA 165 (Ont. C.A.); *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (Ont. S.C.J.), leave to appeal denied 2012 ONSC 6101 (Ont. Div. Ct.); *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083 (Ont. S.C.J.), leave to appeal denied 2014 ONSC 1347 (Ont. Div. Ct.); *Murphy v. BDO Dunwoody LLP* [2006 CarswellOnt 4127 (Ont. S.C.J.)], 2006 CanLII 22809.

102 For these reasons, I find that the motion judge made no error in principle in finding that the cause of action criterion had been met for both of the causes of action asserted by the plaintiff.

### Common Issues Criterion

103 Both the plaintiff and the defendant assert that the motion judge erred in the common issues that he certified. I will deal with each of the proposed common issues in turn.

#### ***Proposed Common Issue 1: Did the Defendant meet the applicable GAAS and PCAOB standards in the preparation of the Auditor's Report for Southern China Livestock in respect of the consolidated financial statements for 2008 and 2009 (the "Auditor's Report")?***

104 The motion judge found that this question, as drafted, is "unsatisfactory because it invites a fishing expedition about the auditing of financial statements that may be a perfectly accurate representation of the financial position of Southern China Livestock" (motion judge's reasons, para. 161). Therefore, he found that the following common issue would have been suitable for certification:

Given the lack of financial controls for Southern China Livestock's business, did the Defendant meet applicable GAAS and PCAOB standards or breach a duty of care by delivering an Auditor's Report for Southern China Livestock International Inc. in respect of the consolidated financial statements for 2008 and 2009 (the 'Auditor's Report')?

105 The plaintiff asserts that the motion judge erred in law and in principle in reframing Proposed Common Issue 1. The defendant argues that the applicable standard of care is an individual issue and should not have been certified as a common issue.

106 In my view, the motion judge was correct in identifying the question of a failure to meet the asserted applicable standards as a common issue. In this case, the pleadings assert that in order to obtain the financing, the company was required to retain an auditor who was registered in the United States with the PCAOB and that auditor was required to review and give an opinion about the company's financial statements in accordance with PCAOB's rules and standards, as well as U.S. GAAS. Thus, the reference to these standards in the first proposed common issue is an appropriate one.

107 However, I take issue with how the motion judge redrafted the first common issue. The motion judge found that there was no assertion that the financial statements were an inaccurate representation of the company's financial circumstances. However, the Statement of Claim makes it clear that the plaintiff is asserting that the company's financial statements "were, in no way, a fair presentation of International's financial position for the periods stated" (Statement of Claim, para. 58).

108 At this stage, the plaintiff is not required to establish the evidence upon which it relies in making this assertion. As Belobaba J. explained, in *Quinte v. Eastwood Mall Inc.*, 2014 ONSC 249 (Ont. S.C.J.), at para. 46:

...As the Supreme Court of Canada recently affirmed in *Pro-Sys Consultants*, the common issue requirement asks not 'whether there is some basis in fact for the claim itself' but 'whether these questions are common to all the class members'. The Court made clear that evidence that the acts alleged actually occurred is not required. All that is needed is 'some assurance...that the questions are capable of resolution on a common basis.' [cites omitted]

109 Essentially, the plaintiff's claim is that if the defendant had actually met the standards set out by the PCAOB and GAAS in the manner in which it conducted its audit, it would not have and could not have issued a clean audit report. Thus, a question directed at whether the defendant did meet those standards is an appropriate one. Therefore, I agree with the plaintiff that the motion erred in law in reframing Proposed Common Issue 1 and I would certify the issue as originally put forward.

#### ***Proposed Common Issue 2: Did the Defendant owe the Class Members a duty of care in respect of the preparation of the Auditor's Report?***

110 The motion judge found that this issue was suitable for certification as drafted. The defendant submits that the determination of this issue is an individual issue as whether the defendant owed the class members a duty of care depends on the law of the state in which each class member resides. According to the defendant, the law that applies is the law of the place where the alleged misrepresentation was received.

111 The question of which law to apply is a question for the trial judge to decide. At this point, the defendant has not filed a defence pleading the application of any foreign law. Further, as van Rensburg J. confirmed, in *Silver v. Imax Corp.*, supra, at para. 152:

It is not obvious, in the context of a class action involving a global class and misrepresentations communicated from a single source, that the applicable law will be that of the place where each individual class member sustained damage. Such an approach would ignore the fact that class proceeding is an aggregate action and not a collection of individual claims. It is also not obvious that the applicable common law principles and defences would vary from place to place such that the court would have to consider the potential application of multiple laws.

112 Proposed Common Issue 17 addresses the assertion by the plaintiff that the appropriate law to apply is the law of Ontario since this is the jurisdiction from which the defendant disseminated the information and it is the jurisdiction from which the defendant conducts business.

113 I agree with the motion judge that both of these issues are suitable for certification.

***Proposed Common Issue 3: Did the Defendant owe the Class Members a duty of care in permitting the Auditors Report to be included as an exhibit to Expedite 4, Inc.'s Private Placement Memorandum?***

114 The motion judge found that this issue was suitable for certification. For the reasons given by the motion judge, I agree.

***Proposed Common Issue 4: What is the applicable standard of care owed by the Defendant to the Class Members?***

115 The motion judge found that this issue was suitable for certification. For the reasons given by the motion judge, I agree.

***Proposed Common Issue 5: Was the Defendant negligent in the manner in which it prepared the Auditor's Report?***

116 The motion judge found that this issue was not suitable for certification as it was redundant.

117 If Proposed Common Issue 5 is directed at establishing whether the tort of negligence has been made out, this can only be done if the requisite elements of the tort have been established. These elements are the subject of other questions.

118 If Proposed Common Issue 5 is directed at the question of whether the defendant breached an applicable standard of care in the manner in which it prepared the Auditor's Report, then the question should be rephrased to read "Did the defendant breach the applicable standard of care in the manner in which it prepared the Auditor's Report?"

***Proposed Common Issue 6: Did the Defendant breach its duty of care owed to Class Members by issuing an unqualified, clean audit opinion in the Auditor's Report that was included as an exhibit to the Private Placement Memorandum?***

119 The motion judge found that this issue was not suitable for certification as it was redundant.

120 Proposed Common Issue 6 is directed at establishing whether if the answer to Proposed Common Issue 3 is "yes", then was the duty of care breached in the manner specified in Proposed Common Issue 6? This issue is directed at the plaintiff's negligence claim and is appropriate for certification.

***Proposed Common Issue 7: Was the information contained in the Auditor's Report materially false, inaccurate or misleading?***

121 The motion judge found that this question was not connected to the negligent misrepresentation claim as pleaded and, therefore, he reframed the question to read:

Given the lack of financial controls for Southern China Livestock's business, did the defendant make a misrepresentation by delivering an Auditor's Report for Southern China Livestock International Inc. in respect of the consolidated financial statements for 2008 and 2009 (the 'Auditor's Report').

122 According to the motion judge, the negligent misrepresentation asserted by the plaintiff can be characterized as "[the defendant] speaking when it ought not to have spoken at all" (motion judge's reasons, para. 166).

123 In its Statement of Claim, the plaintiff makes a number of assertions about the misleading, false and inaccurate nature of the Audit Report. These include assertions that the report misrepresented the manner in which the defendant carried out its work and misrepresented the fact that the company's financial statements complied with generally accepted accounting principles.

124 Proposed Common Issue 7 is directed at these allegations and captures the claim the plaintiff is actually making more accurately than the motion judge's reframed question.

***Proposed Common Issue 8: Was it reasonably foreseeable that the Class Members would rely on the representations made in the Auditor's Report in deciding whether or not to invest in Expedite 4, Inc. through the private placement, or at any time until December 23, 2010?***

125 The motion judge found that this question should not be certified as it is redundant to Proposed Common Issue 2, which asks whether or not the defendant owed the Class Members a duty of care in respect of the preparation of the Auditor's Report.

126 In a negligent misrepresentation context, as opposed to a simple negligence context, an essential component of the proximity analysis is that "the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation" (*Hercules*, para. 24).

127 Proposed Common Issue 8 is directed at this essential element of the plaintiff's negligent misrepresentation claim. This is in contrast to Proposed Common Issue 2, which is focussed on the duty of care that needs to be established to sustain a negligence claim.

128 Thus, in my view, Proposed Common Issue 8 is not redundant to Proposed Common Issue 2 and it is appropriate for certification.

***Proposed Common Issue 9: Was it reasonable for the Class Members to have relied on the Auditor's Report in deciding whether or not to participate in the private placement, or in purchasing any Units at any time up until December 23, 2010?***

129 The motion judge found that this question should not be certified as reliance is an issue that will have to be determined on an individual basis. I agree.

***Proposed Common Issue 10: Did the Defendant know or should it have known that the Class Members would be harmed if the information contained in the Auditor's Report was materially false, inaccurate or misleading?***

130 The motion judge found that this question was redundant and should not be certified.

131 Part of establishing a duty of care in negligence is establishing a sufficiently close relationship between the plaintiff and the defendant such that it would be in the reasonable contemplation of the defendant that carelessness on his or her part would cause damage to the plaintiff (*Hercules*, para. 22).

132 Proposed Common Issue 10 is directed at this essential element of negligence and is, therefore, suitable for certification.

***Proposed Common Issues 11, 12 and 13***

133 In paragraph 176 of his reasons, the motion judge found that these questions "did not want for commonality", yet he refused to certify them.

134 Question 11 is directed at the issue of whether this is a case where reliance can be inferred. The fact that the answer to the question may be "no" does not mean that the question should not be certified.

135 Question 12 is directed at the issue of causation, something that the Court of Appeal, in *Lipson*, has found is suitable for certification in a negligence case. Thus, I would certify the question as it relates to the tort of negligence.

136 Question 13 is directed to the question of the ultimate liability of the defendant to the Class Members, something that will have to await the determination of the individual issues trials.

#### ***Proposed Common Issues 14, 15 and 16***

137 The motion judge refused to certify these common issues on the ground that they were redundant. I agree.

#### ***Proposed Common Issue 17***

138 For the reasons set out in my discussion of Proposed Common Issue 2, I agree with the motion judge that this issue should be certified.

#### **Conclusion**

139 For these reasons, I would allow the appeal, set aside the order of the motion judge and issue an order certifying the action as a class proceeding in relation to the common issues detailed in these reasons.

140 Given this conclusion, I would also allow the plaintiff's appeal as to costs.

*Appeal dismissed; motion for leave to cross-appeal dismissed.*

#### **Footnotes**

<sup>1</sup> *Class Proceedings Act*, S.O. 1992, Ch. 6, s. 5(1)(d).

<sup>2</sup> *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118 (Ont. S.C.J.) (Perell J.), at para. 215.

<sup>3</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19.

<sup>4</sup> *Class Proceedings Act*, *supra*, (fn.1), s. 5(1)(c):

The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

...

(c) the claims of the class members raise common issues.

<sup>5</sup> *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2), (Perell J.), at para. 152.

<sup>6</sup> *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, (Costs) 2014 ONSC 4751 (Ont. S.C.J.), at para. 4.

<sup>7</sup> It may not matter, but the decision of Mr. Justice Perell refers to this in the past tense ("had") (see para. 3), whereas the factum filed on behalf of the plaintiff refers to this in the present tense ("has") (see para. 10).

<sup>8</sup> *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2) (Perell J.), at paras. 203, 204 and 205.

<sup>9</sup> In *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9 (S.C.C.), at para 161, the standards of reasonableness and palpable and overriding error are set up against each other:

Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology-'palpable and overriding error' versus 'unreasonable decision'-does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all

encapsulate the same principle of deference with respect to a trial judge's findings of fact... (Referring to *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 S.C.C. 25 (CanLII), at paras. 55-56).

- 10     *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.) (CanLII), at paras. 28 and 36.
- 11     *Kafka v. Allstate Insurance Co. of Canada*, 2012 ONSC 1035 (Ont. Div. Ct.), at para.12, referring to *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401, 2007 ONCA 781 (Ont. C.A.) (CanLII), at para. 23; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), 1999 CanLII 3753, at para. 12; and, *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321, 2007 ONCA 334 (Ont. C.A.) (CanLII), at para. 33, leave to appeal ref'd at [2007] S.C.C.A. No. 346 (S.C.C.).
- 12     *Class Proceedings Act*, (fn.1), s. 5(1)(d).
- 13     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2) (Perell J.), at para. 192, relying on *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), at paras. 73-75, leave to appeal to the S.C.C. ref'd [2005] S.C.C.A. No. 50 (S.C.C.).
- 14     *Ibid*, at paras. 193 and 196, relying on *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.), at para. 69, leave to appeal to the S.C.C, ref'd [2007] S.C.C.A. No. 346 (S.C.C.); and, *Fischer v. IG Investment Management Ltd.*, [2013] 3 S.C.R. 949, 2013 SCC 69 (S.C.C.), at paras.24-38.
- 15     *Ibid*, at para. 194, relying on *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.), at para. 16, aff'd (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.), which refers to this among other criteria to be considered when a court assesses the preferable process. The listed criteria are:
- (a) the nature of the proposed common issue(s),
- (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).
- 16     *Ibid*, at para. 197, relying on *Fischer v. IG Investment Management Ltd.*, *supra*, (fn. 14). Mr. Justice Perell lists five questions Mr Justice Cromwell referred to in that case as having to be answered when considering whether an alternative 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?
- (5) How do the two proceedings compare?
- 17     Rule 1.04(1.1) of the *Rules Of Civil Procedure* notes:
- In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.
- In making this observation, Mr. Justice Perell (*Ibid*, at para. 200) quoted *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), at paras. 1-2 and 27: Ensuring access to justice is the greatest challenge of 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. ... 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.

...

There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be readjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts 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 that alternative models of adjudication are no less legitimate than the conventional trial.

18 *Plaintiff's Appeal Factum*, at para. 77.

19 2012 ONSC 2995 (Ont. S.C.J.) (CanLII) (the motion to certify a class proceeding), 2013 ONCA 139 (Ont. C.A.) (CanLII) (appeal to the Court of Appeal from the motion to certify in respect of the dismissal of the claim against the [Anglican Diocese](#), and 2014 CanLII 7350 [2014 CarswellOnt 2109 (Ont. Div. Ct.)] (appeal to the Divisional Court from the motion to certify in respect of the refusal to certify on the basis that the class action was *not* the preferable procedure).

20 *Ibid*, (Divisional Court), at para. 25.

21 *Ibid*, (Divisional Court), at para. 26.

22 *Fischer v. IG Investment Management Ltd.*, *supra*, (fn. 14), at para. 35:

The motions court must identify alternatives to the proposed class proceedings. As McLachlin C.J. held in *Hollick*, 'the preferability analysis requires the court to look at *all* reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions': para. 31, (Emphasis added [in *AIC Limited*]). Here, the court considers both other potential court procedures (such as Joinder, test cases, consolidation and so on: *Hollick*, at para. 28) and non-court proceedings.

23 *Ibid*, at para. 48, referring to *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) (CanLII), [2001] 3 S.C.R. 158 (S.C.C.), at paras. 25, 28 and 31.

24 Ontario Law Reform Commission, *Report on Class Actions*, 1982, Volume1, at pp. 5, 82 to 86.

25 *Cavanaugh v. Grenville Christian College*, *supra*, (fn.19) (the motion to certify the class proceeding), at para. 215.

26 *Ibid*, (Divisional Court), at para. 26.

27 *Ibid* (the motion to certify a class proceeding), at para. 163, referring to *Oakley & Oakley Professional Corp. v. Aitken*, 2011 ONSC 5613 (Ont. S.C.J.) (CanLII); *Jaikaran v. Austin*, 2011 ONSC 6336 (Ont. S.C.J.) (CanLII); and, *Hudson v. Austin*, 2010 ONSC 2789 (Ont. S.C.J.) (CanLII). It is the last of the three which Mr. Justice Perell referred to in detail.

28 *Ibid*.

29 *Cavanaugh v. Grenville Christian College*, *supra* (fn.19) (the motion to certify the class proceeding), at para. 171.

30 *Plaintiff's Appeal Factum*, at para. 64.

31 *Fischer v. IG Investment Management Ltd.*, *supra*, (fn. 14), at para. 65.

32 *Plaintiff's Appeal Factum*, at para. 63.

33 *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2)(Perell J.), at para. 208.

34 *Affidavit of Jeffrey Larry*, sworn October 1, 2013, at para. 21.

35     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2)(Perell J.), at para. 42,

36     *Ibid*, at para. 207.

37     *Ibid*, at para. 206.

38     See fn. 14.

39     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2) (Perell J.), at para. 197. The five questions are found in these reasons at fn. 16.

40     *Fischer v. IG Investment Management Ltd.*, *supra*, (fn. 14), at para. 26.

41     *Fischer v. IG Investment Management Ltd.*, *supra*, (fn. 14), at para. 27.

42     *Class Proceedings Act*, *supra*, (fn. 1), s. 5(1)(b).

43     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2) (Perell J.), at para. 104.

44     *Bendall v. McGhan Medical Corp.*, 1993 CanLII 5550, (1993), 14 O.R. (3d) 734 (Ont. Gen. Div.); *Robertson v. Thomson Corp.*, 1999 CanLII 14768, (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.); *Carom v. Bre-X Minerals Ltd.*, 1999 CanLII 14794, (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), aff'd (1999), 46 O.R. (3d) 315 (Ont. Div. Ct.), rev'd on other grounds, 2000 CanLII 16886, (2000), 51 O.R. (3d) 236 (Ont. C.A.); *Wilson v. Servier Canada Inc.*, 2000 CanLII 22407, (2000), 50 O.R. (3d) 219 (Ont. S.C.J.); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.); *Brimner v. VIA Rail Canada Inc.*, 2000 CanLII 22404, (2000), 50 O.R. (3d) 114 (Ont. S.C.J.); *Cheung v. Kings Land Developments Inc.*, 2001 CanLII 28002, (2001), 55 O.R. (3d) 747 (Ont. S.C.J.), leave to appeal refused [2002] O.J. No. 336 (Ont. Div. Ct.); *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2003 CanLII 34059, (2003), 66 O.R. (3d) 466 (Ont. S.C.J.); *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (Ont. S.C.J.); *McCutcheon v. Cash Store Inc.*, 2006 CanLII 15754, (2006), 80 O.R. (3d) 644 (Ont. S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal refused 2011 ONSC 1035 (Ont. S.C.J.) (CanLII); *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 (Ont. S.C.J.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.) (CanLII); *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. S.C.J.) (CanLII) at paras. 587-592, varied 2014 ONCA 90 (Ont. C.A.) (CanLII); *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 (Ont. S.C.J.) (CanLII).

45     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2) (Perell J.), at para. 111.

46     *Affidavit of Jeffrey Larry*, sworn October 1, 2013, at para. 22.

47     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, *supra*, (fn. 2) (Perell J.), at paras. 128- 130.

48     *Ibid*, at para. 130.

49     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, (Costs) 2014 ONSC 4751 (Ont. S.C.J.), at para. 2.

50     *Bell ExpressVu Limited Partnership v. Pieckenhagen*, [2013] O.J. No. 1804 (Ont. Div. Ct.), at para. 3, referring to *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.); *Andriano v. Napa Valley Plaza Inc.*, [2011] O.J. No. 1857, 280 O.A.C. 339 (Ont. Div. Ct.), at paras. 9 to 14; and, see: *Van Damme v. Gelber* (2013), 115 O.R. (3d) 470, 2013 ONCA 388 (Ont. C.A.) (CanLII), at paras. 32 to 35.

51     *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, (Costs) 2014 ONSC 4751 (Ont. S.C.J.), at para. 18.



2016 ONCA 916  
Ontario Court of Appeal

Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP

2016 CarswellOnt 19121, 2016 ONCA 916, 135 O.R. (3d) 743, 273 A.C.W.S.  
(3d) 36, 406 D.L.R. (4th) 201, 66 B.L.R. (5th) 1, 95 C.P.C. (7th) 284

**Excalibur Special Opportunities LP (Plaintiff / Appellant) and  
Schwartz Levitsky Feldman LLP (Defendant / Respondent)  
Proceeding Under the Class Proceedings Act, 1992**

E.A. Cronk, R.A. Blair, J. MacFarland JJ.A.

Heard: June 15, 2016

Judgment: December 6, 2016

Docket: CA C61321

Proceedings: reversing *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* (2015), 45 B.L.R. (5th) 46, 386 D.L.R. (4th) 313, 2015 ONSC 1634, 2015 CarswellOnt 8853, 337 O.A.C. 123, H. Sachs J., Lederer J., Lederman J. (Ont. Div. Ct.); affirming *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* (2014), 31 B.L.R. (5th) 46, 2014 CarswellOnt 9299, 2014 ONSC 4118, Perell J. (Ont. S.C.J.); additional reasons at *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* (2014), 2014 CarswellOnt 11111, 2014 ONSC 4751, Perell J. (Ont. S.C.J.)

Counsel: Linda R. Rothstein, Margaret L. Waddell, Odette Soriano, for Appellant  
Tim Farrell, Jordan Page, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; International; Securities; Torts

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiff was Canadian investor whom was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff's appeal was dismissed — Trial judge found joinder was appropriate — Trial judge found motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Trial judge found class proceedings to be used when they were needed, not just because they could be made to apply and appeared convenient — Trial judge found class action was directed by more public concerns: access to justice, behaviour modification and judicial economy — Plaintiff investor appealed — Appeal allowed — Motion judge erred in failing to find real and substantial connection between Ontario and subject matter, and erred by considering whether it would be reasonable for non-resident class members to expect that their rights would be determined by foreign court as independent factor — Ontario court is not required to approach issue of taking jurisdiction in restrained manner — Motion judge focused incorrectly on private placement transaction in United States, instead of preparation of audit report in Ontario — On claims as pleaded, case was auditors' negligence case involving Ontario auditors in context of private placement in United States — Ontario's connection to claim was neither modest or trivial — Motion judge erred in holding that class proceeding was not preferable procedure — Motion judge did not properly consider barriers to access to justice for all proposed class members, choosing to focus instead on those with highest value claims — Class action would allow members with smaller claims to have the most contentious and costly part of their claims determined in common issues trial — Common issues certified.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiff was Canadian investor whom was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff's appeal was dismissed — Trial judge found joinder was appropriate — Trial judge found motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Trial judge found class proceedings to be used when they were needed, not just because they could be made to apply and appeared convenient — Trial judge found class action was directed by more public concerns: access to justice, behaviour modification and judicial economy — Plaintiff investor appealed — Appeal allowed — Motion judge erred in failing to find real and substantial connection between Ontario and subject matter, and erred by considering whether it would be reasonable for non-resident class members to expect that their rights would be determined by foreign court as independent factor — Ontario court is not required to approach issue of taking jurisdiction in restrained manner — Motion judge focused incorrectly on private placement transaction in United States, instead of preparation of audit report in Ontario — On claims as pleaded, case was auditors' negligence case involving Ontario auditors in context of private placement in United States — Ontario's connection to claim was neither modest or trivial — Motion judge erred in holding that class proceeding was not preferable procedure — Motion judge did not properly consider barriers to access to justice for all proposed class members, choosing to focus instead on those with highest value claims — Class action would

allow members with smaller claims to have the most contentious and costly part of their claims determined in common issues trial — Common issues certified.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff was Canadian investor whom was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff's appeal was dismissed — Trial judge found joinder was appropriate — Trial judge found motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Trial judge found class proceedings to be used when they were needed, not just because they could be made to apply and appeared convenient — Trial judge found class action was directed by more public concerns: access to justice, behaviour modification and judicial economy — Plaintiff investor appealed — Appeal allowed — Motion judge erred in failing to find real and substantial connection between Ontario and subject matter, and erred by considering whether it would be reasonable for non-resident class members to expect that their rights would be determined by foreign court as independent factor — Ontario court is not required to approach issue of taking jurisdiction in restrained manner — Motion judge focused incorrectly on private placement transaction in United States, instead of preparation of audit report in Ontario — On claims as pleaded, case was auditors' negligence case involving Ontario auditors in context of private placement in United States — Ontario's connection to claim was neither modest or trivial — Motion judge erred in holding that class proceeding was not preferable procedure — Motion judge did not properly consider barriers to access to justice for all proposed class members, choosing to focus instead on those with highest value claims — Class action would allow members with smaller claims to have the most contentious and costly part of their claims determined in common issues trial — Common issues certified.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiff was Canadian investor whom was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China — Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm — Accredited investors invested some \$7.5 million before learning that producer lacked financial controls over its all-cash-business — Producer went out of business — Plaintiff brought class action against defendant for negligence and negligent misrepresentation — Plaintiff unsuccessfully brought motion for certification as motion judge found that it was unreasonable to anticipate that members of prospective class would expect that claims had real and substantial connection to Ontario — Plaintiff's appeal was dismissed — Trial judge found joinder was appropriate — Trial judge found motion judge's ruling in respect of preferable procedure should stand because joinder could respond to issues without additional steps that accompany class proceeding — Trial judge found class proceedings to be used when they were needed, not just because they could be made to apply and appeared convenient — Trial judge found class action was directed by more public concerns: access to justice, behaviour modification and judicial economy — Plaintiff investor appealed — Appeal allowed — Motion judge erred in failing to find real and substantial connection between Ontario and subject matter, and erred by considering whether it would be reasonable for non-resident class members to expect that their rights would be determined by foreign court as independent factor — Ontario court is not required to approach issue of taking jurisdiction in restrained manner — Motion judge focused incorrectly on private placement transaction in United States, instead of preparation of audit report in Ontario — On claims as pleaded, case was auditors' negligence case involving Ontario auditors in context of private placement in United States — Ontario's connection to claim was neither modest or trivial — Motion judge erred in holding that class proceeding was not preferable procedure — Motion judge did not properly consider barriers to access to justice for all proposed class members, choosing to focus instead on those with highest value claims — Class action would allow members with smaller claims to have the most contentious and costly part of their claims determined in common issues trial — Common issues certified.

The plaintiff was a Canadian investor whom was among 57 accredited investors under United States legislation for transaction refinancing American-owned hog producer in China. Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm. Accredited investors invested some \$7.5 million before learning that the producer lacked financial controls over its all-cash-business. The producer went out of business. The plaintiff brought a class action against the defendant for negligence and negligent misrepresentation. The plaintiff unsuccessfully brought a motion for certification. The motion judge found that it was unreasonable to anticipate that the members of the prospective class could expect that claims had real and substantial connection to Ontario.

The plaintiff's appeal was dismissed. The trial judge found the prospective representative plaintiff was not one of many small investors, but rather the size of its investment demonstrated that plaintiff did not need a class action to make this economical, as the plaintiff was able to proceed on its own. It was apparent that joinder was appropriate for the problem and for the process. The motion judge's ruling in respect of the preferable procedure should stand as joinder could respond to plaintiff's issues without additional steps. The trial judge found that class proceedings should be used when they were needed, not just because they could be made to apply and appeared to be convenient. A class action was directed by more to public concerns, such as access to justice, behaviour modification and judicial economy.

The plaintiff investor appealed.

**Held:** The appeal was allowed.

Per MacFarland J.A. (Cronk J.A. concurring): The motion judge erred in failing to find a real and substantial connection between Ontario and the subject matter of the dispute.

The motion judge erred by considering whether it would be reasonable for the non-resident class members to expect that their rights would be determined by a foreign court as an independent factor in determining whether to take jurisdiction.

An Ontario court is not required to approach the issue of taking jurisdiction in a restrained manner, and to the extent that the motion judge found that it was, he was in error.

When the motion judge concluded that Ontario did not have a real and substantial connection with the claims of all but one investor, he focused incorrectly on the private placement transaction in the United States, instead of preparation of the audit report in Ontario.

The motion judge misconceived the nature and substance of the proposed claim and in so doing, fell into error in his jurisdictional analysis. On the claims as pleaded, there was little question that the substance of the dispute had a real and substantial connection to Ontario. The case was an auditors' negligence case involving Ontario auditors in the context of a private placement in the United States. Had the motion judge properly characterized the nature of the proposed action, he could not have concluded that Ontario's connection to the claim was either "modest" or "trivial". The motions judge disregarded the pleadings in describing the nature of the claim.

The motion judge erred in holding that a class proceeding was not the preferable procedure. To extent that the motion judge suggested that a plaintiff must establish that a class proceeding is necessary, rather than preferable to other methods, he erred in doing so. The Divisional Court majority erred in describing joinder as the "default" procedure against which the merits of a class proceeding should be assessed. The motion judge did not properly consider the barriers to access to justice for all the proposed class members, choosing to focus instead on those with the highest value claims.

A class action would allow the members with smaller claims to have the most contentious and costly part of their claims determined in the common issues trial. Class actions have a greater effect than individual actions in supplementing and enhancing the regulatory oversight of companies seeking to raise capital.

The common issues were certified.

Per Blair J.A. (dissenting): The appeal should be dismissed. The motion judge did not err in law or commit any palpable and overriding error of fact or of mixed fact and law in refusing to certify a global class or in determining that a class proceeding was not the preferable procedure. His determinations were entitled to deference,

The motion judge did not misinterpret the phrase real and substantial connection. The purpose of his analysis was to determine whether the Ontario court should, not whether it could, assume jurisdiction, and what he was searching for was whether there was a sufficient connection between Ontario and the subject matter of the dispute for that purpose. The error regarding the use of language was not an error that affected the validity of the outcome.

The motion judge did not suggest that court must exercise restraint in finding that it has jurisdiction, once the existence of a presumptive factor has been found to exist, but rather as focusing on the need for a restrained approach when deciding whether the court should assume jurisdiction over a global class.

The plaintiff's action was not mischaracterized. There was no error in the motion judge's approach to the broader jurisdiction question or in his broader characterization of the subject matter of the proposed class proceeding for the purpose of addressing the reasonable expectations of the proposed non-resident class members. The claim against the Ontario auditor could not be determined outside of the almost entirely foreign-related factual matrix. Only one member of the proposed class was resident in Ontario.

The motions judge properly analyzed the proper procedure issue. There was a basis for determining that a class proceeding was not the preferable procedure.

The motion judge did not proceed on the basis that joinder was the default procedure, and was not persuaded that the appellant had met the onus of showing the preferable procedure criterion was satisfied.

## Table of Authorities

### Cases considered by J. MacFarland J.A.:

*Canadian Imperial Bank of Commerce v. Green* (2015), 2015 SCC 60, 2015 CSC 60, 2015 CarswellOnt 18335, 2015 CarswellOnt 18336, 77 C.P.C. (7th) 1, 391 D.L.R. (4th) 567, (sub nom. *Green v. Canadian Imperial Bank of Commerce*) 478 N.R. 202, 44 B.L.R. (5th) 1, [2015] 3 S.C.R. 801, (sub nom. *Green v. Canadian Imperial Bank of Commerce*) 346 O.A.C. 204 (S.C.C.) — referred to

*Fischer v. IG Investment Management Ltd.* (2013), 2013 SCC 69, 2013 CarswellOnt 17258, 2013 CarswellOnt 17259, 45 C.P.C. (7th) 227, 366 D.L.R. (4th) 1, 312 O.A.C. 128, 482 N.R. 80, (sub nom. *AIC Limited v. Fischer*) [2013] 3 S.C.R. 949 (S.C.C.) — considered

*Green v. Canadian Imperial Bank of Commerce* (2014), 2014 ONCA 90, 2014 CarswellOnt 1143, (sub nom. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*) 118 O.R. (3d) 641, 314 O.A.C. 315, 50 C.P.C. (7th) 113, 370 D.L.R. (4th) 402 (Ont. C.A.) — referred to

*Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 2005 CarswellOnt 544, 7 C.P.C. (6th) 60, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 250 D.L.R. (4th) 224, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 195 O.A.C. 244, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 74 O.R. (3d) 321 (Ont. C.A.) — considered

*Van Breda v. Village Resorts Ltd.* (2012), 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 343 D.L.R. (4th) 577, 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda*) [2012] 1 S.C.R. 572, (sub nom. *Charron Estate v. Village Resorts Ltd.*) 114 O.R. (3d) 79 (note) (S.C.C.) — followed

### Cases considered by R.A. Blair J.A. (dissenting):

*Anderson v. Wilson* (1999), 122 O.A.C. 69, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 44 O.R. (3d) 673, 36 C.P.C. (4th) 17, 78 O.T.C. 320 (Ont. C.A.) — referred to in a minority or dissenting opinion

*Anderson v. Wilson* (2000), 2000 CarswellOnt 1837, 2000 CarswellOnt 1838, 258 N.R. 194 (note), 138 O.A.C. 200 (note), 185 D.L.R. (4th) vii (note) (S.C.C.) — referred to in a minority or dissenting opinion

*Fischer v. IG Investment Management Ltd.* (2013), 2013 SCC 69, 2013 CarswellOnt 17258, 2013 CarswellOnt 17259, 45 C.P.C. (7th) 227, 366 D.L.R. (4th) 1, 312 O.A.C. 128, 482 N.R. 80, (sub nom. *AIC Limited v. Fischer*) [2013] 3 S.C.R. 949 (S.C.C.) — considered in a minority or dissenting opinion

*Markson v. MBNA Canada Bank* (2007), 2007 ONCA 334, 2007 CarswellOnt 2716, 85 O.R. (3d) 321, 224 O.A.C. 71, 43 C.P.C. (6th) 10, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273 (Ont. C.A.) — referred to in a minority or dissenting opinion

*Markson v. MBNA Canada Bank* (2007), 2007 CarswellOnt 7420, 2007 CarswellOnt 7421, [2007] 3 S.C.R. xii (note), 383 N.R. 381, 248 O.A.C. 396 (note) (S.C.C.) — referred to in a minority or dissenting opinion

*Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — considered in a minority or dissenting opinion

*Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 2005 CarswellOnt 544, 7 C.P.C. (6th) 60, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 250 D.L.R. (4th) 224, (sub nom. *Currie v. McDonald's Restaurants of Canada*

*Ltd.*) 195 O.A.C. 244, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 74 O.R. (3d) 321 (Ont. C.A.) — considered in a minority or dissenting opinion

*Ramdath v. George Brown College of Applied Arts & Technology* (2010), 2010 ONSC 2019, 2010 CarswellOnt 2038, 93 C.P.C. (6th) 106 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Van Breda v. Village Resorts Ltd.* (2012), 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 343 D.L.R. (4th) 577, 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda*) [2012] 1 S.C.R. 572, (sub nom. *Charron Estate v. Village Resorts Ltd.*) 114 O.R. (3d) 79 (note) (S.C.C.) — considered in a minority or dissenting opinion

**Statutes considered by J. MacFarland J.A.:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — considered

s. 5(1)(b) — considered

s. 5(1)(d) — considered

**Statutes considered by R.A. Blair J.A. (dissenting):**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — considered

**Rules considered by R.A. Blair J.A. (dissenting):**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally — referred to

R. 17 — considered

APPEAL by plaintiff from judgment reported at *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* (2015), 2015 ONSC 1634, 2015 CarswellOnt 8853, 386 D.L.R. (4th) 313, 337 O.A.C. 123, 45 B.L.R. (5th) 46 (Ont. Div. Ct.), dismissing appeal from motion refusing to certify class proceeding.

**J. MacFarland J.A.:**

1 The appellant, Excalibur Special Opportunities LP, was one of 57 investors that lost money in an expressly high-risk investment. It sought to certify a class action against the respondent, Schwartz Levitsky Feldman LLP ("SLF"), an accounting firm, for negligence and negligent misrepresentation over an audit report that Excalibur and the other investors claimed to have relied on in deciding to invest. The motion judge denied Excalibur's motion for certification. A majority of the Divisional Court upheld the motion judge's order. Excalibur now appeals with leave to this court.

**BACKGROUND**

**Southern China Livestock and the Private Placement Memorandum**

2 Southern China Livestock International Inc., incorporated in Nevada, USA, owned or operated hog farms in China through various subsidiary corporations. Seeking to raise capital to expand its operations, Southern China Livestock retained a New York-based investment bank, Rodman & Renshaw LLP, to solicit investors.

3 In 2010, Rodman & Renshaw put out a 230-page Private Placement Memorandum (the "Memorandum") to accredited investors — individuals with a net worth of at least US\$1 million or two years of income over US\$200,000.

4 One of the exhibits to the Memorandum was a one-page audit report prepared by SLF for the fiscal years 2008 and 2009. SLF is a Montreal and Toronto-based accounting firm with stated expertise in auditing Chinese companies. The audit

report stated that the financial statements fairly represented Southern China Livestock's financial position for those years, in accordance with generally accepted accounting principles.

- 5 SLF's audit report is the basis for the proposed class action. It reads in full:

Schwartz Levitsky Feldman LLP

CHARTERED ACCOUNTANTS

LICENSED PUBLIC ACCOUNTANTS

TORONTO - MONTREAL

**REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM**

To the Shareholders of Southern China Livestock International Inc.

We have audited the consolidated balance sheets of Southern China Livestock International Inc. as at September 30, 2009 and 2008 and the consolidated statements of income and comprehensive income, stockholders' equity and cash flows for the years then ended. These consolidated financial statements are the responsibility of the management of Southern China Livestock International Inc. Our responsibility is to express an opinion on these consolidated financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the consolidated financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

The company is not required to have nor were we engaged to perform, an audit of its internal control over financial reporting. Our audit included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the company's internal controls over financing reporting. Accordingly, we express no such opinion.

In our opinion, these consolidated financial statements referred to above present fairly, in all material respects, the financial position of Southern China Livestock International Inc. as of September 30, 2009 and 2008 and the results of its operations and its cash flows for the years then ended in accordance with generally accepted accounting principles in the United States of America.

Toronto, Ontario, Canada

January 28, 2010

1167 Caledonia Road

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- 6 SLF was paid \$45,000 for preparing the audit report.

### ***Excalibur Special Opportunities LP***

7 Excalibur is a limited partnership organized in Manitoba and operating as an investment fund based in Toronto. It invests in small-cap private and public companies. After reviewing the Memorandum "page for page, word for word", Excalibur invested a total of US\$950,000 in Southern China Livestock between March and November 2010.

### ***The Other Investors***

8 Southern China Livestock raised a total of US\$7.6 million through the private placement from a total of 57 investors. Excalibur was one of only two Canadian investors and the only from Ontario (the other was from British Columbia). 50 of the 57 investors were American. All told, 98% of the proposed class members were non-residents of Ontario:

Number of investors (57)	Residence
50	U.S.
2	Canada
1	Cayman Islands
1	Samoa
1	Malaysia
1	United Kingdom
1	Unknown

9 The majority of investors invested under US\$100,000. With its US\$950,000 investment, Excalibur was by far one of the most heavily-invested:

Number of investors (57)	Amount invested
19	\$1 to \$49,000
12	\$50,000 to \$99,000
8	\$100,000 to \$199,000
7	\$200,000 to \$399,000
3	\$400,000 and over
8	(unclear)

### ***The Downfall of Southern China Livestock***

10 In December 2010, Southern China Livestock filed a report mandated under U.S. securities law that Excalibur later described as "shocking". The report revealed that:

- Hogs were sold primarily for cash by farm employees;
- The employees maintained corporate funds in bank accounts under their own names;
- Southern China Livestock had little or no control over the employees' activities;
- Disclosure controls were ineffective; and
- Internal controls over financial reporting were not effective.

11 In June and July 2011, Southern China Livestock's North American directors resigned. A month later, Southern China Livestock withdrew its preliminary prospectus from the Securities and Exchange Commission. As the motion judge described it, at para. 52: "Southern China Livestock went dark, and its shares and warrants are now worthless."

### ***The Proposed Class Action***

12 In October 2012, Excalibur commenced a proposed class action against SLF on behalf of the 57 investors, seeking damages equal to the value of their investments. The essence of the claim is that in light of the true state of Southern China Livestock's financial affairs in 2008 and 2009 — i.e. that it had little control over the revenue and expenses of its all-cash business — SLF could not have provided a clean audit report in accordance with generally accepted accounting principles, as it had professed to do.

#### ***The Motion Judge's Certification Decision***

13 The motion judge dismissed Excalibur's certification motion on two bases.

14 First, he held that the class definition criterion under s. 5(1)(b) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, was not met because the proposed claim lacked a real and substantial connection to Ontario. While Excalibur and SLF are both based in Toronto, the remaining proposed plaintiffs are all non-residents of Ontario, the company in which they invested was based in the United States, and the transactions were governed by American law.

15 Second, the motion judge held that the preferable procedure criterion under s. 5(1)(d) was not met because joinder was a more appropriate mechanism for resolving the plaintiffs' claims. The motion judge contrasted this case with what he called "the quintessential economic loss case", where a class proceeding is the only way for plaintiffs to achieve the goals of access to justice, behaviour modification and judicial economy. By contrast, in this case, Excalibur itself has a nearly US\$1 million claim, and if it joined with just the other top 10 investors, their combined claims would be worth about US\$3 million. This, he held, would amply justify the litigation risk and would have the same corrective effect as a class action, without the additional procedural hurdles.

16 In all other respects, the motion judge was of the view that, with modifications to some of the proposed common issues, the remaining requirements of s. 5(1) of the *Class Proceedings Act, 1992*, were met.

#### ***The Appeal to Divisional Court***

17 Excalibur appealed to the Divisional Court, where the majority deferred to and affirmed the motion judge's decision.

18 Justice Sachs in dissent was of the view that the motion judge erred in failing to find a real and substantial connection between Ontario and the proposed action. That error informed his preferable procedure analysis, in which he fell into further error by failing to conduct the comparative access to justice analysis mandated by the Supreme Court of Canada in *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.).

#### **ISSUES ON APPEAL**

19 There are two issues before this court. The first is whether the Divisional Court majority erred in deferring to the motion judge's determination that there was no real and substantial connection between Ontario and the subject matter of the dispute. The second is whether the majority further erred in deferring to the motion judge's determination that joinder was the preferable procedure to advance the issues raised in the pleadings. Indeed, the Divisional Court went so far as to describe joinder as the "default" procedure and cautioned that: "[w]e should be careful to use class proceedings when they are needed, not just because they can be made to apply and appear convenient": at para. 26.

20 Although SLF challenges some of Excalibur's proposed common issues, it does not contest that the common issues criterion is satisfied generally. I proceed on the basis that all other requirements of s. 5(1) of the Act are satisfied, with the exception of those which are the subject of this appeal.

21 For the following reasons I would allow the appeal essentially for the reasons articulated by Sachs J. in the Divisional Court.

#### **ANALYSIS**

(1) *The motion judge erred in failing to find a real and substantial connection between Ontario and the subject matter of the dispute*

22 As I have explained, of the 57 known investors who formed the putative class, only one was resident in Ontario. The vast majority of investors who lost money in Southern China Livestock were U.S. residents. The motion judge concluded that, in these circumstances, it would not be appropriate to certify a global class proceeding because there was no real and substantial connection between Ontario and the dispute.

23 The motion judge explained that in defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: at para. 102.

24 He also accepted, at para. 107, that there is jurisdiction under the *Class Proceedings Act, 1992* to certify a national or global class action where the class members will include persons and corporations from across Canada and around the world. The issue for the motion judge was not whether there could be a global class action, but whether it was appropriate to certify one in this case: at para. 109.

25 The motion judge set out the factors that in his view governed whether or not to certify a national or global class, at para. 111:

- a) whether the Ontario court has jurisdiction *simpliciter* over the defendant;
- b) whether the Ontario court can assume jurisdiction over a non-resident class member, which largely depends on whether Ontario has a real and substantial connection with the subject matter of the action and on principles of order, fairness and comity between courts;
- c) whether it would be reasonable for the non-resident class members to expect that their rights would be determined by what to them would be a foreign court; and
- d) whether the non-resident plaintiffs can be accorded procedural fairness, including adequate notice and a meaningful opportunity to opt out.

26 The motion judge held that the third factor was fatal to Excalibur's motion. Relying on this court's decision in *Parsons v. McDonald's Restaurants of Canada Ltd. (2005)*, 74 O.R. (3d) 321 (Ont. C.A.) [hereinafter *Currie*], the motion judge held, at paras. 124 and 129, that he had to approach the question whether there was a real and substantial connection between the cause of action and the Ontario court with "restraint", having regard to the reasonable expectations of the foreign plaintiffs.

27 With this in mind, the motion judge held that from the class members' perspective, "it is hard to imagine a case where it would be less reasonable to expect that his or her legal claims had a real and substantial connection to Ontario": at para. 128.

28 The motion judge explained, at para. 130:

The investors in the case at bar were non-residents of Ontario making substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law. Although the transaction included an Audit Report from an Ontario auditor, the standard of care associated with that audit would largely be determined by the American accounting standards under which the Audit Report was provided. It would be to exercise no restraint at all to conclude that Ontario had a substantial connection with this American financing and corporate reorganization.

29 The Divisional Court majority deferred to this conclusion.

30 On appeal, Excalibur takes no issue with factors (a), (b) and (d), but submits that the motion judge erred by including factor (c) as an independent consideration for the court in determining whether to take jurisdiction in a global class proceeding.

It submits that the motion judge further erred in relying on this court's decision in *Currie* for the proposition that he had to exercise "restraint" in applying the real and substantial connection test.

31 I agree with these submissions.

32 *Currie* was concerned with the enforcement of an American settlement agreement that purported to bind Canadian class members. The jurisdictional issue in that case involved the order and fairness implications of enforcing that judgment against the absent Canadian class members. As Excalibur notes in its factum, at para. 50:

When Sharpe J.A. stated, "embedded in the principles of order and fairness is also the notice of jurisdictional restraint," he was observing that fairness includes the foreign court having had a real and substantial connection to the cause of action or the parties, as well as having afforded adequate procedural rights to the non-resident class members. His concern was re-iterated as "Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected."

33 I agree with Excalibur that *Currie* does not stand for the proposition that an Ontario court should approach the issue of taking jurisdiction in a restrained manner. To the extent that the motion judge found that it did, he erred, as did the Divisional Court majority in upholding that determination.

34 The test to determine whether to take jurisdiction over foreign class members begins with an inquiry into jurisdiction *simpliciter*, on the principles set out in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.).

35 There cannot be much question that the court has jurisdiction *simpliciter* in this case. This is an action for negligence and negligent misrepresentation against a defendant who resides in Ontario, carries on business in Ontario and did the audit report, the subject of the dispute, in Toronto. Thus, three of the four presumptive connecting factors outlined in *Van Breda* are present on the facts of the case as pleaded.

36 When the motion judge concluded, at para. 147, that Ontario did not have a real and substantial connection with the claims of 56 of the 57 investors and had only a "modest if not trivial" connection with Excalibur, he focused incorrectly on the private placement transaction in the U.S., instead of SLF's preparation of the audit report in Ontario.

37 At para. 60 of her dissenting reasons in the Divisional Court, Sachs J. stated:

If the action was against the people who were in charge of arranging or promoting the financing for the American corporation that made the investment in question, I would agree with the motion judge's assessment of the connection between Ontario and the proposed action. However, this is not the action that the representative plaintiff is proposing to pursue. Its action is a claim against a firm of accountants that resides in Ontario and actively conducts business here in relation to an audit that the firm performed in Ontario. Conceived of in this way, it cannot be said that the action does not have a real and substantial connection with Ontario.

38 I agree with these comments. The motion judge misconceived the nature and substance of the proposed claim and in so doing, fell into error in his jurisdictional analysis. It is for the plaintiffs to plead their case as they see fit and to succeed or fail on that basis. It is not the court's role to re-write the claim advanced. The following excerpts from Excalibur's statement of claim make it clear that the motion judge mischaracterized the claim it sought to certify:

22. Through the Private Placement Memorandum, SLF and International represented to potential investors that International's audited financial statements were prepared under US generally accepted accounting principles and that the initial audit of International's financial statements performed by SLF was in accordance with PCAOB [Public Company Accounting Oversight Board] standards.

...

27. In 2010, SLF held itself out as experienced and capable of providing audit services for Chinese companies looking to enter the North American public markets. It represented that it concluded its audits of Chinese companies in accordance with the standards of the PCAOB and in accordance with GAAS [generally accepted accounting standards].

...

33. SLF knew that the Private Placement Memorandum was an offering that was made and distributed to an exclusive group of selected and qualified investors such as the Plaintiff and the other Class Members. SLF knew that the Private Placement Memorandum, inclusive of the Auditor's Report, would be relied upon by all prospective investors when making their decision to purchase the Units.

34. The Auditor's Report was prepared by SLF for the specific purpose of improving the investment decisions of prospective investors in the Company, and with the intent that investors would rely upon the information in the audit.

35. SLF consented to the inclusion of its Auditors' Report in Private Placement Memorandum and the dissemination of its Auditors' Report to prospective investors, including the Class Members, as part of the Private Placement Memorandum in connection with Financing.

36. SLF knew that all investors, including the Plaintiff and the Class Members, would reasonably rely on SLF's knowledge and skill and on SLF's opinion in the Auditors' Report for purposes of making a decision about whether to purchase the securities of International through the Financing.

39 At paras. 57-62 of the statement of claim, the particulars of the alleged negligence on the part of SLF are set out. They include:

57. In light of the true state of affairs regarding International's operations in 2008 and 2009, and as described in detail below, SLF could not have obtained the degree of comfort and verification required under GAAS and the PCAOB standards to complete an audit of International without significant reservations and qualifications, if SLF could complete any audit at all.

58. International's financial statements were, in no way, a fair presentation of International's financial position for the periods stated. The Representation was materially false, inaccurate and misleading. Excalibur and the Class Members relied on the clean Auditors' Report to their detriment, and have suffered the loss of their investments as a result, Excalibur and the Class would never have invested in the Units absent the assurance of a clean audit report by SLF.

59. SLF was negligent in failing to exercise the requisite care, skill and diligence of a reasonably competent auditor of a public company in carrying out its audit to ensure that the Auditors' Report accurately presented International's financial condition and performance, all as described below.

60. SLF was also negligent in permitting the Auditors' Report to be included as an exhibit to the Private Placement Memorandum when it knew or ought to have known that it did not exercise the requisite care, skill and diligence of a reasonably competent auditor of a public company in carrying out the audit of International.

61. SLF was negligent in the preparation of the Auditors' Report in that, among other things:

- (a) it failed to conduct its audits in accordance with GAAS;
- (b) it failed to properly supervise its audit staff;
- (c) it failed to ensure that the financial statements were prepared in accordance with GAAP;
- (d) it failed to obtain an adequate understanding of International's business operations and control systems prior to conducting its audit procedures;

- (e) it failed to detect significant weaknesses in International's governance and internal controls;
- (f) it failed to detect significant weaknesses in International's risk management system;
- (g) it failed to report that the financial statements did not fairly present International's financial position in accordance with applicable accounting principles;
- (h) it failed in its duty to warn of facts discovered, or that ought to have been discovered by the application of ordinary diligence, care, skill and GAAS, and other facts indicative of dishonesty, negligence or unreliability of certain senior management of International;
- (i) it failed to comply with the rules and standards of the PCAOB to which its audit was subject:
  - (i) in failing to adequately assess the risk of material misstatement and to compensate by formulating sufficient, appropriate and alternative audit procedures;
  - (ii) by failing to adequately supervise the audit, particularly in circumstances where all of the field work was carried out in China;
  - (iii) in failing to obtain appropriate audit evidence;
  - (iv) by failing to identify weaknesses in internal controls and carrying out necessary audit testing;
  - (v) by failing to sufficiently pursue and evaluate related party transactions;
- (j) it failed to seek or require sufficient and appropriate audit evidence about payables and receivables including the proper supervision and follow-up of the confirmation process; and
- (k) it failed to obtain an adequate or sufficient and appropriate audit evidence in accordance with GAAS.

62. SLF received total audit and audit-related fees of approximately \$365,000 for its services to International.

40 On the claims as pleaded, there is little question that the substance of this dispute, focused as it is on the Auditor's Report prepared by SLF, does have a real and substantial connection to Ontario. This is an auditors' negligence case, involving Ontario auditors in the context of a private placement in the United States. At its core, it does not concern the regulation of such placements in the United States.

41 Considerations of order and fairness are not seriously challenged here. The identity of all class members but one is known and they can be notified directly about the claim and their opt-out options. This is not a situation where there are unknown and indeterminate class members.

42 In my view, had the motion judge properly characterized the nature of the proposed action he could not have concluded that Ontario's connection to the claim was either "modest" or "trivial".

43 Indeed, the majority in the Divisional Court acknowledged as much at para. 33 of their reasons:

[The motion judge] and counsel for the plaintiff see the circumstances of this case quite differently. For the judge, the case is founded on the financing of an American Corporation. It concerns investors, not resident in Ontario, making substantial investments in American dollars in that corporation. For counsel, the case is about an audit done in Ontario by an auditor whose business is located in Toronto and Montreal. The proposition is that, if the perspective of the judge is correct, there is no real and substantial connection to Ontario but, if counsel is right, there is. [Citation omitted.]

44 The majority concluded that it did not have to resolve the issue in light of its decision to uphold the motion judge's preferable procedure analysis, but noted that "[d]eference would suggest" the motion judge's analysis of the real and substantial connection issue should be left to stand: at para. 36.

45 I respectfully disagree. There was in my view a clear error here on the part of the motion judge, which displaces the deference normally accorded to judges on motions for certification. He disregarded the pleadings in describing the nature of the claim.

46 I also agree with the conclusion of Sachs J. on this issue, at paras. 51-54 and 60 of her dissent:

The motion judge found that Ontario had only a "modest if not trivial" connection to the representative plaintiff's claim, and an even weaker connection to the other 56 non-resident investors' claims. As such, according to the motion judge, it would not have been contemplated by the class that their rights arising out of the investment they made would be adjudicated in Ontario. Therefore, order and fairness dictated that the foreign class members not be included in an Ontario class proceeding. As put by the motion judge, at paras. 129 and 130 of his reasons:

[129] The residence of [the defendant] in Ontario is essentially the only connection with Ontario and while that connection certainly gives the Ontario court jurisdiction over [the defendant] and while Ontario courts would welcome foreigners to sue in Ontario that is a different thing from Ontario courts exercising the restraint required of them under the principles of order and fairness in assuming jurisdiction when the foreign plaintiff would have expected to pursue his or her rights in a court that did have a substantial connection with the subject matter of the litigation.

[130] The investors in the case at bar were non-residents of Ontario making substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law. Although the transaction included an Audit Report from an Ontario auditor, the standard of care associated with that audit would largely be determined by the American accounting standards under which the Audit Report was provided. It would be to exercise no restraint at all to conclude that Ontario had a substantial connection with this American financing and corporate reorganization.

In assessing the motion judge's reasoning on this issue, it is important to recognize several key points. The proposed class action is an action against a firm of accountants that is resident in Ontario and actively carries on business here. Its only other office is in Montreal. It has no assets in the United States.

The subject of the action is the audit work done in Ontario by this accounting firm. The partner who did the work is a partner in the firm's Toronto office.

The proposed representative plaintiff is a Toronto-based investment fund that is registered in Manitoba. The investment in question was made out of their Toronto office.

...  
If the action was against the people who were in charge of arranging or promoting the financing for the American corporation that made the investment in question, I would agree with the motion judge's assessment of the connection between Ontario and the proposed action. However, this is not the action that the representative plaintiff is proposing to pursue. Its action is a claim against a firm of accountants that resides in Ontario and actively conducts business here in relation to an audit that the firm performed in Ontario. Conceived of in this way, it cannot be said that the action does not have a real and substantial connection with Ontario.

*(2) The motion judge erred in holding that a class proceeding was not the preferable procedure*

47 In addition to finding that a global class was inappropriate, the motion judge concluded that a joinder of claims was preferable to a class action, "which, although manageable would be and has shown itself to be more procedurally cumbersome

and protracted than a regular action": at para. 216. While the motion judge adverted to the Supreme Court's decision in *Fischer v. IG Investment Management Ltd.* and the five questions to be considered in the preferability analysis, he did not conduct the comparative analysis that case prescribes. He simply concluded that this case was far removed from what he described as the "quintessential economic loss case", in which an individual action is "out of the question" because of the high cost of litigation relative to the low value of the claim: at para. 203.

48 By contrast, in this case, the motion judge noted that Excalibur itself has an almost \$1 million claim. He proposed that if Excalibur was joined "by just the other top 10 investors in an action against SLF (which would not need to be certified and for which there would be no doubt about the court's jurisdiction *simpliciter*), the action would have the heft of being a claim for around USD \$3 million": at para. 206.

49 In short, the motion judge concluded, at paras. 206 and 208:

Excalibur itself does not genuinely need a class action to obtain access to justice.

....

Perhaps, with a few exceptions, the Class Members also do not need a class action in order to obtain access to justice. The Class Members, even the smaller ones, are "accredited investors" which means they are, by definition, not without resources to litigate.

50 The majority in the Divisional Court deferred to the motion judge's conclusion on this point, and went further, stating, at para. 13: "[j]oinder is not simply an alternative, it is the default position in considering whether a class proceeding is or is not the preferable procedure."

51 If the motion judge meant to suggest that a plaintiff must establish that a class proceeding is necessary to obtain access to justice, rather than preferable to other methods, he erred in doing so. Further, the Divisional Court majority erred in describing joinder as the "default" procedure against which the merits of a class proceeding should be assessed. The majority cite no authority for this assertion, which appears to contradict the Supreme Court's jurisprudence on the preferable procedure criterion.

52 For example, at para. 35 of *Fischer v. IG Investment Management Ltd.*, under the heading "What Are the Alternatives to Class Proceedings?", the Supreme Court instructs:

The motions court must identify alternatives to the proposed class proceedings. As McLachlin C.J. held in *Hollick*, "the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions": para. 31 (emphasis added). Here, the court considers both other potential court procedures (such as joinder, test cases, consolidation and so on: *Hollick*, at para. 28) and non-court proceedings.

53 The court is to look at "all reasonably available means of resolving the class members' claims". To me this contradicts any suggestion that joinder is "the default" position.

54 Beyond this, I agree with Sachs J. that the motion judge's error in his real and substantial connection analysis tainted his analysis of the preferable procedure, as demonstrated by his conclusion, at para. 217 of his reasons:

Like all of the [criteria] for certification, the preferable procedure criterion sets a very low and easy to satisfy standard, but it is not so low that it is satisfied automatically because a representative plaintiff can form a group of claimants with manageable common issues, which is more or less all that Excalibur has done in the case at bar. And in the case at bar, **the formation of the class is without showing that Ontario has a real and substantial connection to the investors' claims** and is without showing that a class action is necessary to overcome any barriers to access to justice. In the case at bar, a class action is not necessary to achieve behaviour modification and a class action would not be particularly helpful in providing judicial economy. [Emphasis added by Sachs J.]

55 Justice Sachs held that if the motion judge had conducted the access to justice analysis mandated by *Fischer v. IG Investment Management Ltd.* through a lens that accepted that Ontario had a real and substantial connection to the investors' claims, he could not have concluded that joinder was a preferable mechanism. She offered several reasons why.

56 First, Sachs J. noted, at para. 79, that there was no evidence before the motion judge that joinder was available as an alternative procedure. In particular, there was no evidence that the other class members would be prepared to assume the burdens, risks and responsibilities of commencing their own claims, that they would want or be able to retain the same counsel, or that the defendant would retain the same counsel to defend the hypothetical actions.

57 Second, contrary to the instruction in *Fischer v. IG Investment Management Ltd.*, the motion judge did not properly consider the barriers to access to justice for all the proposed class members, choosing to focus instead on those with the highest value claims. Justice Sachs explained that 19 of the proposed class members' claims are for under \$50,000, and another 12 claims are for between \$50,000 and \$99,000. As she put it, at para. 82: "[t]he cost of pursuing these claims individually would dwarf the potential recovery for these investors." The foreign plaintiffs also face the spectre of motions for security for costs.

58 Third, there was no evidence before the motion judge that the proposed class members are a cohesive group who would or could agree on a form of joint retainer and an allocation of the costs of the litigation. And, since SLF had not acknowledged its willingness to attorn to any jurisdiction, even a successful foreign judgment would pose further jurisdictional challenges.

59 On the other hand, a class action will allow the members with smaller claims to have the most contentious and costly part of their claims determined in the common issues trial. If successful, these plaintiffs will have an Ontario judgment that they will be able to enforce in Ontario against a defendant who resides in Ontario. While a class action requires the additional procedural burden of certification, joinder brings with it its own procedural challenges.

60 Finally, Sachs J. noted that class actions have been recognized as having a greater effect than individual actions in supplementing and enhancing the regulatory oversight of companies seeking to raise capital: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 118 O.R. (3d) 641 (Ont. C.A.), varied 2015 SCC 60, [2015] 3 S.C.R. 801 (S.C.C.), at paras. 35-36.

61 Justice Sachs concluded, at para. 95:

Again, while I recognize that a motion judge's finding with respect to the preferable procedure criterion is one to which deference is owed, I find that, in this instance, the motion judge's analysis cannot stand as his analysis was driven by his error in finding that Ontario was not the proper forum for the adjudication of the foreign class members' claims.

62 I would adopt this reasoning. In my view, on the basis of the foregoing analysis the preferability requirement is met and the Divisional Court majority erred in deferring to the motion judge's holding to the contrary. Even the motion judge here recognized that a resolution of the common issues on the facts of this case would make a "substantial contribution" to resolving the class members' claims: at para. 210.

(3) *This court should certify the common issues as reframed by Sachs J.*

63 Although the motion judge refused to certify Excalibur's class proceeding, he went on to consider its proposed common issues in the event of an appeal. He held that several of the proposed common issues were redundant and that others were defective because they required adjudication on a case-by-case basis, specifically on those issues that claimed reliance on SLF's allegedly negligent misrepresentations. Nevertheless, the motion judge held that several of the proposed common issues were properly certifiable.

64 The Divisional Court majority declined to deal with SLF's objections to the motion judge's treatment of the common issues (which the majority held was mischaracterized as a "cross-appeal") given its ultimate decision to uphold the motion judge's determinations on the global class and preferable procedure criteria.

65 Justice Sachs considered the common issues in light of her conclusion that the motion judge had misconceived the nature of Excalibur's action, leading him to err in his global class and preferable procedure analyses. At paras. 103-138, she carefully considered each of the proposed common issues. She agreed with the motion judge's reformulation of some of the common issues and restored or modified others.

66 On appeal, Excalibur asks that this court certify the common issues as Sachs J. did in her dissenting reasons. I would grant this request. I agree with Sachs J.'s conclusions on the common issues and would adopt her reasoning.

## **CONCLUSION**

67 For the foregoing reasons I would allow the appeal, set aside the order of the Divisional Court, and substitute in its place an order certifying the action as a class proceeding in relation to the common issues as set out in Schedule A to Excalibur's notice of appeal.

68 As per the parties' agreement, I would award Excalibur \$60,000 in costs, inclusive of the costs of the appeal and the motion for leave to appeal. The parties did not address the disposition of costs in the courts below. If the parties cannot agree on that issue, they may make brief written submissions (no more than 3 pages) to the court within 15 days of the release of these reasons.

### ***E.A. Cronk J.A.:***

I agree.

### ***R.A. Blair J.A. (dissenting):***

69 I have had the opportunity to review the draft reasons of my colleague, Justice MacFarland. Respectfully, I disagree with her determination of the appeal.

70 In my view, Perell J. did not err in law, nor did he commit any palpable and overriding error of fact or of mixed fact and law in refusing to certify a global class or in determining that a class proceeding was not the preferable procedure. His determinations are entitled to deference, which the majority of the Divisional Court properly accorded him. I would dismiss the appeal.

71 More particularly, my colleague, and the dissenting justice in the Divisional Court, conclude that the motion judge erred in law by:

(i) mischaracterizing the plaintiff's claim by focusing on the private placement issue in the United States instead of treating the claim as a simple action in auditor's negligence against an Ontario auditor who performed the work out of its Ontario office;

(ii) taking into account, in determining whether the Ontario court should assume jurisdiction, whether it would be reasonable for the non-resident class members to expect that their rights would be determined by what to them would be a foreign court; and by

(iii) failing to conduct a proper preferable procedure analysis, concluding that a joinder of actions was an acceptable alternative, and therefore failing to hold that a class proceeding was the preferable procedure in the circumstances.

72 I come to a different conclusion for the following reasons.

## **Discussion and Analysis**

73 My colleague has succinctly summarized the background facts. I need not expand on them further except as may be necessary in the context of the analysis.

74 I agree that the issue on this appeal is whether the majority in the Divisional Court erred in deferring to the motion judge's decisions with respect to the certification of a global class and the preferable procedure issue. However, if the motion judge committed no reversible legal error and made no palpable and overriding error of fact or of mixed fact and law — which, on my analysis of his reasons, is the case — his decisions in that regard are entitled to deference and may not be overturned simply because judges at a different level might have arrived at different conclusions. Hence the focus of the analysis here is rightly on the decision of the motion judge.

### ***The Identifiable Class Analysis***

75 Much of my disagreement with my colleague's reasoning, and that of the dissenting justice in the Divisional Court, stems from what I see as a misplaced emphasis, here and below, on the expression "real and substantial connection". It is important in this case, I think, to focus on what the motion judge was doing, rather than concentrating too closely on the language he used in explaining what it was that he was doing.

76 In the post-*Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.) era, "real and substantial connection" has a particular connotation. Where one or more of the four presumptive factors outlined by the Supreme Court of Canada in that case are established, a real and substantial connection between the jurisdiction and the subject matter of the proceeding — the hallmark of a court's competence to assume jurisdiction over a case with a foreign element — is presumed to exist and the court acquires jurisdiction *simpliciter*. That is not the end of the matter, however. The presumptive factors may be rebutted, and, even if they are not, the court may still go on to consider whether, in spite of the fact that it *has jurisdiction*, it should take the next step and *assume jurisdiction* over the foreign element in the proceeding.

77 Here, there has never been any dispute that the Ontario court has jurisdiction *simpliciter* over the proposed class action, and therefore that there is a real and substantial connection in the *Van Breda* sense; the action is brought against an auditor defendant that is domiciled, resident and carrying on business in Ontario and that at least performed the impugned audit out of its Toronto office. The motion judge recognized this. The parties accept it.

78 The motion judge undeniably articulated his reasons in terms of a real and substantial connection. But as I read those reasons as a whole, it is clear that he was not using the term in the *Van Breda* sense, nor was he seeking to analyse whether a *Van Breda* type of connection existed or denying that it did. The purpose of his analysis was to determine whether the Ontario court *should*, not whether it *could* assume jurisdiction over a global class, and what he was searching for was whether there was a sufficient connection between Ontario and the subject matter of the dispute for that purpose.

79 The motion judge's review of the evidence and his conclusion that Ontario had a connection but not a real and substantial connection to the action must be read with that in mind.

80 That this was the thrust of the motion judge's approach to the global class decision is evident from a number of passages in his reasons, including the following:

[109] In the immediate case, the question to be decided is not whether there can be a global class action, the question is when is it appropriate to certify a global class.

...

[117] Upon reflection, it now strikes me that this discussion <sup>1</sup> misses the point because the issue about whether there should be a global class is not so much whether a class proceeding procedure would be unfair to the defendant but more about whether including the foreigners in the Ontario proceeding would be fair to the foreigners. In that regard, the question of whether a foreign court would enforce the unfavourable foreign judgment begs the question because as noted by Justice Strathy in *Ramdat v. George Brown College of Applied Arts & Technology*,<sup>2</sup> it generally can be assumed that the foreign court will enforce the Ontario judgment if it was fair for the Ontario court to extend its jurisdiction to the foreign Class Members.

[118] Thus, determining the likelihood of the enforceability of the Ontario judgment in a foreign court begs the question of whether the Ontario court should extend its jurisdiction to a foreigner represented by the Representative Plaintiff. I think, however, the discussion of the likely enforceability of the Ontario judgment is useful because it focusses attention on the issue of when would it be fair for an Ontario court to assume jurisdiction and bind a foreigner to its judgment.

...

[123] Justice Sharpe<sup>3</sup> discussed the topic of national and international class actions and how the principles of conflicts of law should apply in circumstances where there were non-resident plaintiffs in a global class action. Justice Sharpe appreciated that the underlying issue was when should a domestic court assume jurisdiction over foreign plaintiffs and purport to bind them. [Emphasis and footnotes added.]

81 It was from this perspective that the motion judge viewed his task of determining whether to certify the proposed global class here — a class more than 98% of which would be comprised of non-resident members. And it was from this perspective that the motion judge concluded it was appropriate to consider, in the course of performing that task, whether it would be reasonable for the non-resident class member to expect that his or her rights would be determined in and by a foreign court. His concern was to ensure that it was fair and appropriate in the circumstances for the Ontario court *to assume jurisdiction* over the non-resident members of the proposed class.

82 While it may be that the motion judge erred, or at least strayed, in casting his analysis in the language of "real and substantial connection", it is not an error that affects the validity of the outcome of his analysis. Viewed in the foregoing manner, and as I shall explain below, I see no error in his consideration of the reasonable expectation of the non-resident members of the proposed class or in his characterization of the proposed class action in broader terms than that of a straightforward auditor's negligence case brought against an Ontario auditor in Ontario.

83 On the other hand, I respectfully suggest that my colleague and the dissenting justice in the Divisional Court concentrate too narrowly on the notion that the motion judge erred in failing to find a real and substantial connection between Ontario and the subject matter of the dispute in the *Van Breda* sense. They conclude that the motion judge erred in taking this approach and that he compounded this error by adapting the cautionary note of Sharpe J.A. in *Currie*, to the effect that courts should approach the issue of taking jurisdiction with restraint, to the circumstances of this case. I am unable to accept this critique, however.

84 As I have explained above, the motion judge did not fail to find a real and substantial connection between Ontario and the subject matter of the dispute in the *Van Breda* sense. He accepted that Ontario had jurisdiction *simpliciter*.

85 Likewise, the idea that a court should exercise restraint in assuming jurisdiction over a case with a foreign element is not new. Indeed, I would argue that it is deeply-rooted in our entire approach to that issue. Sharpe J.A. merely reflected this state of affairs when he said, in *Currie* at para. 10, that "embedded in the principles of order and fairness is also the notion of jurisdictional restraint". In doing so, he referenced the following comment of La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at p. 1103:

[I]t hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit . . . Thus, fairness to the [party against whom enforcement is sought] requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction. [Emphasis added.]

86 The notion of restraint is reinforced by the provisions in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 dealing with service of defendants outside of Ontario. Rule 17 permits such service without leave of the court in a defined list of circumstances but requires leave of the court in other circumstances. In either event, it permits the foreign party served the originating process to move for an order setting aside the service or staying the proceeding before delivering a defence. This is consistent with the approach whereby courts do not willy-nilly assume jurisdiction over a case with a foreign element. There is a built-in restraint to that approach.

87 One of the mechanisms through which that restraint is exercised is through the need to find a real and substantial connection between the jurisdiction and the subject matter of the dispute. *Van Breda* has clarified, and taken some of the uncertainty out of, the process of determining whether such a connection exists by establishing a set of presumptive factors. I accept that the notion of restraint may not apply to a determination of whether one or more of the presumptive factors exist, but I observe that even the presumptive factors are subject to rebuttal which is consistent with the underlying concept of jurisdictional restraint.

88 The notion of restraint is further evident in common law courts' long-standing power to decline to assume jurisdiction over a foreign party, even though they have the jurisdiction to do so, on the basis of the *forum non conveniens* doctrine. This is a second step if jurisdiction continues to be challenged after one or more of the presumptive factors establishing a real and substantial connection have been found to exist. As LeBel J. put it in *Van Breda*, at para. 104:

When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. [Emphasis added.]

89 It was in this context that the motion judge invoked the notion of restraint and undertook his consideration of whether the proposed non-resident class members would reasonably expect that their rights would be dealt with in the Ontario courts. I do not read his reasons as suggesting that a court must exercise restraint in finding that it *has* jurisdiction, once the existence of a presumptive factor has been found to exist, but rather as focusing on the need for a restrained approach (perhaps better described as a balanced approach) when deciding whether the court *should assume* jurisdiction over a global class. I see no error in this approach.

90 The dissenting justice in the Divisional Court observed, correctly, that several of the *Van Breda* presumptive factors were present in this case. She concluded that the motion judge erred in not finding that there was a real and substantial connection between Ontario and the proposed action because he mischaracterized the plaintiff's action. There are two responses to this.

91 First, as noted above, although he used the "real and substantial connection" language, the motion judge was not addressing the concept in the *Van Breda* sense of jurisdiction *simpliciter*. He was addressing whether the court *should assume* jurisdiction over the non-resident class members and whether there was a sufficient connection between Ontario and the subject matter of the dispute for that purpose.

92 The appellant asserts that the respondent did not argue *forum non conveniens* before the motion judge and points to *Van Breda* for the proposition that once a presumptive factor has been established and the court has jurisdiction, it cannot decline to exercise that jurisdiction unless the defendant invokes *forum non conveniens*.

93 I would not give effect to that submission here. As the respondent submits, while there are overlapping concepts and analytical considerations between jurisdiction and whether the court should certify a global class, the two are not identical. The argument below focussed on the underlying issue of "order and fairness" which is important to the question of when a domestic court will assume jurisdiction over foreign plaintiffs and purport to bind them. It was not essential to invoke the magic phrase "*forum non conveniens*" in order to conduct the analysis in these circumstances.

94 Secondly, he did not err, in my view, by mischaracterizing the subject matter of the proposed class proceeding. The dissenting justice in the Divisional Court chose to characterize that subject matter narrowly: as a simple claim in auditor's negligence against an Ontario auditor. The motion judge — properly in my view — approached it more broadly because he was attempting to resolve not the narrower issue of whether the court *had* jurisdiction but the wider issue of whether it *should assume* jurisdiction over a global class. To adopt the language of respondent's counsel in its factum, "[a] Court will not certify a class over which it has no jurisdiction, but it will not necessarily certify a global class just because it can assert jurisdiction."

95 It was in that regard that the motion judge asked himself about the reasonable expectations of the proposed non-resident class members, and stated the following at paras. 129-130:

The residence of SLF in Ontario is essentially the only connection with Ontario and while that connection certainly gives the Ontario court jurisdiction over SLF and while Ontario courts would welcome foreigners to sue in Ontario that is a different thing from Ontario courts exercising the restraint required of them under the principles of order and fairness in assuming jurisdiction when the foreign plaintiff would have expected to pursue his or her rights in a court that did have a substantial connection with the subject matter of the litigation.

The investors in the case at bar were non-residents of Ontario making substantial investments in American dollars in an American corporation in a transaction that was governed by American corporate and securities law. Although the transaction included an Audit Report from an Ontario auditor, the standard of care associated with that audit would largely be determined by the American accounting standards under which the Audit Report was provided. It would be to exercise no restraint at all to conclude that Ontario had a substantial connection with this American financing and corporate reorganization. [Emphasis added.]

96 Respectfully, I see no error in the motion judge's approach to the broader "whether to assume jurisdiction over a global class action" question or in his broader characterization of the subject matter of the proposed class proceeding for the purpose of addressing the reasonable expectations of the proposed non-resident class members. It may be that at one level the proposed action is simply a claim in negligence against an Ontario auditor. That claim cannot be determined, however, outside of the almost entirely foreign-related factual matrix alluded to by the motion judge and cited above. Keep in mind, as well, that Excalibur is the only member of the proposed class that is resident in Ontario.

97 The motion judge was not establishing new law when he considered, as one of the circumstances when it would be fair to join foreign plaintiffs to an Ontario action, the question of whether it would be reasonable for the non-resident class member to expect that his or her rights would be determined by what to him or her would be a foreign court. Other courts, including this Court in *Currie*, have done so. See also, for example, *Ramdath*. In addressing this issue, he was entitled to take a broader view of the subject matter of the proposed class proceeding.

98 The dissenting justice in the Divisional Court did a comparative analysis between the present case and *Currie*. She distinguished *Currie* on the basis that certain procedural protections that were lacking in the foreign proceeding for the Ontario plaintiffs that were to be bound by the settlement could be satisfied here, essentially because the unnamed non-residents were known and could be notified of these proceedings. I do not think this assists, however. The motion judge did not resort to or rely on *Currie* for its procedural protection component. He relied on it for the restraint proposition on which — for the reasons I have outlined above — he was entitled to proceed for purposes of determining whether the Ontario court *should* assume jurisdiction.

99 Absent error in law or palpable and overriding error of fact or of mixed fact and law, his decision is entitled to deference. I see no such error here. There is, therefore, no basis to interfere with his determination that it was not appropriate to certify a global class in this proceeding, as the majority in the Divisional Court concluded.

#### *The Preferable Procedure Analysis*

100 What I have already said affects my view of the motion judge's treatment of the preferable procedure criterion too. Because I am not persuaded that he erred in arriving at his decision not to certify a global class, his analysis of the preferable procedure issue cannot be tainted by viewing the preferable procedure analysis through the wrong lens.

101 Nor do I accept, as my colleague concludes, that the motion judge did not conduct the comparative analysis mandated by the Supreme Court of Canada in *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.). Absent any such error, it is not for an appellate court to conduct its own *Fischer* analysis and substitute its own view of the preferable procedure criterion for that of the motion judge.

102 Respectfully, the motion judge did not simply conclude that this case was far removed from the "quintessential economic loss case" in which an individual action was "out of the question" because of the high cost of litigation to the low value of the claim, as my colleague asserts. His *Fischer* analysis occupies over 20 paragraphs of his reasons. It acknowledges that

"the preferability analysis must be conducted through the lens of judicial economy, behaviour modification and access to justice" (para. 196) — the touchstones underpinning the rationale for class proceedings. It specifically addresses the five *Fischer* questions that are to be answered when considering whether processes will achieve access to justice (para. 197) and directly or indirectly explores the application of each of those questions to the access to justice issue on the facts before him (paras. 198-218). This includes a canvassing of:

- any economic, psychological, social, or procedural barriers to access to justice (he found none);
- the need to ensure the ultimate remedy provides substantive justice;
- whether behaviour modification was needed beyond the behaviour modification that would come from a normal tort action or another alternative (again, he found no such need); and
- the need to consider the alternatives to a class proceeding and whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims in a manner that accords suitable procedural rights.

103 The motion judge concluded that a joinder of claims was an alternative that satisfied the foregoing requirements in the circumstances of this case. He summarized his conclusions in this regard in the following fashion (paras. 215 and 216):

In the case at bar, the alternative of a joinder of claims would provide effective redress for Excalibur and [any] other investors who could join the action as co-plaintiffs. A joinder of claims would provide suitable procedural rights. A joinder of claims would have avoided a certification motion, although perhaps not a motion to challenge the jurisdiction of the Ontario court as *forum non conveniens* given that the United States would be the expected venue for all of the investors. In comparison to a class action, a joinder of claims would provide access to justice for those class members with meritorious claims, promote adequate behaviour modification of the defendant and provide a similar amount of judicial economy to that which would be achieved by a class action.

In my opinion, in the circumstances of the case at bar, a joinder of claims is preferable to a class action, which, although manageable would be and has shown itself to be more procedurally cumbersome and protracted than a regular action. With the benefit of hindsight, this almost two-year old action might be past discoveries and be ready to set down for trial if it had not been delayed by the pursuit of certification under the *Class Proceedings Act, 1992*.

104 Then, in an observation with which I substantially agree, he concluded:

Like [each] of the criterion for certification, the preferable procedure criterion sets a very low and easy to satisfy standard, but it is not so low that it is satisfied automatically because a representative plaintiff can form a group of claimants with manageable common issues, which is more or less all that Excalibur has done in the case at bar. And in the case at bar, the formation of a class is without showing that Ontario has a real and substantial connection<sup>4</sup> to the investors' claims and is without showing that a class action is necessary to overcome any barriers to access to justice. In the case at bar, a class action is not necessary to achieve behaviour modification and a class action would not be particularly helpful in providing judicial economy. [Footnote added.]

105 Certification is not the automatic or default outcome of an application for certification of a class action. As the majority in the Divisional Court pointed out, "[t]here is no inherent right to proceed on a class basis". Section 5(1) of the *Class Proceedings Act, 1992*, sets out the requirements for certification and the onus is on the moving party to show that those requirements, including that a class proceeding would be the preferable proceedings, have been met.

106 We charge trial judges to exercise the responsibility of gatekeepers in this process, and substantial deference is owed to their certification decisions. Appellate intervention should be restricted to matters of general principle. See *Anderson v. Wilson* (1999), 175 D.L.R. (4th) 409 (Ont. C.A.), at para. 12, leave to appeal to S.C.C. refused, (2000), [1999] S.C.C.A. No. 476 (Ont. C.A.); *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 282 D.L.R. (4th) 385 (Ont. C.A.), at para. 33, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346 (Ont. C.A.).

107 Here, there was a basis in the record for the motion judge's determination that a class proceeding was not the preferable procedure in the circumstances of this case. The appellant complains that he failed to conduct a comparative analysis and argues, for example, that he failed to look at the potential negative aspects of the joinder alternative. However, his reasons show that the motion judge did consider comparative factors and the fact that he did not specifically mention potential difficulties with a joinder proceeding does not mean that he failed to consider them (he recognized, for example, that a joinder of claims might not have avoided a jurisdictional challenge).

108 Although the motion judge did refer, during his comparative analysis, to what he viewed as the quintessential case of a class proceeding for economic loss, he made it clear that the preferable procedure analysis must be conducted in relation to the case at bar, even though it was far from the quintessential case, and he recognized that class proceedings have been certified in other — even similar — cases involving economic loss. At paras. 211-214 of his reasons he said:

That the case at bar is far from the quintessential economic loss class action, however, does not mean that it does not satisfy the preferable procedure criterion. Similar pure economic cases with self-sufficient representative plaintiffs have been certified.

So the preferable procedure analysis must go forward to determine whether the case at bar although far from the quintessential economic loss case, nevertheless, is the preferable procedure for the Class Members' claims.

In making a preferable procedure analysis, it is necessary to consider the alternatives to a class action. The preferable procedure analysis recognizes that a class action is not the only way for a group to litigate.

As noted above in *AIC Limited v. Fischer*, *supra*, the Supreme Court stated that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. [Citations omitted.]

109 It was just this analysis that the motion judge conducted.

110 Before leaving this aspect of the appeal, I should say that I agree with the appellant and with my colleague that the majority of the Divisional Court erred in stating that "[j]oinder is not simply an alternative, it is the default position in considering whether a class proceeding is or is not the preferable procedure" (para. 13). Nothing in the *Class Proceedings Act* or in the jurisprudence justifies such an observation, in my view. However, the motion judge did not proceed on that basis. He conducted the *Fischer* exercise, including a comparative analysis of a class proceeding and joinder. For the reasons cited above, he was not persuaded that the appellant had met the onus of showing the preferable procedure criterion was satisfied.

111 Again, in the absence of reversible error in law or principle or a palpable and overriding error of fact or of mixed fact and law — none of which exist here — it is not for an appellate court to re-do the preferable procedure analysis and substitute its own views for that of the motion judge, whose decision is entitled to deference. Whether there may be credible arguments favouring a different result on the preferable procedure analysis is not the question.

112 I would not give effect to this ground of appeal.

## Disposition

113 For the foregoing reasons, I would dismiss the appeal. Given that disposition, it is not necessary for me to deal with the way in which the motion judge framed the common issues.

114 The Divisional Court refused to grant the appellant leave to appeal a portion of the costs award in favour of the respondent. That issue is therefore not properly before this court.

*Appeal allowed.*

Footnotes

- 1 This passage followed a review of certain authorities dealing with principles of comity and the circumstances in which foreign courts may or may not recognize Ontario judgments.
- 2 [2010 ONSC 2019, 93 C.P.C. \(6th\) 106](#) (Ont. S.C.J.) .
- 3 In *Parsons v. McDonald's Restaurants of Canada Ltd.* ([2005](#)), [74 O.R. \(3d\) 321](#) (Ont. C.A.).
- 4 I have already explained that, in my view, the motion judge was not referring to "real and substantial connection" in the sense of jurisdiction *simpliciter* as set out in *Van Breda* when using that language.

**TAB 15**

**2007 CarswellOnt 240**  
Ontario Superior Court of Justice

Frohlinger v. Nortel Networks Corp.

2007 CarswellOnt 240, 2007 C.E.B. & P.G.R. 8233 (headnote only),  
[2007] O.J. No. 148, 154 A.C.W.S. (3d) 542, 40 C.P.C. (6th) 62

**LESLIE FROHLINGER (Plaintiff) and NORTEL NETWORKS CORPORATION,  
JOHN ANDREW ROTH, FRANK DUNN, F. WILLIAM CONNER, CHAHRAM  
BOLOURI, WILLIAM R. HAWE and DELOITTE & TOUCHE LLP (Defendants)**

Proceeding under the Class Proceedings Act, 1992

PETER GALLARDI (Plaintiff) and NORTEL NETWORKS CORPORATION, FRANK A.  
DUNN, DOUGLAS BEATTY, MICHAEL GOLLOGLY, JOHN EDWARD GLEGHORN,  
ROBERT ELLIS BROWN, ROBERT ALEXANDER INGRAM, GUYLAINE SAUCIER,  
SHERWOOD HUBBARD SMITH, JR. and DELOITTE & TOUCHE LLP (Defendants)

Proceeding under the Class Proceedings Act, 1992

Winkler R.S.J.

Heard: November 6, 2006  
Judgment: January 18, 2007  
Docket: 02-CL-004605; 05-CV-285606CP

Counsel: Joel Rochon, Peter Jervis for Plaintiff

Kirk Baert, Murray Gold for U.S. lead Plaintiffs Nortel I

Peter Griffin, Steve Tenai, D. Michael Brown, Tom Donnelly for Nortel Networks Corporation, Roth, Conner, Bolouri, Hawe  
Thomas G. Heintzman, Junior Sirivar for Frank Dunn

Brian G. Morgan, Christopher P. Naudie for Deloitte & Touche LLP

Allan Sternberg for Chubb Canada

Randy Bennett -- Court Appointed Monitor

Joel Rochon, Peter Jervis for Plaintiff

Barbara L. Grossman, Peter Cavanagh for U.S. lead Plaintiffs Nortel II

Peter Griffin, Steve Tenai, D. Michael Brown and Tom Donnelly for Nortel Networks Corporation, Cleghorn, Brown, Ingram,  
Saucier & Smith

Thomas G. Heintzman and Junior Sirivar for Frank Dunn

Jennifer Lynch for Douglas Beatty

Marie-Andrée Vermette for Michael Gollogly

Subject: International; Civil Practice and Procedure

**Related Abridgment Classifications**

Conflict of laws

**XII** Enforcement of foreign judgments

**XII.12** Miscellaneous

**Headnote**

Conflict of laws --- Enforcement of foreign judgments — Miscellaneous issues

Defendant corporation's stock price dropped significantly over brief period of time — Many shareholders alleged that defendant had issued series of materially false and misleading press releases and statements relating to its financial performance — Two

class action suits were launched in United States against defendant — Ontario-based pension funds served as lead plaintiffs in both American class action claims — Class action suits against defendant were also launched in Canada — American actions proceeded quicker and parties to American actions entered into settlement negotiations — Parties reached conditional settlement agreement which was to serve as global resolution of all outstanding claims — Parties to Canadian actions were consulted in negotiation of ultimate settlement agreement — Plaintiffs brought motion for court approval of settlement agreement — Motion granted — Settlement was fair, reasonable and in best interests of global class — Settlement provided maximum available amount for satisfaction of claims in total, short of trial — Although settlement discussions largely took place in context of American actions, they were conducted by experienced counsel who had undertaken extensive investigation into all claims, and under supervision of experienced judge as neutral third party — Steps taken to ensure fair adoption of bargained settlement in Canadian class action suits were sufficiently diligent.

#### Table of Authorities

##### Cases considered by *Winkler R.S.J.*:

*Baxter v. Canada (Attorney General)* (2006), 2006 CarswellOnt 7879 (Ont. S.C.J.) — referred to  
*Hollick v. Metropolitan Toronto (Municipality)* (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — considered  
*Hunt v. T & N plc* (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to  
*Kelman v. Goodyear Tire & Rubber Co.* (2005), 5 C.P.C. (6th) 161, 2005 CarswellOnt 154 (Ont. S.C.J.) — followed  
*Ragoonian Estate v. Imperial Tobacco Canada Ltd.* (2005), 20 C.P.C. (6th) 262, (sub nom. *Ragoonian v. Imperial Tobacco Canada Ltd.*) 78 O.R. (3d) 98, 2005 CarswellOnt 5992 (Ont. S.C.J.) — considered  
*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

##### Statutes considered:

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — referred to

s. 27(3) — considered

MOTION by plaintiffs for court approval of global settlement agreement.

#### *Winkler R.S.J.:*

1 This is a motion seeking approval of a settlement, together with a companion motion for approval of class counsel fees, brought in two related class proceedings involving Nortel Networks Corporation. Similar approval motions have been brought in the United States District Court, Southern District of New York and in the courts in the provinces of British Columbia and Quebec. By order dated June 22, 2006, this court granted certification, on consent, under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 for the purposes of settlement of these two class proceedings, which are styled as *Frohlinger v. Nortel Networks Corp.* ("Frohlinger") and *Gallardi v. Nortel Networks Corporation et al.* ("Gallardi"). The classes for which certification issued pursuant to these Ontario proceedings were national classes except for residents of British Columbia and Quebec. The classes covered by the U.S. proceedings are world-wide. The plaintiffs in both of the actions, supported by the corporate defendant, some of the individual defendants, and plaintiffs in related proceedings in other jurisdictions, move before this court for approval of a settlement that is a proposed global resolution aimed at concluding all outstanding litigation, based on similar claims, in Canada and the United States. Although some of the individual defendants have not joined in support of the settlement for other reasons, none of those defendants are objecting to the approval of the settlement.

2 For the reasons that follow, I approve the settlement as being "fair, reasonable and in the best interests of the class" and approve class counsel fees, as sought, in the total amount of \$5,000,000 plus disbursements and applicable taxes.

## Background

3 The *Frohlinger* action was commenced with a different representative plaintiff in Ontario on February 23, 2001. Following various amendments, the claim now alleges that during the period between October 24, 2000, and February 15, 2001, Nortel Networks Corporation ("Nortel"), and certain of its officers, issued a series of materially false and misleading press releases and financial statements relating to its financial performance. It is alleged that the price of Nortel securities were artificially inflated during the relevant period as a result of these statements. On February 15, 2001, Nortel issued a press release significantly lowering its next quarterly and full year financial performance guidance to investors. During the next trading day, the share price suffered a drop of approximately \$15.00 or 33% from its closing price on February 15. Shortly thereafter class actions were commenced in the United States, Ontario, British Columbia and Quebec on behalf of purchasers of Nortel securities during the relevant periods. The class actions in the United States were consolidated in the U.S. District Court for the Southern District of New York as *In re Nortel Networks Securities Litigation*. This consolidated litigation is referred to as "Nortel I".

4 The *Gallardi* action was commenced in relation to allegedly misleading financial reports and press releases that are claimed to have caused an artificial inflation in the Nortel securities market price during the period between April 23, 2003 and April 27, 2004. Class actions filed in the United States in relation to these claims have also been consolidated in the Southern District of New York. That consolidated litigation is referred to as "Nortel II".

5 While the class periods are the same in the respect of the *Frohlinger* and Nortel I actions, and in the *Gallardi* and Nortel II actions, the classes are otherwise defined differently to accord with certain distinctions in the class action jurisprudence in Canada and the United States. While these differences are discussed in greater detail below, the practical reality is that the distinctions will not have an impact on the approval of this settlement.

6 Ontario-based pension funds acted as lead plaintiffs in each of the Nortel I and Nortel II actions in the United States, which is indicative of the fact that Nortel securities were widely held on both sides of the border. The U.S. actions advanced more quickly than the Ontario actions for various reasons, and settlement negotiations, under the supervision of Senior United States District Judge Robert W. Sweet, were initiated in September 2005 between the U.S. lead plaintiffs and the defendants. The negotiations culminated in a two-day mediation with Judge Sweet in early February 2006. A conditional agreement in principle was announced in a Nortel press release on February 8, 2006.

7 Neither the plaintiffs nor the class counsel in the Canadian actions participated in the settlement negotiations in the United States. However, since it was intended that the settlement would represent a global resolution of all outstanding class action litigation, further discussions were necessary in order to have the Canadian classes adopt the settlement and thereby achieve the desired global resolution. The end result was a settlement agreement dated June 20, 2006, accepted by all parties to all of the outstanding class actions in both countries. That settlement has now been presented to this court for approval. Approval has also been sought from the courts in New York, British Columbia and Quebec pursuant to the terms of the settlement agreement. In order for the settlement to take effect it must be approved by all of the courts.

## The Settlement

8 Settlement is to be encouraged in litigation. In a class action context, a settlement ought to be approved by the court where it is "fair, reasonable and in the best interests of the class as a whole". In determining whether a proposed settlement meets that test, a number of factors are to be considered but these factors are guidelines rather than rigid criteria. As stated in *Kelman v. Goodyear Tire & Rubber Co.*, [2005] O.J. No. 175 (Ont. S.C.J.) at para. 12 and 13:

[para12] When considering the approval of negotiated settlements, the court ought to have regard to a number of factors, including:

- (i) Likelihood of recovery or likelihood of success;
- (ii) Amount and nature of discovery, evidence or investigation;
- (iii) Settlement terms and conditions;
- (iv) Recommendation and experience of counsel;
- (v) Future expense and likely duration of litigation and risk;
- (vi) Recommendation of neutral parties, if any;
- (vii) Number of objectors and nature of objections;
- (viii) The presence of good faith, arms length bargaining and the absence of collusion;
- (ix) The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- (x) Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

(See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct.) at paras. 71 and 72.)

[para 13] However, these factors provide a guide for analysis rather than a rigid set of criteria that must be applied to every settlement. In practice, it may well be the case that all of the factors are not applicable or, alternatively, should not be given equal weight. (See Parsons at para. 73.) (Emphasis added.)

9 The settlement contains terms relating to direct compensation to class members as well as indirect benefits through the adoption of certain corporate governance changes. In respect of direct compensation, the settlement is divided into two pools, one for each of the Nortel I (*Frohlinger*) and Nortel II (*Gallardi*) actions. Compensation is in the form of cash and shares of Nortel in each pool. In the Nortel I action, class members will share in a pool of U.S. \$438.6 million in cash and 314,333,875 Nortel common shares. In the Nortel II action, the pool of compensation to be shared among class members will consist of U.S. \$370.1 million in cash and 314,333,875 Nortel common shares. I note that the court was advised at the hearing that Nortel may move to consolidate its shares and in the event such consolidation occurs before distribution of the settlement, the actual number of shares issued to the classes will reflect the consolidation.

10 Estimates of what each class member will actually receive vary, as they must in a settlement of this nature, because of the uncertainties wrought by the yet to be calculated valuation of individual claims, the unknown number of class members who will actually file a claim and the normal fluctuations in share prices on a going forward basis.

11 The global amount of the settlement was negotiated based on the underlying principle of Nortel's ability to pay while still remaining a viable going concern. This is similar to the approach undertaken in *Kelman*, as set out at para. 16-17:

[16]...it is clear that the overriding concern was the ability of the defendants to pay a larger amount by way of settlement without putting their solvency at risk....

[17] In consideration of the limits on funds available for settlement, and the other risk factors inherent in litigation, I am satisfied that the plaintiffs achieved through the negotiation the maximum available amount for satisfaction of the claims in total, short of trial...Further, there is some evidence that had the matter proceeded to trial, although a judgment for a larger amount may have been obtained, the actual recovery by the class may have been significantly less because of the solvency issues of the defendants. (Internal citation omitted.)

12 Based on the evidence before this court from the plaintiffs and the experts retained to analyze Nortel's ability to pay by the lead plaintiffs in the U.S. actions, I am satisfied that, as in *Kelman*, the settlement provides "the maximum available amount for satisfaction of the claims in total, short of trial". Moreover, the manner in which this settlement was achieved, with the supervision of Judge Sweet, satisfies a number of the criteria set out in *Kelman* and the cases referred to therein for settlement approval. Although the settlement discussions largely took place in the context of the U.S. actions, they were conducted by experienced counsel, who had undertaken extensive investigation into the claims, under the supervision of an experienced judge as a neutral third party. There can be no doubt that the result was achieved through arms length hard bargaining. The further steps required to obtain adoption of the bargained settlement in the Canadian class actions, with the concomitant due diligence conducted by Canadian class counsel, provides additional comfort to the court that the settlement represents a fair compromise.

13 The fact that an action is certified on consent for settlement purposes does not obviate the requirement that the action as framed must meet the certification criteria under s. 5(1) of the *CPA*. (See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (Ont. S.C.J.) at paras. 24 and 25). That includes the requirement that there be an "identifiable class" which must be defined objectively without resort to merits-based identifiers. (See: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 38.)

14 In the *Frohlinger* Action the class has been defined as:

All persons and entities, except Excluded Persons and members of the British Columbia Class and the Quebec Class, who, while resident in Canada at the time, purchased Nortel common stock or call options on Nortel common stock, or wrote (sold) put options on Nortel common stock during the [period between October 24, 2000 through February 15, 2001, inclusive].

15 In the *Gallardi* Action the class has been defined as:

All persons and entities, except Excluded Persons and members of the Quebec Class, who, while resident in Canada at the time, purchased Nortel common stock or call options on Nortel common stock, or wrote (sold) put options on Nortel common stock during the [period between April 24, 2003, and April 27, 2004, inclusive]

The Ontario classes are defined as national classes so as to include all Canadian residents except those resident in British Columbia and Quebec. The relevant British Columbia and Quebec actions have similar class definitions, save for the obvious inclusion of different residential requirements and the omission of reference to jurisdictional exclusions. The classes for purposes of the U.S. proceedings are world-wide classes which include persons wherever located.

16 In the U.S. proceedings on the other hand, the Nortel I class has been defined as:

All persons and entities, wherever located, who bought Nortel common stock or call options on Nortel common stock during the period October 24, 2000 through February 15, 2001, inclusive, and suffered damages thereby, including, but not limited to, those persons or entities who traded in Nortel Securities on the New York Stock Exchange and/or the Toronto Stock Exchange. (Emphasis added.)

Save for the differing class period, the Nortel II class is similarly defined.

17 As can be seen, the class definitions in the U.S. proceedings and those in the Canadian actions are not precisely the same. In the U.S. actions, the classes are defined by reference to "damages" suffered. Under Canadian law, this would be an unacceptable merits-based definition. However, under the settlement and the plan of administration in this case, it is a distinction without a difference for the practical purposes of claims adjudication and compensation distribution to class members. Accordingly, it is not necessary to undertake a comparative analysis of Canadian and American jurisprudence in this area but, in my view, the rationale underlying the Canadian jurisprudence bears further comment in light of the class definitions in the Canadian actions.

18 Although courts in Canada have rejected merits-based class definitions, the courts also recognize that over-inclusive class definitions must also be avoided. In *Ragoonian Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont.

S.C.J.), Cullity J. undertook an extensive review and analysis of the current Canadian case law with respect to class definitions. In his view there was an "inevitable tension between rejecting a merits-based test and requiring that a class must not be over-inclusive". However, in *Ragoonian Estate*, after a probing review of the relevant case law, Cullity J. ultimately determined that the plaintiff could not define a class that was not over-inclusive without resort to merit-based limits and, accordingly, denied certification.

19 As noted by Cullity J., the "inevitable tension" regarding class definitions stems largely from subsequent interpretations of the Supreme Court of Canada decision in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) which states, in part, at paras. 19-21:

19 ...[t]he difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a "colourable claim" — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues...

20 The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

21 The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended... (Internal citations omitted.)

20 In reviewing this passage in his Reasons in *Ragoonian*, Cullity J. stated at para. 23:

23 In practical — as well as logical — terms, the problem created by the supposed over-inclusive rule and the prohibition on merits-based class definitions is that they operate in opposition to each other. While the former insists that only those with valid — or, in the words of the Chief Justice, "colourable" — claims are included in the class, the latter restricts the possibility of achieving this end. If they are applied strictly, their combined application will tend to exclude the possibility of any acceptable class definition.

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 precondition 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...,

would not bind them or bar them from commencing further actions.

22 The rationale for avoiding over-inclusiveness, on the other hand, is to ensure that litigation is confined to the parties joined by the claims and the common issues which arise.

23 Merits-based definitions are self-evident. Over-inclusive class definitions on the other hand are more elusive. It cannot be the case, as is evident here from the fact that approximately 150,000 claims had been filed as of the date of the hearing, that a class is over-inclusive simply by reason of its numerical size. Similarly, a proper class definition does not include only those persons whose claims will be successful. Rather, as the Chief Justice states in *Hollick*, the essence of a proper class definition goes to the "rational connection between the class as defined and the asserted common issues". It is neither express nor implied in that statement that a class member's "colourable" claim must be one that will ultimately be successful. Indeed, it is the purpose of a class action to resolve claims through the utilization of a common issue phase and an individual issue determination, if necessary.

24 Although the individual issues that exist obviously have an impact on the certification of a class proceeding, the class definition must be connected to the common issues raised by the cause or causes of action asserted. It is this element of commonality, which must be assessed on a case by case basis, that determines the viability of a particular class definition. Hence, where, as here, the allegations are that misstatements led to an artificially inflated share price during certain periods of time, it follows logically that anyone purchasing those shares in a relevant period has a potential claim giving rise to common issues shared with every other purchaser in the same period. As noted in *Hollick*, the relationships between the classes and the common issues asserted in these actions are "clear from the facts". Therefore, in my view, it is not over-inclusive to frame the classes in the manner set out in *Frohlinger* and *Gallardi*. The fact that any person so described may not ultimately be successful in advancing a claim for damages does not preclude their inclusion in the class. As stated by the Chief Justice in *Western Canadian Shopping Centres Inc.* at para. 38:

38 ...the class must be capable of clear definition....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. (Emphasis added.)

25 Over-inclusive class definitions can be avoided without resort to merits-based identifiers by adherence to the concept that the core of a class proceeding is the element of commonality. It is implicit in that concept that the cause of action, the scope of the class and the common issues are inextricably inter-related. Indeed, the first three criteria for certification as a class proceeding under s. 5(1) of the *CPA* may be stated in a single sentence as follows: There must be a cause of action, shared by an identifiable class, from which common issues arise.

26 With respect to defining a certifiable common issue, the Chief Justice stated in *Hollick* at para. 18:

...an issue will be common "only where its resolution is necessary to the resolution of each class member's claim". Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ...ingredient" of each of the class members' claims.

Given this interpretation of "common issue", it can be seen that a class definition will depend in large part on how the cause or causes of action are framed and how the common issues are drawn. However, by necessary extension, a class definition is not over-inclusive if it describes a class of persons who share a claim and whose members share an interest in the resolution of a common issue that is, in turn, a "substantial ingredient" of each of their claims.

27 Moreover, it would be a mistake in the context of a class definition analysis to interpret the terms "colourable" or "valid" claims as only those capable of success. The probability of success of a particular class member's claim cannot be a factor in determining whether a class is properly defined, either as a basis for inclusion or exclusion. To the contrary, a viable cause of action for the purpose of certification is one that is not "certain to fail" because of a "radical defect". (See: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *Hollick*). It would be contrary to the goals of the *CPA* to require each individual class member's claim to pass a higher threshold. If the terms "valid" or "colourable" are taken to mean a claim which will succeed, it will have the effect of imparting a *de facto* merits-based analysis into the certification test.

28 It must be remembered that the *CPA* is a procedural statute meant to provide a mechanism for the resolution of mass claims. As such, certification is a procedural step in the litigation and not a substantive determination. The statute must be interpreted liberally and a rigid approach to class definition based on concerns about over-inclusiveness may well defeat its purposes.

29 While the class definitions set out in the *Frohlinger* and *Gallardi* actions are necessary to comport with the jurisprudence binding on this court, the reality is that any practical difference between those classes and those defined in the U.S. actions are, as stated above, more apparent than real in the context of the administration of this settlement. In broad terms, the compensation under the settlement will be based on a netting of gains and losses suffered by class members during the relevant class period. Those who make claims under the settlement in the U.S. action will be bound by the judgment even if in the end result it is determined that they are not entitled to compensation because of the netting calculation. Thus, class members whether in Canada or the U.S. will receive identical treatment in respect of their claims, regardless of class definition.

30 The differences in the jurisprudence between the two countries highlights some of the potential difficulties that may arise in cross-border litigation, particularly in respect of class actions. Courts in both countries have thus far been adept and adaptable in developing *ad hoc* procedures to deal with these types of issues. Given the increasing trends toward globalization, it is likely that cross-border litigation will increase. The instant case is an example of this. Here the settlement is global in scope crossing provincial and international boundaries and the jurisdictions in which the underlying proceedings have been commenced include two countries and several provinces. It would be useful if more formal protocols were developed to facilitate the courts and the parties in dealing with these types of cases.

### Counsel Fees

31 I turn then to the fee request of class counsel. I am mindful that the fees sought in Ontario are but a fraction of the total fees that will be sought in applications before the various courts and that any fees approved in other jurisdictions will, as with the Ontario counsel fees, be drawn from the settlement funds. In my view, where both the class compensation and counsel fees are to be drawn from a single settlement fund, any court from which approval is sought as part of a global settlement has jurisdiction to review and assess the reasonableness of the counsel fees being sought in the aggregate. However, the approach taken to this review must also be tempered by the principle of comity in order to ensure that global settlements in multi-jurisdictional litigation, and their attendant benefits for class members, are not unduly impeded.

32 In a global settlement of multi-jurisdictional class action litigation, the total amount that will be available to class members in the form of compensation is an overriding concern. To state the obvious, where compensation and counsel fees are to be drawn from a single fund, the total fees that may be awarded to counsel will reduce the amount available for distribution to class members. Therefore, when more than one court is involved in the approval process, each court must be in a position to assess the total compensation available to class members, and must accordingly be advised of the maximum amount of counsel fees that will be sought in each other jurisdiction involved. This is so in the present case. However, adverting to the principle of comity, the decision of a particular court charged with approving specific counsel fees in its jurisdiction should be respected by each other court.

33 Here, the notices approved by the courts in respect of class certification and proposed settlement included a provision detailing the maximum amount of fees that might be sought by counsel in each jurisdiction. Provided that the amounts sought by counsel in each jurisdiction do not exceed those set out in the notice, I will defer to the decisions of those other courts regarding the specific counsel fees awarded in their respective jurisdictions.

34 The fees sought by Ontario class counsel come before this court for approval. As stated, counsel seek approval of a fee for both actions in a total amount of \$5 million dollars (CDN) plus disbursements and applicable taxes. Although the court was made aware of some individual objections to the global fees for counsel in all of the actions in all jurisdictions, no objectors appeared before this court and no objections were advanced by any party to the proceeding or by the plaintiffs in the other actions. I have reviewed the materials provided in support of the fee request of class counsel and find that the fee is reasonable

given the work performed, the risk undertaken and the result achieved. In my view, the amount sought in respect of the Ontario actions is appropriately reflective of the effort expended by Ontario class counsel. Accordingly, the fee requested is approved.

35 I am prepared to meet with counsel on short notice to fix the terms of the orders, if necessary.

*Motion granted.*

# **TAB 16**

**Most Negative Treatment:** Check subsequent history and related treatments.

2017 ONSC 6545  
Ontario Superior Court of Justice

Green v. The Hospital for Sick Children

2017 CarswellOnt 16865, 2017 ONSC 6545, 14 C.P.C. (8th) 311, 287 A.C.W.S. (3d) 429

**REBECCA GREEN (Plaintiff) and THE HOSPITAL FOR SICK CHILDREN, GIDEON KOREN and JOEY GARERI (Defendants)**

Perell J.

Heard: October 11-12, 2017  
Judgment: November 1, 2017  
Docket: CV-15-543259-ooCP

Counsel: Robert Gain, Jody Brown, for Plaintiff

Kate A. Crawford, Logan Crowell, Naveen Hassan, Barry Glaspell, for Defendants, Hospital for Sick Children and Joey Gareri  
Darryl A. Cruz, Erica J. Baron, Jessica L. Laham, Jessica Firestone, for Defendant, Gideon Koren

Subject: Civil Practice and Procedure; Evidence; Family; Public; Torts

**Related Abridgment Classifications**

Civil practice and procedure

✓ Class and representative proceedings

    V.2 Representative or class proceedings under class proceedings legislation

        V.2.b Certification

            V.2.b.i Plaintiff's class proceeding

            V.2.b.i.C Common issue or interest

Civil practice and procedure

✓ Class and representative proceedings

    V.2 Representative or class proceedings under class proceedings legislation

        V.2.b Certification

            V.2.b.i Plaintiff's class proceeding

            V.2.b.i.D Preferable procedure

Civil practice and procedure

✓ Class and representative proceedings

    V.2 Representative or class proceedings under class proceedings legislation

        V.2.b Certification

            V.2.b.i Plaintiff's class proceeding

            V.2.b.i.F Litigation plan

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Hospital operated drug testing laboratory between 2005 and 2015 and during that time tested hair of 18,463 individuals to screen for presence of drugs and alcohol — Of 18,463 individuals tested, total of 10,004 were reported as having positive result and 6,958 of reported positives were individuals referred from child protection agencies — Proposed representative plaintiff was one of individuals tested and, following positive test results, her child remained in foster care for approximately two years — Proposed class action was commenced — Proposed representative plaintiff brought motion for certification of proposed class action — Motion dismissed — Major deficiency in proposed class action was its failure to satisfy preferable

procedure criterion — Procedural and substantive access to justice would invariably require individual issues trials for class members with significant enough injury to justify expense of complex individual trials about liability — Individual issues trials were not amenable to any summary determination as contemplated by s. 25 of Class Proceedings Act, 1992 — Common issues would not sufficiently advance claims of class members and combining common issues trial with individual issues trials made proceedings unmanageable and disadvantageous in comparison to alternative of individual actions — Class action was not preferable procedure for access to procedural justice — Given problems confronting substantive access to justice and problems of efficiency and productivity, and given what little would be accomplished by common issues trial, more efficient and expeditious way to adjudicate claims would be to proceed directly by way of individual actions.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Hospital operated drug testing laboratory between 2005 and 2015 and during that time tested hair of 18,463 individuals to screen for presence of drugs and alcohol — Of 18,463 individuals tested, total of 10,004 were reported as having positive result and 6,958 of reported positives were individuals referred from child protection agencies — Proposed representative plaintiff was one of individuals tested and, following positive test results, her child remained in foster care for approximately two years — Proposed class action was commenced — Proposed representative plaintiff brought motion for certification of proposed class action — Motion dismissed — Proposed representative plaintiff's litigation plan was both unfeasible and palpably procedurally unfair — Deficiency in litigation plan was manifestation and illustration of proposed representative plaintiff's action to satisfy preferable procedure criterion — Representative plaintiff criterion was not satisfied.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Hospital operated drug testing laboratory between 2005 and 2015 and during that time tested hair of 18,463 individuals to screen for presence of drugs and alcohol — Of 18,463 individuals tested, total of 10,004 were reported as having positive result and 6,958 of reported positives were individuals referred from child protection agencies — Proposed representative plaintiff was one of individuals tested and, following positive test results, her child remained in foster care for approximately two years — Proposed class action was commenced — Proposed representative plaintiff brought motion for certification of proposed class action — Motion dismissed — Proposed common issue one did not satisfy common issues criterion because it was not substantial ingredient of each class member's claim, its resolution would not avoid duplication of fact-finding or legal analysis, its answer was not capable of extrapolation, in same manner, to each member of class and its determination would not diminish what would need to be determined in multitude of individual proceedings — For same reasons, proposed common issue number two did not satisfy common issues criterion — Common issue number three about aggregate damages did not satisfy common issues criterion and ancillary common issue number four shall also not be certified — Case at bar was systemic negligence action and there was no base amount of damages that each member of class may be entitled to from fact that it was proven that in general tests were unreliable for use in court proceedings — Common issue number five was peripheral to fundamental common issues and it stood alone as only question that, technically speaking, was certifiable — Punitive damages alone could not justify certification of action as class proceeding.

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*Voutour v. Pfizer Canada Inc.* (2008), 2008 CarswellOnt 4673, 64 C.P.C. (6th) 136 (Ont. S.C.J.) — referred to

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CSC 46 (S.C.C.) — referred to

*White v. Noel* (2014), 2014 ONCJ 555, 2014 CarswellOnt 14923 (Ont. C.J.) — referred to

*Williams v. Canon Canada Inc.* (2011), 2011 ONSC 6571, 2011 CarswellOnt 12407 (Ont. S.C.J.) — referred to

*Williams v. Canon Canada Inc.* (2012), 2012 ONSC 3692, 2012 CarswellOnt 8439, 294 O.A.C. 251, 34 C.P.C. (7th) 403 (Ont. Div. Ct.) — referred to

*Windsor-Essex Children's Aid Society v. B. (T.)* (2014), 2014 ONCJ 239, 2014 CarswellOnt 6619 (Ont. C.J.) — referred to

*Wuttunee v. Merck Frosst Canada Ltd.* (2009), 2009 SKCA 43, 2009 CarswellSask 191, [2009] 5 W.W.R. 228, 69 C.P.C. (6th) 60, 324 Sask. R. 210, 451 W.A.C. 210 (Sask. C.A.) — referred to

*Wuttunee v. Merck Frosst Canada Ltd.* (2009), 2009 CarswellSask 681, 2009 CarswellSask 682, 401 N.R. 399 (note), 359 Sask. R. 318 (note), 494 W.A.C. 318 (note) (S.C.C.) — referred to

*X(minors) v. Bedfordshire County Council* (1995), [1995] 3 All E.R. 353, [1995] 2 A.C. 633, [1995] 3 W.L.R. 152, [1995] UKHL 9 (U.K. H.L.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 2002 CarswellOnt 4272, 28 C.P.C. (5th) 135, 62 O.R. (3d) 535 (Ont. S.C.J.) — referred to

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2004), 2004 CarswellOnt 945, 184 O.A.C. 298, 70 O.R. (3d) 182, 50 C.P.C. (5th) 25 (Ont. Div. Ct.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 2009 CarswellOnt 2533, 70 C.P.C. (6th) 27, 250 O.A.C. 87, 96 O.R. (3d) 252, 81 C.P.C. (6th) 271 (Ont. Div. Ct.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2010), 2010 ONCA 466, 2010 CarswellOnt 4305, 100 O.R. (3d) 721, 87 C.P.C. (6th) 375, 320 D.L.R. (4th) 612, 265 O.A.C. 134 (Ont. C.A.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2011), 2011 CarswellOnt 499, 2011 CarswellOnt 500, 417 N.R. 397 (note), [2011] 1 S.C.R. x (note), 284 O.A.C. 396 (note) (S.C.C.) — referred to

**Statutes considered:**

*Child and Family Services Act*, R.S.O. 1990, c. C.11

Generally — referred to

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5 — considered

s. 5(1)(a) — considered

- s. 5(1)(b) — considered
- s. 5(1)(c) — considered
- s. 5(1)(d) — considered
- s. 5(1)(e) — considered
- s. 5(1)(e)(i) — considered
- s. 5(1)(e)(ii) — considered
- s. 5(1)(e)(iii) — considered
- s. 6 — considered
- s. 12 — considered
- s. 24(1) — considered
- s. 25 — considered
- s. 25(1) — considered
- s. 25(2) — considered
- s. 25(3) — considered
- s. 26 — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — referred to

- s. 142 — considered

*Evidence Act*, R.S.O. 1990, c. E.23

s. 35 — referred to

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

s. 61 — considered

*Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

MOTION for certification of class action.

***Perell J.:***

#### **A. Preface**

1 Sometimes, when a group of individuals is harmed, a class action is the only access to procedural and substantive justice. Sometimes, when a group of individuals is harmed, a class action is the preferred or best access to procedural and substantive justice. However, sometimes when a group of individuals is harmed, a class action sacrifices justice and a class action would not lead the harmed individuals to the substantive justice they deserve, but rather it would impede procedural justice and it would diminish or fail to achieve substantive justice. Sometimes, when a group of individuals is harmed, the only access to procedural and substantive justice is for the individuals to soldier on as individuals to obtain the justice they deserve. The case at bar is one such case.

## **B. Introduction**

2 Between 2005 and 2015, the Hospital for Sick Children ("the Hospital") operated the Motherisk Drug Testing Laboratory ("MDTL"). During this time, the laboratory tested the hair of 18,463 individuals to screen for the presence of drugs and alcohol. Some of the test results were used by physicians treating patients. Some of the test results were used as evidence in criminal proceedings. Some of the test results were used as evidence in matrimonial disputes to determine custody and access rights. And some of the test results were used as evidence in child protection proceedings under the *Child and Family Services Act*<sup>1</sup> that could result in the loss of the tested individual's parental rights.

3 One of the individuals tested was Rebecca Green, whose newborn son had been apprehended by the Toronto Children's Aid Society in the summer of 2009. After the apprehension of her baby, Ms. Green agreed to hair testing to regain access and custody. Her test results, however, were positive, and her son remained in foster care between 2009 and 2011, approximately two years, until Ms. Green's test scores reported negative for drug and alcohol use.

4 Three years later, in October 2014, in *R. v. Broomfield*,<sup>2</sup> Ms. Broomfield was charged with several offences arising from the allegation that she had administered a noxious substance to her two-year-old son. At trial, Crown counsel adduced expert evidence about long-term cocaine ingestion from a pharmacologist/toxicologist and a technician from the Motherisk Program. Ms. Broomfield was convicted and she appealed. On the appeal, new evidence was admitted that revealed that there was controversy among the experts about the use of the testing methods at Motherisk. The Court of Appeal set aside the conviction on one of Ms. Broomfield's charges. The Court of Appeal's decision sparked an uproar and a scandal for the Hospital.

5 In 2015, a proposed class action, the action now before the court, was commenced. In this action, Ms. Green alleges that all the laboratory's 18,463 tests were unreliable and that she and others suffered harm as a result of the reliance that courts and others placed on the test results. She sues the Hospital, Dr. Gideon Koren, the founder of the Motherisk Program, and Joey Gareri, one of the managers of the laboratory, for the systemic negligence of releasing unreliable test results.

6 Ms. Green now moves for certification of her proposed class action. The Defendants deny negligence. They also resist certification of the class action.

7 Collectively, the Defendants submit that none of the criterion for the certification of an action as a class proceeding are satisfied, and, in particular, they submit that: (a) Ms. Green's systemic negligence claim fails the cause of action criterion; (b) her class definition is overbroad; (c) she has not established any meaningful common issues; (d) her action does not satisfy the preferable procedure criteria on both the grounds of unmanageability and also because of alternative preferable procedures; and (e) she does not satisfy the representative plaintiff criterion because she has not prepared a workable litigation plan.

8 I agree with some, but not all, of the Defendants' challenges, and for the reasons that follow, I dismiss Ms. Green's certification motion.

## **C. Evidentiary Background**

### **1. Testimonial and Documentary Evidence**

9 Ms. Green supported her certification motion with the following evidence:

- Her affidavit dated November 3, 2016. Ms. Green was cross-examined.
- Affidavits dated November 1, 2016 and July 21, 2017 of Brittany Tovee, a lawyer from Koskie Minsky, LLP, Ms. Green's proposed Class Counsel. Ms. Tovee was cross-examined.

10 The Hospital and Mr. Gareri resisted the certification motion with the following evidence:

Affidavit dated May 29, 2017 of Naveen Hassan, a lawyer from Borden Ladner Gervais LLP, counsel for the Hospital and for Mr. Gareri.

11 Dr. Koren resisted the certification motion with the following evidence:

- Affidavit dated May 30, 2017 of Lifa Jensen-Taillefer, a law clerk from McCarthy, Tétrault LLP, counsel for Dr. Koren.
- An affidavit dated May 24, 2017 from Dr. Alberto Salomone. Dr. Salomone is a forensic toxicologist with a research focus in hair analysis, and, in particular, hair analysis for psychoactive substances and alcohol biomarkers. He holds a PhD in Analytical Chemistry from the University of Turin. He is the Laboratory Supervisor at a laboratory in Turin, Italy that performs over 300,000 biological tests annually, including hair tests for child protection purposes. Dr. Salomone was cross-examined.
- An affidavit dated May 15, 2017 from Jeffrey Wilson, a leading family law and child protection lawyer. Mr. Wilson was cross-examined.

12 On May 4, 2017, Dr. Koren served a Request to Admit on Ms. Green. The request was to admit 186 facts and the authenticity of 25 documents.

13 On May 24, 2017, Ms. Green responded to the Request to Admit. She admitted the authenticity of the documents, and she admitted the truth of 32 queries, but she refused to admit or answer 154 queries because she said the requests: (a) sought admissions of fact pertaining to the merits of the action pre-certification; (b) sought admissions in respect of "some cases", "some individuals" and unnamed "individuals" without further clarity; and (c) sought admissions in respect of issues temporally outside of the proposed class period.

14 Included in the evidentiary record was the *Independent Review of the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children* (the *Independent Review*) authored by the Honourable Susan Lang, the Independent Reviewer.

15 Many of the queries in the Request to Admit concerned facts found in the *Independent Review*. The parties disagreed about the admissibility and utility of this report for the purposes of the certification motion. The Defendants' position was that the *Independent Review* was inadmissible and could not be relied upon by Ms. Green in support of her motion for certification. I will address the admissibility and the utilization of the report in the next section of my Reasons for Decision.

## **2. The *Independent Review of the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children***

16 Relying on *Robb Estate v. St. Joseph's Health Care Centre*,<sup>3</sup> the Defendants submit that *The Independent Review*, which was put into evidence as an exhibit to Ms. Tovee's affidavit, is hearsay evidence. The Defendants submit that the *Independent Review* is inadmissible evidence on this certification motion and inadmissible for any determination of the merits of Ms. Green's action.

17 The Defendants submit that the *Independent Review* was the product of an *ad hoc*, expeditious, largely voluntary or co-operative inquiry process, but not an adjudicative process with procedural and due process protections. Further, the Defendants submit that the *Independent Review* is not admissible because the Independent Reviewer was not empowered by her Terms of Reference to make findings of liability and indeed expressly indicated in the report that she was not doing so. The Defendants submit that the *Independent Review* was not a public inquiry and, therefore, its report is not admissible pursuant to the public inquiry exception to the hearsay rule.

18 Moreover, the Defendants submit that in making her findings, the Independent Reviewer did not apply the standards of proof applicable in a civil trial and it would be unfair and prejudicial to the Defendants to be bound by findings based on evidence for which they had no opportunity of cross-examination. They submit that there was nothing to preclude Ms. Green from obtaining expert evidence for the certification motion, as Dr. Koren has done, and it was her own election and peril that she chose not to do so.

19 Further still, the Defendants submit that the *Independent Review* cannot be used as a form of issue estoppel. Finally, the Defendants submit that Ms. Green cannot rely on the *Independent Review* while at the same time refusing to properly respond to Dr. Koren's Request to Admit, which requested admissions about numerous facts set out in the *Independent Review*.

20 In response, Ms. Green submits that the *Independent Review* is admissible for the purposes of the certification motion, which she emphasizes is just a procedural motion and not a determination of the merits of her action or of the putative class members' claims. Further, she submits that *Robb Estate v. St. Joseph's Health Care Centre* is distinguishable and the case does not apply in the circumstances of a certification motion.

21 Ms. Green submits that the *Independent Review* is admissible pursuant to the public document exception to hearsay<sup>4</sup> or as as a principled hearsay exception in accordance with the principles of necessity and reliability.<sup>5</sup>

22 Moreover, Ms. Green submits that there is no prejudice to the Defendants from admitting the *Independent Review* for the limited purposes of establishing some basis in fact for four of the five certification criteria because: (a) the scope of a certification motion is limited and does not constitute a finding on the merits; (b) many of the documents referred to in the *Independent Review* were the Defendants' documents; and (c) many of the documents referred to in the *Independent Review* were voluntarily produced and authenticated for the purposes of the certification motion.

23 For my part, methinks both parties doth protest too much, and for the following reasons, I shall admit the *Independent Review* for the limited purposes of the certification motion.

24 At the outset, I respectfully say that the submissions of both sides about the use to be made of the *Independent Review* have to be taken with more than a grain of salt of skepticism. Ms. Green's factums did not read as if the culpability of the Defendants was not an issue for the certification criteria, and in this regard, Ms. Green did appear to submit that based on the *Independent Review*, there was proof of systemic negligence perpetuated on a class-wide basis. And in their factums, the Defendants were somewhat two-faced in objecting to the admission of the *Independent Review*, while at the same time asking Ms. Green to admit copious numbers of facts described in the *Independent Review* or found in the Defendants' own documents and forming part of the evidentiary record for the certification motion.

25 In admitting the *Independent Review* for the purposes of the certification motion, I agree with Ms. Green that it cannot be admitted as proof of the merits of her claim, and I agree with the Defendants that the *Independent Review* cannot be the basis of any issue estoppels. There are, however, for the purposes of the certification motion, facts in the *Independent Review* that are admissible and relevant to the certification criterion.

26 Many of the facts contained in the *Independent Review* are admissible for the purposes of the certification hearing because: (a) the fact is not contentious and is common ground among the parties; (b) the fact is not hearsay with respect to the issues to be determined on the certification motion; or (c) the fact is admissible pursuant to a recognized hearsay exception such as the hearsay exception for admissions by a party<sup>6</sup> or the exception for business records.<sup>7</sup> The fact of the *Independent Review* having occurred is part of the historical background to Ms. Green's and the putative class members' claims and some of the *Independent Review* is admissible simply for having been said but not necessarily for the truth of what was said.

27 In these circumstances, it is not necessary for me to determine whether the *Independent Review* is admissible to the public document exception to hearsay or as as a principled hearsay exception in accordance with the principles of necessity and reliability. The *Independent Review* is admissible and the use to be made of it will depend on a contextual analysis of the matter in issue in the discussion that follows.

## **D. Factual and Procedural Background**

### **1. The Motherisk Program**

28 In 1985, Dr. Koren, who is a physician and clinical toxicologist, founded the Motherisk Program at the Hospital for Sick Children. The program's main function was to offer clinical information on the safety of drugs and other chemical agents used by pregnant and lactating women. The program continues to provide this service today.

29 Julia Klein was the manager of the Motherisk laboratory from January to May 2005. Mr. Gareri was the manager from May 2005 to 2015. A quality manager was introduced in 2008. Beginning in 2008, the laboratory used graduate students and fellowship recipients to interpret the hair test results. A laboratory supervisor was introduced to the Motherisk program in 2009. A written standardized interpretation guideline was also introduced in 2009.

30 In the 1990s, the Hospital established and operated the Motherisk laboratory as part of the Motherisk program. This clinical laboratory, which was a significant revenue generator for the Hospital, offered a hair testing service to physicians, hospitals, community health providers, the Crown, child welfare agencies, and to others who requested tests to determine whether an individual was a substance abuser. Child welfare agencies used hair test results when parents sought voluntary access to services, such as assisting a parent manage drug or alcohol use and when the agency was prosecuting a child protection case.

31 Hair testing is a process by which hair strands are analyzed to detect the use of drugs or alcohol. The science was pioneered in 1978, progressively developed, refined and improved, and is now an accepted science practiced throughout the world and endorsed by the United Nations. In contrast to urine and blood testing, which can detect only recent drug and alcohol use, hair testing detects historical consumption.

32 The hair testing process works by detecting metabolites, which are formed by a human body breaking down (metabolizing) drugs or alcohol that have been consumed.

33 Metabolites remain in hair long after ingestion and hair testing is unaffected by periods of abstinence because the test will detect metabolites in older portions of the hair. Because hair grows at an average of 1 cm per month, a single sample can be cut into smaller segments and a segmental analysis of hair allows for comparison of drug or alcohol use in an individual in different periods of time. In contrast to hair analysis, urine analysis shows alcohol consumption over a much shorter period. Generally, alcohol will only remain in a person's system for 12-36 hours, depending on factors such as level of alcohol consumption and hydration level of the subject.

34 There are two main metabolites for alcohol that can be found in human hair: fatty acid ethyl esters ("FAEE") and ethyl glucuronide ("EtG"), which is the most sensitive and most specific biomarker for alcohol and a marker not influenced by hairspray, wax, oil, grease, or ethanol-containing hair products, which may yield false results. However, EtG concentrations may be lowered or false reports may be caused by bleaching, perming, or dyeing of hair. A concentration of 30 pg/mg EtG in scalp hair up to 6 cm is strongly suggestive of excessive alcohol consumption.

35 To test for alcohol, the Motherisk laboratory used FAEE testing which uses gas chromatography — mass spectrometry ("GC-MS") technology.

36 The Motherisk laboratory used ELISA (enzyme-linked immunosorbent assay) to test for: amphetamine, barbiturates, benzodiazepine, benzoylecgonine (a metabolite of cocaine), cannabis/THC, cocaethylene, cocaine, codeine, hydrocodone, hydromorphone, LSD, MDA, MDMA, meperidine, methadone, methamphetamine, morphine, opiates, oxycodone, PCP, and 6-AM. The details of the various methodologies changed as the test methods were refined and improved from time to time as the science continued to be developed.

37 From September 2010 to May 2014, the laboratory confirmed the majority of its test results for drugs of abuse using GC-MS. From May 2014 to the end of the class period, the laboratory confirmed the majority of its test results for drugs of abuse using liquid chromatography — tandem mass spectrometry (LC-MS/MS).

38 The laboratory's general practice was to collect or receive a hair sample, conduct the hair test, report the results, and provide additional information as requested by the customer of its service.

39 Sometimes, the Motherisk laboratory collected the hair sample for the test and in other instances the hair sample was collected and sent to the laboratory for testing. Up until September 2010, only some hair samples were washed before testing at the laboratory. After September 2010, all adult hair samples were washed.

40 The laboratory provided the client with a Results Report, the content of which changed over time, but which always described the concentration of a drug or alcohol metabolite in the sample tested and whether that amount constituted a "positive", "negative", or "trace" result. If asked, the laboratory staff would respond to questions about the test and its interpretation. In some instances, an additional step was taken before the delivery of the Results Report. The additional step was to send the hair sample to a Reference Laboratory, a third-party, for re-testing or confirmation of the results.

41 Between February 2011 and 2015, the laboratory sent all positive alcohol tests for additional testing.

42 Ms. Green alleges that: the laboratory did not have standard operating procedures; it did not comply with chain of custody and other forensic standards; its testing did not conform with recognized standards; it did not properly retain data; and it did not properly interpret and report test results.

43 From 2005-2010 the laboratory used only the ELISA test to test for substance abuse. Ms. Green alleges this was negligent because ELISA is intended to be only a preliminary screening test.

44 Of the 18,463 individuals who were tested by the Motherisk laboratory, a total of 10,004 were reported as having a positive result. 6,958 of the reported positives were individuals referred from child protection agencies.

45 A positive result had substantial significance to the life of the person tested because evidence of substance abuse could prompt intervention by child protection agencies and the outcome of the child protection proceedings could be a diminishment or the complete loss of parental rights. A positive result could also have substantial significance in matrimonial disputes over custody and access.

46 As noted above, the test results were also sometimes used as evidence in criminal proceedings.

47 Before the commencement of this action, the laboratory's test results were used as evidence in numerous reported court decisions.<sup>8</sup>

## ***2. The Background to Ms. Green's Claim***

48 In June 2009, when Ms. Green was seven months pregnant by her then boyfriend, he assaulted her. She attended at the emergency department of Mount Sinai Hospital for treatment for the assault. A social worker reported the matter to the Toronto Children's Aid Society.

49 On July 27, 2009, Ms. Green met a case worker from the Society and arrangements were made for a follow-up meeting, which was to include the boyfriend. The meeting was scheduled for August 10, 2009, but rescheduled at Ms. Green's request to August 21, 2009 and then to August 26, 2009.

50 In the meantime, the Society received a report from Ms. Green's psychiatrist. He reported that Ms. Green had suffered from substance abuse (cocaine and alcohol) and from reciprocated domestic violence with former boyfriends and with her current boyfriend.

51 On August 26, 2009, Ms. Green and her boyfriend met with the Society, but they refused to sign the consent forms requested by the case worker to address the protection of the anticipated newborn.

52 On August 30, 2009, Ms. Green gave birth to a male child. At the time of birth, Ms. Green was addicted to cocaine and alcohol, and the child's urine tested positive for cocaine. The Society immediately apprehended the child.

53 On September 10, 2009, the child was discharged from the hospital and placed with a foster family.

54 On October 6, 2009, Ms. Green attended at the Motherisk laboratory and her hair was tested. The results were positive for alcohol and cocaine. Ms. Green admits that at this time, she was addicted to cocaine and had problems with alcohol.

55 On October 29, 2009, the child was transferred from foster care to the care of his paternal grandmother.

56 On December 3, 2009, Ms. Green and her boyfriend signed an Agreed Statement of Facts, which included an agreement that the court should make a finding that the child was in need of protection, on the basis that: (a) the child's urine tested positive for cocaine; (b) there were incidents of domestic violence between the parents before the child's birth; (c) the child had suffered physical harm, inflicted by the person having charge of the child or caused by that person's failure to care for, provide, supervise, or protect the child adequately; and (d) there was a risk that the child was likely to suffer physical harm, inflicted by the person having charge of the child or caused by that person's failure to care for, provide, supervise, or protect the child adequately.

57 Based on the Agreed Statement of Facts, Ms. Green consented to an Order that her son be placed in the care and custody of his paternal grandmother for six months. On February 10, 2010, an Order was made based on the Agreed Statement of Facts. The Order permitted both parents access to the child. The Order required Ms. Green to undergo hair and or urine tests.

58 On May 4, 2010, Ms. Green presented for hair testing at the Motherisk laboratory. The Results Report of the test indicated that her hair was washed for the FAEE test and that the scores were: (a) positive for FAEE at 7.69 ng/mg (analyzed by GC-MS); (b) positive for cocaine at 0.44 ng/mg; and (c) below limit of detection for benzoylecgonine. The Reference Range interpreted Ms. Green's results for cocaine as "low", meaning in the 5-25 percentile. The laboratory's Interpretation Guideline indicated that these results would not prove cocaine use. The Guideline indicated that Ms. Green was a chronic alcohol abuser.

59 The laboratory's Reference Range for these hair tests noted that higher concentrations of FAEE could occur in hair in the absence of drinking with the use of high-ethanol content haircare products, and that the laboratory recommended that use of any haircare product containing alcohol be discontinued for three months prior to hair analysis.

60 On May 20, 2010, the Society sought to extend the child protection Order, and a hearing was scheduled for July.

61 For the July hearing, Ms. Green and her boyfriend signed an Agreed Statement of Facts stating that the child was in need of protection. The statement revealed that Ms. Green's attendance at an addiction treatment program had not yet been encouraging to change her drug use and that she and her boyfriend had undergone hair tests at the laboratory and both had tested positive for cocaine and alcohol.

62 On December 7, 2010, Ms. Green presented at the laboratory for another hair test. Her results indicated that her hair was washed for the FAEE test. Her test scores were: (a) positive for FAEE at 4.388 ng/mg (GC-MS analyzed); (b) positive (trace) for cocaine (GC-MS analyzed); and (c) negative for benzoylecgonine. The Interpretation Guideline indicated that Ms. Green's trace cocaine and benzoylecgonine results would not prove cocaine use. The laboratory's Interpretation Guideline indicated that Ms. Green was a chronic alcohol abuser.

63 The laboratory's Reference Range again noted that higher concentrations of FAEE could occur in hair in the absence of drinking with the use of high-ethanol content haircare products, and that the laboratory recommended that use of any haircare product containing alcohol be discontinued for three months prior to hair analysis.

64 On April 28, 2011, Ms. Green began attending for urine tests for drug and alcohol at CML Laboratories and more frequently starting in August 2011. With one exception, the urine tests indicated no alcohol.

65 Relying on Dr. Salomone's evidence, Dr. Koren challenges the accuracy and the reliability of Ms. Green's urine tests from CML Laboratories. In Dr. Salomone's opinion, notwithstanding the negative reports, the results of Ms. Green's urine tests are consistent with alcohol abuse during the periods of February to May 2011, and August to November 2011, respectively. He

explained that since Ms. Green's urine tests were done only on weekdays, it is likely that she consumed alcohol on weekends, and obtained negative results during her weekday urine tests.

66 On April 29, 2011, Ms. Green presented at the Motherisk laboratory for another hair test. For the first time, she provided the laboratory with a list of the haircare products she was using. The test results, which were reported on June 10, 2011, indicated that her hair was washed for all analysis. The test scores were: (a) positive for FAEE at 1.899 ng/mg (GC/LC-MS analyzed); (b) positive for EtG at 60 pg/mg (determined by LC-MS/MS at USDTL); and (c) negative for all drugs tested. The Interpretation Guideline indicated that there was strong evidence of frequent excessive alcohol consumption but that evidence of chronic alcohol abuse did not equal a diagnosis of addiction.

67 The Interpretation Guideline indicated that FAEE results could be falsely elevated in hair by use of ethanol-containing hair products and it was recommended to avoid the use of any haircare product containing ethanol for three months prior to hair analysis and that it was not advisable to use the results of hair testing for alcohol markers in isolation from other evidence pertaining to alcohol consumption to determine recent drinking behaviours.

68 On August 12, 2011, the laboratory provided an interpretation letter of Ms. Green's test results to George Asare at the Toronto Children's Aid Society. The letter stated that:

This sample tested positive for EtG at a concentration of 60 pg/mg. The positive test results for both FAEE and EtG provide clear evidence for frequent, heavy alcohol use during the three-month time period represented.

69 It was Dr. Salomone's opinion that this letter was accurate.

70 On September 14, 2011, Ms. Green swore an affidavit in support of a motion for increased access to her son. In her affidavit, she swore that she had worked cooperatively with the Society to address concerns about cocaine, and the four hair samples that she had provided for analysis supported that she was not taking cocaine and that she had not used cocaine for a significant period of time. She said that she had reduced her alcohol consumption and that the December 2010 test results confirmed her cessation of cocaine use and her reduction of alcohol use. She swore that subsequent results showed a further reduction of alcohol use. She swore that she was prepared to comply with all testing requirements to establish that her alcohol consumption did not constitute an unmanageable risk for unsupervised home visits and for overnight access and that she was willing to not consume alcohol during visits with her son.

71 On September 21, 2011, at a court attendance, the terms of the parents' access were varied on consent.

72 On November 16, 2011, Ms. Green attended at the laboratory for another hair test. Her test scores were reported on December 14, 2011 and indicated that her hair was washed for all analysis. The test scores were: (a) positive for FAEE at 1.385 ng/mg (GC/LC-MS analyzed); (b) positive for EtG at 173 pg/mg (determined by LC-MS/MS at USDTL); and (c) negative for all drugs.

73 On January 4, 2012, the laboratory provided another interpretation letter of the November test to Mr. Asare at the Society. The letter concludes that the elevated levels of both FAEE and EtG provide clear evidence of frequent, heavy alcohol consumption during the three-month period represented by the test.

74 It was Dr. Salomone's opinion that this letter was accurate.

75 On December 19, 2011, Ms. Green and her boyfriend attended in court. Given that Ms. Green's hair test results continued to show "frequent excessive alcohol consumption", the Society and the parents agreed to no overnight visits with the child.

76 On January 23, 2012, Ms. Green wrote to the Society and alleged that the laboratory's test results were not accurate and that she intended to obtain a second opinion. However, she did not do so on the advice of a person whose name she cannot recall.

77 On February 24, 2012, Ms. Green attended the laboratory for another hair test. Her test scores were reported on March 16, 2012. The test scores were negative for all substances tested.

78 On March 29, 2012, Ms. Green and her boyfriend's access was increased to include overnight access. The terms of the access included a requirement that the parents would not consume alcohol during or in the 24 hours before a visit. The parents also agreed to attend for random urine screens, if requested.

79 On May 14, 2012, with the Society's consent, the child was placed in the custody of Ms. Green and her boyfriend. The terms of the court supervisory Order included the condition that the parents abstain from drugs and alcohol entirely, enroll in a relapse prevention program, and not expose the child to any form of violence.

80 On November 29, 2012, the supervision order of May 14, 2012 was terminated.

81 In April 2013, the Society closed its file on Ms. Green and her boyfriend.

### ***3. The Internal Review, the Independent Review, and the Motherisk Commission***

82 In October 2014, in *R. v. Broomfield*,<sup>9</sup> the Ontario Court of Appeal sparked a controversy and a public outcry about the reliability of the hair analysis opinions provided by the Motherisk laboratory. As a result of the public outcry, the Hospital ordered an Internal Review.

83 The Province of Ontario also responded to the scandal. On November 26, 2014 by Order in Council, the Province established the Independent Review of the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children. The government appointed the Honourable Susan Lang as Independent Reviewer.

84 The Motherisk laboratory ceased operating in March 2015 and closed permanently in April 2015, for all purposes except research.

85 On December 17, 2015, the Independent Reviewer released a report. Her principal findings were that: (a) the laboratory's test results were unreliable for use in child protection and criminal proceedings; (b) the procedures used were negligently managed; (c) the laboratory never met forensic as opposed to clinical standards for testing; (d) from 2005 to 2010, contrary to recognized forensic standards, the laboratory did not routinely wash hair samples to remove contamination of the sample; (e) the laboratory did not apply or properly apply chain of custody protocols; (f) the laboratory staff were not adequately supervised; (g) the laboratory staff did not have the expertise to give forensic interpretations of the test results; and (h) the use of MDTL hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.

86 In her report, the Independent Reviewer cautioned that she had not made any determination of civil liability or negligence and she specifically warned against using her findings for that basis. The report contained the following caution:

Consistent with the terms of the order in council, in this Report I do not express any conclusion or recommendation regarding professional discipline matters involving any person or the civil or criminal liability of any person or organization. Nothing in this Report should be interpreted as suggesting otherwise.

87 On December 17, 2015, Dr. Michael Apkon, the CEO of the Hospital, issued the following statement:

We deeply regret that the practices in the Motherisk drug testing laboratory didn't meet the high standard of excellence that we have here at SickKids, and we extend our sincere apologies to the children, families and organizations who feel that they may have been impacted in some way.

88 On January 15, 2016, by Order in Council, the Government of Ontario established the Motherisk Commission led by Commissioner Justice Judith Beaman with a mandate that included reviewing all individual cases where a request is made by a person who may have been affected by the hair testing at the Motherisk laboratory. The Commission's mandate also included offering support and assistance to families affected by flawed hair testing.

89 On January 22, 2016, an article in the *Toronto Star* reported that in an interview Dr. Apkon had stated: "We apologize deeply . . . and acknowledge responsibility for the hospital's role. We appreciate that in some cases, we may need to participate in compensating impacted families."

90 Under the Commissioner's leadership, the Motherisk Commission established a Case Review and Remedy Determination Process, under which, based on its own assessment of priorities or upon request from a member of the public, commission legal counsel would review files in which a positive testing result had been made by the laboratory in order to make a recommendation to the Commissioner that she determine that: (a) Motherisk testing did not have a substantial impact on the outcome of the proceedings; (b) Motherisk testing had a substantial impact on the outcome; or (c) it was unclear what role the Motherisk testing played in the outcome, in which case, further information would be gathered.

91 If the Commissioner determined that a substantial impact had occurred, the Commission would notify the affected parties. A substantial impact was defined to mean that the test materially affected the outcome of the case having regard to one or more of the following factors: (a) the creation of a status quo with respect to the child's living arrangements; (b) the position of the Children's Aid Society respecting the direction of the case; and, (c) the decision of the court.

92 Where the Commissioner determined that a test did have a substantial impact on the outcome of a child protection case, the Review Process sets out services that would be offered to the affected persons including: (a) counselling assistance; (b) a meeting with the Commissioner and/or review counsel to discuss the outcome; (c) legal referral; (d) funding for legal services; and (e) any other services the Commissioner deems appropriate, having regard to the fundamental principles set out in the Terms of Reference.

93 The Commissioner also offers services where a test is determined not to have had a substantial impact on a case, including: (a) counselling assistance; (b) a meeting with the Commissioner and/or review counsel to discuss the outcome; (c) a reconsideration of the file review; and (d) any other services the Commissioner deems appropriate, having regard to the fundamental principles set out in the Terms of Reference.

94 In a June 3, 2016 letter posted on the Motherisk Commission webpage, Commissioner Beaman reported on the status of the Commission's work and findings to Executive Directors and Legal Counsel to Children's Aid Societies. In her letter, Commissioner Beaman noted that the Commission had received approximately 425 files that were considered high priority and had reviewed about one-third of them. Seven files were found to reveal a substantial reliance on the Motherisk hair test results, and in those cases, the Commission was working with the agencies, parents, children and others to move them forward so that the children in these cases were not caught in limbo.

95 According to posts made by the Motherisk Commission on its Facebook page in February 2017: (a) the Motherisk Commission had reviewed 545 cases and had identified 24 cases in which tests were a key factor in the removal of children; (b) 146 individuals had contacted the Motherisk Commission; and (c) 29 people have received counselling services.

#### **4. Mr. Wilson's Evidence**

96 In Ontario, the child protection system is governed by the *Child and Family Services Act*.<sup>10</sup> Mr. Wilson's evidence was proffered for a summary judgment motion brought by Dr. Koren in Ms. Green's individual action, but his evidence was used for the certification motion.

97 I did not allow the summary judgment motion to proceed, pre-certification. For present purposes, it is not necessary to set out Mr. Wilson's evidence, which was largely directed at explaining the child protection regime and the associated court proceedings in child protection matters.

98 Mr. Wilson explained the role and relevance of substance abuse evidence in those proceedings but for the present purposes of a certification motion, I need not explicate his evidence.

**5. Ms. Green's Proposed Class Action**

99 On December 22, 2015, Yvonne Marchand, the then proposed representative plaintiff, filed a Notice of Action against the Hospital, Dr. Koren and Mr. Gareri. Ms. Marchand later withdrew to become a putative class member and to bring her own individual action.

100 On January 20, 2016, Ms. Marchand filed a Statement of Claim.

101 On June 17, 2016, Dr. Koren delivered a Statement of Defence.

102 On June 20, 2016, the Hospital and Mr. Gareri delivered a Statement of Defence.

103 The Defendants issued Third Party Claims against 47 Children's Aid Societies.<sup>11</sup>

104 On November 16, 2016, Ms. Green delivered an Amended Statement of Claim and became the proposed representative plaintiff.

105 On December 2, 2016, Dr. Koren delivered an Amended Statement of Defence.

106 On December 9, 2016, the Hospital and Mr. Gareri delivered an Amended Statement of Defence.

107 In light of Ms. Green confining her damages to the several liability of the Defendants, the Defendants discontinued their Third Party Claims against the 47 Children's Aid Societies.

108 In her Statement of Claim, Ms. Green claims the following relief:

(a) an order certifying this action as a class proceeding and appointing her as representative plaintiff for the Class and the Family Law Class;

(b) a declaration that the Defendants were negligent in the operation and supervision of MDTL;

(c) a declaration that the Defendants are liable to the Plaintiff, the Class and the Family Law Class for damages for their negligence in the operation and supervision of MDTL;

(d) a declaration that the Defendants are liable to the Family Class for damages resulting from the injuries to members of the Family Class;

(e) damages for negligence in the amount of \$200,000,000, or such other sum as this Honourable Court may find appropriate;

(f) damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and/or the equivalent legislation in other provinces;

(g) punitive damages in the amount of \$250,000,000;

(h) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

(i) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity to the plaintiff;

(j) the costs of notice and of administering the plan of distribution of the recovery in this application, plus applicable taxes, pursuant to section 26 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6; and,

(k) such further and other relief as this Honourable Court may deem just.

109 Ms. Green proposes the following class definition:

- (a) All persons who reside in Canada who tested positive from a hair-strand drug and/or alcohol test administered by the Motherisk Drug Testing Laboratory between January 2005 and April 2015 (the "Class" or "Class Members")
- (b) All parents, grandparents, children, grandchildren, siblings and spouses (within the meaning of section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended) of a Class Member (the "Family Law Class" or the "Family Law Class Members")

110 Ms. Green's Statement of Claim pleads a claim of so-called systemic negligence. In her Statement of Claim, Ms. Green alleges that the Defendants were negligent in that: (a) the laboratory staff were not qualified to interpret the hair test results; (b) the laboratory negligently relied on the unconfirmed test results of its enzyme-linked immunosorbent assay ("ELISA"), which should only be used as a preliminary screening test; (c) the laboratory had no written standard operating procedures for the hair tests it carried out and did not keep reliable contemporaneous documentation; (d) the laboratory technicians who were assigned to carry out the ELISA tests were not properly supervised resulting in reporting anomalies or errors; (e) the laboratory failed to wash hair samples routinely before analysis; (f) the laboratory had inadequate chain-of-custody procedures; (g) the laboratory had inadequate record keeping practices; and (h) after 2010, the laboratory used gas chromatography-mass spectrometry ("GC-MS") to purportedly confirm test results, but the procedure was flawed.

111 Ms. Green claims compensatory damages for: (a) pain and suffering; (b) impaired ability to participate in normal family affairs and relationships; (c) loss of custody, be it temporary or permanent, on false pretenses, resulting in loss of dignity and interference with familial relations; (d) unnecessarily protracted and more complex legal proceedings, resulting in increased legal costs, including the need for expert responding evidence; (e) requirement of supervised visitation on false pretenses, resulting in loss of dignity and interference with familial relations; (f) exacerbation of depression, anxiety, emotional distress and mental anguish, leading to impairment of mental and emotional well-being; (g) destruction of credibility, character and trustworthiness; (h) loss of friendship and companionship; and (i) an impaired ability to obtain and sustain employment, resulting either in lost or reduced income and ongoing loss of income.

112 I pause here to note that all of the various heads of damages are intensely individualistic and idiosyncratic as is the quantification of the entitlements to compensation. As the discussion below will reveal, the individual nature of both the causation and the quantification of the damages is a critical factor in the analysis of whether Ms. Green's proposed class action satisfies the criteria for certification as a class action.

113 Ms. Green proposes six common issues; namely:

1. By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?
2. If the answer to Common Issue No. 1 is "yes", are the Family Class members entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3?
3. If the answer to Common Issue No. 1 is "yes", can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?
4. If the answer to Common Issue No. 3 is "yes", in what amount?
5. If the answer to Common Issue No. 1 is "yes", does the Defendants' conduct justify an award of punitive damages?
6. If the answer to Common Issue No. 5 is "yes", what amount of punitive damages ought to be awarded against the Defendants?

114 In their Statements of Defence, the Defendants raise factual defences and legal defences about the duty of care, standard of care, general causation, specific causation, the heads of recoverable damages, the apportionment of liability and also defences based on the class members' claims being: (a) statute-barred under the *Limitations Act, 2002*; <sup>12</sup> (b) precluded by issue estoppel; or by the Defendants being protected by: (c) expert witness immunity; and (d) statutory immunity under s. 142 of the *Courts of Justice Act*, <sup>13</sup> which provides that a person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario.

115 Ms. Green's litigation plan sets out a proposed scheme to manage the action from pre-certification, certification, discovery, the common issues trial, and for the steps following a favourable disposition of the common issues. For present purposes, it is adequate to set out only the portion of the plan that describes the steps prescribed for after the common issues trial. The litigation plan states:

*LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES FAVOURABLE TO THE CLASS*

....

*Valuation of Damages*

24. Assuming that one or more of common Issues (a) and (c) are resolved in favour of the plaintiff, the plaintiff proposes three (3) methods for assessing and distributing damages for the class members as follows: (a) global punitive damages (to be determined as Common Issue (b) and (I) to be distributed on a pro rata basis; (b) aggregate damages for the individual claimants and their family law claimants (to be determined as Common Issue (e) to be distributed on a pro rata basis); and/or (c) Claims Forms damages of individual claimants and their family law claimants to be determined in individual assessments.

25. The Claims Form will ask each claimant to establish their membership in the class by setting out their allegations and the damage they claim to have suffered.

26. The Claims Form must be filed with the Administrator within six (6) months of the Notice of Resolution, failing which the claimant will be deemed to have waived his or her claim.

27. The Administrator shall, after a review of the Claims Forms and all supporting documentation, determine if the claimant qualifies as a class member (the "Approved Claimant").

*Resolution of the Individual Issues*

28. The plaintiff has requested an aggregate assessment of monetary relief as a common issue. Even with that assessment, it may still be necessary to establish a procedure in accordance with section 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 to determine the individual damages of Class Members. A simplified process for such claims is set out below.

*Individual Damage Assessments*

29. The plaintiff proposes the following process for individual damages and causation assessments:

- (a) Within a time prescribed by the court, each Approved Claimant will be invited to attend in a place designated by the Court for an impact interview (the "Impact Interview"), to be conducted by a multidisciplinary panel of three (3) practitioners with experience dealing with adoption, custody, access, and related issues (the "Interview Panel");
- (b) The members of the Interview Panels will be chosen by the plaintiffs' counsel in consultation with the defendants and the court, to ensure the appropriate make up and experience of the Interview Panels;

- (c) The Interview Panel will conduct an Impact Interview with each Approved Claimant and will prepare, within thirty (30) days of the Impact Interview, a joint report setting out the Claimant's experiences and the Interview Panel's conclusions as to the impact of the Approved Claimant's experiences (the "Joint Impact Report");
- (d) Within thirty (30) days of the Joint Impact Report, plaintiffs' counsel and defendants' counsel will meet to determine the damages associated to each Approved Claimant (the "Damages Meeting"), if any;
- (e) If the parties are able to agree on the appropriate level of damages for an Approved Claimant, the defendants shall, within thirty (30) days of such agreement, make payment to the class member;
- (f) If the parties are unable to agree on the appropriate level of damages for an Approved Claimant, within thirty (30) days of the Damages Meeting, plaintiffs' counsel and defendants' counsel will attend before a referee designated by the Court to determine causation and the damages attributable to each Approved Claimant (the "Damages Hearing");
- (g) No further evidence is permitted at the Damages Hearing save for the Joint Impact Report and three (3) page statement from the parties' own designated damages/causation expert;
- (h) The time and place of the Damages Hearing will be set by the referee, but all Damages Hearings are to be scheduled within thirty (30) days of the Joint Impact Report;
- (i) The procedures and conduct of the Damages Hearing will be set by the referee subject to the following:
  - (i) All evidence and submissions shall be presented at the Damages Hearing which shall not take more than two (2) hours in total;
  - (ii) Offers to settle are permitted up to one (1) week prior to the scheduled Damages Hearing;
  - (iii) Two (2) weeks prior to the Damages Hearing, each party shall serve and file with the referee a three (3) page statement from the parties' own designated damages expert, if the party so chooses;
  - (iv) The referee may also make requests for further documentation from the parties at any time;
  - (v) Each party shall have an opportunity to provide oral submissions, not to exceed forty-five (45) minutes per party;
  - (vi) The conduct of the Damages Hearing and all procedures shall be determined by the referee having regards to the purposes and goals of the *Class Proceeding Act, 1992*, subject to any order of the Court providing otherwise;
  - (vii) The referee shall render a decision, with reasons, within sixty (60) days after the Damage Hearing;
  - (viii) The referee's decision is final and binding on the parties;
  - (ix) Should the referee's decision be in favour of the Approved Claimant, the defendants shall pay any damages awarded to the Approved Claimant within thirty (30) days of the referee's decision.

#### *Individual Issues Resolution*

30. For the resolution of any individual issues, aside from issues of damages and causation, the plaintiff proposes the following process:

- (a) Within thirty (30) days of the Joint Impact Report, the defendants shall serve on plaintiffs' counsel a statement of dispute of each Approved Claimant setting out what individual issues the defendants are asserting, aside from damages issues, which would limit the Approved Claimants' recovery of damages (the "Statement of Dispute");

(b) Within thirty (30) days of the Statement of Dispute, a referee appointed by the Court shall convene an individual issue hearing (the "Individual Issue Hearing"), with the following process:

(i) The time and place of the Individual Issue Hearing shall be set by the referee, but all Individual Issue Hearings are to be scheduled within thirty (30) days of receiving the Statement of Dispute;

(ii) In advance of the claims process, the referee, in consultation with plaintiffs' counsel, defendants' counsel and the Court, shall establish procedures for the determination of the Individual Issue Hearings, in a manner having regard to the purpose and goals of the *Class Proceedings Act, 1992*, subject to any order of the Court providing otherwise;

(iii) The referee shall render a decision, with reasons, within sixty (60) days after the Individual Issue Hearing;

(iv) The referee's decision is final and binding on the parties;

(v) Should the referee's decision be in favour of the claimant, a Damages Meeting will take place within thirty (30) days of the referee's decision and the damages will be made in accordance with the Individual Damages Assessments procedure set out above.

## ***6. Other Actions Commenced against the Hospital***

116 In addition to the proposed class action, civil actions against the Defendants and others have been commenced with respect to what occurred at the Motherisk laboratory. The plaintiffs include: Frederick Barham, Kera Barnes, and Krista Lee Barnes, Tamara Broomfield, Christopher Hewitt, Jeffrey Hudson and C.H.H., Yvonne Marchand (she also commenced a judicial review proceeding), Ashley Simon Mason, William McIntyre and Natacha LeRoy, Andrew Ross Rebagliati, Christine Rupert (she also brought a judicial review proceeding), Jessica Symanek, Chastity Timmons (hers is a judicial review application), and Tammy Whiteman.

117 Ms. Mason's action joins 101 co-plaintiffs. Mr. Rebagliati's action joins 58 co-plaintiffs. Ms. Symanek's action joins 106 co-plaintiffs.

118 In all, there are 328 plaintiffs proceeding with individual or joinder actions outside of the proposed class action.

## **E. Discussion and Analysis**

### ***1. Overview***

119 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.

120 As the discussion below will explain, in my opinion, Ms. Green's action satisfies the cause of action criterion for a class action, and with some revision, her action technically satisfies the identifiable class criterion. However, while some of her proposed common issues manifest commonality, they do not satisfy the common issues criterion. And, her action fails the preferable procedure criterion and the representative plaintiff criterion.

121 Thus, although a group of claimants has allegedly been wronged, Ms. Green's proposed class action is not suitable for certification and her certification motion must be dismissed.

122 As I shall explain, the major deficiency in Ms. Green's proposed class action is its failure to satisfy the preferable procedure criterion. This deficiency is related to what I shall describe as a design failure that ripples through all the certification criteria. Ms. Green's class action, which is based on systemic negligence, misses the target of providing access to justice and compensation for the injuries actually suffered by the class members and the design of her action impedes achieving genuine access to justice.

123 In the case at bar, procedural and substantive access to justice will inevitably require individual issues trials for the class members with a significant enough injury to justify the expense of complex individual trials about liability. In the case at bar, hundreds of putative class members are already pursuing individual claims and the putative class members should not suffer the disappointment of a class action that will not take them far enough on the path to substantive justice.

124 To explain why I am dismissing Ms. Green's certification motion, I shall: first, outline the general principles about certification of an action as a class action; second, consider the admissibility and adequacy of the evidence in the case at bar; third, analyze the preferable procedure criterion and the representative plaintiff criterion; and, lastly, address the other certification criterion.

125 As I shall explain below, the design failures in the immediate case are similar to the problems in *Dennis v. Ontario Lottery and Gaming Corp.*<sup>14</sup>, which problems led the court to refuse to certify the action as a class action.

## **2. General Principles: Certification**

126 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

127 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> In particular, there must be a basis in the evidence to establish the existence of common issues.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.<sup>24</sup>

128 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 that of the much less stringent test of "some basis in fact".<sup>25</sup> The evidence on a motion for certification must meet the usual standards for admissibility.<sup>26</sup> 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.<sup>27</sup> In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.<sup>28</sup>

### **3. Admissibility and Adequacy of the Evidence**

129 The Defendants submitted that Ms. Green has adduced no expert report and rather relies on the *Independent Review*, which they submit is inadmissible. The Defendants submit that Ms. Green has not satisfied the evidentiary threshold required for certification of her proposed class action.

130 I disagree. Save as noted below, there was ample evidence to satisfy the some basis in fact standard for the certification criteria. I have already addressed the admissibility of the *Independent Review*. Based on its appropriate use and the Defendants' own documents and admissions, there is ample evidence for an analysis of the certification criterion.

131 The Defendants also submit that Ms. Green does not demonstrate that there is a group of similarly situated individuals, as is required by the *Class Proceedings Act, 1992*, for the certification of a class action.

132 I disagree. There is ample evidence from Ms. Green's evidence and from the Defendants' documents that there are numerous individuals that have potential claims against the Defendants about the Motherisk test results. And, I note that Ms. Green is the substitute for Ms. Marchand and that Ms. Marchand and Mr. Barham, Ms. Broomfield, Ms. Mason, Mr. McIntyre, Mr. Rebagliati, Mr. Rupert, Mr. Symanek, and Mr. Whiteman are potential class members if they do not opt out to pursue their individual actions.

### **4. Preferable Procedure Criterion**

#### *(a) Introduction*

133 As noted above, in the case at bar, the most problematic criterion for Ms. Green is the preferable procedure criterion, which is the fourth of the five criteria. To analyze this criterion, I will assume that the cause of action, the identifiable class, and the representative plaintiff criteria have been satisfied. I will also assume that proposed Common Issue No. 1 satisfies the common issues criterion. That question asks: "By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?" With these assumptions and based on the factual background set out above, I shall describe the general principles of a preferable procedure analysis and then apply those principles to the circumstances of the immediate case.

#### *(b) General Principles: Preferable Procedure*

134 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.<sup>29</sup>

135 In *Fischer v. IG Investment Management Ltd.*,<sup>30</sup> 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.<sup>31</sup> Arguments that no litigation is preferable to a class proceeding cannot be given effect.<sup>32</sup> 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.<sup>33</sup>

136 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.

137 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.<sup>34</sup>

138 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).<sup>35</sup>

139 The court must identify alternatives to the proposed class proceeding.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

140 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?<sup>39</sup>

141 And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin*<sup>40</sup> and *Bruno Appliance and Furniture Inc. v. Hryniak*,<sup>41</sup> 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.

142 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.<sup>42</sup>

143 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 sections 12 and 25 of the *Act* empowers the court with tools to manage and achieve access to justice and judicial economy in those circumstances, and, 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.<sup>43</sup>

144 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

(c) *Analysis: Preferable Procedure*

145 As noted by Justice Cromwell in *Fischer v. IG Investment Management Ltd.*,<sup>47</sup> access to justice has both a substantive and procedural dimension. In the case at bar, I shall begin the analysis of the preferable procedure criterion by focusing on substantive justice where, in my opinion, there is a design defect in Ms. Green's systemic negligence class action as a means to obtaining substantive justice. Then I shall analyze whether Ms. Green's proposed class action satisfies the procedural, managerial, and judicial efficiency aspects of the preferable procedure criterion.

146 The analysis of access to substantive justice begins with the constituent elements of a negligence claim, including a systemic negligence claim; those elements 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.<sup>48</sup>

147 In the case at bar, assuming the action was certified as a class action and assuming Ms. Green was successful at the common issues trial that established that there was a class-wide breach of a duty of care, the remaining four elements of the five constituent elements of the systemic negligence claim, plus the matters of the apportionment of liability and the various defences of the Defendants, would have to be resolved by individual issues trials.

148 Also left for an individual issues trial — and this is the fatal design flaw of Ms. Green's proposed class action - is the class member's individual negligence claim which arises not from the circumstance that Motherisk's tests and reports were commonly unreliable but rather arises from the circumstance that Motherisk's particular test and report about the individual was all of unreliable, false and adversely influential to the outcome of the individual's court proceedings. The design defect in the immediate case is that compensable damages for the interference to and loss of parental rights and the associated personal agony do not follow from the representative plaintiff proving that the hair test reports were generally unreliable but rather follows from the individual class member proving that his or her test specific test results were all of unreliable, false and adversely influential. Describing the design defect somewhat differently, in the case at bar, if a class member took the benefit of a finding at the common issues trial that because of the Defendants' systemic negligence the results of all the hair tests at the Motherisk laboratory were unreliable, that judgment leads to little or no compensatory damages.

149 This truth about the causation of the harm explains why the Motherisk Commission established a Case Review and Remedy Determination Process to identify the cases where the Motherisk testing had "a substantial impact" on the outcome and why primarily in those cases the Commission notified the affected persons. The Motherisk Commission recognized that an unreliable test that did not influence the result of the court proceedings does not occasion a harm for which there might be compensatory damages. In the case at bar, Ms. Green's focus on the systemic negligence of unreliable hair tests misses the point that the significant damages are caused not by the common unreliability of the tests, but by an individual's test being wrong with sometimes tragic consequences.

150 An analogy may be helpful in understanding the design problem. Imagine that the Motherisk laboratory took blood samples to test for the presence of drugs and it was discovered, after the fact, that the laboratory's tests were unreliable and that the technicians had used unsterile equipment for testing the 18,000 patients. Based on those facts, a systemic negligence class action based on the fact that the blood tests were unreliable misses the point that the compensable damages are for those individual class members who were infected or who, individually, upon receiving notice, suffered an emotional shock of sufficient intensity to qualify for damages. In the analogous case, the unreliability of the test results would be neither here nor there in providing access to justice for the actual harm caused by the hospital's negligence in spreading disease.

151 This point can also be illustrated by Ms. Green's case. Assuming she was successful in showing that on a class-wide basis that the Defendants breached a duty of care by producing unreliable tests, Ms. Green, as a class member, would then have an individual issues trial to prove causation of damages from an unreliable test result. Ms. Green would have to prove causation of harm from an unreliable blood test and the quantum of the damages from that harm. However, there are little damages caused simply by an unreliable test result. She could also, of course, - at the individual issues trial — prove that she had been harmed by a false and adversely influential test result. The hard work of proving that the unreliable test actually adversely influenced the result of the court proceedings is a matter that Ms. Green would have to prove at her individual issues trial and the burden of that hard work is not lightened by the results of the common issues trial that established that the Defendants' tests were generally unreliable.

152 *Dennis v. Ontario Lottery and Gaming Corp.*<sup>49</sup> demonstrates how design defects in the theory of the common issues of a proposed class action may cause the action to fail one or more of the certification criterion even if the cause of action and identifiable class criterion are satisfied. In that case, the Ontario Lottery and Gaming Corp. ("OLGC"), which is a crown agency that operates gambling establishments to raise revenues for the province of Ontario, offered a "self-exclusion" program to gamblers who had self-identified themselves as having an addiction to gambling. Over 10,000 gamblers signed up for the program, including Mr. Dennis, who suffered from a personality disorder known as "problem gambling." Under the program, OLGC indicated that it would use its best efforts to deny the self-excluded person entry to all of its gaming venues in the province. Notwithstanding having entered into the program, Mr. Dennis was not denied admission to OLGC's venues, and he continued to gamble. He incurred devastating losses, which in turn led to the loss of his job, the loss of the family's home, strained family relations, and serious mental and physical health issues for Mr. Dennis, his wife, and his children. After he sought psychiatric help and received treatment for his disease, Mr. Dennis brought a proposed class action on behalf of all the persons who had signed up for the program. He sued for breach of contract, negligence, occupier's liability, and waiver of tort. He claimed damages including punitive damages of \$3.5 billion for the class period.

153 Justice [*Calvert v. William Hill Credit Ltd.*, [2008] All E.R. 170 (Eng. Ch. Div.), affd. (2008), [2009] Ch. 330 (Eng. C.A.)] Cullity heard the certification motion, and although he had doubts about Mr. Dennis' various causes of action, he concluded that it was not plain and obvious that Mr. Dennis had not pleaded tenable causes of action. Justice Cullity also concluded that the identifiable class criterion and the representative plaintiff criterion had been satisfied. However, he concluded that the common issues and preferable procedure criteria were not satisfied. For present purposes the heart of Justice Cullity's reasons are found at paragraphs 191-193, 221, 231, and 234-238, which state:

191. In my opinion, the vulnerability of class members is essential to the validity of their claims. Persons who were not problem gamblers would have no tenable claims and there could be no question of certifying the proceeding in respect of such persons. The evidence is that the disorder is progressive and that there is a range of its severity. There is nothing in the

class definition or the formulation of the common issues to confine the claims asserted to members of the class who were vulnerable to any particular degree, if at all, and, in my judgment, the class definition is to that extent objectionably over-inclusive, and the proposed common issues lack commonality. While it can no doubt be presumed that most self-excluded persons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

192. If Mr. Dennis, or any of the other class members, had advanced the same claims in individual actions, OLG would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of s. 4(1) of the *OLA*; causation of proven losses; contributory negligence; and punitive damages. The right of OLG to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the *CPA* and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.

193. In *Hollick*, at para. 21, it was accepted that over-inclusive classes can be permitted where 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". I do not understand this principle to permit an over-inclusive class to be accepted if the reason why it could not be drafted more narrowly is the inability to provide a limiting class criterion that will establish the rational link with the proposed common issues on which commonality depends. In such a situation, instead of common issues determinable on a class-wide basis, there will be individual issues affecting liability to each member of a diverse group. In my judgment, that is the case here.

....

221. In short, if, as I believe, the degree of vulnerability of members of the primary class is relevant to such other elements of liability, it is not permissible to conclude on the basis of statistical sampling, or a five-minute labelling test, that any of the class members was a vulnerable problem gambler to any particular degree. Individual inquiries would be necessary for this purpose and this would then be an example of the situation referred to by the Chief Justice in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 (at para. 29), where a determination of the proposed common issues would degenerate into a consideration of the claims of each of a potentially diverse group of individuals. There would have to be an inquiry into the personal circumstances, the gambling history, the extent of the addiction or compulsion to gamble of each class member at particular times, and, if the approach to causation in *Calvert*, [citation omitted in original<sup>50</sup>] his or her likely behaviour if OLG had exercised its best efforts or exercised reasonable care. An attempt to avoid problems of class definition and commonality at the certification stage by relying on statistical evidence at trial for the purpose of narrowing the class is not, in my opinion, acceptable.

....

231. For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a "problem gambler" has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member's gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the *CPA*. The common issues would have to be so truncated that their resolution would not sufficiently advance the claims of the class members. They would, for the most part, be limited to the interpretation of the forms and the adequacy of OLG's efforts to enforce self-exclusion.

....

234. I agree with counsel for OLG that these individual issues do not lend themselves to a summary determination as is contemplated by s. 25 of the *CPA*. I am satisfied that they cannot be dealt with fairly and adequately without evidence, and a detailed consideration, of the degree of vulnerability, and the circumstances, of each class member. As I have indicated, the

attempt to avoid the individual issues by pleading that all class members were problem gamblers in a severe, or pathological, sense must be rejected. Evidence is required for each of the requirements for certification other than that in s. 5(1)(a).

235. Similarly, the excessively individualistic aspects of the claims asserted by the plaintiffs are not avoided by their counsel's characterization of the claims as "systemic". Where, in cases such as *Rumley v. British Columbia, supra*, such a characterization has been found to be appropriate and helpful, it has been predicated on a material lack of diversity among the members of the class. That is not the case here.

236. The evidence does not support a conclusion that all class members were pathological problem gamblers, and the omission to refer to problem gambling in the formulation of the common issues does not alter the fact that the identification of the class members as vulnerable is fundamental to the plaintiffs' case for certification as well as, in the ultimate analysis, the tenability of their individual claims.

237. This is a situation in which, in my opinion, the procedure under the *CPA* would have disadvantages rather than any significant advantages over individual actions in which the focus would be entirely on the circumstances and experience of a particular individual rather than simultaneously on those of a potentially large class of persons with diverse backgrounds and gambling histories for whom liability could only -- but could not properly -- be established by the use of statistical evidence.

238. In view of the nature of the individual inquiries, and the difficulties of proof relating to the existence of losses, I am not persuaded that certification would appreciably advance the legislative objective of judicial economy. The procedure under the *CPA* has its own associated special costs -- including but not limited to those of giving notice. In view of these costs, and the uniqueness of the personal circumstances and gambling history of each of the class members, I am of the opinion that the expense and complexity of attempting to dispose of all their claims in one inevitably protracted proceeding is likely to outweigh any economy achieved by a resolution of the questions of interpretation, and the adequacy of OLGC's efforts to perform its obligations, in a single trial.

154 The circumstances of the putative class members in the immediate case are similar to the circumstances of the putative class members in *Dennis v. Ontario Lottery and Gaming Corp.* where certification of a class action was refused. Ms. Green's proposed class action requires an individualistic consideration of the influence of the false test results on the predicament of each class member. Those individual issues trials are not amenable to any summary determination as contemplated by s. 25 of the *Class Proceedings Act, 1992*. The determination of the proposed common issues would degenerate into a consideration of the claims of each of a potentially diverse group of individuals. The common issues would not sufficiently advance the claims of the class members and combining a common issues trial with individual issues trials makes the proceeding unmanageable and disadvantageous in comparison to the alternative of individual actions. And there is no appreciable advance in the objective of judicial economy by interposing a common issues trial. The Defendants at the individual issues trials are entitled to raise the defence that the unreliable test results caused no injury in the particular case. They are also entitled to raise other defences and issues associated with the apportionment of damages to the Children's Aid Societies. Falsity and an adverse impact are essential to the validity of the class members' claims and thus the class definition, while technically sufficient, is over-inclusive and the proposed common issue lacks the commonality to connect to a meaningful claim to compensation for the class. None of these problems in the case at bar are avoided by characterizing the class members' claims as systemic.

155 Justice Cullity's decision was affirmed by the Divisional Court and by the Court of Appeal. In the Court of Appeal on the crucial issue of whether a class action was preferable to going directly to individual issues trials, Justice Sharpe stated at paras. 53 and 71:

53. There are certainly cases in which a class action will be an appropriate procedure to deal with a "systemic wrong", a wrong that is said to have caused widespread harm to a large number of individuals. When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-

wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.

....

71. Even if the class definition and common issue requirements were satisfied, it is my view that a class action is not the preferable procedure. A general finding of "systemic wrong" would not avoid the need for protracted individualized proceedings into the vulnerability and circumstances of each class member. A more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions as it is inevitable that a class proceeding will break down into individual proceedings in any event.

156 It may be noted that Justice Cullity in refusing certification in *Dennis v. Ontario Lottery and Gaming Corp.* referred to *Rumley v. British Columbia*,<sup>51</sup> which is a famous example of a systemic negligence case that was certified as a class action. Notwithstanding the *Rumley* decision and other systemic negligence cases, Justice Cullity and the appellate courts did not certify Mr. Dennis's systemic negligence claim. In the case at bar, Ms. Green also relies on the *Rumley* decision, and she very heavily relies on an application of *Rumley* by the New Brunswick Court of Appeal in *Gay v. Regional Health Authority* 7.<sup>52</sup> It is, therefore, necessary to consider these cases and compare them to the circumstances of Ms. Green's proposed class action.

157 Ms. Rumley was a student at the Jericho Hill School, a residential school for the deaf and blind operated by the Province of British Columbia. The Ombudsman investigated the school, and in a 1993 report, he concluded that sexual, physical, and emotional abuse of children was prevalent at the school throughout its history. In 1995, Thomas Berger, Q.C., the Attorney General's special counsel, issued a report that concluded that sexual abuse had been rampant at Jericho Hill School. After the report was issued, the Attorney General of British Columbia acknowledged that the province was responsible for the care and well-being of the children at the school and that the province was responsible for the abuse that had occurred there. Ms. Rumley commenced a class action on behalf of the abused children.

158 In *Rumley v. British Columbia*, the Supreme Court of Canada agreed with the decision of the British Columbia Court of Appeal that the action could be framed as a systemic negligence action and class members would not have to prove a sexual assault by a particular individual; rather, there was a common issue based on the systemic negligence of the school's failure to have in place procedures that would have prevented sexual abuse. Justice McLachlin, as she then was, wrote the judgment of the Supreme Court. She agreed with Justice MacKenzie of the British Columbia Court of Appeal that all class members shared an interest in the question of whether the school was systemically negligent in failing to have systems in place to prevent sexual abuse, which alleged failure could be determined without reference to the circumstances of any individual class member.

159 Ms. Green's case, however, is to the opposite effect of a systemic negligence claim like *Rumley v. British Columbia*, and the class members' claims cannot be determined without reference to individual circumstances. Ms. Green submits that she can rely on the "but for" test or in the alternative the "material contribution" test for causation to move from a finding that the Defendants breached a duty of care to produce a reliable test to causation of harm across the class.<sup>53</sup> The fallacy in this argument, however, is the harm is caused by the unreliable test being both individually false and individually influential to an adverse outcome in the individual's court proceedings, which are matters to be proven at the individual issues trial.

160 Although there are substantial similarities in some of the factual circumstances of Ms. Green's proposed class action and the certified class action in *Gay v. Regional Health Authority* 7, *supra*, there are fundamental differences in the two cases that make the *Gay* decision, about which I have no criticism, distinguishable. The New Brunswick decision is ultimately of no assistance to Ms. Green.

161 The facts of *Gay v. Regional Health Authority* 7 were that a hospital was opened in Miramichi, New Brunswick, in 1995. Dr. Menon was hired as its Chief of Pathology, Director of Clinical Laboratory Services, and anatomical pathologist. From the outset of his appointment, there were complaints about the quality of his work, but the complaints were not taken seriously. It was not until 2006, when there was an external peer review, that the hospital took remedial steps. The results of the independent review also prompted the provincial government to have all specimens handled by Dr. Menon from 1995 to

2007 reviewed by experts at an independent laboratory in Ontario. The hospital notified the 15,000 implicated patients and their personal physicians or referring surgeons and recommended consultation, which in turn entailed retesting and travel and incidental expenses for the patients and attendant emotional distress and alarm from the news. The province also ordered a Commission of Inquiry that produced a comprehensive report. The Commission found serious and alarming deficiencies in Dr. Menon's work over the years and a pattern of errors that, arguably, should have been detected and corrected sooner.

162 In these circumstances, Albert Gay, Kimberley Doyle, and James Wilson commenced a proposed class action as a hospital-based medical malpractice case founded on systemic failures with class wide effects. The plaintiffs sued for medical malpractice in tort, breach of contract, breach of fiduciary duties, and equitable fraud. In their Statement of Claim, the plaintiffs alleged that all the class members had suffered out-of-pocket expenses and compensable mental distress and anxiety. The Statement of Claim also alleged that some patients had been misdiagnosed because of Dr. Menon's negligence in examining their particular specimens and these members of the class sustained even greater harm, losses and expenses. The class action, however, did not pursue claims for negligence in the assessment of particular specimens, which claims could be pursued by individual class members.

163 Reversing the motions judge,<sup>54</sup> the New Brunswick Court of Appeal certified the action as a class action.<sup>55</sup> In certifying that action, the majority of the Court of Appeal was satisfied that all of the certification criteria were satisfied. In reaching their decision to certify, they noted that some members of the proposed class, such as Mr. Wilson, required additional liability and quantum-related procedures in order to achieve a just result for them, but that this work for individual trials did not constitute a valid reason to deny certification. The majority also noted that every putative class member had a cause of action for the recovery of out-of-pocket expenses that required adjudication and that there were indications that some putative class members had actually suffered particularly severe non-physical harm, in addition to physical injury from the systemic negligence. The majority said that these claims should stand and be processed by way of class action even if it were concluded that damages were not recoverable for so-called every-day mental distress and anxiety on a class-wide basis. The majority concluded that access to justice for the out-of-pocket expenses of all class members and for the genuinely serious emotional harm suffered by some class members would be impossible without a class action and to close the door on recovery for those claims was untenable.

164 In my opinion, the example set by the precedent of *Gay v. Regional Health Authority*<sup>7</sup> does not assist Ms. Green in the immediate case. Unlike the plaintiffs in the New Brunswick case, she cannot connect the alleged systemic negligence of unreliable test results to the damages for which compensation is sought by the class members and the door to recovery that needs opening is success at individual issues trials. Unlike the plaintiffs in the New Brunswick case, who would substantially advance their case by success at the common issues trial, for the reasons set out above the same is not true for Ms. Green and the putative class members. Unlike the plaintiffs in *Gay v. Regional Health Authority*<sup>7</sup>, a finding that there had been systemic negligence would not connect the dots to compensable damages.

165 The circumstance that while there may be a duty of care to provide reliable tests and to interpret them reliably but that the compensatory damages are individual to the person whose test results are false and adversely influential is also demonstrated by other cases relied on by Ms. Green. In *Elliott v. Laboratory Specialists, Inc.*<sup>56</sup> the Louisiana Court of Appeal stated: "The risk of harm in our society to an individual because of a false positive drug test is so significant that any individual wrongfully accused of drug usage by his employer is within the scope of protection of the law" [my emphasis added]. In *Stinson v. Physicians Immediate Care, Ltd.*,<sup>57</sup> the Illinois Court of Appeal noted that the rationale for imposing a duty of care on a testing laboratory was oriented to individual claims of harm:

The drug testing laboratory is in the best position to guard against the injury, as it is solely responsible for the performance of the testing and the quality control procedures. In addition, the laboratory, which is paid to perform the test, is better able to bear the burden financially than the individual wrongfully maligned by a false positive report. [Emphasis added]

166 A point to emphasize in the analysis of preferable procedure is that to whatever degree the common issues trial would advance the claims of a class member to substantive access to justice, i.e., to compensation for his or her injury, that progress will be infinitesimal compared to what the class member must establish at his or her inevitable individual issues trial, where

the class member would be exposed to an adverse costs award if he or she were unsuccessful. In my opinion, a class action is not the preferable procedure for access to substantive justice.

167 For many of the same reasons, I also conclude that a class action is not the preferable procedure for access to procedural justice. In this regard, I note again that if Ms. Green is successful at the common issues trial, then complex individual issues trials are inevitable for the class members. In this regard, I disagree with Ms. Green's litigation plan that aborts the Defendants' procedural rights to defend themselves from a \$450 million systemic negligence claim. As I shall discuss further below, the individual issues trials are beyond the resources of sections 12 and 25 of the *Class Proceedings Act, 1992* to tailor and trim the individual issues trials.

168 In the case at bar, in my opinion, the circumstance that complex individual issues are inevitable takes the case into the territory where the individual issues would completely overwhelm the common issues and make the case unmanageable.<sup>58</sup> A costs benefits analysis indicates that little benefit is added by subjecting the individual claims to the delay of a class action's common issues trial. This harsh truth also reveals that the current class actions regime is not a panacea for all access to justice barriers.

169 Moreover, it is already apparent that a significant number of putative class members who may have substantial claims that are economically viable to litigate in the Superior Court are likely to opt out. Ms. Green submits, however, that while this might be a reason to decertify the action, it is not a reason to refuse to certify the action. I agree with Ms. Green's submission as a general proposition, but in the case at bar, the submission misses the points that regardless of whether or not the class members with substantial claims opt out, the remaining class members who have modest claims will still be confronted with individual issues trials that are not economically viable to litigate. In other words, a class proceeding would only delay matters and not remove the barriers to access to justice for perhaps the overwhelming majority of class members who could establish that the test results were unreliable but who could not prove that the test results were false and adversely influential to the outcome of their own court proceedings.

170 In the case at bar, in my opinion, given the problems confronting substantive access to justice and the problems of efficiency and productivity, discussed above, and given what little will be accomplished by the common issues trial, a more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions. Moreover, in individual issues trials, class members would not be limited to recovery for the several liability of the Hospital, Dr. Koren, and Mr. Gareri and other potential defendants could be joined, thus enabling the plaintiff to recover completely for his or her injuries.

171 Sometimes a class action rather than removing obstacles to access to justice introduces new ones that impede the goals of access to justice, behaviour modification and judicial economy. The case at bar is one such case. I conclude that the preferable procedure criterion is not satisfied.

## **5. Representative Plaintiff Criterion**

### *(a) Overview*

172 Dr. Koren, but not the Hospital and Mr. Gareri, challenge Ms. Green's qualifications to be a representative plaintiff. All the Defendants submit that the proposed litigation plan does not satisfy the representative plaintiff criterion.

### *(b) General Principles: Representative Plaintiff Criterion*

173 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.

174 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.<sup>59</sup>

175 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.<sup>60</sup>

176 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.<sup>61</sup>

177 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.<sup>62</sup> 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.<sup>63</sup>

178 For managing the class proceedings and in particular the individual issues phase of the proceeding, the litigation plan and the court has the resources of s. 12 and s. 25 of the *Class Proceedings Act, 1992*, which 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.

....

*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.

[ . . . ]

**(c) Analysis: Representative Plaintiff Criterion**

179 There is no merit to Dr. Koren's argument that Ms. Green is not qualified to be a representative plaintiff. There, however, is merit to the Defendants' argument that the proposed litigation plan does not satisfy the representative plaintiff criterion.

180 Ms. Green's litigation plan contemplates a common issues trial and, if that trial is successful, an Interview Panel would report on all of the complex issues of causation and damages, based on an interview with the claimant and without the defendants having any rights of disclosure or to be heard. Thereafter, if a settlement is not reached, a Damages Hearing will determine all of the causation and damages issues based only on the report of the Interview Panel and statements from one expert on each side, limited to three pages. The Damages Hearing is to take not more than two hours.

181 I agree with the Defendants that this litigation plan is both unfeasible and palpably procedurally unfair. As the above analysis of the preferable procedure criterion reveals, in the case at bar, very difficult, if not the most difficult, forensic work is assigned to the individual issues phase of the proposed class action. Ms. Green's litigation plan ignores this circumstance.

182 The deficiency in the litigation plan is a manifestation and illustration of the failure of Ms. Green's action to satisfy the preferable procedure criterion. The litigation plan presupposes that there are meaningful and efficient common issues and that s. 12 and s. 25 of the *Class Proceedings Act, 1992* would empower the court to devise suitable means to make the class action manageable and to introduce efficiencies for the individual issues trials. In this last regard, Ms. Green relies on my decisions in *Lundy v. VIA Rail Canada Inc.*<sup>64</sup> The *Lundy* case and the case at bar, however, are not remotely comparable. The *Lundy* case involved a very small class of persons who were passengers on a derailed train, none of whom suffered serious injuries and some of whom walked away with no injuries. It also involved a defendant who had admitted liability, who was not disputing causation, and who was disputing only the quantum of the individual claims after making offers to settle.

183 The *Lundy* case was very suitable for the exercise of the tools of s. 12 and s. 25 of the *Class Proceedings Act*. Ms. Green's case is not comparable and section 12 and section 25 are not meant to sacrifice a defendant's rights to due process when confronted with a multi-million dollar damages claim.

184 I conclude that the representative plaintiff criterion is not satisfied.

**6. *Cause of Action Criterion***

185 Without conceding that there was in law a cause of action against them, the Defendants did not dispute that Ms. Green's action satisfies the cause of action criterion.

186 While they did not dispute that the first criterion for certification had been satisfied, there were aspects of the Defendants' arguments about the other certification criteria that raised, either directly or indirectly, issues about the soundness in law of Ms. Green's and the putative class members' claims. To the extent necessary, I will address these cause of action issues in the discussion below about the other certification criterion.

187 For immediate purposes, I conclude that Ms. Green's action satisfies the cause of action criterion.

**7. *Identifiable Class Criterion***

**(a) *Overview***

188 In submitting that Ms. Green's action did not satisfy the identifiable class criterion, the Defendants' arguments were that: (1) the Family Law Class did not have any cause of action under the family law statutes and should not be included as class members; (2) the putative class members could not be identified together as a class because each putative class member

had an individual relationship with the Defendants; and (3) the class definition was overbroad because it included persons who had no claim or who suffered no injury.

*(b) General Principles: Identifiable Class Criterion*

189 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.<sup>65</sup> In defining class membership, 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.<sup>66</sup>

190 In *Western Canadian Shopping Centres Inc. v. Dutton*,<sup>67</sup> 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.

*(c) Analysis: Identifiable Class Criterion*

191 It may be the case that the Family Law Class do not have any cause of action under the family law statutes, but this is not plain and obvious and, therefore, I do not agree with the Defendants' arguments that these claimants should not be included as class members

192 While I agree with the premise of the Defendants' argument challenging the class definition that putative class members have an individual relationship with the Defendants, I view this premise as in the first instance more significant to the arguments discussed above that Ms. Green's action does not satisfy the common issues and preferable procedure criterion. In other words, Ms. Green's proposed class definition satisfies the technical requirements of the identifiable class criterion and avoids the sin of a merits-based definition; however, using her proposed definition creates problems for her in satisfying the commonality and preferable procedure criterion.

193 The result, however, of this analysis (as was the case in *Dennis v. Ontario Lottery and Gaming Corp.*) is that it can be said that the class definition is overbroad and fails the identifiable class criterion. While it may be just a matter of semantics with no difference of meaning, I rather conclude that subject to a revision to be discussed next, that Ms. Green has satisfied the second criterion for certification at peril of failing the third and fourth criterion.

194 The revision is to Ms. Green's class definition which is manifestly overbroad to the extent that it includes persons who have no claim or who suffered no injury because their tests had nothing to do with court proceedings in which personal liberties or parental rights were imperiled. The class definition can and should be revised to exclude these persons.

195 Subject to the above revision, I conclude that Ms. Green's action satisfies the identifiable class criterion.

**8. The Common Issues Criterion**

196 For the purposes of determining whether Ms. Green's proposed common issues severally satisfy the common issues criterion, I shall initially assume, notwithstanding the analysis above, that Ms. Green's proposed class action satisfies the other four certification criteria.

(a) General Principles: Common Issues

197 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,<sup>71</sup> 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.

198 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.<sup>72</sup> 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.<sup>73</sup>

199 The common issue criterion presents a low bar.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

200 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.<sup>77</sup> Even a significant level of individuality does not preclude a finding of commonality.<sup>78</sup>

(b) Common Issue No. 1

201 The first proposed common issue is:

1. By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?

202 Based on the assumption that the other certification criteria are satisfied, I agree that Common Issue No. 1 is certifiable as a common issue.

203 However, based on the analysis above, I conclude that Common Issue No. 1 does not satisfy the common issues criterion because: (a) it is not a substantial ingredient of each class member's claim; (b) its resolution will not avoid duplication of fact-finding or legal analysis; (c) its answer is not capable of extrapolation, in the same manner, to each member of the class; and (d) its determination will not diminish what will need to be determined in a multitude of individual proceedings.

204 Further, with respect to Dr. Koren and Mr. Gareri, the duty of care issue would appear to be individual and not common across the class. The precise argument advanced by Dr. Koren is that there is no direct patient and medical practitioner relationship between any of the class members and the individual defendants and thus any duty of care would arise from the circumstance that the Hospital was retained by Children's Aid Societies and others to provide evidence for use in individual court proceedings.<sup>79</sup> These novel circumstances, it is submitted, do not give rise to a common duty of care across the class. I agree with this argument.

205 I, therefore, conclude that Common Issue No. 1 does not satisfy the common issues criterion.

(c) *Common Issue No. 2*

206 The second proposed common issue is:

2. If the answer to Common Issue No. 1 is "yes", are the Family Class members entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3?

207 For the above reasons applicable to Common Issue No. 1, I conclude that Common Issue No. 2 does not satisfy the common issues criterion.

(d) *Common Issue No. 3*

208 The third proposed common issue is:

3. If the answer to Common Issue No. 1 is "yes", can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?

209 For the above reasons applicable to Common Issues No. 1 and No. 2 and also for the following reason, I conclude that Common Issue No. 3 about aggregate damages does not satisfy the common issues criterion.

210 Section 24(1) of the *Class Proceedings Act, 1992* stipulates when the court may assess aggregate damages. Section 24(1) states:

*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.

211 For an aggregate assessment of damages to be available "no questions of fact or law other than those relating to the assessment of monetary relief" must "remain to be determined in order to establish the amount of the defendant's monetary liability." An antecedent finding of liability is required before resorting to the aggregate damages provision of the *Class Proceedings Act, 1992*, and if liability cannot be established through the common issues, then an aggregate damages common issue cannot be certified.<sup>80</sup>

212 In the case at bar, there inevitably will be individual issues trials to determine both liability and damages. There is no general experience of damages arising from the unreliable tests. For some putative class members, the unreliable tests may have been coincidentally correct. For other putative class members, the unreliable tests may have been irrelevant to the outcome of the court proceedings because there was reliable probative evidence to justify the outcome. I, therefore, conclude that aggregate damages may not be certified as a common issue.

213 The case at bar is not a case in which any part of the class member's damage claim can be aggregated. The case at bar is a systemic negligence action and there is no base amount of damages that each member of the class may be entitled to from the fact that it is proven that in general the Motherisk laboratory tests were unreliable for use in court proceedings. As noted

above, the entitlement to damages for which compensation is sought must be determined at individual issues trials. No part of the entitlement to damages can be determined at the common issues trial because major constituent elements of the tort of negligence remain to be determined as do the merits of the Defendants' defences to liability, one of which is that the unreliability of the tests caused no harm to the individual class member.

214 I conclude that Common Issue No. 3 does not satisfy the common issues criterion.

*(e) Common Issue No. 4*

215 The fourth proposed common issue is:

4. If the answer to Common Issue No. 3 is "yes", in what amount?

216 Since I shall not certify Common Issue No. 3, it follows that the ancillary Common Issue No. 4 also shall not be certified.

*(f) Common Issue No. 5*

217 The fifth proposed common issue is:

5. If the answer to Common Issue No. 1 is "yes", does the Defendants' conduct justify an award of punitive damages?

218 In cases where individual issues trials are inevitable, it has become *de rigueur* to certify the common issue of whether the defendant's conduct would justify an award of punitive damages but not to certify the issue of determining the amount of those damages. It is also normative that punitive damages alone cannot justify the certification of an action as a class proceeding.<sup>81</sup>

219 In the case at bar, I shall not certify Common Issues No. 5 (and No. 6) for two reasons.

220 First, Common Issue No. 5 is peripheral to the fundamental common issues and it stands alone as the only question that, technically speaking, is certifiable. Punitive damages alone cannot justify the certification of an action as a class proceeding.

221 Second, I find remote to the extreme that after awarding the class members the full compensation they deserve and awarding Class Counsel the fees they deserve, a court would go on to make a multi-million-dollar punitive award against the Hospital for Sick Children. However egregious the conduct of Dr. Koren and Mr. Gareri in increasing the Hospital's not-for-profit revenues and however egregious the failures of the administration of the Hospital to supervise its Motherisk laboratory, and, however tragic and heartbreaking the outcomes in individual cases, a punitive award would ultimately not be visited on the Defendants but rather would be inflicted on the sick children at the Hospital who depend upon taxpayers and philanthropists to provide the financial resources for the otherwise good and necessary work of the hospital.

222 I conclude that Common Issue No. 5 does not satisfy the common issues criterion.

*(g) Common Issue No. 6*

223 The sixth common issue is:

6. If the answer to Common Issue No. 5 is "yes", what amount of punitive damages ought to be awarded against the Defendants?

224 Since I shall not certify Common Issue No. 5 and since Common Issue No. 6 is normally not certifiable in actions where individual issues trials are inevitable, it follows that the ancillary and periphery Common Issue 6 also shall not be certified.

*(h) Conclusion - Common Issues*

225 For the above reasons, I conclude that the common issues criterion is not satisfied.

## F. Conclusion

226 For the above reasons, I dismiss Ms. Green's certification motion.

227 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days from the release of these Reasons for Decision, followed by Ms. Green's submissions within a further 20 days.

*Motion dismissed.*

## Footnotes

1 R.S.O. 1990, c. C.11.

2 [2014 ONCA 725](#) (Ont. C.A.).

3 [\[1998\] O.J. No. 5394](#) (Ont. Gen. Div.).

4 [Levac v. James, 2016 ONSC 7727](#) (Ont. S.C.J.).

5 [R. v. Khelawon, 2006 SCC 57](#) (S.C.C.).

6 Subject to the rule in criminal proceedings about confessions made to a person in authority, evidence of an out of court statement of a party is admissible: [R. v. Evans, \[1993\] 2 S.C.R. 629](#) (S.C.C.).

7 A business record of a fact made in the ordinary course of business at the time of the occurrence of the fact by a person obliged to record the information is admissible: [Ares v. Venner, \[1970\] S.C.R. 608](#) (S.C.C.); Ontario *Evidence Act*, R.S.O. 1990, c. E.23, s. 35.

8 [C.U.P.E., Local 43 v. Toronto \(Metropolitan\), \[1988\] O.J. No. 723](#) (Ont. Div. Ct.); [R. v. Ruvinsky, \[1998\] O.J. No. 3621](#) (Ont. Prov. Div.); [Catholic Children's Aid Society of Metropolitan Toronto v. P. \(D.\), 1998 CarswellOnt 1047](#) (Ont. Prov. Div.); [I.U.O.E., Local 793 v. Sarnia Cranes Ltd., \[1999\] O.L.R.D. No. 1282](#) (Ont. L.R.B.); [Portelance v. Blanchard, 2005 CarswellOnt 5192](#) (Ont. S.C.J.); [R. v. McCauley, \[2007\] O.J. No. 1593](#) (Ont. S.C.J.); [R. v. McCauley \[2007 CarswellOnt 2551](#) (Ont. S.C.J.)], 2007 CanLII 13937; [Children's Aid Society of Northumberland v. P. \(D.\), \[2008\] O.J. No. 2047](#) (Ont. S.C.J.); [Garrity v. Garrity, \[2008\] O.J. No. 2401](#) (Ont. S.C.J.); [Children's Aid Society of Halton \(Region\) v. G. \(T.\), 2008 ONCJ 806](#) (Ont. C.J.); [Children's Aid Society of Toronto v. B. \(Y.\), 2008 ONCJ 800](#) (Ont. C.J.); [Catholic Children's Aid Society of Toronto v. S. \(C.\), 2008 ONCJ 785](#) (Ont. C.J.); [Children's Aid Society of Hamilton v. V. \(L.\), \[2009\] O.J. No. 1468](#) (Ont. S.C.J.); [Children's Aid Society of Waterloo \(Regional Municipality\) v. A. \(L.J.A.\), 2009 ONCJ 226](#) (Ont. C.J.); [Children's Aid Society of Pictou \(County\) v. G. \(A.J.\), 2009 NSFC 26](#) (N.S. Fam. Ct.); [Children's Aid Society of Lanark \(County\) & Smiths Falls \(Town\) v. M. \(S.\), \[2009\] O.J. No. 5713](#) (Ont. S.C.J.); [Children's Aid Society of Toronto v. L. \(T.\), 2009 ONCJ 788](#) (Ont. C.J.); [Children's Aid Society of Toronto v. A. \(R.E.\), 2009 CarswellOnt 8380](#) (Ont. C.J.); [Children's Aid Society of Durham \(County\) v. W. \(T.\), \[2009\] O.J. No. 4456](#) (Ont. S.C.J.); [Children's Aid Society of Simcoe \(County\) v. L. \(S.\), \[2009\] O.J. No. 633](#) (Ont. S.C.J.); [Children's Aid Society of Toronto v. S. \(D.\), \[2009\] O.J. No. 4605](#) (Ont. S.C.J.); [Children & Family Services for York Region v. C. \(H.\), \[2009\] O.J. No. 3527](#) (Ont. Div. Ct.); [Children's Aid Society of Toronto v. L. \(V.\), 2009 ONCJ 766](#) (Ont. C.J.); [R. v. B. \(T.\), 2010 ONSC 1579](#) (Ont. S.C.J.); [R. v. Broomfield, 2010 ONCA 558](#) (Ont. C.A. [In Chambers]); [Children & Family Services for York Region v. B. \(T.\), 2010 ONSC 7047](#) (Ont. S.C.J.); [Nova Scotia \(Minister of Community Services\) v. S. \(R.M.\), 2010 NSSC 177](#) (N.S. S.C.); [R. v. B. \(T.\), 2010 ONSC 1579](#) (Ont. S.C.J.); [Catholic Children's Aid Society of Toronto v. V. \(A.\), 2010 ONCJ 657](#) (Ont. C.J.); [Catholic Children's Aid Society of Toronto v. S. \(S.\), 2010 ONCJ 700](#) (Ont. C.J.); [Family & Children's Services of Lennox & Addington v. W. \(S.\), 2010 ONSC 2585](#) (Ont. S.C.J.); [Children's Aid Society of Niagara Region v. B. \(T.\), 2011 ONSC 2702](#) (Ont. S.C.J.); [New Brunswick \(Minister of Social Development\) v. C. \(J.R.\), 2011 NBQB 355](#) (N.B. Q.B.); [Nova Scotia \(Minister of Community Services\) v. L. \(N.\), 2011 NSSC 369](#) (N.S. S.C.); [Children's Aid Society of Algoma v. G. \(L.\), 2011 ONCJ 392](#) (Ont. C.J.); [Children's Aid Society of Toronto v. E. \(R.H.\), 2011 ONCJ 650](#) (Ont. C.J.); [Children's Aid Society of Toronto v. G. \(T.\), 2011 ONCJ 625](#) (Ont. C.J.); [Children's Aid Society of Toronto v. S. \(T.\), 2011 ONCJ 732](#) (Ont. C.J.); [Mattalo v. Perri, 2011 ONCJ 899](#) (Ont. C.J.); [Catholic Children's Aid Society of Hamilton v. P. \(C.R.\), 2011 ONSC 2056](#) (Ont. S.C.J.); [Mi'kmaw Family & Children's Services v. L. \(B.\), 2011 NSSC 161](#) (N.S. S.C.); [Children's Aid Society of Simcoe \(County\) v. W. \(T.\), 2012 ONSC 3635](#) (Ont. S.C.J.); [Catholic Children's Aid Society of Toronto v. M. \(M.\), 2012 ONCJ 369](#) (Ont. C.J.); [Children's Aid Society of Halton \(Region\) v. K.](#)

(D.), 2012 ONCJ 633 (Ont. C.J.); *Children's Aid Society of Toronto v. B.* (B.), 2012 ONCJ 646 (Ont. C.J.); *Children's Aid Society of Toronto v. B.* (D.), 2013 ONCJ 405 (Ont. C.J.); *R. c. S. (G.)*, 2013 QCCQ 2108 (C.Q.); *Children's Aid Society of Algoma v. S.* (R.), 2013 ONCJ 688 (Ont. C.J.); *Children's Aid Society of Toronto v. D. B.-S.*, 2013 ONCJ 8 (Ont. C.J.); *Children's Aid Society of Toronto v. N.* (S.), 2013 ONCJ 345 (Ont. C.J.); *Children's Aid Society of Toronto v. S.* (S.), 2013 ONCJ 51 (Ont. C.J.); *R. c. G.S.*, 2013 QCCQ 2108 (C.Q.); *Children's Aid Society of Toronto v. J. (C.)*, 2014 ONCJ 221 (Ont. C.J.); *Chatham-Kent Children's Services v. K.* (A.), 2014 ONCJ 224 (Ont. C.J.); *Children's Aid Society of Toronto v. B.*, 2014 ONCJ 486 (Ont. C.J.); *Catholic Children's Aid Society of Toronto v. D.* (A.), 2014 ONCJ 490 (Ont. C.J.); *Nova Scotia (Minister of Community Services) v. L.* (N.), 2014 NSSC 201 (N.S. S.C.); *Children's Aid Society of the Niagara Region v. P.* (L.), 2014 ONSC 4914 (Ont. S.C.J.); *Children's Aid Society of Toronto v. B.*, 2014 ONCJ 90 (Ont. C.J.); *R. v. Chauhan*, 2014 ONSC 5557 (Ont. S.C.J.); *B. (S.) v. C. (C.)*, 2014 ONSC 2903 (Ont. S.C.J.); *White v. Noel*, 2014 ONCJ 555 (Ont. C.J.); *Windsor-Essex Children's Aid Society v. B.* (T.), 2014 ONCJ 239 (Ont. C.J.); *Children's Aid Society, Region of Halton v. R.* (A.M.), 2014 ONCJ 183 (Ont. C.J.).

9 *Ibid.*

10 *Ibid.*

11 (1) Akwesasne Child and Family Services; (2) Anishinaabe Abinoojii Family Services; (3) Brant Family and Children's Services; (4) Bruce, Grey Child and Family Services; (5) Children's Aid Society of Hamilton; (6) Catholic Children's Aid Society of Hamilton; (7) Children's Aid Society of Toronto; (8) Catholic Children's Aid Society of Toronto; (9) Jewish Family and Child; (10) Native Child and Family Services of Toronto; (11) Chatham-Kent Children's Services; (12) Children's Aid Society of the District of Nipissing and Parry; (13) Children's Aid Society of Algoma; (14) Children's Aid Society of London and Middlesex; (15) Children's Aid Society of Oxford County; (16) Simcoe Muskoka Family Connexions; (17) Dilico Anishinabek Family Care; (18) Family Care, Dufferin Child and Family Services; (19) Durham Children's Aid, Society; (20) Family and Children's Services of Frontenac; Lennox and Addington; (21) Family and Children's Services of Lanark, Leeds and Grenville; (22) Family and Children's Services of Guelph and Wellington County; (23) Family and Children's Services Niagara; (24) Family and Children's Services of Renfrew County; (25) Family and Children's Services of St. Thomas and Elgin County; (26) Family and Children's Services of the Waterloo Region; (27) Halton Children's Aid Society; (28) Highland Shores Children's Aid; (29) Huron-Perth Children's Aid Society; (30) Kawartha-Haliburton Children's Aid Society; (31) Kenora-Rainy River Districts Child and Family Services; (32) Kunuwanimano Child & Family Services; (33) North Eastern Ontario: Family and Children's Services; (34) Payukotayno James and Hudson Bay Family Services; (35) Peel Children's Aid Society; (36) Sarnia-Lambton Children's Aid Society; (37) The Children's Aid Society of Haldimand and Norfolk; (38) The Children's Aid Society of Ottawa; (39) The Children's Aid, Society of the District of Thunder Bay; (40) The Children's Aid Society of the Districts of Sudbury and Manitoulin; (41) The Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry; (42) Tikitagan Child and Family Services; (43) Valoris for Children and Adults of Prescott-Russell; (44) Weechi-it-te-win Family Services Inc.; (45) Windsor- Essex Children's Aid Society; (46) Kina Gbezhgomi Child & Family Services; and (47) York Region Children's Aid Society.

12 S.O. 2002, c. 24, Sched. B.

13 R.S.O. 1990, c. C.42.

14 2010 ONSC 1332 (Ont. S.C.J.), aff'd 2011 ONSC 7024 (Ont. Div. Ct.), aff'd 2013 ONCA 501 (Ont. C.A.), leave to appeal refused (2014), [2013] S.C.C.A. No. 373 (S.C.C.).

15 *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.).

16 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 16.

17 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 26 to 29; *Hollick v. Metropolitan Toronto (Municipality)*, at paras. 15 and 16.

18 *Hollick v. Metropolitan Toronto (Municipality)*, at paras. 28 and 29.

19 *Hollick v. Metropolitan Toronto (Municipality)*, at paras. 16-26.

- 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      *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) at para. 140.
- 22      *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, *supra*, at para. 110.
- 23      *Hollick v. Metropolitan Toronto (Municipality)*, at para. 22.
- 24      *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (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.); *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.); *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      *Hollick v. Metropolitan Toronto (Municipality)*, *supra*, at paras. 16-26; *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.).
- 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.); *Ernewein v. General Motors of Canada Ltd.*; *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (Ont. S.C.J.) at para. 13.
- 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      *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)*, *ibid*.
- 30      2013 SCC 69 (S.C.C.) at paras. 24-38.
- 31      *Cloud v. Canada (Attorney General)*, *ibid*.
- 32      *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.).
- 33      *Markson v. MBNA Canada Bank*, *supra*; *Hollick v. Metropolitan Toronto (Municipality)*, *ibid*.
- 34      *Fischer v. IG Investment Management Ltd.*, *supra*; *Hollick v. Metropolitan Toronto (Municipality)*, *ibid*; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.).
- 35      *Cloud v. Canada (Attorney General)*, *ibid*; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.).
- 36      *Fischer v. IG Investment Management Ltd.*, *ibid* at para. 35; *Hollick v. Metropolitan Toronto (Municipality)* at para. 28.
- 37      *Fischer v. IG Investment Management Ltd.*, *ibid* at paras. 48-49.
- 38      *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.
- 39      *Fischer v. IG Investment Management Ltd.*, *supra* at paras. 27-38; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, *supra* at para. 125.
- 40      2014 SCC 7 (S.C.C.).

41 2014 SCC 8 (S.C.C.).

42 *Markson v. MBNA Canada Bank*, *ibid*; *Marcantonio v. TVT 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.).

43 *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at paras. 48-49, rev'd, (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.); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 35; *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (Ont. S.C.J.) at para. 20; *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.); *Silver v. Imax Corp.*, *ibid*; *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.) at para. 103; *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.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Ont. Div. Ct.) at para. 59; *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.).

44 *Mouhertes v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.); *Arabi v. Toronto Dominion Bank*, [2006] O.J. No. 2072 (Ont. S.C.J.), aff'd [2007] O.J. No. 5035 (Ont. Div. Ct.).

45 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, *supra*.

46 *Fantl v. Transamerica Life Canada*, *supra*, at para. 26.

47 2013 SCC 69 (S.C.C.) at paras. 24-38.

48 *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.) at para. 3.

49 *Ibid.*

50 *Calvert v. William Hill Credit Ltd.*, [2008] All E.R. 170 (Eng. Ch. Div.), aff'd. (2008), [2009] Ch. 330 (Eng. C.A.).

51 [2001] 3 S.C.R. 184 (S.C.C.).

52 2014 NBCA 10 (N.B. C.A.).

53 *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11 (Ont. C.A.); *Chen v. Ross*, 2014 BCSC 374 (B.C. S.C.); *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 (S.C.C.).

54 2012 NBQB 88 (N.B. Q.B.).

55 Drapeau C.J.N.B. and Deschênes, J.A with Robertson, J.A. dissenting.

56 588 So. 2d 175 (U.S. La. Ct. App. 5th Cir. 1991) at p. 176.

57 646 N.E.2d 930 (U.S. Ill. Ct. App. 2 Dist. 1995) at p. 934.

58 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, *supra*.

59 *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.).

60 *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.) at paras. 41, 48, varied [2003] O.J. No. 2218 (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-7; *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.

61 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 41.

- 62     *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.
- 63     *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.), *supra*, at paras. 62-67; *Griffin v. Dell Canada Inc.*, *ibid.*.
- 64     *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879 (Ont. S.C.J.); 2015 ONSC 3531 (Ont. S.C.J.); 2015 ONSC 7063 (Ont. S.C.J.); and 2016 ONSC 425 (Ont. S.C.J.).
- 65     *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).
- 66     *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.).
- 67     2001 SCC 46 (S.C.C.) at para. 38.
- 68     *Hollick v. Metropolitan Toronto (Municipality)*, at para. 18.
- 69     *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, at paras. 39 and 40
- 70     *Western Canadian Shopping Centres Inc. v. Dutton*, at para. 40; *Ernewein v. General Motors of Canada Ltd.* at para. 32; *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.); *McCracken v. Canadian National Railway*, at para. 183.
- 71     2013 SCC 57 (S.C.C.) at para. 106.
- 72     *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.
- 73     *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, varied on other grounds (2004), 42 B.L.R. (3d) 161 (B.C. C.A.); *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.), varied 2011 ONSC 5882 (Ont. Div. Ct.).
- 74     *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at para. 42; *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), (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); 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.).
- 75     *Cloud v. Canada (Attorney General)*.
- 76     *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.).
- 77     *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) at paras. 44 — 46.
- 78     *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*, at para. 54.
- 79     See the analysis in *K. (H.V.) v. Children's Aid Society of Haldimand-Norfolk*, [2003] O.J. No. 1572 (Ont. S.C.J.); *X (minors) v. Bedfordshire County Council*, [1995] UKHL 9 (U.K. H.L.).
- 80     *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, *supra*, at para. 131; *Kalra v. Mercedes Benz*, 2017 ONSC 3795 (Ont. S.C.J.).
- 81     *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (Ont. S.C.J.) at para. 75, aff'd [2004] O.J. No. 5309 (Ont. Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (Ont. S.C.J.) at para. 104.

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**TAB 17**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Dobbie v. Arctic Glacier Income Fund](#) | 2011 ONSC 25, 2011 CarswellOnt 1301, 199 A.C.W.S. (3d) 1012, 3 C.P.C. (7th) 261, [2011] O.J. No. 932 | (Ont. S.C.J., Mar 1, 2011)

1976 CarswellSask 116  
Supreme Court of Canada

Haig v. Bamford

1976 CarswellSask 112, 1976 CarswellSask 116, [1976] 3 W.W.R. 331, [1976] S.C.J. No. 31, [1977] 1 S.C.R. 466, 27 C.P.R. (2d) 149, 72 D.L.R. (3d) 68, 9 N.R. 43

**Haig v. Bamford, Hagan, Wicken and Gibson**

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpre JJ.

Judgment: April 1, 1976

Counsel: *R. W. Thompson*, for appellant.  
*E. R. Gritzfeld, Q.C.*, for respondents.

Subject: Intellectual Property; Property; Contracts; Corporate and Commercial; Torts

**Related Abridgment Classifications**

Civil practice and procedure

[XXIV Costs](#)

[XXIV.9 Particular items of costs](#)

[XXIV.9.i Witness fees and expenses](#)

[XXIV.9.i.i Expert witness](#)

[XXIV.9.i.i.B Miscellaneous](#)

Torts

[VII Fraud and misrepresentation](#)

[VII.3 Negligent misrepresentation \(Hedley Byrne principle\)](#)

[VII.3.a Nature and extent of duty of care](#)

[VII.3.a.iii Miscellaneous](#)

**Headnote**

Fraud and Misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Nature and extent of duty of care

Negligence — Chartered accountants' negligent preparation of financial statement.

*Appeal* from the judgment of the Saskatchewan Court of Appeal, [1974] 6 W.W.R. 236, 53 D.L.R. (3d) 85, which allowed the appeal from the judgment of MacPherson J., [1972] 6 W.W.R. 557, 32 D.L.R. (3d) 66, who found the defendants, a firm of chartered accountants, negligent in preparing a financial statement relied upon by the plaintiff, a private investor.

The defendants in the ordinary course of their business prepared a financial statement for a client knowing that the statement would be used to persuade investors to put money into the client's business. The statement contained a serious error in that it showed as income a substantial sum of money which was in fact prepayment on contracts upon which work had not started. As well the defendants did not audit the records of their client although an audited statement had been requested and it appeared an audit had been done. The plaintiff invested \$20,075 on the basis of the financial statement and after discovering the error invested a further \$2,500 to meet a payroll.

On appeal *held*, the appeal was allowed; the defendants were liable to the plaintiff for \$20,075. The respondent accountants, in preparing in the course of their professional duties a financial statement which they knew was to be supplied to members of

a limited class for the purpose of raising funds, owed a duty of care in the preparation of the financial statement to a potential investor even if the accountants were not aware of the identity of the investor.

**Table of Authorities**

**Cases considered:**

*Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164, [1951] 1 All E.R. 426* — referred to

*Dutton v. Bognor Regis Urban District Council, [1972] 1 Q.B. 373, [1972] 1 All E.R. 462* — referred to

*Mutual Life & Citizens' Assur. Co. v. Evatt, [1971] A.C. 793, [1971] 1 All E.R. 150* — referred to

*Wellbridge Holdings Ltd. v. Winnipeg, [1972] 3 W.W.R. 433, [1971] S.C.R. 957, 22 D.L.R. (3d) 470* — referred to

*Rivtow Marine Ltd. v. Washington Iron Works, [1973] 6 W.W.R. 692, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530* — referred to

*J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769, 26 D.L.R. (3d) 699* — referred to

*Hedley Byrne & Co. v. Heller & Partners, [1964] A.C. 465, [1963] 2 All E.R. 575* — applied

**Dickson J. (Laskin C.J.C., Ritchie, Spence, Pigeon and Beetz JJ. concurring):**

1 This appeal concerns the liability of an accountant to parties other than his employer for negligent statements. The Court is asked to decide whether there was in the relationship of the parties to the appeal such kind or degree of proximity as to give rise to a duty of care owed by the respondents to the appellant. The damages involved are not large but the question raised is of importance to the accounting profession and to the investing public.

**I**

2 In October 1961 Siegfried Scholler and his brother entered into partnership under the firm name of Scholler Brothers Millwork in the City of Moose Jaw. The firm made cabinets and other furniture and also undertook contracts for interior woodwork. The partnership was dissolved in December 1962, and from then until February 1964 Siegfried Scholler carried on the business as sole proprietor. In early 1964, following a fire, Saskatchewan Economic Development Corporation ("Sedco") agreed to advance Scholler \$34,000 for the purpose of establishing a plant to undertake millwork and the manufacture of furniture in Moose Jaw, conditional upon incorporation of the sole proprietorship. Scholler Furniture & Fixtures Ltd. ("the company") was incorporated and the sole proprietorship came to an end. Scholler was an excellent workman but a poor financial planner. He evinced a compulsive urge to expand the business of the company with the result that by January 1965 a serious shortage of working capital became apparent. Scholler approached Sedco for a further loan of \$20,000 which was approved, contingent upon (i) production of a satisfactory audited financial statement of the company for the period from date of incorporation, 10th February 1964, to 31st March 1965 and (ii) the infusion of \$20,000 of equity capital.

3 Instructions were issued to the firm of R. L. Bamford & Co. ("the accountants"), of whom the respondents (defendants) were partners, to prepare the required financial statement and Scholler began a search for an outside investor. He made it known to the accountants that he was seeking an investor. The trial Judge, MacPherson, J. [reported [1972] 6 W.R.R. 557], made a crucial finding, not disturbed by the Court of Appeal for Saskatchewan [[1974] 6 W.R.R. 236, 53 D.L.R. (3d) 85], that the accountants knew, prior to completion of the financial statement, dated 18th June 1965, at the root of the present litigation, that the statement would be used by Sedco, by the bank with whom the company was doing business and by a potential investor in equity capital.

4 The manager of Sedco, a Mr. Wiltshire, helped Scholler in his search for a potential investor and, with the consent of Scholler, showed a copy of the financial statement to his friend, the plaintiff Haig, who had been looking for a "likely opportunity". Haig discussed the statement with his bank manager and with a chartered accountant. The bottom line of the statement showed that the operations of the company were profitable; the potential was promising; a \$20,000 loan from Sedco and \$20,000 of equity money would provide necessary working capital. Influenced by these considerations Haig, an experienced businessman, purchased in mid-August 1965 shares in the capital stock of the company for \$20,075 and guaranteed the bank loan to the extent of \$20,000. He became president; Scholler became vice-president and operating head. All looked well: there was ample work for the company as the Saskatchewan liquor laws had recently been altered to permit mixed drinking and the formerly all-male beer parlours were being upgraded. But something was wrong. Notwithstanding the addition of \$40,000 in capital, which enabled trade creditors to be paid, within a very short time the company was again troubled by serious cash shortage. The accountants were consulted and investigation soon disclosed the source of the trouble: a \$28,000 prepayment received by the

company in March 1965 on two contracts from Robert Simpson Regina Limited, upon which work had not started, had been treated as if the work had been completed and the moneys earned. The \$28,000 had been credited to revenue by the company's bookkeeper rather than shown as a liability. The accountants had failed to spot the error. On Haig's instructions a new financial statement, dated 29th September 1965, was prepared by the accountants for the period 10th February 1964 to 31st March 1965 in which the \$28,000 prepayment was removed from revenue and shown under liabilities as "deferred revenue — progress advance". In the result, the position as certified by the accountants and the true position of the accounts were as follows:

	Position as certified by accountants	True position
	(18th June 1965 statement)	(29th September 1965 statement)
Sales	\$186,603.64	\$158,603.64
Gross profit	80,896.50	52,896.50
Net profit		
Before tax	26,590.31	(1,994.52)
Net profit		
After tax	20,717.04	nil
Surplus	21,321.04	600.00

5 Instead of making a profit in the period, as shown by the June statement, the company had suffered a loss: instead of buying into a thriving business, as the financial statement of 18th June 1965 would have suggested, Haig bought into a distressed enterprise which never showed a profit. During the six months from 31st March 1965 to 31st August 1965 a net loss of \$21,460.10 was sustained. By early December the company had reached the limit of its bank line of credit. To meet the payroll Haig made a further investment of \$2,500, matched by a like amount from Sedco. A meeting of creditors, held late in the month, decided against further support and at year-end, the company ceased business. Haig lost the \$20,075 paid for shares, the loan of \$2,500, and \$6,500 under the bank guarantee. He sued the accountants, the company and Scholler to recover \$20,075 and \$2,500 but later discontinued against Scholler and the company.

## II

6 The trial Judge negligence on the part of the accountants. I think the evidence amply supports that finding. From the expert testimony, it appears that the engagement of a chartered accountant can be on either an "audit" basis or a "non-audit" basis. If the engagement is for an audit, the accountant does what he considers necessary by way of auditing procedures, tests and verification of internal controls, accounts and records to permit him to give an opinion on the financial statements. In an engagement of the non-audit type, the accountant merely helps the client in the preparation of the financial statement on terms which permit him to accept the client's records and dispense with the checks and verifications expected in an audit. The product of an audit is a financial statement accompanied by an auditor's report expressing an opinion on the financial statement. At the end of a non-audit engagement, a financial statement is issued to which is appended a comment in which the auditor expressly disclaim responsibility.

7 The accountant had performed non-audit accounting services for the partnership, Scholler Brothers Millwork, in 1963, and at that time the financial statement was accompanied by a letter, the final paragraph of which disclaimed in these words:

The attached financial statements have been prepared from the books and records and information furnished, without audit, and we are not able to express an opinion as to the financial position of the business.

8 In the present proceedings the accountants sought to maintain that their engagement in 1965 was of a non-audit nature and that they were performing for the company a mere accounting function in preparing a financial statement from the client's financial records. This submission fails for two reasons: first, Sedco required audited financial statements as a condition of the further loan to the company and the evidence is clear that the statements were prepared in satisfaction of that condition, as the

accountants had been advised by Sedco and the company; second, the auditor's report follows the format generally recognized as appropriate for audited financial statements in these terms:

We have examined the records of Scholler Furniture & Fixtures Ltd. for the period from incorporation, February 10, 1964 to March 31, 1965 and have prepared therefrom the attached Balance Sheet as at the latter date and Statement of Profit and Loss for the period. Our examination included a general review of the accounting procedures and such tests of the accounting records and other supporting evidence as we considered necessary in the circumstances.

The accounts receivable are as shown by the records and we have not confirmed them by direct communication with the recorded debtors.

The inventories of materials and work-in-process were not taken by us or under our supervision and have been accepted as certified to us by Mr. Siegfried Scholler.

Subject to the foregoing reservations we report that, in our opinion, the attached Balance Sheet and related Statement of Profit and Loss present fairly the financial position of Scholler Furniture & Fixtures Ltd. as at March 31, 1965 and the results of operations for the period ended on that date in accordance with generally accepted accounting principles and as shown by the books of the Company.

9 The report would lead the reader to believe that an audit had been done but the evidence shows that no audit was done. The report is qualified in three respects but not with respect to liabilities. Gary Lloyd Davidge, then an articled student in the accountants' office and now a chartered accountant, prepared the impugned financial statements. He testified that he had been instructed by his firm not to do an audit; he believed he was acting as accountant and not auditor; he was not furnished with an audit program. He did not peruse invoices or purchases orders; he did not inquire as to prepayments or as to the state of contracts; he did not analyze the figures as to sales or work in progress; nor did he inquire as to internal controls to determine to what extent the controls could be relied upon to assure the accuracy of the revenue accounts. He left the employ of the accountants before the statement was delivered to the client, in the belief that it would be accompanied by a complete disclaimer as had accompanied the 1963 financial statements of Scholler Brothers Millwork. Notwithstanding all of this, the auditors rendered the quoted opinion in which they said that their examination had included a general review of the accounting records and other supporting evidence as they considered necessary in the circumstances. That was not true. They also expressed the opinion, subject to the three reservations earlier referred to, that the balance sheet and related statement of profit and loss fairly presented the financial position of the company at 31st March 1965. The work done by or on behalf of the accountants did not warrant any such affirmation. In representing to have done an audit when they were aware that an audit had not been done, in my view the accountants were guilty of a serious dereliction of duty. This was more than honest blunder or error in judgment.

### **III**

10 I come then to the question whether Haig, who received the defective financial statements and relied on them to his loss, has a right of recovery from the accountants. MacPherson J. at trial allowed recovery. He held that the accountants knew or ought to have known that the statements would be used by a potential investor in the company; although Haig was not, in the Judge's words, "in the picture" when the statement was prepared, he must be included in the category of persons who could be foreseen by the accountants as relying on the statement and therefore the accountants owed a duty to Haig. The Judge applied a test of foreseeability.

11 The majority in the Court of Appeal for Saskatchewan (Hall J.A. with Maguire J.A. concurring) came to a different conclusion. The majority of the Court were satisfied that the accountants had been informed by Scholler that the statement would be used to induce persons to invest equity capital in the company. Hall J.A. noted that at that time there was no specific person or group in mind as a prospective investor or investors; Haig was not known to the accountants and they were not aware that he had been shown a copy of the statement or that he had been approached to invest in the company. The learned Justice of Appeal observed that the financial statement had been given to Haig without the knowledge of Scholler or the company. With respect, I think this observation is in error as Wiltshire testified that before giving a copy of the statement to Haig he had received

Scholler's permission. The point is, however, of no great consequence for if the accountants, at the request of the company, prepared financial statements for distribution to, inter alia, potential investors, and furnished the company with copies for that purpose, I fail to understand why the company or anyone on its behalf would be expected to seek permission of the accountants before releasing a copy. The learned Justice of Appeal concluded that the accountants owed Haig the duty to be honest but that they were not liable to him for negligence and, since the misrepresentation contained in the financial statement was the result of an "honest blunder", the appeal should be allowed with costs. The dissenting Judge, Woods J.A., was of opinion that the accountants knew that the statement was intended for a special purpose, a purpose that would affect the economic interest of those from whom Scholler would attempt to secure funds, and that Haig fell within this category. The outcome of this appeal rests, it would seem, on whether, to create a duty of care, it is sufficient that the accountants knew that the information was intended to be disseminated among a specific group or class, as MacPherson J. and Woods J.A. would have it, or whether the accountants also needed to be apprised of the plaintiff's identity, as Hall and Maguire JJ.A. would have it.

#### **IV**

12 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 interest of the general public as well as of shareholders and potential shareholders.

13 With the added prestige and value of his services has come, as the leaders of the profession have recognized, a concomitant and commensurately increased responsibility to the public. It seems unrealistic to be oblivious to these developments. It does not necessarily follow that the doors must be thrown open and recovery permitted whenever someone's economic interest suffers as the result of a negligent act on the part of an accountant. Compensation to the injured party is a relevant consideration but it may not be the only relevant consideration. Fear of unlimited liability for the accountant, "liability in an indeterminate amount for an indeterminate time to an indeterminate class", was considered a relevant factor by Cardozo J. in *Ultramare Corp. v. Touche* (1931), 255 N.Y. 170, 174 N.E. 441 AT 444. From the authorities, it appears that several possible tests could be applied to invoke a duty of care on the part of accountants vis-a-vis third parties: (i) foreseeability of the use of the financial statement and the auditor's report thereon by the plaintiff and reliance thereon; (ii) actual knowledge of the limited class that will use and rely on the statement; (iii) actual knowledge of the specific plaintiff who will use and rely on the statement. It is unnecessary for the purpose of the present case to decide whether test (i), the test of foreseeability, is or is not a proper test to apply in determining the full extent of the duty owed by accountants to third parties. The choice in the present case, it seems to me, is between test (ii) and test (iii) — actual knowledge of the limited class or actual knowledge of the specific plaintiff. I have concluded on the authorities that test (iii) is too narrow and that test (ii), actual knowledge of the limited class, is the proper test to apply in this case.

14 *The English authorities:* I do not think one can do better than begin with Lord Denning's dissent in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, [1951] 1 All E.R. 426, which later found favour in *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, [1963] 2 All E.R. 575. After identifying accountants as among those under a duty to use care, Lord Denning, in answer to the question "To whom do these professional persons owe this duty?" said (p. 434):

They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts.

15 And:

The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff for use by him?

16 One can find some support in these words for the position taken by the majority in the Saskatchewan Court of Appeal but their effect is tempered by what appears later in the judgment, p. 435:

It will be noticed that I have confined the duty to cases where the accountants prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him, in the words of CARDOZO, C.J., in *Ultramares Corp. v. Touche* [supra], to

... liability in an indeterminate amount for an indeterminate time to an indeterminate class.

Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier.

17 In the case at bar, the accounts were prepared for the guidance of a "specific class of persons", potential investors, in a "specific class of transactions", the investment of \$20,000 of equity capital. The number of potential investors would, of necessity, be limited because the company, as a private company, was prohibited by s. 3(o) (iii) of The Companies Act of Saskatchewan, R.S.S. 1965, c. 131, from extending any invitation to the public to subscribe for shares or debentures of the company.

18 One comes then to the *Hedley Byrne* case, supra. The argument was raised in that case that the relationship between the parties was not sufficiently close to give rise to any duty. Lord Reid dealt with that argument in these words (p. 580):

It is said that the respondents did not know the precise purpose of the inquiries and did not even know whether National Provincial Bank, Ltd. wanted the information for its own use or for the use of a customer: they knew nothing of the appellants. I would reject that argument. They knew that the inquiry was in connexion with an advertising contract, and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did not know who these contractors were: there is no suggestion of any speciality which could have influenced them in deciding whether to give information or in what form to give it. I shall therefore treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind or degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff.

19 In the present case the accountants knew that the financial statements were being prepared for the very purpose of influencing, in addition to the bank and Sedco, a limited number of potential investors. The names of the potential investors were not material to the accountants. What was important was the nature of the transaction or transactions for which the statements were intended, for that is what delineated the limits of potential liability. The speech of Lord Morris in *Hedley Byrne* included this observation, p. 588:

It is, I think, a reasonable and proper inference that the bank must have known that the National Provincial were making their inquiry because some customer of theirs was or might be entering into some advertising contract in respect of which Easipower, Ltd., might become under a liability to such customer to the extent of the figures mentioned. The inquiries were from one bank to another. The name of the customer (Hedleys) was not mentioned by the inquiring bank (National Provincial) to the answering bank (the bank): nor did the inquiring bank (National Provincial) give to the customer (Hedleys) the name of the answering bank (the bank). These circumstances do not seem to me to be material. The bank must have known that the inquiry was being made by someone who was contemplating doing business with Easipower Ltd. and that their answer or the substance of it would in fact be passed on to such person.

20 Lord Devlin stood on narrow ground, content with the proposition that wherever there is a relationship equivalent to contract there is a duty of care and such relationship may be either *general*, such as that of solicitor and client and of banker and customer, or *particular*, created ad hoc, in which case it becomes necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility. This reference to "assumption of responsibility" is crucial in cases involving economic loss, according to C. Harvey, "Economic Losses and Negligence" (1972), 50 Can. Bar Rev. 580. Harvey devises a test for imposing a duty of care in cases of economic loss which he phrases as follows (p. 600):

(A) *person should be bound by a legal duty of care to avoid causing economic loss to another in circumstances where a reasonable man in the position of the defendant would foresee that kind of loss and would assume responsibility for it.*

21 This "assumption of responsibility" test is an interesting one, although it is no more objective than a foreseeability test. It would allow the Court to narrow the scope of liability from that resulting from a foreseeability test, but it would still require a policy determination as to what should be the scope of liability. As Lord Pearce stated in *Hedley Byrne* (p. 615):

How wide the sphere of the duty of care in negligence is to be laid depends ultimately on the courts' assessment of the demands of society for protection from the carelessness of others.

22 Lord Pearce in *Hedley Byrne* adopted Lord Denning's dissent in *Candler's* case, to which I have already referred, noting that the result produced was somewhat similar to the American Restatement of the Law of Torts.

23 Two other cases decided in England might be mentioned briefly, in one of which the ambit of the duty of care was extended and, in the other, restricted. In *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 373, [1972] 1 All E.R. 462, it was held that the relationship between a building inspector, who had negligently approved the foundations of a house, and the plaintiff, subsequent purchaser of the house, was sufficiently proximate to form the basis of a duty of care. In *Mutual Life & Citizens' Assur. Co. v. Evatt*, [1971] A.C. 793, [1971] 1 All E.R. 150, a majority of the Privy Council denied recovery to Evatt for negligent advice given to him gratuitously by an insurance company, of which he was a policy holder, for the reason that he did not allege that at or prior to the time of his inquiry the company carried on the business of supplying information or advice on investments or that it claimed to possess any special skill or competence. These considerations are not, of course, present in the case at bar. Here the accountants held themselves out as possessing special qualifications, skill and competence which, for reward, they were prepared to place at the disposal of the public.

24 *The American authorities:* Judgment in the two leading cases was written by Cardozo J. In *Glanzer v. Shepard* (1922), 233 N.Y. 236, the defendants, public weighers, at the request of a seller of beans, made a return of the weight and furnished the plaintiff buyer with a copy. The buyer paid the seller on the faith of the certificate which turned out to be erroneous. The buyers were entitled to recover from the weighers. The certificate was held to be the very "end and aim" of the transaction and not something issued in the expectation that the seller would use it thereafter in the operations of his business as occasion might require.

25 The question whether third parties were protected from the negligence of accountants came before the New York Courts in *Ultramare Corp. v. Touche*, supra. The breach made in the wall of privity by *Glanzer's* case was narrowed in *Ultramare*. In that case, a company showed a balance sheet prepared by the defendants to a factor who advanced money to the company. The factor was unknown to the defendants, and Cardozo J. held that the defendants owed the factor no duty of care. Although the *Ultramare* decision has been followed widely in the United States, it has also been criticized: see Prosser, Law of Torts, 4th ed., pp. 706-709; Hawkins, "Professional Negligence Liability of Public Accountants" (1959), 12 Vand. Law Rev. 797; note, "Accountants' Liability for False and Misleading Statements" (1967), 67 Colum. Law Rev. 1437. *Ultramare* has also been distinguished in a case similar to the one at bar, *Rusch Factors Inc. v. Levin* (1968), 284 F. Supp. 85. In *Rusch*, the Court held that the plaintiff investor, who had relied on the financial statement prepared by the defendant, was actually foreseen by the defendant. Pettine J. distinguished *Ultramare* in these words (p. 91):

There, the plaintiff was a member of an undefined, unlimited class of remote lenders and potential equity holders not actually foreseen but only foreseeable.

26 The *Rusch* case was followed by the United States Court of Appeal (Fourth Circuit) in *Rhode Island Hospital Trust National Bank v. Swartz* (1972), 455 F. 2d 847. That case mentions that *Rusch* has been followed in Iowa and Minnesota.

27 The case before us is closer to *Glanzer* than to *Ultramares*. 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 Sedco and an equity investor; the statements were required primarily for these third parties and only incidentally for use by the company. In the *Ultramares* case, Touche would know that the statements were primarily for company use although they might be read in the ordinary course of business by shareholders, investors, banks and countless others.

28 Prosser, Law of Torts, 4th ed., notes at p. 707 that a duty of reasonable care has been found where a representation is made to a third person with knowledge that he intends to communicate it to the specific individual plaintiff for the purpose of inducing him to act, and that most of the courts have drawn the line there. The following question is posed, however (p. 708):

But what if the defendant is informed that his representation is to be passed on to some more limited group, as a basis for action on the part of some one or more of them?

29 And the answer is in these words (p. 709):

... where the group affected is a sufficiently small one, and particularly, as in the case of the successful bidder, only one person can be expected to suffer loss, the guess may be hazarded that the recovery will be allowed. Certificates of expert examination are intended to be exhibited, not hidden under a bushel; and a rule which denies recovery because the defendant who has provided one for such a purpose does not know the plaintiff's name, or the particulars of the transaction, has a very artificial aspect.

30 The approach taken in the American Restatement of Torts (2d) SS 552 is to permit recovery for loss suffered by the person or one of the persons for whose benefit or guidance the professional person intends to supply the information or knows that the recipient intends to supply it. A duty of care arises if the defendant accountant knows that a third party will receive his statements. This knowledge is not with regard to the specific individual but to a limited class of which he forms a part. An explanatory note in the Restatement shows this:

A is negotiating with a bank for a credit of \$50,000. The bank requires an audit by certified public accountants. A employs B & Company, a firm of accountants, to make the audit, telling them he is going to negotiate a bank loan. A does not get his loan from the first bank but does negotiate a loan with another bank, which relies upon B & Company's certified statements. The audit carelessly overstates the financial resources of A, and in consequence the second bank suffers pecuniary loss. B & Company is subject to liability to the second bank.

31

(See also (1969), 53 Minn. Law Rev. 1357.)

32 *The Canadian authorities:* The *Hedley Byrne* case has been considered by this Court in *Welbridge Holdings Ltd. v. Winnipeg*, [1972] 3 W.W.R. 433, [1971] S.C.R. 957, 22 D.L.R. (3d) 470. Recovery for economic loss caused by negligence has been allowed in *Rivtow Marine Ltd. v. Washington Iron Works*, [1973] 6 W.W.R. 692, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, where Ritchie J. said, p. 1213:

... I am of opinion that the case of *Hedley Byrne* represents the considered opinion of five members of the House of Lords to the effect that a negligent misrepresentation may give rise to an action for damages for economic loss occasioned thereby without any physical injury to person or property and apart from any contract or fiduciary relationship.

33

*See also* J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769, 26 D.L.R. (3d) 699.

V

34 In summary, Haig placed justifiable reliance upon a financial statement which the accountants stated presented fairly the financial position of the company as at 31st March 1965. The accountants prepared such statements for reward in the course of their professional duties. The statements were for benefit and guidance in a business transaction, the nature of which was known to the accountants. The accountants were aware that the company intended to supply the statements to members of a very limited class. Haig was a member of the class. It is true the accountants did not know his name but, as I have indicated earlier, I do not think that is of importance. I can see no good reason for distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer (*Candler's* case and *Glanzer's* case) and the case in which the information is handed to the employer who, to the knowledge of the accountant, passes it to members of a limited class (whose identity is unknown to the accountant) in furtherance of a transaction the nature of which is known to the accountant. I would accordingly hold that the accountants owed Haig a duty to use reasonable care in the preparation of the accounts.

35 I am of the view, however, that Haig cannot recover from the accountants the sum of \$2,500 which he advanced to the company in December 1965 because by that time he was fully cognizant of the true state of affairs. It cannot be said that the sum was advanced in reliance upon false statements. Haig had the choice of advancing additional money in the hope of saving his original investment. He chose to make a further advance, but the choice was his and not one for which the accountants are liable.

36 I would allow the appeal, set aside the judgment of the Court of Appeal for Saskatchewan and reinstate the judgment of MacPherson J., subject only to disallowance of the claim of \$2,500, the whole with costs in this Court and in the Courts below.

***Martland J. (Judson and de Grandpre JJ. concurring):***

37 I agree with the conclusion reached by my brother Dickson that, based upon the finding of the learned trial Judge [reported [\[1972\] 6 W.W.R. 557](#)] which was not disturbed by the Court of Appeal [[\[1974\] 6 W.W.R. 236, 53 D.L.R. \(3d\) 85](#)], the respondents knew, prior to the completion of the financial statement, that it would be used by Sedco, by the bank with which the company was doing business and by a potential investor in equity capital, the respondents owed a duty of care, in the preparation of that financial statement, to that potential investor (the appellant), even though they were not aware of his actual identity.

38 I would dispose of the appeal in the manner proposed by my brother Dickson.

# **TAB 18**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Pro-Sys Consultants Ltd. v. Microsoft Corp.](#) | 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258, 345 B.C.A.C. 1, 589 W.A.C. 1, 45 C.P.C. (7th) 1, 12 C.C.L.T. (4th) 171, 19 B.L.R. (5th) 177, 40 N.R. 201, J.E. 2013-1905, 50 B.C.L.R. (5th) 219, [2014] 1 W.W.R. 421, [2013] 3 S.C.R. 477, 235 A.C.W.S. (3d) 552, [2013] S.C.J. No. 57, 364 D.L.R. (4th) 573, [2013] B.C.W.L.D. 9020, [2013] B.C.W.L.D. 9021, [2013] B.C.W.L.D. 9027, [2013] B.C.W.L.D. 9028 | (S.C.C., Oct 31, 2013)

2001 SCC 68, 2001 CSC 68  
Supreme Court of Canada

Hollick v. Metropolitan Toronto (Municipality)

2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 2001 SCC 68, 2001 CSC 68, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 108 A.C.W.S. (3d) 774, 13 C.P.C. (5th) 1, 153 O.A.C. 279, 205 D.L.R. (4th) 19, 24 M.P.L.R. (3d) 9, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 56 O.R. (3d) 214 (headnote only), 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, J.E. 2001-1971, REJB 2001-26157

**John Hollick, Appellant v. The City of Toronto, Respondent and Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment, the Environmental Commissioner of Ontario and the Law Foundation of Ontario, Intervenants**

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

Heard: June 13, 2001

Judgment: October 18, 2001

Docket: 27699

Proceedings: affirming (1999), 32 C.E.L.R. (N.S.) 1 (Ont. C.A.); reversing in part (1998), 28 C.E.L.R. (N.S.) 198 (Ont. Div. Ct.); reversing (1998), 27 C.E.L.R. (N.S.) 48 (Ont. Gen. Div.)

Counsel: *Michael McGowan, Kirk M. Baert, Pierre Sylvestre and Gabrielle Pop-Lazic*, for Appellant.

*Graham Rempe and Kalli Y. Chapman*, for Respondent.

*Robert V. Wright and Elizabeth Christie*, for Interveners, Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment.

*Doug Thomson and David McRobert*, for Intervener, Environmental Commissioner of Ontario.

Written submissions only by *Mark M. Orkin, Q.C.*, for Intervener, Law Foundation of Ontario.

Subject: Civil Practice and Procedure; Public; Municipal

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.C](#) Common issue or interest

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.vi** Refusal to certify

Environmental law

**III** Statutory protection of environment

**III.3** Environmental offences

**III.3.d** Practice and procedure

**III.3.d.ii** Parties

**III.3.d.ii.A** Class proceedings

Municipal law

**XII** Municipal liability

**XII.4** Practice and procedure

**XII.4.a** Actions

**XII.4.a.ii** Parties

**XII.4.a.ii.C** Miscellaneous

Remedies

**II** Injunctions

**II.1** Principles relating to availability of injunctions

**II.1.h** Adequacy of other remedies

**II.1.h.v** Miscellaneous

## **Headnote**

Practice --- Parties — Representative or class actions — Procedural requirements

Plaintiff brought action as representative of 30,000 nearby residents against city for compensatory and punitive damages for pollution emanating from landfill — Action was not certified as class action — Allowing class action would not serve interests of access to justice, and behavior modification was not serious concern — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Municipal law --- Municipal liability — Practice and procedure — Actions — Parties — General

Plaintiff brought action as representative of 30,000 nearby residents against city for compensatory and punitive damages for pollution emanating from landfill — Action was not certified as class action — Allowing class action would not serve interests of access to justice, and behavior modification was not serious concern — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Environmental law --- Statutory protection of environment — Practice and procedure — Parties

Plaintiff brought action as representative of 30,000 nearby residents against city for compensatory and punitive damages for pollution emanating from landfill — Action was not certified as class action — Allowing class action would not serve interests of access to justice, and behavior modification was not serious concern — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Procédure --- Parties — Recours collectifs — Exigences procédurales

À titre de représentant de 30 000 résidents voisins, le demandeur a intenté contre la ville une action en dommages matériels et exemplaires pour la pollution provenant d'un site d'enfouissement des déchets — Action n'a pas été certifiée comme recours collectif — Autoriser le recours collectif ne favoriserait pas l'accès à la justice, et la modification des comportements ne représentait pas une considération importante — Loi de 1992 sur les recours collectifs, L.O. 1992, c. 6.

Droit municipal --- Responsabilité municipale — Procédure — Actions — Parties — En général

À titre de représentant de 30 000 résidents voisins, le demandeur a intenté contre la ville une action en dommages matériels et exemplaires pour la pollution provenant d'un site d'enfouissement des déchets — Action n'a pas été certifiée comme recours collectif — Autoriser le recours collectif ne favoriserait pas l'accès à la justice, et la modification des comportements ne représentait pas une considération importante — Loi de 1992 sur les recours collectifs, L.O. 1992, c. 6.

Droit de l'environnement --- Protection législative de l'environnement — Procédure — Parties

À titre de représentant de 30 000 résidents voisins, le demandeur a intenté contre la ville une action en dommages matériels et exemplaires pour la pollution provenant d'un site d'enfouissement des déchets — Action n'a pas été certifiée comme recours collectif — Autoriser le recours collectif ne favoriserait pas l'accès à la justice, et la modification des comportements ne représentait pas une considération importante — Loi de 1992 sur les recours collectifs, L.O. 1992, c. 6.

The plaintiff sought to pursue his action against the city as the representative of 30,000 other residents who lived in the vicinity of a landfill owned and operated by the city, from which the plaintiff complained physical and noise pollution was emanating. The motions judge found that the plaintiff had satisfied the certification requirements in s. 5(1) of the *Class Proceedings Act*, 1992 and certified the action as a class proceeding. The Divisional Court overturned the certification order on the grounds that the plaintiff had not stated an identifiable class and had not satisfied the commonality requirement. The certification order was set aside without prejudice to the plaintiff's right to bring a fresh application on further evidence. The Court of Appeal dismissed the plaintiff's appeal, agreeing that commonality had not been established, and affirming the Divisional Court's order except insofar as it would have allowed the plaintiff to bring a fresh application on further evidence. The plaintiff appealed.

**Held:** The appeal was dismissed.

An identifiable class existed within the meaning of s. 5(1)(b) and was defined by reference to objective criteria: a person was a member of the class if he or she owned or occupied property inside a specified area within a specified period of time.

The plaintiff showed a sufficient basis in fact to satisfy the commonality requirement under s. 5(1)(c). The plaintiff submitted complaint records from the Ministry of Environment and Energy and the Metropolitan Works Department which documented hundreds of complaints over a 13-year period.

However, a class proceeding was not the preferable procedure for resolution of the common issues as required by s. 5(1)(d). With respect to judicial economy, any common issue was negligible in relation to the individual issues. While each member of the class would have to establish that the landfill emitted physical or noise pollution, there was no reason to believe that pollution was distributed evenly across the geographical area or time period specified in the class definition.

Allowing the class action would not serve the interests of access to justice. If the claims were so small as to engage access to justice concerns, the no-fault small claims trust fund administered by the Ministry of the Environment to cover individual claims of up to \$5,000 arising out of "offsite impact", would likely provide redress more quickly than the judicial system. If class members had more substantial claims, they would likely find it worthwhile to bring individual actions.

Behavior modification was not a significant concern. Allowing a class action would not serve the end of holding accountable those who cause widespread but individually minimal harm. If individual class members had substantial claims, they would likely be willing to prosecute those claims individually, or, if the claims were small, they could obtain compensation through the trust fund. In either case, the city would be forced to internalize the costs of its conduct.

Le demandeur voulait poursuivre son action contre la ville à titre de représentant des 30 000 autres résidents qui vivaient dans les environs d'un site d'enfouissement des déchets que la ville exploitait en tant que propriétaire. Le demandeur soutenait que de la pollution physique et du bruit provenaient de la décharge. Le juge saisi de la requête a estimé que le demandeur avait satisfait aux exigences de la certification énoncées à l'art. 5(1) de la *Loi de 1992 sur les recours collectifs* et a certifié l'action en tant que recours collectif. La Cour divisionnaire a infirmé l'ordonnance de certification au motif que le demandeur n'avait pas prouvé l'existence d'un groupe identifiable et n'avait pas satisfait à l'exigence des questions communes. L'ordonnance accordant la certification a été annulée sans préjudice au droit du demandeur de présenter une nouvelle demande étayée par une preuve additionnelle. La Cour d'appel a rejeté le pourvoi du demandeur, puisque qu'elle était d'accord que l'existence des questions communes n'avait pas été établie, et a maintenu l'ordonnance de la Cour divisionnaire à l'exception de l'autorisation de présenter une nouvelle demande étayée par une preuve additionnelle. Le demandeur a interjeté appel.

**Arrêt:** Le pourvoi a été rejeté.

Un groupe identifiable existait au sens de l'art. 5(1)b) et il était défini d'après un critère objectif: une personne était membre d'un groupe lorsqu'elle était propriétaire ou occupait un terrain à l'intérieur d'une région spécifique pendant une période de temps spécifique.

Le demandeur a démontré l'existence d'une base factuelle pour remplir l'exigence des questions communes de l'art. 5(1)c). Le demandeur a présenté les rapports de plaintes du ministère de l'Environnement et de l'Énergie et du Service des travaux publics qui documentaient des centaines de plaintes reçues pendant une période de plus de 13 ans.

Un recours collectif n'était toutefois pas la meilleure procédure pour résoudre les questions communes, comme l'exigeait l'art. 5(1)d). En ce qui a trait à l'économie des ressources judiciaires, toute question commune était négligeable relativement aux

questions individuelles. En dépit du fait que chaque membre du groupe aurait à prouver que la décharge faisait de la pollution physique ou du bruit, il n'y avait aucune raison permettant de croire que la pollution était la même dans toute la région géographique ou pendant toute la période de temps indiquée dans la définition du groupe.

Autoriser le recours collectif ne favoriserait pas l'accès à la justice. Si les demandes étaient assez modestes pour que se pose la question de l'accès à la justice, le fonds d'indemnisation pour la responsabilité sans faute, géré par le ministère de l'Environnement dans le but de couvrir les réclamations individuelles d'un maximum de 5 000 \$ qui résultent d'incidents externes, devrait probablement permettre d'obtenir réparation plus rapidement que ne le permettrait la voie judiciaire. Si leurs réclamations étaient plus importantes, les membres du groupe arriveraient probablement à la conclusion qu'il vaut la peine d'intenter une action individuelle.

La modification des comportements ne représentait pas une considération importante. Autoriser le recours collectif ne contribuerait pas à la réalisation de l'objectif voulant que ceux qui causent des dommages étendus mais individuellement minimes en soient tenus responsables. Si les membres individuels du recours collectif avaient des réclamations importantes, ils seraient probablement d'accord pour poursuivre leurs réclamations individuellement; si les réclamations étaient modestes, ils pourraient être indemnisés par le fonds d'indemnisation. Dans tous les cas, la ville serait forcée d'absorber les coûts de son comportement.

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

*Caputo v. Imperial Tobacco Ltd.* (1997), 148 D.L.R. (4th) 566, 34 O.R. (3d) 314, 13 C.P.C. (4th) 163 (Ont. Gen. Div.) — considered

*Mouhteros v. DeVry Canada Inc.* (1998), 22 C.P.C. (4th) 198, 41 O.R. (3d) 63 (Ont. Gen. Div.) — considered

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*Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.) — considered

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*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385 (S.C.C.) — considered

### Statutes considered:

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

Generally — referred to

s. 4(2) — referred to

s. 4(2)(a) — referred to

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — referred to

s. 2(1) — considered

s. 2(2) — referred to

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

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s. 5(4) — referred to

s. 5(5) — considered

s. 6 — considered

*Code de procédure civile*, L.R.Q., c. C-25

livre IX — referred to

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s. 61(1) — referred to

s. 74(1) — referred to

*Environmental Protection Act*, R.S.O. 1990, c. E.19

Generally — referred to

s. 14(1) — referred to

s. 99 — referred to

s. 172(1) — referred to

s. 186(1) — referred to

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

Generally — referred to

s. 61 — referred to

**Rules considered:**

*Federal Rules of Civil Procedure*, 28 U.S.C., Appendix

R. 23(b)(3) — referred to

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 12.01 — considered

APPEAL from judgment reported at (1999), 41 C.P.C. (4th) 93, 32 C.E.L.R. (N.S.) 1, (sub nom. *Hollick v. Toronto (City)*) 46 O.R. (3d) 257, 127 O.A.C. 369, 181 D.L.R. (4th) 426, 7 M.P.L.R. (3d) 244, 1999 CarswellOnt 4135, [1999] O.J. No. 4747 (Ont. C.A.), reversing in part judgment reported at (1998), 168 D.L.R. (4th) 760, 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, (sub nom. *Hollick v. Toronto (City)*) 42 O.R. (3d) 473, 31 C.P.C. (4th) 64, 1998 CarswellOnt 4880, [1998] O.J. No. 5267 (Ont. Div. Ct.), reversing judgment reported at (1998), 18 C.P.C. (4th) 394, 27 C.E.L.R. (N.S.) 48, 1998 CarswellOnt 1453, [1998] O.J. No. 1288 (Ont. Gen. Div.), certifying plaintiff's action against city for compensatory and punitive damages for pollution emanating from city's landfill, as class proceeding.

POURVOI du demandeur à l'encontre de l'arrêt publié à (1999), 41 C.P.C. (4th) 93, 32 C.E.L.R. (N.S.) 1, (sub nom. *Hollick v. Toronto (City)*) 46 O.R. (3d) 257, 127 O.A.C. 369, 181 D.L.R. (4th) 426, 7 M.P.L.R. (3d) 244, 1999 CarswellOnt 4135, [1999] O.J. No. 4747 (Ont. C.A.), qui a infirmé en partie le jugement publié à (1998), 168 D.L.R. (4th) 760, 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, (sub nom. *Hollick v. Toronto (City)*) 42 O.R. (3d) 473, 31 C.P.C. (4th) 64, 1998 CarswellOnt 4880, [1998] O.J. No. 5267 (Ont. Div. Ct.), qui avait renversé l'arrêt publié à (1998), 18 C.P.C. (4th) 394, 27 C.E.L.R. (N.S.) 48, 1998

CarswellOnt 1453, [1998] O.J. No. 1288 (Ont. Gen. Div.), qui avait certifié à titre de recours collectif l'action intentée par le demandeur contre la ville en dommages-intérêts matériels et exemplaires pour la pollution provenant de la décharge de la Ville.

**The judgment of the court was delivered by McLachlin C.J.C.:**

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

**I. Facts**

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

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

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

3 Until 1983, the Keele Valley site was a gravel pit owned privately. It operated under a Certificate of Approval issued by the Ministry of the Environment in 1980. After the respondent purchased the site in 1983, the Ministry of the Environment issued a new Certificate of Approval. The 1983 Certificate covers an area of 375.9 hectares, of which 99.2 hectares are actual disposal area. The remainder of the land constitutes a buffer zone. The Certificate restricts Keele Valley to the receipt of non-hazardous municipal or commercial waste, and it sets out various other requirements relating to the processing and storage of waste at the site. It also provides for a Small Claims Trust Fund of \$100,000, administered by the Ministry of the Environment, to cover individual claims of up to \$5,000 arising out of "offsite impact".

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

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

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

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant

submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7.) The appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest *vis-à-vis* the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, \$500 million in compensatory damages and \$100 million in punitive damages.

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

## II. Judgments

7 The motions judge, Jenkins J., found that the appellant had satisfied each of the five certification requirements set out in s. 5(1) of the *Class Proceedings Act*, 1992: ([1998](#), 27 C.E.L.R. (N.S.) 48 (Ont. Gen. Div.). He found that the appellant's statement of claim disclosed causes of action under s. 99 of the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, and under the rule in *Rylands v. Fletcher* ([1868](#)), L.R. 3 H.L. 330 (U.K. H.L.); that the appellant had defined an identifiable class of two or more persons; that the issues of liability and punitive damages were common to the class; and that a class action would be the preferable procedure for resolving the complaints of the class. Finally, he found that the appellant would be an adequate representative for the class and that the appellant had set out a workable litigation plan. Though Jenkins J. struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy and rejected his claims under the *Family Law Act*, R.S.O. 1990, c. F. 3, on the grounds that the facts pleaded "cannot . . . establish a basis for a claim for loss of care, guidance, and companionship" (p. 62). Jenkins J. concluded that the appellant had satisfied the certification requirements of s. 5(1). Accordingly he ordered that the appellant be allowed to pursue his action as representative of the stated class.

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

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

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

9 The Court of Appeal for Ontario, *per* Carthy J.A., dismissed Hollick's appeal ([1999](#), 46 O.R. (3d) 257 (Ont. C.A.)), agreeing with the Divisional Court that commonality had not been established. Citing *Bywater v. Toronto Transit Commission* ([1998](#), 27 C.P.C. (4th) 172 (Ont. Gen. Div.)), Carthy J.A. noted that the definition of a class should not depend on the merits of

the litigation. However, he saw no bar to a court's looking beyond the pleadings to determine whether the certification criteria had been satisfied. "If it were otherwise", he noted, "any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court" (p. 264). Carthy J.A. acknowledged that a court should not test the existence of a class by demanding evidence that each member of the purported class have, individually, a claim on the merits. The court should, however, demand "evidence to give some credence to the allegation that . . . 'there is an identifiable class . . . '".

10 Carthy J.A. did not find it necessary to resolve the issue of whether the appellant had stated an identifiable class, because in his view the appellant had not satisfied the commonality requirement. In Carthy J.A.'s view, proof of nuisance was essential to each of the appellant's claims. Because a nuisance claim requires the plaintiff to make an *individualized* showing of harm, there was no commonality between the class members. Carthy J.A. wrote (at pp. 266-67):

This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. . . .

No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

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

### III. Legislation

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

**5.** (1) The court shall certify a class proceeding on a motion under section 2,3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

#### IV. Issues

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

#### V. Analysis

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

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

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

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

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres Inc.* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable

possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions*, *supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclose[] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd. (1997)*, 34 O.R. (3d) 314 (Ont. Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.

17 With these principles in mind, I turn now to the case at bar. The issue is whether the appellant has satisfied the certification requirements set out in s. 5 of the Act. The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater*, *supra*, at pp. 175-76; *Western Canadian Shopping Centres Inc.*, *supra*, at para. 38.

18 A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres Inc.*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims.

19 In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a "colourable claim" — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see *Western Canadian Shopping Centres Inc.*, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated *vis-à-vis* the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 people had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that:

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

20 The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an air plane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who

owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

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

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

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

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

25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see *Report*, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence."). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.5 of the Act, other than the requirement that the pleadings disclose

a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at § 4.60.

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

27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions — judicial economy, access to justice, and behaviour modification: see also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.); compare British Columbia *Class Proceedings Act*, s. 4(2) (listing factors that court must consider in assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues — common and individual — raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

28 The Report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation, and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform*, *supra*, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the *common issues*" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes,

The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinction[] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, *supra*, at § 4.690. I would endorse that approach.

30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b) (3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia *Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act*, 1992 (1993), at p. 27.

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

32 I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints — those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

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

**2001 SCC 69** (S.C.C.), at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.

34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in *Western Canadian Shopping Centres Inc.*, *supra*, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28; *Environmental Protection Act*, R.S.O. 1990, c. E.19. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

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

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

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

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

*Appeal dismissed.*

*Pourvoi rejeté.*

# **TAB 19**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Manson Insulation Products Ltd. v. Crossroads C&I Distributors](#) | 2012 ABQB 3, 2012 CarswellAlta 22, [2012] A.W.L.D. 1743, [2012] A.W.L.D. 1802, [2012] A.W.L.D. 1807, [2012] A.W.L.D. 1810, 212 A.C.W.S. (3d) 675 | (Alta. Q.B., Jan 6, 2012)

**1990 CarswellBC 216**  
Supreme Court of Canada

Hunt v. T & N plc

1990 CarswellBC 216, 1990 CarswellBC 759, [1990] 1 W.D.C.P. (2d) 523, [1990] 2 S.C.R. 959, [1990] 6 W.W.R. 385, [1990] B.C.W.L.D. 2347, [1990] S.C.J. No. 93, 117 N.R. 321, 23 A.C.W.S. (3d) 101, 43 C.P.C. (2d) 105, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 4 C.O.H.S.C. 173 (headnote only), 74 D.L.R. (4th) 321, J.E. 90-1436, EYB 1990-67014

**CAREY CANADA INC. (CAREY-CANADIAN MINES LTD.) et al. v.  
HUNT, T & N plc and FLINTKOTE MINES LIMITED; FLINTKOTE  
MINES LIMITED et al. v. HUNT, T & N plc and CAREY CANADA INC.**

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

Heard: February 22, 1990

Judgment: October 4, 1990

Docket: Nos. 21508, 21536

Counsel: *J. Giles, Q.C.*, and *R. McDonell*, for Carey Canada Inc.

*D.M.M. Goldie, Q.C.*, for Lac d'Amiate du Québec Ltée.

*M. Koenigsberg*, for National Gypsum Co.

*D. Martin* and *M.P. Maryn*, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.

*J.A. Macaulay* and *K.N. Affleck*, for T & N plc.

*R. Ward* and *S.E. Fraser*, for Flintkote Mines Limited.

*J.J. Camp, Q.C.*, and *P.G. Foy*, for Hunt.

Subject: Torts; Civil Practice and Procedure; Employment

**Related Abridgment Classifications**

Civil practice and procedure

**X Pleadings**

**X.2 Statement of claim**

**X.2.f** Striking out for absence of reasonable cause of action

**X.2.f.v** Cause not known in law

Civil practice and procedure

**X Pleadings**

**X.2 Statement of claim**

**X.2.f** Striking out for absence of reasonable cause of action

**X.2.f.vi** Facts pleaded not supporting claim

**Headnote**

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Cause not known in law

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Facts pleaded not supporting claim

Civil procedure — Pleadings — Striking out — No reasonable cause of action — Plaintiff suffering from disease allegedly caused by exposure to asbestos suing some defendants in negligence and alleging all defendants conspired to withhold information about dangers associated with asbestos — Defendant applying to have conspiracy action dismissed on grounds that statement of claim disclosed no reasonable cause of action — Action to be struck where it is "plain and obvious" statement of claim discloses no reasonable cause of action — Plaintiff's claim raising difficult points of law but still disclosing reasonable cause of action — Allegation of negligence not barring allegation of conspiracy — Determination of plaintiff's chance of success being improper on motion to strike.

The plaintiff was exposed to asbestos fibres during his employment as an electrician servicing various mining operations run by the defendants. He alleged that all of the defendants knew that asbestos could cause disease in those exposed to its fibres. In addition to suing the defendant mining companies for negligence, the plaintiff alleged that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of the conspiracy he contracted mesothelioma. One of the defendants applied to have the action against it, based solely on the conspiracy allegation, dismissed on the basis that it disclosed no reasonable claim. The trial judge allowed the motion. The Court of Appeal allowed an appeal from that decision stating that it was not possible at this stage of the proceedings to determine whether the facts supported an action in conspiracy. The defendants appealed.

**Held:**

Appeal dismissed.

The test to be applied to determine whether an action may be struck for disclosing no reasonable claim is to consider, assuming that the facts as stated in the statement of claim can be proved, whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action. If there is a chance that the plaintiff might succeed, then the plaintiff should be allowed to proceed to have the action tried. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect, such as those listed in R. 19(24) should the relevant portions of a plaintiff's statement of claim be struck for disclosing no reasonable claim.

Here, it was plain and obvious that allowing this action to proceed would not amount to an abuse of process. While there has clearly been judicial reluctance to extend the scope of the tort of conspiracy beyond the commercial context, this court has never suggested that the tort could not have application in other contexts. Further, although the view has been expressed that modern commercial realities suggest that the action has lost much of its usefulness, it would be highly inappropriate to deny the plaintiff the opportunity to present his case when his allegations expressly fit within the court's previous pronouncements on the law on civil conspiracy.

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. On the contrary, if a statement of claim raises such points of law, then it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

A cause of action in conspiracy is not precluded on the ground that the plaintiff also alleges another cause of action. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be ascertained when it has first been established that the defendant did in fact commit the other alleged torts. Further, it is inappropriate on a motion to strike out a statement of claim to get into the question of whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence as to the other torts can be led and decided upon accordingly before turning to the determination of the tort of conspiracy.

**Table of Authorities**

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*A.G. of Duchy of Lancaster v. London & North Western Ry. Co.*, [1892] Ch. 274 (C.A.) — considered

*Can. Cement Lafarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 145 D.L.R. (3d) 385, 72 C.P.R. (2d) 1, 47 N.R. 191 [B.C.] — considered

*Drummond-Jackson v. Br. Medical Assn.*, [1970] 1 W.L.R. 688, [1970] 1 All E.R. 1094 (C.A.) — considered

*Dumont-Jackson v. Can. (A.G.), [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159* — considered

*Dyson v. A.G., [1911] 1 K.B. 410* (C.A.) — considered

*Evans v. Barclays Bank & Galloway, [1924] W.N. 97* (C.A.) — referred to

*Frank v. Smith, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40* — distinguished

*Gilbert Surgical Supply Co. v. F.W. Horner Ltd., [1960] O.W.N. 289, 34 C.P.R. 17* (C.A.) — considered

*Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark, [1899] 1 Q.B. 86* (C.A.) — considered

*Kemsley v. Foot, [1951] 2 K.B. 34, [1951] T.L.R. 197, [1951] 1 All E.R. 331* (C.A.) [affirmed [1952] A.C. 345, [1952] 1 All E.R. 501 (H.L.)] — referred to

*Lonrho v. Shell Petroleum Co., [1982] A.C. 173, [1980] 1 W.L.R. 627* (H.L.) — considered

*McNaughton v. Baker, [1988] 4 W.W.R. 742, 25 B.C.L.R. (2d) 17, 28 C.P.C. (2d) 49* (C.A.) — referred to

*Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563* — referred to

*Metro. Bank, Ltd. v. Pooley, 10 App. Cas. 210, [1881-85] All E.R. Rep. 949* (H.L.) — considered

*Minnes v. Minnes (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497* (B.C.C.A.) — considered

*Mogul S.S. Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598* [affirmed [1892] A.C. 25 (C.A.)] — referred to

*Nagle v. Feilden, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689* — referred to

*Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1* [Fed.] — considered

*Peru Republic v. Peruvian Guano Co. (1887), 36 Ch. D. 489* — considered

*R. v. Clark, [1943] O.R. 501, [1943] 3 D.L.R. 684* (C.A.) [leave to appeal to S.C.C. refused [1944] S.C.R. 69, [1944] 1 D.L.R. 495] — considered

*Ross v. Scottish Union and National Ins. Co. (1920), 47 O.L.R. 308, 53 D.L.R. 415* (C.A.) — considered

**Statutes considered:**

Business Concerns Records Act, R.S.Q. 1977, c. D-12

Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66)

**Rules considered:**

British Columbia Supreme Court Rules, 1976

R. 19(24) [am. B.C. Reg. 517/79]

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R. 21.01

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O. 18, r. 19

O. 25, r. 4

**Authorities considered:**

Baker, An Introduction to English Legal History, 2nd ed. (1979), p. 69.

Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C.L. Rev. 229, p. 254.

Fridman, The Law of Torts in Canada (1990), vol. 2, pp. 265-66.

36 Hals. (4th) 4, para. 2, n. 7.

36 Hals. (4th) 26, para. 35, n. 5.

MachLachlin and Taylor, British Columbia Practice, 2nd ed. (1979), vol. 1, p. 19-71.

Milsom, Historical Foundations of the Common Law, 2nd ed. (1981), p. 72.

**Words and phrases considered:**

**PLAIN AND OBVIOUS TEST**

[Considering] how the rules regarding the striking out of a statement of claim are to be applied, [the Supreme Court of Canada] has . . . consistently upheld the "plain and obvious" test.

. . . in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 . . . At pp. 486-487 . . . I provided the following summary of the law in this area (with which the rest of the Court concurred):

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

Appeal from judgment of British Columbia Court of Appeal, [1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*), setting aside judgment of Hollinrake J. dismissing action against one defendant for failing to disclose reasonable claim.

**The judgment of the court was delivered by Wilson J.:**

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

**1. The Facts**

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

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

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

16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.

17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.

18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plaintiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge

becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.

19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

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

- (a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;
- (b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;
- (c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;
- (d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and
- (e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

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

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

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

and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

## 2. The Courts Below

### (a) *Supreme Court of British Columbia*

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

Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey J. refers to the "predominant purpose" of the defendants' conduct [see *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 145 D.L.R. (3d) 385, 72 C.P.R. (2d) 1, 47 N.R. 191 [B.C.]]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in *Can. Cement LaFarge Ltd.*

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

**(b) British Columbia Court of Appeal**

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

8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal [[1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*)] and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

(1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to the very different social considerations.

(2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law: see *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122, 34 D.L.R. (2d) 497 (B.C.C.A.).

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

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

**3. The Issues**

10 The issues that arise in this appeal are:

11 1. *In what circumstances may a statement of claim (or portions of it) be struck out?*

12 2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

**4. Analysis**

13

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

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

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b). [emphasis added]

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

#### (a) England

16 In *Metro. Bank, Ltd. v. Pooley*, 10 App. Cas. 210, [1881-85] All E.R. Rep. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even though there was no written rule stating that courts could do so. The Lord Chancellor noted that "[t]he power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure." That is, it was open to courts to ensure that their process was not used simply to harass parties through the initiation of actions that were obviously without merit.

17 Before the advent of the Supreme Court of Judicature Act, 1873, and the new Rules of the Supreme Court (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see 36 Hals. (4th) 4, para. 2, n. 7, and 26, para. 35, n. 5; Milsom, Historical Foundations of the Common Law, 2nd ed. (1981), at p. 72; and Baker, An Introduction to English Legal History, 2nd ed. (1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in *Pooley*, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4, of the 1883 Rules of the Supreme Court came into force:

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

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

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

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

19 In one of the better known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated (*Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86 at 91 (C.A.)):

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

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

20 The Master of the Rolls had made this very point some six years earlier (*A.G. of Duchy of Lancaster v. London & North Western Ry. Co.*, [1892] 3 Ch. 274 at 276-77 (C.A.)):

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

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

21 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see *Dyson v. A.G.*, [1911] 1 K.B. 410 (C.A.); *Evans v. Barclays Bank & Galloway*, [1924] W.N. 97 (C.A.); *Kemsley v. Foot*, [1951] 2 K.B. 34, [1951] 1 T.L.R. 197, [1951] 1 All E.R. 331 (C.A.); and *Nagle v. Feilden*, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.). Lord Justice Fletcher Moulton's observations in *Dyson*, at pp. 418-19, are particularly instructive:

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

22 A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in *Drummond-Jackson v. Br. Medical Assn.*, [1970] 1 W.L.R. 688, [1970] 1 All E.R. 1094 (C.A.). I note that in *Drummond-Jackson* the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C., O. 25, r. 4, in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

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

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

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

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

23 Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some 80 years earlier in *A.G. of Duchy of Lancaster*: length and complexity were *not* appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-1102:

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

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

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

Salmon LJ said:

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

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

Lord Pearson concluded at p. 1102:

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

24 In England, then, the test that governs an application under R.S.C., O. 18, r. 19, has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

## (b) Canada

### (i) Ontario and British Columbia Courts of Appeal

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

## Ontario

26 In Ontario, for example, the Court of Appeal dealt with R. 124 (the predecessor to R. 21.01) in *Ross v. Scottish Union and National Ins. Co.* (1920), 47 O.L.R. 308, 53 D.L.R. 415 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4, and read as follows:

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

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

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

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

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

28 At an early date, then, the Ontario Court of Appeal had modelled its approach to R. 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *R. v. Clark*, [1943] O.R. 501 at 515, [1943] 3 D.L.R. 684 (C.A.):

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

29 More recently, in *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289 at 289-90, 34 C.P.R. 17 (C.A.), Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

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

## British Columbia

31 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122-23, 34 D.L.R. (2d) 497 (B.C.C.A.), Tysoe J.A. observed:

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

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

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

The law as stated in *Minnes v. Minnes* was recently reaffirmed in *McNaughton v. Baker*, [1988] 4 W.W.R. 742, 25 B.C.L.R. (2d) 17 at 23, 28 C.P.C. (2d) 49 (C.A.), per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on *Minnes v. Minnes* in this appeal.

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

#### *(ii) Supreme Court of Canada*

33 While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the court in *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.], stated:

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

34 I had occasion to affirm this proposition in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 [Fed.]. At pp. 486-87 I provided the following summary of the law in this area (with which the rest of the court concurred):

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

And at p. 477 I observed:

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

35 Most recently, in *Dumont v. Can. (A.G.)*, [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

36 Thus, the test in Canada governing the application of provisions like R. 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(a).

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

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

38 In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt (*Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563 at 593, per Slade L.J.):

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

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

39 In *Lonrho v. Shell Petroleum Co.*, [1982] A.C. 173, [1980] 1 W.L.R. 627, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a

highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

40 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fueled the development of the tort in the late 19th and early 20th centuries, namely, that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise" (see *Mogul S.S. Co. v. McGregor, Gow & Co. (1889)*, 23 Q.B.D. 598 at 616, per Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem*, [1901] A.C. 495, and accepted as good law in the *Crofters case* [1924] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

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

This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.

My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

42 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in *Lonrho* (see *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, supra) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy." The Court of Appeal continued:

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

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

43 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in *Lonrho*. Indeed, this court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in *Lonrho* in *Can. Cement Lafarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, supra. Justice Estey stated at p. 468:

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

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

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

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

(1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,

(2) *where the conduct of the defendants is unlawful*, the conduct is directed towards the plaintiff (alone or together with others), and *the defendants should know in the circumstances that injury to the plaintiff is likely to and does result*. In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [emphasis added]

46 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As G.H.L. Fridman has noted in *The Law of Torts in Canada* (1990), vol. 2, at p. 265:

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

Fridman goes on to observe at pp. 265-66:

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

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

47 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in *Can. Cement LaFarge Ltd.*, when he prepared paras. 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr. Hunt's statement of claim, it is certainly *not* that paras. 18 or 19 fail to follow the language of this court's most recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

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

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

49 Finally, the defendants point to my observations in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context" (at p. 124). I concluded that even though the tort could in theory be extended to the facts of *Frame*, it was not desirable to extend the tort to the custody and access context.

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

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

While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

52 I note that in *Frame v. Smith*, at p. 126, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination" [p. 125]. But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

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

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

55 The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

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

57 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff *alleges* that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the *facts* as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants') submission that "[u]pon proof

of the commission of the tortious acts alleged" in para. 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

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

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

## 5. Disposition

60 The appeal should be dismissed with costs.

*Appeal dismissed.*

### Footnotes

\* Chief Justice at the time of judgment.

**TAB 20**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Wakelam v. Johnson & Johnson](#) | 2011 BCSC 1765, 2011 CarswellBC 3670, [2012] B.C.W.L.D. 1559, [2012] B.C.W.L.D. 1560, [2012] B.C.W.L.D. 1561, [2012] B.C.W.L.D. 1562, [2012] B.C.W.L.D. 1563, [2012] B.C.W.L.D. 1564, [2012] B.C.W.L.D. 1569, [2012] B.C.W.L.D. 1570, [2012] B.C.W.L.D. 1574, 212 A.C.W.S. (3d) 18, 27 B.C.L.R. (5th) 336, [2012] 7 W.W.R. 354 | (B.C. S.C., Dec 22, 2011)

2009 CarswellOnt 2535  
Ontario Superior Court of Justice

Lambert v. Guidant Corp.

2009 CarswellOnt 2535, [2009] O.J. No. 1910, 177 A.C.W.S. (3d) 48, 72 C.P.C. (6th) 120

**Gerard Lambert and Elsa Ibbetson (Plaintiffs) and Guidant Corporation, Guidant Canada Corporation, Guidant Sales Corporation and Cardiac Pacemakers Inc. (Defendant)**

Cullity J.

Heard: January 6-8, 2009; February 9-12, 2009

Judgment: May 8, 2009

Docket: 05-CV 295630 CP

Counsel: Won J. Kim, James C. Orr, James Newland, Megan B. McPhee for Plaintiffs  
John A. Campion, Paul J. Martin, Sarah J. Armstrong for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.H](#) Miscellaneous

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — General principles

Plaintiff L was implanted with pacemaker designed, developed, manufactured and sold by defendants — Defendants issued several advisory letters to physicians, patients and regulatory authorities drawing attention to malfunctions of defendants' pacemakers — United States Food and Drug Administration issued several class I recalls for defendants' pacemakers which indicated reasonable probability of malfunctioning — L had pacemaker explanted and replaced by another of defendants' pacemakers — Shortly thereafter, L was advised replacement pacemaker was also included in recall — Plaintiffs brought action against defendants for defective design, manufacture and marketing of alleged defective pacemakers seeking damages for painful medical procedures, potentially defective devices and psychological harm from learning they were potentially at risk — L sought to represent persons in whom pacemakers were implanted — Plaintiff I was L's spouse and sought to represent persons with derivative claims as family members of those within primary class — Defendants were currently defendants in similar class proceedings in British Columbia and Quebec — Multi-district litigation in United States over defendants' pacemakers was subject to proposed settlement, but Canadian patients were not entitled to participate — Plaintiffs brought motion to certify proceeding as class action under Class Proceedings Act, 1992 — Motion granted — Fundamental purpose at certification stage

of class proceeding was to determine if requirements in s. 5(1) of Act were satisfied and not to decide factual issues — Use that defendants sought to make of evidence on motion was not consistent with this purpose — It was not legitimate response to plaintiffs' motion for defendants to attempt to demonstrate claims asserted on behalf of class members were without merit — Causes of action on which plaintiffs rely were adequately disclosed in pleading — Class definition was not unnecessarily over-inclusive at this stage of proceeding, but may be amended following productions and discovery — Proposed common issues were substantively very similar to those accepted for purpose of class certification in another case relating to defendants' defibrillators — Class proceeding was preferred method to try claims — Apart from issue of credibility, plaintiffs were willing to and capable of representing interests of class — Litigation plan was comprehensive.

## Table of Authorities

### Cases considered by *Cullity J.*:

- Attis v. Canada (Minister of Health)* (2007), 2007 CarswellOnt 2786, 46 C.P.C. (6th) 129 (Ont. S.C.J.) — considered
- Caputo v. Imperial Tobacco Ltd.* (2004), 2004 CarswellOnt 423, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350, [2004] O.T.C. 112 (Ont. S.C.J.) — referred to
- Carom v. Bre-X Minerals Ltd.* (1999), 35 C.P.C. (4th) 43, 1999 CarswellOnt 1456, 46 B.L.R. (2d) 247, 44 O.R. (3d) 173 (Ont. S.C.J.) — referred to
- Cassano v. Toronto Dominion Bank* (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. *Cassano v. Toronto-Dominion Bank*) 287 D.L.R. (4th) 703 (Ont. C.A.) — considered
- Cloud v. Canada (Attorney General)* (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — referred to
- Frohlinger v. Nortel Networks Corp.* (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — considered
- Heron v. Guidant Corp.* (2007), 2007 CarswellOnt 9010 (Ont. S.C.J.) — referred to
- Hoffman v. Monsanto Canada Inc.* (2005), 2005 SKQB 225, 2005 CarswellSask 311, 15 C.E.L.R. (3d) 42, [2005] 7 W.W.R. 665, 264 Sask. R. 1 (Sask. Q.B.) — considered
- Hoffman v. Monsanto Canada Inc.* (2007), [2007] 6 W.W.R. 387, 28 C.E.L.R. (3d) 165, 2007 CarswellSask 190, 2007 SKCA 47, 39 C.P.C. (6th) 267, 293 Sask. R. 89, 397 W.A.C. 89, 283 D.L.R. (4th) 190 (Sask. C.A.) — referred to
- Hollick v. Metropolitan Toronto (Municipality)* (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — followed
- Hunt v. T & N plc* (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — followed
- LeFrancois v. Guidant Corp.* (2008), 2008 CarswellOnt 2073, 56 C.P.C. (6th) 268 (Ont. S.C.J.) — considered
- LeFrancois v. Guidant Corp.* (2008), 2008 CarswellOnt 3566, 65 C.P.C. (6th) 32 (Ont. S.C.J.) — referred to
- LeFrancois v. Guidant Corp.* (2009), (sub nom. *Guidant Corp. v. LeFrancois*) 245 O.A.C. 213, 2009 CarswellOnt 30, 67 C.P.C. (6th) 9 (Ont. Div. Ct.) — referred to
- Mustapha v. Culligan of Canada Ltd.* (2008), 55 C.C.L.T. (3d) 36, 375 N.R. 81, 293 D.L.R. (4th) 29, [2008] 2 S.C.R. 114, 2008 CarswellOnt 2824, 2008 CarswellOnt 2825, 2008 SCC 27, 238 O.A.C. 130, 92 O.R. (3d) 799 (note) (S.C.C.) — considered
- Pearson v. Inco Ltd.* (2005), 2005 CarswellOnt 6598, 205 O.A.C. 30, 78 O.R. (3d) 641, 261 D.L.R. (4th) 629, 20 C.E.L.R. (3d) 258, 43 R.P.R. (4th) 43, 18 C.P.C. (6th) 77 (Ont. C.A.) — considered
- Peter v. Medtronic Inc.* (2007), 50 C.P.C. (6th) 133, 2007 CarswellOnt 7975 (Ont. S.C.J.) — referred to
- Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée* (2006), 35 C.P.C. (6th) 264, 2006 CarswellOnt 7317 (Ont. S.C.J.) — considered
- Price v. Panasonic Canada Inc.* (2001), 2001 CarswellOnt 4639 (Ont. S.C.J.) — considered
- Rumley v. British Columbia* (2001), 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 10 C.C.L.T. (3d) 1 (S.C.C.) — considered

*Shaw v. BCE Inc.* (May 14, 2003), Doc. 02-CV-236453CP (Ont. S.C.J.) — considered

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5 — referred to

s. 5(1) — referred to

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 8 — referred to

s. 10 — referred to

s. 12 — referred to

s. 24 — referred to

s. 25 — referred to

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

Generally — referred to

*Federal Food, Drug and Cosmetic Act*, 21 U.S.C. 9

Generally — referred to

*Food and Drugs Act*, R.S.C. 1985, c. F-27

Generally — referred to

**Regulations considered:**

*Food and Drugs Act*, R.S.C. 1985, c. F-27

*Medical Devices Regulations*, SOR/98-282

Generally — referred to

s. 1 "recall" — considered

MOTION by plaintiffs to certify proceeding as class action.

**Cullity J.:**

1 The hearing of the motion to certify this proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 was of unusual length due to the elaborateness and comprehensiveness of the attack launched by the defendants on the plaintiffs' case for certification and the attempted use of evidence for this purpose. Most of the evidence had a direct bearing on the merits of

the claims asserted by the plaintiffs on behalf of the class they seek to represent and, although defendants' counsel went to some pains to relate it to the requirements for certification, its relevance and weight for this purpose were very much in issue.

## **Background**

2 The claims asserted by the plaintiffs concern allegedly defective pacemakers designed, manufactured and marketed by the defendants. The plaintiffs allege that, with prior knowledge that the devices were defective and prone to failure, the defendants permitted them to be implanted in patients and concealed the defects from patients, health care providers and regulatory authorities including Health Canada and the U.S. Food and Drug Administration ("FDA"). On behalf of the persons in whom the pacemakers were implanted, they claim damages not only for the painful medical procedures associated with the implantation, and explantation, of potentially defective devices but also for psychological harm consisting of emotional distress, anger, and anxiety from learning that they were potentially at risk. Mr Lambert is proposed as a representative of a primary class consisting of such persons. His spouse, Ms Ibbetson, seeks to represent persons who have derivative claims as members of the families of those within the primary class.

3 The claims were originally made against the defendants in respect of, among other things, their negligence in designing, manufacturing and selling allegedly defective defibrillators and pacemakers. After a carriage motion had been instituted in connection with this proceeding and a consolidated action involving the defendants' defibrillators, orders were made permitting the substitution of Mr Lambert and Ms Ibbetson for the original plaintiff in this action, and granting leave for the statement of claim to be amended to exclude the claims in respect of defibrillators: *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (Ont. S.C.J.).

4 The claims against the defendants in connection with the defibrillators were continued in a separate proceeding which was subsequently certified: *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) and [2008] O.J. No. 2402 (Ont. S.C.J.). Leave to appeal to the Divisional Court was denied on January 6, 2009 [2009 CarswellOnt 30 (Ont. Div. Ct.)]. In *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), Hoy J. made an order certifying an action in which similar claims had been made against a different manufacturer of defibrillators.

5 While the claims and the facts of *LeFrancois* and this case have several points of similarity, defendants' counsel emphasised that *LeFrancois* was under appeal and that they did not resile from any of the submissions they had made at first instance. Although they accepted that, in at least one respect, their challenge to the appropriateness of certification in this case was, in this court, probably foreclosed by the earlier decision, they reserved to their clients the right on any appeal to repeat the submissions on that point that had been rejected in *LeFrancois*. On all the other statutory requirements for certification, defendants' counsel submitted that *LeFrancois* was distinguishable on various grounds.

## **1. The Defendants**

6 Guidant Corporation is incorporated under the laws of Indiana. It is the parent corporation of the other defendants and has numerous other subsidiaries.

7 The Guidant group of companies designs, develops, manufactures and sells therapeutic medical devices for use in treating cardiac and vascular diseases. Such devices include the pacemakers at issue in this litigation.

8 The plaintiffs allege that the defendants are organised so as to function as a single business unit sharing common purposes and objectives and with a common overall management. I will refer to the defendants collectively as "Guidant".

## **2. The Plaintiffs**

9 Gerard Lambert and Elsa Ibbetson have lived together in a spousal relationship since 1974. They reside in Toronto.

10 Mr Lambert was implanted with one of the allegedly defective pacemakers on June 8, 2000. After he was advised that this pacemaker was the subject of a recall, it was explanted on June 1, 2006 and replaced by a different model. It is pleaded that, shortly thereafter, Mr Lambert was advised that the replacement pacemaker was one of a second series included in an FDA recall.

### **3. Terminology: advisories and recalls**

11 The significance of reports and communications from Guidant, the FDA and Health Canada is very much in issue in the litigation. These were referred to by counsel as "advisories" and "recalls".

12 The advisories issued by Guidant that were referred to throughout the hearing generally consisted of letters sent by Guidant to physicians, patients and the regulatory authorities reporting, and drawing their attention to, potential malfunctions with Guidant's pacemakers. Those sent to physicians were also referred to as "Dear Doctor letters".

13 The term "recall" is defined in the Medical Device Regulations made pursuant to the *Food and Drugs Act*, R.S.C. 1985, c. F. 27 (as amended) as follows:

"recall", in respect of a medical device that has been sold, means any action taken by the manufacturer, importer or distributor of the device to recall or correct the device, or to notify owners and users of its defectiveness or potential defectiveness, after becoming aware that the device

- (a) may be hazardous to health;
- (b) may fail to conform to any claim made by the manufacturer or importer relating to the effectiveness, benefits, performance characteristics or safety; or
- (c) may not meet the requirements of the Act or these Regulations.

14 It was emphasised by defendant's counsel that this definition is sufficiently broad to encompass advisories as described above. It is not limited to "recalls" in a sense that would require devices to be replaced or returned to Guidant.

15 A similarly broad description is contained in a bulletin issued by the FDA which states in part:

A recall is an action taken to address a problem with a medical device that violates FDA law. Recalls occur when a medical device is defective, when it could be a risk to health, or when it is both defective *and* a risk to health. A medical device recall does not always mean that you must stop using the product or return it to the company. A recall sometimes means that the medical device needs to be checked, adjusted, or fixed. If an implanted device (for example, a pacemaker or an artificial hip) is recalled, it does not always have to be removed. When an implanted device has the potential to fail unexpectedly, companies often tell doctors to contact their patients to discuss the risk of removing the device compared to the risk of leaving it in place.

16 The FDA classifies recalls according to the potential degree of risk to public health. Class I recalls indicate that there is a high risk, class II that there is a less serious risk and class III that the risk is low. Reports and notices to the public and press releases are primarily the responsibility of the vendor, but the FDA posts information about class I recalls on its website and may also issue its own press releases or public health notices

### **4. The Pacemakers**

17 There are numerous different models of the pacemakers manufactured and sold by Guidant. These are classified as belonging to different "families" such as DISCOVERY, PULSAR, or NEXUS. Within each family the models are identified by numbers. Pacemakers within 80 of the models have been identified by the plaintiffs as the devices that were defective. The defendants' evidence is that only 51 of the 80 models comprising 28,443 pacemakers were implanted in Canada. They assert, also, that only various subsets of each model - comprising 14,791 pacemakers - were subject to advisories issued by Guidant that referred to the defects identified by the plaintiffs. These devices can, it is said, be identified by reference to the different serial number provided for each of them.

### **5. Guidant's Conduct**

18 While the alleged defects of the pacemakers fall into four separate categories, the plaintiffs allege that Guidant's misconduct in connection with them is systemic and part of a pattern that commenced on or before February, 2002 when it became aware of serious problems with certain models of its defibrillators. Between 2002 and 2005 further problems were identified and it is pleaded that none of them was disclosed to medical device regulators, physicians, patients or to the public until May 23, 2005 - the day before the proposed publication date of a New York Times article that was to refer to a death linked to one of the defective defibrillators.

19 In the meantime, one of Guidant's subsidiaries had pleaded guilty to ten federal felonies in the United States in connection with, among other things, a failure to report to the FDA more than 2,600 adverse events with its products.

20 On July 18, 2005, the defendants issued advisories consisting of letters to physicians and healthcare professionals that subsets of numerous models of its pacemakers were subject to a hermetic seal defect that caused the seals to degrade and, ultimately, could lead to the failure of the device. On July 22, 2005, the devices, identified by their model numbers, were subjected to a class I FDA recall which was intended to indicate that there was a reasonable probability that the malfunctioning devices would cause serious health concerns or death. Additional devices subject to the defect were reported by Guidant in an advisory of January 21, 2006 that referred to the models potentially affected and not the serial numbers of the devices.

21 In further advisories of September 22, 2005, Guidant identified defects with other models of its pacemakers. On December 21, 2005, these devices were subjected to a class II FDA recall that referred to the possibility that the continued operation of the pacemakers would cause temporary or reversible health problems, and a remote possibility of more serious health consequences. In the advisory of September 22, Guidant stated that it was unable to identify the root cause of one of the malfunctions and it identified the devices at risk only in terms of their model numbers. In a subsequent advisory of December 12, 2005, Guidant identified the cause and stated that it was providing physicians with the serial numbers of affected devices. The FDA recall of December 21, 2005, however, indicated that all serial numbers of the specified models were subject to it.

22 The fourth potential defect was identified in an advisory of June 26, 2006 as affecting subsets of 54 different models. For the most part, the advisories and recalls in evidence refer to the affected pacemakers only as subsets of specified models and state that details of the particular devices comprising the subsets are being provided separately to the physicians to whom the advisories were sent.

23 On March 20, 2006, an independent panel of experts, that had been appointed by Guidant to assess and evaluate its operations, released a lengthy report that referred, among other things, to Guidant's failure to give timely warnings to physicians and patients of defects it had identified with its products. Guidant's practices were said to be

contrary to the policy that patient safety is the first priority for evaluation, and managing device malfunction.

24 Guidant is currently the defendant in similar class proceedings in British Columbia and Quebec. I was informed that there was also an individual action in British Columbia. Multi-District litigation in the United States with respect to Guidant's pacemakers and defibrillators is the subject of a proposed settlement in which Guidant would pay \$240 million to 8,500 plaintiffs. The devices covered by the settlement include those in issue in this proceeding but patients implanted in Canada are not entitled to participate in it.

## Evidence

### ***1. Evidence in Support of Certification***

25 The plaintiffs delivered affidavits of Mr Lambert and Dr Geddes Frank Owen Tyers - a qualified cardiovascular and thoracic surgeon.

(a) *Mr Gerard Lambert*

26 Mr Lambert swore two affidavits of which the second dealt only with revisions to the litigation plan. In his first affidavit, he deposed to his personal history as a recipient of two Guidant pacemakers, his reasons for commencing the litigation under the CPA and his personal commitment to its prosecution in the interests of the class. He referred to certain of the advisories issued by Guidant, the pacemakers that had been identified as potentially defective and the harm he had suffered. His description of the procedure under the CPA and the contents of the proposed litigation plan in its original form, and as subsequently amended, were stated to be based on information provided by his counsel.

(b) *Dr Geddes Frank Owen Tyers*

27 Dr Tyers is now Professor Emeritus at the University of British Columbia. He was formerly an eminent academic and practising surgeon specialising in cardiovascular and thoracic surgery. From 1965 he was continuously involved in cardiac rhythm and management device research and development. At different times, he held academic posts in other universities in Canada and in the United States.

28 Dr Tyers has published voluminously in his area of specialisation and expertise and has been a member of numerous professional bodies and committees concerned with cardiovascular medical science. He has also had extensive practical experience with the implementation of pacemakers and defibrillators and, in his retirement, he still does occasional implants.

29 In his affidavit, Dr Tyers addressed the natural functioning of the heart in human beings, the irregularities that can occur, and the manner in which pacemakers operate to monitor and remedy abnormal heart rhythms. Although he stated that the occurrences that will require pacing are unpredictable, it was his opinion that all patients who have been implanted with a pacemaker will, at one time or another, critically depend upon its proper functioning on a second to second basis, and that almost all such persons are at risk of serious injury or death if the device fails without warning.

30 Dr Tyers referred to the history of the advisories that had been issued by Guidant and the nature of the defects they had disclosed. He stated that he had received notice of, or observed, a remarkable number of problems with the Guidant pacemakers. In his opinion, each recipient of one of the recalled products was subject to an increased risk to their overall health and mental and physical well-being, including the risk of permanent injury and death.

31 Dr Tyers deposed that explantation in order to replace a pacemaker is accompanied by further risks and should not, he stated, be considered to be a minor surgical intervention.

32 Finally Dr Tyers estimated that only a minority of incidents of malfunctioning pacemakers are identified and investigated as, for example, pacemakers are rarely explanted from deceased patients.

**2. Responding Evidence**

33 The defendants delivered affidavits of Dr Michael Kim - an associate professor of medicine at north-western University; Dr Albert Druktinis - a forensic psychiatrist; Mr Brooks Berg - the manager of Regulatory Affairs at the Cardiac Rhythm Management Division of Boston Scientific Corporation, the present corporate owner of Guidant; Ms Lisa Becker - the Director of Regulatory Affairs at the same division of Boston Scientific Corporation; and Mr Jerome R. Morse - a member of the Ontario Bar.

(a) *Dr Michael Kim*

34 Dr Kim was asked to opine on the treatment of patients suffering from cardiac health disorders with particular reference to treatment involving implantable pacemakers. He has held teaching and research appointments at a number of universities in the United States. He specialises in cardiac electrophysiology - the study of heart rhythm disorders and related clinical conditions. He has lectured widely in cardiology and electrophysiology for professional associations and has numerous research publications. Over the past eight years he has performed over 2,000 invasive electrophysiology procedures of which about 1,000 have concerned implantable devices such as pacemakers and defibrillators.

35 After a general discussion of the types of electrical disorders that can affect the natural function of the heart, and the role of pacemakers in treating abnormally slow heart rates, Dr Kim emphasised the differences in function between defibrillators and pacemakers. In so doing, he was critical of Dr Tyers' affidavit which, in his opinion, inaccurately conflated the devices in a number of ways. In particular, Dr Kim insisted that most recipients of pacemakers are not "dependent" on them in the sense that there would be a risk of death if the device failed. He recognized that no accepted definition of pacemaker dependency exists.

36 Dr Kim also emphasised the uniqueness of a determination of whether it was desirable to replace potentially malfunctioning pacemakers in any particular non-dependent patient, and the relevance of the individual characteristics and medical history of each patient. In his opinion, relatively few patients with a recalled pacemaker require premature explantation of the device.

37 Dr Kim also dealt at some length with the factors that may bear on a cardiologist's decision to recommend explantation and the risks that would be associated with the operation. He stressed, again, the need for any recommendations or advice of the attending physician to be made on a patient by patient basis.

38 In a second affidavit Dr Kim commented further on the concept of pacemaker dependency. Using his definition of "true pacemaker dependency", he estimated that only ten to fifteen per cent of his patients would qualify. He acknowledged the possibility of a broader definition that would include persons who experience severe symptoms, including loss of consciousness, when a pacemaker is turned off. In his experience no more than 25 % of the North American pacemaker population would fall within the expanded definition.

(b) *Dr Albert Drukeinis.*

39 Dr Drukeinis has been in private practice as a psychiatrist for more than 30 years. During part of that time he was Chief of Psychiatry at a hospital in New Hampshire and was an adjunct associate professor of psychiatry at Dartmouth Medical School. He deposed that he has performed 3,000 clinical and forensic evaluations of patients who have claimed mental and emotional harm as a result of stressful life events, and that he has lectured widely on the issue of emotional damages in litigation.

40 On the basis of his understanding of Canadian law - as set out in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) - he offered his opinion that "evidence and conclusions concerning emotional damage cannot be offered to a court without expert psychiatric evidence".

41 In support of his opinion, he emphasised the complexity of the questions of causation that may be involved and how the inquiry requires an exploration of a claimant's entire life history. A battery of psychological tests may, he said, be required to address issues of validity, exaggeration and malingering. In his opinion, the total time required to conduct a forensic psychiatric evaluation would rarely be less than 10 to 12 hours and often it could be many times that number.

(c) *Mr Brooks Berg*

42 Mr Berg described in some detail the manner in which pacemakers operate and how their settings are tailored to the problems and needs of each patient. He described also the four failure modes or trends for which claims are asserted by the plaintiffs and how Guidant dealt with reported incidents of which, he deposed, there were only 13, involving six models, in Canada. He referred to the finite life of any pacemaker and the ultimate need to replace it due to battery depletion.

43 The possibility that any pacemaker will malfunction is, he stated, a known risk of which physicians are advised by Guidant.

44 Mr Berg described the reliability rates attaching to the Guidant pacemakers as remarkably high, and device malfunctioning extremely rare, due to Guidant's demonstrated continuing corporate-wide commitment to - and the enormous efforts it has made to ensure -high standards of engineering, design, manufacturing and monitoring.

45 On the third day of the hearing an issue was raised with respect to the correct interpretation of a chart provided by Mr Berg that purported to summarise details of devices implanted in Canada that fell within the models identified in the statement of

claim. In particular, there was an issue whether any devices that fell within an advisory were implanted subsequently. Defendants' counsel had stated more than once that this had not occurred.

46 The hearing was adjourned and, on its resumption, a further affidavit of Mr Berg was filed that contained an exhibit of 730 pages that purports to identify by serial number each of the 28,443 pacemakers implanted in Canada. Details of the date of implantation and of explantation (if this occurred) and whether or not it was subject to an advisory were provided.

47 In Mr Berg's cross examination on this affidavit it was disclosed that more than 400 pacemakers had been implanted after one of the defects - though not its cause - had been identified by Guidant in the advisory of September 22, 2005, and that 14 pacemakers had been implanted by hospitals in Canada after they had been identified in a subsequent update in December of that year.

(d) *Ms Lisa Becker*

48 Ms Becker has been Director of Regulatory Affairs at Guidant since October, 2006. In that capacity she has had responsibility for various matters involving Health Canada and the FDA including regulatory submissions in respect of defibrillators and pacemakers. Internally, she has the responsibility to ensure that the products comply with Health Canada and FDA requirements and that proper documentation has been provided to the regulatory bodies.

49 Her affidavit was directed at the requirements of the Medical Device Regulations made pursuant to the *Food and Drugs Act*. In her opinion, the question whether Guidant violated any of such requirements, including those relating to mandatory problem reporting, must be analysed separately for each device model.

50 I have not found Ms Becker's opinions in her affidavit to be helpful. The plaintiffs do not have to prove that there was a breach of reporting requirements on a model by model basis. Their claims are based, in part, on an alleged failure to report in a comprehensive and timely manner the defects or trends particularised in the statement of claim.

51 Each of the relevant advisories and regulatory recalls deals with numerous models together, and I am not persuaded that the exhaustive examination of the investigations into 80 (or 51) models separately would be required if the plaintiffs are to prove their case. Nor am I satisfied that Ms Becker's opinions of what will be necessary for this purpose are admissible as evidence.

(e) *Mr Jerome Morse*

52 Mr Morse is an experienced legal practitioner who has conducted a civil litigation practice since his call to the Bar in 1981. He was asked to provide an opinion as an expert witness on the procedural and evidentiary requirements for the preparation and conduct of individual trials in product liability, medical malpractice and personal injury cases including those brought against medical device manufacturers that raise issues of causation, harm and damages.

53 The gist of Mr Morse's affidavit was that the litigation plan proposed by the plaintiffs does not contemplate, or provide for, the necessary procedural protections for the defendants in connection with substantial legal issues of causation and damages that may remain after a trial of common issues.

54 Plaintiffs' counsel objected to the admissibility of Mr Morse's evidence and, in my opinion, they were correct in so doing. Quite apart from Mr Morse's disclaimer in cross-examination of an intention to suggest that his opinions reflected any expertise in class actions, his evidence addresses the very issues that this court must decide under section 5 (1) (e) of the CPA, and that the trial judge may have to consider after a trial of common issues.

55 In my opinion, the views of legal practitioners, however eminent, on the requirements of section 5 (1) (e) - or on any of the other requirements for certification for that matter - are not admissible as evidence to be considered in arriving at a decision. That is not, of course, to suggest that Mr Morse's opinions are not of interest, or that they would be unworthy of careful consideration outside the courtroom. In this motion, however, they have no more weight, status or authority than any opinions offered by counsel in the course of the hearing.

### **3. Comments on the Evidence**

56 It is a trite observation that, in this jurisdiction, decisions on certification most commonly determine the outcome of a proceeding commenced under the CPA. A consequence is that the certification motion that was intended to be no more than a preliminary screening process at a very early stage of the litigation is very often strenuously contested. The requirement that the motion be heard within 90 days of the close of pleadings has become a virtual dead letter.

57 In cases involving products liability, it is almost the invariable practice for defendants to file evidence - including affidavits of experts - for the purpose of demonstrating that the statutory requirements in section 5 of the CPA are not satisfied. Very often defendants' counsel will submit, and sometimes they have been able to establish, that the necessary connection exists notwithstanding the direct bearing that the evidence may have on the merits of the claims asserted on behalf of the class. In other cases, attempts to influence decisions on certification by evidence going to the merits have been less successful. This case may well represent the high water mark of such attempts.

58 As in other cases involving products liability, a great deal of the evidence was directly relevant to the merits of the plaintiffs' claims and the resolution of the common issues they have proposed for trial. Some of this was useful and required in order to provide the court with the necessary background to any determination of the requirements for certification. It is, however, one thing to admit the evidence for this limited purpose and quite another to permit its uncontrolled use in determining whether the statutory requirements are satisfied.

59 While plaintiffs' counsel were careful not to overstep the line in the presentation of their case in their original factum, a large part of the hearing involved the submissions of defendants' counsel on evidence that goes directly to the merits, and that, at this stage of the proceeding, is entirely within their own specialised knowledge. Their attempted reliance on this evidence raises quite fundamental questions about the requirements of proof and the function of the court at this stage of the proceeding.

60 The inevitable tension between evidence that is admissible as relevant to the certification requirements, and that which is inadmissible as evidence of the merits, was addressed in *Hollick v. Metropolitan Toronto (Municipality)* [2001 CarswellOnt 3577] (S.C.C.)] (at paras 19-26) where it was insisted that the merits are irrelevant and that, in discharging the evidentiary burden with respect to the statutory conditions for certification -other than that in section 5 (1) (a) which is to be decided solely on the pleading - a plaintiff would be required to satisfy only a minimum standard - "some basis in fact".

61 The general discussion of the relevance and admissibility of evidence in *Hollick* was made in the context of the existence of class members' claims that raise common issues and it was unnecessary for the court to explore the implications of its affirmation of the minimum standard. Read literally, and without qualification, the reasons of the learned Chief Justice might suggest that all issues of fact that relate to the requirements for certification are to be decided in accordance with that standard and not in accordance with the ordinary civil standard of a balance of probabilities. Thus, in finding that a class proceeding would not be the preferable procedure on the facts of the case, the Chief Justice stated that this was so "[e]ven on the generous approach advocated above" (para 36).

62 While without further guidance, I would be reluctant to accept that no questions of fact that affect the statutory requirements are to be decided in accordance with a standard less onerous than the usual civil standard - for example, facts that would determine whether a proposed representative plaintiff has an interest in conflict with those of class members - I believe that, consistently with the analysis in *Hollick*, I must accept that the standard is less strict in connection with - at least - the requirement that there is a class of persons whose claims raise common issues.

63 The justification for such an approach is illustrated by the facts of this case where, for the purpose of rebutting the case for certification, the defendants have filed a mass of evidence of facts relating to the pacemakers, the problems with them and the patients in whom they were implanted. This evidence, which includes the 730 pages that are said to provide details of the implantation of 51 different models of pacemakers in each of 28,443 patients in Canada, is at this stage uniquely within the knowledge of the defendants. The plaintiffs do not accept that this evidence is necessarily reliable but, as much of it was not

challenged on cross-examination by plaintiffs' counsel - and no motions were made with respect to numerous refusals - it was submitted by defendants' counsel that the evidence must be accepted as undisputed.

64 I do not accept that, at the certification stage, this is a legitimate approach. Quite apart from the fact that much of the detailed evidence relating to the implants was introduced, and admitted, for a limited purpose during the hearing of the motion, I do not consider that it was intended, or that it would be reasonable, to require the plaintiffs to embark on the inquiries and investigations necessary to test the methodology and grounds on which the defendants' numerous and unqualified assertions of fact were based. This would be the function of discoveries that will normally be conducted after certification has been granted and the descriptions of the class and the common issues have been ascertained in preparation for a trial of common issues or, in an appropriate case, a motion for summary judgment.

65 It may be that, after discoveries have been completed and the case proceeds towards trial, particular assertions of facts on which the defendants rely will ultimately be accepted by the plaintiffs. It may then, for example, be possible to narrow the definition of the class. At this stage of the proceeding, however, the plaintiffs are, in my opinion, entitled to treat as in issue facts relating to the defendants' conduct that are exclusively within their knowledge and may bear directly on the resolution of the claims against them. Such an approach is, I believe, necessary to reconcile the rule that certification motions are not tests of the merits of a proceeding with the undoubted fact that evidence that bears on the merits can also be relevant to requirements for certification such as the existence of a class with claims that raise common issues, and the manageability of the litigation.

66 A recurring theme in the defendants' submissions was that the prevailing approach to certification in this jurisdiction has departed from the legislative intention embodied in section 5 (1) of the CPA. I was told that, rather than acting as a gatekeeper, the courts have been holding the gate open and have "stumbled into a black hole".

67 It was repeatedly submitted by defendants' counsel that decisions certifying proceedings must have an "air of reality". To the extent that this means that the statutory requirements must be read and applied in the light of the purposes and objectives of the legislation, it is a truism. To the extent, however, that references to an air of reality are intended to introduce a preliminary merits test - disguised or otherwise - they are inconsistent with the analysis in *Hollick* and the significance that McLachlin C.J. attributed to the rejection of the views of the Ontario Law Reform Commission. In its report released in 1982, the Commission was firmly of the opinion that a plaintiff seeking certification should have the burden of establishing that the claims advanced have "substantive adequacy" and apparent validity. In the unanimous opinion of the members of the commission, this would be required in order to eliminate the potential use of the class action procedure to blackmail defendants into agreeing to settle unmeritorious claims. The possibility that such claims could be excluded by a requirement that the pleading disclosed a cause of action was categorically rejected.

68 The legislative history was relied on in *Hollick* as justifying the very weak evidential burden of "some basis in fact" that was held to apply to each of the statutory requirements for certification, other than that relating to the disclosure of a cause of action. It must, I believe, follow logically that, although a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter. For this reason, the court has generally declined to choose between conflicting opinions of qualified experts on the requirement of commonality of issues, or on the existence of the claims of class members that are said to raise such issues. Similarly, on this motion, I do not believe I would be obligated to choose between the conflicting opinions of Dr Tyers and Dr Kim on the important questions of pacemaker dependency, and the risks to which the putative class members were exposed, even if - which I doubt - such opinions had any significant bearing on the requirements for certification.

69 I am also not concerned with whether the statutory requirements are adequate to exclude the kind of legalised blackmail that was contemplated by the Law Reform Commission. The analysis in *Hollick* must be applied and the plaintiff must not be subjected to any more stringent an evidential burden than that affirmed by the Chief Justice. I believe it follows, also, that in determining the weight to be given to the evidence in rebuttal filed by the defendants, I must take into account that it is not the function of the court at this preliminary stage of the proceeding to decide factual issues - and, for such purpose, to weigh, and

draw inferences from, the evidence - in the same manner, and to the same extent, as when the court exercises its function as a trier of fact in the exercise of its ordinary jurisdiction.

70 Most fundamentally, the purpose of the certification stage of a class proceeding is to determine whether the requirements in section 5 (1) of the CPA are satisfied and, if so, to define the issues to be tried. It would be a reversal of the process to permit certification to be determined by deciding issues that are likely to be front and centre at a trial.

71 The use that defendants' counsel sought to make of evidence on this motion was not consistent with the above principles. The fact that productions and examinations for discovery do not occur prior to certification is consistent with the legislative intention that the certification stage is not the time for facts that bear on the merits of a plaintiff's claims to be determined. It would be inconsistent with the purpose of discovery - and manifestly unfair to plaintiffs - to deny certification on the basis of findings of fact that may be in dispute and that would likely be the subject of discoveries prior to trial. To a very large extent, this is what defendants' counsel urged me to do in this case.

72 There are, in my opinion, two further comments that arise out of the defendants' reliance on evidence in this case. The first is that the court is concerned only with the claims asserted by the plaintiffs on behalf of the class. It is not concerned with other claims that defendants' counsel believe the plaintiff should have made, or would, for the purpose of rebuttal, have preferred them to have made. I mention this obvious point because, at different times during the hearing, it was evident that plaintiffs' counsel had difficulty in recognizing the case to which defendants' counsel were responding.

73 The second point is, I believe, the inevitable consequence of the "some basis in fact" approach adopted in *Hollick* to the existence of a rational connection between the class and the common issues. As it is not necessary for the plaintiffs to establish on a balance of probabilities that each class member will have an interest in the resolution of the common issues, there must always be the possibility that the judge at trial will find that this is not the case.

74 In *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.), for example, the decision of the Court of Appeal to certify the proceeding was premised on its acceptance of - as a common issue - the question whether published reports of nickel contamination from the defendant's facility had a depressing effect on property values in the geographical area in which the class members resided. The Court of Appeal's acceptance of this common issue would not preclude a finding at trial, on the basis of a full evidential record, that some property values in the area were depressed and others were not. Such a finding would, in effect, deny that the issue had commonality - that success for one class member would mean success for all: *Western Canadian Shopping Centres Inc. v. Dutton* [2001 CarswellAlta 884 (S.C.C.)], para 40. The court would then, it seems, have the option of decertifying the proceeding or, if the facts permitted, adopting a nuanced approach analogous to that approved by the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.), at para 32, by amending the certification order, dividing the class into subclasses, and answering the common issues separately for each subclass.

75 The relevance of the above comments to the evidence presented on behalf of the defendants in this case can be seen by the assertions of fact repeatedly made by defendants' counsel on the basis of evidence that plaintiffs' counsel could not reasonably be expected, prior to discoveries, to be in a position to assess for accuracy, reliability or completeness. These include:

1. 28,443 patients were implanted with Guidant pacemakers in Canada;
2. Only 51 models were involved with those implants;
3. Only 14,791 of the devices implanted were subject to advisories from Guidant;
4. Only 3,497 of the 14,791 were subject to Class 1 recalls;
5. Only 3,559 (or possibly 1337) pacemakers were explanted after an advisory relating to them;
6. Only 13 incidents relating to the alleged defects were reported to Guidant from Canada;

7. Seventy-five per cent to 90 per cent of class members were not dependent on pacemakers to the extent that they would be harmed if the device failed to function;
8. All Guidant pacemakers had a very low failure rate;
9. Guidant was highly successful in meeting, or surpassing, its predicted reliability rates;
10. At all relevant times Guidant had a "robust" system of reporting performance problems and possible defects;
11. Guidant would issue advisories whenever they had knowledge of a departure from the predicted reliability rate, or if this would meaningfully improve patient welfare;
12. Guidant was subject to a rigorous regulatory system; and
13. No pacemakers subject to an advisory were implanted after the advisory was issued.

76 While each of the alleged facts was ostensibly relied on in connection with one or more of the statutory requirements for certification, a number of them had little, if any, relevance for this purpose and some had, in my opinion, none at all. An underlying theme - in my opinion, the predominant underlying theme - of the defendant's case against certification was that the alleged facts demonstrated that the claims asserted on behalf of the class members were without merit. The action was, in counsel's words, "misguided and weak". This theme was not well disguised by an appeal to the supposed implied overriding requirement that the plaintiffs' case for certification must possess an "air of reality".

77 Nor is it a legitimate response to the plaintiffs' motion to certify the proceeding to rely on the strength of the defendants' case on the merits to demonstrate that a trial of the common issues would be - as defendants' counsel contended - "a monster of complexity" and "the trial of the century" extending over three years, or more than five years, according to the estimates provided by defendants' counsel at different times during the hearing.

78 The response of plaintiffs' counsel was that, until the defendants' productions have been received, and examinations for discovery of the defendants have been conducted, the plaintiffs could not reasonably be expected to assess the reliability and comprehensiveness of the evidence relied on for the above assertions. In their counsel's submission, the required exercise could not properly, or reasonably, be undertaken by way of a cross-examination of the affidavits delivered on this motion. I accept this submission.

79 On virtually the only occasion when plaintiffs' counsel considered they were in a position to challenge the reliability of the evidence of any of the above assertions of fact, the challenge had, in my opinion, some merit. When, in the course of the hearing, plaintiffs' counsel challenged the confidently repeated assertion that no devices had been implanted after they had been referred to in an advisory, the defendants' response was to file the additional affidavit that exhibited the 730 page list of 28,443 implanted devices in Canada. Leave was granted to plaintiffs' counsel to cross-examine the deponent on this matter. As I have indicated earlier in these reasons, this revealed not only that 14 pacemakers had been implanted after an advisory that identified them as potentially defective, but that more than 400 of the pacemakers had been implanted after the problem and the model numbers had been identified in the advisory of September 22, 2005.

80 Defendants' counsel, moreover, subsequently attempted to rely on the contents of the exhibit for other purposes notwithstanding that the contents had not been previously disclosed -although apparently relied on by the deponent when preparing his first affidavit - and notwithstanding that the leave to cross-examine had been limited to the matter of the post-advisory implants.

81 As has been insisted on many prior occasions, the certification motion is essentially procedural in nature. There is, of course, nothing to prevent the defendants from making full disclosure of facts that will assist in narrowing the class, or formulating the issues. Just as obviously, the proceedings are adversarial and they cannot be compelled to do this. If, however, they choose to rely on assertions of facts peculiarly within their own knowledge, and which cannot properly and adequately

be tested on the motion, they cannot, in my opinion, insist that their evidence must be accepted as conclusive. The court must decide the weight that is to be given to it in the light of all the evidence and with strict attention to, and its focus on, the claims actually advanced by the plaintiffs on behalf of the class, and the standard of proof applicable to them.

82 To the limited extent that any of the above factual assertions are relevant to one or others of the requirements for certification, I will comment on them in connection with the claims advanced on behalf of the class, and together with the evidence in support of such claims. In doing this, I intend to have regard to the underlying principle that motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would fall to be determined at a trial when the merits of the claims of class members are in issue. The starting point and the emphasis at this stage of the proceedings must be on the claims as formulated and advanced by the plaintiffs.

## Certification

83 Each of the five conditions in section 5 (1) of the CPA is a prerequisite for certification.

### 1. Section 5 (1) (a) - disclosure of a cause of action

84 In the statement of claim the plaintiffs claim declarations and damages for the torts of negligence and conspiracy. In addition, they seek punitive damages and the right to elect a disgorgement of revenues under the principles governing waiver of tort.

85 Although the defendants have reserved the right to request a reconsideration by appellate courts of the principles that have previously been approved and applied in this jurisdiction for the purposes of section 5 (1) (a), they have conceded that such an exercise cannot properly be undertaken on this motion in this court. They have also accepted that, in view of the close similarities between the statement of claim in this case and the pleading in *LeFrancois*, my rejection of their submissions in that case would apply equally to those they would seek to rely on in the present motion. Counsel made no additional submissions on the requirement in section 5 (1) (a). They refiled the factum they had delivered in *LeFrancois* and reserved their right to rely on it in the event of an appeal.

86 In these circumstances, I confirm my understanding that, for the purposes of section 5 (1) (a), I am constrained by the previous decisions - including *Hollick* and *Cloud v. Canada (Attorney General)* [[2004] O.J. No. 4924 (Ont. C.A.)] at para 41 - to apply the plain and obvious test in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) on the assumption that the facts pleaded by the plaintiffs will be proven. The submission of defendants' counsel that this is an inappropriate test for the purpose of the screening, or gatekeeping, function of the court at the certification stage is supported by the views of the Ontario Law Reform Commission, at page 311 of its Report - as well as the reasoning in *Hoffman v. Monsanto Canada Inc.*, [2007] 6 W.W.R. 387 (Sask. C.A.). However, as noted by McLachlin C.J. in *Hollick*, at para 16, the views of the Ontario Law Reform Commission with respect to the need for a preliminary merits test were not accepted by the drafters of the CPA.

87 The statement of claim contains numerous particulars of the defendants' alleged negligence. Essentially, it is pleaded that Guidant designed, manufactured, sold and distributed the pacemakers for implantation in class members knowing that they were subject to defects, and failing to disclose this in a timely manner to class members, the FDA and Health Canada.

88 It is alleged that, by reason of these negligent acts and omissions, class members suffered damages and losses that include personal injuries and the pain suffered, and risks incurred, from medical procedures for implantation of the defective devices, explantation, and implantation of replacements. In addition, damages are claimed for "emotional distress including mental distress, anger, depression and anxiety".

89 In connection with the claim for conspiracy it is pleaded, among other things, that the defendants conspired to conceal the defects in the products they were selling and to perform the other particularised acts of negligence, and that, in so doing, they breached provisions of the *Food and Drugs Act*, the Medical Device Regulations and US legislation and medical device reporting regulations. This conspiracy is alleged to have been directed towards the plaintiffs and class members with knowledge that they would suffer injuries and losses.

90 The plaintiffs reservation of a right to elect the restitutionary remedy known as waiver of tort is based essentially on the same conduct pleaded in connection with the claims in negligence, and the profits received by the defendants prior to the recalls.

91 The claim for punitive damages rests on an allegation that the defendants' wrongful conduct as particularised in the pleading was deliberate, callous and sufficiently egregious to support it.

92 Finally, the derivative claims of the family class are based, generally, on expenses incurred, loss of income, and compensation for loss of support, guidance, care and companionship, they might otherwise have received from members of the primary class.

93 In *LeFrancois*, the sufficiency of the above allegations was challenged on a number of grounds. In particular, it was submitted that most of the categories of harm pleaded were not compensable in damages, that the claim for conspiracy was barred by the doctrine of merger, and that the restitutionary remedy was not available for negligent misconduct. As I have indicated, it was the position of defendants' counsel in this case that, in view of the close similarity of the pleading to that in *LeFrancois*, it was not open to me to accept the submissions I had rejected in that case. Whether or not that is strictly correct, I am of the opinion that, for essentially the same reasons as those in the earlier case, the causes of action on which the plaintiffs rely are adequately disclosed in the pleading. The claims in the two cases are grounded in essentially the same allegations of systemic corporate misconduct and I do not believe it would serve any useful purpose to inflate these lengthy reasons further by repeating the analysis in *LeFrancois*.

## **2. Section 5 (1) (b) - the class**

94 The statement of claim defines the primary class that the plaintiffs seek to represent as:

All persons who were implanted in Canada with one or more of [the 80 models] of pacemakers.

95 In addition there is the family class with derivative claims under the *Family Law Act*, R.S.O. 1990, c. F. 3 or under equivalent, or comparable, legislation in other provinces.

96 The definition provides objective criteria and it is not suggested that there should be any difficulty in identifying the members of the class. The defendants claim that they can do this and, in the evidence filed on the fourth day of the hearing, they provided details of the dates and locations in Canada in which each of the alleged 28,443 members was implanted, and they have indicated whether each such device was the subject of one of the advisories. As the class is limited to persons who were implanted in Canada, the defendants evidence that only 51 of the 80 models were sold in this country has no bearing on the adequacy of the class description.

97 In the submission of defendants' counsel, the class proposed by the plaintiffs should be rejected on the ground that there was no evidence that anyone other than the plaintiffs has a genuine interest in trying the merits of the claims asserted by them and, also, because the class definition is "grossly broad and over-inclusive".

98 In some cases, judges have insisted that as a requirement for certification the court must be satisfied that the plaintiffs are not the only members of the class who wish to enforce the claims that the plaintiffs seek to assert on their behalf. In *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée*, [2006] O.J. No. 4625 (Ont. S.C.J.), at para 55, MacDougall J. stated:

In my view, before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class-action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

99 In other cases, courts have not insisted on evidence of a group interest in the enforcement of the claims, and I do not understand the above statement in *Poulin* to require evidence in all cases that the plaintiffs are not the only persons interested in advancing claims: *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.) is an example of a case in which

a proceeding was certified notwithstanding the absence of any evidence of interest by putative class members other than the plaintiffs. In such cases, it seems that the court may be prepared to presume from the nature of the claims and the circumstances of a particular case that the plaintiffs are likely to have the support of other class members. Such a presumption does not seem unreasonable where, as here, the claims are asserted on behalf of persons who allegedly suffered physical or psychological harm from the defendants' negligent manufacture and marketing of defective medical implants.

100 As a general rule, the question whether such evidence should be required is, I believe, best considered along with the other factors that may bear on the exercise of the court's discretion under section 5 (1) (d). In the present case, however, I note that, quite apart from the existence of the pending actions in British Columbia and Quebec - in one of which defendants' counsel have been retained - and the multi-district litigation involving the same Guidant pacemakers in the United States - plaintiffs' counsel informed me that they have been in contact with a number of other putative class members who expressed an interest in the proceeding. If the defendants are not willing to accept that assurance, I would give leave to the plaintiffs to deliver an affidavit of one of their counsel for the purpose. Each of such persons would be similarly situated to Mr Lambert and - subject to the arguments of defendants' counsel on over-inclusiveness - would have at least a colourable claim that has a rational connection with the proposed common issues that will be considered below.

101 The requirement that a class must not be over-inclusive has its foundation in the following passage from the reasons of McLachlin C.J. in *Hollick*, at para 21:

The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad - that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended ... (italics in original)

102 As the passage indicates, the prohibition is not against over-inclusive class definitions *per se* but against those that are unnecessarily over-inclusive in the sense that any attempt to limit them would arbitrarily exclude some persons who have the same interest as other class members in a resolution of the common issues. It follows that, as classes cannot be limited to persons who suffered harm or damages, class descriptions in mass tort cases - and, in particular, cases involving claims for negligence - will almost inevitably be over-inclusive. The inevitability that acceptable class definitions will be over-inclusive was recognized by Winkler J. (now Winkler C.J.O.) in *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.) and *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. (6th) 129 (Ont. S.C.J.).

103 In *Frohlinger*, at para 23, the learned judge stated:

Merits-based definitions are self-evident. Over-inclusive class definitions on the other hand are more elusive. It cannot be the case, as is evident here from the fact that approximately 150,000 claims had been filed as of the date of the hearing, that a class is over-inclusive simply by reason of its numerical size. Similarly, a proper class definition does not include only those persons whose claims will be successful. Rather, as the Chief Justice states in *Hollick*, the essence of a proper class definition goes to the "rational connection between the class as defined and of the asserted common issues". It is neither expressed or implied in that statement that a class "colourable" claim must be one that will ultimately be successful. Indeed, it is the purpose of a class action to resolve claims through the utilization of a common issue phase and an individual issue determination, if necessary

104 The following passage in *Attis*, at para 52, is to the same effect:

The fact that some of the individual class members may not have suffered harm, or not yet suffered harm, does not alter the fact that they were exposed to an allegedly defective device. While any particular class member's claim may prove to be unsuccessful, one purpose of class-action litigation is to achieve judicial economy by resolving all potential claims.

In consideration of an allegation that a given product is unsafe for use, it is difficult to accept the proposition that all users would not have some interest in the outcome of litigation. Conversely, it is equally difficult to accept a proposition that

the defendants subject to the allegation would not want to ensure that all potential claims are resolved and all potential claimants bound by the result, including those claims that may fail.

105 The criticism levelled by defendants' counsel in terms of the over-inclusiveness of the class definition in this case is not consistent with the above analysis. In paragraph 149 of their factum, defendants' counsel stated:

The only class members who are likely to have a genuine claim for compensation against the defendants are individuals (1) who are pacemaker-dependent, (2) who were implanted with one of the 14,791 devices subject to one of the four trends in respect of which an advisory was sent, and (3) who had their devices explanted because of the advisory.

106 Counsel accepted that any formulation of a class definition in terms of such criteria would, like definitions limited to those who suffer harm, offend the principle that prohibits merits-based criteria. At the same time, however, counsel assert that the result is an unacceptably over-inclusive class definition as, on the evidence they have provided, the number of individuals who are likely to satisfy the second and third of the criteria that cannot be included in the definition would be no more than 3,559. Thus, having excluded merits-based criteria from the class definition, they then asked the court to reject the definition on the basis of those criteria. The short answer is that the criteria raise issues that go directly to the merits of the claims asserted on behalf of the class and it is not the function of the court at the certification stage to decide such questions. Merits-based criteria are rejected precisely because they raise issues that are to be resolved either at a trial of common issues or, subsequently, when individual issues are determined.

107 Even if defendants' counsel were correct in their estimate of only 3,559 persons with "potentially genuine claims" this would not necessarily be inimical to the plaintiffs' case for certification. Apart from anything else, it would detract significantly from the force of counsel's submissions that manageable procedures for resolving individual issues could not be devised.

108 I do not understand it to be disputed that the defects occurred in the 80 models of Guidant pacemakers identified by the plaintiffs, or that devices with these defects were implanted in 28,443 patients in Canada. At the hearing, defendants' counsel expanded their submissions on the over-inclusiveness of the class definition so as to reduce even further the number of members with colourable claims. Their reasoning was as follows:

- (1) only approximately 14,791 of the patients received pacemakers that were subject to an advisory;
- (2) only 3,497 of these had been subject to a class I recall and the remaining 11,294 that were subject to a class II recall could not give rise to valid claims; and
- (3) of the 3,497 patients, more than two thirds would not have been pacemaker-dependent and at risk of harm if their devices malfunctioned because of the Class 1 defect.

109 The first of these submissions ignores the fact that the claims asserted on behalf of the class are, again, not premised on the accuracy of Guidant's advisories and, like the second and third of the above submissions, this may be in issue at a trial. Plaintiffs' counsel objected, moreover, that their clients should not be compelled prior to discoveries to investigate, challenge and rebut the evidence provided by the defendants of such facts that are within their own special knowledge and are not otherwise available to the plaintiffs. I believe this objection is well founded.

110 It is not open to a defendant to rebut evidence that indicates some basis in fact for the existence of colourable claims by attempting to prove on a balance of probabilities that the claims will not succeed at trial. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: *Hollick*, at para 16. The line between evidence that demonstrates the absence of any basis of fact for the claims of class members, and that which amounts to the kind of attack on the validity of such claims that is properly left to a trial, may be difficult to draw but, in my opinion, it has been crossed by defendants' counsel in this case.

111 In order to reduce the class without arbitrarily excluding persons interested in the common issues, it would be necessary to accept at least the uncorroborated evidence of Guidant's proponents that the only possibly defective devices in the models referred

to in the FDR recalls were those Guidant has identified by their serial numbers in lists that were said to have accompanied the advisories. In the submission of plaintiffs' counsel they should not be compelled to do this at the certification stage, and should be permitted, at least provisionally, to define the class by reference to the models identified in the FDA recalls. At this stage, Guidant's assertions that only particular subsets of the models were affected are not supported by any evidence of the methodology employed, or anything else that would enable the plaintiffs to verify, or challenge, their accuracy. Unless the parties can reach agreement on them, these are pre-eminently questions to be tried and not questions to be disposed of on this motion and on which certification should depend. Sections 8 and 10 of the CPA contemplate that certification orders may need to be amended, and it may well be found possible to reduce the size of the class as the litigation proceeds towards trial.

112 The submissions of defendants' counsel were premised on the complete reliability of the contents of the advisories. A decision to certify the proceeding would, I was told, "drive a dagger through the heart" of the advisory system and, indeed, the medical device manufacturing industry. However, the conduct of Guidant with respect to the advisories is very much in issue in the litigation. The advisories were based on Guidant's investigations of reported incidents of malfunctioning pacemakers and, in their pleading, the plaintiffs have challenged the adequacy of the investigations and the reasonableness of the conclusions drawn from them, as well as alleging that Guidant failed to report the latter in a fair, objective and unbiased manner. It was, moreover, accepted by Mr Berg, as well as supported by the evidence of Dr Tyers, that not all incidents of malfunctioning pacemakers were reported. It was Dr Tyers' evidence that a majority of failed devices were never returned to Guidant for examination and that, in consequence, the failure rates claimed by Guidant grossly underestimated the number of actual failures and injuries experienced. Guidant's reliance on the existence of only 13 known incidents of malfunctioning devices in Canada - and its counsel's repeated references to these - must also be viewed in the light of the undisputed evidence of under-reporting.

113 Given that damages are claimed for mental distress, depression and anxiety, and are not limited to physical injury caused by the defective pacemakers, counsel also referred to the fact that in Guidant's advisories, and the notices of recall provided by the regulatory authorities and health care facilities, reference was generally made only to the affected models and the serial numbers of the subset that are said to be affected were not set out. 54,000 Guidant pacemakers were covered by the models referred to in a January 21, 2006 advisory update in which Guidant stated that it had not been able to identify the serial numbers of a subset of affected devices subject to the class I recall by the FDA.

114 The submission of defendants' counsel on the suggested over-inclusiveness of the class definition is consistent with much of their detailed response to the motion in that they: either beg questions that bear on the merits, or ask the court to decide them; either ignore the plaintiffs' theory of the case, or attribute to - or seek to impose upon - them their own theory; and they ignore the very low standard of proof - some basis in fact - required to discharge the evidential burden on the plaintiffs with respect to the existence of the class. In particular, they attempt to exclude all claims for damages of persons other than those who had their devices explanted because of one of the advisories issued by Guidant, and to tie the plaintiffs' case to the contents of the advisories. The plaintiffs are not obligated at this stage to accept the timeliness of the advisories, or the adequacy or accuracy of their contents. These matters are aspects of the defendants' overall conduct on which the claims asserted on behalf of the class are based.

115 Each of the three merits-based criteria identified, and quite properly rejected as class criteria, by the defendants - and then relied on by them to establish over-inclusiveness - is at present very much in issue in this proceeding. At this stage, the question is whether the class members have colourable claims in the sense referred to by McLachlin C.J. in *Hollick* and discussed by Winkler J. in *Frohlinger*. In order to establish the necessary basis of fact for an affirmative answer, the plaintiffs have provided the expert evidence of Dr Tyers. This is, in my judgment more than sufficient for the purpose and it is not the function of a court on this procedural motion to resolve the substantive conflicts and inconsistencies between his evidence and that of the equally well-qualified Dr Kim, and the evidence of the defendants' employee, Mr Berg.

116 On the basis of the record, I am not prepared to find that the class definition is *unnecessarily* over-inclusive at this stage of the proceeding. Although in the course of their submissions counsel suggested that the information in the 730 page summary would have permitted the plaintiffs to devise a more narrow - and, presumably, acceptable - class description, they did not indicate how this might be achieved. In declining to do this, counsel stated that it was not their obligation to assist the plaintiffs.

As I have indicated, however, I do not consider that the plaintiffs are compelled on this motion to accept as incontrovertible fact the contents of the summary.

117 Nor am I prepared to grant the request of defendants' counsel for an order directing members of the class who wish to make claims to identify themselves prior to a trial of common issues. As this would, in effect, convert the opting-out procedure under the CPA into an opting-in process, I do not believe I have jurisdiction to make such an order under section 12 of the CPA, or otherwise. Sections 24 and 25 of the statute contemplate that claims to share in awards of damages are to be made after a trial of common issues and I see no reason why I should require earlier decisions to participate to be made, even if I had the authority to do this.

118 My acceptance of the class definition proposed by the plaintiffs does not preclude the possibility that it might be amended following productions and the examinations for discovery of the defendants. Plaintiffs' counsel were not averse to doing this. What they object to is being forced to accept the accuracy and comprehensiveness of the contents of the advisories and the detailed summary at this stage of the proceeding.

### **3. Section 5 (1) (C) - Common Issues**

119 The plaintiffs propose the following common issues for trial:

- (1) Did the defendants, or any of them owe a duty of care to the class in respect of the design, development, testing, manufacturing, licensing, assembling, distribution and sale of the pacemakers?
- (2) If so, did the defendants, or any of them, breach such duty? If so, what was the nature of the breach?
- (3) Did the defendants, or any of them, owe a duty to the class to warn of the potential defects associated with the pacemakers, and if so, when did such duty arise?
- (4) If so, did the defendants, or any of them, fail to warn the class of the existence of the potential defects associated with the pacemakers?
- (5) Did the defendants, or any two or more of the defendants, act in combination to conceal information from the class, Health Canada and the FDA relating to the potential defects associated with the pacemakers? If so, was the defendants' conduct unlawful in that it violated the Food and Drugs Act, the medical devices regulations, the Food, Drug, and Cosmetic Act and related medical device reporting legislation and regulations? Should the defendants have known that, in the circumstances, injury to the class was likely to occur as a result of the defendant's actions?
- (6) Can all or part of the class elect to have damages determined through an accounting and disgorgement of the proceeds of the sale of the pacemakers implanted in class members? If so, in what amount and for whose benefit is such accounting to be made? If part, but not all, of the class can elect, which part or parts of the class can elect?
- (7) Should any or all of the defendants pay punitive damages to the class?
- (8) Should any or all of the defendants pay the cost of administering and distributing any recovery? If so, in what amount?
- (9) Should any or all of the defendants be ordered to pay pre-judgment interest? If so, who should pay, and at what annual rate? Should the payment be simple or compound interest? How is the pre-judgment interest to be calculated?

120 The proposed common issues are substantively very similar to those proposed and accepted for the purpose of certification of the claims in respect of Guidant's defibrillators in *LeFrancois*. With the exception of the reference to pacemakers - rather than defibrillators - they are virtually identical both in form as well as substance to the common issues accepted by Hoy J. in *Peter*. A resolution of these issues in favour of the class would not determine whether Guidant is liable for damages for negligence or conspiracy, but it would resolve questions that are central to any finding of liability.

121 Defendants' counsel were, in my opinion, correct in their insistence that the commonality of the issues, and the extent to which their resolution would advance the proceeding, must be decided on the basis of the relevant evidence of the particular facts of this case. *LeFrancois* was, in their submission, clearly distinguishable because of the evidence here that relates to the number of class members, the number of models, and the fact that only subsets of each model were the subject of the alleged defects identified in the advisories. Each model -and, presumably, each subset - was, in counsel's submission, necessarily the product of a separate process of designing, manufacturing, testing and regulatory approval, and each has had its own performance history and post-market surveillance program. The consequential inability to extrapolate a finding with respect to one subset to others of the same model, and from one model to another, was, they submitted, fatal to any finding of commonality.

122 Defendants' counsel submitted, further, that the need to engage in a detailed examination of Guidant's conduct with respect to each of 51 models would make the trial of common issues away a "monster of complexity" and the "trial of the century" that would take three or five years to complete.

123 On the basis of the record before me, I am not prepared to accept these submissions. Only four specific defects have been particularised in the statement of claim and the fact that they have been found in 51 different models - or subsets of models - does not persuade me that the reasonableness of Guidant's conduct with respect to them will necessarily involve the detailed and lengthy inquiries into the history of the development, surveillance or marketing of each model that defendants' counsel assumed would be required. There is evidence that each of the four defects is common to particular models, or subsets, and it is the conduct of the defendants with respect to these common defects that will be in issue. Whether or not a separation of the class into four or more subclasses would be required before, or at, trial, this evidence is, in my judgment, sufficient to satisfy the evidential burden on the plaintiffs on the question of commonality for purposes of certification on this motion.

124 Given the extent to which the facts are, at present, within the sole knowledge of the defendants, it would be idle to speculate about the likely length of a common issues trial and I am not going to deny certification on the basis of the estimates provided by their counsel prior to discoveries. Similar *in terrorem* submissions were made and rejected in *LeFrancois*, at para 76

125 In deference to submissions made by defendants' counsel, I would add the following as a common issue for trial:

Are any of the categories of damages referred to in paragraph 62 of the statement of claim not compensable as such and, if so, which?

**4. Section 5 (1) (d) - the preferable procedure.**

126 Viewed in the light of the three objectives of the CPA, there are strong reasons for preferring the procedure under the statute to the institution of proceedings by class members as individuals.

127 Access to justice will be served in that few class members are likely to be willing to accept the risks and expense of litigating the complex issues of fact and law against these defendants. Behavioural modification is also very much a goal that would likely be achieved by proof of the serious factual allegations on which the claims of class members are based. The third of the statutory objectives - judicial economy - will be achieved by a single trial of the common issues with or without the "monstrous complexity" to which defendants' counsel have referred.

128 The question of judicial economy - and that of preferability in general - must, however, be looked at in the context of the claims as a whole and what will be required for their resolution: *Hollick*, at paras 27 - 30. As McLachlin C.J. noted, at para 29, undue weight is not to be given to "the fact that [section 5 (1) (d)] uses the phrase "resolution of the common issues" rather than "resolution of the class members' claims". For this reason, the plaintiffs are required to demonstrate that the resolution of the common issues will substantially advance the proceeding. If, on the basis of the necessary cost-benefit approach, its significance as a step in the litigation will be overwhelmed by the number and complexity of individual issues that remain, certification should be refused. This has happened in previous decisions in which it has been said that the end of the common issues trial would, in reality, mark the commencement of the litigation rather than its end.

129 Allied to this approach to determining the preferable procedure is the court's insistence in previous cases that the evidence must establish that a class proceeding will be a fair, efficient and manageable method of achieving the goals of the CPA: see, for example, *Caputo v. Imperial Tobacco Ltd.* (2004), 42 B.L.R. (3d) 276 (Ont. S.C.J.), at para 68.

130 The resulting inquiry can, of course, be one of some difficulty for the court to embark upon at the certification stage and, in particular, where the individual issues may be affected by findings made at trial. In the submission of defendants' counsel, the number of class members, and the complexity of the individual issues involved in the claims for damages for negligence and conspiracy - and, in particular, the proof of harm and causation - would make it impossible for the court to devise procedures for their resolution that would be both manageable and fair to the defendants. Methods of disposing of 28,443 claims - each involving a hearing of at least three days - were, it was asserted, far beyond the capacity of the court to implement and supervise. This factor, by itself, was in counsel's submission, sufficient to distinguish the case from the facts of *LeFrancois*.

131 This approach of defendants' counsel to the requirement of preferability does not affect the alternative claim for a disgorgement of revenues. It also either ignores their submissions that only a very small percentage of the class members will have suffered compensable harm, or it assumes that those submissions will be rejected. As I indicated earlier in these reasons, the size of the class I have accepted may be reduced significantly after discoveries have been conducted and plaintiffs' counsel have had an opportunity to test the accuracy, and the reliability, of the defendants' evidence of the number of the allegedly defective pacemakers implanted in Canada, and the likely incidence of compensable harm inflicted upon the recipients. It was no part of the plaintiffs' case for certification that each one of the 28,443 class members will have received a defective device or will have suffered serious physical or psychological harm as a consequence of having done so.

132 There is also the possibility that the class will be further reduced by reason of the trial judge's acceptance of defendants' counsel's submissions on the legitimate heads of compensable damages. Even if all of those claimed are accepted, it does not follow that a large proportion of a class members will be making claims for damages for such serious physical injuries that will require something akin to mini-trials for their determination. Different more summary procedures might well be devised to resolve claims for damages arising solely from the implantation and successful explantation of defective devices.

133 In addition, individual issues will, of course, only have to be determined in respect of class members who make claims pursuant to section 25 of the Act and, again, if the evidence of the defendants is accepted at trial, the number of such persons may not be fatal to manageability.

134 This case is unusual by reason of the possibility of a very over-inclusive class that, by reason of the nature of the evidence on which the defendants sought to rely, cannot fairly be reduced at this stage of the proceeding. It is also unusual in that the position taken by defendants' counsel on the question of preferability is inconsistent with, and contradicts, their reliance on such evidence for the purpose of the other statutory requirements. In determining whether a class proceeding is the preferable procedure and, for such purpose, determining whether there is some basis of fact for an affirmative answer, a court is entitled - and, I believe, must - look at the totality of the evidence and not just that provided on behalf of the plaintiffs. In these circumstances, I am satisfied that there is enough evidence to justify a conclusion that the provisions of section 25 of the Act confer upon the trial judge sufficient powers to fashion, and manage, the resolution of the individual issues. As the goals of the CPA would otherwise be achieved, I find that a class proceeding is the preferable procedure.

##### **5. Section 5 (1) (e) - the representative plaintiffs and the litigation plan**

###### **(a) Representative Plaintiffs**

135 Mr Lambert and Ms Ibbetson are proposed as the representatives of the primary class and the family class respectively. The burden is on each of them to demonstrate that they would fairly and adequately represent the interests of the class. The court must be satisfied that they have the willingness and the ability to do this capably and vigorously. They must understand and accept the responsibilities that will attach to them as class representatives if certification is granted.

136 Most importantly, they are to prosecute the litigation in the interests of the class and not solely in their own interests. Although, for this purpose, they will normally have to place great reliance on their counsel's advice, this must not be allowed to detract from the fundamental principle that it is the clients, and not their lawyers, who are in charge of the litigation and that it is to be conducted in accordance with their instructions. On a motion to certify the proceedings, the intended representatives must satisfy the court that they have the ability - and are prepared -to do this. Such a finding is a precondition to a conclusion that a proposed representative will fairly and adequately represent the interests of the class.

137 In *Hoffman v. Monsanto Canada Inc.*, [2005] 7 W.W.R. 665 (Sask. Q.B.), at para 337, the court stated:

The representative plaintiff under the Class Actions Act has a responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the court for the adequate performance of these obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the court.

138 Although class representatives who are merely puppets of their lawyers will be rejected, class counsel have responsibilities unique to class proceedings. As well as the usual obligation to ensure that their clients are fully informed about the procedural steps required, and to obtain and follow their instructions, they have the responsibility to see that the clients are aware of and accept the obligations that, if certification is granted, will attach to them as representatives of the class. For that reason the competence and experience of class counsel has been considered to be a relevant consideration.

139 The plaintiffs are represented by counsel experienced in class proceedings. I have no doubt that Mr Lambert and Ms Ibbetson are motivated to advance the interests of the class members. By itself, such motivation is not sufficient to satisfy the onus on the plaintiffs and it was submitted by defendants' counsel that neither of them would be a suitable representative. Relying heavily on the answers Mr Lambert gave in cross-examination on his affidavit, defendants' counsel argued that he lacked an adequate understanding, and acceptance, of the responsibilities he would be required to assume. It was submitted also that both he and Ms Ibbetson were unduly partisan and lacked credibility to an extent that neither should be considered to have the complete integrity that the court should require.

140 To a very large extent, the criticism of Mr Lambert's knowledge of, and acceptance, of the responsibilities of a class representative were based on his admission that he did not know of any other members of the class, had not inquired of his counsel about them and had not read any of the affidavits filed on behalf of the defendants. It was also objected that Mr Lambert's understanding of such matters as the nature and function of the advisories and recalls, and the concept of pacemaker dependency, was neither complete nor accurate.

141 Of necessity, the matters on which representative plaintiffs may appropriately defer to, and rely upon, the judgment of their counsel will vary according to the particular facts of each case. In the circumstances of this litigation, I do not attribute great weight to the suggested deficiencies. Mr Lambert's explanation, for example, that he would not have understood much of the evidence of Mr Berg and Dr Kim - that is "what I have lawyers for" - has the appearance of an honest and, in view of the nature of their evidence, by no means a disqualifying admission.

142 Communications with other class members are important but they will become more so after certification is granted. In many, and probably most, class actions, counsel establish a website or at least provide a telephone number so that inquiries from interested persons about the proceeding will go to them and not to the plaintiffs personally. From Mr Lambert's answers in cross-examination, this appears to have been done here. Moreover, although some cases receive considerable publicity prior to the hearing of a certification motion, notice to members of the putative class is not normally required at this stage. In some circumstances, the nature of the claims asserted makes it undesirable to raise expectations and, if certification is granted, close attention must be given to the contents of the notice to be sent to class members. In *Lefrancois*, for example, defendants' counsel have quite properly insisted that the notice of certification should be framed in a manner that will not cause unfounded concerns among recipients of defibrillators who are not at risk. In this respect, the present case is no different.

143 Consistently with their general approach to the motion, the cross-examination of defendants' counsel tended to ignore the fact that there are facts that are in dispute and, in particular, that the plaintiffs reserve the right to contest the reliability of the defendants' evidence of the limited subsets of defective pacemakers in each of the 51 models. Thus, for example, on page 20 of the cross-examination conducted on January 6, 2009, the following exchange occurred between Mr Campion and Mr Lambert:

Q. Now, it is your evidence, as I understand it, that you received a defective device from Guidant and the Toronto East General Hospital and Dr Campbell?

A. As far as I understand, yes.

Q. My proposition is stronger than that, it is your unequivocal testimony that you received a defective device from Guidant?

A. I received a device from Guidant. It was recalled back. Whether or not mine was defective, I don't know.

Q. Okay. So you now saying that you're not sure that your device was defective?

A. No, I'm saying that Guidant recalled them, mine was in that model that was recalled. So rather than be sorry, I considered that it's defective, of course.

Q. And you also take the position that all of the 28,000 or the 14,000 putative plaintiff's that you seek to represent also received defective devices, is that right?

A. No. I said that 14,000 people have a possibility of having a defective pacemaker, the same as I have.

144 Similarly, other lines of questioning developed by defendants' counsel in their exhaustive cross-examination assumed acceptance of their concepts and terminology relating to advisories, recalls and pacemaker dependency.

145 The challenge to Mr Lambert's credibility, and that of Ms Ibbitson, was most fully developed in a continuation of their examinations in open court on the first day set aside for the hearing of the certification motion. The request for permission to do this was made after defendants' counsel had obtained documentation as a result of the answers previously given by Mr Lambert. My initial response to the request was that I was not satisfied that the issue of credibility was likely to have significant relevance to the requirement in section 5 (1) (e) of the CPA. There was also a concern that the hearing of the motion to certify the proceeding would have to be postponed again unnecessarily. I indicated also that I thought it unlikely that I could properly make a finding of a disqualifying lack of credibility on the basis of transcripts.

146 After counsel had made submissions on the possible relevance of the issue of credibility in this context, I ruled that the examinations could continue in open court on the date set down for the commencement of the hearing of the motion to certify the proceeding, and that I would defer a decision on the question of admissibility until the submissions of counsel had been made in the course of the certification hearing.

147 In so ruling, I was strongly influenced by the appearance of inconsistencies between the facts that had emerged and the answers given previously by Mr Lambert that might, I considered, call into question his acceptability as a class representative. To that extent, I accepted the submissions of defendants' counsel.

148 At different stages of a class proceeding there may be motions that require decisions to be made in the interests of the class as a whole. On such motions the evidence of representative plaintiffs - or proposed representative plaintiffs - may be important. On certification motions such evidence will normally be required. This would usually be the case with motions to discontinue and, in particular, motions to approve settlements and counsel's fees in which the court must be able to rely on the judgment and opinions of a credible representative or proposed representative. The evidence may consist of relevant facts, communications with class members, or simply of reasons why the motion should be granted, or dismissed, in the interests of the class.

149 The court has an obligation to protect the interests of the class members and, in my opinion, it is entitled to insist that a person who represents them in the proceeding has credibility on issues that may involve or affect such interests.

150 An absence of credibility on issues that affect only the individual claims of the plaintiff will not necessarily require a conclusion that he or she would not fairly and adequately represent the class. In *Price v. Panasonic Canada Inc.*, [2001] O.J. No. 5244 (Ont. S.C.J.), para 15, leave to conduct a further cross-examination was denied by Shaughnessy J. on the ground the issues of credibility were relevant to the merits and not to the requirements for certification. By way of contrast, in *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (Ont. S.C.J.), a proposed representative was rejected when, in cross-examination, he had admitted that statements in his affidavit were untrue and the court concluded that he had "a credibility problem of some magnitude". There seems no doubt that such a conclusion should be drawn if the court is satisfied that it would be unsafe to rely on any evidence that the plaintiff might give - that there is to that extent a general lack of credibility. In Mr Campion's submission this was such a case and it was on this ground that I permitted the examinations to continue despite the fact that the impugned evidence of Mr Lambert and Ms Ibbetson was relevant only, if at all, to the former's individual claims.

151 The evidence on which defendants' counsel relied related primarily to communications and advice Mr Lambert stated that he had received from East York Hospital and his personal physician to the effect that he should have his pacemakers explanted. The relevant letters from the hospital and the hospital's notes of an attendance there were produced at the continuation of the cross-examination and it is clear that they contained no such advice. Mr Lambert testified that he had destroyed the letters but it emerged that one of them was in the possession of his counsel. When questioned by Mr Campion, Ms Ibbetson stated emphatically that she had not sent the letter to them. Subsequently, when a fax cover sheet was produced by her counsel, she agreed that the transmittal message was in her handwriting.

152 While there are inconsistencies between the undoubted facts and the evidence of the plaintiffs with respect to the contents of the communications and the destruction of the letters from the hospital, they are not, in my opinion, as great as counsel suggested and some of them disappear when Mr Lambert's statements are read in the context of his evidence as a whole. He was skeptical of the extent that the hospital would be prepared to make clear and unequivocal statements that the pacemakers were defective and must be replaced, but he believed that this was "insinuated". In his original cross-examination, he had stated that he would not expect the hospital - as a Guidant customer - to tell him if his pacemaker was malfunctioning.

153 Mr Lambert's suspicions may have been unfounded, and his attempts to read between the lines of the letters may not have been successful, but it does not follow that he was being untruthful. At different times during his cross-examinations he admitted to difficulty in remembering facts including details relating to the letters. His evidence that he destroyed the first of them was qualified by the words "as far as I remember". Although in an answer to one question he stated that he had torn up each of the two letters from the hospital, he qualified this subsequently by stating that he had not destroyed one of the letters but had merely thrown it in the garbage. While counsel placed some emphasis on the unlikelihood that the physician - a cardiologist - would, as Mr Lambert stated, have advised him to have his first pacemaker explanted simply on the basis of the first letter from the hospital, it does not appear that the letter was shown to the physician. Mr Lambert's evidence was that the cardiologist had said that, if the hospital had stated that the pacemaker should be explanted, then Mr Lambert should have this done.

154 Mr Lambert was not a sophisticated witness in medical matters. From reading the initial transcript and from listening to, and observing the taking of, his evidence in court it was, I believe, also clear that there was a vast difference between the skilled examiner's deliberate and precise choice of language and that of Mr Lambert. While, in the continuation of the examination, counsel succeeded in clarifying the contents of the communications from the hospital, and in establishing that Mr Lambert's evidence of his personal recollections may not always be reliable, it did not persuade me that this indicated a lack of integrity that would disqualify him as a class representative. On the totality of his evidence, I believe the most severe criticism that can justly be levelled at him as a witness is that at times he tended to give categorical answers when his actual recollections of the relevant facts were probably less than perfect.

155 The same criticism can be levelled in respect of the evidence of Ms Ibbetson. Despite her emphatic assertion that she had not sent a copy of a second letter to her lawyers, she was subsequently compelled to admit that she must have done this even though, she said, she did not remember doing so.

156 The question is whether, in these circumstances, I should find that the apparent willingness of the plaintiffs to give categorical answers on the basis of imperfect recollections shows such a serious disregard for their obligations to testify honestly and truthfully that they should be disqualified as class representatives. I decline to make such a finding. To do so would, in my opinion, be to impose too high a standard. It is part of the stock-in-trade of cross-examining counsel to confound, and discredit the testimony of, witnesses by exposing discrepancies between the facts and what they believe they remember. I believe that is probably all that occurred in this case. Given the likelihood that copies of the letters from the hospital would be available from its records, I find it much less likely that the plaintiffs would, as defendants' counsel submitted, give evidence they knew to be untrue in, presumably, an attempt to withhold evidence of their true contents from the court.

157 I am satisfied that, apart from the issue of credibility, the plaintiffs are willing to represent, and capable of representing, the interests of the class and, for the reasons I have given, I reject the challenge that they lack the degree of credibility and personal integrity that the court should require for this purpose.

(b) *The Litigation Plan*

158 The litigation plan, as now proposed, is quite comprehensive. As well as the cooperative arrangements between plaintiffs' counsel and those in the other provinces - and the facilities in place for communicating with class members - it deals with the various stages of the proceeding before and after certification. It was, however, criticised by defendants' counsel on the ground that it does not make adequate provision for procedures required to permit the defendants to protect their substantive rights and meaningfully contest individual issues of causation and damages.

159 Consistently with their general approach, the criticisms of defendant's counsel were not understated. Ignoring their earlier submission that the putative class is grossly over-inclusive, they ridiculed the notion that it would be necessary to hold 28,443 individual trials at which the defendants would be able to fairly and fully defend on issues of causation and damages. For the reasons I have given, the totality of the evidence - including that provided by the defendants - indicates that nothing like that number of individual trials is likely to be necessary. It is, I believe, quite likely that it will become possible to reduce the size of the class and, depending upon the decisions made at the trial of common issues, it may well be that many - and quite possibly most - of the claims asserted will not require trials of any length, or at all. The proposed plan contemplates that different procedures may be required according to the nature and severity of the damages claimed. Section 25 of the CPA gives a trial judge ample discretion to do this.

160 The uncertainty in this regard and the fact that it is for the trial judge to devise the procedures for the resolution of individual issues makes it unreasonable to require the plaintiffs to set out in their litigation plan all steps that that may conceivably be required to be taken. The principal purposes of a "workable" litigation plan are to assist in the determination of the preferable procedure and to demonstrate that manageable methods of conducting the litigation are feasible: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), at p. 203. The purpose is not to bind the plaintiffs or the defendants to any particular procedure.

161 The defendants are, of course, correct in insisting that their rights must be protected in the determination of individual issues. They will be entitled to make submissions to the trial judge on the manner in which this will be done. The proposed litigation plan provides for their participation in the resolution of issues of causation and I do not believe it is necessary to go further at this stage and to speculate, for example, about the rights and limits to pre-trial discoveries on individual issues. It is, in my opinion, sufficient that the proposed plan can accommodate reasonable measures that will permit the resolution of the individual issues in a manner that would be fair as between the parties.

162 The amount of detail to be provided in a proposed litigation plan will vary according to the circumstances of each case. While a mere list of steps to be taken will not be acceptable, and workable methods for resolving individual issues must be

provided, the uncertainty that attaches in this case to the number and the nature of the individual claims that will be made would make it unduly speculative to require the plaintiffs to provide more detail. In this respect, the plan is no less comprehensive than that approved in *Peter* and *LeFrancois*. As with the class definition, further light may be shed on the adequacy of the litigation plan as a blueprint as the case proceeds towards trial. To the extent that they will be relying on it as a guide, the parties may find it necessary, or useful, to amend it from time to time under the supervision of the case-management judge.

## Conclusion

163 The requirements for certification are, in my judgment, satisfied. There will be an order accordingly.

164 If the parties are unable to agree upon costs, the plaintiffs' submissions may be made within 14 days of the release of these reasons, and the defendants will have a further 10 days in which to respond.

*Motion granted.*



2009 CarswellOnt 6512  
Ontario Superior Court of Justice (Divisional Court)

Lambert v. Guidant Corp.

2009 CarswellOnt 6512, [2009] O.J. No. 4464, 181 A.C.W.S. (3d) 644, 82 C.P.C. (6th) 367

**GERARD LAMBERT and ELSA IBBITSON (Plaintiffs) and GUIDANT CORPORATION, GUIDANT CANADA CORPORATION, GUIDANT SALES CORPORATION and CARDIAC PACEMAKERS INC. (Defendants)**

Jennings J.

Heard: July 9, 2009

Judgment: October 20, 2009

Docket: Toronto 248/09

Proceedings: refusing leave to appeal *Lambert v. Guidant Corp.* (2009), 2009 CarswellOnt 2535, 72 C.P.C. (6th) 120 (Ont. S.C.J.)

Counsel: Won J. Kim, Megan B. McPhee, Serge Kalloghlian for Plaintiffs  
John A. Campion, Paul J. Martin, Sarah J. Armstrong for Defendants

Subject: Civil Practice and Procedure

**Related Abridgment Classifications**

Civil practice and procedure

[XXIII](#) Practice on appeal

[XXIII.10](#) Leave to appeal

[XXIII.10.d](#) Miscellaneous

**Headnote**

Civil practice and procedure --- Practice on appeal — Leave to appeal — Miscellaneous

Plaintiffs brought action against defendants, seeking damages as result of allegedly defective heart devices — Plaintiffs' motion to certify proceeding as class action under Class Proceeding Act, 1992 was granted — Defendants brought motion for leave to appeal — Motion dismissed — In his reasons, certification judge reviewed in considerable detail evidence led by each party — Certification judge accepted some of evidence and some of it he did not, which he was entitled to do — Certification judge was alive to and fully discussed tension between admissible evidence relevant to certification requirements and inadmissible evidence going to merits — In weighing evidence, certification judge was clearly guided by law established in Supreme Court of Canada decision which established "some basis in fact" standard applicable to statutory requirements for certification — Certification judge was alive to concern that class definition was overly inclusive — There was no reason to doubt certification judge's conclusion that class definition was not "unnecessarily overly inclusive" — Certification judge correctly concluded his analysis with observation that definition of class could be amended following productions and examinations for discovery — In certification judge's very full reasons, he made factual findings to which deference was owed and he correctly applied established principles of law dealing with certification of class actions — There was no reason to doubt correctness of his decision — There were no conflicting decisions.

**Table of Authorities**

**Cases considered by Jennings J.:**

[Hollick v. Metropolitan Toronto \(Municipality\)](#) (2001), (sub nom. [Hollick v. Toronto \(City\)](#)) 56 O.R. (3d) 214 (headnote only), (sub nom. [Hollick v. Toronto \(City\)](#)) 205 D.L.R. (4th) 19, (sub nom. [Hollick v. Toronto \(City\)](#)) [2001] 3 S.C.R. 158, (sub nom. [Hollick v. Toronto \(City\)](#)) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — considered

*LeFrancois v. Guidant Corp.* (2009), (sub nom. *Guidant Corp. v. LeFrancois*) 245 O.A.C. 213, 2009 CarswellOnt 30, 67 C.P.C. (6th) 9 (Ont. Div. Ct.) — considered

*Peter v. Medtronic Inc.* (2008), 2008 CarswellOnt 2759, 55 C.P.C. (6th) 242 (Ont. Div. Ct.) — considered

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

s. 5(1) — referred to

MOTION by defendants for leave to appeal judgment reported at *Lambert v. Guidant Corp.* (2009), 2009 CarswellOnt 2535, 72 C.P.C. (6th) 120 (Ont. S.C.J.), certifying action as class proceeding.

**Jennings J.:**

1 The appellants seek leave to appeal the decision of Cullity J. dated May 8, 2009, certifying this action as a class proceeding.

2 I was told this action is the third of a trilogy of cases seeking damages as a result of allegedly defective heart devices. The two other actions have recently been certified in this province, being *Peter v. Medtronic Inc.* and *LeFrancois v. Guidant Corp.* Leave to appeal the certification orders to the Divisional Court was denied in both cases.

3 The certification application took seven days to hear. The opening paragraph of Cullity J.'s carefully reasoned thirty page decision is instructive:

The hearing of the motion to certify this proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 was of unusual length due to the elaborateness and comprehensiveness of the attack launched by the defendants on the plaintiffs' case for certification and the attempted use of evidence for this purpose. Most of the evidence had a direct bearing on the merits of the claims asserted by the plaintiffs on behalf of the class they seek to represent and, although defendants' counsel went to some pains to relate it to the requirements for certification, its relevance and weight for this purpose were very much in issue.

4 I deny leave to appeal for the following reasons.

5 Before me, the main thrust of the moving parties' forceful argument was that Cullity J. misconstrued the "some basis in fact" standard applicable to the statutory requirements for certification, as established by the Supreme Court of Canada in *Hollick v. Metropolitan Toronto (Municipality)* [2001 CarswellOnt 3577 (S.C.C.)], so as to effectively prevent the moving party from leading evidence to challenge that the requirements for certification had been met.

6 My review of the reasons of Cullity J. must be in the context of numerous directions from the Court of Appeal that deference is owed to those experienced judges hearing certification applications in this province. The cases have been helpfully and recently gathered in the decisions of Ferrier J. in *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 36 (Ont. Div. Ct.) and Carnwath J. in *Peter v. Medtronic Inc.*, [2008] O.J. No. 1916 (Ont. Div. Ct.).

7 Mr. Campion quite properly acknowledged the considerable expertise in these matters possessed by Cullity J.

8 The evidentiary principles to be applied on a certification motion have been clearly established. The plaintiff must establish "some basis in fact" for the certification and must file evidence in support of his or her position. It is for the motions judge to determine what evidence is necessary to permit the determination of the requirements for certification as opposed to evidence directly relevant to the merits of the claim.

9 In paragraphs 25 through 55 of his reasons, Cullity J. reviewed in considerable detail the evidence led by each party. Some of it he accepted and some of it he did not. He was entitled to do that. He was alive to and fully discussed the tension between admissible evidence relevant to certification requirements and inadmissible evidence going to the merits. In weighing the evidence, Cullity J. was clearly guided by the law established in *Hollick* to which he made frequent reference.

10 The moving party submitted that the class definition was overly inclusive. Cullity J. was alive to that concern, (see reasons for judgment paragraphs 94-118) and I have no reason to doubt his conclusion that the class definition was not "*unnecessarily* overly inclusive" (emphasis in judgment). He correctly concluded his analysis with the observation that the definition of the class may be amended following productions and examinations for discovery.

11 In my opinion what was really driving this motion for leave was counsel's concern that courts dealing with certification applications have interpreted s.5(1) of the CPA so as to make any meaningful opposition to certification virtually impossible. I am aware that amongst the members of the class action bar, counsel's view is not unique. If I am correct I observe that any perceived imperfections in the certification process must be resolved by the Legislature. The judges must work with the legislation that presently exists.

12 Further, I agree with Cullity J.'s observations on this issue as set out by him in the following paragraphs of his reasons:

66. A recurring theme in the defendants' submissions was the prevailing approach to certification in this jurisdiction has departed from the legislative intention embodied in section 5(1) of the CPA. I was told that, rather than acting as a gatekeeper, the courts have been holding the gate open and have "stumbled into a black hole".

67. It was repeatedly submitted by defendants' counsel that decisions certifying proceedings must have an "air of reality". To the extent that this means that the statutory requirements must be read and applied in the light of the purposes and objectives of the legislation, it is a truism. To the extent, however, that references to an air of reality are intended to introduce a preliminary merits test - disguised or otherwise - they are inconsistent with the analysis in *Hollick* and the significance that McLachlin C.J. attributed to the rejection of the view of the Ontario Law Reform Commission. In its report released 1982, the Commission was firmly of the opinion that a plaintiff seeking certification should have the burden of establishing that the claims advanced have "substantive adequacy" and apparent validity. In the unanimous opinion of the members of the commission, this would be required in order to eliminate the potential use of the class action procedure to blackmail defendants into agreeing to settle unmeritorious claims. The possibility that such claims could be excluded by a requirement that the pleading disclosed a cause of action was categorically rejected.

68. (in part) The legislative history was relied on in *Hollick* as justifying the very weak evidential burden of "some basis in fact" that was held to apply to each of the statutory requirements for certification, other than that relating to the disclosure of a cause of action. It must, I believe, follow logically that, although a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter. ...

69. I am also concerned with whether the statutory requirements are adequate to exclude the kind of legalised blackmail that was contemplated by the Law Reform Commission. The analysis in *Hollick* must be applied and the plaintiff must not be subjected to any more stringent an evidential burden than that affirmed by the Chief Justice. I believe it follows, also, that in determining the weight to be given to the evidence in rebuttal filed by the defendants, I must take into account that it is not the function of the court at this preliminary stage of the proceedings to decide factual issues - and, for such purpose, to weigh, and draw inferences from, the evidence - in the same manner, and to the same extent, as when the court exercises its function as a trier of fact in the exercise of its ordinary jurisdiction.

70. Most fundamentally, the purpose of the certification stage of a class proceedings is to determine whether the requirements in section 5(1) of the CPA are satisfied and, if so, to define the issues to be tried. It would be a reversal of the process to permit certification to be determined by deciding issues that are likely to be front and centre at a trial.

13 The ground of conflicting decisions was not aggressively pursued before me. The cases relied upon by the moving party were fact driven and do not establish a conflict.

14 To conclude in Cullity J.'s very full reasons he made factual findings to which deference is owed and he correctly applied established principles of law dealing with the certification of class actions.

15 I have no reason to doubt the correctness of his decision. There are no conflicting decisions.

16 The motion is dismissed with costs payable to the responding parties fixed at \$15,000, as agreed by counsel at the hearing.

*Motion dismissed.*

**TAB 21**

**Most Negative Treatment:** Application/Notice of Appeal

**Most Recent Application/Notice of Appeal:** [Lavender v. Miller Bernstein LLP](#) | 2018 CarswellOnt 22744 | (S.C.C., Nov 5, 2018)

2018 ONCA 729  
Ontario Court of Appeal

Lavender v. Miller Bernstein LLP

2018 CarswellOnt 14443, 2018 ONCA 729, 142 O.R. (3d) 401, 295 A.C.W.S. (3d) 869, 427 D.L.R. (4th) 95

**Barry Lavender (Moving Party / Respondent) and  
Miller Bernstein LLP (Responding Party / Appellant)**

Gloria Epstein, K. van Rensburg, David Brown JJ.A.

Heard: March 5, 2018

Judgment: September 5, 2018

Docket: CA C64207

Proceedings: reversing *Lavender v. Miller Bernstein* (2017), 2017 CarswellOnt 10841, 2017 ONSC 3958, Edward P. Belobaba J. (Ont. S.C.J.); additional reasons at *Lavender v. Miller Bernstein* (2017), 2017 CarswellOnt 12901, 2017 ONSC 4739, Edward P. Belobaba J. (Ont. S.C.J.)

Counsel: Robert Staley, Gavin Finlayson, Preet Bell, Nathan Shaheen, for Appellant  
Paul Bates, Daniel Bach, Serge Kalloghlian, for Respondent

Subject: Public

**Related Abridgment Classifications**

Professions and occupations

VII Auditors

VII.3 Negligence

**Headnote**

Professions and occupations --- Auditors — Negligence

Ontario Securities Commission placed dealer into receivership because it failed to segregate investors' assets and maintain minimum net free capital in breach of regulatory requirements — Unsegregated assets had been appropriated and used by dealer for its own purposes, and investors lost some \$10.6 million — Auditor admitted filing falsified forms that were supposed to be audited — Investor brought class action against auditor for damages for negligence — Class counsel applied for partial summary judgment on duty of care which was granted — Auditor appealed — Appeal allowed and claim dismissed — Motion judge did not have benefit of SCC Livent decision so conflated questions of proximity and foreseeability and did not conduct proper proximity analysis on duty of care — Proximity not established between auditor and class in relation to Form 9 Reports — Parties were not in such close and direct relationship that it would be just and fair having regard to that relationship to impose duty of care in law — Limited scope of auditor's undertaking and lack of direct connection with class militated against finding proximity — No reliance on reports by class — Motion judge also made erroneous findings of fact including that auditor filed Reports and had access to names and accounts of class — Statutory scheme did not create proximate relationship between auditor and class for their investment decisions in relation to forms that they never saw — Claims for pure economic loss warrant more rigorous examination than other claims for negligence.

**Table of Authorities**

**Cases considered by Gloria Epstein J.A.:**

*Anns v. Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 W.L.R. 1024, (sub nom. *Anns v. London Borough of Merton*) [1977] 2 All E.R. 492, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — followed

*Cavanaugh v. Grenville Christian College* (2013), 2013 ONCA 139, 2013 CarswellOnt 2500, 32 C.P.C. (7th) 1, (sub nom. *L.C. v. Grenville Christian College*) 304 O.A.C. 163, 360 D.L.R. (4th) 670 (Ont. C.A.) — referred to

*Cooper v. Hobart* (2001), 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, [2002] 1 W.W.R. 221, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 277 N.R. 113, 8 C.C.L.T. (3d) 26, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 261 W.A.C. 268, [2001] 3 S.C.R. 537, [2001] B.C.T.C. 215, 2001 CSC 79 (S.C.C.) — followed  
*Deloitte & Touche v. Livent Inc. (Receiver of)* (2017), 2017 SCC 63, 2017 CSC 63, 2017 CarswellOnt 20138, 2017 CarswellOnt 20139, 416 D.L.R. (4th) 32, 55 C.B.R. (6th) 1, 71 B.L.R. (5th) 175, 43 C.C.L.T. (4th) 1, [2017] 2 S.C.R. 855 (S.C.C.) — considered

*Edwards v. Law Society of Upper Canada* (2001), 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, 34 Admin. L.R. (3d) 38, 206 D.L.R. (4th) 211, 277 N.R. 145, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, (sub nom. *Edwards v. Law Society of Upper Canada (No. 2)*) 56 O.R. (3d) 456 (headnote only), 153 O.A.C. 388, [2001] 3 S.C.R. 562, 2001 CSC 80, 56 O.R. (3d) 456, 56 O.R. (3d) 456 (note), [2001] O.T.C. 325 (S.C.C.) — referred to

*Followka v. Royal Oak Ventures Inc.* (2010), 2010 SCC 5, 2010 CarswellNWT 9, 2010 CarswellNWT 10, 71 C.C.L.T. (3d) 1, [2010] 4 W.W.R. 35, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) 398 N.R. 20, 315 D.L.R. (4th) 577, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) 474 A.R. 1, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) 479 W.A.C. 1, (sub nom. *Followka v. Pinkerton's of Canada Ltd.*) [2010] 1 S.C.R. 132, 80 C.C.E.L. (3d) 1 (S.C.C.) — referred to

*Hercules Management Ltd. v. Ernst & Young* (1997), 1997 CarswellMan 198, 211 N.R. 352, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, 1997 CarswellMan 199 (S.C.C.) — considered

*Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board* (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 50 C.C.L.T. (3d) 1, 50 C.R. (6th) 279, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 285 D.L.R. (4th) 620, 64 Admin. L.R. (4th) 163, 230 O.A.C. 253, 368 N.R. 1, [2007] 3 S.C.R. 129, [2007] R.R.A. 817 (S.C.C.) — referred to

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — considered

*Knight v. Imperial Tobacco Canada Ltd.* (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — referred to

*Lipson v. Cassels Brock & Blackwell LLP* (2013), 2013 ONCA 165, 2013 CarswellOnt 2953, 31 C.P.C. (7th) 128, 114 O.R. (3d) 481, [2013] 4 C.T.C. 116, 303 O.A.C. 124, 360 D.L.R. (4th) 577 (Ont. C.A.) — considered

*Mandeville v. Manufacturers Life Insurance Co.* (2014), 2014 ONCA 417, 2014 CarswellOnt 6645, 120 O.R. (3d) 81, 321 O.A.C. 83, 34 C.C.L.I. (5th) 171, 27 B.L.R. (5th) 86 (Ont. C.A.) — referred to

*Mandeville v. Manufacturers Life Insurance Co.* (2015), 2015 CarswellOnt 3271, 2015 CarswellOnt 3272 (S.C.C.) — referred to

*Martel Building Ltd. v. R.* (2000), 2000 SCC 60, 2000 CarswellNat 2678, 2000 CarswellNat 2679, 36 R.P.R. (3d) 175, (sub nom. *Martel Building Ltd. v. Canada*) 193 D.L.R. (4th) 1, (sub nom. *Martel Building Ltd. v. Canada*) 262 N.R. 285, 3 C.C.L.T. (3d) 1, 5 C.L.R. (3d) 161, 186 F.T.R. 231 (note), (sub nom. *Martel Building Ltd. v. Canada*) [2000] 2 S.C.R. 860, 2000 CSC 60 (S.C.C.) — referred to

*Odhayji Estate v. Woodhouse* (2003), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 70 O.R. (3d) 253 (note), [2004] R.R.A. 1, 2003 CSC 69 (S.C.C.) — referred to

*Rankin (Rankin's Garage & Sales) v. J.J.* (2018), 2018 SCC 19, 2018 CSC 19, 2018 CarswellOnt 7370, 2018 CarswellOnt 7371, 25 M.V.R. (7th) 1, 422 D.L.R. (4th) 317, 47 C.C.L.T. (4th) 1 (S.C.C.) — considered

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

*Securities Act, R.S.O. 1990*, c. S.5

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure, R.R.O. 1990*, Reg. 194

Generally — referred to

**Regulations considered:**

*Securities Act, R.S.O. 1990*, c. S.5

*General, R.R.O. 1990*, Reg. 1015

s. 107 — considered

s. 117 — considered

s. 118 — considered

s. 142 — considered

s. 144 — referred to

Form 9 — referred to

APPEAL from a decision reported at *Lavender v. Miller Bernstein* (2017), 2017 ONSC 3958, 2017 CarswellOnt 10841 (Ont. S.C.J.) granting partial summary judgment to class plaintiff.

**Gloria Epstein J.A.:**

**A. OVERVIEW**

1 Buckingham Securities ("Buckingham") is a now defunct securities dealer. In 2001, the Ontario Securities Commission (the "OSC") suspended Buckingham's registration and an order was made placing it into receivership because it breached regulatory requirements by failing to segregate investor assets and maintain a minimum level of net free capital. Its clients, who held investment accounts with the firm, lost millions.

2 The respondent, Barry Lavender, commenced a class action in 2005 on behalf of every person who had an investment account with Buckingham when Buckingham was placed into receivership (the "Class"). Mr. Lavender alleged that in each of fiscal years 1998 to 2000, Buckingham's auditor, the appellant, Miller Bernstein LLP (the "Auditor"), negligently audited an annual registration renewal requirement filed with the OSC that confirmed compliance with segregation and minimum capital requirements: *General, R.R.O. 1990*, Reg. 1015, s. 142 (under the *Securities Act, R.S.O. 1990*, c. S.5); see also ss. 107, 117, 118 and Form 9, known as Form 9 Reports. Buckingham's Form 9 Reports falsely stated that Buckingham was in compliance with the regulatory segregation and minimum capital requirements.

3 The motion judge agreed with the Class, holding that the Auditor owed the class members a duty of care in conducting the audit and that the Auditor fell below the requisite standard of care. He granted summary judgment in favour of the Class.

4 The Auditor appeals. For the reasons that follow I would allow the appeal. In my view, the Auditor did not owe the class members a duty of care and the motion judge erred in so holding.

**B. BACKGROUND FACTS**

5 Under the statutory regime that existed at the relevant time, which has since been repealed, the Form 9 Report had to be audited each year in accordance with generally accepted auditing standards and audit requirements published by the OSC: *General*, s. 144. The Auditor audited Buckingham's Form 9 Reports for the years 1998, 1999 and 2000, and signed the audit reports contained in them. After the Auditor audited the Form 9 Reports, Buckingham filed the reports with the OSC. No class member ever obtained or reviewed any of the Form 9 Reports through this process or otherwise.

6 In 2004, the OSC initiated proceedings against Buckingham and certain of its principals, including Howard Kornblum, the partner at Miller Bernstein who oversaw the audit. Buckingham and several of its principals later admitted to the OSC that, in breach of regulatory requirements, they made materially untrue statements in the 1999 and 2000 Form 9 Reports filed with the OSC.

7 The Class asserts that by negligently performing its assurance audit by failing to properly review and confirm the accuracy of Buckingham's Form 9 Reports, the Auditor breached the duty of care that it owed to the Class, as clients of Buckingham, causing more than \$10 million in losses.

8 In 2010, the parties consented to certification of the class proceeding. The certification settlement agreement, as codified in a July 20, 2010 order of Cullity J., provided that the class members include those Buckingham clients who maintained accounts at Buckingham on July 6, 2001 — the date on which the OSC suspended Buckingham's operations. As part of the settlement, the parties agreed to certification on six common issues and to the Class's abandoning its claims in negligent and reckless misrepresentation. In the certification order, the following common issues were certified:

- i. Did the *Securities Act* and the regulations thereunder (the "OSA") require Buckingham to segregate the cash and securities of its clients from its own cash and securities?
- ii. 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?
- iii. Did the Auditor 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?
- iv. If the answer to (iii) is yes, did the Auditor breach that duty of care to the Class and/or one or more of the sub-classes, either negligently or recklessly?
- v. If the answer to (iv) is yes, was the Auditor'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?
  1. If the answer to (v) 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?
  2. If the answer to (v)(1) is yes, how should the damages to be payable by the Auditor be calculated?
- vi. Does Ontario law recognize a tort of knowing assistance of breach of contract and, if so, what are the elements of that tort?
  1. If the answer to (vi) is yes, have the elements of that tort been met by all of the Class and/or all of one or more of the sub-classes?

9 In 2016, the Class moved for summary judgment on the first five of the six common issues. The motion judge granted summary judgment in favour of the Class on the certified common issues relevant to liability.

## C. THE SUMMARY JUDGMENT DECISION

10 The motion judge noted that there was no real dispute over the first two issues: Buckingham was required to segregate and hold in trust the cash and securities of the Class members on a client-by-client basis at all times, and it failed to do so.

11 The motion judge identified the third issue — the question of whether the Auditor owed the Class a duty of care — as "the core question" at issue on the motion: at para. 11. This issue is also the crux of this appeal.

12 The motion judge began his duty of care analysis by noting the Class's claim was properly characterized as one for negligence *simpliciter*, not negligent misrepresentation. He acknowledged that this was "obviously not a conventional negligence case", but, relying, *inter alia*, on this court's authority in *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165, 114 O.R. (3d) 481 (Ont. C.A.), he noted that on certain facts it is possible for a plaintiff in a negligent misstatement case to proceed against a defendant on the basis of a simple negligence claim: at para. 16. He explained, at para. 15, why the claim was properly one for negligence *simpliciter*:

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.

13 Turning to whether a duty of care arose in this context, the motion judge noted, at para. 16, that it was not sufficient for the Class to say that the case fit within the negligent performance of a service "category" in which courts have recognized duties of care in certain third party benefit situations. He pointed out that the categories which have developed to govern recovery in tort for pure economic loss are merely analytical tools. The relationship between the Class and the Auditor was not one that had been previously recognized as giving rise to a duty of care and the two-stage analysis set out in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) and *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), had to be undertaken.

14 As outlined in more detail below, 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 motion judge found, relying on *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), that the foreseeability and proximity requirements were satisfied in this case. Even though the Class members never saw or even knew at the time about the Form 9 Reports, the Auditor "as a matter of simple justice" had an obligation to be mindful of their interests when auditing and filing the Reports: at para.

19.<sup>1</sup> More specifically, the motion judge reasoned, at para. 21, as follows:

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.

15 The motion judge further concluded that the relationship was of sufficient closeness to ground foreseeability. Here, the Auditor was retained to audit and file the Form 9 Reports, had access to the individual names and investor accounts of every Class member, 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. Even if the Class members knew nothing about the Form 9 Reports, 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.

16 The motion judge was therefore satisfied that the Class had established a *prima facie* duty of care under the first stage of the *Anns/Cooper* analysis.

17 He was similarly satisfied that policy concerns did not negate imposing liability. More specifically, the second stage of the *Anns/Cooper* 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.

18 In this case, the motion judge noted that policy concerns are especially important in claims for pure economic loss, particularly given the spectre of indeterminate or unlimited liability. In his view, however, case law was clear that indeterminate liability was not a concern when an auditor knows the identity of the plaintiff (or a class of plaintiffs) and when the auditor's statements are used for the specific purpose for which they were made.

19 Here, the motion judge was satisfied that the Auditor both knew the Class members' identities and that the Form 9 Reports "were used for the very purpose for which they were prepared — to be relied on by the OSC in protecting investor (class member) assets": at para. 29. The Auditor knew the names of each of Buckingham's clients at the time of its audits and was required to stay informed of any major changes to Buckingham's business between audits. Moreover, its potential liability was narrowly circumscribed since it knew its precise potential liability (the sum of all customer accounts) at the time of each audit. As a result, the motion judge concluded, at para. 39, that "[u]nder the *Anns-Cooper* analysis . . . 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".

20 After reaching this central conclusion, the motion judge went on to hold that the Auditor breached the duty of care it owed to the Class. The Auditor signed audit reports addressed to the OSC for fiscal years 1998, 1999 and 2000, falsely stating that it had examined the Form 9 Reports in accordance with auditing standards. It admitted that it breached its duty of care in the 1999 and 2000 Form 9 audits and there was uncontested evidence that it also breached its duty with respect to the 1998 Form 9 audit.

21 On the fifth issue, damages, the motion judge held that it was not possible at that time to determine damages on a Class-wide basis. He noted that the Class had indicated it may bring a follow-up motion based on a "corrected spreadsheet" prepared by the Receiver to determine the issue of damages at a later time.

22 On the basis of this analysis, the motion judge answered the questions, with the exception of the question of damages, in favour of the Class, and granted summary judgment.

## D. ISSUE

23 In my view, the central issue on appeal is whether the Auditor owed the Class a duty of care in relation to its audit of the Form 9s. For the reasons outlined below, I conclude that it did not. In light of this conclusion, it is not necessary to consider any of the other issues raised on appeal; I would allow the appeal and dismiss the Class's claim.

## E. ANALYSIS

### (1) The Duty of Care Analysis after *Livent*

24 In the Supreme Court's recent decision in *Deloitte & Touche v. Livent Inc. (Receiver of)* [2017 CarswellOnt 20138 (S.C.C.)], the court applied and refined the *Anns/Cooper* framework to define the duty of care owed by an auditor. Its analysis sets the conceptual table for my determination of whether the Auditor owed the Class a duty of care in this case. Below I consider and describe the *Anns/Cooper* framework, with particular attention paid to the Supreme Court's recent refinements in *Livent*.

25 In order to understand the application of *Livent* to this appeal, it is helpful to briefly restate the facts of that case. The *Livent* appeal arose out of the receivership of a theatre company, Livent Inc. ("Livent"), whose principals were fraudulently manipulating the company's financial records in order to attract investment. Its auditor, Deloitte & Touche ("Deloitte"), never uncovered the fraud, but did identify irregularities in the reporting of an asset sale in 1997. Nevertheless, Deloitte did not resign and instead assisted Livent in soliciting investment by providing a comfort letter and helping to prepare and approve a press

release that misrepresented the basis for the reporting of Livent's profit from the fraudulent sale. It also prepared Livent's 1997 audit, finalized in 1998 after Deloitte's discovery of the reporting irregularities. When the fraud was subsequently uncovered by new equity investors, Livent filed for insolvency protection and was placed into receivership.

26 Livent, through its receiver, sued Deloitte for damages in negligence and breach of contract. The trial judge concluded that Deloitte owed Livent a duty of care and fell below the standard of care on two occasions: (i) its provision of the comfort letter and approval of the press release containing misrepresentations in order to help Livent solicit further investment; and (ii) its completion of Livent's 1997 statutory audit.

27 This court dismissed the appeal. Deloitte appealed to the Supreme Court. The principal issue before the Supreme Court was the nature and scope of the duty of care owed by Deloitte with respect to those two separate negligent acts. The appeal was allowed, in part.

28 Applying the *Anns/Cooper* framework, Gascon and Brown JJ., for the majority, concluded that Deloitte owed Livent a duty of care in relation to its 1997 statutory audit, but not in relation to its representations concerning the solicitation of investment. Livent asserted that it detrimentally relied on Deloitte in each of these events, which impaired its ability to oversee its operations. The court, however, drew a distinction between the two events. Because the comfort letter and press release were prepared in order to solicit investment and not to assist shareholders with management oversight, Livent could not reasonably rely on those documents to oversee management. By contrast, the majority concluded that Deloitte owed a duty of care to Livent in relation to the statutory audit because the audit was prepared for the precise purpose of scrutinizing management conduct.

29 In reaching these conclusions, the Supreme Court refined and applied the two stages of the *Anns/Cooper* analysis. At the first stage, the court asks whether the facts establish a *prima facie* duty of care. The court then proceeds to the second stage, where it asks whether residual policy considerations justify denying liability in tort. I consider these two stages below.

#### (a) Stage One: *Prima Facie* Duty of Care

30 Most relevant for this appeal, the majority of the Supreme Court in *Livent*, at para. 20, reaffirmed that there is a *prima facie* duty of care where there exists a "sufficiently close relationship between the plaintiff and the defendant". This stage of the analysis involves establishing both reasonable foreseeability and proximity. The majority stressed that these elements are conceptually distinct and must be considered separately.

31 The majority in *Livent* reiterated the statement from *Cooper* that "foreseeability alone" is not enough to establish a *prima facie* duty of care; the first stage of the *Anns/Cooper* framework requires "something more". That "something more" is proximity. The majority observed, at para. 24, that it is useful to consider proximity before foreseeability in cases of negligent misrepresentation or negligent performance of a service because "[w]hat the defendant reasonably foresees as flowing from his or her negligence depends upon the characteristics of his or her relationship with the plaintiff, and specifically, in such cases, the purpose of the defendant's undertaking".

32 The proximity analysis determines whether the parties are sufficiently "close and direct" that it would be "just and fair having regard to their relationship to impose a duty of care": *Livent*, at para. 25, citing *Cooper*, at paras. 32 and 34. As most recently reaffirmed by the Supreme Court in *Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19* (S.C.C.), at para. 23, that close and direct relationship must be such that "the defendant is under an obligation to be mindful of the plaintiff's interests."

33 A preliminary question at this stage is whether the relationship at issue falls within a previously established category of relationship in which proximity has already been found to exist. If the relationship falls within a previously established category, or is analogous to one, then proximity is established, without more: *Livent*, at paras. 26-28. The majority in *Livent* cautioned, however, that courts must be careful to avoid identifying established categories "in an overly broad manner": at para. 28. As the majority noted, at para. 52, "the mere fact that proximity has been recognized as existing between an auditor and its client for *one* purpose is insufficient to conclude that proximity exists between the same parties for *all* purposes" (emphasis in original). Rather, the majority explained, at para. 28, that "a finding of proximity based upon a previously established or analogous

category must be grounded not merely upon the identity of the parties, but upon examination of the particular relationship at issue in each case."

34 Where an established proximate relationship cannot be found, courts must undertake a full proximity analysis by examining the relationship between the plaintiff and the defendant. Relevant considerations may include, but are not limited to, "expectations, representations, reliance, and the property or other interests involved" as well as any statutory obligations: *Livent*, at para. 29, citing *Cooper*, at paras. 34, 38.

35 In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are "determinative" of the proximity analysis: (i) the defendant's undertaking; and (ii) the plaintiff's reliance: *Livent*, at para. 30. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care, and the plaintiff has a right to rely on the defendant's undertaking to do so. These "corollary rights and obligations create a relationship of proximity": *Livent*, at para. 30.

36 However, the plaintiff's reliance must be within the scope of the defendant's undertaking — that is, the purpose for which the representation was made or the service was undertaken. Anything outside that scope will fall outside the scope of the proximate relationship and the defendant's duty of care; the defendant cannot be liable for a risk of injury against which it did not undertake to protect: *Livent*, at para. 31. Further, as the majority in *Livent* observed, at para. 31, "the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship" (emphasis in original).

37 Although the proximity and reasonable foreseeability stages are analytically distinct, they are nonetheless connected. In cases of negligent misrepresentation or performance of a service, *Livent* explains that the proximate relationship informs the foreseeability inquiry: at para. 34. A plaintiff's injury will be reasonably foreseeable in such cases where (1) the defendant should reasonably foresee that the plaintiff will rely on its representation; and (2) reliance would, in the particular circumstances of the case, be reasonable: *Livent*, at para. 35. This is also defined by the nature of the defendant's undertaking. The plaintiff may rely on the defendant to act with reasonable care for the particular purpose of the undertaking, but not for a purpose outside the scope of that undertaking.

#### (b) Stage Two: Residual Policy Considerations

38 Where a *prima facie* duty of care is recognized on the basis of proximity and reasonable foreseeability, the analysis advances to stage two of the *Anns/Cooper* framework. The court goes on to ask whether there are any "residual policy considerations" outside the relationship of the parties — that is, *despite* the proximate relationship between the parties and the reasonably foreseeable quality of the plaintiff's injury — that may negate the imposition of a duty of care: *Livent*, at paras. 37, 41.

39 The majority in *Livent* clarified, at para. 41, that the first stage of the *Anns/Cooper* framework does most of the analytical heavy lifting. Only in rare cases, such as those considering decisions of governmental policy or quasi-judicial bodies, will liability be denied on the basis of stage two. Residual policy considerations contemplate "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Livent*, at para. 38, citing *Cooper*, at para. 37.

40 Accordingly, the *Livent* majority observed, at para. 42, that rarely, if ever, will a concern for indeterminate liability persist after a properly applied proximity and foreseeability analysis.

41 Applying this framework, the majority held that Deloitte owed *Livent* a duty of care in relation to the 1997 statutory audit, but not with respect to the comfort letter and press release.

### The Statutory Audit

42 The majority concluded that Deloitte's statutory audit fell within an established category of proximity, and that the type of injury *Livent* suffered as a result of the statutory audit was a reasonably foreseeable consequence of Deloitte's negligence.

43 Proximity was established based on a previously recognized category of proximate relationship. The court had already held in *Hercules Managements* that an auditor owes its corporate client a duty of care in the preparation of a statutory audit. It thus followed that, unless the purpose of Deloitte's undertaking to prepare the audit differed from the purpose underlying the audit in *Hercules Managements*, proximity was established. Finding it did not differ, the majority concluded Livent and Deloitte were in proximity in relation to the audit.

44 Reasonable foreseeability was also established. The majority agreed that Livent's losses were a reasonably foreseeable consequence of Deloitte's negligence, since the negligence allowed Livent to artificially extend its solvency. The majority found, at para. 64, that the purpose of the audit was to protect Livent from the consequences of undetected errors and wrongdoing, and to provide shareholders with reliable intelligence, enabling oversight. Livent's reliance on Deloitte for the purpose of overseeing the conduct of management was therefore both reasonable and reasonably foreseeable.

45 Since a proximate relationship based on a previously recognized category was found, the court noted that it need not consider whether residual policy considerations negated the duty of care.

### **The Comfort Letter and Press Release**

46 With respect to the comfort letter and press release, the majority found that proximity was established for the purpose of helping Livent to solicit investment, but that Livent's losses (which did not arise out of any inability to attract investment) did not fall within the scope of Deloitte's duty of care and were not a reasonably foreseeable consequence of Deloitte's assistance.

47 The majority first considered proximity. As the courts had not previously established a proximate relationship between an auditor and its client for the purposes of soliciting investment, it was necessary to conduct a full proximity analysis. Here, the majority held that Deloitte's provision of a comfort letter and ongoing assistance in relation to a press release were undertaken for the purpose of helping Livent to solicit investment and that Livent was therefore entitled to rely upon Deloitte to carry out these services with reasonable care.

48 However, the court held that Livent's losses were not a reasonably foreseeable consequence of Deloitte's assistance in the solicitation of investment. In drafting the comfort letter and helping with the press release, Deloitte undertook only to assist Livent with soliciting investment; it did not undertake to assist Livent's shareholders in overseeing management. Accordingly, Deloitte could not be held liable for failing to take reasonable care to assist such oversight. Livent had no right to rely on Deloitte's representations for that purpose, and its reliance was neither reasonable nor reasonably foreseeable.

49 Having concluded that no *prima facie* duty of care arose, the court did not go on to consider residual policy considerations with regard to the press release and comfort letter that were prepared for Livent's solicitation of investment.

### **(2) The Parties' Submissions on the Duty of Care and Livent's Impact on this Appeal**

50 The parties filed supplementary factums addressing the application of *Livent* to the appeal. Both parties agree that the analysis from *Livent* is highly relevant to the outcome of this appeal and that the key theme from the Supreme Court's decision is the necessity of ascertaining the scope of an auditor's undertaking when conducting a duty of care analysis. They agree that the Auditor's undertaking here is central to determining whether proximity and reasonable foreseeability are established. They disagree, however, on the proper characterization of that undertaking in the circumstances.

#### *(a) The Auditor's Position*

51 The Auditor argues the motion judge's decision is inconsistent with the principles articulated in *Livent*. This is based on two "refinements" to the *Anns/Cooper* analysis from *Livent*: (i) the clear distinction drawn between foreseeability and proximity; and (ii) a greater emphasis placed on a more demanding first stage of the *Anns/Cooper* test.

52 In the light of these refinements, the Auditor argues the motion judge conflated reasonable foreseeability and proximity and failed to properly engage in the proximity analysis. The Auditor argues that on the facts of this case, reliance is required to establish proximity. Absent reliance, the relationship between the Class and the Auditor cannot meet this threshold.

53 The Auditor submits that *Livent* emphasizes the importance of properly ascertaining the scope of a defendant's undertaking — a defendant cannot be liable for an injury in relation to which it did not take responsibility. Here, the Auditor undertook to audit Buckingham's Form 9 Reports, which were to be *confidentially* submitted by Buckingham to the OSC *only*. The scope of the Auditor's undertaking extended only to Buckingham or, at the furthest, to the OSC. The Auditor did not undertake responsibility to assist the Class in supervising the management of Buckingham, or in selecting or retaining a securities dealer. No representations were made to the Class, there was no reliance by the Class, and the Class could not have had any expectations of the Auditors.

54 On the reasonable foreseeability analysis, the Auditor emphasizes *Livent*'s focus on the nature of the plaintiff's reasonable reliance. In this case, there was no reliance — neither the representative plaintiff nor any member of the Class saw the Form 9 Reports or even knew of their existence. In any event, the Class did not have the right to rely on the Auditor for something outside the scope of the Auditor's specific undertaking.

55 On the second branch of the *Anns/Cooper* test, the Auditor argues that indeterminate liability concerns in these circumstances must negate any duty of care, despite the Supreme Court's observing in *Livent* that only in rare cases will liability be negated solely because of residual policy considerations.

(b) *The Class's Position*

56 The Class agrees that *Livent* provides the applicable framework for the proximity analysis in this case, subject to necessary modifications to account for a different method of causation since this is not a negligent misrepresentation case. It also agrees that the proximity analysis from *Livent* focuses on the nature of the defendant's undertaking. However, the Class argues that the Auditor mischaracterizes its undertaking in a manner that is inconsistent with the record. It argues that the Auditor undertook to protect the Class against the *very* harm that occurred: specifically, the Class asserts that the Auditor undertook to provide accurate information as part of its Form 9 audits so that the OSC would use that information to protect investors.

57 To support this assertion, the Class points to the following aspects of the record, *inter alia*:

- Mr. Kornblum's admissions that: (i) the OSC used the Form 9 Reports to "facilitate the identification of circumstances when an entity was not in compliance with the *Securities Act* and Regulations"; (ii) he knew the Form 9 Reports would be sent to the OSC; (iii) the reason the OSC wanted the Form 9 Reports to be audited was to provide "comfort" that the numbers were accurate; and (iv) the OSC was relying on the Auditor to achieve that level of comfort.
- The Auditor's regulatory expert admitted that the OSC reviewed the Form 9 Reports as part of its investor protection mandate and that the reports were a "key part of the rules around licensing" which "had an underlying goal of protection of investors".
- Auditing standards required the Auditor to understand that the OSC would use the Form 9 Reports to execute its investor protection function, and that negligence in its audit of the segregation or capital requirements could cause the precise loss that the Class suffered.
- The motion judge found as a fact at para. 21 of his reasons, as outlined above, that "[the Auditor] 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 Auditor] 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."

58 The Class also argues that the harm that occurred was reasonably foreseeable. The Form 9 Report was a "special report on compliance"; its purpose was to provide accurate information to the OSC so the OSC could protect Class member assets. The Auditor's negligent audit impaired the OSC's investor protection function and exposed the Class members to the specific foreseeable risk against which the Auditor undertook to protect.

**(3) Application: The Duty of Care Analysis**

**(a) Stage One: Is There a Prima Facie Duty of Care?**

**(i) Proximity**

59 I agree with the Auditor that the motion judge, who, as I previously indicated, did not have the benefit of the *Livent* decision, conflated the questions of proximity and foreseeability and that he did not conduct a proper proximity analysis in this case. This is a legal error. Conducting such an analysis, and in light of the Supreme Court's refinements of the *Anns/Cooper* test in *Livent*, in my view, the Class's claim fails on the first branch of that test and this court can intervene: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 245 (S.C.C.), at para. 36. I do not believe that proximity is established between the Auditor and the Class in relation to the Form 9 Reports. As I explain below, the parties are *not* in "such a 'close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law)": *Livent*, at para. 25.

***The relationship does not fit within a previously established category of proximity***

60 I begin by observing that the relationship between the Auditor and the Class does not fall within a previously established or analogous category of relationship where proximity has already been found. The Class has not identified any case in which a duty of care has been recognized between an auditor and a company's investor account holders for purposes of auditing the company's Form 9 Reports or through a similar component of the securities statutory regime. Accordingly, this court must undertake a full proximity analysis to determine whether there is a sufficiently "close and direct" relationship to ground a duty of care: *Livent*, at para. 29.

***No relationship of proximity is established in the circumstances***

61 In conducting the proximity inquiry courts must examine all relevant factors arising from the relationship between the parties. The relevant factors vary depending on the circumstances of the case. They may include reliance, expectations, representations, property or other interests, and statutory obligations: *Livent*, at para. 29, citing, *inter alia*, *Cooper*, at paras. 35 and 38; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at paras. 50 and 56; *Followka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 26; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.), at paras. 9 and 13. In cases of pure economic loss arising from negligent misrepresentation or performance of a service, the defendant's undertaking and the plaintiff's reliance are determinative: *Livent*, at para. 30.

62 The absence of a personal relationship between the parties, while "not necessarily determinative", is nonetheless an "important factor to consider": *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at para. 30; *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 304 O.A.C. 163 (Ont. C.A.), at paras. 75-77. The court will inquire into whether the defendant's actions have a close or direct effect on the plaintiff, "such that the [defendant] ought to have had the [plaintiff] in mind as a person potentially harmed": *Hill*, at para. 29. As the Supreme Court explained in *Hercules Managements*, at para. 24, the plaintiff must establish "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."

63 Here, the motion judge anchored his finding of proximity on the correspondence between some of the Class members and the Auditor as well as his conclusion that the Class members would reasonably expect the Auditor and Buckingham to provide accurate information to the OSC:

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. [at para. 23]

64 With respect, I am of the view that the motion judge's finding that a relationship of proximity existed is unsupportable on the evidence. Simply put, it stretches proximity beyond its permissible bounds. I say this for the following reasons.

65 First, the primary reason I believe proximity has not been established turns on the nature of the Auditor's undertaking and the connection between that undertaking and the loss claimed. Buckingham retained the Auditor to audit its Form 9 Reports, which Buckingham then filed confidentially with the OSC. Although the motion judge observed that the Form 9 Reports were used by the OSC to police securities dealers and that their purpose was to protect investor assets, it does not necessarily follow that the audit of the Form 9 Reports creates proximity between an auditor and those investors. The Auditor made no representations to members of the Class, most of whom never even knew of the Auditor's existence or its involvement with Buckingham. The Auditor did not undertake to assist the Class in making investment decisions. The limited scope of the Auditor's undertaking and lack of direct connection between the Auditor and the Class militate against finding proximity in this case.

66 In my view, the interposition of the OSC and Buckingham between the Auditors and the Class rendered the relationship between the parties too remote to ground a duty of care. The Auditor may well have owed a duty of care to Buckingham to properly conduct the audit. Perhaps an argument could be made that a duty was also owed to the OSC (which provided regulatory oversight and received the audit reports). This, however, is an issue I need not determine. In this case, the Auditor's undertaking did not extend to assisting the Class members — who, as mentioned earlier and as the motion judge noted, never saw the Form 9 Reports and did not even know of their existence — with supervising Buckingham and making investment decisions. As a result, I am of the view that the Auditor's undertaking in this case strongly militates against a finding of proximity.

67 A second related consideration weighing against holding that the Auditor and Class were in a proximate relationship for the purpose of the Form 9 Reports is the absence of *any* reliance, whether intended or not. Indeed, the Class conceded that the members did not rely on or review any of the Form 9 Reports. As I have indicated, the Form 9 Reports were held confidentially by the OSC. They were not shared with the Class and not intended to inform or induce the Class in making investment decisions. The absence of the class members' reliance on the Form 9 Reports further supports my view there is no proximity between the Auditor and the Class in relation to the Reports.

68 The third reason that informs my conclusion that the motion judge erred in finding proximity is because, with respect, I am of the view that his analysis is based, in part, on factual findings that amount to palpable and overriding errors.

69 First, the motion judge found that the Auditor, and not Buckingham, filed the Form 9 Reports with the OSC. This is incorrect. Although the Auditor audited the Form 9 Reports, the obligation to file the Form 9 Reports rested with Buckingham. Second, the motion judge found that the Auditor had access to the names and accounts of every member of the Class. Again, this is incorrect. The record demonstrates that Buckingham's clients and their accounts changed regularly and the Auditor was not engaged to perform a continuous audit.

70 In my view, both of these palpable and overriding errors further distance the Auditor from the Class and undermine the motion judge's proximity analysis.

71 The fourth factor weighing against a finding of proximity in this case is the relevant statutory scheme. While the Class does not contend that the duty of care arises by the direct operation of any statute, the statutory scheme nonetheless provides

relevant context for assessing the sufficiency of proximity between parties: *Livent*, at para. 29. Here, the statutory scheme required Buckingham, as a securities dealer, to segregate investor assets and maintain a net free capital, and to file an audited Form 9 Report with the OSC that confirmed that it had met these obligations: *General*, Reg. 1015, ss. 107, 117-18, 142 and 144. In my view, it cannot be said that these provisions are sufficient to ground a relationship of proximity between a securities dealer's auditor and its account holders for the purpose of this case. While the Auditor was required to audit Buckingham's Form 9 Reports in accordance with generally accepted auditing standards and audit requirements published by the OSC, the statutory scheme did not create a proximate relationship between the Auditor and the Class for the purpose of their investment decisions in relation to forms that they never saw.

72 Finally, I am conscious of the Supreme Court's admonition that significant scrutiny is warranted when deciding whether to recognize a duty of care in a claim for pure economic loss: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 35; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 42. While there is no automatic bar to recovery for pure economic loss, such claims warrant more rigorous examination than other claims for negligence: *Martel Building Ltd.*, at para. 35; *Mandeville v. Manufacturers Life Insurance Co.*, 2014 ONCA 417, 120 O.R. (3d) 81 (Ont. C.A.), at paras. 148-50, leave to appeal refused [2014] S.C.C.A. No. 390 (S.C.C.). This consideration further weighs against finding proximity in this case.

73 In summary, I am of the view that the Class's claim fails at the proximity stage of the *Anns/Cooper* analysis. When properly scrutinized in the light of the *Livent* decision and other jurisprudence, the Class's claim cannot survive because there is no proximity between the Auditor and the Class in relation to the Form 9 Reports.

## **(ii) Reasonable Foreseeability**

74 Given my conclusion in relation to proximity, it is not necessary to consider whether any harm suffered was reasonably foreseeable. As *Livent* confirms, at para. 23, both reasonable foreseeability and proximity are required to establish a *prima facie* duty of care. In the absence of proximity, there is no *prima facie* duty of care.

### *(b) Stage Two: Do Any Residual Policy Concerns Negate the Duty of Care?*

75 In the light of my conclusion on stage one of the *Anns/Cooper* analysis, it is not necessary to consider the second stage of the *Anns/Cooper* analysis: *Livent*, at para. 57.

## **F. CONCLUSION**

76 As I have outlined above, I am of the view that the Class's claim fails due to a lack of proximity. I would not recognize a duty of care owed by the Auditor to the Class in these circumstances for these purposes. The motion judge erred in granting summary judgment in favour of the Class.

## **G. DISPOSITION**

77 For these reasons, I would allow the appeal, set aside the judgment below, and grant summary judgment to the Auditor, dismissing the Class's claim for negligence.

78 As to costs, failing agreement as to costs, I would ask the parties and the Law Foundation of Ontario to make submissions as to the costs before the motion judge and before this court, taking into account and providing any requisite notice pursuant to the provisions of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, or any other relevant legislation.

### ***K. van Rensburg J.A.:***

I agree.

### ***David Brown J.A.:***

I agree.

*Appeal allowed and class action dismissed.*

Footnotes

- 1 On appeal, the Class concedes that it was an error for the motion judge to find that the Auditor filed the Form 9 Reports. The Auditor audited and signed the Form 9 Reports, but Buckingham, as the registrant, actually filed them with the OSC.

**TAB 22**

**Most Negative Treatment:** Check subsequent history and related treatments.

2017 ONSC 6342  
Ontario Superior Court of Justice

LBP Holdings Ltd. v. Hycroft Mining Corporation

2017 CarswellOnt 16283, 2017 ONSC 6342, 285 A.C.W.S. (3d) 699

**LBP HOLDINGS LTD. (Plaintiff) and HYCROFT MINING CORPORATION, SCOTT A. CALDWELL, ROBERT M. BUCHAN, DUNDEE SECURITIES LTD. and CORMARK SECURITIES INC. (Defendants)**

Perell J.

Heard: October 6, 2017

Judgment: October 24, 2017

Docket: CV-14-508513CP

Counsel: Andrew J. Morganti, Hadi Davarinia, for Plaintiff

John Fabello, Gillian B. Dingle, Alexandra Shelley, for Defendants, Cormark Securities Inc. and Dundee Securities Ltd.

John M. Picone, for Defendants, Hycroft Mining Corporation, Scott A. Caldwell and Robert M. Buchan

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

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiff brought action against H Corp. and two of its executives, C and B, for primary market misrepresentation pursuant to s. 130 of Securities Act and equivalent statutes in other provinces — H Corp. defendants consented to certification of statutory action against them as class proceeding — Abandoning statutory claim, plaintiff also claimed against C Inc. and D Ltd. ("underwriters") for negligent misrepresentation and for negligence simplicitor, i.e. for common law negligence — Plaintiff brought motion for certification of action as class proceeding — Motion granted in part; motion dismissed as against underwriters — Having regard to constituent elements of torts, elements of reliance, causation, and damages were matters that raised highly individual issues that had to be proven at individual issues trials — Inevitability of individual issues trials substantially diminished productivity of common issues trial and introduced significant concerns about manageability — Individual issues were not amenable to summary determinations under ss. 12 and 25 of Class Proceedings Act, 1992 — Cost/benefit analysis indicated that there was little benefit in subjecting individual claims to procedure of class action — Common issues of statutory claim against H Corp. defendants were not congruent with common issues of tort claims against underwriters — This increased problems of managing action with combined claims and decreased benefits of class action procedure.

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**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5 — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(4) — referred to

s. 6 — considered

s. 12 — considered

s. 25 — considered

s. 29(1) — referred to

*Securities Act*, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XXIII — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185 ] — referred to

s. 1(1) "underwriter" — considered

s. 59(1) — considered

s. 130 — considered

s. 130(1) — considered

MOTION by plaintiff for certification of action as class proceeding.

***Perell J.:***

## **A. Introduction**

1 Pursuant to the *Class Proceedings Act, 1992*,<sup>1</sup> LBP Holdings Ltd. sues Hycroft Mining Corporation and two of its executives, Scott A. Caldwell and Robert M. Buchan for primary market misrepresentation pursuant to s. 130 of Ontario's *Securities Act*<sup>2</sup> and equivalent *Securities Acts* in other provinces. The Hycroft defendants consent to certification of the statutory action against them as a class proceeding.

2 Abandoning a statutory claim, LBP Holdings also sues Cormark Securities Inc. and Dundee Securities Ltd., (the "Underwriters"), for negligent misrepresentation and for negligence *simpliciter*; *i.e.*, for common law negligence. The Underwriters resist certification of the tort claims. They submit that LBP Holdings' Statement of Claim does not disclose a reasonable cause of action in tort against them and, in any event, a class proceeding is not the preferable procedure for resolving the common issues. The Underwriters also submit that they are entitled, in any event, to costs arising from LBP Holdings' abandonment of the statutory claim against them.

3 For the reasons that follow, I certify the action as against the Hycroft Defendants and I dismiss the certification motion as against Cormark Securities and Dundee Securities.

## **B. Factual and Procedural Background**

### **1. The Bought Deal Distribution of Hycroft's Shares**

4 LBP Holdings is a Nova Scotia corporation. Lloyd B. Parker is its director, president and secretary. LBP Holdings was a shareholder in Hycroft.

5 Hycroft, formerly Allied Nevada Gold Corp., operates the Hycroft Gold Mine in Nevada, U.S.A. The mine is its source of revenue. Hycroft's shares trade on the New York ("NYSE") and Toronto ("TSX") stock exchanges.

6 Cormark Securities and Dundee Securities are underwriters. Under the Ontario *Securities Act*, an underwriter is defined in s. 1(1) as follows:

"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

7 Where securities are distributed pursuant to a prospectus and there is an underwriter, s. 59(1) of the Ontario *Securities Act* requires that the prospectus include a certificate in the prescribed form from the underwriter(s). Section 59(1) states:

59(1) Subject to subsection 63(2), where there is an underwriter, a prospectus shall contain a certificate in the prescribed form, signed by the underwriter or underwriters who, with respect to the securities offered by the prospectus, are in a contractual relationship with the issuer or security holder whose securities are being offered by the prospectus.

8 The prescribed form requires the underwriters to certify that the prospectus contains full, true and plain disclosure to the best of their knowledge, information and belief.<sup>3</sup>

9 Underwriters are among the entities that are exposed to liability for misrepresentations in a prospectus pursuant to s. 130 of the Ontario *Securities Act*. Section 130 provides a purchaser of a security under a prospectus; *i.e.*, a purchaser in the primary market, with a remedy for misrepresentation. The statutory remedy is available against the issuer and the underwriters of the security as well as against the directors of the issuer and others who have signed the prospectus or have allowed their reports or statements to be used in the prospectus. The remedy is available regardless of whether the purchaser relied on the misrepresentation, which makes the statutory claim easier to prove than the common law claim for negligent misrepresentation, which has reasonable reliance as a constituent element. The statutory claim is also more amenable to certification as a class action. Section 130 states:

*Liability for misrepresentation in prospectus*

130. (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

- (a) the issuer or a selling security holder on whose behalf the distribution is made;
- (b) each underwriter of the securities who is required to sign the certificate required by section 59;

- (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;
- (d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and
- (e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),  
or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter.

*Defence*

(2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation.

*Idem*

(3) No person or company, other than the issuer or selling security holder, is liable under subsection (1) if he, she or it proves,

- (a) that the prospectus or the amendment to the prospectus was filed without his, her or its knowledge or consent, and that, on becoming aware of its filing, he, she or it forthwith gave reasonable general notice that it was so filed;
- (b) that, after the issue of a receipt for the prospectus and before the purchase of the securities by the purchaser, on becoming aware of any misrepresentation in the prospectus or an amendment to the prospectus he, she or it withdrew the consent thereto and gave reasonable general notice of such withdrawal and the reason therefor;
- (c) that, with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he, she or it had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the prospectus or the amendment to the prospectus did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert;
- (d) that, with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert but that contains a misrepresentation attributable to failure to represent fairly his, her or its report, opinion or statement as an expert,
  - (i) the person or company had, after reasonable investigation, reasonable grounds to believe and did believe that such part of the prospectus or the amendment to the prospectus fairly represented his, her or its report, opinion or statement, or
  - (ii) on becoming aware that such part of the prospectus or the amendment to the prospectus did not fairly represent his, her or its report, opinion or statement as an expert, he, she or it forthwith advised the Commission and gave reasonable general notice that such use had been made and that he, she or it would not be responsible for that part of the prospectus or the amendment to the prospectus; or

(e) that, with respect to a false statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document, and he, she or it had reasonable grounds to believe and did believe that the statement was true.

*Idem*

(4) No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert unless he, she or it,

- (a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or
- (b) believed there had been a misrepresentation.

*Idem*

(5) No person or company, other than the issuer or selling security holder, is liable under subsection (1) with respect to any part of the prospectus or the amendment to the prospectus not purporting to be made on the authority of an expert and not purporting to be a copy of or an extract from a report, opinion or statement of an expert unless he, she or it,

- (a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or
- (b) believed there had been a misrepresentation.

*Limitation re underwriters*

(6) No underwriter is liable for more than the total public offering price represented by the portion of the distribution underwritten by the underwriter.

*Limitation in action for damages*

(7) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of such damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon.

*Joint and several liability*

(8) All or any one or more of the persons or companies specified in subsection (1) are jointly and severally liable, and every person or company who becomes liable to make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable.

*Limitation re amount recoverable*

(9) In no case shall the amount recoverable under this section exceed the price at which the securities were offered to the public.

*No derogation of rights*

(10) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

10 Although this action is about the primary market, for the discussion later of the cause of action criterion for certification and the scope of an underwriter's duty of care, it shall be useful to note that with respect to distributions of shares in the secondary market, at common law a purchaser of shares had no cause of action about misrepresentations in a prospectus.<sup>4</sup> This lacunae in the law was remedied by amendment to the Ontario *Securities Act* and the addition of Part XXIII.1 (Civil Liability for Secondary Market Disclosure), which provided a statutory cause of action for misrepresentation without proof of reliance. The statutory remedy is available against the issuer, directors of the issuer and certain others who have signed the prospectus or have allowed their reports or statements to be used in the prospectus. There, however, is no statutory secondary market misrepresentation claim against underwriters. Thus, although underwriters are exposed to statutory liability in the primary market, they are not included amongst those exposed to statutory liability for secondary market disclosure.<sup>5</sup> Underwriters are, however, exposed to tort claims in both the primary and the secondary markets.

11 In an Underwriting Agreement dated May 2, 2013, Cormark Securities and Dundee Securities contracted with Hycroft to act as underwriters in a public offering of Hycroft's common shares. Under the Underwriting Agreement, Cormark Securities and Dundee Securities were permitted to conduct due diligence with respect to their certificate under the Ontario *Securities Act*. The Underwriting Agreement stated:

[Hycroft agrees to] . . . allow the Underwriters to conduct all due diligence which they may reasonably require in order to fulfill their obligations as Underwriters and in order to enable the Underwriters to responsibly execute the certificates required to be executed by them in the Canadian Preliminary Prospectus, the Canadian Final Prospectus or in any Supplementary Material.

12 On May 9, 2013, Hycroft released the final short form prospectus and published it on SEDAR (System for Electronic Document Analysis and Retrieval). The prospectus included the certification of the Underwriters. In the short form prospectus, Cormark Securities and Dundee Securities affirmed:

To the best of our knowledge, information, and belief, this short form prospectus together with the documents incorporated by reference, constitutes full, true and plain disclosure of all material facts relating to the securities offered by this short form prospectus as required by the securities legislation of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador.

13 On May 17, 2013, Hycroft effected a cross-border \$150 million (USD) secondary public offering of 14 million shares of common stock at a price of \$10.75 (USD) per share. The offering was financed as a "bought deal" with Cormark Securities and Dundee Securities acting as principals. A bought deal is an offering where the underwriter, rather than acting as sales agent of the issuer, commits to buying the entire offering from the issuer of the security and then the underwriter resells it. Under a bought deal, the underwriter takes on the market risk of reselling, and thus a bought deal is different from an underwriting in which an underwriter makes best efforts to sell the securities of the issuer but provides no guarantee of the amount or value of the securities that will be sold and the issuer takes on the market risk.

14 For the resale of the Hycroft shares, the price of the shares sold pursuant to the prospectus was based on the prevailing price for Hycroft's shares in the secondary market on the TSX on April 29, 2013 (the last trading day before the announcement of the offering) and May 8, 2013 (the last trading day before the filing of the prospectus).

15 Incorporated by reference as an integral part of the short form prospectus was Hycroft's 2012 Annual Report, its Q12013 Interim Report, and its MD&As (Management Discussion and Analysis of Financial Conditions and Results of Operations). The documents incorporated by reference included representations about Hycroft's gold production and its ability to finance its gold mine.

16 LBP Holdings alleges that the representations about the gold mine's production violated Hycroft's disclosure obligations because the prospectus omitted to disclose that during late 2012, the company was having persistent operational problems with its Lewis Leach Pad that had not been rectified. These operational problems had an adverse effect on Hycroft's ability to produce gold. LBP Holdings alleges that the production projections were unreasonable because of the persistent operational problems.

17 LBP Holdings submits that before signing the underwriter's prescribed certificate for the public offering, by the exercise of due diligence, the Underwriters ought to have discovered the material facts not disclosed by Hycroft.

18 LBP Holdings alleges that the Underwriters knew and intended that the purchasers would rely on the prospectus in making a decision to purchase Hycroft's securities.

19 Pursuant to the prospectus, Hycroft shares were distributed in British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, and the United States. Excluding U.S. purchasers, 247 Canadians and 7 foreigners purchased 7.2 million Hycroft common shares directly from Cormark Securities and Dundee Securities.

20 The Underwriters know the identities and addresses of the purchasers. On average, each purchaser purchased \$307,745.12 (USD) worth of shares.

21 LBP Holdings reviewed the prospectus for the secondary public offering before making its purchase. LBP Holdings purchased 20,000 shares of Hycroft for \$215,000 (USD).

22 On August 6, 2013, Hycroft released information about operational problems with the Lewis Leach Pad at the mine. The disclosure led to a nearly 26% decline in the value of Hycroft's shares falling from \$6.09 to \$4.56.

23 On August 7, 2013, the decline continued, and the shares closed at \$3.85, a two-day decline of approximately 37%.

## ***2. LBP Holdings' Proposed Class Action***

24 By notice of action, on July 16, 2014, LBP Holdings commenced a proposed class action against Hycroft and Messrs. Caldwell and Buchan.

25 LBP Holdings' Statement of Claim was filed on August 14, 2014. LBP Holdings claims damages of \$47 million (USD). The Underwriters were not named as parties.

26 LBP Holdings proposed to be the representative plaintiff for:

All persons, other than Excluded Persons, who acquired Hycroft Mining Corporation's SPO [secondary public offering] securities in a transaction occurring outside the United States pursuant to the Prospectus and during its distribution period (the "Class").

Excluded Persons is defined as the defendants' affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the Individual Defendants' immediate families and any entity in which any of the foregoing has or had an interest during the distribution period for the Prospectus, or any time a document incorporated by reference in the Prospectus was released, and, with respect to the Class definition in paragraph 1(g) means U.S. citizens or residents who acquired Hycroft's securities in the SPO in a trade under the U.S. prospectus. Also excluded from the Class are any SPO shares sold prior to July 22, 2013.

27 The definition of "Excluded Persons" will exclude any investor that is included within a U.S. class proceeding against Hycroft that parallels the action in Ontario.

28 In the Canadian proposed class action, LBP Holdings alleges that Hycroft published core documents and made other statements containing material misrepresentations about: (a) its ability to process and leach ore at the Hycroft Mine; (b) the feasibility of its 2013 gold production and cash cost guidance projections; and (c) its ability to finance the expansion of the

Hycroft Mine. LBP Holdings pleads that these misrepresentations were incorporated by reference into the short form prospectus for the secondary public offering.

29 LBP Holdings pleads that the alleged misrepresentations were first corrected on July 22, 2013, when Hycroft published its second quarter operating results. Those results disclosed previous operating errors that prevented Hycroft from achieving its production targets. LBP Holdings pleads that the alleged misrepresentations were corrected again on August 6 and 7, 2013, when Hycroft announced in a series of conference calls that, because it could not leach enough ore to generate sufficient cash flows, the expansion of the Hycroft Mine had to be postponed.

30 On March 5, 2015, LBP Holdings amended its Statement of Claim.

31 On March 9, 2015, Hycroft filed for protection under U.S. bankruptcy law.

32 Two months later, on May 15, 2015, LBP Holdings served a motion seeking to add Cormark Securities and Dundee Securities as defendants to the proposed Canadian class action. The motion to add the Underwriters as defendants was to be heard a year later by Justice Belobaba.

33 On October 2015, before the argument of the joinder motion, Hycroft emerged from the Chapter 11 bankruptcy protection in the United States.

34 On the motion to add defendants, on April 27, 2016, Justice Belobaba held that LBP Holdings' claim against Cormark Securities and Dundee Securities under s. 130 of the Ontario *Securities Act* was statute-barred and that its claims under Part XXIII.1 of the *Act* - the secondary market claim against the Underwriters as alleged "experts" - for which leave is required, had no reasonable prospect of success. Justice Belobaba also held that LBP Holdings' unjust enrichment claim did not disclose a reasonable cause of action.

35 At the joinder motion, Cormark Securities and Dundee Securities did not object to the common law claims, and Justice Belobaba held that the tort claims, "remain alive for purposes of certification, although I assume that this is not a preferred alternative for the plaintiff."

36 After the decision on the joinder motion, LBP Holdings discontinued its secondary market claims (both statutory and common law) and its common law primary market claims against the Hycroft Defendants. This left LBP Holdings with a statutory claim against the Hycroft Defendants. The discontinuance of the other claims was in exchange for the consent of the Hycroft Defendants to certification of the statutory primary market prospectus misrepresentation claim under s. 130 of Ontario's *Securities Act* and the equivalent *Securities Acts* in other provinces. In March 2017, LBP Holdings filed a Fresh as Amended Statement of Claim reflecting these changes.

37 There was no agreement between LBP Holdings and the Underwriters about the certification of the action against them and by Notice of Motion dated March 17, 2017, LBP Holdings sought to certify the claims against the Underwriters for: (a) prospectus misrepresentation under s. 130 of the *Securities Act*, (b) negligent misrepresentation, and (c) negligence. The certification motion was returnable on July 25, 2017.

38 On the return of the certification motion, LBP Holdings abandoned its statutory claims as against Cormark Securities and Dundee Securities, and Justice Belobaba adjourned the incomplete certification motion to allow LBP Holdings to amend, once again, its Statement of Claim. The substantive part of the Order of Justice Belobaba stated:

1. THIS COURT ORDERS that subject to submissions on costs, leave is granted to the plaintiff pursuant to s. 29(1) of the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "CPA") to abandon all claims for primary market liability under securities legislation, including under Part XXIII of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 and equivalent provisions of other securities legislation (the "Statutory Primary Market Claim") as against the Underwriters.

2. THIS COURT ORDERS that this motion is adjourned pursuant to s. 5(4) of the CPA to permit the plaintiff to deliver an amended Fresh as Amended Statement of Claim for consideration under s. 5 of the CPA:

- (a) to remove the Statutory Primary Market Claim as against the Underwriters;
- (b) to re-plead the plaintiff's claims for primary market common law liability in negligence *simpliciter* and negligent misrepresentation;
- (c) to revise the proposed common issues as they relate to the plaintiff's claims for primary market common law liability in negligence *simpliciter* and negligent misrepresentation.

3. THIS COURT ORDERS that the Underwriters are not precluded from advancing any arguments in response to the plaintiff's amended Fresh as Amended Statement of Claim, including the argument that the plaintiff's claim for primary market common law liability in negligence *simpliciter* is subsumed with the plaintiff's claim for primary market common law liability in negligent misrepresentation.

4. THIS COURT ORDERS that the costs of this motion, including costs resulting from the plaintiff's abandonment of its Statutory Primary Market Claim as against the Underwriters, are to be determined as part of the hearing of the motion for certification of this action as a class proceeding.

39 On August 10, 2017, LBP Holdings served a Second Fresh as Amended Statement of Claim that deleted the statutory prospectus misrepresentation claim as against the Underwriters; repledged the negligence and the negligent misrepresentation claim, and revised the proposed common issues.

40 In the Second Fresh as Amended Statement of Claim, LBP Holdings alleges that: the Underwriters owed class members a duty of care to conduct reasonable due diligence and ensure that the prospectus made "full, true and plain disclosure . . . free of misrepresentation" and the duty of care arose from the Underwriters' certificate and from the Underwriting Agreement between Hycroft and the Underwriters that created a "special relationship" between the Underwriters and class members. LBP Holdings pleads that the Underwriters' certificate represented that the prospectus made full, true and plain disclosure but the prospectus contained multiple misrepresentations. Paragraph 104 of the Second Fresh as Amended Statement of Claim states:

104. Had the Underwriters not breached their duty of care in conducting their due diligence and pricing the securities offered by the Prospectus, the Plaintiff and the members of the Class would either: (a) not have purchased Hycroft's securities in the SPO [secondary public offering] at all; or, in the alternative, (b) they would have purchased those securities at a lower price; or, in the further alternative, (c) they would have purchased fewer securities offered in the SPO.

41 LBP Holdings alleges that the Underwriters failed to meet the standard of care because they knew or ought to have known that the prospectus did not make full, true, and plain disclosure of all material facts and, therefore, contained misrepresentations. It alleges that the Underwriters failed in their due diligence to learn about the operational problems at the Lewis Leach Pad or did learn about the problems and were negligent in not reporting the material facts in the prospectus.

42 In an amended Notice of Motion for certification, LBP Holdings proposes the following common issues:

*Common Issues relating to Part XXIII of the OSA ["Ontario Securities Act"] (against the Corporate Defendants)*

1. Was Hycroft a responsible issuer within the meaning of the *OSA*?
2. Was Hycroft obliged to disclose all material facts in the Prospectus?
3. Did Hycroft encounter operational problems with the Lewis Leach Pad during Q1 2013 and prior to the release of the final Prospectus?
4. If so, was Hycroft required to disclose the operational problems at the Lewis Leach Pad in its final Prospectus for the SPO [secondary public offering]?

5. Did Hycroft's final Prospectus omit the material facts about the then known operational problems with the Lewis Leach Pad?
6. Were the Individual Defendants aware of the operational problems with the Lewis Leach Pad prior to the release of the final Prospectus?
7. If so, did the Individual Defendants conduct any type of due diligence to determine whether the facts about the operational problems at the Lewis Leach Pad were material facts as defined in the *OSA*?
8. Were the gold production and cash cost guidance projections relating to Hycroft's Q2 and annual results for 2013 fiscal year reasonable when made prior to and within the final Prospectus?
9. Did the pricing of the SPO incorporate the material facts released by the Individual Defendants during quarterly conference calls?
10. Are any of the Individual Defendants liable for releasing the final Prospectus that contained misrepresentations? If so, which Individual Defendant or both Individual Defendants?

*Common Issues relating to Negligent Misrepresentation (against the Underwriters)*

1. Did the Underwriters owe a duty of care to the Plaintiff and the members of the Class to ensure that the final Prospectus for the SPO did not contain any misrepresentations and otherwise made full, true and plain disclosure of all material facts?
2. What is the standard of care applicable to the Underwriters?
3. Did the Prospectus contain any misrepresentations or other failures to make full true and plain disclosure of all material facts?
4. If so, did the Underwriters breach the applicable standard of care?
5. If so, how did the Underwriters breach the applicable standard of care?
6. Did the Underwriters' breach of the applicable standard of care result in their section 59 *OSA* underwriter certification forms being released containing a misrepresentation?

*Common Issues relating to Negligence Simpliciter (against the Underwriters)*

Were the Underwriters negligent in conducting their due diligence and in pricing the securities offered by the final Prospectus? More specifically:

1. Did the Underwriters owe a duty of care to the Plaintiff and the members of the Class in respect of the SPO?
2. What is the standard of care applicable to the Underwriters?
3. Did the Underwriters breach the applicable standard of care?
4. If so, how did the Underwriters breach the applicable standard of care?
5. Did the Underwriters' breach of the applicable standard of care result in the securities offered by the final Prospectus being over-priced?
6. If so, at what price should the securities offered by the final Prospectus have been priced?

## C. Discussion and Analysis

### 1. The Certification Motion as against the Hycroft Defendants

43 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and who has presented a workable litigation plan.

44 The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification.<sup>6</sup> 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.<sup>7</sup>

45 As noted at the outset, the Hycroft Defendants consent to certification of the statutory claim under s. 130 of the Ontario *Securities Act* and equivalent legislation in other provinces in exchange for LBP Holdings abandoning its common law tort claims against them.

46 Having reviewed the record, I am satisfied that as against the Hycroft Defendants, LBP Holdings has satisfied the criterion for certification of the statutory claims under the Ontario *Securities Act* and equivalent *Securities Acts* in other provinces.

47 Accordingly, I order the action be certified as a class proceeding with respect to the Hycroft Defendants.

### 2. The Certification Motion as against the Underwriters: Overview

48 Turning to the certification motion as against Cormark Securities and Dundee Securities, they resist certification by challenging: (a) the cause of action criterion; and (b) the preferable procedure criterion.

49 By way of overview of the analysis that will follow, I shall address the preferable procedure criterion first and then consider the cause of action criterion.

50 With respect to the preferable procedure criterion, I shall assume that LBP Holdings has satisfied the cause of action criterion for discrete claims for negligent misrepresentation and for negligence (what LBP Holdings calls a negligence *simpliciter* claim). To foreshadow the result, I conclude that a class action is not the preferable procedure for either cause of action against the Underwriters.

51 Notwithstanding this dispositive conclusion, following the discussion of the preferable procedure criterion, I shall go on to consider Cormark Securities' and Dundee Securities' argument that the cause of action criterion is not satisfied.

52 To foreshadow the result, I agree with the Underwriters' argument that LBP Holdings' negligence claim is subsumed by its negligent misrepresentation claim, but I do not agree with the Underwriters' argument that LBP Holdings has not adequately pleaded a cause of action for negligent misrepresentation. Thus, LBP Holdings' action does satisfy the cause of action criterion for a claim of negligent misrepresentation.

53 Still foreshadowing the result, I agree with the Underwriters' argument that the cause of action criterion cannot be satisfied for a negligence claim based on the Underwriters' conduct in association with the bought deal distribution of Hycroft's shares. In my opinion, a free-standing negligence claim, although adequately pleaded, does not survive a duty of care analysis, which I also foreshadow to say is a different analysis from simply determining whether the constituent elements of a negligence claim have been properly pleaded. I also foreshadow to say that if the duty of care element is satisfied for a negligent misrepresentation claim that it does not necessarily follow that the defendant will also have a duty of care for a negligence claim.

54 The result of the analysis below is that the cause of action criterion is satisfied for a negligent misrepresentation claim but not for a negligence claim. However, the action should, nevertheless, not be certified because, in any event, a class proceeding is not the preferable procedure for either cause of action.

55 I pause here to note that because the action is not being certified as against Cormark Securities and Dundee Securities, it is not necessary to address - as a discrete item - their request for costs arising from LBP Holdings' abandonment of its statutory claims as against them. This claim for costs, including any claim for substantial indemnity costs in whole or in part, is incorporated in their claim for costs for the dismissal of the certification motion.

### **3. Preferable Procedure Criterion**

#### *(a) General Principles: Preferable Procedure*

56 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.<sup>8</sup>

57 In *Fischer v. IG Investment Management Ltd.* [hereinafter AIC Limited v. Fischer],<sup>9</sup> 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.<sup>10</sup> Arguments that no litigation is preferable to a class proceeding cannot be given effect.<sup>11</sup> 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.<sup>12</sup>

58 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.

59 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.<sup>13</sup>

60 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).<sup>14</sup>

61 The court must identify alternatives to the proposed class proceeding.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

62 In *AIC Limited v. Fischer*, 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?<sup>18</sup>

63 And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin*<sup>19</sup> and *Bruno Appliance and Furniture Inc. v. Hryniak*,<sup>20</sup> 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.

64 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.<sup>21</sup>

65 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 sections 12 and 25 of the *Act* empowers the court with tools to manage and achieve access to justice and judicial economy in those circumstances, and, 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.<sup>22</sup>

66 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

#### 4. Analysis: Preferable Procedure

67 In the case at bar, LBP Holdings seeks to combine common law claims for negligent misrepresentation and negligence against the Underwriters with the certified statutory claim under s. 130 of the Ontario *Securities Act* against the Hycroft Defendants. Cormark Securities and Dundee Securities submit, however, that the negligence claim is subsumed by the negligent misrepresentation claim. As I shall explain in my discussion of the cause of action criterion below, I agree with the Underwriters' submission that this has occurred in the case at bar; however, for the purposes of a preferable procedure analysis, I shall assume that the cause of action criterion has been satisfied for both causes of action, and I shall examine whether these discrete actions satisfy the preferable procedure criterion.

68 Cormark Securities and Dundee Securities argue that the proposed class action would ultimately involve a vast number of complex individual trials on the critical issues of reliance, causation, and damages, thus undermining two of the key goals of a class action, judicial economy and access to justice. They submit that in the circumstances of the immediate case, a class action is unmanageable, inefficient, unfair and unnecessary having regard to the alternative of individual actions.

69 In opposition, LBP Holdings submits that the combination of claims in the case at bar appropriately satisfies the preferable procedure criterion and will provide behaviour modification, judicial economy, and access to justice.

70 I shall begin the analysis of the parties' competing arguments by noting that I agree with LBP Holdings' submission that a common law negligent misrepresentation claim can be certified notwithstanding that there will be individual issues trials to address the reliance and damages elements of the tort.<sup>26</sup> I also agree with its submission that the circumstance in the immediate case that there is a statutory claim, which the courts have held is uniquely suited for a class action,<sup>27</sup> does not derogate from a plaintiff's right to also sue for a common law claim. And I agree that this last point is underlined by s. 130 of the Ontario *Securities Act*, which expressly states that: "the right of action for rescission or damages . . . is in addition to and without derogation from any other right the purchaser may have."

71 Further, I agree with LBP Holdings' submission that, generally speaking, if the statutory cause of action is certified, then numerous synergies might be achieved for a companion common law tort. However, I note that in the immediate case, the statutory cause of action is not being certified as against the Underwriters and, as I shall explain below, the statutory misrepresentation claim against the Hycroft Defendants is not congruent with the common law claims against the Underwriters.

72 Where I part company with LBP Holdings is my view that in the particular circumstances of the immediate case, the tort claims against the Underwriters (either separately or in combination with the statutory claim against the Hycroft Defendants) do not satisfy the preferable procedure criterion.

73 In *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*,<sup>28</sup> the Court of Appeal held a common law negligent misrepresentation claim in securities cases may not be suitable for certification where it would involve numerous individual issues of causation, reliance, and damages assessments. In *McKenna v. Gammon Gold Inc.*,<sup>29</sup> Justice Strathy, as he then was, concluded that reliance was an individual issue and the need to prove reliance as a constituent element of negligent misrepresentation makes a common law misrepresentation claim fundamentally unsuitable for certification.

74 However, courts have been willing to certify common law misrepresentation claims alongside associated statutory claims or alongside associated negligence claim.<sup>30</sup> The point to note is that notwithstanding the categorical arguments of the parties, it cannot be said that a class action is always or is never the preferable procedure for a negligent misrepresentation claim or a negligence claim in a proposed class action about the sale of securities in the primary or secondary markets for corporate securities. The principles for determining whether the preferable procedure criterion has been satisfied must be applied to the exigencies of each case.

75 In my opinion, in the case at bar, applying the principles as they have been articulated by the Supreme Court in *AIC Limited v. Fischer*,<sup>31</sup> LBP Holdings' negligent misrepresentation claim and its negligence claim do not satisfy the preferable procedure criterion either standing alone or standing in combination with the statutory claim.

76 I begin a more detailed analysis of the preferable procedure criterion in the circumstances of the immediate case by describing the constituent elements of a negligent misrepresentation cause of action and of a negligence cause of action and by noting that they are more complex than the statutory misrepresentation claim under s. 130 of the Ontario *Securities Act*.

77 The constituent elements of negligent misrepresentation are: (1) 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.<sup>32</sup>

78 The constituent elements of a negligence action 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.<sup>33</sup>

79 In contrast, the constituent elements of a statutory misrepresentation claim with respect to the sale of securities pursuant to a prospectus are: (a) a distribution of securities by prospectus; (b) a misrepresentation in the prospectus; (c) the plaintiff purchasing a security offered by the prospectus during the period of distribution; and (d) the defendant being the issuer of the prospectus or one of the persons referred to in s. 130(1) of the *Act*.<sup>34</sup>

80 In the case at bar, having regard to the constituent elements of the torts, the elements of reliance, causation, and damages are matters that raise highly individual issues that must be proven at individual issues trials. In the case at bar, individual issue trials against the Underwriters are inevitable for both the negligent misrepresentation and the negligence claim.

81 I would not go so far as to say that the individual issues would completely overwhelm the common issues in the action against the Underwriters, but the inevitability of individual issues trials does very substantially diminish the productivity of the common issues trial and introduces significant concerns about manageability similar to the concerns that led the Court of Appeal, in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*,<sup>35</sup> to conduct a preferable procedure analysis and to conclude that the common law action was not certifiable. Moreover, the individual issues in the case at bar are not amenable to summary determinations using the tools of s. 12 and 25 of the *Class Proceedings Act, 1992*. A costs benefits analysis indicates that little benefit is added by subjecting the individual claims to the procedure of a class action.

82 Further, in the case at bar, the common issues of the statutory claim against the Hycroft Defendants are not congruent with the common issues of the tort claims against the Underwriters. These circumstances increase the problems of managing the action with the combined claims and decrease the benefits of a class action procedure.

83 In the case at bar, combining the statutory misrepresentation claim against the Hycroft Defendants with the common law misrepresentation and negligence claims against the Underwriters is incongruent and unlikely to produce synergies and efficiencies because the legal situation of the Underwriters is different from that of the Hycroft Defendants. The Underwriters' misrepresentation is of a different order than the Hycroft Defendants' misrepresentation, and outside of the statutory scheme the Underwriters' standard of care is also different in its nature, as the discussion below of the cause of action criterion will reveal.

84 Cormark Securities or Dundee Securities are not in the mining industry, and their misrepresentations, if any, are concerned with their representing that the prospectus contains full, true and plain disclosure to the best of their knowledge, information and belief. The Underwriters' representation is different from the representations or omissions of material facts made by the Hycroft Defendants. Thus, the Underwriters' representation could be true even if the prospectus did not contain full, true and plain disclosure by the Hycroft Defendants. The Underwriters' duty of care in negligence and standard of care in negligence are also different from the duty of care and standard of care of the Hycroft Defendants. The misrepresentation claim and the negligence

claim against the Underwriters, while they arise out of a common factual narrative that involves the Hycroft Defendants, do not rest on the same factual or legal foundation as the claim against the Hycroft Defendants. The findings made in the statutory action against the Hycroft Defendants will only moderately assist the prosecution of the tort misrepresentation claim.

85 In the case at bar, coat tailing the tort claims against the Underwriters with the statutory misrepresentation claim against the Hycroft Defendants is problematic in terms of manageability and given the difference between the claims against the co-defendants, there is only modest advancement in judicial economy and much less than would be the case if a statutory claim against the Underwriters had been combined with the common law claims against them. Indeed, given that the misrepresentations, duty of care, and standard of care issues are not the same for the co-defendants, combining the statutory and common law claims may complicate the prosecution and defence of the various causes of action.

86 The negligence claim against the Underwriters is also incongruent with the misrepresentation claim against them, which presupposes a very different theory of liability that does not concern what the Underwriters said but rather concerns what they did or did not do before signing the certificate in the prospectus. The misrepresentation claim is about words found in the prospectus, but the negligence claim is about deeds and the Underwriters' alleged role as a gatekeeper and price setter before the prospectus was released and shares distributed.

87 I appreciate that for the purposes of a free standing negligence claim, a common issues trial would be an efficient and productive means to determine the duty of care and standard of care issues of the claim against the Underwriters. I appreciate that the prosecution of the negligence claim will require expensive expert evidence about the role that underwriters play in the securities marketplace. And I appreciate that advantageously, the expense of the common issues trial could be distributed over hundreds of class members; however, there is the prospect of unmanageability and negligible synergies to be achieved by combining all the claims, and, in any event, after the common issues trial of the common law claims, expensive evidence, and repetitive evidence, would be required at the individual issues trials about reliance, causation, and damages.

88 And given the monetary size of most, if not all of the putative Class Members' claims, a class action is not preferable to individual actions by those Class Members who can prove that they relied on something that Cormark Securities and Dundee Securities said or did not say before they decided to purchase Hycroft's shares. The individual claims would appear to be economically viable to litigate in the Superior Court. There is an alternative route for access to justice. For example, the Plaintiff's own claim is in excess of \$200,000 (USD) and the average claim of the Class Members is over \$300,000 (USD). Indeed, LBP Holdings indicated that if its action was not certified as against the Underwriters, it would proceed with an individual action against the Underwriters perhaps with other putative Class Members joined as co-plaintiffs.

89 I, therefore, conclude that the preferable procedure criterion is not satisfied in the proposed class action against the Underwriters.

### ***5. The Cause of Action Criterion***

#### ***(a) General Principles and Introduction***

90 The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The Underwriters submit that this criterion has not been satisfied in the case at bar.

91 The Underwriters do not dispute that LBP Holdings is capable of disclosing a reasonable cause of action for negligent misrepresentation, but they assert that as currently pleaded, LBP Holdings' misrepresentation claim is deficient for failure to plead the constituent element of reliance.

92 Further, the Underwriters argue that the negligence claim fails the cause of action criterion because the duties pleaded do not exist, reliance on the Underwriters is not and cannot be properly pleaded, and the negligence claim overlaps with and is subsumed within the negligent misrepresentation claim. Thus, they argue that the cause of action criterion has not been satisfied and cannot be satisfied by granting LBP Holdings leave to amend, for the sixth time, its Statement of Claim.

93 In this part of my Reasons for Decision I shall analyze whether the cause of criterion has been satisfied. To do this, I shall first set out in this introduction the general principles about the cause of action criterion. Next, I will discuss the pleading of the negligent misrepresentation claim. This discussion will be brief because I disagree with the Underwriters' submission that the pleading is inadequate. Then, in the following parts of the decision, I will consider at much greater length whether LBP Holdings' Statement of Claim discloses a reasonable cause of action in negligence assuming that it is distinct and independent and not subsumed by the negligent misrepresentation claim.

94 The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*<sup>36</sup> 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*. Thus, 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.<sup>37</sup>

95 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.<sup>38</sup> Matters of law that are not fully settled should not be disposed of on a motion to strike, and the court's power to strike a claim is exercised only in the clearest cases.<sup>39</sup>

96 In *Knight v. Imperial Tobacco Canada Ltd.*,<sup>40</sup> the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success, and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

97 On motions brought under the procedure to strike a claim or defence as untenable in law, leave to amend the pleading may and usually will be given, and leave to amend will be denied only in the clearest cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged and there is no reason to suppose that the party could improve his or her case by any amendment.<sup>41</sup>

#### (b) *The Negligent Misrepresentation Cause of Action*

98 But for an alleged failure to plead reasonable reliance, which, as noted above, is a constituent element of the tort of negligent misrepresentation, Cormark Securities and Dundee Securities do not dispute that LBP Holdings has adequately pleaded a reasonable cause of action for negligent misrepresentation.

99 Reading the Statement of Claim generously, in my opinion, all of the constituent elements of a negligent misrepresentation claim have been adequately pleaded.

100 As for the reliance element, LBP Holdings pleads that the Underwriters intended and knew the purchasers of Hycroft shares would rely upon the prospectus in making a decision to purchase. Mr. Parker testified that LBP Holdings reviewed a copy of the prospectus and relied on it in making its decision to purchase Hycroft's shares.

101 I, therefore, conclude that insofar as a common law negligent misrepresentation claim is concerned, that LBP Holdings has satisfied the cause of action criterion.

#### (c) *The Negligence Cause of Action:*

#### **Is it Subsumed by the Negligent Misrepresentation Cause of Action?**

102 Turning to LBP Holdings' cause of action in negligence, I agree with the Underwriters that as was the case in *Deep v. M.D. Management*,<sup>42</sup> *Singer v. Schering-Plough Canada Inc.*,<sup>43</sup> *Silver v. Imax Corp.*,<sup>44</sup> and *Mask v. Silvercorp Metals Inc.*,<sup>45</sup> the negligence claim is subsumed by the negligent misrepresentation claim and reliance is a constituent element of this claim.

103 The above cases are authority that a plaintiff cannot dress up what in substance is a negligent misrepresentation claim as a negligence claim and thereby avoid the necessity of proving reliance as a constituent element of its cause of action. In my opinion, it is plain and obvious that in the immediate case, the pleading of negligence has been dressed up to hide its real identity as a negligent misrepresentation claim arising out of the circumstances that led to the Underwriters signing their certification found in the short form prospectus.

104 In the case at bar, the negligence claim arises from the same circumstances as the negligent misrepresentation claim, and it does have the appearance of being a disguised version of the misrepresentation claim. The alleged duties to properly price the shares and to perform due diligence to ensure comprehensive disclosure of material facts in the prospectus are inexorably intertwined with the negligent misrepresentation claim that caused the alleged inflated share price and the putative Class Members' damages by purchasing Hycroft's shares. LBP Holdings' negligence claim purportedly focuses on the fact that it was a purchaser in a bought deal from the Underwriters, but this circumstance does not detach the negligence claim from the circumstance that the claim is essentially about the content of the prospectus, the Underwriters' due diligence about its certificate that was found in the prospectus, and the damage caused by the purchasers reading the prospectus before making a decision to purchase shares.

105 The negligence claim in the case at bar is much like the claim in *Deep v. M.D. Management*, where Mr. Deep sued Nortel for negligent misrepresentation and for negligence after the value of Nortel's shares dropped precipitously in value. Much like the case at bar, the underlying alleged duty of care was to accurately represent Nortel's financial situation in the prospectus and the misconduct, *i.e.* the breach of duty concerns activities or the failure to take steps before the shares were ever released to the public.

106 It follows from the conclusion that the negligence claim is subsumed by the negligent misrepresentation claim that there is no free-standing negligence claim and rather that the negligence claim is a reprise of a negligent misrepresentation claim that satisfies the cause of action criterion. Therefore, the negligence claim as such does not satisfy the cause of action criterion.

107 However, I shall nevertheless go on in the next parts of my Reasons for Decision to analyze LBP Holdings' negligence pleading as if it were an independent cause of action in negligence and determine whether it is plain and obvious that LBP Holdings' Statement of Claim does not disclose a legally viable claim in negligence.

#### (d) Negligence Duty of Care Analysis: General Principles

108 Notwithstanding my view that the negligence pleading is a reprise of the negligent misrepresentation pleading, for the purposes of a cause of action analysis, I shall treat the negligence claim against the Underwriters as a discrete and independent claim from the negligent misrepresentation claim, and I shall analyze that claim as an independent cause of action.

109 I shall proceed in this fashion because I agree with LBP Holdings' submission that it is doctrinally possible that a defendant may be concurrently liable for negligent misrepresentation and negligence, and I agree with its submission that concurrent negligent misrepresentation and negligence claims have been certified in cases such as: *Robinson v. Rochester Financial Ltd.*,<sup>46</sup> *Dobbie v. Arctic Glacier Income Fund*,<sup>47</sup> *Lipson v. Cassels Brock & Blackwell LLP*,<sup>48</sup> *Cannon v. Funds for Canada Foundation*,<sup>49</sup> *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*<sup>50</sup> and *Lavender v. Miller Bernstein*.<sup>51</sup> Thus, in the case at bar, it is necessary to undertake a duty of care analysis to explain why LBP Holdings' negligence claim does not satisfy the cause of action criterion.

110 In this section of my Reasons for Decision, I shall set out the general principles for a duty of care analysis, and then in the following section, I shall apply those principles to the case at bar.

111 The Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions<sup>52</sup> adapting and explaining the House of Lord's decision in *Anns v. Merton London Borough Council*,<sup>53</sup> which derived from the seminal negligence case, *McAlister (Donoghue) v. Stevenson*.<sup>54</sup>

112 The first element of a tort claim for negligence is a duty of care. As Lord Esher stated in *Le Livre v. Gould*:<sup>55</sup> "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them". The contemporary Canadian analysis of whether a duty of care exists begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new category of claim. If the claim falls within an established category, then precedent will have established that there is a duty of care associated with the relationship between the parties.<sup>56</sup>

113 Where the plaintiff's loss is purely economic, although the categories are not closed, there are five recognized categories of claims for which a duty of care has been found with respect to pure economic losses; namely (1) negligent misrepresentation;<sup>57</sup> (2) negligent performance of a service (professional negligence)<sup>58</sup>; (3) products liability where the goods pose a danger;<sup>59</sup> (4) the liability of public authorities<sup>60</sup>; and (5) relational economic loss.<sup>61</sup>

114 If the case does not come within an established category, it is necessary to undertake a duty of care analysis. In *Anns v. Merton London Borough Council*, the House of Lords adopted a two-step analysis to determine whether there was a duty of care between a plaintiff and a defendant: (1) Is there a sufficiently close relationship between the plaintiff and the defendant such that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff?; and (2) Are there any considerations that ought to negative or limit (a) the scope of the duty; (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?

115 As developed by the case law in Canada, the two-step analysis became a four-step analysis. The first step is to determine whether the case falls within a recognized category of case. In Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying the requirements of the next three steps: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficiently close *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity. Thus, in a new category of case whether a relationship giving rise to a duty of care exists depends on foreseeability and proximity, moderated by policy concerns.<sup>62</sup>

116 To determine the foreseeability element, the court asks whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act.<sup>63</sup> A reasonable foreseeability analysis requires only that the general harm, not its manner of incidence, be reasonably foreseeable.<sup>64</sup>

117 Proximity focuses on the type of relationship between the plaintiff and defendant and asks whether this relationship is sufficiently close that the defendant may reasonably be said to owe the plaintiff a duty to take care not to injure him or her.<sup>65</sup> Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests.<sup>66</sup> The proximity inquiry probes whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between the defendant and the plaintiff.<sup>67</sup> The focus of the proximity probe is on the nature of the relationship between victim and alleged wrongdoer and the question is whether the relationship is one where the imposition of legal liability for the wrongdoer's actions would be appropriate.<sup>68</sup> Not every foreseeable harm will attract a duty of care, which 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.<sup>69</sup> The proximity analysis of the first stage of the duty of care test involves policy issues because it asks the normative question of whether the relationship is sufficiently close to give rise to a legal duty.<sup>70</sup>

118 The proximity analysis involves considering factors such as expectations, representations, reliance, and property or other interests involved.<sup>71</sup> Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.<sup>72</sup>

119 The proximity inquiry recognizes a distinction between misfeasance, which is an overt act that may be foreseen to cause harm to another, and nonfeasance which is the failure to act to prevent foreseeable harm to another. Where the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care.<sup>73</sup> Where the allegation is that the defendant failed to prevent harm, the law requires close examination of the question of proximity and is concerned with whether the case discloses factors that show that the relationship between the plaintiff and the defendant is sufficiently close and direct to give rise to a legal duty of care.<sup>74</sup>

120 The proximity aspect of the formulation of a duty of care was examined in *Childs v. Desormeaux*,<sup>75</sup> which was the case that examined whether a social host has a duty of care to a stranger who is injured by an inebriated guest who drives away from the social host's party and causes a motor vehicle accident. In this case, Chief Justice McLachlin noted at para. 31 that: "[W]here the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care." This qualification recognizes that action that causes harm to another and inaction that fails to prevent harm being caused to another have different qualities of moral and legal culpability. In *Childs v. Desormeaux*, without intending to establish rigid categories, the Chief Justice identified three situations where there may be a relationship giving rise to a duty of care and liability for failure to act: (1) where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls; (2) where the parties have relationships of supervision and control, such as those of a parent and a minor child, or a teacher and student; and (3) where the defendant either exercises a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.

121 At paras. 38-40, Chief Justice McLachlin identified several recurrent themes running through the situations where the law will impose a duty of care and liability for failure to act to prevent the harm suffered by the plaintiff; namely: (1) the defendant's involvement in the creation of a risk or in controlling a risk to which others have been invited may justify imposing an obligation to minimize the risk; (2) respect for the plaintiff's autonomy may justify a defendant standing by and not intervening to prevent or minimize the risk to the plaintiff because the law accepts that competent people have a right to engage in risky activities; and (3) where the defendant creates or invites others into a dangerous situation, the defendant may reasonably expect that the persons invited can rely on the defendant to ensure that the risk is a reasonable one or to take appropriate rescue action if the risk materializes. In *Childs v. Desormeaux*, the Chief Justice explained (para. 39) that: "the law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene."

122 Moving on to the final stage of the duty of care analysis, and the consideration of whether countervailing policy considerations negate a duty of care, the policy concerns must be more than speculative and a real potential for negative consequences must be apparent.<sup>76</sup> The final stage of the analysis is not concerned with the type of relationship between the plaintiff and the defendant. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the plaintiff and the defendant such that the imposition of a duty would be fair.<sup>77</sup> The final stage of the analysis is about the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.<sup>78</sup>

(e) *The Negligence Cause of Action: Analysis*

123 I regard LBP Holdings' negligence claim as adequately pleaded from the perspective of alleging the constituent elements of a negligence claim, which are set out above. As a free-standing and independent tort claim, the negligence claim against the Underwriters focuses on their failing to perform due diligence, mispricing the shares, and allowing a sale of the shares to proceed in the primary marketplace. To quote from its factum, LBP Holdings' negligence claim concerns the manner in which the underwriters: (1) performed their due diligence obligations under the Underwriting Agreement, (2) performed their contractual duties under the Underwriting Agreement, and (3) performed their statutory duties as gatekeepers in connection with the share offering.

124 LBP Holdings emphasizes that the theory of its case in negligence is discrete and different from the theory of its case in negligent misrepresentation. Insofar as the negligence claim is concerned, LBP Holdings' argument that the Underwriters had a proximate relationship hinges on the existence of a bought deal and contract of sale between the Underwriters and the purchasers of shares. In its Reply Factum, LBP Holdings states:

. . . [its] common law negligence *simpliciter* claim is absolutely distinct and independent cause of action from the negligent misrepresentation claim. That is, the negligence claim concerns different impugned acts of the Underwriters, that were performed at different times within the underwriting process, from the impugned conduct that leads to a negligent misrepresentation. . . . Given that the Underwriters sell to, distribute to, and collect the capital from (either directly or through agents) the members of the Class, there is a special relationship between the Underwriters and investors, which gives rise to a duty of care between the Underwriters and the Class Members.

125 What LBP Holdings' submission reveals is that insofar as its negligence claim is concerned, the pertinent relationship between the putative Class Members and the Underwriters is the relationship of a seller to a purchaser. Based on this relationship, LBP Holdings submits that in addition to the Underwriters' statutory duties and its duty of care for the economic tort of negligent misrepresentation, they also have an independent duty of care for a pure economic loss claim in negligence. As acknowledged during the hearing of the certification motion, LBP Holdings' negligence claim focuses on the relationship that comes about between the putative Class Members and the Underwriters because the distribution of shares in the case at bar was pursuant to a "bought deal". LBP Holdings also acknowledged that it was not asserting that underwriters acting just as sales agents of the vendor would have comparable duties of care in negligence for pure economic losses.

126 These acknowledgements by LBP Holdings reveal both the novelty and also the tenuousness of the alleged duty of care. In general, there is no recognized duty of care to properly price goods to reflect their genuine value in the marketplace or to perform due diligence in the pricing of the goods sold. In general, while vendors of goods will have contractual duties to purchasers, sometimes statutory duties to purchasers, and duties to not manufacture dangerous or potentially dangerous goods, generally speaking, the law of the sale of goods is *caveat emptor* and permits self-interested hard bargaining. Apart from negligent misrepresentation and warranty in contract, vendors of goods typically do not have a duty of care to purchasers.

127 I begin the analysis of whether there is a duty of care of the type posited in the case at bar by noting that it does not follow that because a defendant has a legally proximate relationship that gives rise to a duty of care for negligent misrepresentation that he or she will necessarily have a duty of care for negligence *simpliciter*. The converse is also true and it does not follow that because a defendant has a duty of care for negligence that he or she will have a duty of care for negligent misrepresentation.

128 These points are trite and can be quickly demonstrated by illustration and analogy. The fact that a defendant motor vehicle driver has a duty of care to a plaintiff passenger to drive the vehicle without negligence does not necessarily mean that the defendant has other duties of care to the passenger, including a duty of care about what he or she says to the passenger about buying stocks in the stock market. Similarly, it does not categorically follow that because a defendant has a proximate relationship giving rise to a duty of care for negligent misrepresentation that the defendant has a duty of care of a different sort.

129 Thus, it does not necessarily follow from the fact that a defendant underwriter has a duty of care for the words it expresses in a certificate in a prospectus that the defendant underwriter has a duty of care to price the shares so that they do not underrate their true value. The duties of care being different, each requires a duty of care analysis. In other words, in the case

at bar, that LBP Holdings' negligent misrepresentation claim falls within an established duty of care to prevent pure economic loss, does not by itself mean that LBP Holdings' discrete negligence claim falls within a new category where pure economic losses are recoverable.

130 The categories of negligence are not closed, but newly proposed categories require new analysis. In the case at bar, the posited Underwriters' duty of care in negligence is a novel cause of action that does not fall within an established duty of care category for pure economic loss. It also cannot be regarded as an extension of an existing category. For example, there is no relationship contractual, statutory, or otherwise where the Underwriters, directly or indirectly, undertook to provide a service for the benefit of the putative Class Members.

131 LBP Holdings' argument for a duty of care in the case at bar is similar to the unsuccessful argument of the plaintiff in *Martel Building Ltd. v. R.*<sup>79</sup> The facts of the *Martel Building Ltd.* case were that Martel leased space to the federal government's Department of Public Works. In the spring of 1991, Martel's president met with officials from Public Works to negotiate a renewal of the lease, but then over a year passed until Public Works indicated that negotiations would have to be completed promptly or an open tender process would begin. Several more meetings followed without much progress and, in October 1992, Martel was told the tender process was proceeding, although Public Works would accept proposals from Martel until October 27, 1992. On that day, a proposal was made that Martel thought the negotiators would recommend, but on October 30, Public Works required that details of Martel's plans to retrofit its building be immediately settled or there would be a tender to find new space. It was not possible for Martel to comply, and tender documents were issued by Public Works. Martel and three others submitted bids and, although Martel's bid was the lowest, it was not awarded the contract. After the lease was awarded to Standard Life, Martel sued Public Works. Martel advanced three different claims, one in contract and two in negligence. With respect to negligence, Martel argued that Public Works had breached a duty to negotiate in good faith and also a duty of care in the tendering process.

132 The Supreme Court's judgment dismissing Martel's claim was written jointly by Justices Iacobucci and Major.<sup>80</sup> They concluded that all three of Martel's claims failed. The duty of care in tendering claim failed because it was subsumed by the contract claim that had failed. As for the breach of a duty to negotiate in good faith, it largely turned on how Public Works had conveyed or not conveyed information to Martel and Justices Iacobucci and Major regarded it as a novel economic loss claim that required a duty of care analysis. They concluded that Martel had shown a sufficiently close relationship between the parties such that the defendant Public Works was under an obligation to be mindful of Martel's legitimate interests; however, they also concluded that policy considerations would negate or limit the scope of the duty of care, the class of persons to whom it is owed, or the damages from a breach of duty. Justices Iacobucci and Major concluded that, as a general proposition, no duty of care arises in conducting negotiations.

133 For the present purposes of analyzing the negligence claim against the Underwriters, Justices Iacobucci's and Major's identification of policy factors negating a duty of care is particularly pertinent. They identified six factors that were relevant to determining whether a duty of care for pure economic loss should be recognized; namely (1) whether extending recovery for pure economic losses would create circumstances of indeterminate liability; (2) whether extending recovery for pure economic losses would deter useful economic activity; (3) whether extending recovery for pure economic losses would encourage or discourage economically efficient conduct; (4) whether extending recovery for pure economic losses would interject tort law as after-the-fact insurance against failures to pursue alternative strategies or opportunities or to act with due diligence or self-vigilance, a necessary ingredient of commerce; (5) whether extending recovery for pure economic losses would introduce the courts to a significant regulatory function when other causes of action already provided remedies for misconduct; and (6) whether extending recovery for pure economic losses would encourage needless litigation and a multiplicity of lawsuits in place of allowing market forces to operate.

134 In the circumstances of the *Martel Building Ltd.* case, there was no indeterminate liability, but the Supreme Court concluded that the other policy factors negated a *prima facie* duty of care. In essence, Justices Iacobucci and Major agreed with the argument of Public Works that to extend the tort of negligence into the conduct of commercial negotiations would be

an unnecessary and unsound invasion of the marketplace where business risks should be borne by the parties and not be re-allocated through the imposition of a duty of care.

135 Returning to the case at bar, assuming that the Underwriters had a duty of care for negligence independent of their duty of care for representations, then in my opinion, policy factors similar to those that were identified in the *Martel Building Ltd.* case negate the duty of care. I accept that there is no problem of indeterminate liability on the particular facts of the case at bar; however, extending an underwriter's liability for pure economic losses beyond an underwriter's current liability for negligent misrepresentation or for statutory liability under the Ontario *Securities Act* would: (a) deter useful economic activity where the parties are best left to allocate risks through the autonomy of contract, insurance, and due diligence; (b) encourage a multiplicity of inappropriate lawsuits; (c) arguably disturb the balance between statutory and common law actions envisioned by the legislator; and (e) introduce the courts to a significant regulatory function when existing causes of action and the marketplace already provide remedies.

136 In the case at bar there are also factors that indicate that the claim against the Underwriters does not even reach the policy factors stage of an *Anns v. Merton* analysis. In the immediate case even if the foreseeability stage of an *Anns v. Merton* analysis is satisfied, the proximity stage arguably is not satisfied. As noted above, the proximity analysis recognizes a distinction between misfeasance and nonfeasance, and at the heart of the negligence claim against the Underwriters, as distinct from the claim for misrepresentation, is the notion that the Underwriters had a gatekeeper's duty to prevent the harm of buying Hycroft's shares at an inflated price. Where the allegation is that the defendant failed to prevent harm, the law requires close examination of the question of proximity,<sup>81</sup> and as noted by Chief Justice McLachlin in *Childs v. Desormeaux*,<sup>82</sup> where the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care. In my opinion, even in the circumstances of a bought deal, an underwriter would not anticipate that purchasers would be relying on it to act as a gatekeeper beyond and distinct from its duties of care under s. 130 of the Ontario *Securities Act* and its common law duties with respect to misrepresentations in the prospectus.

137 As reflected by the scheme of the *Securities Act*, which responds to misrepresentations in a prospectus, the role played by the underwriters is different and more remote and less proximate, than the role played by the issuers, the auditors, and others whose words and opinions are found in a prospectus or in the disclosure documents that inform the secondary marketplace in securities. Underwriters, in their role in a distribution of securities pursuant to a prospectus, do not stand in the same relationship of proximity to shareholders as do the others involved in the distribution.

138 In the case at bar, it simply begs the question of whether there is a duty of care in negligence to submit that had the Underwriters fulfilled their duties, the securities would either not have been issued or would have been offered at lower prices. That questioning reads negligence backwards from harm having occurred to a foreseeable duty to prevent harm.

139 I disagree with LBP Holdings' argument that its concurrent and independent negligence claim against the Underwriters is essentially the same as the negligence claims that were made in *Robinson v. Rochester Financial Ltd.*,<sup>83</sup> *Lipson v. Cassels Brock & Blackwell LLP*,<sup>84</sup> *Cannon v. Funds for Canada Foundation*,<sup>85</sup> *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*,<sup>86</sup> and *Lavender v. Miller Bernstein*,<sup>87</sup> which claims survived a duty of care analysis. In making its argument for a duty of care in negligence, LBP Holdings principally relied on *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*.

140 In those cases, the role of the defendants and their relationship to the class members was different and more proximate than in the case at bar, where, but for the bought deal, LBP Holdings acknowledged that an underwriter would not have a duty of care beyond his statutory duties and its duty of care with respect to misrepresentations in its certificate.

141 The facts of *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* were that in March 2010, Rodman & Renshaw LLP, as placement agents, offered a private placement of the shares and warrants of Southern China Livestock, an American corporation that was raising money for its hog farming business in China. The portfolio manager of the plaintiff, Excalibur, a Manitoba limited partnership that invested in small-cap companies carefully read the Private Placement

Memorandum. The Memorandum included the audited financial statements and the auditor's opinion prepared by Schwartz Levitsky Feldman LLP, a firm of chartered accountants that held itself out as an expert in conducting financial due diligence and providing auditing services for companies based in China. Based on his reading of the offering memorandum and relying on the fact that Schwartz Levitsky Feldman LLP had delivered a clean audit opinion, the portfolio manager decided that Excalibur should invest \$950,000 of what turned out to be an approximately \$7.5 million investment by 57 investors. From the proceeds of the private placement, Schwartz Levitsky Feldman LLP was paid \$45,000 for its services. Later that year, in December, Southern China Livestock filed its annual 10-K Report under American securities legislation that included a Management's Discussion and Analysis section. Upon reading the 10-K Report, the portfolio manager was shocked by the disclosures and he concluded that the audit report could not have fairly and fully represented the financial state of Southern China Livestock. Seven months' later Southern China Livestock's North American directors resigned and it closed. Its shares and warrants were worthless. With the demise of Southern China Livestock, Excalibur commenced a class action against Schwartz Levitsky Feldman LLP and advanced concurrent claims for negligent misrepresentation and negligence. In other words, Excalibur submitted that in breach of a duty of care, Schwartz Levitsky Feldman LLP spoke falsely (negligent misrepresentation) and alternatively in breach of a duty of care, Schwartz Levitsky Feldman LLP ought not to have spoken at all (negligence). The essence of Excalibur's negligence claim is that Schwartz Levitsky Feldman LLP breached a duty of care by issuing a clean audit report and but for this report the private placement would not have been able to proceed.

142 In contrast to the circumstances and the relationships in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, in the case at bar, the role of the Underwriters is different. The Underwriters are not auditors; they are not hired to provide an opinion or to develop an investment transaction or an investment scheme, but rather they are hired essentially to be distributors of another's goods often as sales agents or, as in the immediate case, by assuming the risks of a bought deal. Underwriters make a weak representation of the sort made in the case at bar that the prospectus contains full, true and plain disclosure to the best of their knowledge, information and belief. They do not make strong representations of the nature made by the promoters, auditors, lawyers, and experts involved in the creation of the investment. Underwriters are obliged by statute to make a representation but are afforded a variety of statutory defences if they exercise due diligence before providing their certificate, but that is not the same thing as assuming a responsibility to ensure that the purchasers are making a sound bargain.

143 For similar reasons, while I do not doubt the soundness of the conclusions in *Robinson v. Rochester Financial Ltd.*,<sup>88</sup> *Dobbie v. Arctic Glacier Income Fund*,<sup>89</sup> *Lipson v. Cassels Brock & Blackwell LLP*,<sup>90</sup> *Cannon v. Funds for Canada Foundation*,<sup>91</sup> and *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*<sup>92</sup> that it was not plain and obvious that there was not a concurrent duty of care in negligence, the case at bar, which involves underwriters, and not auditors, promoters, and lawyers expressing tax opinions necessary to market or promote an investment, does not present a tenable duty of care in negligence in addition to the underwriters' duty of care in negligent misrepresentation.

144 Nor is *Lavender v. Miller Bernstein*,<sup>93</sup> where on a summary judgment motion on the common issues in a class action against an auditing firm, Justice Belobaba held that the auditors had breached a free-standing duty of care in negligence of any assistance to LBP Holdings in advancing its negligence claim against the Underwriters in the case at bar. In that case, Justice Belobaba also held that the negligence claim was not subsumed by the negligent misrepresentation claim against the auditors.

145 The facts of *Lavender v. Miller Bernstein* were that Buckingham Securities was a securities dealer that was obliged to file with the Ontario Securities Commission ("OSC") audited Form 9 reports confirming its minimum net free capital and confirming the segregation of assets and investor accounts. The accounting firm Miller Bernstein audited the Form 9s. It, however, failed to note that the reports were false for fiscal years 1998, 1999, and 2000. In 2001, the OSC placed Buckingham Securities into receivership because it failed to segregate investor (class member) assets and to maintain a minimum net free capital in breach of regulatory requirements. Buckingham Securities went out of business, and the investors lost \$10.6 million. The plaintiff, Lavender, who was one of the investors, sued Miller Bernstein for negligence, but it submitted that he was attempting to dress up a negligent misrepresentation claim as something else because he was unable to establish reliance. Miller Bernstein also submitted that it had no duty of care to its client's client.

146 In *Lavender v. Miller Bernstein*, Justice Belobaba accepted that there could be a free-standing cause of action in negligence against the auditors in a situation in which a duty of care exists independent of the duty of care for negligent misrepresentation, and then Justice Belobaba examined whether the relationship between Miller Bernstein with Buckingham Securities' investors was proximate enough to give rise to a duty of care. Justice Belobaba appreciated that it was a novel duty of care to safeguard against pure economic loss and that an *Anns v. Merton* duty of care analysis was required. He stated:<sup>94</sup>

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. 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. [footnotes omitted]

147 Justice Belobaba undertook the duty of care analysis, and he concluded that on the particular facts of the case, a duty of care had been established. He stated:<sup>95</sup>

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 . . . 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.

...

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." [footnotes omitted]

148 While there was a duty of care existing on the particular facts of *Lavender v. Miller Bernstein*, the particular facts of the case at bar, including the pleaded fact that the purchasers relied on the Underwriters' certificate in making their investment decision, do not lead to comparable conclusions that that the purchasers could reasonably expect the Underwriters to have

superadded duties of care to act as a gatekeeper, to undertake due diligence, and to assume the risk of ensuring that the shares were properly valued. The Underwriters do not have a responsibility comparable to the auditors in *Lavender v. Miller Bernstein* to prepare a document designed to ensure regulatory compliance. Nor do I think that it is a matter of simple justice that underwriters who can be sued for both negligent misrepresentation and also under s. 130 of the Ontario *Securities Act* should have the posited superadded duties of care in negligence when they enter into a bought deal that exposes them to the commercial risk associated with the sale of the shares. Insofar as the bought deal is concerned, the Underwriters had a contractual relationship and warranting the value of the shares sold is a matter of contract not negligence *simpliciter*.

#### D. Conclusion

149 For the above reasons, I certify the action as against the Hycroft Defendants and I dismiss the certification motion as against Cormark Securities and Dundee Securities.

150 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of Cormark Securities and Dundee Securities within 20 days from the release of these Reasons for Decision followed by LBP Holdings' submissions within a further 20 days.

*Motion granted in part.*

#### Footnotes

1 S.O. 1992, c. 6.

2 R.S.O. 1990, c. S.5.

3 *Ibid*, s. 59(1).

4 *Menegon v. Philip Services Corp.*, [2001] O.J. No. 5547 (Ont. S.C.J.), aff'd [2003] O.J. No. 8 (Ont. C.A.).

5 *LBP Holdings Ltd. v. Allied Nevada Gold Corp.*, 2016 ONSC 1629 (Ont. S.C.J.), leave to appeal to Div. Ct. ref'd 2016 ONSC 6037 (Ont. Div. Ct.), appeal to C.A. dismissed 2017 ONCA 13 (Ont. C.A.).

6 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 26 to 29; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) [hereinafter *Hollick v. Toronto (City)*] at paras. 15 and 16.

7 *Hollick v. Toronto (City)*, *supra*, at paras. 28 and 29.

8 *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. Toronto (City)*, *supra*.

9 2013 SCC 69 (S.C.C.) at paras. 24-38.

10 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at paras. 73-75, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'd (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

11 *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.).

12 *Markson v. MBNA Canada Bank*, *supra*, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Toronto (City)*, *supra*.

13 *AIC Limited v. Fischer*, *supra*; *Hollick v. Toronto (City)*, *supra*; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.).

- 14     *Cloud v. Canada (Attorney General)*, *supra* at paras. 73-75, 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.).
- 15     *AIC Limited v. Fischer*, *supra*, at para. 35; *Hollick v. Toronto (City)*, *supra* at para. 28.
- 16     *AIC Limited v. Fischer*, *supra* at paras. 48-49.
- 17     *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.
- 18     *AIC Limited v. Fischer*, *supra*, at paras. 27-38; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, *supra*, at para. 125.
- 19     2014 SCC 7 (S.C.C.).
- 20     2014 SCC 8 (S.C.C.).
- 21     *Markson v. MBNA Canada Bank*, *supra*, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346 (S.C.C.); *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.).
- 22     *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.); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 35; *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (Ont. S.C.J.) at para. 20; *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.); *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.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.) at para. 103; *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.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Ont. Div. Ct.) at para. 59; *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.).
- 23     *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.); *Arabi v. Toronto Dominion Bank*, [2006] O.J. No. 2072 (Ont. S.C.J.), aff'd [2007] O.J. No. 5035 (Ont. Div. Ct.).
- 24     *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, *supra*.
- 25     *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.) at para. 26.
- 26     *Fantl v. Transamerica Life Canada*, *supra*; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (S.C.C.) at para. 122.
- 27     *Pennyfeather v. Timminco Ltd.*, 2017 ONCA 369 (Ont. C.A.) at para. 6; *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 (Ont. S.C.J.) at para. 174, leave to appeal allowed in part, 2010 ONSC 4068 (Ont. Div. Ct.), varied and returned for reconsideration with respect to conspiracy pleading, 2011 ONSC 3782 (Ont. Div. Ct.), reconsidered 2011 ONSC 6630 (Ont. S.C.J.).
- 28     *Ibid.*
- 29     *Supra*, at para. 160.
- 30     *Fantl v. Transamerica Life Canada*, *supra*; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. S.C.J.), rev'd on other grounds, 2014 ONCA 90 (Ont. C.A.), aff'd, 2015 SCC 60 (S.C.C.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Ont. Div. Ct.); *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Ont. Div. Ct.); *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.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (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.); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 35; *Markson v. MBNA Canada Bank*, [2007] S.C.C.A. No. 346 (S.C.C.).

*Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.), rev'd, [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.).

31 2013 SCC 69 (S.C.C.).

32 *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.).

33 *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.) at para. 3.

34 *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764 (Ont. S.C.J.) at para. 44.

35 *Ibid.*

36 [1990] 2 S.C.R. 959 (S.C.C.).

37 *Dawson v. Rexcraft Storage & Warehouse Inc.*, 164 D.L.R. (4th) 257 (Ont. C.A.); *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.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, aff'd, (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

38 *Hollick v. Toronto (City)*, supra, at para. 25; *Cloud v. Canada (Attorney General)*, supra; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

39 *Dawson v. Rexcraft Storage & Warehouse Inc.*, 164 D.L.R. (4th) 257 (Ont. C.A.), *Temelini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664 (Ont. C.A.).

40 2011 SCC 42 (S.C.C.) at paras. 17-25.

41 *Mitchell v. Lewis*, 2016 ONCA 903 (Ont. C.A.) at para. 21; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72 (Ont. C.A.) at para. 16; *Adelaide Capital Corp. v. Toronto Dominion Bank*, [2007] O.J. No. 2445 (Ont. C.A.) at para. 6; *Miguna v. Ontario (Attorney General)*, [2005] O.J. No. 5346 (Ont. C.A.).

42 [2007] O.J. No. 2392 (Ont. S.C.J.), aff'd 2008 ONCA 189 (Ont. C.A.).

43 2010 ONSC 42 (Ont. S.C.J.).

44 [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Ont. S.C.J.). See also *McKenna v. Gammon Gold Inc.*, supra, at paras. 51-52.

45 2015 ONSC 5348 (Ont. S.C.J.), aff'd 2016 ONCA 641 (Ont. C.A.).

46 2010 ONSC 463 (Ont. S.C.J.), leave to appeal ref'd 2010 ONSC 1899 (Ont. Div. Ct.).

47 2011 ONSC 25 (Ont. S.C.J.), leave to appeal granted 2012 ONSC 773 (Ont. S.C.J.).

48 2011 ONSC 6724 (Ont. S.C.J.), rev'd on other grounds 2013 ONCA 165 (Ont. C.A.).

49 2012 ONSC 399 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Ont. Div. Ct.)

50 2014 ONSC 4118 (Ont. S.C.J.), aff'd 2015 ONSC 1634 (Ont. Div. Ct.), rev'd on different grounds 2016 ONCA 916 (Ont. C.A.), leave to appeal to the SCC ref'd [2017] S.C.C.A. No. 54 (S.C.C.).

51 2017 ONSC 3958 (Ont. S.C.J.).

52 *Haig v. Bamford* (1976), [1977] 1 S.C.R. 466 (S.C.C.); *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.); *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.); *Manolakos v. Gohmann*, [1989] 2 S.C.R. 1259 (S.C.C.); *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.); *Winnipeg*

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53 [1978] A.C. 728 (U.K. H.L.).

54 [1932] A.C. 562 (U.K. H.L.).

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56 *Childs v. Desormeaux*, 2006 SCC 18 (S.C.C.) at para. 14.

57 *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.).

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67 *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38 (S.C.C.); *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 (S.C.C.); *Design Services Ltd. v. R.*, 2008 SCC 22 (S.C.C.) at para. 26.

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- 74     *Followka v. Royal Oak Ventures Inc.*, 2010 SCC 5 (S.C.C.) at para. 26.
- 75     *Ibid.*
- 76     *Hill v. Hamilton-Wentworth Regional Police Services Board*, supra, at paras. 47-48; *Followka v. Pinkerton's of Canada Ltd.*, supra, at para. 57.
- 77     *Cooper v. Hobart*, supra, at para. 37; *Odhayji Estate v. Woodhouse*, supra, at para. 51.
- 78     *Cooper v. Hobart*, supra; *Odhayji Estate v. Woodhouse*, supra.
- 79     [2000] 2 S.C.R. 860 (S.C.C.).
- 80     Chief Justice McLachlin and Justices Gonthier, Bastarache, Binnie and Arbour, JJ. concurred.
- 81     *Followka v. Pinkerton's of Canada Ltd.*, supra, at para. 26.
- 82     2006 SCC 18 (S.C.C.).
- 83     *Ibid.*
- 84     *Ibid.*
- 85     *Ibid.*
- 86     *Ibid.*
- 87     *Ibid.*
- 88     *Ibid.*
- 89     *Ibid.*
- 90     *Ibid.*
- 91     *Ibid.*
- 92     *Ibid.*
- 93     *Ibid.*
- 94     *Ibid.*, at para. 16.
- 95     *Ibid.*

**TAB 23**

**Most Negative Treatment:** Reversed

**Most Recent Reversed:** [Lipson v. Cassels Brock & Blackwell LLP](#) | 2013 ONCA 165, 2013 CarswellOnt 2953, [2013] 4 C.T.C. 116, [2013] O.J. No. 1195, 303 O.A.C. 124, 31 C.P.C. (7th) 128, 114 O.R. (3d) 481, 360 D.L.R. (4th) 577, 225 A.C.W.S. (3d) 821 | (Ont. C.A., Mar 19, 2013)

2011 ONSC 6724  
Ontario Superior Court of Justice

Lipson v. Cassels Brock & Blackwell LLP

2011 CarswellOnt 12642, 2011 ONSC 6724, [2011] O.J. No. 5062, [2012] 2 C.T.C. 144, 108 O.R. (3d) 681, 12 C.P.C. (7th) 328, 209 A.C.W.S. (3d) 229

**Jeffrey Lipson (Plaintiff) and Cassels Brock & Blackwell LLP (Defendant) and Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100 (Third Parties)**

Perell J.

Heard: November 7-8, 2011  
Judgment: November 14, 2011  
Docket: 09-CV-376511

Counsel: Peter L. Roy, J. Adam Dewar, for Plaintiff

Peter H. Griffin, Shara N. Roy, for Defendant

Sean Dewart, Tim Gleason, for Third Parties, Gardner Roberts LLP, Estate of Ronald Farano, deceased

Subject: Civil Practice and Procedure; Torts; Income Tax (Federal); Provincial Tax

**Related Abridgment Classifications**

Civil practice and procedure

**VII Limitation of actions**

**VII.5 Actions in tort**

**VII.5.a Specific actions**

**VII.5.a.i Actions against particular parties**

**VII.5.a.C Barristers and solicitors**

Tax

**II Income tax**

**II.17 Tax credits**

**II.17.d Charitable donations**

**II.17.d.viii Miscellaneous**

**Headnote**

Civil practice and procedure --- Limitation of actions — Actions in tort — Specific actions — Actions against particular parties — Barristers and solicitors

Between 2000 and 2003, L participated in timeshare program in which he, and others, donated both cash and also resort timeshare to Canadian athletic associations — L anticipated receiving tax credits for his charitable donations — Tax opinion prepared by law firm, CBB, was included in promotional material — CBB's opinion was that it was unlikely that Canada Customs and Revenue Agency could successfully deny tax credits — In 2004, Canada Revenue (CR) disallowed anticipated tax credits — In

2004 and 2005, L and other participants sought advice from law firm, T, and in 2006 some participants commenced litigation against CR as test cases — In 2008, test case litigation settled, and CR allowed participants to receive tax credit for cash portion of donation but L was denied greater part of his anticipated tax credit based on value of donated timeshares — In 2009, L commenced proposed class action against CBB for damages for negligence and negligent misrepresentation — L moved for certification of class action — Motion dismissed — L's proposed class action was statute-barred — Class members, including L, discovered or should have discovered their tort claims against CBB when validity of tax credits was denied by CR in 2004 — At that time and not later than 2006, when T was retained to sue CR, class members knew or ought to have known material facts on which negligence claim or negligent misrepresentation claim against CBB was based — As soon as letters from CR started to arrive, L and class members knew or ought to have known that CBB's opinion had caused them damage because but for those opinions they would not have participated in timeshare program and suffered damages.

Tax --- Income tax — Tax credits — Charitable donations — Miscellaneous

Between 2000 and 2003, L participated in timeshare program in which he, and others, donated both cash and also resort timeshare to Canadian athletic associations — L anticipated receiving tax credits for his charitable donations — Tax opinion prepared by law firm, CBB, was included in promotional material — CBB's opinion was that it was unlikely that Canada Customs and Revenue Agency could successfully deny tax credits — In 2004, Canada Revenue (CR) disallowed anticipated tax credits — In 2004 and 2005, L and other participants sought advice from law firm, T, and in 2006 some participants commenced litigation against CR as test cases — In 2008, test case litigation settled, and CR allowed participants to receive tax credit for cash portion of donation but L was denied greater part of his anticipated tax credit based on value of donated timeshares — In 2009, L commenced proposed class action against CBB for damages for negligence and negligent misrepresentation — L moved for certification of class action — Motion dismissed — L's proposed class action was statute-barred — Class members, including L, discovered or should have discovered their tort claims against CBB when validity of tax credits was denied by CR in 2004 — At that time and not later than 2006, when T was retained to sue CR, class members knew or ought to have known material facts on which negligence claim or negligent misrepresentation claim against CBB was based — As soon as letters from CR started to arrive, L and class members knew or ought to have known that CBB's opinion had caused them damage because but for those opinions they would not have participated in timeshare program and suffered damages.

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*Anderson v. Wilson* (2000), 138 O.A.C. 200 (note), 2000 CarswellOnt 1837, 2000 CarswellOnt 1838, 258 N.R. 194 (note), 185 D.L.R. (4th) vii (note) (S.C.C.) — referred to

*Attis v. Canada (Minister of Health)* (2003), 29 C.P.C. (5th) 242, 2003 CarswellOnt 347 (Ont. S.C.J.) — referred to

*Attis v. Canada (Minister of Health)* (2003), 2003 CarswellOnt 4868 (Ont. C.A.) — referred to

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*Boulanger v. Johnson & Johnson Corp.* (2002), 2002 CarswellOnt 1813 (Ont. S.C.J.) — referred to

*Boulanger v. Johnson & Johnson Corp.* (2003), 2003 CarswellOnt 1405, 32 C.P.C. (5th) 203, 226 D.L.R. (4th) 747, 170 O.A.C. 333, 64 O.R. (3d) 208 (Ont. Div. Ct.) — referred to

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*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

*Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B

Generally — referred to

MOTION by class member for certification of class action.

**Perell J.:**

**A. Introduction**

1 Between 2000 to 2003, Jeffrey Lipson and about 900 other Canadian taxpayers participated in a Timeshare Program in which they donated both cash and also resort timeshares to Canadian athletic associations. Mr. Lipson and the donors anticipated receiving tax credits for their charitable donations. In the marketing of the Timeshare Program, a tax opinion prepared by the law firm Cassels Brock & Blackwell LLP, was included in the promotional material. The Cassels Brock opinion was that it was unlikely that the Canada Customs and Revenue Agency could successfully deny the tax credits. Mr. Lipson says that he and the other participants would not have participated in the program but for the opinion of a reputable law firm that the charitable tax credits under the *Income Tax Act* would be available.

2 In 2004, Canada Revenue disallowed the anticipated tax credits in their entirety.

3 In 2004 and 2005, Mr. Lipson and other participants sought advice from Thornsteinssons LLP, a law firm that specializes in tax litigation, and in 2006, some of the participants commenced litigation against Canada Revenue as test cases to determine the availability of the tax credits for the donations.

4 In 2008, the test case litigation settled, and Canada Revenue allowed the participants to receive a tax credit for the cash portion of the donation. Mr. Lipson and the other participants in the Timeshare Program, however, were denied the greater part of their anticipated tax credit based on the value of the donated timeshares.

5 In 2009, to recover his losses, Mr. Lipson commenced a proposed class action against Cassels Brock for damages for negligence and negligent misrepresentation.

6 Cassels Brock brought third party claims against Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100. These third parties were involved in the promotion and marketing of the Timeshare Program.

7 Mr. Lipson now brings a motion for certification of his action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

8 Cassels Brock and the third parties Gardiner Roberts and the Farano Estate oppose the certification of Mr. Lipson's action as a class proceeding and, among other things, they submit that the claims of all the Class Members, including most particularly Mr. Lipson, are statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

9 Cassels Brock also submits that Mr. Lipson's proposed class action does not satisfy the common issues, preferable procedure, and suitable representative plaintiff criteria of the test for certification. Further, Cassels Brock submits that Mr. Lipson's negligence claim does not disclose a reasonable cause of action or it is a disguised and defective negligent misrepresentation claim purporting to obviate the reasonable reliance and causation elements of the tort.

10 For the Reasons for Decision that follow, it is my opinion that Mr. Lipson's proposed class action is statute-barred and, therefore, it should be dismissed.

11 Further, it is my opinion that, but for the fatal statute bar, Mr. Lipson's action would have satisfied the criterion for certification, although I should acknowledge that: (a) some of the proposed common issues do not meet the test for commonality and require revision; and (b) Cassels Brock had a strong, albeit ultimately unsuccessful argument that a class proceeding was not the preferable procedure for the resolution of the Class Members' claims.

12 After this introduction, I will explain my opinions by: (a) describing the evidentiary background; (b) describing the factual background; (c) analyzing whether Mr. Lipson's action satisfies the criteria for certification ignoring Cassel Brock's, Gardiner Roberts' LLP and the Farano Estate's arguments that the action is statute-barred; (d) analyzing whether the Class Members' claims are statute-barred; and (e) concluding with some directions about the determination of costs for the certification motion and directions about the resolution of the third party claims.

## B. Evidentiary Background

13 The evidentiary record for the certification motion was as follows:

- An affidavit of Mr. Lipson, who was cross-examined for the certification motion.
- An affidavit from Alexandra Carr, an associate lawyer at Roy Elliott O'Connor LLP, proposed class counsel. She appended a transcript of a cross-examination of Harley Mintz from another action with respect to the Timeshare Program.
- Affidavits containing an opinion from law professor, Vern Krisna, who was retained by Mr. Lipson to provide an expert opinion on the nature of the Timeshare Program's tax credits and on the validity or appropriateness of the legal opinions prepared by Cassels Brock about the tax credits for charitable donations. Professor Krisna was cross-examined for the certification motion.
- An affidavit from Eric Wagner, an articling student with the law firm of Lenczner Slaght Royce Smith Griffin LLP, the lawyers of record for Cassels Brock. He collected materials associated with the Timeshare Program.
- The transcript of a cross-examination of Stephen Elliott, one of the promoters of the Timeshare Program.

## C. Factual Background

### 1. The Timeshare Program

14 Around 2000, Stephen Elliott and Steven Mintz approached the accounting firm, Mintz & Partners with the idea of a Timeshare Program that would provide tax benefits to participants. Steven Mintz's brother Harley was a partner of the accounting firm.

15 Messrs. Elliot and Mintz's idea was that participants in the Timeshare Program would donate timeshares to a Canadian amateur athletic association along with sufficient cash to discharge the encumbrances against the timeshares. In return for the donations, the athletic association would provide the participants with tax receipts for the charitable donations.

16 The Timeshare Program was established, and Mintz & Partners established an entity known as Tuscany Marketing Services to oversee the marketing of the program.

17 Many participated in the marketing of the Timeshare Program, including Venturedge Corporation, which was a corporation owned by Gerald Prenick and Morris Langer, the principals of Prenick Langer LLP, another accounting firm and a third-party to these proceedings.

18 More precisely, the structure of the Timeshare Program and of the associated marketing campaign was as follows:

- Mr. Adrian Crosbie-Jones, a resident of the Bahamas, purchased timeshares in a Caribbean resort, which he settled (conveyed) to a trust known as the Athletic Trust of Canada.
- The Athletic Trust had two classes of beneficiaries. One class was the capital property beneficiaries, who at the discretion of the trustee would be assigned timeshares for which they had to agree to pay ongoing expenses and to assume the obligation to pay the encumbrance or lien against the timeshare.
- Canadian residents could apply to become beneficiaries of the trust if they demonstrated past charitable giving and a desire to assist amateur athletics in Canada. The trustee had the discretion to allocate timeshares to the beneficiaries who then would be in a position to donate them.
- A capital property beneficiary with a timeshare could, but was not obliged to, donate it to a Canadian amateur athletic association along with sufficient cash to have the timeshare conveyed free and clear of encumbrances.
- In return for a donation, the athletic association would issue two donation tax receipts.
- One tax receipt was for the donor's cash contribution to discharge the encumbrance, which ranged from \$4,600 to \$9,700 per timeshare.
- The other tax receipt was for the then fair market value of the donated timeshare less the amount of the encumbrance. The second receipt ranged from between \$8,765 and \$18,900.
- Thus, the two charitable donation receipts issued to donor participants in the Timeshare Program ranged from between \$13,275 to \$28,000 per timeshare.
- It should be noted that from an economic perspective, under these arrangements and assuming that tax receipts were operative, a donor would earn an approximately 35% return on his or her cash contribution to the athletic association, since it was the settlor of the trust who had paid for the timeshare settled on the Athletic Trust of Canada that was being conveyed to the athletic association.
- Canadian Athletic Advisors Ltd. was retained to sell or to re-sell the timeshares that were being donated to the athletic associations. Canadian Athletic Advisors received a 5% commission of the revenue from the sale of the timeshares, net of expenses.
- The athletic associations that received donations agreed to pool their donated timeshares into a common marketing pool to facilitate the re-sales by Canadian Athletic Advisors.
- The athletic associations agreed that if the resort developers repurchased 100 or more timeshares, the associations would sell a one bedroom timeshare for \$1,000 (USD) and a two bedroom timeshare for \$1,100 (\$USD).

- It may be noted that under these arrangements, although the athletic association would have issued tax receipts for between \$13,275 and \$28,600 per timeshare, its own financial resources would ultimately have increased only by around a \$1,300.
- The promotional materials for the Timeshare Program promised attractive income tax benefits. The marketing package included a Beneficiary Guide and a FAQ (frequently asked questions) sheet.
- Potential participants in the Timeshare Program could and did contact the promoters of the Timeshare Program, and many of the potential participants could and did obtain independent financial and legal advice from lawyers and accountants.
- The promotional material referred to the fact that Canadian Athletic Advisors had retained Cassels Brock to provide legal opinions with respect to the tax consequences of the Timeshare Program.
- The sales force was provided with the promotional material and with a due diligence information package. The sales force was provided with the legal opinions obtained from Cassels Brock.

## **2. The Cassels Brock Legal Opinions**

19 In 2000, Messrs. Elliot and Mintz retained Cassels Brock to provide Canadian Athletic Advisors with a legal opinion about the tax consequences under the *Income Tax Act* of participating in the Timeshare Program.

20 Cassels Brock is a full service law firm carrying on business in Toronto as a limited liability partnership. Lorne Saltman, a tax lawyer and a partner of the firm, prepared the opinion for Canadian Athletic Advisors.

21 In the following years, Cassels Brock prepared more legal opinions for Canadian Athletic Advisors about the Timeshare Program. There are six opinions. The opinions are substantially the same.

22 Using the October 8, 2003 opinion as an example, it is a 26-page, single-spaced, legal opinion divided into nine parts after an introduction. The parts are: (1) Facts; (2) Relevant Provisions of the Tax Act; (3) Meaning of "Gift"; (4) Transfer of Timeshare Weeks to Class A Beneficiaries; (5) Capital Gains; (6) Valuation; (7) General Anti-Avoidance Rule ("GAAR"); (8) Tax Shelter Identification Number; and (9) General Comments.

23 For present purposes, the following excerpts from the Cassels Brock opinions are pertinent, with emphasis added.

Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks

You have requested our opinion regarding the Canadian Federal Income Tax consequences relating to a donation of a 75-year leasehold Biennial Timeshare Resort Weeks at the Alexandra Resort and Spa in Providenciales, Turks and Caicos Islands, British West Indies (the "Timeshare Weeks") by individual Canadian resident taxpayers. It is contemplated that any such donation would entitle the donor to claim a tax credit under the *Income Tax Act* (Canada) (the "Tax Act").

Our comments are based on the facts and assumptions expressed below. **This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property.** The Timeshare Weeks will generally be considered to be held as capital property, unless the taxpayer is a trader or dealer in timeshare weeks, has acquired the Timeshare Weeks as an adventure in the nature of trade, or does not otherwise hold the Timeshare Weeks for investment purposes. ....

## **3. Meaning of "Gift"**

In order to claim a tax credit for a donation there must be a complete gift of the property. Each of several elements must be found in order for a donation to qualify as a gift for income tax purposes. These elements are summarized by the CCRA in its Interpretation Bulletin IT-110R3 entitled, "Gifts and Official Donation Receipts" ....

If a Class A Beneficiary chooses to retain the Timeshare Weeks, he or she may do so and hold, exchange, or sell the Timeshare Weeks, as well as to utilize them for his or her own vacations, or for any other lawful and permitted purposes. **If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them, the CCRA may be more inclined to challenge the arrangement (but see our opinion below at page 23 as to the unlikely success of such a challenge.) ....**

#### 7. General Anti-Avoidance Rule ("GAAR")

Although the current version of GAAR has been in place since 1988, there has to date been little jurisprudence of direct relevance to charitable donations. GAAR is intended to apply to situations where a transaction or series of transactions results in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit, or unless the transaction does not result in a misuse of the provisions of the Tax Act or an abuse having regard to the provisions of the Tax Act as a whole. ....

Accordingly, **we are of the opinion that a good argument can be made that it cannot reasonably be said that there is an abuse of the provisions of the Tax Act as a whole in these circumstances.** In our opinion, and based on the foregoing, a donation of Timeshare Weeks in these circumstances would not likely be successfully attacked under GAAR. ....

#### 9. General Comments

This opinion is based on the current provisions of the Tax Act, the regulations thereunder, and our understanding of the current administrative practices of the CCRA. .... No advance tax ruling has been sought or obtained from the CCRA to confirm the tax consequences or any of the transactions described herein.

**This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion.** It may not be relied upon by any other person or for any other purpose, nor may it be quoted in whole or in part or its existence or contents otherwise referred to, without our prior written consent.

**Based on and subject to the foregoing review, in our opinion it is unlikely that the CCRA could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries who receive a distribution of the Timeshare Weeks from the Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAA.**

This opinion is based upon our understanding of the facts and circumstances surrounding the proposed arrangements. If these facts or circumstances turn out to be different from what we have understood, our opinion may be different, in which event this letter should not be relied upon.

24 In Mr. Lipson's action, a core allegation against Cassels Brock is that it failed to consider whether Canada Revenue would consider the conveyance of timeshares a gift in accordance with the *Income Tax Act* jurisprudence.

25 It was Professor Krisna's opinion that the Cassels Brock opinions did not address the circumstance that if a tax credit was available for the donation of a timeshare, the credit would yield a financial return to the donor that exceeded his or her cash outlays in making the donation. His opinion was that Cassels Brock failed to address the implications of the financial advantages of making a donation of timeshares in circumstances where the purported donor was gaining (being enriched) and not losing (being impoverished) by his or her donation. This circumstance ran the risk that Canada Revenue would deny that the donation was actually a gift or intended to be a gift; i.e. Canada Revenue could submit that the donor did not actually make a gift or did not have the necessary donative intent of gift giving.

26 It was also Professor Krisna's opinion that Cassels Brock's opinion did not meet the standard of care expected of a tax lawyer.

### **3. Other Legal Opinions**

27 In December 2002, the law firm Aikins, McCauley & Thorvaldson provided a tax opinion to Canadian Athletic Advisors about whether the opinions set out in the Cassels Brock opinion for the Canada *Income Tax Act* were applicable to the Manitoba Tax Act. The firm provided the perfunctory legal opinion that:

Although we have not independently verified the strength of the arguments raised or the conclusions reached in the Cassels Brock Opinion, given the similarities between the *Federal Tax Act* and the *Manitoba Tax Act*, we know of no reason why similar arguments could not be raised and similar conclusions could not be reached, with the necessary contextual changes, with respect to the *Manitoba Tax Act*.

28 As noted above, one of the entities marketing the Timeshare Program was Venturedge, which was a corporation established by Mr. Prenick and Mr. Langer, the principals of the third party Prenick and Langer LLP.

29 On behalf of Venturedge, Mr. Prenick retained the late Ronald J. Farano, Q.C., a tax partner at the law firm Gardiner Roberts LLP to provide a second opinion about the Timeshare Program. The opinion written by Mr. Farano stated:

Based upon my understanding of the law as it exists as of this date the [Cassels Brock] Opinion properly reflects the legal situation in an income tax context.

30 It is a contested point about whether Mr. Prenick may have provided Mr. Farano's opinion to prospective participants in the Timeshare Program.

### **4. Mr. Lipson's Participation in the Timeshare Program**

31 In the fall of 2000, Morris Langer of Prenick Langer LLP, who was Mr. Lipson's accountant, told Mr. Lipson about the Timeshare Program.

32 Jeffrey Lipson is a wealthy retired businessman living in Toronto, Ontario. Before his retirement, he oversaw his family's retail business and he was a real estate investor.

33 Mr. Lipson says that he did not understand the intricacies of the Timeshare Program, and he asked Mr. Langer whether there was a legal opinion to support the tax benefits. Mr. Langer advised him that Cassels Brock had issued a supporting legal opinion. This satisfied Mr. Lipson, who says that he had a high aversion to financial risk, and he decided to participate in the program. Mr. Lipson says that he would not have participated in the Timeshare Program if there had not been a favourable tax opinion from a reputable law firm.

34 Mr. Lipson, however, did not read the Cassels Brock opinion, and he has no recollection of ever reading it even to this date.

35 In 2000 and in the following years, Mr. Lipson went ahead and participated in the program. After his 2000 donation, he did not put his mind to the Cassels Brock opinion before making more donations.

36 For 2000, he claimed tax credits of \$634,352. For 2001, he claimed credits of \$1,261,988. For 2002, he claimed credits of \$2,085,835. For 2003, he claimed credits of \$1,148,879.60.

### **5. The Denial of the Tax Credits and Proceedings Against Canada Revenue**

37 In October and November 2004, in terse letters to the participants in the Timeshare Program, Canada Revenue disallowed the charitable donation receipts as a basis for tax credits. As an explanation for denying the charitable donations: (1) Canada Revenue denied that the Athletic Trust was a validly constituted trust and, therefore, Canada Revenue's position was that there had been no valid transfer of timeshares; (2) Canada Revenue denied that the donors had acquired legal title to timeshares and denied that the donors had transferred timeshares to the athletic associations; (3) Canada Revenue denied that the Athletic Trust was a not charitable trust; (4) Canada Revenue denied that the donation of the timeshares was a true gift and was not giving

willingly without conditions or without restrictions on the charity; (5) Canada Revenue contended that the reported fair market value was significantly overstated.

38 With the receipt of the correspondence from Canada Revenue, Mr. Lipson immediately realized that there was a problem, and he sought legal and accounting advice at some expense. During his cross-examination, he stated that he realized that the tax treatment allegedly ensured by Cassel Brock's opinion "was not going to happen."

39 In April 2004, Mr. Lipson and many other participants retained Thornsteinssons LLP to represent them in dealing with Canada Revenue with respect to the Timeshare Program.

40 In January 2006, several of Thornsteinssons' clients brought test cases to challenge the disallowances of the tax receipts.

41 Also in 2006, Mr. Lipson filed notice of objection to his reassessments. He claimed that he was entitled to the full amount of the tax credits. These notices were held in abeyance pending the determination of the test cases.

42 In 2008, CCRA settled the test cases, and it offered to settle with all of the donors. Mr. Lipson settled with CCRA at that time.

43 In the settlement, Canada Revenue agreed that the cash paid by the donors to discharge the encumbrances against the timeshares constituted a charitable donation entitled to a tax credit. Canada Revenue, however, denied any charitable donation for the alleged fair market value of the donated timeshare.

44 Mr. Lipson submits that the settlement with Canada Revenue crystallized his damages and the damages suffered by the other participants in the Timeshare Program caused by the negligence of Cassels Brock. He further submits that but for the Cassels Brock opinions there would not have been a Timeshare Program. He submits that with the settlement, he discovered that he had suffered damages and that he had a claim against Cassels Brock for negligence and negligent misrepresentation.

45 Mr. Lipson submits that his heads of damages are: (a) special damages associated with the litigation with Canada Revenue; (b) the expense of interest arrears on his unpaid taxes; and (c) lost financial opportunities. The claims of the proposed Class Members are similar.

## ***6. The Class Action***

46 After the settlement with Canada Revenue, on April 15, 2009, Mr. Lipson commenced a proposed class action.

47 It should be noted that Mr. Lipson's action was commenced almost four and a half years from the first letters from Canada Revenue disallowing the tax credits and two and a half years after retaining a law firm to take proceedings against Canada Revenue.

48 Mr. Lipson claims damages in the amount of \$55 million for professional negligence and negligent misrepresentation. He also claims special damages for accounting, legal and other professional fees and expenses.

49 In his Statement of Claim against Cassels Brock, Mr. Lipson advances a claim of solicitor's negligence based on the allegation that the law firm provided advice negligently.

50 Mr. Lipson pleads that Cassels Brock breached a duty to Class Members to exercise the care and skill of a reasonably competent tax solicitor by:

(a) concluding that it was reasonably unlikely that the Canada Revenue could successfully deny the tax credits claimed by the Class Members in connection with the Timeshare Program;

(b) failing to consider or explain that Canada Revenue might deny all of the tax credits claimed by the Class Members in connection with the Timeshare Program on the grounds that they lacked the required donative intent to make a gift to the athletic associations because they had entered into a series of predetermined transactions merely to obtain a tax benefit; and

(c) permitting Cassels Brock's name and reputation to be used by the Athletic Trust in promoting and legitimizing the Timeshare Program in circumstances where Cassels Brock failed to exercise the requisite reasonable care and skill in assessing the income tax consequences relating to donations under the Timeshare Program.

51 Mr. Lipson pleads that but for Cassels Brock's negligence, the promoters of the Timeshare Program would not have created and made the Timeshare Program available to the public, and could not have successfully promoted the Timeshare Program. He pleads that Cassels Brock knew or should have known that without a favourable tax opinion, the Timeshares Program would not have been or could not have been made publicly available or successfully promoted. He pleads that Cassels Brock knew or ought to have known that potential donors, including Lipson and the other Class Members, would rely upon the Legal Opinions, including the existence and favourable nature of the Legal Opinions, in deciding whether to participate in the Timeshare Program in each Taxation Year. He pleads that but for Cassels Brock's involvement, no Class Member would have participated in the Timeshare Program and none would have suffered a loss.

52 He pleads that the opinions were prepared by Cassels Brock knowing that a favourable tax opinion was a necessary precondition to the creation and successful promotion of the Timeshare Program and that the Class Members (including Lipson) would rely on the existence of a favourable tax opinion in deciding whether to participate in the Timeshare Program. He pleads that in reliance on the legal opinions and its express and implied representations, the Class Members decided to participate in the Timeshare Program on the understanding they could both support amateur athletics and reduce their tax liability.

53 Mr. Lipson proposes the following class definition, which he estimates will identify approximately 900 Class Members:

All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "Class Members" or the "Class").

54 Mr. Lipson proposes the following common issues:

#### **Negligence**

- (1) Did the Defendant owe the Class a duty of care (in, among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?
- (2) If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?
- (3) Did the Defendant breach the foregoing standard(s) of care? If so, how?
- (4) If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

#### **Damages or Other Relief**

- (5) If the answer to common issue 4 is "yes", what types or heads of damages, if any, are the class members entitled to?
- (6) If the answer to common issue 4 is "yes" what remedy or remedies, if any, are the Class Members entitled to?
- (7) If the Class Member is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

55 On April 15, 2011, Cassels Brock issued a third party claim against: Mintz & Partners LLP; Deloitte and Touche LLP; Glenn F. Ploughman; Shelley Shifman; Prenick Langer LLP; TMK Financial Group Ltd.; Gardiner Roberts LLP; the Estate of Ronald J. Ferano, deceased; John Doe 1-100; John Doe Inc. 1-100; John Doe Partnership 1-100; and John Doe LLP 1-100. It is alleged that these third parties promoted or marketed the Timeshare Program.

56 Mintz & Partners LLP, Gardiner Roberts LLP, and the Estate of Ronald J. Farano, deceased have defended the main action.

57 Mintz & Partners LLP, Deloitte & Touche LLP, Prenick Langer LLP, Gardiner Roberts LLP, and the Estate of Ronald J. Farano, deceased, have defended the Third Party Claim.

58 On July 27, 2011, I granted the third parties leave to participate on the certification motion, and Gardiner Roberts and the Farano Estate did participate and they opposed certification.

59 Cassels Brock submits that several of the criteria for certification have not been satisfied. In any event, Cassels Brock and Gardiner Roberts LLP and the Farano Estate submit that the proposed class action is statute-barred.

#### D. The Criteria for Certification as a Class Action

##### 1. Introduction

60 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, 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.

61 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: *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, (Ont. Div. Ct.).

62 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

63 The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions — providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 26-29; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 15 and 16.

64 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 28-29.

65 In the case at bar, Cassels Brock did not dispute that Mr. Lipson's Statement of Claim disclosed a cause of action in negligent misrepresentation, and it accepted that there was a satisfactory class definition and an adequate litigation plan if the action was certified as a class action.

66 However, Cassels Brock challenged Mr. Lipson's pleading in negligence. The law firm also challenged the commonality of the proposed common issues, and it disputed that a class action was the preferable procedure. It challenged Mr. Lipson as a suitable representative plaintiff.

67 In any event, as noted above, Cassels Brock, Gardiner Roberts, and the Farano Estate submitted that the class action should be dismissed as statute-barred, which is a matter that I will discuss after analyzing whether the action otherwise satisfies the criteria for certification as a class action.

##### 2. Disclosure of Cause of Action

68 The first criterion is whether 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*, [1990] 2 S.C.R. 959 (S.C.C.) 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*. Thus, 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: *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) (S.C.C.); *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.).

69 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 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. ref'd, (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Abdoool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

70 Cassels Brock concedes that Mr. Lipson has disclosed a cause of action for negligent misrepresentation, the constituent elements of which are: (1) a duty of care relationship; (2) a misrepresentation by the defendant; (3) the defendant having been negligent in making the misrepresentation; (4) the plaintiff having reasonably relied on the misrepresentation; and (5) the plaintiff having suffered damages as a consequence of relying on the misrepresentation. See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.).

71 However, Cassels Brock challenges Mr. Lipson's negligence claim as not showing a reasonable cause of action or as a disguised and defective negligent misrepresentation action that attempts to circumvent the constituent elements of reasonable reliance and causation of damages.

72 Cassels Brock states that there was no lawyer and client relationship between it and the Class Members, and Cassels Brock submits that the Class Members claims are for pure economic losses for which the only available tort claim would be the tort of negligent misrepresentation. As I understand it, the point of this argument is that if Mr. Lipson's action is to proceed as a class action, it can proceed only as a negligent misrepresentation claim, in which case each of the class members must prove reasonable reliance.

73 Cassels Brock's arguments are similar to those made by the defendants in *Robinson v. Rochester Financial Ltd.*, [2010] O.J. No. 187 (Ont. S.C.J.), leave to appeal ref'd 2010 ONSC 1899 (Ont. Div. Ct.), which was a class action that was certified by Justice Lax, who allowed a general negligence claim to proceed. Cassels Brock submits that *Robinson* is distinguishable or wrongly decided.

74 In *Robinson*, the defendants were the promoters of a donation program in which the participants anticipating receiving tax credits under the *Income Tax Act*. The law firm Fraser Milner Casgrain LLP had prepared tax opinions for the promoters supporting the availability of tax credits. Canada Revenue, however, denied the tax credits, and the participants sued the promoters for breach of contract and for negligence. The participants sued Fraser Milner Casgrain for negligence.

75 The participants alleged that the law firm's legal opinions were a necessary precondition to the marketing of the donation program and that they had relied on the existence of the opinions as a factor in deciding whether to participate in the program. The participants alleged that Fraser Milner Casgrain was liable for negligence in preparing the opinions. The participants alleged that the opinions prepared for the promoters were prepared to be relied on by the promoters as fundamentally necessary to promote the donation program.

76 On the certification motion, Fraser Milner Casgrain moved to have the action against it dismissed. It argued that in the pleaded circumstances it could not have a duty of care and there could not be a negligence claim based on an allegedly negligent opinion that was never read or relied upon by the participants and that had been prepared just for the promoters.

77 Justice Lax disagreed with Fraser Milner Casgrain's argument that the participants' claim was a disguised and deficient negligent misrepresentation claim; rather, she viewed it as a discrete negligence claim pleading duty of care, standard of care, breach of the standard of care, causation, and damages. Justice Lax concluded that it was at least arguable that Fraser Milner Casgrain ought to have foreseen that its tax opinion would be used to market the program and that the participants would suffer damages if the opinion was negligently prepared. It was arguable that the law firm had a duty of care to the participants in the donation program. In paragraph 31 of her judgment, Justice Lax stated:

In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.

78 I take Justice Lax to be saying that it was not plain and obvious that the participants did not have a claim in negligence against the law firm. She appreciated that the negligence claim was a novel cause of action given that the participants were not the clients of the firm and that the opinion had been prepared only for the promoter clients. Justice Lax appreciated that the participants' claim against the law firm might not succeed and that it was still open for Fraser Milner Casgrain to argue that it had no duty of care to the participants of the program. These matters, however, were for trial and did not stand against the certification of the action as a class action.

79 I agree with Justice Lax's analysis. The *Robinson* case is not distinguishable from the case at bar, and, indeed, the case at bar is a stronger case for her analysis, which posits that it is arguable that the law firm had a duty of care and that the other constituent elements of negligence claim might be established; i.e. it is not plain and obvious that Mr. Lipson and the Class Member's do not have a free-standing claim for negligence that is discrete from a claim for negligent misrepresentation. See also: *Yorkshire Trust Co. v. Empire Acceptance Corp.*, [1986] B.C.J. No. 3254 (B.C. S.C.); *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381 (B.C. C.A.); *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (Ont. S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 (Ont. S.C.J.).

80 On the duty of care point of a negligence analysis, the case at bar is stronger than in the *Robinson* case because Cassels Brock wrote its opinions so that they might be relied on "by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by this opinion" while in *Robinson* the opinion was for the promoters although it was foreseeable that they would use to market the donation program to potential donors.

81 I conclude that Mr. Lipson has satisfied the cause of action criterion for the certification of his action as a class action.

82 I will discuss below whether his negligent misrepresentation action and his negligence action generate common issues suitable to be certified for a class action and whether a class action would be the preferable procedure for the determination of Mr. Lipson and the Class Members' claims.

### **3. Identifiable Class**

83 As already noted above, there is no challenge to the proposed class definition.

84 I find that the proposed definition satisfies the identifiable class criterion of the test for certification as a class action.

### **4. Common Issues**

85 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 18.

86 The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

87 The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

88 For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 39-40.

89 The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 65, leave to appeal to the S.C.C. ref'd, (S.C.C.), rev'd, [2003], 65 O.R. (3d) 492 (Ont. Div. Ct.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 33.

90 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: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.

91 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: *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.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.) at para. 126, leave to appeal granted (Ont. Div. Ct.), var'd 2011 ONSC 5882 (Ont. Div. Ct.).

92 While only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common; otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one: *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 61, aff'd 2010 ONSC 4724 (Ont. Div. Ct.).

93 Cassels Brock submits that Mr. Lipson's proposed common issues, which are set out earlier in these Reasons for Decision, want for commonality and are unfair. It submits that the certification of the list of proposed common issues would deny it the right and the ability to defend itself from the Class Members' claims. Thus, it states in paragraph 126 of its factum:

126. These proposed common issues raise significant individual issues. Grouping them together as common issues would severely limit Cassels Brock's ability to defend itself. It would be unable to raise, for instance, the individual circumstances of a plaintiff's actual knowledge of (including whether they read) the Opinion Letters, representations made by any third party agents or advisors (many of whom are third parties in the action), what reliance a plaintiff placed on the Opinion Letters, the results of any additional due diligence performed by the participant or their agents or advisors (such as the Farano Opinion), and the actual loss suffered by any individual plaintiff. All of these issues are raised squarely on the face of the pleading and the common issues as proposed.

94 Cassels Brock argues that reliance and causation are inherently idiosyncratic and individual issues that make Mr. Lipson's action unsuitable for a class action and that Mr. Lipson has unfairly designed the common issues to relieve the Class Members of the requirement of proving reliance and causation as elements of their claims of negligent misrepresentation and negligence respectively.

95 Notwithstanding Cassels Brock's arguments, in my opinion, questions 1, 2, and 3 of the list of proposed questions are suitable for certification as common issues. These issues have sufficient commonality and are not unfair to Cassels Brock.

96 Further, questions 5 and 6 would be suitable for certification if they were revised to state:

(5) If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?

(6) If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

97 However, in my opinion, questions 4 and 7 are problematic, and these questions should not be certified for the class action.

98 Question 4 is:

(4) If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

99 Question 4 either assumes that causation is a common issue or it makes determining whether causation is a common issue a common issue, which is not permissible. The commonality of an issue must have some basis in fact and cannot be simply assumed, and a common issue cannot be the determination of whether the purported common issue has commonality.

100 In my opinion, the commonality factors relied on by Mr. Lipson establishes some basis in fact that Cassels Brock's role was sufficient to cause *individual* Class Members, like Mr. Lipson, to incur a loss, but these factors are not sufficient to show some basis in fact that Cassels Brock's role was the necessary cause of *all* of the Class Members suffering a loss.

101 It seems to me that for Mr. Lipson's "but for causation argument" to work on a class-wide basis, there would have to be some basis in fact that Cassels Brock had the monopoly on the legal opinions that were the posited as a *sine qua non* for the Timeshare Program, but the evidence and common sense is to the contrary. The Timeshare Program was in fact supported by other opinions.

102 By way of illustration and comparison and contrast, the commonality of question 1, whether Cassels Brock owed the class a duty of care, has some basis in fact because Cassels Brock wrote its opinions so that they might be relied on "by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by this opinion." The legal opinions were communicated or made available to the whole class.

103 In contrast, the submission that but for the Cassels Brock opinion, the Class Members would not have suffered damages because there would not have been a Timeshare Program does not show some basis in fact for the commonality of causation because: (a) in so far as the negligent misrepresentation claim is concerned, the Class Members would still have to establish that they reasonably relied on Cassels Brock's opinion, which is an inherently individualistic inquiry; and (b) insofar as the negligent misrepresentation and negligence claims are concerned it should not be assumed and it does not necessarily follow that if Cassels Brock had a duty of care and breached the standard of care, it necessarily caused damages to *all* class members, including those who did not read or perhaps did not even put their mind to the existence of a tax opinion or who actually relied on the advice of persons who expressed their own independent opinion about the availability of tax receipts to participants in the Timeshare Program.

104 In *Yorkshire Trust Co. v. Empire Acceptance Corp.*, *supra* at para. 15. Justice McLachlin, as she then was, pointed out that reliance was considered an essential element of a cause of action for negligent misrepresentation for two reasons; namely, (1) it confines the class of persons who may sue; and (2) it constitutes the causal link between the misrepresentation and the loss; it is because the plaintiff relied on the statement that he or she suffered a loss.

105 Later, in her judgment at para. 18, Justice McLachlin notes that in cases where a causal link independent of reliance can be found, courts have been prepared to find a cause of action despite the absence of reliance. Earlier, in this judgment, I accepted that it was not plain and obvious that the Class Members did not have a reasonable cause of action in negligence, in which case the Class Members would not have to prove reasonable reliance, which is not a constituent element of a general negligence claim. (Proof of reasonable reliance would remain a constituent element in the Class Members' negligent misrepresentation claim). However, it does not follow from the absence of the requirement to show reliance in a general negligence claim that causation is to be assumed or that causation is no longer a constituent element of the general negligence claim.

106 While it may be provable for *some* Class Members, particularly those that put their minds to what the tax opinions actually stated, that Cassels Brock's alleged negligence caused them to participate in the Timeshare Program with attendant losses, and while it may be provable for *some more* Class Members, who were ignorant of Cassels Brock's opinions, that they have Cassels Brock to blame for their being a Timeshare Program, it does not follow that Cassels Brock should not be able to argue that there were *some* Class Members that have only themselves or others to blame for participating in the Timeshare Program.

107 Causation is an element of culpability for the torts of negligent misrepresentation and negligence, and this is a matter of fairness and justice. In *Hanke v. Resurface Corp.*, [2007] 1 S.C.R. 333 (S.C.C.), Chief Justice McLachlin stated at para. 23:

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at para. 26 per Sopinka J.

108 In *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), Justice Sopinka also stated at para. 26 that "causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."

109 Assuming that Cassels Brock opinion was the *sine qua non* or indispensable precondition to the Timeshare Program for all Class Members is unfair to the defendant Cassels Brock and ignores the evidence that there were other supportive legal opinions available and some of the marketers were accountants or professional advisors capable of evaluating the merits, or lack thereof, of the Cassels Brock opinions and of providing their own advice and opinions.

110 Moreover, it is at least arguable that the Timeshare Program would have gone forward regardless of Cassels Brock's opinion for those who would have been satisfied with a tax credit for the cash portion of their donation to the Athletic Association or for those with a higher tolerance for risk than Mr. Lipson or for those aware of the weaknesses of the Cassels Brock opinion but still prepared to take their chances. Put shortly, in the circumstances of this case, reasonable reliance and causation are individual not common issues and Cassels Brock should be able to show that individual Class Members have not proven all of the constituent elements of their respective tort claims.

111 This conclusion means that assuming that Mr. Lipson was successful at a common issues trial of questions 1, 2, and 3, Class Members would have to establish on an individual basis that they actually reasonably relied on the Cassels Brock opinion in making their decision to participate in the Timeshare Program or that the existence of the Cassels Brock opinion was a causal factor in their decision to participate in the Timeshare Program.

112 With causation as an individual issue, the Class Members would not have to prove that the Cassels Brock opinion was the *sine qua non* of the Timeshare Program for all Class Members and Cassels Brock would have the burden of proving that its opinion was not a factor or a contributing factor in the particular Class Members' decision to participate in the program. Treating reliance and causation as individual issues is fair to both parties.

113 As for question 7, it states:

(7) If the Class is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

114 There is no basis in fact and no theory advanced as to how the identified class — as a class — would be entitled to a damages award as a class. The class members would have individual claims for damages, which would depend on their individual tax situations. In this regard, I understand that there are limits to the availability of tax credits, and thus it is conceivable that there may have been other reasons for Canada Revenue to deny or limit the charitable tax credits in whole or in part from the Timeshare Program. In other words, the assessment of damages is an individual issue for each Class Member.

115 Based on the above analysis, I conclude that questions 1, 2, 3, 5 and 6 as revised are suitable common issues and that Mr. Lipson's action satisfies the third criterion for certification as a class action.

### **5. Preferable Procedure**

116 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: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, (S.C.C.).

117 Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, leave to appeal to S.C.C. ref'd, (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

118 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: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, rev'd (2005), 78 O.R. (3d) 38 (Ont. Div. Ct.), which aff'd (2004), 71 O.R. (3d) 741 (Ont. S.C.J.), leave to appeal to S.C.C. ref'd, (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.).

119 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (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): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, (S.C.C.).

120 A class proceeding will not satisfy the requirement that it be the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39; *Abdoool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at paras. 134, 135; *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.); *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770 (Ont. S.C.J.); *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (Ont. S.C.J.), aff'd (Ont. Div. Ct.).

121 In the case at bar, there is little to commend Mr. Lipson's action as class action as the preferable procedure based on access to justice or behaviour modification. There was no suggestion that the class members could not afford to litigate their substantial individual claims, and there was no suggestion that Cassels Brock or law firms in general need behaviour modification and that a class action is required to encourage Cassels Brock or law firms in general to meet the standard of care of a tax lawyer when offering tax opinions about charitable donation programs.

122 Turning to the preferability factor of judicial economy, in the case at bar, the common issues that have been certified would be followed by individual issues trials to determine the issues of reliance, reasonable reliance, causation, and quantification of damages, and, thus, Cassels Brock submits that the common issues are overwhelmed by the individual issues and a class action is not the preferable procedure.

123 While there is considerable strength in this submission, in my opinion, it understates the judicial resource economies to be achieved by the common issues trial. If, for instance, Cassels Brock were to succeed in showing that its opinion met the standard of care, then all 900 claims would have been resolved. Conversely, if Mr. Lipson were successful at the common issues

trial, the Class Members would have gone a long distance in advancing their claims against Cassels Brock. Cassels Brock's third party claims are manageable within the context of the individual issues trials, which is where they appear to properly belong.

124 Practically speaking, the common issues trial would be about Cassels Brock's role in providing its opinions and the individual issues trial would be about the conduct of the class members and the third parties, if any. This is a manageable and preferable procedure to having the common issues repeatedly litigated. Thus, I conclude that the fourth criterion for certification is satisfied in the case at bar.

#### ***6. Representative Plaintiff and Litigation Plan***

125 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: *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 (Ont. C.A.).

126 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: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 22, leave to appeal granted, (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.) at paras. 41, 48, varied (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.), at paras. 71-77; *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.

127 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: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 41.

128 The representative plaintiff must: (a) have knowledge of the overall factual situation; (b) assist in gathering evidence; (c) and decide whether to pursue the claim. However, because he or she will have the advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff: *Frey v. Bell Mobility Inc.*, [2007] S.J. No. 476 (Sask. Q.B.) at para. 7.

129 If the access to justice concerns of the *Class Proceedings Act, 1992*, are to be accomplished, the court should not subject the proposed representative plaintiff to the LSAT or some sort of Class Action Aptitude Test and should be skeptical of the defendant's arguments based on the personality of the candidate: *Coulson v. Citigroup Global Markets Canada Inc.*, [2010] O.J. No. 1109 (Ont. S.C.J.) at para. 158.

130 Cassels Brock submits that Mr. Lipson does not have the attributes to qualify as a representative plaintiff. It points out that although he ultimately abandoned the attempt, he sought to purchase interests in the actions of fellow class members. It points out that he never read the Cassels Brock opinions and has shown little interest in understanding his own allegations about the alleged deficiencies in the opinions.

131 Putting aside the problem discussed next of whether his claim is statute-barred, in my opinion, Mr. Lipson is a suitable representative plaintiff. With the assistance of competent counsel he has brought this action forward to a certification motion. There is no reason to think that he would not move the action forward to the common issues stage, which as noted above, focuses on Cassels Brock's role. He has prepared an unchallenged litigation plan and he has selected competent counsel with considerable experience in class action litigation.

132 I, therefore, conclude that the fifth criterion for certification has been satisfied.

#### ***7. Conclusion about the Certification of Mr. Lipson's Action as a Class Action***

133 Assuming that the action is not statute-barred, which is the topic next to be considered, for the above Reasons and subject to the qualifications noted above, Mr. Lipson's action satisfies the criteria for certification as a class action.

#### E. Are the Class Members Claims Statute-Barred?

134 Cassels Brock, Gardiner Roberts LLP, and the Farano Estate submit that Mr. Lipson's claims and the claims of all the Class Members in negligence and in negligent misrepresentation are statute-barred. They submit that when it can be shown that the proposed representative plaintiff's claim is statute-barred, he or she cannot be a member of the proposed class and he or she cannot act as the representative plaintiff. *Stone v. Wellington (County) Board of Education*, [1999] O.J. No. 1298 (Ont. C.A.); *Graham v. Imperial Parking Canada Corp.*, 2010 ONSC 4982 (Ont. S.C.J.).

135 Under the *Limitations Act, 2002*, actions are subject to a two-year limitation period from the date a claim is discovered. The discoverability rule is codified and particularized by s.5 (1) of the *Limitations Act, 2002*, which states:

5 (1) A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage occurred;
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission;
  - (iii) that the act or omission was that of the person against whom the claim is made; and
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

136 The discoverability principle governs the commencement of a limitation period and stipulates that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief: *Nielsen v. Kamloops (City)* (1984), 10 D.L.R. (4th) 641 (S.C.C.); *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.). Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.

137 The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the material facts, which is to say, the constitute factual elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 (Ont. S.C.J.), aff'd (Ont. C.A.), leave to appeal to S.C.C. ref'd (S.C.C.).

138 In my opinion, the Supreme Court of Canada's decision in *Central & Eastern Trust Co. v. Rafuse*, *supra*, is dispositive of the question of whether the Class Members' claims are statute-barred. In my opinion, the *Central Trust* case demonstrates that Mr. Lipson's and the other Class Members' claims are barred by the operation of the *Limitations Act, 2002*, which came into force in 2004 and which imposes a two-year limitation period for the claims in negligence and negligent misrepresentation.

139 In *Central Trust Company v. Rafuse*, Jack Rafuse and Frankly Cordon were the lawyers acting for Central Trust in a mortgage loan transaction. Central Trust had granted a mortgage loan to the purchasers of the shares of a motel and restaurant business. In breach of the standard of care, the lawyers, who were also acting for the purchasers, were negligent and in breach of contract for failing to advise Central Trust that the mortgage might, if challenged, be held to be void, which is what occurred

when, after the mortgage went into default, the Supreme Court declared the mortgage to be illegal as contravening a statute making it unlawful for a company to give financial assistance in connection with a purchase of its own shares.

140 Following the judgment of the Supreme Court declaring the mortgage to be void, Central Trust sued the lawyers for breach of contract and negligence. The Nova Scotia Court of Appeal held that the lawyers had been negligent, but the appellate court dismissed the action on the grounds that it was statute-barred. Central Trust appealed to the Supreme Court of Canada, which reversed the decision and held that the claim in negligence was not statute-barred.

141 In *Central Trust*, in the Supreme Court, the major issues included whether a lawyer could be concurrently liable in contract and in tort. For present purposes, the important issue to consider was whether Central Trust's action was statute-barred. In this regard, it was conceded that Central Trust's claim in contract was statute-barred. That being the case, after the Supreme Court decided that concurrent liability was possible, it addressed the questions of whether the claim in negligence was also statute-barred. The precise questions were whether the doctrine of discoverability applied to the claim in negligence and, if so, when had Central Trust discovered the solicitor's negligence claim.

142 Justice Le Dain decided that a doctrine of discoverability applied to the running of limitation periods. In paragraph 77 of his judgment, he stated:

I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence, ....

143 Having decided that the doctrine of discoverability applied, this meant that the limitation period, which was six years for Central Trust's negligence claim, started to run not when the claim in negligence occurred but from the date that the claim was discovered or from the date that it ought to have been discovered.

144 To apply the doctrine of discoverability, the relevant dates for Central Trust's claim were as follows: (a) the mortgage was granted as security on December 31, 1968; (b) the lawyer's certificate of title stating that the mortgage formed a first charge on the property was given to Central Trust on January 17, 1969; (c) the validity of the mortgage was challenged on April 21, 1977; (d) the mortgage was held to be void by the Supreme Court on April 22, 1980; and (e) Central Trust's action for negligence was instituted on October 22, 1980.

145 Justice Le Dain held that although the 1968 mortgage was not declared by final judgment to be void until 1980, it was void *ab initio* and actual damage occurred when Central Trust took the mortgage on December 31, 1968, because it acquired no enforceable security for its loan. However, as of the date of the mortgage loan, Central Trust did not know that it had suffered damage, and thus the question was when ought Central Trust to have discovered it had been damaged. The answer was April 1977, when the validity of the mortgage was challenged during foreclosure proceedings.

146 Justice Le Dain's succinct analysis of discoverability is found in paragraph 77 where he stated:

Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure. Accordingly [Central Trust's] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred.

147 It should be noted that the damage suffered by Central Trust occurred when it accepted a mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, and Justice Le Dain held that the limitation period

for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage, even though the actual declaration of the invalidity of the mortgage would occur still later.

148 The same analysis can be applied to the case at bar. The Class Members, including Mr. Lipson, discovered or should have discovered their tort claims against Cassels Brock when the validity of the tax credits was denied by Canada Revenue in 2004. At that time and certainly not later than 2006, when Thornsteinssons LLP was retained to sue Canada Revenue, the Class Members knew or ought to have known the material facts on which the negligence claim or negligent misrepresentation claim against Cassels Brock was based.

149 Like Central Trust, which took the security of a mortgage that turned out to be illegal based on its lawyers' title opinion, in the case at bar, the Class Members made donations that turned out to be ineligible for tax credits. It is alleged that the Class Members relied on Cassels Brock's opinions or but for Cassels Brock's opinions they would not have participated in the Timeshare Program. In both situations, albeit with hindsight, the damage to the participants occurred at the time when Cassels Brock was negligent but their awareness of the material facts of their claim against Cassels Brock came later when Central Trust or the participants in the Timeshare Program respectively learned that there was a potential problem with the tax credits.

150 In the case at bar, as soon as the letters from Canada Revenue started to arrive, Mr. Lipson and the Class Members knew or ought to have known that Cassels Brock's opinion had caused them damage because they had actually relied on the opinions, or, but for those opinions they would not or could not have participated in the Timeshare Program and suffered damages. Given that Canada Revenue was challenging the validity of the trust, the validity of the gift, the donative intent of the participants, and the value of the donation, the donors knew that Canada Revenue could successfully deny the tax credit.

151 The Class Members had all of the material facts necessary to determine that they had grounds for understanding that they had a tort claim against Cassels Brock. The Class Members may not have known the full extent of what it was going to cost them for having participated in the Timeshare Program but they did know that there had been harm caused because of Cassels Brock's opinions.

152 Mr. Lipson relies on *Beuthling v. Hayes*, [2011] O.J. No. 858 (Ont. S.C.J.) to argue that the limitation period did not start running until a settlement was reached with Canada Revenue. *Beuthling v. Hayes* was an action for solicitors' negligence by Mr. Beuthling, who alleged that because of his lawyer's incompetence, he had been wrongfully convicted for sexual assault. Justice Grey dismissed the defendant lawyer's motion for summary judgment based on a limitation period defence. Justice Grey concluded that the limitation period did not begin to run until Mr. Beuthling's conviction had been set aside because that would have been the earliest that he would have known that he had a chance to succeed in recovering a judgment for damages against his lawyer.

153 The *Beuthling* case does not assist Mr. Lipson. In the circumstances of a wrongful conviction because of a lawyer's failure to meet the standard of care of a competent defence lawyer, the client might know that the lawyer was incompetent at the time of the conviction and the client would have suffered damages as at the time of the conviction, however, the client could not know that he or she had a claim for solicitor's negligence until the conviction was set aside. The setting aside of the conviction is not a crystallization of damages, which would have already incurred, nor is it the perfection or completion of the constituent elements of the negligence action, which would also have occurred; rather, the setting aside of the conviction is the discovery that this claim exists. In this regard, the client's situation in *Beuthling* is analogous to Central Trust in *Central Trust v. Rafuse*, where Central Trust suffered damages at the moment when the lawyers provided negligent services but Central Trust did not discover it had a claim for solicitor's negligence until the validity and enforceability of the mortgage was challenged.

154 For the reasons, expressed above, in so far as the timeliness of the action is concerned, Mr. Lipson's and the Class Members' situation is different from Central Trust in the *Central Trust* case and of Mr. Beuthling, both of whom brought actions after the discovery of the already constituted negligence claims against their lawyers. In the case at bar, Mr. Lipson and the Class Members discovered that they had a claim against Cassels Brock in 2004 or in 2006. Mr. Lipson, however, did not commence his negligence and negligent misrepresentation actions until 2009.

155 By way of counterargument, Mr. Lipson submits that Cassel Brock's and the Third Parties' argument that the limitation period had run its course mistakenly uses knowledge of a potential loss to establish discoverability instead of knowledge that the loss was attributable to a breach of duty by Cassels Brock which was not ascertainable until there was a settlement or adjudication with Canada Revenue.

156 I think this counterargument means that although the Class Members knew they had a potential loss when they received the letters from Canada Revenue, they did not know whether to blame Cassels Brock for their potential loss. Thus, the Class Members submit an action against Cassels Brock would have been premature and that they had not discovered their claims against Cassels Brock. This argument is wrong.

157 At the time of the letters from Revenue Canada, the Class Members' loss was actual not potential and they knew who to blame for that actual loss. The Class Members had been denied the tax credits in their entirety, and they allegedly had been lured into a transaction or not properly warned about a transaction that they allege they would have avoided but for the role played by Cassels Brock. The Class Members incurred expenses, i.e. special damages, in an attempt to fix their problems by retaining another law firm and bringing proceedings against Canada Revenue.

158 In the case at bar, no independent inquiry of the facts is necessary to determine whether or not the Class Members claims are statute-barred. Indeed, this is apparent from the statement of claim that sets out that the material facts for the discovery of the negligence and negligent misrepresentation claims that occurred when the letters from Canada Revenue arrived denying the tax credits to the Class Members.

#### F. Conclusion

159 For the above Reasons, I dismiss Mr. Lipson's action. It follows that the third party claims should be discontinued because they are moot.

160 If the parties, including the third parties, cannot agree about the resolution of the third party claims and the matter of costs, a case conference should be arranged to address the manner in which these matters will be determined.

*Motion dismissed.*



**Most Negative Treatment:** Check subsequent history and related treatments.

2013 ONCA 165  
Ontario Court of Appeal

Lipson v. Cassels Brock & Blackwell LLP

2013 CarswellOnt 2953, 2013 ONCA 165, [2013] 4 C.T.C. 116, [2013] O.J. No. 1195, 114 O.R.  
(3d) 481, 225 A.C.W.S. (3d) 821, 303 O.A.C. 124, 31 C.P.C. (7th) 128, 360 D.L.R. (4th) 577

**Jeffrey Lipson, Plaintiff (Appellant/Respondent by way  
of Cross-Appeal) and Cassels Brock & Blackwell LLP,  
Defendant (Respondent/Appellant by way of Cross-Appeal)**

S.T. Goudge, Janet Simmons, E.E. Gillespie JJ.A.

Heard: September 17-18, 2012

Judgment: March 19, 2013

Docket: CA C54702

Proceedings: reversing *Lipson v. Cassels Brock & Blackwell LLP* (2011), 2011 ONSC 6724, 2011 CarswellOnt 12642, 12 C.P.C. (7th) 328, [2012] 2 C.T.C. 144, 108 O.R. (3d) 681, Perell J. (Ont. S.C.J.)

Counsel: David F. O'Connor, J. Adam Dewar, for Appellant

Peter H. Griffin, Ian MacLeod, Shara N. Roy, for Cassels Brock & Blackwell LLP

Tim Gleason, Sean Dewart, for Gardner Roberts LLP, Estate of Ronald Farano

Alexandra Urbanski, for Deloitte & Touche LLP

Subject: Estates and Trusts; Income Tax (Federal); Civil Practice and Procedure; Torts

**Related Abridgment Classifications**

Tax

**II** Income tax

**II.17** Tax credits

**II.17.d** Charitable donations

**II.17.d.vii** Whether genuine gift

**Headnote**

Tax --- Income tax --- Tax credits --- Charitable donations --- Whether genuine gift

Taxpayer participated in what was promoted as tax reduction program that involved donating timeshares to registered Canadian amateur athletics association in return for charitable tax donation receipts --- Before participating in program, taxpayer relied on tax opinion prepared by lawyer with defendant law firm --- Taxpayer filed income tax return under Income Tax Act for 2000, 2001, 2002, and 2003 taxation years, and claimed tax credits of \$634,352 for 2000, \$1,261,988 for 2001, \$2,085,835 for 2002, and \$1,148,879.60 for 2003 --- Canada Revenue Agency reassessed taxpayer, and denied most of tax deduction --- Taxpayer paid back taxes and interest arrears --- Taxpayer commenced proposed class action on behalf of all individuals who participated in program against defendant for damages for negligence and negligent misrepresentation --- Defendant served summonses to witness for purposes of pending certification motion under Class Proceedings Act --- Motion judge dismissed action, holding that it was statute-barred by two-year limitation period set out in Limitations Act, 2002, but that proposed class action otherwise satisfied criteria for certification --- Taxpayer appealed, and law firm cross-appealed --- Appeal allowed; cross-appeal dismissed --- Portions of order holding that action was dismissed was set aside, and substituted with order certifying action as class proceeding --- Motion judge erred in interpreting and applying case law --- When case law was interpreted properly, it was apparent that record before motion judge did not disclose whether taxpayer's claim was statute-barred, nor did it support conclusion that limitation period applicable to taxpayer's claim also applied to entire class --- Motion judge erred in

finding that causation in simple negligence was not proper common issue — Issue as to whether or not but for law firm's opinion, program would have been marketed and therefore available to cause harm to all members of class was properly resolved in common trial — Motion judge did not err in finding that taxpayer properly pleaded elements of negligence.

**Table of Authorities**

**Cases considered:**

*Central & Eastern Trust Co. v. Rafuse* (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse*) 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon*) [1986] R.R.A. 527 (headnote only), (sub nom. *Central Trust Co. v. Rafuse*) [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse*) 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse*) 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse*) 75 N.S.R. (2d) 109 (S.C.C.) — considered

*Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors* (2012), 2012 ONCA 851, 2012 CarswellOnt 15101, 113 O.R. (3d) 401 (Ont. C.A.) — referred to

*Kenderry - Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger* (2001), 53 O.R. (3d) 208, 2001 CarswellOnt 682 (Ont. S.C.J.) — followed

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(b)-5(1)(e) — referred to

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

*Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B

Generally — referred to

s. 5 — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20 — referred to

R. 21 — referred to

APPEAL by taxpayer and CROSS-APPEAL by law firm from judgment reported at *Lipson v. Cassels Brock & Blackwell LLP* (2011), 2011 ONSC 6724, 2011 CarswellOnt 12642, 12 C.P.C. (7th) 328, [2012] 2 C.T.C. 144, 108 O.R. (3d) 681 (Ont. S.C.J.), dismissing taxpayer's motion.

**S.T. Goudge, Simmons JJ.A.:**

**A. Overview**

1 The main issue before us is whether, on a motion for certification, the motion judge erred in holding that a proposed class action for solicitor negligence and negligent misrepresentation is statute-barred, but that the action otherwise qualifies for certification.

2 The appellant, Jeffrey Lipson, is one of about 900 Canadian taxpayers who donated cash and resort timeshare weeks to registered Canadian athletic associations during the four-year period between 2000 and 2003. He and the other donors made their

donations through a program (the "Timeshare Tax Reduction Program" or "the Program") operated by the Canadian Athletic Trust (the "Athletic Trust").

3 Under the terms of the Timeshare Tax Reduction Program, donors anticipated receiving tax credits worth more than the donor's actual financial outlay. In support of the viability of the Program, the promotional material included an opinion prepared by Cassels Brock & Blackwell LLP indicating that it was unlikely that the Canada Customs and Revenue Agency could successfully deny the anticipated tax credits.

4 In 2004, the CCRA notified Mr. Lipson that it intended to disallow his claims for tax credits under the Timeshare Tax Reduction Program in their entirety. On receiving this information, he and other donors who had received similar notices sought legal and accounting advice.

5 In 2006, two of the other donors launched proceedings with the assistance of counsel as a test case to challenge the CCRA's denial of the tax credits.

6 In 2008, the CCRA settled the test case on the basis that the donors would receive tax credits for their actual cash donations, but not for their donations of timeshare weeks (which had been paid for by a third party). Mr. Lipson and other members of the proposed class entered into similar arrangements with the CCRA.

7 In April 2009, almost five years after he had received the initial notice of disallowance from the CCRA, Mr. Lipson commenced a proposed class action in which he sued Cassels Brock for negligence and negligent misrepresentation relating to their opinion about the Timeshare Tax Reduction Program. Mr. Lipson claimed damages in the form of interest arrears, lost opportunities to make other donations, and special damages consisting of professional fees for challenging the CCRA's position.

8 On a motion for certification of the action as a class proceeding, Perell J. found that, apart from the limitations issue (and with the exception of certain proposed common issues including causation), the proposed class action satisfied the criteria for certification. Nonetheless, in an order dated November 14, 2011 (the "Order"), he dismissed the action, holding that it is statute-barred by the two-year limitation period set out in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

9 Mr. Lipson raises two issues on appeal:

1. Did the motion judge err in dismissing his action as statute-barred?
2. Did the motion judge err in not certifying the action, including his proposed common issue relating to causation, as a class proceeding?

10 In the event Mr. Lipson succeeds on the first issue, Cassels Brock cross-appeals from aspects of the motion judge's finding that the proposed class action otherwise satisfies the criteria for certification.

11 For the reasons that follow, we allow the appeal, set aside those portions of the Order holding that the action is statute-barred and dismissing it, and substitute an order certifying the action as a class proceeding. The cross-appeal is dismissed.

## **B. Background**

### **(1) The Timeshare Tax Reduction Program**

12 The motion judge provided a full summary of the origin and structure of the Timeshare Tax Reduction Program at paras. 14 to 18 of his reasons.

13 In brief, after establishing the Athletic Trust in Ontario, a Bahamian resident purchased timeshare weeks in a Caribbean resort and transferred them to the Trust.

14 Under the terms of the Timeshare Tax Reduction Program, potential donors could apply to become beneficiaries of the Athletic Trust and, once accepted, the trustee of the Athletic Trust had discretion to distribute timeshare weeks to them.

Beneficiaries could, but were not required to, donate their timeshare weeks to a registered Canadian amateur athletic association, along with sufficient cash to discharge encumbrances on the timeshare weeks.

15 In return for each donation, the registered Canadian amateur athletic association that received the donation would issue two charitable tax receipts: one for the donor's cash contribution to discharge the encumbrances on the timeshare weeks (ranging from \$4,600 to \$9,700 per donated timeshare week); and one for the then fair market value of the donated timeshare week, less the amount of the encumbrance (ranging from \$8,765-\$18,900).

16 The Program also included arrangements for pooling the donated timeshare units and facilitating their resale to the original developer at a significantly discounted price, subject to a 5% commission on net revenue to one of the promoters of the Program.

17 Without getting into all the details, in general, the net result of these arrangements was:

- assuming receipt of the anticipated tax credits, participants in the Program would realize a net return on their cash donations of about 35% (this is because it was the Bahamian resident who settled the Athletic Trust and actually paid for the timeshare weeks); and
- although they issued charitable receipts to each participant totalling between \$13,275 and \$28,600, the registered Canadian amateur athletic associations that received donations ultimately benefited by about \$1,300 per donated timeshare week.

## **(2) The Cassels Brock Legal Opinions**

18 Commencing in 2000, on each occasion that timeshare weeks were made available for distribution to beneficiaries, Cassels Brock was retained to provide the promoters of the Timeshare Tax Reduction Program with a legal opinion about the tax consequences of participating in the Program as a beneficiary and donor.

19 In all, Cassels Brock provided six opinions between October 2000 and April 2003. The six opinions are substantially the same. The motion judge excerpted the relevant passages of the opinions at para. 23 of his reasons.

20 For the purposes of this appeal, two aspects of the opinions are key. First, the opinions are directed not just to the promoters of the Athletic Trust, but also to potential donors. In fact, all but the final opinion specifically state that the opinion "may be relied upon ... by ... potential donors".

21 Second, although the opinions acknowledge the prospect of a challenge by the CCRA to the tax benefits available under the Program, the opinions state that "it is unlikely that the CCRA could successfully deny ... the [anticipated] tax credit[s]."

22 As we have said, a copy of the pertinent Cassels Brock opinion was included in the promotional material marketing the Timeshare Tax Reduction Program on each occasion that timeshare weeks were offered for distribution.

23 Because the opinions are central to the issues on appeal, we set out here the text of the key passages. The remainder of the excerpts quoted by the motion judge together with certain other passages we consider important are set out in Appendix 'A':

### **Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks**

You have requested our opinion regarding the Canadian Federal Income Tax consequences relating to a donation of ... Timeshare Resort Weeks ... by individual Canadian resident taxpayers. It is contemplated that any such donation would entitle the donor to claim a tax credit under the *Income Tax Act* (Canada) (the "Tax Act").

*...This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property.*

...

3. Meaning of "Gift"

In order to claim a tax credit for a donation there must be a complete gift of the property.

...

*If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them, the CCRA may be more inclined to challenge the arrangement (but see our opinion below at page 23 as to the unlikely success of such a challenge.)*

...

7. General Anti-Avoidance Rule ("GAAR")

...

In our opinion, and based on the foregoing, a donation of Timeshare Weeks in these circumstances would not likely be successfully attacked under GAAR.

...

9. General Comments

...

*This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion. ...*

*Based on and subject to the foregoing review, in our opinion it is unlikely that the CCRA could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries who receive a distribution of the Timeshare Weeks from the Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to a [registered Canadian amateur athletic association].*

**(3) Other Legal Opinions Obtained by Promoters and Marketers**

24 In addition to the Cassels Brock opinion, in December 2002, the promoters of the Timeshare Tax Reduction Program obtained an opinion from a Manitoba law firm confirming the applicability of the Cassels Brock opinion to the *Manitoba Tax Act*.

25 Further, one of the entities marketing the Timeshare Tax Reduction Program obtained a second opinion confirming the Cassels Brock opinion from Ronald J. Farano, Q.C., a tax partner at Gardner Roberts LLP.

**(4) Mr. Lipson's Participation in the Timeshare Tax Reduction Program**

26 In an affidavit filed on the certification motion, Mr. Lipson deposed that his accountant spoke to him about the Timeshare Tax Reduction Program in the fall of 2000. Although he understood "the gist" of the Program, he says he did not understand the intricacies of how it worked. He asked his accountant whether there was a legal opinion to support the tax benefits of the program. On being told that Cassels Brock had issued a supporting legal opinion, Mr. Lipson was satisfied that the Program offered legitimate tax benefits and decided to participate. He states: "I would not have participated in the Program absent a favourable tax opinion from a reputable law firm."

27 On his cross-examination, Mr. Lipson indicated he has no recollection of reading the Cassels Brock opinion. He understood from his accountant that the Cassels Brock opinion provided an assurance that the Program was "legal" and thus that there would be "nothing for the [CCRA] to complain about." According to Mr Lipson, had there been an 80% chance he would not receive the tax credits, he would not have participated.

28 Mr. Lipson confirmed that, for the years 2000 to 2003, he claimed the following tax credits for donations under the Timeshare Tax Reduction Program:

2000 — \$634,352

2001 — \$1,261,988

2002 — \$2,085,835

2003 — \$1,148,879.60.

**(5) Mr. Lipson's Dealings with the CCRA**

29 In a series of letters to Mr. Lipson dated October 19 through to November 9, 2004, the CCRA indicated it would be denying the full amount of the tax credits Mr. Lipson had claimed arising from the Program. Among other things, in their correspondence, the CCRA challenged (i) the validity of the Athletic Trust; (ii) the validity of the gifts of timeshare weeks; and (iii) the valuation of timeshare weeks.

30 Both in the statement of claim and in his affidavit, Mr. Lipson indicates that in response to the reassessments, he "sought legal and accounting advice at significant personal expense". In his affidavit, Mr. Lipson also states that he retained Thorsteinssons LLP in April 2004 to act for him in his dealings with the CCRA and that it is his understanding that Thorsteinssons acted for most of the class members in this regard.

31 On his cross-examination, Mr. Lipson confirmed that the promoters of the Program had created a fund to look after any challenge to the tax structure that might occur and that he understood that Thorsteinssons' legal fees were paid from that fund. This evidence was confirmed by evidence from one of the creators of the Program.

32 According to Mr. Lipson, the dispute with the CCRA proceeded by way of test cases launched in 2006 by two of the participants in the Timeshare Tax Reduction Program on behalf of all of the donors who participated in the Program and who were reassessed.

33 On March 24, 2008, Mr. Lipson accepted an offer to settle made by the CCRA restricting his tax credits for participation in the Timeshare Tax Reduction Program to the amount of his cash donations to Canadian athletic associations.

34 Although Thorsteinssons conducted the test case litigation, on his cross-examination, Mr. Lipson testified that he retained Davies Ward Phillips & Vineberg LLP "to interface" with Thorsteinssons. Further, he says he settled with the CCRA as a result of advice received from Davies Ward, and not Thorsteinssons.

35 During his cross-examination, Mr. Lipson agreed with suggestions that he realized there was a problem as soon as he received the first disallowance letter and that he knew then that the result Cassels Brock had said would occur was not going to happen.

**(6) The Proposed Class-Action**

36 On April 15, 2009, Mr. Lipson commenced the proposed class action in which he sued Cassels Brock for negligence and negligent misrepresentation.

37 At para. 35 of his Fresh As Amended Statement of Claim, Mr. Lipson characterizes the Cassels Brock opinions as follows:

35. In each of the Legal Opinions, Cassels Brock stated that Lipson and the other Class Members would obtain the tax benefits described in the promotional materials. Cassels Brock's ultimate conclusion, as set out in each of the Legal Opinions, was that:

[I]t is unlikely that the [CCRA] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A beneficiaries who receive a distribution of the Timeshare Weeks from the [Athletic] Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAA.

38 In essence, Mr. Lipson alleges that Cassels Brock (i) fell below the standard of care of a reasonably competent tax solicitor in preparing its opinion, resulting in an opinion that contains material misrepresentations; (ii) knew that a favourable tax opinion was a necessary precondition to the creation and successful promotion of the Timeshare Tax Reduction Program; and (iii) knew that potential donors would rely on the existence of a favourable tax opinion in deciding whether to participate in the Program.

39 Mr. Lipson claims that, but for the Cassels Brock opinion, the Timeshare Tax Reduction Program could not have been made publicly available or successfully promoted. In addition, he claims that he and the other class members decided to participate in the Program in reliance on the Cassels Brock opinion and the representations, both express and implied, which it contained.

40 Finally, Mr. Lipson claims that, as a result of the negligence and negligent misrepresentations of Cassels Brock, he and the other class members suffered damages in the form of substantial interest arrears under federal and provincial income tax legislation, loss of the opportunity to make other donations or participate in other tax shelters, and special damages in the form of accounting and other professional fees to respond to the CCRA's reassessments.

41 In his Fresh As Amended Statement of Claim, Mr. Lipson defines the proposed class as:

[A]ll individuals who applied and were accepted to be beneficiaries of the Athletic Trust 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of [certain registered Canadian amateur athletic associations].

42 According to the Fresh As Amended Statement of Claim, Mr. Lipson and the other class members settled with the CCRA when it became "at least likely, if not certain" that the CCRA would be successful in challenging the tax credits claimed by Mr. Lipson and the other class members.<sup>1</sup>

#### **(7) Cassels Brock's Third-Party Claim and Statement of Defence**

43 On April 15, 2011, Cassels Brock issued a third party claim against a number of individuals and entities, alleging that they provided tax, financial or legal advice to putative class members with respect to the Timeshare Tax Reduction Program. Gardiner Roberts LLP and the Estate of former Gardiner Roberts senior tax partner Ronald J. Farano, deceased, are among the named third parties.

44 In accordance with a direction from the motion judge, prior to the certification motion, Cassels Brock delivered its statement of defence and the third parties delivered statements of defence to the main action and to the third party action.

45 The statements of defence to the main action included an assertion that, by pleading that the CCRA denied his claims for tax credits in 2004, Mr. Lipson had acknowledged that the proposed class action is statute-barred.

#### **(8) Mr. Lipson's Reply**

46 In his reply, Mr Lipson pleaded that "[u]ntil January 2008 during the test case litigation ... it was not known or reasonably discoverable that it was at least likely ... that [the CCRA] would be successful in challenging the tax credits claimed by Lipson and the other Class Members." He also pleaded that it was not until at least January 2008, when the test case appeal litigation had significantly progressed, that a proceeding against Cassels Brock became an appropriate avenue for the donors to seek redress.

#### **(9) The Proposed Common Issues**

47 On the certification motion, the Mr. Lipson proposed the following common issues:

Negligence

1. Did the Defendant owe the Class a duty of care (in among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?
2. If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?
3. Did the Defendant breach the foregoing standard(s) of care? If so, how?
4. If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

Damages or Other Relief

5. If the answer to common issue 4 is "yes", what types or heads of damages, if any, are the class members entitled to?
6. If the answer to common issue 4 is "yes", what remedy or remedies, if any, are the Class Members entitled to?
7. If the Class Member is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

**(10) Expert Opinion from Professor Vern Krishna**

48 Mr. Lipson's material on the certification motion included affidavits and letters of opinion from Professor Vern Krishna concerning the validity and appropriateness of the Cassels Brock legal opinions supporting the Timeshare Tax Reduction Program.

49 Professor Krishna's letters of opinion address two main issues: i) Cassels Brock's opinions concerning whether the donation of timeshare weeks constitutes a valid gift; and ii) Cassels Brock's opinions concerning the general anti-avoidance rule.

50 In relation to the first issue, Professor Krishna concludes that the Cassels Brock opinions failed to address issues relevant to the validity of the gift in circumstances where the anticipated tax credit substantially exceeds the donor's financial outlay. On that issue, he opines that the Cassels Brock legal opinions do not meet the standard of care expected of a tax lawyer.

51 In relation to the second issue, Professor Krishna states that while "existing jurisprudence suggests that the [Timeshare Tax Reduction Program] would violate the general anti-avoidance provisions of the *Income Tax Act* ... the jurisprudence in the Supreme Court of Canada did not emerge until 2005." Moreover, "even after the three Supreme Court of Canada's decisions, there remains considerable uncertainty as to the scope and reach of GAAR." On that issue, he opines that the Cassels Brock legal opinions reasonably address the anti-avoidance aspects of the Timeshare Tax Reduction Program in light of the available jurisprudence at the relevant time.

**(11) The Positions of the Parties on the Certification Motion**

52 Cassels Brock and the third parties opposed certification of the proposed class action on the grounds that the claims of all class members, including Mr. Lipson, are statute-barred under the *Limitations Act*. In particular, they argued that the class members' claims were discoverable when the CCRA disallowed their claims for tax credits. In addition, they claimed that, when it can be shown that a proposed representative plaintiff's claim is statute-barred, he or she cannot be a member of the proposed class and he or she cannot act as the representative plaintiff.

53 Cassels Brock also submitted that the proposed class action failed to satisfy three of the five criteria for certification under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6:

- i) The claims of the class members must raise a common issue (s. 5 (1)(c));

- ii) A class proceeding must be the preferable procedure for the resolution of the common issues (s. 5 (1)(d)); and
- iii) There must be a suitable representative plaintiff (s. 5 (1)(e)).

54 Finally, although Cassels Brock conceded that the proposed class action disclosed a cause of action for negligent misrepresentation, it argued that the negligence claim failed to disclose a reasonable cause of action (s. 5 (1)(a)) because none of the class members were clients of Cassels Brock.

### C. The Motion Judge's Decision

55 In the analysis section of his reasons, the motion judge dealt first with the question of whether, leaving aside the limitation issue, the proposed class action meets the criteria for certification. He held as follows:

- It was not plain and obvious that either the negligent misrepresentation claim or the negligence claim failed to disclose a reasonable cause of action (s. 5(1)(a) of the *Class Proceedings Act*). Although the negligence claim may be novel, the question of whether Cassels Brock owed class members a duty of care should be left for trial.
- The proposed class definition satisfies the identifiable class criterion (s. 5 (1)(b) of the *Class Proceedings Act*).
- The claims of the proposed class raise common issues. Proposed questions one, two and three are suitable for certification as common issues. Proposed questions five and six would be suitable for certification if revised.<sup>2</sup> Proposed questions four and seven, relating to causation and damages, are not suitable common issues. (Section 5 (1)(c) of the *Class Proceedings Act*).
- A class proceeding would be the preferable procedural for resolution of the common issues. Although there is little to suggest that the class proceeding is necessary to ensure access to justice or to modify behaviour, the judicial economy factor justifies a class proceeding in which the common issues at trial will focus essentially on the opinions of Cassels Brock. (Section 5 (1)(d) of the *Class Proceedings Act*).
- As Mr. Lipson had selected competent and experienced counsel and, as his litigation plan was unchallenged, there was no reason to believe he would not move the action forward to the common issues stage. Leaving aside the limitations issue, he is a suitable representative plaintiff (Section 5 (1)(e) of the *Class Proceedings Act*).

56 As for the limitations issue, the motion judge concluded that no independent factual inquiry was necessary to dispose of it. Based on the Supreme Court of Canada's decision in *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), and a review of the facts alleged in the statement of claim, the claims for negligence and negligent misrepresentation should have been discovered in 2004 when the CCRA denied the validity of the tax credits or, at the very latest, in 2006, when Thornsteinssons was retained to sue the CCRA. The claims of Mr. Lipson and the other class members were therefore statute-barred.

### D. The Appeal

#### (1) Did the motion judge err in dismissing the appellant's claim as statute-barred?

##### (a) The Positions of the Parties on Appeal

57 On appeal, Mr. Lipson submits that the motion judge acted without jurisdiction or authority in dismissing the action as statute-barred on a certification motion. He argues that the purpose of a certification motion is purely procedural. Such a motion is intended to determine whether the proposed claims are suitable as a class proceeding and there is to be no preliminary review of the merits of any proposed defence.

58 Further, Mr. Lipson says that, in the absence of a Rule 21 motion or a summary judgment motion, he had no proper notice of the limitation issue. The record he placed before the court was intended to address only the certification issue. It was not

intended to address a merits defence. It was particularly not intended to address a merits defence for the class that had never been certified as a common issue — and one which, by its very nature, is not a common issue in any event.

59 In the alternative, if the motion judge was entitled to address the limitation issue under s. 5(1)(a) of the *Class Proceedings Act* — as relating to whether the statement of claim disclosed a reasonable cause of action — Mr. Lipson submits that the motion judge erred by failing to accept the facts as pleaded in the statement of claim and in the reply as true. In both documents, Mr. Lipson pleaded facts indicating the claim was not discovered until approximately January 2008 when the test case had significantly progressed and it became apparent that the CCRA would likely be successful in denying a substantial portion of the tax credits claimed.

60 Further, whether the motion judge proceeded under s. 5(1)(a) or 5(1)(e) (proper plaintiff) of the *Class Proceedings Act*, Mr. Lipson submits that he erred by misinterpreting *Central & Eastern Trust Co. v. Rafuse* as standing for the proposition that, in a claim for negligence arising from a solicitor's opinion, the limitation period begins to run when the validity of the opinion is challenged.

61 Cassels Brock asserts that a motion judge on a certification hearing is required to perform a gatekeeping function — accordingly, where it is apparent on the certification motion that an action is bound to fail, the certification judge has the authority both to decline to certify the action and to dismiss it without the need for a cross-motion. The motion judge's decision in this regard is entitled to deference.

62 In this case, Mr. Lipson had notice of the limitations issue by virtue of the statements of defence that were delivered. Further, on Mr Lipson's own evidence, it was clear — and the motion judge concluded — that the limitation period had expired. Mr. Lipson did not read the Cassels Brock opinions. Moreover, he testified that he understood the opinions to mean that the Timeshare Tax Reduction Program was legal and that there was no risk that the CCRA would reassess him. He learned in 2004 that that was not the case — he also began incurring damages in the form of legal and accounting fees at that time.

63 Further, all members of the class were aware of the reassessments and had begun incurring legal and accounting fees by no later than 2006 when the test case litigation was commenced.

64 Except for acknowledging that it may have been preferable for Cassels Brock to have brought a formal motion to dismiss the action, the third parties, take the same position as Cassels Brock. They assert that the motion judge had authority to decline to certify the action because it was clear on the evidence that the limitation period had expired and Mr. Lipson was fully aware of this issue.

*(b) The Discoverability Principle*

65 As the motion judge observed, in this case, the application of the two-year limitation period turns on the discoverability principle, now codified in s. 5 of the *Limitations Act*. That section provides as follows:

5. (1) A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage occurred,
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  - (iii) that the act or omission was that of the person against whom the claim is made, and
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

*(c) Discussion*

66 In our view, it is unnecessary that we resolve the question of whether it is open to a certification judge to dismiss a proposed class action based on a finding that the action is statute-barred, and in particular, in the absence of a cross-motion under either Rule 20 or Rule 21.

67 Based on our review of the motion judge's reasons, his decision to dismiss the proposed class action as statute-barred turned on his interpretation of the Supreme Court of Canada's decision in *Central & Eastern Trust Co. v. Rafuse* and his application of that decision to the facts of this case.

68 In our respectful view, the motion judge erred in interpreting and applying *Central & Eastern Trust Co. v. Rafuse*. Moreover, when that decision is interpreted properly, it is apparent that the record before the motion judge did not disclose whether Mr. Lipson's claim was statute-barred. Nor did it support the conclusion that the limitation period applicable to Mr. Lipson's claim also applied to the entire class.

69 The motion judge's findings concerning *Central & Eastern Trust Co. v. Rafuse* begin at para. 138 of his reasons where he said that, in his view, the Supreme Court of Canada's decision in that case is dispositive of the question of whether the class members' claims in this case are statute-barred.

70 The motion judge correctly described the issues in *Central & Eastern Trust Co. v. Rafuse*. In that case, the defendant solicitors had acted for Central Trust on a mortgage transaction in 1969 and had certified that Central Trust had a valid mortgage against the title to the property on which it was registered. However, in a subsequent action by Central Trust against the mortgagor, the mortgage was held to be void *ab initio* because it contravened a statutory prohibition against a certain form of lending.

71 In 1980, Central Trust sued the solicitors who acted for it on the mortgage transaction. A major issue was whether the solicitors could be held liable both in contract and in negligence. If the solicitors could be found concurrently liable in negligence, further issues arose concerning whether the doctrine of discoverability applied in determining the limitation period, and, if so, when the limitation period began to run.

72 However, the motion judge had this to say at paras. 146-147 of his reasons about the Supreme Court of Canada's conclusions about discoverability:

[146] Justice Le Dain's succinct analysis of discoverability is found in paragraph 77 where he stated:

Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, *the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure*. Accordingly [Central Trust's] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred.

[147] It should be noted that the damage suffered by Central Trust occurred when it accepted a mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, and *Justice Le Dain held that the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage*, even though the actual declaration of invalidity of the mortgage would occur still later.

[Emphasis added.]

73 In our respectful view, the motion judge's conclusion about Justice Le Dain's holding in *Central & Eastern Trust Co. v. Rafuse* is incorrect. Justice Le Dain did not hold that "the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage". Rather, he concluded that the *earliest* date on which the claim for solicitor's negligence could have commenced running was the date on which the validity of the mortgage (and therefore the validity of the solicitors' opinion) was challenged.

74 Because the applicable limitation period for solicitor negligence was six years when *Central & Eastern Trust Co. v. Rafuse* was decided, it was unnecessary that Justice Le Dain go further and determine the actual date on which the limitation period commenced — the action for solicitor negligence had been started well within six years after the earliest date on which Justice Le Dain found the cause of action was discoverable.

75 In *Kenderry - Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger* (2001), 53 O.R. (3d) 208 (Ont. S.C.J.), at para. 19, Molloy J. recognized that *Central & Eastern Trust Co. v. Rafuse* is not binding authority for the proposition that the limitation period in an action for solicitor negligence begins to run on the date of a manifest challenge to the solicitor's opinion.

76 Instead, Molloy J. held that, in an action for solicitor negligence arising from a solicitor's opinion, "[t]he date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence to run will depend on the circumstances of the particular case."

77 We agree with that conclusion and note that it was adopted by the majority in this court's decision in *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 (Ont. C.A.), at para. 71.

78 The motion judge in this case applied his understanding of *Central & Eastern Trust Co. v. Rafuse* to the facts pleaded in the Fresh As Amended Statement of Claim at paras. 148 to 158 of his reasons. We excerpt the most relevant portions of these paragraphs below:

[148] The same analysis can be applied to the case at bar. The Class Members, including Mr. Lipson ... should have discovered their tort claims against Cassels Brock when the validity of the tax credits was denied by Canada Revenue in 2004. At that time and certainly not later than 2006, when Thornsteinssons LLP was retained to sue Canada Revenue, the Class Members knew or ought to have known the material facts on which the negligence claim or negligent misrepresentation claim against Cassels Brock was based.

[149] Like Central Trust, ... *the Class Members made donations that turned out to be ineligible for tax credits*. It is alleged that the Class Members relied on Cassels Brock's opinions or but for Cassels Brock's opinions they would have not participated in the Timeshare Program. *In both situations ... their awareness of the material facts of their claim against Cassels Brock came ... when Central Trust or the participants in the Timeshare Program respectively learned that there was a potential problem with the tax credits.*

[150] In the case at bar, as soon as the letters from Canada Revenue started to arrive, Mr. Lipson and the Class Members knew or ought to have known that Cassels Brock's opinion had caused damage because they had actually relied on the opinions, or, but for those opinions they would not or could not have participated in the Timeshare Program and suffered damages. Given that Canada Revenue was challenging the validity of the trust, the validity of the gift, the donative intent of the participants, and the value of the donation, **the donors knew that Canada Revenue could successfully deny the tax credit.**

[157] At the time of the letters from Revenue Canada, the Class Members' loss was actual not potential and they knew who to blame for that actual loss. The Class Members had been denied the tax credits in their entirety, and they allegedly had been lured into a transaction or not properly warned about a transaction that they allege they would have avoided but for

the role played by Cassels Brock. The Class Members incurred expenses, i.e. special damages, in an attempt to fix their problems by retaining another law firm in bringing proceedings against Canada Revenue.

[158] In the case at bar, no independent inquiry of the facts is necessary to determine whether or not the Class Members' claims are statute-barred. Indeed, this is apparent from the statement of claim that sets out the material facts for the discovery of the negligence and negligent misrepresentation claims that occurred when the letters of from Canada Revenue arrived denying the tax credits to the Class Members. [Emphasis added.]

79 In our respectful view, the motion judge's reasons concerning this issue are not entirely clear.

80 On the one hand, although the motion judge seems to acknowledge that the notices of disallowance were not a final disposition of the tax credit issue — and therefore at best provided notice of a *potential* claim — he appears to have concluded that all class members should have known when they received the notices of disallowance that the CCRA could successfully challenge their claims for tax credits and that the action therefore became statute-barred at that time (for example, see paras. 150 and 158).

81 Further, the motion judge appears to have treated the class members' knowledge that they were incurring professional fees to challenge the CCRA's denial of the claimed tax credits as a relevant factor affecting the commencement of the limitation period (for example, see paras. 148, 157).

82 In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional fees to challenge the CCRA's denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of Cassels Brock.

83 As pleaded in the Fresh As Amended Statement of Claim, the Cassels Brock opinion was that it was unlikely that the CCRA could successfully deny the claimed tax credits. Accordingly, the fact of a CCRA challenge to the tax credits did not, in itself, mean the challenge would likely be successful or make the Cassels Brock opinion invalid. Further, even accepting that receipt of the notices of disallowance prompted class members to obtain professional advice and to launch test case litigation to challenge the denial of the tax credits, that conduct does not demonstrate when class members knew, or ought reasonably to have known, that the test case litigation would not likely be entirely successful.

84 The test case litigation did not settle until 2008. The answer to when the limitation period began to run for each Class Member may very well depend on several factors, including what position, if any, Cassels Brock took in response to the CCRA challenge; what notice, if any, Cassels Brock gave to class members of their position, if any, on the CCRA challenge; and what each class member was told by his or her professional advisor(s) and when: see *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*. Importantly, this may be an issue that must be determined individually for each class member, depending on what individual class members were told and when.

85 In the Fresh As Amended Statement of Claim, Mr. Lipson pleaded that he and the other class members settled with the CCRA when it became "at least likely, if not certain" that the CCRA would be successful in challenging the tax credits claimed by Mr. Lipson and the other class members. In his Reply, he pleaded that "[u]ntil January 2008, during the test case litigation ... it was not known or reasonably discoverable that it was at least likely ... that [the CCRA] would be successful in challenging the tax credits claimed by Lipson and the other Class Members."

86 Although perhaps not express, these pleadings at least imply that Mr. Lipson and the other class members were not advised until January 2008 of the likelihood that the CCRA's disallowance of the tax credits would succeed, at least in part.

87 For the purposes of s. 5(1)(a) of the *Class Proceedings Act* (the reasonable cause of action prong of the certification test), no evidence is admissible. Unless patently ridiculous or incapable of proof, a plaintiff's pleadings must be accepted as true. On their face, Mr. Lipson's pleadings do not demonstrate that, prior to January 2008, he knew that the CCRA's challenge

to his claimed tax credits would likely be successful. Accordingly, his pleadings do not demonstrate that his claim was statute-barred when he commenced his action in April 2009.

88 Further, under ss. 5(1)(b)-(e) of the *Class Proceedings Act* (the remaining prongs of the certification test), a plaintiff need only show some evidence that the proposed claim satisfies each of the relevant criteria. Because the limitation issue is a defence, in the absence of evidence tending to demonstrate that the limitation period had expired, the limitation issue did not undermine Mr. Lipson's request for certification.

89 Cassels Brock argues that Mr. Lipson's own evidence demonstrates that, at least for him, the relevant limitation period had expired. They rely, for example, on the fact that he testified that he did not read the Cassels Brock opinion; that he interpreted the existence of the opinion as meaning the Timeshare Tax Reduction was legal and not subject to challenge; and that, when the CCRA challenged the tax credits, he knew he had a problem and that he would not obtain what Cassels Brock had promised.

90 We do not accept this argument. Whatever Mr. Lipson's interpretation of the Cassels Brock opinion, their opinion remains the same. Their opinion did not promise that the CCRA would not challenge the anticipated tax credits under the Timeshare Tax Reduction Program. Rather, it stated that it was unlikely that the CCRA could *successfully* challenge tax credits claimed under the Program. Mr. Lipson is not entitled to, and did not, sue Cassels Brock for an opinion they did not give. To the extent that his interpretation of the opinion may weaken his claim for reliance in relation to his negligent misrepresentation claim, in our view, that will be an issue for the trial judge.

91 Based on the foregoing reasons, we allow the appeal on this ground.

**(2) Did the motion judge err in finding that causation in simple negligence is not a proper common issue?**

92 The motion judge found that Mr. Lipson's pleading disclosed a cause of action in negligent misrepresentation and also in simple negligence, and that it was not plain and obvious that these claims would fail. He also found that, for both causes of action, whether Cassels Brock owed the class a duty of care and whether it had breached that duty were proper common issues.

93 However, the motion judge found that, for both causes of action, the question of whether Cassels Brock's breach caused the class damage was not a proper common issue but instead had to be answered on an individual basis for each class member.

94 Mr. Lipson contests this finding as it applies to his claim in simple negligence. He says that, for that cause of action, causation should be certified as a common issue.

95 For the following reasons, we agree.

96 In finding that Mr. Lipson's claim in simple negligence was properly disclosed by his pleading, the motion judge looked to Mr. Lipson's allegations that the Cassels Brock legal opinion was a necessary precondition for the marketing of the program, that Cassels Brock ought to have foreseen that for the promoters the opinion was fundamentally necessary for the presentation of the program, and that those who then bought into the program would suffer damage if the opinion had been negligently prepared.

97 Thus, the claim in simple negligence is distinct from Mr. Lipson's claim in negligent misrepresentation, which required proof of reliance on the opinion by individual class members in deciding to participate in the program.

98 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. In our view, this issue is common to the claims of all class members.

99 It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program. For example, there may be evidence that the promoters were satisfied to go to market without any legal opinion, or because of legal opinions other than those of Cassels Brock. However, that determination is for the trial. At this stage, there need only be some basis in fact supporting Mr. Lipson's simple negligence

claim. That requirement was met here. In addition to Mr. Lipson's pleading that the legal opinion was a necessary precondition, there was evidence of the promoters' accountant who said as much.

100 In summary, as it is pleaded, Mr. Lipson's claim in simple negligence raises the issue of whether, but for the Cassels Brock opinion, the program would have been marketed and therefore available to cause harm to all members of the class. This issue is properly resolved in a common trial.

#### **E. The Cross-Appeal**

101 Cassels Brock raises three issues by way of cross-appeal.

102 First, it says that the motion judge erred in finding that Mr. Lipson properly pleaded the elements of negligence, in particular: duty of care, causation and damages.

103 We do not agree. The claim pleads that Cassels Brock owed a duty of care to those who it could reasonably foresee would read and rely on its opinion and to those who would participate in the program marketed by the promoters based on the opinion. The claim pleads causation and damages insofar as those participating in the program on either basis suffered losses as a consequence.

104 Second, Cassels Brock says that the motion judge erred in certifying as common issues whether it owed the class a duty of care, what types of heads of damage class members may have suffered, and what remedies they might therefore be entitled to.

105 Again, we do not agree. Cassels Brock is mistaken in arguing that reliance on its opinion (which is an individual issue) is a key element in determining whether it owed a duty of care to any class members. Whether or not any class member in fact relied on the Cassels Brock opinion is irrelevant to whether Cassels Brock owed a duty of care to those who Cassels Brock could reasonably foresee might do so. Cassels Brock is also in error in saying that the quantum of damage each class member in fact suffered (an individual issue) is integral to determining what types or heads of damage to which class members could be entitled, and what remedies flow from that determination. The former is not relevant to the latter.

106 Third, Cassels Brock argues that the motion judge erred in finding that Mr. Lipson's action met the preferred procedure requirement for certification. It says that, in this case, the individual issues overwhelm the common issues and that the third party claims make a common trial unmanageable.

107 Here too we reject Cassels Brock's argument. The motion judge's conclusion about preferable procedure requires the balancing of a number of considerations. This exercise of judicial discretion will attract appellate scrutiny only if it reflects an error in principle or an unreasonable finding of fact. Neither argument raised by Cassels Brock permits such a conclusion. The motion judge was well-aware of the individual issues that would remain after adjudication of the common issues. He weighed the relative importance of each in fully resolving the action, and determined that the latter were not overwhelmed by the former. We see no basis to interfere with his conclusion.

108 Mr. Lipson's litigation plan effectively addresses the manageability question in light of the third party claims. The motion judge approved that plan, and Cassels Brock did not challenge the plan in this court. Here too, we see no basis to interfere with the motion judge's determination.

#### **F. Disposition**

109 For these reasons, we allow the appeal, set aside paras. 1, 2 and 3 of the Order and dismiss the cross-appeal. Further, the action is ordered certified as proposed by the motion judge, with the addition of the common issue of causation in simple negligence. The Order should be amended to that effect.

110 The parties shall file submissions of no more than ten pages addressing the issues of costs here and below. These are to be filed within 30 days of the release of these reasons.

**E.E. Gillese J.A.:**

I agree

*Appeal allowed; cross-appeal dismissed.*

#### **Appendix 'A'**

#### **Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks**

You have requested our opinion regarding the Canadian Federal Income Tax consequences relating to a donation of 75-year leasehold Biennial Timeshare Resort Weeks at the Alexandra Resort and Spa in Providenciales, Turks and Caicos Islands, British West Indies (the "Timeshare Weeks") by individual Canadian resident taxpayers. It is contemplated that any such donation would entitle the donor to claim a tax credit under the *Income Tax Act* (Canada) (the "Tax Act").

This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property. The Timeshare Weeks will generally be considered to be held as capital property, unless...

...

#### **1. Meaning of "Gift"**

In order to claim a tax credit for a donation there must be a complete gift of the property. Each of several elements must be found in order for a donation to qualify as a gift for income tax purposes. These elements are summarized by the CCCRA in its Interpretation Bulletin IT-110R3 entitled, "Gifts and Official Donation Receipts", at para 3 as follows:

A gift, for purposes of sections 110.1 and 118.1, is a voluntary transfer of property without valuable consideration. Generally, a gift is made if all three of the conditions listed below are satisfied:

...

(c) the transfer is made without expectation of return. No benefit of any kind may be provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value.

...

The courts have held that a tax advantage (that is a tax credit for an individual) is not considered to be a benefit within this test (see *Friedberg (A.D.) v. Canada*, 92 D.T.C. 6031 (F.C.A.)).

...

If a Class A Beneficiary chooses to retain the Timeshare Weeks, he or she may do so and hold, exchange, or sell the Timeshare Weeks, as well as to utilize them for his or her own vacations, or for any other lawful and permitted purposes. *If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them, the CCCRA may be more inclined to challenge the arrangement (but see our opinion below at page 23 as to the unlikely success of such a challenge.)*

...

#### **7. General Anti-Avoidance Rule ("GAAR")**

Although the current version of GAAR has been in place since 1988, there has to date been little jurisprudence of direct relevance to charitable donations. GAAR is intended to apply to situations where a transaction or series of transactions results in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide*

purposes other than to obtain the tax benefit, or unless the transaction does not result in a misuse of the provisions of the Tax Act or an abuse having regard to the provisions of the Tax Act as a whole.

...

Accordingly, we are of the opinion that a good argument can be made that it cannot reasonably be said that there is an abuse of the provisions of the Tax Act as a whole in these circumstances.

In our opinion, and based on the foregoing, a donation of Timeshare Weeks in these circumstances would not likely be successfully attacked under GAAR.

...

**9. General Comments** This opinion is based on the current provisions of the Tax Act, the regulations thereunder, and our understanding of the current administrative practices of the CCCRA. .... No advance tax ruling has been sought or obtained from the CCCRA to confirm the tax consequences or any of the transactions described herein.

This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion. It may not be relied upon by any other person or for any other purpose, nor may it be quoted in whole or in part or its existence or contents otherwise referred to, without our prior written consent.

Based on and subject to the foregoing review, in our opinion it is unlikely that the CCCRA could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries who receive a distribution of the Timeshare Weeks from the Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAA.

#### Footnotes

**1** Paragraphs 54 and 55 of the Fresh As Amended Statement of Claim provide as follows:

54. In or about January 2008, [the CCRA] agreed to settle the test case litigation on the basis that [the two donors] would be entitled to a tax credit for the cash portion of their donations to the [registered Canadian amateur athletic associations] under the [Timeshare Tax Reduction Program], but would not receive any tax credits for their donations of Timeshare Weeks. [The CCRA] extended this settlement offered to Lipson and the other Class Members.

55. Faced with the prospect that it was at least likely, if not certain — and not "unlikely" as Cassels Brock had represented in each of the Legal Opinions — that [the CCRA] would be successful in challenging the tax credits claimed by Lipson and the other Class Members in respect of at least their donation of Timeshare Weeks to the [registered Canadian amateur athletic associations], Lipson accepted [the CCRA's] settlement offers.

**2** The motion judge stated the revised questions as follows:

5. If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?

6. If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

**TAB 24**

**Most Negative Treatment:** Check subsequent history and related treatments.

2007 ONCA 334  
Ontario Court of Appeal

Markson v. MBNA Canada Bank

2007 CarswellOnt 2716, 2007 ONCA 334, [2007] O.J. No. 1684, 157 A.C.W.S. (3d) 29, 224  
O.A.C. 71, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273, 43 C.P.C. (6th) 10, 85 O.R. (3d) 321

**Stephen Markson (Plaintiff / Appellant) and  
MBNA Canada Bank (Defendant / Respondent)**

M. Rosenberg, J.C. MacPherson, P. Rouleau JJ.A.

Heard: December 7, 2006

Judgment: May 2, 2007

Docket: CA C45191

Proceedings: reversed *Markson v. MBNA Canada Bank* (2005), 204 O.A.C. 94, 78 O.R. (3d) 38, 2005 CarswellOnt 5230, 22 C.P.C. (6th) 221 (Ont. Div. Ct.); affirmed *Markson v. MBNA Canada Bank* (2004), 48 B.L.R. (3d) 129, 2004 CarswellOnt 3177, 71 O.R. (3d) 741 (Ont. S.C.J.).

Counsel: Linda Rothstein, Kirk M. Baert for Appellant  
William G. Horton, Jill M. Lawrie for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Criminal; Property

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.C Common issue or interest

Civil practice and procedure

V Class and representative proceedings

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V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.D Preferable procedure

Criminal law

XIV Offences against rights of property

XIV.3 Criminal interest rate

Financial institutions

VI Loans and discounts

VI.9 Interest

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiff customer alleged that combined effect of flat fee and interest rate charged by defendant bank on credit card cash advances amounted to usurious rate of interest contrary to s. 347 of Criminal Code — Plaintiff brought action for breach of

contract, accounting of interest paid, injunctive relief and restitutionary damages — Motion judge dismissed plaintiff's motion to certify, holding that class proceeding was not preferable procedure because if action succeeded and defendant was forced to comply with law, its customers would have fewer options and pay more interest — Divisional Court agreed with motion judge's analysis of preferable procedure respecting restitutionary claims and claims for injunctive and declaratory relief, and held that motion judge could consider potential negative consequences of class action to members when weighing alternative procedures — Plaintiff appealed — Appeal allowed and motion for certification granted — Findings of motion judge on issue of preferable procedure were fundamentally inconsistent, and motion judge erred in principle in analyzing whether class proceeding was preferable procedure — If plaintiff pursued individual action and obtained declaration or injunction, consequence would be no different than class proceeding, as defendant would comply with injunction or conduct its business in accordance with declaration and stop violating law for all customers and not just plaintiff — Motion judge also failed to apply criteria for preferable procedure which involved considering proceeding through lens of judicial economy, access to justice and behaviour modification — Judge appeared to have accepted that class proceeding would meet behaviour modification and access to justice issues, but failed to expressly deal with issue of judicial economy — Goal of judicial economy also favoured class proceeding — Class proceeding would be fair, efficient, manageable way to advance claim — Class proceeding was not only preferable procedure, but only viable procedure for remedying alleged wrong and calling alleged wrongdoer to account.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff customer alleged that combined effect of flat fee and interest rate charged by defendant bank on credit card cash advances amounted to usurious rate of interest contrary to s. 347 of Criminal Code — Plaintiff brought action for breach of contract, accounting of interest paid, injunctive relief and restitutionary damages — Motion judge refused to certify action as class proceeding, holding that common issues requirement was only met with respect to claims for declaration and injunction and not in respect of restitution claim, and that defendant's records were such that case would disintegrate into manual examination of millions of transactions — Divisional Court dismissed appeal, holding that individual issues would have to be decided before liability to class members could be determined and that plaintiff had not shown that common trial would adjudicate substantial part of member's claims, and so failed to meet commonality requirement regarding restitution claims — Plaintiff appealed — Appeal allowed and motion for certification granted — Claims were unsuitable for certification if transactions had to be examined individually as time and cost would overwhelm common issues — By recasting case to take advantage of ss. 23 and 24 of Class Proceedings Act, plaintiff met lower courts' concerns regarding common issues for restitution and breach of contract claims and costs of analyzing claims — Section 23 authorized plaintiff to use statistical sampling to determine issues relating to amount or distribution of monetary award — Section 24, together with statistical sampling methods permitted by s. 23, would meet individual assessment problem — This was case where aggregate liability to members of class could be reasonably determined — Section 23 and 24 provided means of avoiding potentially unconscionable result of wrong eluding effective remedy — Section 24 was applicable where only questions of fact or law that remained to be determined concerned assessment of monetary relief, and plaintiff satisfied this and other preconditions in s. 24 — Provided plaintiff could establish liability on class-wide basis, s. 23 could be used to calculate global damages figure and s. 24 could be used to find way to distribute aggregate sum to class members — Result might be that some members who did not suffer damage would receive share of award, but that was very result contemplated by s. 24 — This case was very kind of case that s. 24 was designed to deal with because it was impractical and inefficient to identify specific recipients — Accordingly, there were common issues in relation to claims for declaratory and injunctive relief, restitution, and breach of contract.

Financial institutions --- Loans and discounts — Interest

Plaintiff customer alleged that combined effect of flat fee and interest rate charged by defendant bank on credit card cash advances amounted to usurious rate of interest contrary to s. 347 of Criminal Code — Plaintiff brought action for breach of contract, accounting of interest paid, injunctive relief and restitutionary damages — Motion judge refused to certify action as class proceeding, holding that common issues requirement was only met with respect to claims for declaration and injunction and not in respect of restitution claim, and that defendant's records were such that case would disintegrate into manual examination of millions of transactions — Divisional Court dismissed appeal, holding that individual issues would have to be decided before liability to class members could be determined and that plaintiff had not shown that common trial would adjudicate substantial part of member's claims, and so failed to meet commonality requirement regarding restitution claims — Plaintiff appealed — Appeal allowed and motion for certification granted — Claims were unsuitable for certification if transactions had to be

examined individually as time and cost would overwhelm common issues — By recasting case to take advantage of ss. 23 and 24 of Class Proceedings Act, plaintiff met lower courts' concerns regarding common issues for restitution and breach of contract claims and costs of analyzing claims — Section 23 authorized plaintiff to use statistical sampling to determine issues relating to amount or distribution of monetary award — Section 24, together with statistical sampling methods permitted by s. 23, would meet individual assessment problem — This was case where aggregate liability to members of class could be reasonably determined — Section 23 and 24 provided means of avoiding potentially unconscionable result of wrong eluding effective remedy — Section 24 was applicable where only questions of fact or law that remained to be determined concerned assessment of monetary relief, and plaintiff satisfied this and other preconditions in s. 24 — Provided plaintiff could establish liability on class-wide basis, s. 23 could be used to calculate global damages figure and s. 24 could be used to find way to distribute aggregate sum to class members — Result might be that some members who did not suffer damage would receive share of award, but that was very result contemplated by s. 24 — This case was very kind of case s. 24 was designed to deal with because it was impractical and inefficient to identify specific recipients — Accordingly, there were common issues in relation to claims for declaratory and injunctive relief, restitution, and breach of contract.

Criminal law --- Offences — Criminal interest rate — Receiving payment of interest at criminal rate

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*Carom v. Bre-X Minerals Ltd.* (2000), 2000 CarswellOnt 3838, 138 O.A.C. 55, 1 C.P.C. (5th) 62, 11 B.L.R. (3d) 1, 196 D.L.R. (4th) 344, 51 O.R. (3d) 236 (Ont. C.A.) — considered

*Carom v. Bre-X Minerals Ltd.* (2001), 283 N.R. 399 (note), 157 O.A.C. 399 (note), 2001 CarswellOnt 3609, 2001 CarswellOnt 3610 (S.C.C.) — referred to

*Chadha v. Bayer Inc.* (2003), 223 D.L.R. (4th) 158, 168 O.A.C. 143, 2003 CarswellOnt 49, 63 O.R. (3d) 22, 23 C.L.R. (3d) 1, 31 B.L.R. (3d) 214, 31 C.P.C. (5th) 40 (Ont. C.A.) — considered

*Chadha v. Bayer Inc.* (2003), 320 N.R. 399 (note), 65 O.R. (3d) xvii, 2003 CarswellOnt 2810, 2003 CarswellOnt 2811, 191 O.A.C. 397 (note) (S.C.C.) — referred to

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*Degelder Construction Co. v. Dancorp Developments Ltd.* (1998), 165 D.L.R. (4th) 417, 113 B.C.A.C. 1, 184 W.A.C. 1, 129 C.C.C. (3d) 129, [1998] 3 S.C.R. 90, 58 B.C.L.R. (3d) 1, 1998 CarswellBC 2246, 1998 CarswellBC 2247, [1999] 5 W.W.R. 797, 231 N.R. 122, 5 C.B.R. (4th) 1, 20 C.R. (5th) 77, 20 R.P.R. (3d) 165 (S.C.C.) — considered

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*Nelson v. C.T.C. Mortgage Corp.* (1986), 1986 CarswellBC 757, 1986 CarswellBC 781, 32 B.C.L.R. (2d) xxx (note), [1986] 4 W.W.R. 481, [1986] 1 S.C.R. 749, 67 N.R. 161, 29 D.L.R. (4th) 159 (S.C.C.) — referred to

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*Smith v. National Money Mart Co.* (2007), 2007 CarswellOnt 29, 29 E.T.R. (3d) 199 (Ont. S.C.J.) — followed

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*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — followed

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**Statutes considered:**

*Bank Act*, S.C. 1991, c. 46

Sched. II — referred to

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5 — referred to

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 10 — considered

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s. 24(1) — considered

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s. 24(1)(b) — considered

s. 24(1)(c) — considered

s. 24(2) — considered

s. 24(3) — considered

s. 24(4) — considered

s. 26 — referred to

s. 26(2)(a) — considered

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

s. 347 — considered

s. 347(1)(b) — considered

APPEAL by plaintiff from judgment reported at *Markson v. MBNA Canada Bank* (2005), 204 O.A.C. 94, 78 O.R. (3d) 38, 2005 CarswellOnt 5230, 22 C.P.C. (6th) 221 (Ont. Div. Ct.), upholding judgment refusing certification of action as class proceeding.

***M. Rosenberg J.A.:***

1 The issue in this case is whether a claim based on allegations that a financial institution received interest on cash advances in violation of s. 347(1)(b) of the *Criminal Code* is suitable for certification as a class action under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. The alleged violation of s. 347(1)(b) turns on the fact that the defendant bank charges a flat fee (the transaction fee), in addition to compound interest, on every cash advance from its credit cards. Depending on other activity in the cardholder's account and the timing of repayment, it is possible that the interest rate calculated in accordance with s. 347 will exceed the 60 per cent maximum prescribed by s. 347. In these reasons I will refer to an effective annual interest rate exceeding 60 per cent as the criminal interest rate.

2 The plaintiff seeks three types of relief. First, he seeks a declaration that the defendant's practice violates s. 347 and injunctive relief to prevent the defendant from continuing its practice. Second, he seeks damages for breach of contract and restitution for the amounts received by the defendant in excess of the permissible interest rate. Finally, he seeks punitive damages.

3 Cullity J., an experienced class proceedings judge, refused to certify the class because the restitution and breach of contract claims did not raise common issues and because a class proceeding was not the preferable procedure with respect to the balance of the claims. His reasons are reported at (2004), 71 O.R. (3d) 741 (Ont. S.C.J.). A majority of the Divisional Court (Dunnet and Jennings JJ.) upheld that decision. O'Driscoll J., dissenting, would have overturned the decision and certified the class proceedings. Their reasons are reported at (2005), 78 O.R. (3d) 38 (Ont. Div. Ct.).

4 The fundamental question raised by the appeal is whether a class proceeding is appropriate where *all* members of the class are at risk of being charged a criminal interest rate and thus, potential beneficiaries of the declarative and injunctive relief sought, but *only some* of the members — a much smaller number of the class — were actually victims of the defendant's practice and thus, entitled to damages and restitution. A related issue is whether a class proceeding is the preferable procedure where it is reasonable to conclude that some, perhaps many, might actually prefer that the alleged illegal practice continue rather than

risk losing the benefit of taking cash advances on their credit card or having additional restrictions imposed on the size of the advances and repayment terms.

5 For the following reasons I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order granting the motion for certification. In short, it is my view that a trial judge could find that this is an appropriate case for an aggregate assessment of monetary relief under s. 24 of the *CPA*. Accordingly, that section, together with the statistical sampling methods permitted by s. 23, will meet the individual assessment problem identified by the motion judge. I am also of the view that the motion judge erred in principle in his analysis of whether a class proceeding is the preferable procedure. As the Chief Justice said in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 29, "Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct". In my view, this is manifestly a case where a class proceeding is not only the preferable procedure, but also the only viable procedure for remedying the alleged wrong and calling the alleged wrongdoer to account.

### **The Facts**

6 The facts underlying this action are fully set out in the comprehensive reasons of the motion judge. I will, however, provide a brief summary of the relevant facts so that the legal issues can be properly understood. The defendant MBNA is a Schedule II bank under the *Bank Act*, S.C. 1991, c. 46. It issues MasterCard credit cards. Cardholders (or customers) can use their credit cards to make purchases and to obtain cash advances. The defendant charges a transaction fee for cash advances. At the applicable time, the transaction fee charged was the greater of \$7.50 or one per cent of the cash advanced. For the purposes of the certification motion only, the defendant concedes that the transaction fee falls within the definition of interest in s. 347.

7 In addition to the transaction fee, the cardholder is charged compound interest from the day the cash advance is made until it is paid off. While the cardholder is required to pay off a certain minimum amount outstanding on the credit card account each month, the cardholder is not required to pay down the account to zero every month. If a cardholder borrows less than \$62.30, does not engage in any other transactions in the month, and pays off the cash advance, including the transaction fee and interest before the end of the month, the defendant will receive a payment of interest, as defined in s. 347, in excess of 60 per cent. Depending on how quickly the cardholder pays off the amounts owing, the effective annual interest rate can be astronomical, in the thousands of per cent.

8 As this short explanation foreshadows, many variables influence whether or not the defendant receives interest at the criminal rate. The most important are the timing of repayment and other transactions on the account. For example, an isolated cash advance of \$62.30, or more, will result in an effective annual interest rate of less than 60 per cent if the cardholder simply repays in accordance with the required minimum monthly payments. Similarly, if the cardholder uses the credit card to not only make cash advances but to purchase goods or services, which do not attract a transaction fee, the effective interest rate on the account may or may not exceed 60 per cent. There are various combinations and permutations that affect the interest rate calculation.

9 The defendant claims that there is no simple way to determine the interest rate that it charged its customers on various transactions. As of December 2003, it had approximately 2.5 million credit card accounts with current charging practices. Between January 2000 and December 2003, there were eight million cash advance transactions. Of these eight million cash advances, 17 per cent were for amounts less than \$62.00. It has no electronically-preserved data for the period before January 2000 and therefore provided no data as to the number of cash advances for that period. The motion judge described the defendant's position in these terms at para. 36:

It claims that it is not possible to determine from its database the effective annual interest rate received by it for each cash transaction and that this could be done only by manually and individually tracking each advance from the time it was made to the time it was repaid in full. Even then, assumptions would have to be made about the effect of multiple transactions in the accounts in order to determine when a particular advance was repaid in full.

10 The plaintiff does not accept this position. The motion judge described his position in these terms at para. 37:

From the information provided in the affidavits filed on behalf of the defendant, a forensic accountant retained by the plaintiff indicated that he was not satisfied of the accuracy and completeness of MBNA's assertion that it cannot determine, on an automated basis, the effective annual interest rate it received for each cash transaction. In his opinion, if his firm was able to review MBNA's systems with the co-operation and assistance of its staff, it would be able to determine if it is possible to identify the potential class members and devise a system to do this.

11 As I will discuss later when dealing with the question of common issues for the restitution claim, it appears that the motion judge accepted the defendant's position. As he said at para. 55: "There is, in my judgment, insufficient evidence of the likelihood that an appropriate electronic system can be developed — and of the cost of doing this — to justify certification of the restitutionary issues."

12 The defendant denies that its practice in respect of cash advances violates s. 347(1)(b). It relies on a voluntariness defence arising from the decision of the Supreme Court of Canada in *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 (S.C.C.) and *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.) ("Garland No. I"). Those cases hold that there is no violation of s. 347(1)(b) where a payment of interest exceeding 60 per cent arises from a voluntary act of the debtor. The defendant submits that because the cardholder can determine when to pay back the cash advance, whether to make other purchases, how much to borrow and so on, any payment of interest at the criminal rate is voluntary. The defendant submits that this voluntariness defence applies to all of the impugned transactions.

### **The Reasons of the Motion Judge**

13 The motion judge noted that at least with respect to the representative plaintiff there was little controversy about the facts; that resolution of the claim would depend more on issues of law than issues of fact. As he said at para. 17, the principal issue would relate to the interpretation of s. 347 of the *Criminal Code*:

The threshold question, that may determine the outcome of the litigation, is whether payments of excess interest on advances obtained pursuant to the cardholders agreement are necessarily to be considered voluntary. This is, I believe, a question of law as, essentially, it requires an elucidation of the definition provided by Major J. [in *Degelder, supra*].

14 The motion judge then identified the central factual issues that would arise if the legal issues were determined in the plaintiff's favour. Factual investigations would be required to identify those cardholders who paid interest at a criminal rate and the amount paid in excess of 60 per cent in each case.<sup>1</sup> However, he indicated that such investigations would be required only in respect of the claim for restitution. This distinction appears to have dominated the motion judge's reasons and ultimately led him to find that a class proceeding is not the preferable procedure.

15 After reviewing the evidence in much greater detail than I have done here, the motion judge turned to the requirements for certification in s. 5 of the *CPA*. With respect to s. 5(1)(a) — disclosure of a cause of action — as the motion judge noted, this issue was to be determined on the basis of the pleadings, including the provisions of the cardholders agreement and disclosure statement that were to be considered incorporated into the amended statement of claim. He held that the s. 5(1)(a) requirement was made out in respect of the cause of action relating to the alleged violation of s. 347 and consequent unjust enrichment. He was also satisfied that a cause of action based on breach of contract was made out on the theory that the respondent failed to credit excess payments of interest to its customers.

16 As the motion judge noted, the requirement in s. 5(1)(b) — existence of a class — posed a problem of under and over-inclusion. The original class proposed in the statement of claim was as follows:

all persons who (i) hold or have held an MBNA Credit Card and (ii) paid, or have been charged, or will pay, or will be charged interest on Cash Advances on a MBNA Credit Card since MBNA commenced carrying on business in Canada, and the date of judgment in this matter.

17 While this definition might suffice in respect of the claims for declaratory and injunctive relief, it was over-inclusive because it would include a large number of cardholders who never paid interest at the alleged criminal rate because they (i) never took cash advances or (ii) repaid their advances in a manner that did not trigger a criminal interest rate. These cardholders would have no restitution claim and, presumably, for the same reason no claim for breach of contract.

18 The motion judge was also of the view that the definition could be criticized as under-inclusive because it excludes existing cardholders "who have not, and do not, pay interest within the defined period but may do so thereafter" [para. 38].

19 In the end, the motion judge rejected the defendant's argument that the defined class was over-inclusive. He did so, it seems, on the theory that each member of the proposed class was potentially at risk of being charged a criminal interest rate and that there was no way to define the class more narrowly. The proposed definition had the advantage of allowing potential class members to identify themselves without running afoul of the rule that the class must be defined without reference to the merits of the claim. Thus, the motion judge rejected an alternative definition of the class that had been proposed by the plaintiff and would have restricted the class to those cardholders who made interest payments in excess of an effective annual rate of 60 per cent.

20 The motion judge did, however, reformulate the original class definition because of a concern that the definition did not refer to persons who obtained cash advances after the date on which notice of certification was given. Accordingly, at para. 43, he proposed the following definition:

All persons in Canada who, at any time before the date [or the last of the dates] on which notice of certification is given pursuant to the order of this Court, hold or have held, an MBNA credit card on which cash advances could be obtained.

21 The motion judge held that the common issues requirement prescribed in s. 5(1)(c) was met only with respect to the claims for a declaration and an injunction. Accordingly, at para. 60, he restated and reduced the original twelve common issues proposed to the following:

1. Has MBNA received interest in excess of an effective annual rate of 60 per cent on cash advances made under agreements or arrangements with class members?
2. If so, were, and are, class members entitled to withhold payment of such excess interest:
  - (a) because MBNA's receipt of such excess interest would be in violation of s. 347 of the *Criminal Code*; or
  - (b) pursuant to such agreements or arrangements?
3. Should MBNA be [e]njoined from charging, or receiving and not crediting, excess interest in the future?
4. Should the class be awarded punitive damages against MBNA?

22 The motion judge was of the view that issues concerned solely with the rights of class members to restitution "would not advance the proceeding sufficiently in view of the likelihood that it will be necessary to review the transactions of each cardholder in order to identify those who paid interest at a criminal rate, the amount of such payments and the variables that affected the rate in each case" [para. 53]. In Appendix "A" I have set out the common issues proposed by the plaintiff before the motion judge. Some of the common issues rejected by the motion judge were: whether the defendant was required to pay to the class, as restitution, the transaction fees or, alternatively, the interest it has received from the class that exceeds an effective annual interest rate of 60 per cent and whether the cash advance transaction fee was incurred voluntarily by the class so as to give rise to a defence of voluntariness.

23 The motion judge's finding that there were not appropriate common issues in respect of the restitution claim depended, in part, on his view that since it was unlikely that an electronic system could be developed to identify the transactions on which an effective interest rate exceeding 60 per cent was paid, the case would disintegrate into manually examining millions of transactions. Even if some kind of electronic system could be developed, the expense of this exercise would far exceed the

benefit to the individual class members given the plaintiff's concession that restitution to individual cardholders would be in the neighbourhood of \$7.50. Accordingly, the motion judge refused to certify the proceeding in respect of the issues directed solely at the restitutionary claims.

24 The motion judge then addressed s. 5(1)(d), the question of preferable procedure, in relation to the balance of the claims. He seems to have found that a class proceeding would meet the goals of access to justice and behaviour modification. He did not expressly deal with the third goal — judicial economy. Rather, he found that the preferable procedure requirement was not met in relation to the claims for declaratory and injunctive relief because if the action succeeded, the defendant would be required to comply with the law and compliance with the law would reduce the credit options available to consumers. The basis for this finding was in an affidavit filed by the defendant. In short, the defendant asserted that to avoid receiving a criminal interest rate on transactions it could preclude customers from drawing less than a certain amount and repaying the advance before a certain date. In the result, customers would end up with fewer options and would be required to pay greater amounts of interest. As the motion judge put it at para. 67: "Given the declaratory and injunctive nature of the relief sought by the plaintiff, the right to opt out would provide cold comfort to class members who would prefer to pay less interest than to participate, as private citizens, in the enforcement of s. 347 of the *Criminal Code*."

25 The motion judge considered that it would still be open to the plaintiff to pursue the litigation in his individual capacity, but it was not appropriate to force other consumers to join in the proceeding. As he said at para. 68:

Mr. Markson is free to pursue his objective in his individual capacity but that does not mean that the court should subject cardholders in general to the proceedings when there are reasons why they might well consider orders for the declaratory and injunctive relief as not in their best interests if they were informed of the likely consequences, and there is no evidence to the contrary.

26 In the result, the motion judge refused to certify the proceeding in relation to the claims for a declaration and an injunction. He nevertheless went on to consider the final criterion, the presence of an appropriate representative plaintiff. The principal challenge to Mr. Markson as an appropriate representative plaintiff rested with the defendant's assertion that it had a defence to his claim that might not apply to the class as a whole based on evidence from which it could be inferred that the plaintiff had deliberately set out to create a transaction that resulted in him paying an effective rate of interest in excess of 60 per cent. The motion judge dealt with this issue at length and resolved the issue in the plaintiff's favour. Since this is not an issue on the appeal I will simply say that I agree with the motion judge's analysis.

27 The motion judge did not expressly deal with whether the plaintiff had proposed an acceptable litigation plan. Again, however, this is not an issue on the appeal.

## **The Reasons of the Divisional Court**

### **(a) The Majority**

28 Writing for the majority of the Divisional Court, Dunnet J., Jennings J. concurring, agreed with the motion judge. At para. 47, she interpreted the reasons of the motion judge as holding that each cash advance transaction, including its surrounding circumstances, "would have to be reviewed in order to determine whether interest at an effective annual rate in excess of 60 per cent was received by each cardholder, the quantum of such excess in each case, whether that receipt arose as a result of a voluntary act and whether, ultimately, the test for unjust enrichment in each case could be established." She held that the record before the motion judge disclosed that notwithstanding resolution of the proposed common issues, individual issues would have to be decided before the defendant's liability to any class member could be determined. Consequently, she concluded, at para. 49, that "the [plaintiff] failed to demonstrate that a common trial would adjudicate a substantial part of each class member's claims and thus failed to meet the commonality requirement regarding the restitutionary claims."

29 The majority of the Divisional Court also agreed with the motion judge's analysis of preferable procedure respecting the restitutionary claims and the claims for injunctive and declaratory relief. In particular, the majority concluded, at para. 71,

that the motion judge was "entitled to consider the potential negative consequences of a class action to class members when weighing alternative procedures."

**(b) O'Driscoll J. (Dissenting)**

30 O'Driscoll J., dissenting, held that the motion judge erred in several respects. First, he committed the error identified by this court in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.), leave to appeal refused (2001), [2000] S.C.C.A. No. 660 (S.C.C.), by finding common issues in relation to some but not all of the causes of action notwithstanding the causes of action substantially overlapped. O'Driscoll J. held at para. 43 of his reasons that:

Far from being unrelated and disparate claims, in my view, the claim grounded in an alleged breach of s. 347 of the Code and the claim grounded in breach of contract and calling for restitution all revolve around whether the respondent received interest exceeding the rate allowed in s. 347 of the Code from the appellant and other members of the class when the cardholders obtained cash advances on their individual cards.

31 Accordingly, the motion judge erred in separating these issues; the plaintiff had provided a sufficient basis to conclude that a resolution of common issues relating to breach of contract and restitution would, in a significant way, advance those claims. The motion judge also erred in finding that a class proceeding was not the preferable procedure because:

- Individual actions would be cost prohibitive given the small amounts in issue for any individual. Thus, a class proceeding meets the goal of access to justice.
- There was no undertaking from the defendant that it would stop its method of charging on cash advances. A class proceeding therefore meets the goal of behaviour modification.
- The defendant's "*in terrorem*" argument about the sanctions it would impose upon its customers if it were forced to comply with the law is not a matter for the court, but for Parliament<sup>2</sup> and the marketplace [para. 55].

32 Further, O'Driscoll J. was unimpressed with the argument that the plaintiff was not a suitable representative plaintiff. As he said at para. 34, "In a 'clean hands' competition between these parties, in my view, the appellant would win in a walk." He concluded, at para. 60, that "this case fits perfectly into the mould designed for class proceedings." He would therefore have allowed the appeal and certified the class action with the common issues identified by the plaintiff, which have been reproduced in Appendix "A".

**Analysis**

**(a) Introduction**

33 This court has repeatedly held that the decisions of experienced judges, like the motion judge in this case, are entitled to substantial deference. Accordingly, as was said in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (Ont. C.A.) at para. 39, leave to appeal refused [2005] S.C.C.A. No. 50 (S.C.C.), this court "should restrict its intervention to matters of general principle."

34 As indicated, the motion judge found that the following requirements of s. 5 of the *CPA* had been made out:

- Disclosure of a cause of action [5(1)(a)] in relation to unjust enrichment based on a violation of s. 347 and breach of the cardholders agreement;
- Existence of a class [5(1)(b)];
- Common issues [5(1)(c)] in relation to claims for injunctive and declaratory relief and punitive damages; and,
- Acceptable representative plaintiff [5(1)(e)].

35 I agree with the motion judge with respect to those issues decided in the plaintiff's favour. Accordingly, I will address only the common issues criterion in relation to the claims for restitution and breach of contract, and the question of preferable procedure. In my view, the motion judge erred in principle with respect to the preferable procedure issue. I am also of the view that by recasting its case to take advantage of ss. 23 and 24 of the *CPA*, the plaintiff has met the concerns of the motion judge and the Divisional Court regarding common issues for the restitution and breach of contract claims.

**(b) Common issues and the claims for restitution and breach of contract**

36 The fundamental problem underlying the question of issues common to the claims for restitution and breach of contract is that the defendant has structured its affairs such that it is practically impossible to determine the extent of its breach of s. 347 of the *Criminal Code*. In framing the issue in this way, I should not be taken as having found that the defendant deliberately structured its affairs to avoid a possible class proceeding or a finding that it violated s. 347. The fact remains, however, that the effect of the defendant's accounting practices is that the precise extent of any violation of s. 347 can be determined only at great cost.

37 While the plaintiff continues to assert that it may be possible to design a computer programme that could determine the extent of the alleged breach of s. 347 and identify the individual cardholders who would be entitled to restitution or damages for breach of contract, I have not been persuaded that the motion judge's finding to the contrary is unreasonable. Accordingly, if the millions of transactions have to be examined individually, the motion judge is undoubtedly correct that those claims are not suitable for certification; the time and cost to determine the size of the liability in relation to each member of the class would overwhelm the common issues. However, if the motion judge is correct in finding that each transaction would have to be examined individually, the allegedly illegal conduct of the defendant will continue and its customers will receive no remedy for the previous violations.

38 On appeal to this court the plaintiff for the first time submitted that ss. 23 and 24 of the *CPA* offer a solution to the common issues problem with respect to the restitution and breach of contract claims. The relevant provisions are as follows:

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.

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.

39 Provided the defendant is not prejudiced, it is open to a plaintiff to recast its case to make it more suitable for certification: see *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) at paras. 30-34 and *Rumley v.*

*British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) at para. 30. In sum, that is what has occurred here. While the plaintiff has not abandoned its position that it may be possible to design a computer programme to identify those customers who actually paid a criminal interest rate, he now suggests that in the alternative, an aggregate monetary award can meet the commonality concerns. The defendant has not shown how it has been prejudiced by this change in the plaintiff's position.

40 The statistical sampling authorized by s. 23 cannot be used to determine the defendant's liability. Rather, s. 23 provides a means "of determining issues relating to the amount or distribution of a monetary award". Similarly, this court held in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.) at para. 49, leave to appeal refused [2003] S.C.C.A. No. 106 (S.C.C.), that s. 24 "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."

41 If the common issues relating to the application for a declaration and injunctive relief were to be determined in the plaintiff's favour, the trial court will have found that the defendant received interest in excess of an effective annual rate of 60 per cent on cash advances. Thus, liability to some class members will have been established. At least some members of the class would therefore be entitled to a remedy, either by way of restitution or damages for breach of contract. In my view, those two findings — liability and entitlement to a remedy — are sufficient to trigger the application of ss. 23 and 24.

42 As I have said, because of the way the defendant has structured its affairs it is practically impossible to determine the extent of its breach of s. 347. Once the common issues are resolved, it would be possible to review the statements of each individual cardholder and calculate the cardholder's damages. The vast number of accounts to be reviewed and the small potential award in each case are such that it is impractical and inefficient to do so. Sections 23 and 24 provide a means of avoiding the potentially unconscionable result of a wrong eluding an effective remedy.

43 Pursuant to s. 24(1), the section applies if: (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 be reasonably determined without proof of individual claims. In my view, this is a case where the aggregate liability to all members of the class can be reasonably determined.

44 The difficult issue in this case is whether s. 24 can apply where, as here, it is alleged that whether or not an individual was affected by a breach of contract or violation of the *Criminal Code* can only be done on a case-by-case basis. This depends on an interpretation of s. 24(1). Section 24 has received relatively little attention in the reported cases: see e.g. *Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279 (Ont. Div. Ct.) at paras. 136-39. However, I agree with Cullity J. in *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974 (Ont. S.C.J.) at para. 25 that at the certification stage the plaintiff need only establish that "there is a reasonable likelihood that the preconditions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues."

45 In this case, conditions (a) and (c) pose no difficulty. With respect to (a), monetary relief is claimed on behalf of the class. As to condition (c), statistical sampling — as provided for in s. 23 — can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims. Thus, this condition is also satisfied.

46 This leaves condition (b). Can it be said that 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? The defendant submits that liability turns on individual assessments and therefore, resolution of common issues concerning the alleged breach of s. 347 and breach of contract would not establish its liability to any particular customer. If the defendant is correct, the kind of action sought to be pursued in this case will almost never be capable of certification. Large institutions allegedly receiving large amounts of illegal profits from millions of small transactions will effectively be immunized from suit.

47 Condition (b) in s. 24(1) must be interpreted in light of the other parts of the section, and in particular, in light of s. 24(3). It is a basic tenet of statutory interpretation that any provision of a statute must be interpreted having regard to the entire context, as explained in Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

48 Section 24(3) provides, in part, that, "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". The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.

49 In the context of this case, if the plaintiff can establish that the defendant administered its cash advances in a manner that violated s. 347 and/or breached its contract with its customers, it will have established potential liability on a class-wide basis. Each member of the class would be entitled to declaratory and injunctive relief. The only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member's entitlement to monetary relief. Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be impractical or inefficient to identify the class members entitled to share in the award".

50 An example of such an award is found in *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 (Ont. S.C.J.). In that case, on consent, Winkler J. certified a class proceeding and approved a settlement. The defendant CIBC was alleged to have charged undisclosed and unauthorized fees or charges in relation to foreign currency transactions on VISA accounts. The members of the class were defined as all persons in Canada issued one or more CIBC VISA cards on or before a certain date. There was apparently no attempt to identify those members of the class who had actually used their VISA cards to conduct transactions in foreign currency.

51 In *Gilbert*, CIBC agreed to pay \$16.5 million to settle the claims. Slightly less than \$14 million<sup>3</sup> was to be paid directly to class members in amounts ranging from 72 cents to \$14.32. As Winkler J. observed at para. 15 these amounts were arbitrary and "[did] not purport to compensate class members in terms of actual amounts owing nor [did] they compensate only class members with valid claims". It would have been too costly and time consuming to determine liability and amount on an individual basis. Moreover, like this case, in *Gilbert*, records were not available for a significant portion of the period in question. But, as Winkler J. said, at para. 15, "The CPA anticipates such a problem in s. 24(2) and (3) which provide that the court may order that an award be applied so that individual class members share in an award on an average or proportional basis and that the court shall consider whether it would be impractical or inefficient to identify class members entitled to share in the award or exact shares in making such a determination."<sup>4</sup>

52 By resort to ss. 23 and 24 in this case it will be possible for the trial court to deal with the problem identified by the motion judge in para. 57 of his reasons that "the cost of investigating, and analyzing, the details of each cardholder's transactions with MBNA — 8 million since 2000 — and processing the claims of those who are found to have paid interest at a criminal rate, might well be quite disproportionate in relation to the amounts recoverable".

53 In my view, this case, like *Gilbert*, is the very kind of case which s. 24 was designed to deal with because it is impractical and inefficient to identify specific recipients. Such an award is consistent with the recommendations of the Ontario Law Reform Commission in its *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) at 572:

We therefore recommend that, where the court makes an aggregate assessment, but the circumstances render impracticable the determination of those class members entitled to share in the award or the exact share that should be allocated to particular class members, the court should be empowered to order that the members of the class are entitled to share in

the award on an average or proportional basis where the failure to do so would deny recovery to a substantial number of class members who have been injured.

54 I do not consider this application of the *CPA* inconsistent with the decisions of the Supreme Court of Canada, such as *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.). In that case, the plaintiff could establish that only a very small proportion of the class had actually complained about the pollution. The court nonetheless found that the common issues requirement was satisfied: see para. 26 of *Hollick*.<sup>5</sup> The court went on to find that the case for certification failed because the preferable procedure requirement was not met.

55 Nor does this application of the *CPA* offend this court's holding in *Chadha, supra* or *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 1 (S.C.C.). In *Chadha*, the plaintiff adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to the consumers who made up the proposed class. That is not an issue in this case. There is no question that the allegedly illegal fees were passed on to the class members and received by the defendant. The only serious issue is how many members of the class actually suffered an economic loss. This issue can be addressed by ss. 23 and 24.

56 In *Pearson, supra*, at para. 77, the court stated that s. 24 might apply if the plaintiff could "show that every member of the class was adversely affected by the disclosure of the nickel pollution by Inco." However, that is how the *Pearson* case was cast by the plaintiff in this court and the court was not required to consider the full scope of the application of s. 24.

57 Accordingly, in addition to the common issues identified by the motion judge in relation to the claims for declaratory and injunctive relief, there are common issues relating to the claims for restitution and breach of contract as follows:

- (a) If MBNA received interest in excess of an effective annual rate of 60 per cent on cash advances made under agreements or arrangements with class members, is MBNA required to repay to the class, as restitution, the transaction fees it received from the class, or alternatively, the interest it has received from the class that exceeds an effective annual rate of 60 per cent interest?
- (b) Are the terms of the paragraph headed "Interest" of the Cardholder Agreement a bar to the class claim?
- (c) Has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60 per cent, within the meaning of s. 347 of the *Criminal Code*?
- (d) Has MBNA breached its contracts with the class by failing to credit their accounts with the interest it has received that exceeds an effective annual rate of 60 per cent?
- (e) Do provincial Statutes of Limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of s. 347 of the *Criminal Code*?

58 If these issues are determined in favour of the class, the trial judge will be able to resort to ss. 23 and 24 of the *CPA* to resolve the issues of quantum and distribution of the monetary award. Section 26 provides a shopping list of methods for distributing an award under s. 24, including abatement and credit to class members by the defendant (s. 26(2)(a)). That said, the trial judge might nevertheless find, pursuant to s. 24(4) that individual claims need to be made to give effect to the order. If so, it may well be that the trial judge will be asked to exercise the power under s. 10 of the *CPA* to "amend the certification order, ... decertify the proceeding or ... make any other order it considers appropriate."

59 Strictly speaking it is not necessary to state the possibility of an aggregate damage award as a common issue: see *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (Ont. S.C.J.) at para. 102. However, I think it is appropriate to do so in this case, given the importance of the issue. I would state the issue as follows:

Can the amount of restitution and damages for breach of contract be determined on an aggregate basis? If so, in what amount?

60 There is one further issue that requires consideration in relation to the problem of common issues — the voluntariness defence. The defendant has taken slightly inconsistent positions in relation to the voluntariness defence. On the one hand, counsel asserted that voluntariness was a complete defence to all of the claims, and on the other, stated that the issue would have to be determined on a case-by-case basis. The motion judge did not directly address this issue.<sup>6</sup> However, in his subsequent decision in *McCutcheon v. Cash Store Inc.*, [2006] O.J. No. 1860 (Ont. S.C.J.), the motion judge explained that he did not consider voluntariness to be an issue that would have to be determined on an individual basis. At para. 67 of *McCutcheon*, he said the following in relation to this case:

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

61 The so-called voluntariness defence arises from the decisions of the Supreme Court of Canada in *Degelder*, *supra*, and *Nelson v. C.T.C. Mortgage Corp.* (1984), 16 D.L.R. (4th) 139 (B.C. C.A.), aff'd [1986] 1 S.C.R. 749 (S.C.C.). In *Degelder*, at para. 34, Major J. held that "[t]here is no violation of s. 347(1)(b) [the provision at issue in this case] where a payment of interest at a criminal rate arises from a *voluntary* act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement." [Emphasis in original].

62 In this case, the defendant submits that since the cardholder controls the amount of the cash advance and the amounts and period of repayment (subject only to certain minimum payment requirements) and whether or not to engage in other transactions (i.e. credit card purchases) affecting the ultimate interest rate paid, the voluntariness defence protects it from liability under s. 347(1)(b).

63 Hoy J. considered the question of the voluntariness defence in the context of a class proceeding in *Smith v. National Money Mart Co.*, [2007] O.J. No. 46 (Ont. S.C.J.).<sup>7</sup> The claim in *National Money Mart* concerned an allegation that the defendants received a criminal rate of interest on "payday loans". At the time the loan is advanced to the customer, the customer provides a personal cheque payable to the lender for a period ending one day after the stated due date of the loan (being the day before the borrower's payday). If the customer is able to pay off the loan before the due date by paying the principal amount and the accumulated interest (at a rate of 59% per annum) there is no cheque cashing fee. If, however, the lender needs to pay off the loan by cashing the personal cheque, certain cheque cashing and other fees are triggered, potentially also triggering a criminal interest rate if those fees come within the definition of interest in s. 347. As in this case, the *National Money Mart* defendants argued that the voluntariness defence was applicable and would have to be determined on an individual basis. Hoy J. held that application of the voluntariness defence was a common issue. As she pointed out, in *Garland No. 1* the Supreme Court of Canada did not approach the voluntariness issue on a case-by-case basis: see also *Bodnar v. Cash Store Inc.* (2006), 55 B.C.L.R. (4th) 53 (B.C. C.A.) at paras. 11-12.

64 I agree with the reasons of Hoy J. in *National Money Mart* and the motion judge that the voluntariness defence could be accepted as a common issue. The defendant may well be right that since the customer can choose the amount of the cash advance, when to repay it and whether to make additional credit purchases, the payment of interest at a criminal rate arises from a voluntary act of the debtor. However, that defence would apply across the class. It is not apparent to me why decisions, such as the date of repayment, would give rise to a voluntariness defence in one case and not another. At least at this stage, I cannot see why it will be necessary to determine the application of the defence on an individual basis. Accordingly, in my view, the possible availability of a voluntariness defence does not stand in the way of certification. I would therefore include the following as a common issue:

If MBNA received interest at an effective annual rate in excess of 60 per cent on cash advances made under agreements or arrangements with class members, did payment of interest at that rate arise from the voluntary acts of the class members so as to give rise to a "voluntariness defence" thereby precluding a violation of s. 347 of the *Criminal Code of Canada*?

65 To conclude on this aspect of the case, in my view there are common issues in relation to the claims for restitution and breach of contract. In fairness to the motion judge and the Divisional Court, I have reached this conclusion because of the application of ss. 23 and 24 of the *CPA*, matters that were not raised before those courts.

**(c) Preferable Procedure**

66 Even though the motion judge found that there were common issues in relation to the claims for injunctive and declaratory relief, he held that a class proceeding was not a preferable procedure because if the action was successful and the defendant was forced to comply with the law, its customers would end up with fewer options and would be required to pay greater amounts of interest. Yet, the motion judge recognized that the plaintiff could pursue an individual action. In my view, the motion judge erred.

67 First, the findings of the motion judge are fundamentally inconsistent. If the plaintiff did pursue an individual action and obtained a declaration or injunction I cannot imagine why the consequence would be any different than a class proceeding. Surely, the defendant bank would comply with the injunction or conduct its business in accordance with the declaration and stop violating the law, not just in relation to this plaintiff, but for all of its customers. Thus, whether the issue were pursued as an individual action or a class proceeding, the customers would be deprived of certain options.

68 The only significant result of refusing to allow this action to go forward as a class proceeding but permitting the plaintiff to pursue his individual action is that the defendant, even if found to have violated the *Criminal Code* and breached its contract with its customers, will not be required to disgorge the illegal profit. In the result, customers will not only lose the options referred to by the motion judge, but they will also receive no recompense for past illegal acts by the defendant. In my view, this is not a reasonable result. To a similar effect see *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] O.J. No. 865 (Ont. Div. Ct.).

69 Second, in my view, the motion judge erred in failing to apply the criteria for preferable procedure as articulated by the Supreme Court of Canada. A succinct statement of the applicable principles is set out in *Hollick, supra*, at paras. 27 to 31. I would summarize those principles as follows:

- (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
- (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
- (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

70 As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

71 As I have said, the motion judge appears to have accepted that a class proceeding would meet the goals of behaviour modification and access to justice. For the reasons that follow, I agree with that conclusion. The defendant has said that it will continue to conduct business in a manner that may violate the law until presumably the law is changed or it is required to stop by court order. A class proceeding would therefore meet the goal of behaviour modification. While presumably an individual action that resulted in an injunction or declaration would achieve the same result, a class proceeding, unlike an individual

action, will also have the advantage of requiring the defendant to account for the economic harm it has caused. As Doherty J.A. observed in *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.) at para. 58, "Accountability is an important first step toward behaviour modification".

72 In my view, access to justice overwhelmingly favours a class proceeding. The amounts involved are so small that no litigant would have an interest in pursuing an individual claim. The legal and other fees to pursue the claim would be hugely disproportionate to the amounts in issue in any individual claim. No other viable procedure has been identified to resolve the claims.

73 The goal of judicial economy also favours a class proceeding. Admittedly, maximum judicial economy will result if this action is not certified, in that no claim would be advanced at all.<sup>8</sup> However, this result hardly strikes me as what the courts had in mind in terms of judicial economy. Moreover, it would be an overly rigid interpretation of the *CPA* and inconsistent with the instruction in *Hollick, supra*, at para. 15 that "courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters." I agree with Winkler J. in *1176560 Ontario Ltd., supra*, at para. 45 that:

Arguments that no litigation is preferable to a class proceeding cannot be given effect. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.

74 Thus, judicial economy should focus on the relationship of the common issues to the other issues in the case. Viewed from this perspective, a class proceeding is not inconsistent with judicial economy. If I am right that the voluntariness defence can be determined on a class-wide basis and that ss. 23 and 24 can resolve the issues of quantum and distribution of the monetary award, the entire case will be determined by resolution of the common issues. It will not be necessary to engage in trials of any individual issues. A class proceeding in this case would achieve litigation efficiency in the sense referred to in the *Report of the Attorney General's Advisory Committee on Class Action Reform* (Ontario: Ministry of the Attorney General, 1990) at 15, in providing "an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many."<sup>9</sup>

75 A class proceeding will be a fair, efficient and manageable way of advancing the claim. It may be that some customers of the defendant would prefer that it continue to have the right to break the criminal law (if it is doing so), in order to offer its customers some added advantages. In this sense, allowing the plaintiff to pursue a class proceeding may be seen as unfair to some of the customers. In an organized society however, I do not see this as the kind of fairness concern that should prevent a court from intervening. Rather, the concern should be whether the defendant is acting in accordance with the law. As Iacobucci J. said in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.) at para. 57, "As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime".

## **Conclusion**

76 I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order granting the motion for certification on terms that are consistent with these reasons. The case should be remitted to the supervision of the Regional Senior Justice or such judge as he directs to manage the action.

### **J.C. MacPherson J.A.:**

I agree.

### **P. Rouleau J.A.:**

I agree.

*Appeal allowed.*

## **Appendix "A"**

### **Common Issues Proposed by the Plaintiff Before the Motion Judge**

At para. 45 of his reasons, the motion judge enumerated the following as the proposed common issues:

- (a) is the cash advance transaction fee "interest" for the purpose of calculating the effective annual interest under s. 347 of the Criminal Code;
- (b) in what circumstances does MBNA charge interest at a rate in excess of an effective annual interest rate of 60 per cent;
- (c) in what circumstances does MBNA receive interest at a rate in excess of an effective annual interest rate of 60 per cent;
- (d) did MBNA receive interest at a rate in excess of 60 per cent, and if so, how much;
- (e) if so, is MBNA required to pay to the class, as restitution, the transaction fees it received from the class, or alternatively, the interest it has received from the class that exceeds an effective annual rate of 60 per cent interest;
- (f) is the cash advance transaction free incurred voluntarily by the class, so as to give rise to a defence of "voluntariness" to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the Criminal Code of Canada;
- (g) do the class members pay the cash advance transaction fee voluntarily, so as to give rise to a defence of "voluntariness" to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the Criminal Code of Canada;
- (h) are the terms of the paragraph headed "Interest" of the cardholder agreement a bar to the class claim;
- (i) has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60 per cent, within the meaning of s. 347 of the Criminal Code;
- (j) has MBNA breached its contracts with the class by failing to credit their accounts with the interest it has received that exceeds an effective annual rate of 60 per cent;
- (k) do provincial statutes of limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of s. 347 of the Criminal Code; and
- (l) is the class entitled to punitive damages?

#### **Footnotes**

- <sup>1</sup> The respondent also asserted that even if the legal questions were determined in favour of the plaintiff, there would still need to be an individual investigation as to whether in the particular circumstances the payment received was effected by a voluntary act undertaken by the cardholder. This may be inconsistent with the respondent's principal position in this case that voluntariness would be a defence to all of the claims of the class members. I discuss this issue further below.
- <sup>2</sup> On February 6, 2007, the House of Commons passed Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, 1st. Sess., 39<sup>th</sup> Parl., 2006. Pursuant to the provisions of this Bill, some payday lenders will be exempt from the application of s. 347 of the *Criminal Code*. It is not apparent that the Bill would impact on the issues in this case.
- <sup>3</sup> A further \$1 million was to be paid to the United Way and \$1.65 million to the Class Proceedings Fund of the Law Foundation of Ontario.

**4** Also see the reasons of Winkler J. in *Nantais v. Easyhome Ltd.*, [2005] O.J. No. 5805 (Ont. S.C.J.).

**5** Certification ultimately failed in *Hollick* because the plaintiff could not meet the preferable procedure requirement.

**6** He did address a related issue of whether the defendant might have a unique defence against the plaintiff because of the circumstances surrounding his two transactions. The motion judge held at para. 88 that if the plaintiff's claim was dismissed because of a defence unique to him, it would be possible to appoint a substitute representative plaintiff.

**7** The parties brought this case to our attention after the appeal was argued. We received additional submissions with respect to *National Money Mart* on January 22 and 23, 2007.

**8** See *National Money Mart*, above, at para. 135.

**9** Quoted with approval by MacPherson J.A. in *Carom*, above, at para. 5

**TAB 25**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Omarali v. Just Energy Group Inc.](#) | 2016 ONSC 4094, 2016 CarswellOnt 12236, 89 C.P.C. (7th) 113, 2016 C.L.L.C. 210-054, 269 A.C.W.S. (3d) 25, [2016] O.J. No. 3997 | (Ont. S.C.J., Jul 27, 2016)

**2012 ONCA 445**  
Ontario Court of Appeal

McCracken v. Canadian National Railway

2012 CarswellOnt 8010, 2012 ONCA 445, [2012] O.J. No. 2884, 100 C.C.E.L. (3d) 27, 111 O.R. (3d) 745, 2012 C.L.L.C. 210-041, 218 A.C.W.S. (3d) 758, 21 C.P.C. (7th) 57, 293 O.A.C. 274

**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, E.A. Cronk J.J.A.

Heard: February 28-29, 2012

Judgment: June 26, 2012

Docket: CA C52635

Proceedings: 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 Kotryl for Respondent / Appellant by Cross-Appeal

Subject: Civil Practice and Procedure; Employment; Public; Torts

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.C](#) Common issue or interest

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.H](#) Miscellaneous

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.e](#) Costs, fees and disbursements

[V.2.e.vi](#) Miscellaneous

Civil practice and procedure

[XXIV](#) Costs

[XXIV.6](#) Effect of success of proceedings

[XXIV.6.e](#) Miscellaneous

Labour and employment law

[III](#) Employment standards legislation

[III.6](#) Hours of work

**Headnote**

Labour and employment law --- Employment standards legislation — Hours of work

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code do not apply to managers, superintendents or employees who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first-line supervisors (FLS) as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Criterion of identifiable class was satisfied, six questions passed test for certification as common issues, four additional questions involving aggregate assessment of damages could not be certified as common issues and plaintiff was deemed to be suitable representative plaintiff — Plaintiff's litigation plan was based on supposition that all of causes of action and common issues would be certified, which did not occur — Plaintiff appealed and defendant cross-appealed certification order — Defendant's appeal allowed in part; certification vacated — Trial judge did not err by concluding plaintiff's proposed misclassification issue could not be determined on class-wide basis — Case law did not support plaintiff's allegation that misclassification cases are inherently amenable to resolution by class action, as almost all cases referred to employees with common job description and that was not present for allegations against defendant — Trial judge did not find there was basis in fact establishing misclassification could be resolved on class-wide basis — Plaintiff's evidence failed to establish commonality on misclassification issue — Commonality requirement in s. 5(1)(c) of Class Proceedings Act, 1992 requires evidence to afford some basis in fact to find that claims of individual class members raise common issues as defined by case law — Inability to determine misclassification meant matter could not proceed as class proceeding — Trial judge did not err by applying new test for certification — Trial judge did not impose secondary and higher burden of proof on plaintiffs at certification stage.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first-line supervisors (FLS) as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion was granted with qualifications and conditions; cross-motion granted in part — Six questions were certified — Four additional questions involving aggregate assessment of damages could not be certified as common issues — Plaintiff appealed and defendant cross-appealed certification order — Defendant's appeal allowed in part; certification vacated — Trial judge did not err by concluding plaintiff's proposed misclassification issue could not be determined on class-wide basis — Plaintiff's evidence failed to establish commonality on misclassification issue — Commonality requirement in s. 5(1)(c) of Class Proceedings Act, 1992 requires evidence to afford some basis in fact to find that claims of individual class members raise common issues as defined by case law — Trial judge did not err in refusing to certify common issue of misclassification of FLS workers as management, which excluded them from overtime eligibility — Plaintiff's affiants' assertions regarding duties of FLS was not evidence that court could rely on in establishing basis for existence of common issue of misclassification, as assertions were vague and anecdotal and fell short of meeting requirement of specifying source of information and belief — Trial judge's role in common issues trial is not to formulate issues for trial but to make decisions for issues that have already been set out, as setting issues for trial is role of judge who hears certification motion — It would be misapplication of CPA to certify action where common issues are not set out and trial judge is expected to formulate issues for trial — Misclassification issue and lack of evidence on it was fundamental bar to certification — Plaintiff had responsibility for proposing common issues and for adducing evidence showing issues existed — Plaintiff's evidence admitted that it did not contain basis to find

misclassification issue could be resolved without individual assessments for class members — Trial judge erred by setting out his own certifiable common issue as evidence underlying claims remained insufficient, as core of commonality did not exist and at its heart, matter was about misclassification which did not have evidentiary support.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — General principles

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code do not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first-line supervisors (FLS) as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Criterion of identifiable class was satisfied — Plaintiff appealed and defendant cross-appealed certification order — Defendant's appeal allowed in part; certification vacated — Trial judge did not err by applying new test for certification — Trial judge did not impose secondary and higher burden of proof on plaintiffs at certification stage — Trial judge merely explained that legal principles governing criteria for certification have to be considered in context of evidentiary record filed in support of motion.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — General principles

Plaintiff brought motion to certify proceedings concerning overtime pay as class action — Defendant brought cross-motion under R. 21 of Rules of Civil Procedure — Motion was granted with qualifications, and cross-motion was granted in part — Both parties denied that other was successful and both claimed costs as successful party — Plaintiff sought costs of \$740,650.55 and defendant sought costs of \$400,000, each on partial indemnity scale — Plaintiff awarded costs claimed — It was appropriate that class counsel be treated as successful party on certification motion and proceedings under R. 21 — Plaintiff and class counsel achieved level of success that justified award of costs for what, practically speaking, was single complex motion with multitude of issues, some of them interconnected and some mutually exclusive — Level of success achieved by defendant did not rise to level that would justify offsetting awarded to defendant — It is not unusual that class action emerging from certification motion is different from class action sought by class counsel and plaintiff — This is usual and anticipated, precisely because defendants may challenge each of criteria for certification — Common questions are often revised as part of certification motion — Court may modify definition of class or common issues — Award was within reasonable expectations of unsuccessful party, conclusion supported by reference to amount of defendant's claimed costs — Defendant appealed — Appeal allowed — Common issues findings were reversed — Success as justification for costs award was eliminated.

Civil practice and procedure --- Costs — Effect of success of proceedings — Miscellaneous

Plaintiff brought motion to certify proceedings concerning overtime pay as class action — Defendant brought cross-motion under R. 21 of Rules of Civil Procedure — Motion was granted with qualifications, and cross-motion was granted in part — Both parties denied that other was successful and both claimed costs as successful party — Plaintiff sought costs of \$740,650.55 and defendant sought costs of \$400,000, each on partial indemnity scale — Plaintiff awarded costs claimed — It was appropriate that class counsel be treated as successful party on certification motion and proceedings under R. 21 — There was no reason to depart from typical structure of awards made after certification motion — Plaintiff and class counsel achieved level of success that justified award of costs for what, practically speaking, was single complex motion with multitude of issues, some of them interconnected and some mutually exclusive — Level of success achieved by defendant did not rise to level that would justify offsetting awarded to defendant — Common questions are often revised as part of certification motion — Court may modify definition of class or common issues — It was appropriate to include costs of cross-examinations — Award was within reasonable expectations of unsuccessful party, conclusion supported by reference to amount of defendant's claimed costs — Defendant appealed — Appeal allowed — Common issues findings were reversed — Success as justification for costs award was eliminated.

## Table of Authorities

### Cases considered by W.K. Winkler C.J.O.:

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*C.W.C. v. Island Telephone Co.* (1990), 81 di 126, 1990 CarswellNat 938, 1990 CarswellNat 939 (Can. L.R.B.) — referred to

*Canada Post Corp. v. C.U.P.W.* (1989), 79 di 35, 1989 CarswellNat 862, 90 C.L.L.C. 16,007, 1989 CarswellNat 863 (Can. L.R.B.) — referred to

*Canadian Union of Bank Employees v. Bank of Nova Scotia* (1977), 21 di 439, 77 C.L.L.C. 16,090, [1977] 2 Canadian L.R.B.R. 126, 1977 CarswellNat 581, 1977 CarswellNat 582 (Can. L.R.B.) — referred to

*Captains & Chiefs Assn. v. Algoma Central Marine* (2010), 2010 CarswellNat 3302, 2010 CarswellNat 3303, 2010 CIRB 531, 2010 CCRI 531 (C.I.R.B.) — referred to

*Captains & Chiefs Assn. v. Algoma Central Marine* (2011), 2011 CarswellNat 1918, 2011 CAF 94, 2011 CarswellNat 576, 2011 FCA 94 (F.C.A.) — referred to

*Caputo v. Imperial Tobacco Ltd.* (2004), 2004 CarswellOnt 423, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350, [2004] O.T.C. 112 (Ont. S.C.J.) — followed

*CMLQ Investors Co. v. CIBC Trust Corp.* (1996), 1996 CarswellOnt 3376, 3 C.P.C. (4th) 62 (Ont. C.A.) — referred to

*Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, 46 B.C.L.R. (4th) 234, 218 B.C.A.C. 177, 359 W.A.C. 177, 2005 BCCA 540, 2005 CarswellBC 2592, 19 C.P.C. (6th) 253 (B.C. C.A.) — referred to

*Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155, 2002 CarswellOnt 3569 (Ont. S.C.J.) — referred to

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*Smith v. National Money Mart Co.* (2007), 2007 CarswellOnt 2376 (Ont. S.C.J.) — referred to

*Syndicat des agents de maîtrise de Québec-Téléphone v. Québec-Téléphone* (1996), 106 di 1 (Can. L.R.B.) — referred to  
*Telephone Supervisors Assn. v. British Columbia Telephone Co.* (1977), 33 di 361, 1977 CarswellNat 593, 1977 CarswellNat 594, [1977] 2 Canadian L.R.B.R. 385, 77 C.L.L.C. 16,107 (Can. L.R.B.) — referred to

*U.S.W.A. v. Cominco Ltd.* (1980), 40 di 75, [1980] 3 Can. L.R.B.R. 105, 80 C.L.L.C. 16,045, 1980 CarswellNat 698, 1980 CarswellNat 699 (Can. L.R.B.) — referred to

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**Statutes considered:**

*Canada Labour Code*, R.S.C. 1985, c. L-2

Generally — referred to

Pt. I — referred to

Pt. III — referred to

Pt. III, Div. I — referred to

Pt. III, Div. XVI — referred to

s. 3 — referred to

s. 3(1) "employee" — considered

s. 167(2) — considered

s. 167(2)(a) — considered

s. 169(1) — considered

s. 174 — considered

s. 191 — referred to

s. 196 — referred to

s. 198 — referred to

s. 199 — referred to

s. 252(2) — referred to

s. 264(a) — referred to

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 1 "common issues" — considered

s. 2(3)(a) — considered

s. 2(3)(b) — referred to

s. 5(1) — referred to

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 5(1)(e)(ii) — considered

s. 12 — referred to

s. 13 — referred to

s. 24 — referred to

s. 25 — considered

s. 30 — referred to

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 6 — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally — referred to

R. 21 — referred to

R. 21.01(1) — referred to

R. 21.01(1)(b) — referred to

R. 21.01(3) — referred to

R. 21.01(3)(a) — referred to

R. 37.13(2) — referred to

R. 37.13(2)(a) — referred to

R. 39.01(4) — considered

**Regulations considered:**

*Canada Labour Code*, R.S.C. 1985, c. L-2

*Canada Labour Standards Regulations*, C.R.C. 1978, c. 986

Generally — referred to

s. 24 — referred to

APPEAL of judgments reported 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.) and *McCracken v. Canadian National Railway* (2010), 100 C.P.C. (6th) 334, 2010 ONSC 6026, 2010 CarswellOnt 8330 (Ont. S.C.J.).

### ***W.K. Winkler C.J.O.:***

#### **A. Introduction**

1 This is the third of a trilogy of class action cases against federally-regulated employers claiming unpaid overtime pay: see also *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.). The court's concurrently released reasons in *Fulawka* and *Fresco* explain why the two class actions against the defendant banks for unpaid overtime pay should be certified.

2 The present class action against the defendant, Canadian National Railway Company ("defendant" or "CN"), is premised on a different theory of liability than in the overtime class actions against the banks. The overtime actions against the banks are brought on behalf of class members who were classified as non-managerial employees.<sup>1</sup> Their right to be paid overtime wages at 1.5 times their normal hourly rate is provided for in their employment contracts and by the provisions of Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code"). The central issue is not whether the class members are eligible for overtime pay but, rather, whether the policies, practices or systems of the defendant banks have effectively and routinely denied payment of overtime compensation to class members, contrary to the express or implied terms of their employment contracts.

3 In contrast, in the present case, CN has classified the class members as managerial employees. The class consists of First Line Supervisors ("FLSs") employed by CN. The effect of s.167(2)(a) of the *Code* is that employers are not required to pay overtime compensation as provided in Part III of the *Code* to employees who "are managers or superintendents or exercise management functions". CN's overtime policy explicitly excludes FLSs from eligibility for overtime pay. The success of the proposed class action for unpaid overtime pay thus depends on the threshold issue whether CN has misclassified FLSs as managerial employees.

#### **B. Overview of the Proceedings**

4 The motion to certify the class action against CN under s. 5(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6, s. 30 ("CPA"), was heard together with CN's motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss the action. On the Rule 21 motion, CN argued that the Superior Court of Justice lacks jurisdiction to hear the proposed action. The motion judge rejected this argument. However, he struck, dismissed and stayed various elements of the plaintiff's claims in negligence and breach of contract. The motion judge granted the motion for certification, but in doing so, he significantly re-drafted the common issues.

5 Both parties have appealed different elements of the motion judge's orders. The plaintiff appeals from the Rule 21 order and the certification order, while CN appeals and cross-appeals from the Rule 21 order and appeals from the certification order. CN also appeals from the order awarding the plaintiff his costs of both motions. All the appeals that would otherwise lie in the Divisional Court have been traversed to this court.<sup>2</sup>

6 The parties raise a matrix of issues before this court. However, it is not necessary to decide most of these issues to dispose of the various appeals and cross-appeals.

7 For the reasons that follow, I would allow CN's appeal from the certification order and set aside that order. I conclude that the motion judge was correct in rejecting the plaintiff's proposed common issues concerning whether CN misclassified FLSs

as managerial employees. The evidence on the motion did not support a finding that a common issues trial judge would be able to resolve the fundamental issue of misclassification on a class-wide basis. Rather, the evidence indicated that individualized assessments of the job duties and responsibilities of class members would be needed to determine if they were properly classified.

8 However, the motion judge fell into reversible error in recasting as a common issue the question of what the minimum requirements are to be a managerial employee at CN. The same evidentiary deficiency — the lack of evidence supporting a finding of a core of commonality concerning FLSs' job duties and responsibilities — still remained.

9 These conclusions on the absence of a core of commonality make it unnecessary to decide the correctness of the motion judge's rulings on the Rule 21 motion, or to review his rulings on the other proposed common issues and preferable procedure. At the end of these reasons, I comment briefly on a few practice points that arise out of some of these rulings.

### C. Factual Background

#### (1) Overview of the Proposed Class Proceeding

10 The putative representative plaintiff, Michael McCracken ("plaintiff"), is a former CN employee. He started this action on behalf of approximately 1,550 current and former non-unionized CN employees across Canada who have held the position of FLS since July 5, 2002.

11 The plaintiff began working at CN in 1998 as a unionized employee. In October 2005, he was promoted to the non-unionized position of manager of corridor operations, which is a FLS position. In January 2008, he was promoted to the position of senior manager, corridor operations. The plaintiff alleges in his statement of claim<sup>3</sup> that the senior manager position is a FLS position, while according to CN, it is a higher-ranking managerial position rather than a FLS position. The plaintiff held the position of senior manager, corridor operations until March 26, 2008, the day after he served the statement of claim in this action. He deposed that he was informed that he was being demoted to the unionized position of dispatcher because he had started the action and not for performance deficiencies. The plaintiff resigned from CN in 2010.

12 The plaintiff pleads causes of action against CN based on CN's alleged violation of the *Code*, breach of contract, breach of a duty of good faith, negligence and unjust enrichment. The central allegation driving the proposed class action is that, since July 5, 2002, CN has uniformly, deliberately, improperly, negligently, and illegally misclassified FLSs as managers. As a result of this misclassification, CN is said to have unlawfully deprived the class members of their entitlement to receive overtime pay and holiday wages as stipulated by the *Code*. The statement of claim alleges that all class members have been regularly scheduled, as a matter of uniform company policy, to work in excess of 40 hours per work week or 8 hours per day without receiving overtime pay, contrary to law and in violation of various provisions of Part III of the *Code*, as will be discussed below.

13 The plaintiff claims \$250 million in general damages, \$50 million in special damages and an order pursuant to s. 24 of the *CPA* directing an aggregate assessment of damages. The plaintiff also seeks an order requiring CN to disgorge amounts wrongly withheld from the class in respect of unpaid overtime and holiday pay. In addition, the plaintiff requests various forms of declaratory and injunctive relief, including a declaration that CN has been unjustly enriched, and a declaration that CN has breached the *Code* and the express or implied terms of the employment contracts with class members by misclassifying these employees and by failing to pay them overtime pay.

#### (2) The Role of FLSs at CN

14 In CN's employment hierarchy, FLSs are immediately above unionized workers and immediately below the non-unionized managerial positions of assistant superintendant and superintendant. FLSs are the primary point of contact between the non-unionized and unionized workforce.

15 Approximately 82 percent of CN's Canadian employees are unionized. This element of CN's workforce is represented by five major unions and is divided into over 30 different bargaining units, each of which is governed by a different collective agreement. The collective agreements regulate such matters as the length of the work week, overtime, vacation pay, and

contracting out of work. FLSs are required to know and enforce the rules found in the various collective agreements that apply to the unionized employees under their supervision.

16 CN's recruiting materials describe the duties of FLSs as follows:

The First Line Supervisor manages the day-to-day operation of their territory through their unionized staff; ensures the on-time performance of trains, delivering on our commitments to our customers; the efficient utilization of locomotives and repair of cars (Mechanical); repair and maintenance of trackage and signals (Engineering); and safe haulage of merchandise to their destination (Transportation); as well as interacting with customers (Marketing).

17 CN identified 70 different job positions held by FLSs. More than 90 percent of FLSs are responsible for duties associated with train operations, which encompasses the movement of trains, the repair and maintenance of tracks and signals, and the repair and maintenance of train cars and engines. There are also FLS positions in finance and accounting, customer service, corporate facilities, and various other miscellaneous positions.

18 The salary range for FLSs is from \$55,600 to \$109,200. FLSs are eligible for bonuses equivalent to 15 to 30 percent of their base pay. They are also entitled to benefits, including a defined benefit pension plan and a share purchase plan.

### **(3) CN's Overtime Policy**

19 CN's overtime policy, titled "Compensation Management — Time Management" ("Policy"), came into effect on January 1, 2006. The Policy put into writing the policy and practice that had existed at CN since July 5, 2002.

20 The Policy states that it "is intended for non-unionized, professional and administrative support employees working in Canada. *For greater clarity, this policy does not apply to managers, supervisors or anyone who exercise[s] management functions*" (emphasis added). The Policy entitles non-unionized and non-managerial employees of CN to receive compensation at a rate of 1.5 times the employee's regular rate for pre-authorized or directed overtime hours worked.

21 FLSs are not eligible for such overtime pay under the Policy. However, the Policy provides that FLSs may be paid discretionary lump sum amounts in extraordinary circumstances where extensive hours are required:

In the spirit of the FLS compensation package, First Line Supervisors may receive payments under the Service Response/Emergency program, in case of extraordinary circumstances where extensive hours are required e.g. derailments, severe winter conditions etc. Under these special circumstances, a Vice-President, General Manager or equivalent may authorize a special lump sum payment to be paid in increments of \$500. In cases involving payments in excess of \$2,500, the authorizing officer will review the circumstances with the appropriate Vice-President.

22 The Policy also provides that FLSs who are required to work on a general holiday will receive time off at the regular rate.

23 The plaintiff refers to the Policy several times in his statement of claim. He asserts that the Policy forms part of each class member's contract of employment. He alleges that FLSs had been entitled to receive overtime wages until July 5, 2002, when the Policy came into effect. The plaintiff requests a declaration that the Policy is "unlawful, void and unenforceable".

24 On the certification motion, CN led evidence that conflicted with the plaintiff's allegation that FLSs received overtime wages up until July 5, 2002. CN pointed to its 1998 policy on overtime applicable to FLSs working in the Operations Division,<sup>4</sup> which announced that CN was "adopt[ing] the CP [Canadian Pacific] method of not paying overtime or shift premiums and instead create[d] an allowance" for these FLSs.

### **(4) Hours Worked by FLSs**

25 The plaintiff pleads that FLSs regularly work in excess of 40 hours per week or eight hours per day and they regularly work on statutory holidays. He also pleads that FLSs are frequently called for unscheduled work and to substitute for unionized and non-unionized employees: see the motion judge's reasons, at para. 48.

26 The plaintiff pleads, and the defendant does not dispute, that CN does not keep records of the hours worked by FLSs.

#### **(5) Relevant Code Provisions**

27 The provision of the *Code* of most significance in this case is s. 167(2), which states:

167. (2) Division I does not apply to or in respect of employees who

(a) are managers or superintendents or exercise management functions...

28 The plaintiff also pleads and relies on provisions in Division I of Part III of the *Code* regulating the standard hours of work and payment of overtime for employees who are subject to Part III: see ss. 169(1) and 174. As explained in *Fulawka*, at para. 33, the combined effect of ss. 169(1) and 174 of the *Code* is that an employer must pay an employee overtime wages at the rate of 1.5 times the regular rate of wages when the employee works more than eight hours in a day or more than 40 hours in a week. However, s. 167(2)(a) exempts employees who are managers, superintendents or who exercise management functions from entitlement to overtime pay under these provisions.

29 The plaintiff further pleads and relies on the provisions in Division XVI of the *Code*, and in the accompanying regulation, which impose obligations on employers to accurately record and maintain records of employees' hours of work: see ss. 252(2) and 264(a) of the *Code* and s. 24 of the *Canada Labour Standards Regulations*, C.R.C., c. 986.<sup>5</sup> He also pleads and relies on the provisions in ss. 191, 196, 198 and 199 of Division V of the *Code* governing compensation for general holidays, including the entitlement of managerial employees to be compensated for work performed on a general holiday.

30 The plaintiff pleads that the duties and obligations found in these provisions of the *Code* and the *Regulations* are implied by fact or law into the contracts of employment of class members.

#### **(6) Procedural History**

31 The plaintiff moved to certify the action as a class proceeding. He submitted that a misclassification case such as his is "inherently amenable to resolution by way of class proceeding." CN argued that none of the criteria for certification was satisfied.

32 CN moved under rule 21.01(3)(a) for an order dismissing the action on the basis that the Superior Court of Justice has no jurisdiction to directly enforce the *Code*. CN also moved under rule 21.01(1)(b) to strike portions of the claim for failing to disclose a reasonable cause of action. The certification and Rule 21 motions were argued together in July 2011.

#### **D. The Motion Judge's Reasons**

33 The motion judge granted CN's Rule 21 motion in part and granted the plaintiff's certification motion with qualifications and conditions. His reasons on the Rule 21 motion may be summarized as follows:

- The language of the *Code* reveals that Parliament intended that courts have a subject matter jurisdiction to enforce wage claims for overtime and thus the statutory rights in the *Code* are terms of the contract of FLSs "by force of statute": see paras. 114-85.
- The plaintiff's claim for breach of the express or implied terms of the employment contract discloses a reasonable cause of action: see paras. 199-227.
- However, the plaintiff's claim for breach of contract based on CN's alleged failure to pay holiday pay should be dismissed on the merits because CN provided class members with time *in lieu* of holiday pay, which is permitted by ss. 198 and 199 of the *Code*: see paras. 204-13.

- The plaintiff's claims for breach of an express or implied term of the contract should be stayed because these causes of action are academic or moot, the court having concluded that the terms of the *Code* are terms of the contract by force of statute: see paras. 228-34.
- The plaintiff has actually proven on the Rule 21 motion that he has a cause of action for breach of a statutory implied term, which is an issue that might otherwise have been decided at the common issues trial: see paras. 224-27.
- The court on a certification motion has jurisdiction to decide or stay what would otherwise be a common issue based on rule 37.13(2)(a) of the *Rules of Civil Procedure*, and this jurisdiction is augmented and enhanced by ss. 12 and 13 of the *CPA*: see paras. 228-32.
- The asserted cause of action for breach of a free-standing duty of good faith should be struck because no such independent duty exists. However, the pleading of the material facts alleging a breach of duty of good faith may remain in support of the cause of action for breach of contract: see paras. 235-45.
- The plaintiff has shown a cause of action for unjust enrichment: see para. 246-48.
- The plaintiff's proposed cause of action for negligence should be struck from the statement of claim for failing to disclose a reasonable cause of action: see paras. 249-72.
- CN's limitation period argument is limited to the claims and causes of action for negligence and breach of a free-standing duty of good faith based on CN allegedly improperly classifying its FLSs as managers. These claims are not proceeding so the limitation period issue is moot: see paras. 273-76.

34 The motion judge then turned to the certification motion. Before assessing the five criteria for certification under s. 5(1) of the *CPA*,<sup>6</sup> the motion judge addressed CN's argument that the evidentiary threshold that a plaintiff must meet to prove the certification criteria should be higher than the "some basis in fact" test described in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), at paras. 16-26. At paras. 291-92, the motion judge described a "festering point of complaint by defendants" that a plaintiff need only show "some basis in fact" for each of the criteria for certification to obtain a certification order.

35 The motion judge explained that the "some basis in fact" test is not applied in the way that defendants have suggested. Rather, he observed that satisfying the "some basis in fact" test is "necessary but not sufficient for the satisfaction of the various criteria" (at para. 300). I will say more about his reasons on this issue below, at paras. 72-81.

36 The motion judge next addressed the five criteria for certification and concluded they were met for the following reasons.

**(1) Section 5(1)(a): Do the Pleadings Disclose a Cause of Action?**

37 The motion judge relied on his reasons on the Rule 21 issues to conclude that the plaintiff had shown a cause of action for unjust enrichment and for breach of contract based on express or implied contractual terms and based on contractual terms implied by force of statute: see para. 304.

**(2) Section 5(1)(b): Identifiable Class**

38 CN did not dispute that the plaintiff identified a class that technically satisfies the requirements of the *CPA*, but argued that the class definition was deficient because the plaintiff failed to provide any evidence concerning FLSs in 56 of the 70 job positions held by FLSs, and argued that there was thus no basis in fact for including these FLSs as class members.

39 The motion judge found this argument to be fallacious because the plaintiff demonstrated some basis in fact for his own cause of action and for his own job description. He concluded that this was a sufficient evidentiary basis for the plaintiff's submission that there is a group of similarly-situated claimants with similar claims: see paras. 305-11.

**(3) Section 5(1)(c): Common Issues**

40 The plaintiff initially proposed a list of seven common issues (the "Revised List"), which includes "misclassification" as common issue 1: see the motion judge's reasons, at para. 322, and Appendix A to these reasons. The plaintiff's Revised List was predicated on his submission that, at the common issues trial, the court could and should determine whether FLSs were properly or improperly classified as managers on a class-wide basis: see the motion judge's reasons, at para. 323.

41 The motion judge expressed reservations about the commonality of some of the proposed issues. To focus the discussion on his concerns, the motion judge prepared an amended list containing six common issues (the "Amended Revised List") and requested the parties' submissions on his suggestions: see the motion judge's reasons, at para. 325, and Appendix B to these reasons. This list did not include misclassification of the class as a free-standing common issue, although it included questions about whether CN had statutory or common law duties to properly classify class members and, if so, whether CN had breached any of these alleged duties.

42 The plaintiff accepted the Amended Revised List with the following three reservations: i) misclassification of the whole class should be certified as a common issue, as the plaintiff had initially submitted; ii) there should be an additional common issue about how management status can be determined on a class-wide basis; and iii) there should be a common issue about the aggregate assessment of damages.

43 CN disputed that any of the proposed common issues — whether from the plaintiff's Revised List or the motion judge's Amended Revised List — are proper common issues for one or more or all of the following reasons: (i) the issues are not common to the class; (ii) answering the proposed common issues depends on individual findings of fact for each claimant; (iii) the proposed common issues are not necessary to the resolution of each class member's claim for overtime; (iv) resolution of the common issues would not significantly advance the litigation; and (v) the common issues lack a factual basis in the evidence.

44 The motion judge examined each of the proposed common issues from both lists and through a process of elimination, he arrived at a final list of six questions, which he ultimately certified ("Approved List"): see the motion judge's reasons, at para. 351, and Appendix C to these reasons. I include his Approved List here for ease of reference:

**Common Issue One — Payment of Overtime Pay**

Did the Class Members receive overtime pay under the [Code]?

**Common Issue Two — Contract Terms**

What are the terms by force of statute of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; and (iii) the recording of hours worked?

**Common Issue Three — Minimum Requirements of Manager Status at CN**

In accordance with the meaning under s. 167 (2) of the *Canada Labour Code*, of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?

**Common Issue Four — Unjust Enrichment**

Would the Defendant be unjustly enriched by failing to compensate a Class Member with pay or overtime pay for hours worked in excess of his or her standard hours of work?

**Common Issue Five — Damages or other relief**

If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

#### Common Issue Six — Punitive Damages

Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

45 The motion judge observed, at paras. 353-54, that four of these questions (common issues 1, 2, 4 and 5) are answerable before the common issues trial. He said, at para. 359, that while answering these four questions would advance the litigation, they are not determinative of the action "because the heart of the matter remains whether the first line supervisors were or were not managers, which is unanswered."

46 In arriving at this list, the motion judge rejected the plaintiff's proposed common issues 1, 2, 3(a)-(b), 4(a)-(i) and 7(a) from the Revised List. He observed, at para. 331, that these questions, which include the proposed misclassification common issue: "lack commonality or would depend on individual findings of fact for each claimant." In his opinion, "these questions cannot be determined on a class-wide basis and rather require individual questions to be answered."

47 Rather than certifying misclassification as a common issue, the motion judge certified a common issue of his own design — common issue 3 — which would identify "the minimum requirements to be a managerial employee at CN".<sup>7</sup> The motion judge reasoned, at para. 363, that this question "avoids the problems of commonality" of the plaintiff's proposed misclassification question. He found, at paras. 363-64, that common issue 3 could be answered on a class-wide basis and that doing so would substantially advance the litigation because it would divide the class into the following three groups:

- i) class members who satisfy the minimum standards for being a manager at CN because of who they are and what they do;
- ii) class members who could not possibly satisfy the minimum standards for being a manager at CN; and
- iii) class members whose status as a manager at CN remained to be determined.

48 According to the motion judge, at para. 367, by dividing the class into these three groups, the claims of the first group would be dismissed, while the claims of the latter two groups would proceed to manageable individual issues trials as contemplated by s. 25 of the *CPA*.

#### (4) Section 5(1)(d): Preferable Procedure

49 After critiquing the parties' approach to the preferable procedure issue, at paras. 445-51, the motion judge concluded, at para. 456, that a class action is preferable to the administrative process under the *Code* for resolving the class members' claims. He observed that the class proceeding will "provide access to justice and judicial economy for a mass mistake in an efficient and manageable way."

#### (5) Section 5(1)(e): Representative Plaintiff and Litigation Plan

50 The motion judge found Mr. McCracken to be a suitable representative plaintiff because "he has no conflict of interest in the sense that his claim or position in the class is adverse in interest" to other class members and he "was astute enough to hire seasoned class action counsel" to prosecute the litigation: see paras. 471-72.

51 As for the litigation plan, the motion judge observed, at para. 474, that the plaintiff "must go back to the drawing board and prepare a new litigation plan based on the outcomes of the motion and cross-motion." He held that, even in the absence of a suitable litigation plan, this criterion was satisfied because he foresaw no difficulty in producing one. The motion judge made the certification order subject to the condition that a litigation plan be settled.

#### (6) Costs

52 The motion judge awarded the plaintiff — "really class counsel" — costs of the motions on a partial indemnity scale fixed at \$740,650.55: see *McCracken v. Canadian National Railway*, 2010 ONSC 6026 (Ont. S.C.J.), at para. 33. He found that, even though the defendant succeeded in part on the Rule 21 motion and even though the plaintiff's certification motion was granted with qualifications, the plaintiff had achieved a level of success warranting an award of costs in his favour without an offsetting award in favour of CN (at para. 21).

## E. The Misclassification Issue

### (1) *Misclassification is a Necessary Element for Establishing Liability*

53 As discussed, the class members' claims for damages for unpaid overtime are framed in breach of statute, breach of contract, negligence and unjust enrichment. In attempting to make this action amenable to certification as a class proceeding, the plaintiff proposed a common issue concerning misclassification. In theory, if this common issue were to be resolved in the plaintiff's favour, this would be a finding that CN had uniformly and improperly classified all FLSs as managerial employees. Such a finding would significantly advance the unpaid overtime claims of class members on a class-wide basis because it would establish their eligibility to receive overtime wages under Part III of the *Code*.

54 Conversely, if CN were found to have properly classified the class members as managers or as employees who exercise managerial functions, then CN would not have breached any alleged statutory or private law duty to pay them overtime wages and their claims would fail.

55 The central factual assertion related to the misclassification issue is found in paragraph 13 of the statement of claim:

The nature of the Class Members' duties, responsibilities and authority is such that they were not managers or superintendents or exercising management functions within the meaning of section 167(2) of the *Code*.

56 There is no question that, in the abstract, a class-wide resolution of the issue concerning the alleged misclassification of FLSs would significantly advance the litigation. A crucial question on the motion was whether there is some basis in fact to find that the misclassification issue could be resolved commonly.

### (2) *Plaintiff's Proposed Common Issues Concerning Misclassification*

57 The plaintiff argues that the motion judge erred in refusing to certify common issue 1 on his Revised List, which states:

Common Issue One — Misclassification

Are the Class Members excluded from overtime eligibility under contract (express or implied) and/or under the [*Code*]?

58 The plaintiff's Revised List includes other questions concerning the misclassification issue. These questions ask if CN had contractual, statutory, or tort duties to properly classify the class members and, if so, whether CN breached any of these duties: see common issues 2, 3(a) and (b) and 4(a)-(i) in Appendix A. My analysis of common issue 1 applies equally to the misclassification issue as it arises out of these common issues.

### (3) *Plaintiff's Evidentiary Basis for Misclassification as a Common Issue*

59 The plaintiff contends that he led evidence on the certification motion establishing that misclassification can "be determined on a class-wide basis (or at the very least, on the basis of sub-groups)", and that this evidence "far exceeded" the standard of some basis in fact.

60 The plaintiff points to two types of evidence that he introduced on the motion:

- (1) evidence that CN made an arbitrary, class-wide determination that all class members are management without conducting any analysis of their job functions; and

(2) evidence of restrictive and common limits on class members' authority and discretion such that they uniformly had no real decision-making authority in essential managerial matters.

61 The primary evidence that the plaintiff points to in the first category is the following testimony of CN's director of compensation, Louis Lagacé, during cross-examination on his affidavit:

Q. Have you ever analyzed the individual job functions [of FLSs]?

A. Not under my leadership.<sup>8</sup>

Q. To your knowledge has it ever been done?

A. Well, I cannot speak of my predecessors. But clearly, you know, in our company first line supervisors are managers and therefore they are not subject to overtime.

Q. To your knowledge has there ever been an analysis of each of the jobs of the first line supervisors to determine whether they're managers?

A. No. We rely largely on when someone is appointed a first line supervisor, say a trainmaster, clearly this individual is administered along the job grade and compensated accordingly.

62 The plaintiff's evidence in the second category — which is said to show that there are common limits on FLSs' decision-making authority — consists of sworn affidavits from the plaintiff, 11 current or former class members, and two CN employees who are union representatives. The class members who gave affidavit evidence on behalf of the plaintiff held one or more of the following job titles: trainmaster, mechanical supervisor, chief train dispatcher (also known as manager of corridor operations or MCO), coordinator operations and crew management supervisor.<sup>9</sup> Although CN identified 70 different job titles for FLSs based on its payroll codes, the plaintiff submits that the job titles of the affiants are from a group of ten job titles that are held by nearly 80 percent of currently-employed class members.

63 These class members assert that FLSs do not have real decision-making authority in essential managerial matters and that they uniformly lack the following powers or responsibilities that are characteristic of managers:

- the authority to hire, terminate, promote, demote or transfer employees;
- the authority to represent management in collective bargaining or in grievance procedures;
- unfettered authority to discipline;
- involvement in setting budgets or policies;
- determining employees' schedules; and
- negotiating contracts on behalf of CN.

64 The following summary of the affidavits submitted by the plaintiff illustrates the nature of the evidence that he tendered to show that FLSs uniformly lack real decision-making authority in managerial matters:

- Affidavit evidence of Ian McCracken, who held the FLS position of manager, corridor operations, from 2005 to January 2008 and held the title of senior manager, corridor operations from January to March 2008, at MacMillan Yard, Toronto:

I do not believe that I was ever a manager or that I ever exercised management functions while I was a FLS. I could not hire, fire, promote, demote or transfer other employees. My efforts to assist in matters involving hiring were rebuffed. My power to discipline other employees was limited to investigating and recommending that minor

disciplinary warnings be issued. I lacked the power to decide whether discipline would actually be imposed and, if so, its nature. Those decisions were made by my supervisors and more senior managers. I could not make budgetary or expenditure decisions on behalf of CN. I was told by my manager that I lacked the authority to make any changes to schedules for rail traffic controllers, even if I felt that a change was logical. When other MCOs requested the trains be subjected to unscheduled stops, I was expected to run these requests by the superintendent or assistant superintendent.

- Affidavit evidence of George Anderson, presently a unionized employee at CN, who held three different FLS positions <sup>10</sup> from 1995 to 2006:

In my role as FLS, I did not have any authority to hire, fire, suspend, promote, demote or transfer employees. I had no independent authority to issue demerit points, suspensions, terminations or demotions. I could initiate investigations and recommend demerit points to my supervisor or general manager, but I could not issue demerit points without their prior approval. I was never involved in any arbitration cases on behalf of CN. I had no independent authority to schedule hours of work for employees. I did not make any budgetary decisions and I had no involvement in the development of company policy or planning. I did not negotiate any contracts on behalf of CN. When employees under my supervision needed to work overtime, I could keep them working in accordance with their collective agreements and as specifically authorized by my superiors. *During my time at CN, I have worked primarily in the South Western Ontario region, including in Windsor, Sarnia and London. At all of these locations, in my experience, the FLSs had no different level of authority than described above.*

[Emphasis added.]

- Affidavit evidence of John Caissie, who has held FLS positions <sup>11</sup> in Winnipeg, Moncton, Toronto and Montreal over the last 19 years:

My responsibilities as a FLS have included supervising a number of employees. At no time have I exercised managerial functions. I have not had a determining influence on the employment, promotion or discipline of other staff. I have never hired, fired, promoted or transferred employees. I have never unilaterally disciplined employees, though I have recommended discipline at times to my superiors, who are under no obligation to accept my recommendations. I have not acted on behalf of CN at grievance arbitrations, nor have I ever controlled scheduling or made budgetary or expenditure decisions. Finally, I have never been involved in company policy or planning, or negotiated contracts on behalf of CN. *I understand, from speaking with various colleagues throughout my employment that the level of supervision I exercised as trainmaster, manager — crew utilizations and manager — corridor operations is in line with that exercised by other FLSs employed by CN in both large and small centres across the country.*

[Emphasis added.]

#### **(4) CN's Evidence on the Misclassification Issue**

65 CN's primary position on commonality, as described by the motion judge, at para. 56, was that the misclassification issue, as a matter of adjudication, cannot be proved globally in a class action because the status of each FLS must be assessed individually. To support this position, CN lead evidence to show a wide disparity in the roles and functions of FLSs, including of FLSs holding the same job position: see the motion judge's reasons, at para. 69.

66 CN tendered evidence — including affidavits from 19 class members — to show that class members work in different environments ranging from small towns to large cities, from office environments to shops, garages, small depots, or outdoors in train yards, or along the vast length of track that comprises CN's rail network: see the motion judge's reasons, at para. 44.

67 In addition, in an effort to highlight the lack of commonality of FLSs' job functions and responsibilities, CN introduced a chart outlining the affidavit evidence adduced by both parties about the varying duties and responsibilities of class members

who held the positions of MCO and trainmaster. CN argued that this chart illustrates that the level of authority and managerial responsibility of class members varies significantly. For example, some MCO's deposed that they have authority to approve overtime and to perform job performance appraisals of unionized employees without approval or oversight from higher levels of CN management. In contrast, other MCOs deposed that they have no authority to make any changes to work schedules or to provide input into performance evaluations.

68 Similarly, some class members who held the position of trainmaster said that they have authority to directly lay off unionized employees or to make decisions about required staffing levels that sometimes cause lay-offs, while another class member asserted that trainmasters cannot unilaterally lay-off employees. Several trainmasters gave evidence that they have the authority to remove an employee from service where drugs or alcohol are involved and in the event of a serious rule violation. There was no evidence to the contrary. Several trainmasters indicated that they have authority to impose demerit points and to level discipline, while others said that they never disciplined employees or they claimed to have only a limited role in discipline.

69 In addition, CN's tendered affidavit evidence indicated that FLSs working in more remote locations exercise greater decision-making authority than FLSs working in busier, more urban locations where more senior-level managers are present in the workplace. For example, one trainmaster, Norman Hart, deposed that he supervised only 16 yard employees and inbound and outbound train crews when he worked at CN's largest rail yard near downtown Toronto, whereas he supervised well over 100 employees when he worked at a smaller yard in Hornepayne, Ontario. His evidence indicated that he exercised more significant decision-making authority over unionized staff when he worked in Hornepayne where there was no higher-level manager within a several hundred mile radius.

70 CN's secondary line of attack against the proposed common issue of misclassification involved adducing evidence intended to refute the plaintiff's assertion that FLSs were not properly classified as managers. CN offered evidence showing the following attributes of FLSs, as described by the motion judge, at paras. 68-69:

- FLSs are expected to play a pivotal role in managing CN's workforce because they are the primary point of contact between management and unionized employees.
- Many FLSs undergo extensive training to acquire the management skills required for their jobs.
- Some FLSs have the authority to approve overtime and leaves of absence, to co-ordinate crews, to schedule shifts, to approve changes to the vacation schedule, to complete job performance appraisals, to administer collective agreements and to oversee compliance with safety legislation.
- FLSs carry out their role dependent upon their experience and aptitudes, for example, some FLSs manage large numbers of employees whereas others exercise control over significant budgets.

## F. Analysis

71 As discussed, the success of the proposed class action is contingent on the threshold issue whether CN misclassified FLSs as managerial employees. The overarching dispositive question on appeal is whether the allegation of misclassification raises a certifiable common issue. In resolving this question, it is necessary to address the following three questions raised by the parties:

- (1) Did the motion judge err by creating a new test for certification?
- (2) Did the motion judge err by rejecting the plaintiff's proposed common issue of misclassification?
- (3) Did the motion judge err by reframing a common issue concerning the minimum requirements to be a managerial employee at CN?

### ***(1) Did the Motion Judge Err by Creating a New Test for Certification?***

#### *(a) Plaintiff's Submissions*

72 The plaintiff contends that the motion judge erred by applying a new test for certifying common issues. The relevant passage from the motion judge's reasons states, at paras. 301-302:

That the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters. In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law, and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.

Applying the some basis in fact test to the case at bar, Mr. McCracken must show that there is some basis in fact for his cause of action and some basis in fact for each of the certification criteria other than the first one. CN, however, if it is able to do so, may show that there is no evidentiary basis for the claims or the certification criteria. If the evidentiary basis is established, then whether the certification criteria have been satisfied remains a matter of argument between Mr. McCracken and CN on a level playing field.

73 The plaintiff interprets the motion judge's comment that the "some basis in fact" test is a "necessary but not sufficient condition for certification" to mean that the motion judge not only required him to show some basis in fact for the proposed common issues, but that he also imposed "an additional burden of proving, on a balance of probabilities, and as a matter of law and policy, that a common issue ought to be certified." According to the plaintiff, the motion judge viewed this "additional burden" as "levelling the playing field" between plaintiffs and defendants on a certification motion.

74 The plaintiff complains that the motion judge's approach to establishing commonality is "unsupported by any class action jurisprudence and is at odds with the purpose of class proceedings." He contends that the motion judge failed to certify the proposed misclassification issue because he confused what should have been a factual analysis with a legal and policy analysis.

*(b) The Motion Judge Did Not Apply a New Test for Certification*

75 The "some basis in fact" principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.

76 Second, in keeping with the procedural scheme of the *CPA*, the use of the word "some" conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued. This legislative intention is reflected in s. 2(3)(a) of the *CPA*, which — although honoured more often in the breach — requires the proposed representative plaintiff to bring a motion for certification within 90 days of the filing of, or the expiry of the time for filing of, a statement of defence or notice of intent. Thereafter, leave of the court is required to bring the motion: see s. 2(3)(b).

77 With the exception of the motion judge's suggestion that the "some basis in fact" test applies to the cause of action requirement in s. 5(1)(a) of the *CPA*, his reasons do not bear out the plaintiff's suggestion that he imposed an additional and unprecedented burden of proof on the plaintiff at the certification stage. In my view, the motion judge was simply explaining that the legal principles governing the criteria for certification have to be considered in the context of the evidentiary record filed in support of the motion. It is clear from *Hollick* that, were it otherwise, the certification criteria would be argued in the air.

78 An example of what the motion judge meant by his comment that the "some basis in fact test is a necessary but not sufficient condition for certification" is provided by the preferable procedure analysis in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.). The court there stated, at para. 67: "[I]n 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."

79 This point applies equally to the common issues criterion in s. 5(1)(c) of the *CPA*. In assessing whether there is some basis in the evidence to establish the existence of common issues, the motion judge must consider the pertinent legal principles that apply to the commonality assessment with reference to the evidence adduced on the motion.

80 As indicated, the notable exception is that the "some basis in fact" test does not apply to the first criterion in s. 5(1)(a) that the pleadings disclose a cause of action. This criterion does not require the plaintiff to lead evidence showing a basis in fact for the allegations in the pleadings: see *Hollick*, at para. 25. The pleadings must contain sufficient factual allegations to establish the necessary elements of the cause of action asserted. However, unless the allegations of fact are patently ridiculous or incapable of proof, the facts must be accepted as pleaded for the purpose of determining if the plaintiff has stated a viable cause of action.

81 It is not clear to me what the motion judge had in mind with his remarks about the plaintiff and defendant being on a level playing field on the certification motion. However, I do not accept the plaintiff's submission that the motion judge imposed an impermissibly higher burden on him to show commonality. The motion judge found that the misclassification issue required individual assessments of the class members. For the reasons that follow, I agree with his conclusion on this point.

## **(2) Did the Motion Judge Err by Rejecting the Plaintiff's Proposed Common Issue of Misclassification?**

### *(a) Governing Principles on Common Issues*

82 This court's reasons in *Fulawka*, at para. 80, describe the definition of common issues in s. 1 and the requirement in s. 5(1)(c) of the *CPA* that the claims of the class members raise common issues. *Fulawka* also sets out, at para. 81, the legal principles concerning the common issues requirement that have emerged from the case law, citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276 (Ont. S.C.J.), at para. 140. And, as noted in *Fulawka*, at para. 82, it is up to the motion judge to decide which of the governing legal principles concerning the common issues requirement are contentious in any particular case.

83 As will become clear in the ensuing analysis, the contentious legal principles governing the commonality inquiry in the present case are the following:

The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), at para. 39.

With regard to the common issues, "success for one 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." That is, 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: *Dutton*, at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 46 B.C.L.R. (4th) 234 (B.C. C.A.), at para. 32; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, [2009] S.J. No. 179 (Sask. C.A.), at paras. 145-46 and 160.

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (Ont. S.C.J.), at para. 39, aff'd [Kumar v. Mutual Life Assurance Co. of Canada] (2001), 17 C.P.C. (5th) 103 (Ont. Div. Ct.), aff'd [2003] O.J. No. 1160 (Ont. C.A.) and *Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. No. 1161 (Ont. C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (Ont. S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Ont. Div. Ct.).

Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.), at para. 29.

### *(b) Plaintiff's Submissions on his Proposed Common Issue of Misclassification*

84 The plaintiff contends that misclassification cases are "inherently amenable to resolution by way of class proceeding." In support of this view, he relies on *obiter* comments by the motion judges in *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, 101 O.R. (3d) 93 (Ont. S.C.J.), and in *Fresco v. Canadian Imperial Bank of Commerce* (2009), 84 C.C.E.L. (3d) 161 (Ont. S.C.J.), about misclassification class actions.

85 He also points to a "substantial body" of decisions by the Canadian Industrial Relations Board and its predecessor, the Canadian Labour Relations Board (collectively, the "Board"), which he says show that group-wide determinations of managerial classification can be made: *Captains & Chiefs Assn. v. Algoma Central Marine*, 2010 CIRB 531, [2010] C.I.R.B.D. No. 40 (C.I.R.B.), aff'd 2011 FCA 94, [2011] F.C.J. No. 340 (F.C.A.); *I.B.E.W. Local 1574 v. NorthwesTel Mobility Inc.*, 2006 CIRB 346, [2006] C.I.R.B.D. No. 4 (C.I.R.B.); *Syndicat des agents de maîtrise de Québec-Téléphone v. Québec-Téléphone*, [1996] C.L.R.B.D. No. 36 (Can. L.R.B.), aff'd [*Québec-Téléphone v. Syndicat des agents de maîtrise de Québec-Téléphone*] (1997), 75 A.C.W.S. (3d) 1056 (Fed. C.A.) [1997 CarswellNat 2170 (Fed. C.A.)]; *I.A.M. v. Québecair* (1978), 33 di 480 (Can. L.R.B.) (CLRB no. 163); *U.S.W.A. v. Cominco Ltd.* (1980), 40 di 75 (Can. L.R.B.) (CLRB no. 240); and *C.W.C. v. Island Telephone Co.* (1990), 81 di 126 (Can. L.R.B.) (CLRB no. 811).

86 The plaintiff then argues that the motion judge was satisfied that the evidence shows "some basis in fact" to find that the misclassification issue can be determined on a class-wide basis. He especially relies on the motion judge's following statements, at paras. 70 and 293:

For his part, Mr. McCracken provided evidence about the role of first line supervisors, and his evidence shows that there is some basis in fact for his allegations that first line supervisors are not managers under the *Code*. There is evidence that at least some of them: (a) do not have authority to hire, terminate, promote, demote, or transfer employees; (b) do not represent management in collective bargaining or in grievance procedures; (c) have limited authority to discipline restricted to investigating and recommending minor discipline; and (d) are not involved in setting budgets, CN policies, or its Service Plan.

.....

... Mr. McCracken has provided some basis in fact for the proposition that all first line managers are non-managers. Therefore, he might assert that the commonality of the first line supervisors is established as a common issue to be decided at the common issues trial.

87 The plaintiff says that, having made these factual findings, the motion judge erred by refusing to certify his proposed misclassification issue given that this issue is indisputably a substantial and necessary ingredient of each class member's claim.

*(c) The Motion Judge Did Not Err by Concluding that the Plaintiff's Proposed Misclassification Issue Cannot be Determined on a Class-wide Basis*

88 There are three flaws in the plaintiff's argument:

- (i) the cases he relies on do not establish that misclassification cases are inherently amenable to resolution by way of a class action;
- (ii) the motion judge did not find a basis in fact showing that the plaintiff's proposed misclassification issue could be resolved commonly; and
- (iii) the plaintiff's evidence fails to establish the existence of a common issue of misclassification.

89 I discuss each flaw in turn.

**(i) Misclassification cases are not necessarily appropriate for certification**

90 The plaintiff relies on Strathy J.'s statement in *Fulawka*, at para. 145, that: "misclassification cases are appropriate for certification due to commonality of employment functions and common treatment by the employer." He also relies on the

following comments by Lax J. in *Fresco*, at para. 54, distinguishing misclassification cases from the claim for overtime wages in the proceeding before her:

A useful place to begin is to compare the kind of claim that is advanced in this proceeding with the kind of claims that are advanced in the misclassification cases. *In those cases, commonality arises from the employees' identical or similar job duties and the determination by the employer that it is not required to pay overtime to employees with these duties.* The question for the common issues judge is whether the employees' duties entitle them to overtime within the meaning of the applicable statutes and regulations. This can be assessed without examining individual claims. Success for one does mean success for all... [Emphasis added. Footnote and citation omitted.]

91 These comments do not assist the plaintiff. I agree with the motion judge's observation, at para. 385, that these comments cannot be taken as a categorical assertion that every misclassification case is inevitably certifiable as a class action. On the contrary, these comments make it clear that misclassification cases are amenable to certification where the similarity of job duties performed by class members provides the fundamental element of commonality.

92 Indeed, after the present appeal was argued, Strathy J. released a decision refusing to certify a proposed class action for unpaid overtime: see *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, [2012] O.J. No. 1853 (Ont. S.C.J.). That action was based on the allegation that the defendant bank had misclassified class members as managerial employees. Strathy J. concluded that the actual job duties performed by the members of the proposed class differed significantly, which would make it impossible to assess on a common basis whether the defendant bank had properly classified them.

93 The Board decisions that the plaintiff relies on likewise do not support his position. In these cases, the Board made determinations of managerial status under s. 3 of Part I of the *Code* for the purpose of deciding if employees should be included in the bargaining unit. Employees who perform "management functions" are excluded from the collective bargaining rights conferred by Part I of the *Code* because the definition of "employee" in s. 3 excludes persons who perform "management functions" from the protection of Part I.

94 A review of these decisions — and other Board decisions that CN cites — reveals that the Board has made group-wide determinations of managerial status in cases where the job tasks of the affected employees are defined by a common job description and where there was no dispute that the employees perform similar tasks, or where the parties consented to a group determination by the Board: see e.g. *Algoma Central*, at para. 13; *NorthwesTel*, at paras. 10-14; and *I.L.W.U., Local 514 v. Vancouver Wharves Ltd.* (1974), [1975] 1 Canadian L.R.B.R. 162 (Can. L.R.B.).

95 Contrary to the plaintiff's proposed reading of these decisions, in *Island Telephone*, the Board indicated that it carefully reviewed the individual circumstances of the employees in question. In addition, where the case involves classifying numerous positions and where there are varying levels of responsibility between positions and within the same position, the Board has received extensive oral and documentary evidence to determine whether a particular employee's position is managerial in nature: see, e.g., *Canada Post Corp. v. C.U.P.W.* (1989), 79 di 35 (Can. L.R.B.) (CLRB no. 767); *Canadian Union of Bank Employees v. Bank of Nova Scotia* (1977), 21 di 439 (Can. L.R.B.) (CLRB no. 91); and *Quebecair*. Moreover, even in cases where the employees' job descriptions were substantially similar, the Board considered the particular circumstances of individual employees in isolated locations and concluded that, unlike employees in more centralized work places who reported to higher-level managers, the employees in more isolated locations actually performed management functions: see *Québec-Téléphone*, at para. 40; *Telephone Supervisors Assn. v. British Columbia Telephone Co.* (1977), 33 di 361 (Can. L.R.B.) (CLRB No. 98), at p. 378.

**(ii) The motion judge did not find a basis in fact showing that the plaintiff's proposed misclassification issue could be resolved commonly**

96 The second shortcoming in the plaintiff's argument is his contention that the motion judge found there is a basis in fact establishing that the misclassification issue could be resolved on a class-wide basis. The plaintiff relies on the motion judge's comment that his evidence "shows that there is some basis in fact for his allegations that [FLSs] are not managers under the

*Code.*" However, the motion judge tempered this observation with his ensuing comment, at para. 70, that there is evidence that "*at least some of them*" do not exercise managerial functions (emphasis added).

97 And while the motion judge said, at para. 293, that "Mr. McCracken has provided some basis in fact for the proposition that all first line managers are non-managers", he concluded that same paragraph with the following remark:

However, as I will explain later in these Reasons for Decision, accepting Mr. McCracken's submission as correct is to accept as a given truth something that is patently or obviously untrue because there are some questions that are not common issues and rather are fundamentally or intrinsically or unavoidably individual questions.

Following up on this point, the motion judge later said, at para. 333, that: "[t]he common label of being a first line supervisor tells almost nothing about entitlement [to overtime pay] under the *Code*."

98 Thus, when his reasons are viewed in their entirety, I do not think that the motion judge can accurately be said to have found that there is a basis in fact showing that the plaintiff's proposed misclassification issue could be determined on behalf of the entire class.<sup>12</sup>

99 I will now explain why such a factual finding was not available when the applicable legal principles on commonality are applied to the evidentiary record.

### **(iii) The plaintiff's evidence fails to establish the existence of a common issue of misclassification**

#### *(a) What the plaintiff's evidence needed to establish*

100 The plaintiff filed evidence from multiple class members indicating that they do not have real decision-making authority and asserting that CN has misclassified them as managers or as employees who exercise managerial functions. However, to raise common issues, more is required than simply showing that some members of the class have similar claims. This point was made in *Lau v. Bayview Landmark Inc. (1999)*, 40 C.P.C. (4th) 301 (Ont. S.C.J.), at para. 24:

But neither is it enough to show that there is a group of similarly situated individuals with respect to claims against the defendants. Evidence of the mere existence of multiple plaintiffs with a similar cause of action against the defendants does not in and of itself establish that the claims should be litigated as a class action. The claims that those individuals could assert must also be capable of raising common issues.

101 To satisfy the commonality requirement in s. 5(1)(c) of the *CPA*, the evidence must afford some basis in fact to find that the claims of individual class members raise common issues as defined by the case law.

102 The plaintiff's proposed misclassification common issue asks:

Are the class members excluded from overtime eligibility under contract (express or implied) and/or under the [*Code*]?

103 The plaintiff is required to show that there is a basis in fact to find that this proposed common issue satisfies the apposite legal principles concerning commonality, which are repeated here for ease of reference (citations omitted):

The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis.

With regard to the common issues, "success for one 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." That is, 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.

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.

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

104 For these legal principles to be satisfied in the context of a proposed common issue of misclassification, the plaintiff's evidence must establish some basis in fact to find that the job functions and duties of class members are sufficiently similar that the misclassification element of the claim against CN could be resolved without considering the individual circumstances of class members. In the absence of such evidence, there is no basis in fact to find that resolving the proposed common issue would avoid duplication of fact-finding or legal analysis, or that success for one class member will mean success for all, or that individual findings of fact would not be required with respect to each individual claimant. Likewise, in the absence of this type of evidence, the requirement that the common issue should not be framed in overly broad terms is not met. That is because the motion judge could not be satisfied that the plaintiff's proposed abstract question will not "break down into individual proceedings."

(b) *The plaintiff's evidence*

105 The plaintiff's evidence, as summarized above at paras. 62-64, includes affidavits from class members who held several different FLS positions. This evidence indicates that these class members lacked real decision-making authority in managerial matters, including the powers of hiring and firing, imposing discipline, and setting budgets and policies.

106 These class members spoke more generally about the duties and responsibilities of other FLSs — including ones they had worked with or ones they had spoken to. However, even in this latter respect, the affiants' assertions are not evidence that a court could rely on as establishing a basis in fact for the existence of a common issue of misclassification because the assertions in question are vague and anecdotal.

107 For example, Mr. Anderson deposed: "During my time at CN, I have worked primarily in the South Western Ontario region, including in Windsor, Sarnia and London. At all of these locations, in my experience, the FLSs had no different level of authority than described above." Mr. Anderson does not indicate what FLS job positions he is referring to, the number of class members he has in mind, or why he is well-positioned to assess the level of authority exercised by these class members.

108 Equally vague and unhelpful is the following statement in Mr. Caissie's affidavit:

I understand, from speaking with various colleagues throughout my employment that the level of supervision I exercised as Trainmaster, Manager — Crew Utilizations and Manager — Corridor Operations is in line with that exercised by other FLSs employed by CN in both large and small centres across the country.

109 Mr. Caissie does not identify the "various colleagues" he spoke with, nor indicate the positions held by the "other FLSs" to which he refers. He also fails to explain why these colleagues were well-positioned to comment on the level of supervision exercised by FLSs in both large and small centres across the country.

110 Even considering rule 39.01(4) of the *Rules of Civil Procedure*, which permits an affidavit on a motion to contain statements of the deponent's information and belief, this evidence falls short of meeting the requirement for specifying the source of the information and belief: see *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (Ont. S.C.J.). In sum, these statements are simply bald, sweeping and conclusory assertions. They do not constitute evidence showing a basis in fact for the claim that the class members' job duties and responsibilities across all of CN's workplaces are sufficiently similar that a common issues trial judge could determine on a class-wide basis whether CN properly classified them as managerial employees.

111 The plaintiff, in responding to CN's evidence showing a lack of uniformity in the job duties and responsibilities of class members, also filed affidavits from two union leaders at CN: Rex Beatty and John Dinnery. Mr. Beatty has never held a FLS position, while Mr. Dinnery held a FLS position from 1979-1982 — long before the start of the class period.

112 Mr. Beatty described his experience working for unions representing CN employees. The relevant parts of his evidence are confined to observations about the authority of the trainmaster position, which is held by about 18 percent of current class members. For example, he stated: "At no location do trainmasters have the authority to hire, discipline, or terminate employees, to negotiate contracts with the union, or to participate in the grievance procedure beyond its most preliminary stage."

113 Mr. Dinnery's evidence primarily describes his involvement with FLSs in his role as president of the United Steel Workers Union, Local 2004 ("USW 2004"). The USW 2004 represents CN employees in the engineering division. Employees in the bargaining unit represented by USW 2004 are subject to Collective Agreement 10.1, which is one of approximately 40 collective agreements governing CN's unionized workforce. Mr. Dinnery said:

Because the Collective Agreement is the same from coast to coast, the authority of [FLSs] under the Agreement is similarly uniform. Based on my experience in the union leadership, I believe that the union's dealing with [FLSs] are exactly the same across Canada. Indeed, under the Collective Agreement, employees must be treated in the same manner by their supervisors.

114 This evidence reveals several inaccuracies and limitations. First, the premise for Mr. Dinnery's claim that the authority of FLSs is uniform appears to be that their authority is defined by the collective agreement. However, the collective agreement only dictates the terms and conditions of the work performed by employees who are supervised by the FLSs. In other words, the uniformity is not of the supervisors but of the supervised.

115 Second, his statement ignores that there are different collective agreements that apply to the employees supervised by FLSs. Differences in the collective agreement provisions concerning matters such as imposing discipline, lay-offs, and setting hours of work undermine the premise of uniformity in the FLSs' authority.

116 Third, Mr. Dinnery's evidence is limited to discussing the role of FLSs in CN's engineering division. He says nothing about the role of FLSs in the transportation or mechanical departments, or in the areas of sales and marketing or support services. His evidence is further limited to describing the role played by FLSs in imposing discipline and participating in the grievance process. In the former respect, he acknowledged that under the collective agreement with USW 2004, FLSs have authority to impose up to 15 demerit points for minor infractions without needing authorization from higher management to do so, subject to the employee's right to request a formal investigation by more senior management. Mr. Dinnery did not discuss the other indicia of management functions, such as the extent of FLSs' authority over matters such as budgeting, scheduling hours of work, deciding staffing levels, ordering lay-offs, or participating in policy-making.

*(c) The lack of evidence of job descriptions for FLS positions*

117 On the certification motion, there was no evidence in the form of job descriptions for the various FLS positions. Class counsel asked CN's representative, Mr. Lagacé, to undertake to "provide copies of the various job descriptions [for FLSs] in the various salary grades as they existed in 1999." CN refused on the basis that the undertaking was not within the proper scope of a cross-examination on an affidavit and on the basis that "it is not relevant to the issues before the court". The plaintiff did not bring a refusals motion to compel the requested undertaking.

118 CN asserts on appeal that it does not have any formal job descriptions for FLS positions. In oral argument, the plaintiff asked the court to draw an adverse inference on this point because of CN's refusal to provide any documentation in response to the questions put to the deponent.<sup>13</sup> However, there is no adverse inference that could be drawn that would advance the plaintiff's request to certify the action. Evidence of job descriptions is only relevant to the commonality criterion. In considering as a whole the evidence of the nature of the job functions performed by class members, the court cannot go so far as to infer

that each job is identical or substantially similar. CN has adduced evidence to the contrary suggesting that individuals with the same job title had different duties and responsibilities.

*(d) The plaintiff's suggested use of "sub-groups"*

119 The plaintiff — in apparent recognition of the lack of evidence showing sufficient commonality of the job functions and responsibilities of class members — suggested on appeal that the misclassification issue could be adjudicated based on "sub-groups". However, he did not offer any concrete guidance on how to sub-divide the class, such as by way of job title, or by the location where class members worked (e.g., urban centres versus more isolated areas). Instead, the plaintiff suggested using the sub-groups that the motion judge identified in approved common issue 3, namely: (1) class members who clearly meet the minimum managerial criteria; (2) those who clearly could not meet these criteria; and (3) those whose status remains to be determined.

120 Applying the plaintiff's suggested lines of division would not assign individual class members to a particular sub-group. The common issues trial judge would need to identify the indicia of managerial functions and would then need to apply these indicia to members of the class, without any assurance that this application could be done commonly, that is, without the need to examine the individual circumstances of most, if not all, of the 1,550 class members.

*(e) Plaintiff's position in reply*

121 In his reply factum, the plaintiff contends that a trial judge would substantially advance the case for all class members by making a class-wide determination of the various indicia of management that are relevant within the organizational and operational context of CN. He goes on to identify three possible scenarios that might arise after the trial judge identifies these criteria:

In particular, a trial judge could substantially advance the case for all class members by first making a class-wide determination of the various indicia of management specifically relevant within the organizational and operational context of CN. A trial judge could then make one of several determinations depending on the evidence led at trial. *One determination would be to move to an individual assessment process in which "the common issues judge could use the considerable resources of the CPA to achieve manageable individual proceedings" in order to determine, on a principled and consistent basis, which of the class members (or groups of class members) are not management.* A second determination could find that the class as a whole, or sub-groups within the class, do or do not have sufficient independent authority under the above criteria to qualify as management. A third determination could be that some of the common indicia may be determined, on a class-wide basis, leaving only limited individual inquiries. [Footnotes omitted. Emphasis added.]

122 The next section of my reasons explains why determining the various indicia of management will not substantially advance the case for all class members. I make three observations about the plaintiff's position in reply.

123 First, the plaintiff's Revised List did not refer anywhere to the need for the trial judge to identify the legal and factual criteria for deciding whether class members were properly classified as managerial employees. In submitting that "a trial judge could substantially advance the case for all class members by first making a class-wide determination of the various indicia of management", the plaintiff is arguing, in effect, that the action should be certified so that the common issues trial judge can determine what the common issues should be.

124 At a conceptual level, the plaintiff's approach is fundamentally wrong. The sentiment expressed in *Caputo*, at para. 56, applies here:

[T]he 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.

125 In other words, it is a misapplication of the *CPA* to certify an action where the common issues trial judge is expected to formulate the issues for trial. I would add that while the motion judge on certification may amend or revise common issues, it is the plaintiff who bears the responsibility at first instance for proposing the common issues and for adducing evidence demonstrating that those issues exist. The plaintiff must not abdicate this responsibility in the hope that the motion judge will formulate certifiable issues.

126 Second, the plaintiff's submissions reveal a practical defect. The plaintiff speaks of the common issues trial judge making determinations of the indicia of management that are "specifically relevant within the organizational and operational context of CN". However, the evidentiary record reveals that the "organizational and operational context of CN" differs for individual class members depending on factors such as which FLS job title they hold, where they work and whether they work alongside other FLSs or higher-level managers. The effect of this evidence is that there are no common issues but rather an amalgam of individual assessments. As stated by Cullity J. in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (Ont. S.C.J.), at para 45: "[i]f an issue is one that the court at trial could decide only by reference to the facts relating to the claim of each class member, it lacks commonality."

127 Finally, the plaintiff acknowledges in these submissions that, after the common issues trial judge identifies the indicia of managerial status, "one determination would be to move to an individual assessment process" for deciding which of the class members are not management. This acknowledgement amounts to a full and complete answer to the certification requirement in s. 5(1)(c) because it is an admission that the plaintiff's evidence does not provide a basis in fact to find that the misclassification issue can be resolved without the need for individual assessments of class members.

(f) Summary

128 The plaintiff's litigation strategy seizes on the superficial commonality that all class members work for CN and all share the common label of being a FLS. However, this common label conveys a false impression of commonality given the evidence on the motion of the different job responsibilities and functions of class members, who hold many different job titles and who work in a variety of workplaces with different reporting structures and different sizes of workforce. There is no basis in fact to support a finding that the essential misclassification determination could be made without resorting to the evidence of individual class members. Simply put, the plaintiff has not shown that any significant element of his claim is capable of common proof.

129 Finally, determining the minimum requirements to be a managerial employee at CN would not advance the claims of class members in any significant way.

**(3) Did the Motion Judge Err by Reframing a Common Issue Concerning the Minimum Requirements to be a Managerial Employee at CN?**

130 The motion judge rejected the plaintiff's proposed misclassification common issues on the basis that they lacked commonality. Having done so, he drew up a set of revised common issues for certification, at para. 351, which included the following common issue:

In accordance with the meaning under s. 167 (2) of the [Code], of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?

The motion judge held that this "minimum requirements" issue could be determined on a class-wide basis and that resolving it would substantially advance the litigation.

131 I do not agree with the motion judge's conclusion that the issue he proposed is a certifiable common issue. The motion judge rejected the plaintiff's various formulations of a misclassification common issue based on his finding that the element of commonality is lacking. In that, he was correct.

132 Where the motion judge fell into error was in attempting to recast common issues that were, in his view, amenable to certification. Despite his efforts to reformulate the common issues, the evidentiary shortcomings remained. A core of

commonality either exists on the record or it does not. In other words, commonality is not manufactured through the statement of common issues. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around.

133 In the absence of a common issues trial that would be able to resolve the threshold misclassification issue, determining the issue of the minimum indicia of management — or on the motion judge's formulation, the "minimum requirements" for being a managerial employee at CN — would not advance the proceeding in any significant way. The motion judge seemingly acknowledged this point, as reflected by his remarks, at para. 359, that "the heart of the matter remains whether the first line supervisors were or were not managers, which is unanswered."

134 In attempting to state common issues that would minimally advance the proceeding on a class-wide basis, the motion judge lost sight of the fact that the plaintiff's action for unpaid overtime is fundamentally a misclassification case. Answering the motion judge's revised common issues would not eliminate the need for substantial individual inquiries to determine whether — having regard to the specific job duties and responsibilities of class members and the organizational context in which each works — CN had properly or improperly classified FLSs as managerial employees.

135 In the absence of an evidentiary basis for certifying a common issue that would resolve the misclassification allegation, the proposed class action for unpaid overtime wages simply collapses.

## **G. Additional Issues**

136 On the Rule 21 motion, the motion judge concluded that the Superior Court of Justice has jurisdiction to enforce the provisions of Part III of the *Code* pertaining to overtime and holiday pay. He reached this conclusion based on his view that the *Code* provisions are terms of CN's employment contracts "by force of statute". CN contends that this conclusion is in error.

137 Given that I see no basis in fact for the proposed common issue of misclassification, it is not necessary to consider the parties' arguments concerning jurisdiction. Nor is it necessary to consider CN's submission that the motion judge should have struck the plaintiff's claims for breach of contract for failing to state a proper cause of action. However, in not addressing these issues, I do not wish to be understood as endorsing the motion judge's reasons on them.

138 The parties also object to the following rulings by the motion judge on the Rule 21 motion and on the certification motion:

1. Did the motion judge err in staying the plaintiff's claims for breach of express or implied terms of the class members' contracts of employment?
2. Did the motion judge err in dismissing the plaintiff's claim for holiday pay?
3. Did the motion judge err in striking the plaintiff's pleading in negligence for policy reasons without the benefit of a proper record?
4. Did the motion judge err in refusing to certify the proposed common issue concerning contractual terms?
5. Did the motion judge err in refusing to certify any of the proposed common issues concerning the duty in contract, the duty of good faith, and a duty in tort?
6. Did the motion judge err in finding that an aggregate assessment of damages would not be available?
7. Did the motion judge err in finding on the certification motion that a class proceeding would be the preferable procedure?

139 Again, given my reasons on the absence of a proper common issue concerning the fundamental question of misclassification, it is not necessary to assess these questions individually. However, as the first five of these questions point

to a common theme about the scope of a motion judge's authority on a Rule 21 motion and on an accompanying motion for certification, I make the following comments.

140 The motion judge made the following rulings and observations that, in my view, misconstrue the extent of his authority under the *Rules* and under the relevant provisions of the *CPA*:

- A consequence of the certification and Rule 21 motions is that several common issues will have already been determined (at para. 14).
- The function of a Rule 21 motion is not to adjudicate the genuine merits of a claim or defence, but there is a way on any motion to obtain judgment on the merits by way of a motion for judgment. It is appropriate to use the motion for judgment jurisdiction under rule 37.13(2) in this case to dismiss the plaintiff's claim for holiday pay on the merits (at paras. 211-12).
- It is also appropriate to use the motion for judgment jurisdiction and the jurisdiction provided by ss. 12 and 13 of the *CPA* to decide common issues on their merits before the common issues trial (at paras. 228-31).
- It would be propitious to the advancement of the class action and fair to both the class members and CN to exercise the court's jurisdiction to decide that the terms of the *Code* are terms of the employment contracts by force of law (at para. 232).
- The plaintiff's claims for breach of express or implied contract terms should be stayed (at paras. 228-34).
- Four of the six questions on the list of approved common issues can and should be answered before the common issues trial and these answers, which are readily available, would substantially advance the class member's litigation against CN (at para. 353).
- The answer to common issue two is now known as a by-product of CN's motion under rule 20.01(3)(a). The answer to the question is that compliance with the overtime provisions of the *Code* is by force of statute an implied term of the contracts of employment between CN and the FLSs (at para. 357).
- Answering common issue two substantially advances the litigation and makes it unnecessary or moot to answer several factually or legally more difficult questions (at para. 357).
- Common issues four and five are subjunctive tense questions that are readily answered in the subjunctive. On the assumption that CN did not pay overtime pay when it was required to do so and on the assumption that CN's as yet unpledged defence failed at the common issues trial, then the requirements for an unjust enrichment claim would be satisfied at the common issues trial and CN would have to disgorge its ill-gotten gains, once those gains had been calculated (at para. 358).

141 While a Rule 21 motion permits a motion judge to find that a pleaded cause of action is wholly without merit, a motion judge should not convert such a motion into a motion for judgment using rule 37.13(2)(a) unless the parties agree that all relevant evidence is before the court and they have had a full opportunity to argue their positions on the motion for judgment: see *Royal Bank v. Rastogi*, 2011 ONCA 47 (Ont. C.A.), at para. 22, citing *CMLQ Investors Co. v. CIBC Trust Corp.* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.), at para. 8. Those circumstances did not exist here.

142 Nor do I agree that the provisions in ss. 12 and 13 of the *CPA* confer jurisdiction on a certification judge to decide the common issues before the common issues trial. Section 12 is a purely procedural provision that allows a motion judge to make orders concerning the conduct of a class action, while s. 13 empowers a motion judge to stay a related proceeding.

143 Moreover, deciding common issues on the certification motion is antithetical to the well-established principle enshrined in *Hollick*, at para. 16, that the decision to certify a class action is not a decision on the merits of the action. A key reason for this is that the evidentiary record at the certification stage is far from complete.

144 I also note that the motion judge fundamentally altered the plaintiff's proposed common issues. While this is a power that may be exercised by the motion judge, it should be exercised with caution and restraint and should be the exception rather than the norm.

145 Given his decision to refashion the common issues, the motion judge granted certification subject to the condition that a litigation plan be settled. In my view, motion judges should not, as a matter of common practice, bifurcate the requirement in s. 5(1)(e)(ii) of the *CPA* to produce "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class". Nor should the litigation plan requirement be treated as a mere afterthought.

146 Preparing a litigation plan requires the plaintiff to translate his or her analytical proposal for a class proceeding into practice by having to explain, in concrete terms, the process whereby the common issues, and any remaining individual issues, will be decided. The need for a clear explanation of how a proposed common issue would be resolved for all class members on a common basis serves as an important check in considering if the plaintiff has met the common issues and preferable procedure criteria.

## **H. Conclusion and Disposition**

147 The absence of commonality is fatal to the certification of this action. I would allow CN's appeal and cross-appeal from the certification order and would set aside that order. The plaintiff's appeal from the motion judge's certification order is dismissed. Given my proposed disposition of the appeals from the certification order, I would dismiss the parties' appeals from the motion judge's order under Rule 21.

148 In light of this result, the motion judge's costs order should be set aside. CN shall have its costs of the certification motion, to be fixed by the motion judge.

149 The parties may make written submissions on the costs of the appeal, with the respondent/defendant's submissions to be delivered within 10 days of the release of these reasons and the appellant/plaintiff's submissions to be delivered within 10 days thereafter.

***John Laskin J.A.:***

I agree

***E.A. Cronk J.A.:***

I agree

*Defendants' appeals allowed in part.*

## **Appendix A — Plaintiff's Revised List of Common Issues**

### **Common Issue One — Misclassification**

1. Are the Class Members excluded from overtime eligibility under contract (express or implied) and/or under the *Canada Labour Code*, c. L-2, as amended?

### **Common Issue Two — Overall Breach and Misclassification**

2. Did the Defendant breach its contracts of employment with the Class or was it unjustly enriched, by denying eligibility for overtime compensation to some or all Class Members whom CN classified as [FLSs]?

### **Common Issue Three — Breach of Contract**

3.

a) What are the relevant terms of (express or implied or otherwise) of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

b) Did the Defendant breach any of the foregoing terms? If so how?

**Common Issue Four — Duties of the Defendant**

4.

a) Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?

b) If so, did the Defendant breach this duty?

c) Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?

d) If so, did the Defendant breach this duty?

e) Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members, including (but not limited to) a duty to take reasonable steps to ensure that Class Members were properly classified?

f) If so, did the Defendant breach this duty?

g) Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?

h) If so, what is the standard of care?

i) Did the Defendant fall below the standard of care? If so how?

**Common Issue Five — Unjust Enrichment**

5.

a) Was the Defendant enriched by (i) failing to compensate the Class Members with pay or overtime pay for hours worked in excess of their standard hours of work, or (ii) failing to compensate the Class Members with holiday pay?

b) If the answer to question 5(a)(i) or (ii) is "yes," did the Class suffer a corresponding deprivation?

c) If the answer to question 5(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?

d) If the answer to question 5(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

**Common Issue Six — Damages or other Relief**

6.

a) If an answer to any of the foregoing common issues is in favour of the Class, what remedies are Class Members entitled?

b) If an answer to any of the foregoing common issues is in favour of the Class, is the Defendant potentially liable on a class-wide basis? If "yes":

1. Can damages be assessed on an aggregate basis? If "yes":

- a. Can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?
- b. What is the quantum of aggregate damages owed to Class Members?
- c. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

#### **Common Issue Seven — Punitive Damages**

7.

- a) Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct?
- b) If the answer to 7(a) is "yes," can that damage award be determined on an aggregate basis?
- c) If the answer to 7(b) is "yes," what is the appropriate method or procedure for distributing the aggregate aggravated, exemplary or punitive damage award to the Class?

#### **Appendix B — Motion Judge's Proposed "Amended Revised List of Common Issues"**

#### **Common Issue One — Payment of Overtime Pay**

1. Did the Class Members receive overtime pay and or holiday pay under the *Canada Labour Code*, c. L-2, as amended?

#### **Common Issue Two — Breach of Contract**

2.

- a. What are the terms (express or implied or otherwise) of the Class Member's contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

#### **Common Issue Three — Duties of the Defendant**

3.

- a. Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?
- b. If so, did the Defendant breach this duty?
- c. Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?
- d. If so, did the Defendant breach this duty?
- e. Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members to ensure that Class Members were properly classified?
- f. If so, did the Defendant breach this duty?
- g. Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?
- h. If so, what is the standard of care?
- i. Did the Defendant fall below the standard of care? If so how?

#### **Common Issue Four — Unjust Enrichment**

4.

- a. Would the Defendant be enriched by (i) failing to compensate a Class Members with pay or overtime pay for hours worked in excess of his or her standard hours of work, or (ii) failing to compensate the Class Member with holiday pay?
- b. If the answer to question 4(a)(i) or (ii) is "yes," would the Class Member suffer a corresponding deprivation?
- c. If the answer to question 4(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?
- d. If the answer to question 4(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

#### **Common Issue Five — Damages or other Relief**

5. If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

#### **Common Issue Six — Punitive Damages**

6. Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

### **Appendix C — Common Issues Approved by the Motion Judge**

#### **Common Issue One — Payment of Overtime Pay**

Did the Class Members receiv overtime pay under the *Canada Labour Code*, c. L-2, as amended?

#### **Common Issue Two — Contract Terms**

What are the terms by force of statute of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; and (iii) the recording of hours worked?

#### **Common Issue Three — Minimum Requirements of Manager Status at CN**

In accordance with the meaning under s. 167 (2) of the *Canada Labour Code*, of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?

#### **Common Issue Four — Unjust Enrichment**

Would the Defendant be unjustly enriched by failing to compensate a Class Member with pay or overtime pay for hours worked in excess of his or her standard hours of work?

#### **Common Issue Five — Damages or other relief**

If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

#### **Common Issue Six — Punitive Damages**

Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

#### **Footnotes**

<sup>1</sup> In *Fulawka*, the plaintiff's pleadings included a misclassification claim concerning Level 6 employees at Bank of Nova Scotia ("Scotiabank"). In 2008, Scotiabank re-classified these employees as non-management and extended overtime entitlement to them.

Scotiabank also implemented a retroactive claims process whereby Level 6 employees could claim unpaid overtime going back to 2005.

- 2 The appellate routes are a maze of complexity owing to s. 30 of the *CPA* and s. 6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The parties both filed motions for leave to appeal in the Divisional Court from the motion judge's order certifying the action as a class proceeding. In addition, both parties appealed to this court from the motion judge's order under rules 21.01(1) and (3) of the *Rules of Civil Procedure* dismissing part of the plaintiff's claim. The defendant sought leave to appeal the interlocutory parts of the Rule 21 order to the Divisional Court and cross-appealed as of right from the final elements of that order to this court. The defendant also sought leave to appeal to the Divisional Court from the motion judge's costs order on the motions. On consent of the parties, leave to appeal to the Divisional Court from the interlocutory parts of the motion judge's Rule 21 order, and his certification and costs orders, was granted by orders of Jennings J., dated December 14, 2010. Pursuant to a consent order of Doherty J.A., dated February 9, 2011, the appeals as of right from the order under Rule 21 were combined with the appeals pending in Divisional Court for hearing by this court.
- 3 Amended Fresh as Amended Statement of Claim, dated March 3, 2010.
- 4 Most FLS positions exist in the Operations Division in one of three departments: Transportation, Mechanical and Engineering.
- 5 These statutory and regulatory provisions are discussed in this court's reasons in *Fulawka*, at para. 35.
- 6 The criteria in s. 5(1) of the *CPA* may be summarized as follows:
  - (a) the pleadings disclose a cause of action;
  - (b) there is an identifiable class;
  - (c) the claims raise common issues;
  - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
  - (e) there are appropriate representative plaintiffs who could produce a workable litigation plan.
- 7 The motion judge reviewed, at paras. 58-67, various cases describing the analytical approach under the *Code* to classifying employees as a manager or an employee who exercises management functions.
- 8 Mr. Lagacé assumed the role of Director of Compensation at CN in January 2001.
- 9 The class member, Enzo Fabrizi, says he held the position of Commuter Central Officer from 1997-2006 and his affidavit focuses on this time period. This particular job title does not appear on the list of 70 FLS job categories as of April 1, 2008, which CN filed in evidence.
- 10 Mr. Anderson deposed that he held the FLS positions of MCO in Toronto and manager of dispatchers and crew clerks in Michigan, U.S.A. He also held the position of trainmaster, first in Michigan, and later in Windsor and Sarnia. To the extent that Mr. Anderson's comments relate to his experience while working as a FLS in Michigan, it is not admissible evidence in the proposed class action. The class consists only of FLS employees at CN's Canadian operations.
- 11 Mr. Caissie deposed that he held the following FLS positions: manager for customs in Winnipeg; crew coordinator in Moncton; trainmaster in Brampton; and manager — crew utilization in Toronto. He is currently a MCO in Toronto.
- 12 I recognize that the motion judge commented, at para. 345, that "Mr. McCracken has met the low standard of showing that there is some basis in fact for his proposed common issues." However, this comment must be read in light of his finding, at para. 331, that the plaintiff's proposed misclassification question — together with various other of his proposed questions on the Revised List — "cannot be determined on a class-wide basis and rather require individual questions to be answered."
- 13 The record suggests that CN at least had a job description for the FLS position of trainmaster. The record includes a 2007 report by an inspector with Human Resources and Social Development Canada under Part III of the *Code*, regarding his investigation of a trainmaster's complaint that he was improperly excluded from the overtime provisions of the *Code* because CN misclassified him as a

manager. The inspector commented: "It is my determination, after reviewing the comments made by both parties, *the job descriptions of the Trainmaster submitted by both Mr. [H] and CN Rail* and the above-noted cases, ... that Mr. [H] did perform sufficient managerial functions to warrant his exclusion from the Hours of Work provision of the *Code*" (emphasis added).

**TAB 26**

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Bodnar v. Community Savings Credit Union](#) | 2019 BCSC 1885, 2019 CarswellBC 3205 | (B.C. S.C., Nov 4, 2019)

2019 SCC 42, 2019 CSC 42

Supreme Court of Canada

Pioneer Corp. v. Godfrey

2019 CarswellBC 2746, 2019 CarswellBC 2747, 2019 SCC 42, 2019 CSC 42, [2019]

11 W.W.R. 191, 26 B.C.L.R. (6th) 1, 309 A.C.W.S. (3d) 32, 437 D.L.R. (4th) 383

**Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc. (Appellants) and Neil Godfrey (Respondent)**

Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., Samsung Electronics America, Inc., Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., BENQ Corporation, BENQ America Corporation and BENQ Canada Corp. (Appellants) and Neil Godfrey (Respondent) and Option consommateurs, Consumers Council of Canada, Canadian Chamber of Commerce and Consumers' Association of Canada (Intervenors)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: December 11, 2018

Judgment: September 20, 2019

Docket: 37809, 37810

Proceedings: affirming [Godfrey v. Sony Corporation \(2017\)](#), 2017 CarswellBC 2245, 2017 BCCA 302, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448, Groberman J.A., Newbury J.A., Savage J.A. (B.C. C.A.); affirming [Godfrey v. Sony Corp. \(2016\)](#), 2016 BCSC 844, [2016] B.C.J. No. 979, 2016 CarswellBC 1313, D.M. Masuhara J. (B.C. S.C.)

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Reidar M. Mogerman, Linda J. Visser, David G.A. Jones, Charles M. Wright, Katie I. Duke, Bridget M. R. Mora, for Respondent Maxime Nasr, Violette Leblanc, for Intervener, Option consommateurs

Jonathan J. Foreman, Jean-Marc Metrailler, for Intervener, Consumers Council of Canada

Sandra A. Forbes, Adam Fanaki, for Intervener, Canadian Chamber of Commerce  
Jean-Marc Leclerc, Mohsen Seddigh, for Intervener, Consumers' Association of Canada

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

**Related Abridgment Classifications**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.A Pleadings disclose cause of action**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.C Common issue or interest**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.H Miscellaneous**

Commercial law

**VI Trade and commerce**

**VI.5 Competition and combines legislation**

**VI.5.f Right to civil action**

**VI.5.f.i General principles**

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous

Limitation period — Plaintiff applied for certification of class proceeding under Class Proceedings Act — He alleged that defendants, who manufactured optical disc drives (ODDs) and ODD products, conspired to fix prices of ODDs and ODD products — Certification judge certified action as class proceeding, subject to certain exceptions and conditions — Defendants' appeals were dismissed — Defendants appealed — Appeals dismissed — While certain subset of named defendants argued that plaintiff's claim against them was statute-barred as it was commenced after two-year limitation period in s. 36(4)(a)(i) of Competition Act expired, discoverability rule applied to extend limitation period in s. 36(4)(a)(i) and it was not plain and obvious that plaintiff's claim against defendants in issue would fail on this basis — It was not "plain and obvious" that fraudulent concealment could not delay running of limitation period in this case.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff applied for certification of class proceeding under Class Proceedings Act — He alleged that defendants, who manufactured optical disc drives (ODDs) and ODD products, conspired to fix prices of ODDs and ODD products — Proposed class consisted of direct purchasers and indirect purchasers, as well as umbrella purchasers, whose ODD or ODD product was manufactured and supplied by non-defendant — Certification judge certified action as class proceeding, subject to certain exceptions and conditions — Defendants' appeals were dismissed — Defendants appealed — Appeals dismissed — In order for loss-related questions to be certified as common issues, plaintiff's expert's methodology need only be sufficiently credible or plausible to establish that loss reached requisite purchaser level — Certification judge identified correct standard to certify commonality of loss as common issue — There was no palpable and overriding error in certification judge's conclusion that

plaintiff showed some basis in fact for finding loss issues to be common — Certification judge's decision to certify questions related to aggregate damages for non-umbrella purchasers should not be disturbed.

Commercial law --- Trade and commerce — Competition and combines legislation — Right to civil action — General principles Plaintiff applied for certification of class proceeding under Class Proceedings Act — He alleged that defendants, who manufactured optical disc drives (ODDs) and ODD products, conspired to fix prices of ODDs and ODD products — Proposed class consisted of direct purchasers and indirect purchasers, as well as umbrella purchasers, whose ODD or ODD product was manufactured and supplied by non-defendant — Certification judge certified action as class proceeding, subject to certain exceptions and conditions — Defendants' appeals were dismissed — Defendants appealed — Appeals dismissed — It was not plain and obvious that umbrella purchasers' cause of action under s. 36(1)(a) of Competition Act (CA) could not succeed — It was not plain and obvious that plaintiff's common law and equitable claims could not succeed, except as was otherwise held by certification judge — Prior to enactment of cause of action contained in what was now s. 36(1) of CA, breach of s. 45(1) of CA was, as it still was, able to satisfy "unlawful means" element of tort of civil conspiracy — Courts below correctly decided it was not plain and obvious that plaintiff was precluded from bringing common law and equitable causes of action alongside his claim under s. 36(1)(a) of CA.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiff applied for certification of class proceeding under Class Proceedings Act — He alleged that defendants, who manufactured optical disc drives (ODDs) and ODD products, conspired to fix prices of ODDs and ODD products — Proposed class consisted of direct purchasers and indirect purchasers, as well as umbrella purchasers, whose ODD or ODD product was manufactured and supplied by non-defendant — Certification judge certified action as class proceeding, subject to certain exceptions and conditions — Defendants' appeals were dismissed — Defendants appealed — Appeals dismissed — While certain subset of named defendants argued that plaintiff's claim against them was statute-barred as it was commenced after two-year limitation period in s. 36(4)(a)(i) of Competition Act (CA) expired, discoverability rule applied to extend limitation period in s. 36(4)(a)(i) and it was not plain and obvious that plaintiff's claim against defendants in issue would fail on this basis — It was not plain and obvious that umbrella purchasers' cause of action under s. 36(1)(a) of CA could not succeed — It was not plain and obvious that plaintiff's common law and equitable claims could not succeed, except as was otherwise held by certification judge. Procédure civile --- Procédures entamées dans le cadre d'un recours collectif ou par le représentant — Procédures entamées dans le cadre d'un recours collectif ou par le représentant en vertu d'une législation sur les recours collectifs — Autorisation — Recours collectif du demandeur — Divers

Délai de prescription — Demandeur a demandé l'autorisation d'un recours collectif en vertu de la Class Proceedings Act — Il a fait valoir que les défenderesses, qui fabriquaient des lecteurs de disques optiques (LDO) et des produits munis de LDO, ont comploté pour fixer les prix des LDO et des produits munis de LDO — Juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions — Appels interjetés par les défenderesses ont été rejetés — Défenderesses ont formé un pourvoi — Pourvois rejetés — Alors qu'un certain sous-groupe faisant partie des défenderesses désignées alléguait que la réclamation du demandeur à son encontre était prescrite puisqu'elle avait été déposée une fois le délai de prescription de deux ans prévu à l'art. 36(4)a)(i) de la Loi sur la concurrence écoulé, la règle de la possibilité de découvrir s'appliquait de façon à prolonger le délai de prescription prévu à l'art. 36(4)a)(i) et il n'était pas « évident et manifeste » que la réclamation du demandeur contre les défenderesses devait être rejetée pour ce motif — Il n'était pas « évident et manifeste » que la doctrine de la dissimulation frauduleuse ne pouvait pas retarder le point de départ du délai de prescription dans le présent dossier.

Procédure civile --- Procédures entamées dans le cadre d'un recours collectif ou par le représentant — Procédures entamées dans le cadre d'un recours collectif ou par le représentant en vertu d'une législation sur les recours collectifs — Autorisation — Recours collectif du demandeur — Cause commune ou intérêt commun

Demandeur a demandé l'autorisation d'un recours collectif en vertu de la Class Proceedings Act — Il a fait valoir que les défenderesses, qui fabriquaient des lecteurs de disques optiques (LDO) et des produits munis de LDO, ont comploté pour fixer les prix des LDO et des produits munis de LDO — Groupe projeté était composé des acheteurs directs, des acheteurs indirects et des acheteurs sous parapluie, soit les acheteurs dont les LDO ou produits munis de LDO ont été fabriqués et fournis par une personne qui n'était pas une défenderesse — Juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions — Appels interjetés par les défenderesses ont été rejetés — Défenderesses

ont formé un pourvoi — Pourvois rejetés — Pour que les questions relatives à la perte soient autorisées en tant que questions communes, la méthode de l'expert du demandeur n'a qu'à être suffisamment fiable ou acceptable pour établir que l'acheteur du niveau requis a subi une perte — Juge saisi de la demande d'autorisation a arrêté la norme applicable à l'autorisation, en tant que question commune, de la question de la communauté de la perte — Il n'y avait aucune erreur manifeste et déterminante dans la conclusion du juge saisi de la demande d'autorisation que le demandeur a établi un certain fondement factuel permettant de qualifier de communes les questions liées à la perte — Il n'y avait pas lieu de modifier la décision du juge saisi de la demande d'autorisation d'autoriser les questions liées à l'octroi de dommages-intérêts globaux aux acheteurs qui n'étaient pas sous parapluie.

Droit commercial --- Échange et commerce — Législation en matière de concurrence et de coalitions — Droit de poursuivre au civil — Principes généraux

Demandeur a demandé l'autorisation d'un recours collectif en vertu de la Class Proceedings Act — Il a fait valoir que les défenderesses, qui fabriquaient des lecteurs de disques optiques (LDO) et des produits munis de LDO, ont comploté pour fixer les prix des LDO et des produits munis de LDO — Groupe projeté était composé des acheteurs directs, des acheteurs indirects et des acheteurs sous parapluie, soit les acheteurs dont les LDO ou produits munis de LDO ont été fabriqués et fournis par une personne qui n'était pas une défenderesse — Juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions — Appels interjetés par les défenderesses ont été rejetés — Défenderesses ont formé un pourvoi — Pourvois rejetés — Il n'était pas évident et manifeste que la cause d'action que reconnaît l'art. 36(1) de la Loi sur la concurrence (LC) aux acheteurs sous parapluie ne pouvait pas réussir — Il n'était pas évident et manifeste que les recours de common law ou d'equity exercés par le demandeur ne pouvaient être accueillis, sauf indication contraire dans les conclusions du juge saisi de la demande d'autorisation — Avant l'adoption de la disposition conférant une cause d'action qui se trouve dans ce qui est devenu l'art. 36(1) de la LC, une infraction à l'art. 45(1) de la LC pouvait, et peut encore, satisfaire à l'élément « moyens illégaux » du délit de complot civil — Tribunaux d'instance inférieure ont à juste titre décidé qu'il n'était pas évident et manifeste que le demandeur ne pouvait exercer des recours de common law et d'equity en même temps qu'une action fondée sur l'art. 36(1)a) de la LC.

Procédure civile --- Procédures entamées dans le cadre d'un recours collectif ou par le représentant — Procédures entamées dans le cadre d'un recours collectif ou par le représentant en vertu d'une législation sur les recours collectifs — Autorisation — Recours collectif du demandeur — Procédures écrites révèlent une cause d'action

Demandeur a demandé l'autorisation d'un recours collectif en vertu de la Class Proceedings Act — Il a fait valoir que les défenderesses, qui fabriquaient des lecteurs de disques optiques (LDO) et des produits munis de LDO, ont comploté pour fixer les prix des LDO et des produits munis de LDO — Groupe projeté était composé des acheteurs directs, des acheteurs indirects et des acheteurs sous parapluie, soit les acheteurs dont les LDO ou produits munis de LDO ont été fabriqués et fournis par une personne qui n'était pas une défenderesse — Juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions — Appels interjetés par les défenderesses ont été rejetés — Défenderesses ont formé un pourvoi — Pourvois rejetés — Alors qu'un certain sous-groupe faisant partie des défenderesses désignées alléguait que la réclamation du demandeur à son encontre était prescrite puisqu'elle avait été déposée une fois le délai de prescription de deux ans prévu à l'art. 36(4)a)(i) de la Loi sur la concurrence (LC) écoulé, la règle de la possibilité de découvrir s'appliquait de façon à prolonger le délai de prescription prévu à l'art. 36(4)a)(i) et il n'était pas évident et manifeste que la réclamation du demandeur contre les défenderesses devait être rejetée pour ce motif — Il n'était pas évident et manifeste que la cause d'action que reconnaît l'art. 36(1)a) de la LC aux acheteurs sous parapluie ne pouvait pas réussir — Il n'était pas évident et manifeste que les recours de common law ou d'equity exercés par le demandeur ne pouvaient être accueillis, sauf indication contraire dans les conclusions du juge saisi de la demande d'autorisation.

The plaintiff applied for certification of a class proceeding under the Class Proceedings Act (CPA). He alleged that the defendants, who manufactured optical disc drives (ODDs) and ODD products, conspired to fix prices of ODDs and ODD products. The proposed class consisted of direct purchasers and indirect purchasers, as well as umbrella purchasers, whose ODD or ODD product was manufactured and supplied by a non-defendant. The certification judge certified the action as a class proceeding, subject to certain exceptions and conditions. The defendants' appeals were dismissed. The defendants appealed.

**Held:** The appeals were dismissed.

Per Brown J. (Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Rowe, Martin JJ. concurring): While a certain subset of the named defendants argued that the plaintiff's claim against them was statute-barred as it was commenced after the two-year

limitation period in s. 36(4)(a)(i) of the Competition Act (CA) expired, the discoverability rule applied to extend the limitation period in s. 36(4)(a)(i) and it was not plain and obvious that the plaintiff's claim against the defendants in issue would fail on this basis. It was also not "plain and obvious" that fraudulent concealment could not delay the running of the limitation period in this case. The concern which drives the application of the doctrine of equitable fraud is not limited to the unconscionability of taking advantage of a special relationship with the plaintiff. Nor is the doctrine's application limited to cases where there is something tantamount to or commensurate with a special relationship between the plaintiff and the defendant. The inquiry is not into the relationship within which the conduct occurred, but into the unconscionability of the conduct itself.

It was not plain and obvious that the umbrella purchasers' cause of action under s. 36(1)(a) of the CA could not succeed. The text of s. 36(1)(a) of the CA supported the view that umbrella purchasers had a cause of action thereunder for conduct contrary to s. 45(1) of the CA. The purpose of the CA is to maintain and encourage competition in Canada with a view to providing consumers with competitive prices and product choices. A conspiracy to price-fix was the very antithesis of the CA's objective. Monetary sanctions for such anti-competitive conduct furthered the CA's purpose. Interpreting s. 36(1)(a) of the CA so as to permit umbrella purchaser actions also furthered two other objectives of the CA, being deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour. Recognizing the umbrella purchasers' cause of action under s. 36(1)(a) did not risk exposing the defendants to indeterminate liability.

It was not plain and obvious that the plaintiff's common law and equitable claims could not succeed, except as was otherwise held by the certification judge. Prior to the enactment of the cause of action contained in what was now s. 36(1) of the CA, a breach of s. 45(1) of the CA was, as it still was, able to satisfy the "unlawful means" element of the tort of civil conspiracy. The courts below correctly decided that it was not plain and obvious that the plaintiff was precluded from bringing common law and equitable causes of action alongside his claim under s. 36(1)(a) of the CA.

It was not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor was it necessary that the methodology of the expert in issue be able to identify those class members who suffered no loss so as to distinguish them from those who did. In order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish that loss reached the requisite purchaser level. The certification judge identified the correct standard to certify commonality of loss as a common issue. There was no palpable and overriding error in the certification judge's conclusion that the plaintiff showed some basis in fact for finding the loss issues to be common.

The certification judge's decision to certify certain questions related to aggregate damages for the non-umbrella purchasers should not be disturbed. Aggregate damages under s. 29(1)(b) of the CPA are purely remedial, available only after all other common issues have been determined, including liability. Neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, was relevant to the decision to certify aggregate damages as a common issue. The aggregate damages questions the certification judge certified related solely to whether damages could be determined on an aggregate basis and if so, in what amount.

Per Côté J. (dissenting in part): The appeals should be allowed in part.

With respect to the limitations issues raised in the appeal of certain defendants, the discoverability rule does not apply to the limitation period in s. 36(4)(a)(i) of the CA because the event that triggers the commencement of the limitation period occurs without regard to the state of a plaintiff's knowledge. As for the doctrine of fraudulent concealment, it was not plain and obvious that it would toll the operation of the limitation period in this case only if the plaintiff was capable of demonstrating a special relationship existed. It might be that something tantamount to or commensurate with the existence of a special relationship would be sufficient to toll the limitation period. Simply establishing the existence of the conspiracy would not suffice.

The CA does not prevent a plaintiff from advancing a claim at common law or in equity together with, or instead of, a claim pursuant to the statutory cause of action in s. 36(1) of the CA in respect of the same anti-competitive prohibitions. However, the umbrella purchasers could not succeed in their claims against the defendants under s. 36(1) of the CA. Also, it could not be accepted that a methodology capable of proving only that loss reached the indirect purchaser level in the distribution chain was sufficient for the purpose of certifying the loss-related questions proposed by the plaintiff as "common issues", pursuant to s. 4(1)(c) of the CPA.

Le demandeur a demandé l'autorisation d'un recours collectif en vertu de la Class Proceedings Act (CPA). Il a fait valoir que les défenderesses, qui fabriquaient des lecteurs de disques optiques (LDO) et des produits munis de LDO, ont comploté pour fixer les prix des LDO et des produits munis de LDO. Le groupe projeté était composé des acheteurs directs, des acheteurs indirects

et des acheteurs sous parapluie, soit les acheteurs dont les LDO ou produits munis de LDO ont été fabriqués et fournis par une personne qui n'était pas une défenderesse. Le juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions. Les appels interjetés par les défenderesses ont été rejetés. Les défenderesses ont formé un pourvoi.

**Arrêt:** Les pourvois ont été rejetés.

Brown, J. (Wagner, J.C.C., Abella, Moldaver, Karakatsanis, Gascon, Rowe, Martin, JJ., souscrivant à son opinion) : Alors qu'un certain sous-groupe faisant partie des défenderesses désignées alléguait que la réclamation du demandeur à son encontre était prescrite puisqu'elle avait été déposée une fois le délai de prescription de deux ans prévu à l'art. 36(4)a)(i) de la Loi sur la concurrence (LC) écoulé, la règle de la possibilité de découvrir s'appliquait de façon à prolonger le délai de prescription prévu à l'art. 36(4)a)(i) et il n'était pas « évident et manifeste » que la réclamation du demandeur contre les défenderesses devait être rejetée pour ce motif. Il n'était pas plus « évident et manifeste » que la doctrine de la dissimulation frauduleuse ne pouvait pas retarder le point de départ du délai de prescription dans le présent dossier. Ce n'est pas seulement l'iniquité qui découle du fait de laisser une personne profiter de l'avantage d'une relation spéciale avec le demandeur qui justifie l'application de la doctrine de la fraude d'equity. L'application de la doctrine n'est pas non plus restreinte aux cas où il y a quelque chose d'équivalent ou correspondant à une relation spéciale entre le demandeur et le défendeur. L'examen ne porte pas sur la relation dans le cadre de laquelle le comportement a eu lieu, mais sur le caractère abusif du comportement lui-même.

Il n'était pas évident et manifeste que la cause d'action que reconnaît l'art. 36(1)a) de la LC aux acheteurs sous parapluie ne pouvait pas réussir. Le texte de l'art. 36(1)a) de la LC étayait le point de vue selon lequel, sous son régime, les acheteurs sous parapluie avaient une cause d'action pour tout comportement allant à l'encontre de l'art. 45(1) de la LC. L'objet de la LC est de préserver et de favoriser la concurrence au Canada dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits. Comploter en vue de fixer les prix va totalement à l'encontre de l'objet de la LC. Les sanctions pécuniaires imposées dans de tels cas de conduite anticoncurrentielle favorisaient ainsi l'atteinte de la fin visée par la LC. Interpréter l'art. 36(1)a) de la LC de façon à autoriser les actions des acheteurs sous parapluie favorisait l'atteinte de deux autres objectifs, soit la dissuasion des comportements anticoncurrentiels et l'indemnisation des victimes de ces comportements. La reconnaissance de la cause d'action des acheteurs sous parapluie fondée sur l'art. 36(1)a) ne risquait pas d'exposer les défenderesses à une responsabilité indéterminée.

Il n'était pas évident et manifeste que les recours de common law ou d'equity exercés par le demandeur ne pouvaient être accueillis, sauf indication contraire dans les conclusions du juge saisi de la demande d'autorisation. Avant l'adoption de la disposition conférant une cause d'action qui se trouve dans ce qui est devenu l'art. 36(1) de la LC, une infraction à l'art. 45(1) de la LC pouvait, et peut encore, faire à l'élément « moyens illégaux » du délit de complot civil. Les tribunaux d'instance inférieure ont à juste titre décidé qu'il n'était pas évident et manifeste que le demandeur ne pouvait exercer des recours de common law et d'equity en même temps qu'une action fondée sur l'art. 36(1)a) de la LC.

Il n'était pas nécessaire, pour justifier l'autorisation de la question de la perte en tant que question commune, que la méthode proposée par un expert du demandeur établisse que chaque membre du groupe a subi une perte. Il n'était pas non plus nécessaire que la méthode de l'expert en question permette d'identifier les membres du groupe qui n'ont subi aucune perte de manière à les distinguer de ceux qui en ont subi une. Pour que les questions relatives à la perte soient autorisées en tant que questions communes, la méthode de l'expert du demandeur n'a qu'à être suffisamment fiable ou acceptable pour établir que l'acheteur du niveau requis a subi une perte. Le juge saisi de la demande d'autorisation a arrêté la norme applicable à l'autorisation, en tant que question commune, de la question de la communauté de la perte. Il n'y avait aucune erreur manifeste et déterminante dans la conclusion du juge saisi de la demande d'autorisation que le demandeur a établi un certain fondement factuel permettant de qualifier de communes les questions liées à la perte.

Il n'y avait pas lieu de modifier la décision du juge saisi de la demande d'autorisation d'autoriser certaines questions liées à l'octroi de dommages-intérêts globaux aux acheteurs qui n'étaient pas sous parapluie. Les dommages-intérêts globaux au sens de l'art. 29(1)(b) de la CPA ont un objectif purement réparateur et ne peuvent être octroyés qu'après le règlement de toutes les autres questions communes, y compris la responsabilité. Ni l'éventail des conclusions que pourra tirer le juge du procès à l'issue de l'audition des questions communes, ni la possibilité d'accorder des dommages-intérêts globaux aux membres du groupe qui n'ont subi aucune perte n'étaient pertinentes pour la décision d'autoriser les dommages-intérêts globaux en tant que question commune. Les questions liées aux dommages-intérêts globaux que le juge saisi de la demande d'autorisation a autorisées consistaient

seulement à savoir si le montant des dommages-intérêts pouvait être arrêté globalement et, dans l'affirmative, quel était ce montant.

Côté, J. (dissidente en partie) : Les pourvois devraient être accueillis en partie.

En ce qui concerne les questions relatives aux délais de prescription soulevées dans le pourvoi d'une des défenderesses, la règle de la possibilité de découvrir ne s'applique pas au délai de prescription prévu à l'art. 36(4)a)(i) de la LC, puisque l'événement qui marque le point de départ du délai de prescription se produit peu importe si un demandeur a connaissance du préjudice. En ce qui a trait à la dissimulation frauduleuse, il ne semblait pas évident et manifeste que cette doctrine serait susceptible de repousser le point de départ du délai de prescription en l'espèce seulement si le demandeur arrivait à démontrer qu'il existait une relation spéciale. Il était possible que quelque chose d'équivalent ou correspondant à une relation spéciale suffise à reporter le point de départ du délai de prescription. Cependant, le simple fait d'établir l'existence du complot ne suffirait pas.

La LC n'empêche pas le demandeur d'intenter un recours en common law ou en equity en même temps, ou au lieu, d'un recours fondé sur la cause d'action prévue à l'art. 36(1) à l'égard des mêmes pratiques anticoncurrentielles. Toutefois, les acheteurs sous parapluie ne pouvaient pas avoir gain de cause contre les défenderesses dans leurs réclamations fondées sur l'art. 36(1) de la LC. De même, on ne saurait affirmer qu'une méthode permettant uniquement de prouver que la perte a atteint le niveau des acheteurs indirects dans la chaîne de distribution suffisait à l'autorisation des questions liées à la perte proposées par le demandeur en tant que « questions communes » au titre de l'art. 4(1)c) de la CPA.

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*Dell'Aniello c. Vivendi Canada inc.* (2014), 2014 SCC 1, 2014 CarswellQue 28, 2014 CarswellQue 29, 2014 CSC 1, (sub nom. *Dell'Aniello v. Vivendi Canada Inc.*) 453 N.R. 150, 369 D.L.R. (4th) 195, (sub nom. *Vivendi Canada Inc. v. Dell'Aniello*) 2014 C.E.B. & P.G.R. 8066 (headnote only), 51 C.P.C. (7th) 1, (sub nom. *Vivendi Canada Inc. v. Dell'Aniello*) [2014] 1 S.C.R. 3, 8 C.C.P.B. (2nd) 163 (S.C.C.) — considered

*Elder Advocates of Alberta Society v. Alberta* (2011), 2011 SCC 24, 2011 CarswellAlta 763, 2011 CarswellAlta 764, 81 C.C.L.T. (3d) 1, [2011] 6 W.W.R. 191, 41 Alta. L.R. (5th) 1, 2 C.P.C. (7th) 1, 331 D.L.R. (4th) 257, 416 N.R. 198, 499 A.R. 345, 514 W.A.C. 345, (sub nom. *Alberta v. Elder Advocates of Alberta Society*) [2011] 2 S.C.R. 261 (S.C.C.) — referred to

*Ermineskin Indian Band & Nation v. Canada* (2006), 2006 FCA 415, 2006 CarswellNat 4511, 2006 CAF 415, 2006 CarswellNat 4833, (sub nom. *Ermineskin Indian Band & Samson Indian Band v. Canada (Minister of Indian Affairs & Northern Development)*) 357 N.R. 1, [2007] 2 C.N.L.R. 51, [2007] 3 F.C.R. 245, [2007] 3 F.C. 245 (F.C.A.) — referred to

*Ermeskin Indian Band & Nation v. Canada* (2009), 2009 SCC 9, 2009 CarswellNat 203, 2009 CarswellNat 204, (sub nom. *Ermeskin Indian Band & Samson Indian Band v. Canada (Minister of Indian Affairs & Northern Development)*) 384 N.R. 203, 302 D.L.R. (4th) 577, [2009] 2 C.N.L.R. 102, [2009] 1 S.C.R. 222, 186 C.R.R. (2d) 98 (S.C.C.) — referred to

*Fairhurst v. Anglo American PLC* (2014), 2014 BCSC 2270, 2014 CarswellBC 3591 (B.C. S.C.) — referred to

*Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* (2016), 2016 ONCA 621, 2016 CarswellOnt 12776, 351 O.A.C. 308, 132 O.R. (3d) 81, 407 D.L.R. (4th) 128 (Ont. C.A.) — referred to

*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, 14 C.P.C. (3d) 364, [1993] 5 W.W.R. 1, 85 Man. R. (2d) 63, 41 W.A.C. 63, 1993 CarswellMan 109 (Man. C.A.) — considered

*Gagnon v. Foundation Maritime Ltd.* (1961), [1961] S.C.R. 435, 28 D.L.R. (2d) 174, 45 M.P.R. 399, 61 C.L.L.C. 15,365, 1961 CarswellNB 2 (S.C.C.) — considered

*Gendron v. Supply & Services Union of the P.S.A.C., Local 50057* (1990), [1990] 4 W.W.R. 385, 66 Man. R. (2d) 81, [1990] 1 S.C.R. 1298, 44 Admin. L.R. 149, 90 C.L.L.C. 14,020, 1990 CarswellMan 205, 109 N.R. 321, 1990 CarswellMan 379 (S.C.C.) — considered

*Guerin v. R.* (1984), [1984] 6 W.W.R. 481, (sub nom. *Guerin v. Canada*) [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada*) 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — referred to

*Hollick v. Metropolitan Toronto (Municipality)* (2001), 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, 2001 CSC 68 (S.C.C.) — referred to

*I.B. of T.C.W. & H. of A., Local 213 v. Therien* (1960), [1960] S.C.R. 265, 22 D.L.R. (2d) 1, 60 C.L.L.C. 15,273, 1960 CarswellBC 141 (S.C.C.) — considered

*Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 2009 CarswellOnt 8610, 99 O.R. (3d) 358 (Ont. S.C.J.) — referred to

*Kitchen v. Royal Air Force Assn.* (1958), [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563, [1955-95] P.N.L.R. 18 (Eng. C.A.) — considered

*Knight v. Imperial Tobacco Canada Ltd.* (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered

*M. (K.) v. M. (H.)* (1992), 142 N.R. 321, (sub nom. *M. c. M.*) [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1, 1992 CarswellOnt 841, 1992 CarswellOnt 998 (S.C.C.) — considered

*Option consommateurs c. Infineon Technologies AG* (2013), 2013 SCC 59, 2013 CarswellQue 10520, 2013 CarswellQue 10521, 364 D.L.R. (4th) 668, 45 C.P.C. (7th) 99, (sub nom. *Infineon Technologies AG v. Option consommateurs*) 450 N.R. 355, (sub nom. *Infineon Technologies AG v. Option Consommateurs*) [2013] 3 S.C.R. 600, 20 B.L.R. (5th) 1 (S.C.C.) — considered

*Peixeiro v. Haberman* (1997), 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 30 M.V.R. (3d) 41, [1997] 3 S.C.R. 549, 12 C.P.C. (4th) 255, 46 C.C.L.I. (2d) 147, 217 N.R. 371 (S.C.C.) — considered

*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, (sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*) [2002] 1 S.C.R. 678, 2002 CSC 19 (S.C.C.) — considered

*Photinopoulos v. Photinopoulos* (1988), 63 Alta. L.R. (2d) 193, [1989] 2 W.W.R. 56, 54 D.L.R. (4th) 372, 92 A.R. 122, 31 C.P.C. (2d) 267, 1988 CarswellAlta 220, 1988 ABCA 352 (Alta. C.A.) — referred to

*Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (2009), 2009 BCCA 503, 2009 CarswellBC 3035, 98 B.C.L.R. (4th) 272, 312 D.L.R. (4th) 419, 277 B.C.A.C. 271, 469 W.A.C. 271, [2010] 4 W.W.R. 273, 81 C.P.C. (6th) 9 (B.C. C.A.) — referred to

*Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2013), 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258, 364 D.L.R. (4th) 573, 50 B.C.L.R. (5th) 219, 45 C.P.C. (7th) 1, [2014] 1 W.W.R. 421, 40 N.R. 201, 345 B.C.A.C. 1, 589 W.A.C. 1, [2013] 3 S.C.R. 477, 19 B.L.R. (5th) 177, 12 C.C.L.T. (4th) 171 (S.C.C.) — followed

*Proprietary Articles Trade Assn. v. Canada (Attorney General)* (1931), [1931] A.C. 310, [1931] 2 D.L.R. 1, [1931] 1 W.W.R. 552, 55 C.C.C. 241, 1931 CarswellNat 1 (Jud. Com. of Privy Coun.) — considered

*R. c. Proulx* (2016), 2016 QCCA 1425, 2016 CarswellQue 8386, 2016 CarswellQue 13659 (C.A. Que.) — referred to  
*Rizzo & Rizzo Shoes Ltd., Re* (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

*Ryan v. Moore* (2005), 2005 SCC 38, 2005 CarswellNfld 157, 2005 CarswellNfld 158, 254 D.L.R. (4th) 1, 247 Nfld. & P.E.I.R. 286, 735 A.P.R. 286, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, 18 E.T.R. (3d) 163, 334 N.R. 355, [2005] 2 S.C.R. 53, [2005] R.R.A. 694, 2005 CSC 38 (S.C.C.) — considered

*Shah v. LG Chem Ltd.* (2018), 2018 ONCA 819, 2018 CarswellOnt 17002, 142 O.R. (3d) 721, 429 D.L.R. (4th) 514, 28 C.P.C. (8th) 281 (Ont. C.A.) — referred to

*Shah v. LG Chem, Ltd.* (2015), 2015 ONSC 6148, 2015 CarswellOnt 15099, 390 D.L.R. (4th) 87, 79 C.P.C. (7th) 72 (Ont. S.C.J.) — considered

*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* (2013), 2013 SCC 58, 2013 CarswellBC 3259, 2013 CarswellBC 3260, 364 D.L.R. (4th) 626, [2014] 1 W.W.R. 477, 51 B.C.L.R. (5th) 1, 450 N.R. 287, 345 B.C.A.C. 87, 589 W.A.C. 87, [2013] 3 S.C.R. 545 (S.C.C.) — considered

*Watson v. Bank of America Corp.* (2015), 2015 BCCA 362, 2015 CarswellBC 2356, 389 D.L.R. (4th) 577, 376 B.C.A.C. 153, 646 W.A.C. 153, 79 B.C.L.R. (5th) 1, [2016] 3 W.W.R. 629 (B.C. C.A.) — considered

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CSC 46 (S.C.C.) — considered

**Cases considered by Côté J. (dissenting):**

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to in a minority or dissenting opinion

*Associated General Contractors of California Inc. v. California State Council of Carpenters* (1983), 74 L.Ed.2d 723, 103 S.Ct. 897, 459 U.S. 519 (U.S. Sup. Ct.) — considered in a minority or dissenting opinion

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559, 2002 CSC 42 (S.C.C.) — considered in a minority or dissenting opinion

*Blue Shield of Virginia v v. McCready* (1982), 73 L.Ed.2d 149, 102 S.Ct. 2540, 457 U.S. 465 (U.S. Sup. Ct.) — referred to in a minority or dissenting opinion

*Bou Malhab c. Diffusion Métromédia CMR inc.* (2011), 2011 SCC 9, 2011 CarswellQue 383, 2011 CarswellQue 384, 79 C.C.L.T. (3d) 165, (sub nom. *Bou Malhab v. Diffusion Métromédia CMR inc.*) 328 D.L.R. (4th) 385, (sub nom. *Malhab v. Diffusion Métromédia CMR inc.*) 412 N.R. 1, 89 C.C.E.L. (3d) 1, [2011] 1 S.C.R. 214 (S.C.C.) — considered in a minority or dissenting opinion

*British Columbia (Securities Commission) v. McLean* (2013), 2013 SCC 67, 2013 CarswellBC 3618, 2013 CarswellBC 3619, 366 D.L.R. (4th) 30, [2014] 2 W.W.R. 415, (sub nom. *McLean v. British Columbia Securities Commission*) 452 N.R. 340, 53 B.C.L.R. (5th) 1, (sub nom. *McLean v. British Columbia (Securities Commission)*) [2013] 3 S.C.R. 895, (sub nom. *McLean v. British Columbia Securities Commission*) 347 B.C.A.C. 1, (sub nom. *McLean v. British Columbia Securities Commission*) 593 W.A.C. 1, 64 Admin. L.R. (5th) 237 (S.C.C.) — referred to in a minority or dissenting opinion

*CCS Corp. v. Secure Energy Services Inc.* (2014), 2014 ABCA 96, 2014 CarswellAlta 346, 575 A.R. 1, 612 W.A.C. 1, 8 Alta. L.R. (6th) 161 (Alta. C.A.) — referred to in a minority or dissenting opinion

*Canadian Imperial Bank of Commerce v. Green* (2015), 2015 SCC 60, 2015 CSC 60, 2015 CarswellOnt 18335, 2015 CarswellOnt 18336, 77 C.P.C. (7th) 1, 391 D.L.R. (4th) 567, (sub nom. *Green v. Canadian Imperial Bank of Commerce*) 478 N.R. 202, 44 B.L.R. (5th) 1, [2015] 3 S.C.R. 801, (sub nom. *Green v. Canadian Imperial Bank of Commerce*) 346 O.A.C. 204, 135 O.R. (3d) 334 (note) (S.C.C.) — considered in a minority or dissenting opinion

*Canadian National Railway v. Norsk Pacific Steamship Co.* (1992), 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289, 137 N.R. 241, (sub nom. *Norsk Pacific Steamship Co. c. Cie des Chemins de Fer nationaux du Canada*) [1991] R.R.A. 370, [1992] 1 S.C.R. 1021, 1992 CarswellNat 168, 53 F.T.R. 79, 1992 CarswellNat 655, 1992 A.M.C. 1910, 228 W.A.C. 70, 11 C.C.L.T. (2d) 14 (S.C.C.) — referred to in a minority or dissenting opinion

*Central & Eastern Trust Co. v. Rafuse* (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse*) [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse*) 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse*) 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse*) 75 N.S.R. (2d) 109, (sub nom. *Central Trust Co. v. Rafuse*) 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon*) [1986] R.R.A. 527 (headnote only) (S.C.C.) — considered in a minority or dissenting opinion

*Eli Lilly & Co. v. Apotex Inc.* (2009), 2009 FC 991, 2009 CarswellNat 3042, 80 C.P.R. (4th) 1, 351 F.T.R. 1 (Eng.), 2009 CF 991, 2009 CarswellNat 6607 (F.C.) — referred to in a minority or dissenting opinion

*Fairview Donut Inc. v. TDL Group Corp.* (2012), 2012 ONSC 1252, 2012 CarswellOnt 2223 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* (2016), 2016 ONCA 621, 2016 CarswellOnt 12776, 351 O.A.C. 308, 132 O.R. (3d) 81, 407 D.L.R. (4th) 128 (Ont. C.A.) — considered in a minority or dissenting opinion

*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, 14 C.P.C. (3d) 364, [1993] 5 W.W.R. 1, 85 Man. R. (2d) 63, 41 W.A.C. 63, 1993 CarswellMan 109 (Man. C.A.) — considered in a minority or dissenting opinion

*First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29, 1989 CarswellBC 309 (B.C. S.C.) — referred to in a minority or dissenting opinion

*Garford Pty Ltd. v. Dywidag Systems International Canada Ltd.* (2010), 2010 FC 996, 2010 CarswellNat 3709, 88 C.P.R. (4th) 7, 375 F.T.R. 38 (Eng.), 2010 CF 996, 2010 CarswellNat 6486 (F.C.) — referred to in a minority or dissenting opinion

*Gendron v. Supply & Services Union of the P.S.A.C., Local 50057* (1990), [1990] 4 W.W.R. 385, 66 Man. R. (2d) 81, [1990] 1 S.C.R. 1298, 44 Admin. L.R. 149, 90 C.L.L.C. 14,020, 1990 CarswellMan 205, 109 N.R. 321, 1990 CarswellMan 379 (S.C.C.) — referred to in a minority or dissenting opinion

*General Motors of Canada Ltd. v. City National Leasing* (1989), 93 N.R. 326, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, 32 O.A.C. 332, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 68 O.R. (2d) 512 (note), 1989 CarswellOnt 956, 1989 CarswellOnt 125 (S.C.C.) — referred to in a minority or dissenting opinion

*Giroux Estate v. Trillium Health Centre* (2005), 2005 CarswellOnt 241, 13 E.T.R. (3d) 1, 194 O.A.C. 231, 74 O.R. (3d) 341, 30 C.C.L.T. (3d) 88, 249 D.L.R. (4th) 662 (Ont. C.A.) — considered in a minority or dissenting opinion

*Guerin v. R.* (1984), [1984] 6 W.W.R. 481, (sub nom. *Guerin v. Canada*) [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada*) 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — considered in a minority or dissenting opinion

*Illinois Brick Co. v. Illinois* (1977), 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (U.S. Ill. S.C.) — referred to in a minority or dissenting opinion

*Kitchen v. Royal Air Force Assn.* (1958), [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563, [1955-95] P.N.L.R. 18 (Eng. C.A.) — considered in a minority or dissenting opinion

*Knight v. Imperial Tobacco Canada Ltd.* (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.*) 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered in a minority or dissenting opinion

*Laboratoires Servier v. Apotex Inc.* (2008), 2008 FC 825, 2008 CarswellNat 3000, 67 C.P.R. (4th) 241, 2008 CF 825, 2008 CarswellNat 5245, 332 F.T.R. 193 (Eng.) (F.C.) — referred to in a minority or dissenting opinion

*M. (K.) v. M. (H.)* (1992), 142 N.R. 321, (sub nom. *M. c. M.*) [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1, 1992 CarswellOnt 841, 1992 CarswellOnt 998 (S.C.C.) — considered in a minority or dissenting opinion

*McMaster University v. Wilchar Construction Ltd.* (1971), [1971] 3 O.R. 801, 22 D.L.R. (3d) 9, 1971 CarswellOnt 775 (Ont. H.C.) — referred to in a minority or dissenting opinion

*Mustapha v. Culligan of Canada Ltd.* (2008), 2008 SCC 27, 2008 CarswellOnt 2824, 2008 CarswellOnt 2825, 55 C.C.L.T. (3d) 36, 293 D.L.R. (4th) 29, 375 N.R. 81, 238 O.A.C. 130, [2008] 2 S.C.R. 114, 92 O.R. (3d) 799 (note) (S.C.C.) — considered in a minority or dissenting opinion

*Peixeiro v. Haberman* (1997), 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 30 M.V.R. (3d) 41, [1997] 3 S.C.R. 549, 12 C.P.C. (4th) 255, 46 C.C.L.I. (2d) 147, 217 N.R. 371 (S.C.C.) — considered in a minority or dissenting opinion

*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, (sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*) [2002] 1 S.C.R. 678, 2002 CSC 19 (S.C.C.) — considered in a minority or dissenting opinion

*Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2010), 2010 BCSC 285, 2010 CarswellBC 508 (B.C. S.C.) — considered in a minority or dissenting opinion

*Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2013), 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258, 364 D.L.R. (4th) 573, 50 B.C.L.R. (5th) 219, 45 C.P.C. (7th) 1, [2014] 1 W.W.R. 421, 40 N.R. 201, 345 B.C.A.C. 1, 589 W.A.C. 1, [2013] 3 S.C.R. 477, 19 B.L.R. (5th) 177, 12 C.C.L.T. (4th) 171 (S.C.C.) — considered in a minority or dissenting opinion

*R. c. Proulx* (2016), 2016 QCCA 1425, 2016 CarswellQue 8386, 2016 CarswellQue 13659 (C.A. Que.) — considered in a minority or dissenting opinion

*R. v. Alex* (2017), 2017 SCC 37, 2017 CSC 37, 2017 CarswellBC 1815, 2017 CarswellBC 1816, 10 M.V.R. (7th) 1, 349 C.C.C. (3d) 383, 412 D.L.R. (4th) 1, 38 C.R. (7th) 257, 386 C.R.R. (2d) 31, [2017] 1 S.C.R. 967 (S.C.C.) — referred to in a minority or dissenting opinion

*Reference re Pan-Canadian Securities Regulation* (2018), 2018 SCC 48, 2018 CSC 48, 2018 CarswellQue 9836, 2018 CarswellQue 9837, 41 Admin. L.R. (6th) 1, 428 D.L.R. (4th) 68, [2018] 3 S.C.R. 189 (S.C.C.) — referred to in a minority or dissenting opinion

*Ryan v. Moore* (2005), 2005 SCC 38, 2005 CarswellNfld 157, 2005 CarswellNfld 158, 254 D.L.R. (4th) 1, 247 Nfld. & P.E.I.R. 286, 735 A.P.R. 286, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, 18 E.T.R. (3d) 163, 334 N.R. 355, [2005] 2 S.C.R. 53, [2005] R.R.A. 694, 2005 CSC 38 (S.C.C.) — considered in a minority or dissenting opinion

*Shah v. LG Chem Ltd.* (2018), 2018 ONCA 819, 2018 CarswellOnt 17002, 142 O.R. (3d) 721, 429 D.L.R. (4th) 514, 28 C.P.C. (8th) 281 (Ont. C.A.) — referred to in a minority or dissenting opinion

*Shah v. LG Chem, Ltd.* (2015), 2015 ONSC 6148, 2015 CarswellOnt 15099, 390 D.L.R. (4th) 87, 79 C.P.C. (7th) 72 (Ont. S.C.J.) — considered in a minority or dissenting opinion

*Shah v. LG Chem, Ltd.* (2017), 2017 ONSC 2586, 2017 CarswellOnt 6145, 100 C.P.C. (7th) 165, 413 D.L.R. (4th) 546 (Ont. Div. Ct.) — considered in a minority or dissenting opinion

*Snow (Guardian ad litem of) v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, (sub nom. *Snow v. Kashyap*) 389 A.P.R. 182, (sub nom. *Snow v. Kashyap*) 29 C.R.R. (2d) 336, 1995 CarswellNfld 233 (Nfld. C.A.) — considered in a minority or dissenting opinion

*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* (2013), 2013 SCC 58, 2013 CarswellBC 3259, 2013 CarswellBC 3260, 364 D.L.R. (4th) 626, [2014] 1 W.W.R. 477, 51 B.C.L.R. (5th) 1, 450 N.R. 287, 345 B.C.A.C. 87, 589 W.A.C. 87, [2013] 3 S.C.R. 545 (S.C.C.) — referred to in a minority or dissenting opinion

*Taylor v. 1103919 Alberta Ltd.* (2015), 2015 ABCA 201, 2015 CarswellAlta 1063, 55 R.P.R. (5th) 180, 19 Alta. L.R. (6th) 407, 602 A.R. 105, 647 W.A.C. 105 (Alta. C.A.) — considered in a minority or dissenting opinion

*Ultramares Corp. v. Touche* (1931), 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (U.S. N.Y. Ct. App.) — considered in a minority or dissenting opinion

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, 272 N.R. 135, 8

C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CSC 46 (S.C.C.) — referred to in a minority or dissenting opinion

*Westfair Foods Ltd. v. Lippens Inc.* (1989), [1990] 2 W.W.R. 42, 64 D.L.R. (4th) 335, 61 Man. R. (2d) 282, 30 C.P.R. (3d) 209, 1989 CarswellMan 203 (Man. C.A.) — considered in a minority or dissenting opinion

**Statutes considered by Brown J.:**

*Canada Labour Code*, R.S.C. 1970, c. L-1

Generally — referred to

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

Generally — referred to

s. 4(1) — referred to

s. 4(1)(a) — considered

s. 4(1)(b) — considered

s. 4(1)(c) — considered

s. 29(1)(b) — considered

s. 31(1)(a)(i) — considered

s. 37(1) — considered

*Code civil du Québec*, L.Q. 1991, c. 64

art. 1457 — referred to

*Combines Investigation Act*, R.S.C. 1970, c. C-23

Generally — referred to

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

Pt. VI — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 36 — referred to

s. 36(1) — considered

s. 36(1)(a) — considered

s. 36(4) — considered

s. 36(4)(a) — considered

s. 36(4)(a)(i) — referred to

s. 36(4)(a)(ii) — considered

s. 45 — considered

s. 45(1) — considered

s. 45(1)(b) — referred to

s. 45(1)(c) — referred to

s. 45(1)(d) — considered

s. 62 — considered

*Highway Traffic Act*, R.S.O. 1990, c. H.8

s. 206(1) — referred to

*Limitation Act*, S.B.C. 2012, c. 13

ss. 6-8 — referred to

s. 21 — referred to

*Limitation of Actions Act*, S.N.B. 2009, c. L-8.5

s. 5 — referred to

*Limitation of Actions Act*, S.N.S. 2014, c. 35

s. 8 — referred to

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

s. 3(1) — referred to

*Limitations Act*, S.S. 2004, c. L-16.1

ss. 5-7 — referred to

*Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B

ss. 4-5 — referred to

s. 15 — referred to

*Survival of Actions Act*, R.S.N. 1990, c. S-32

s. 5 — referred to

**Statutes considered by Côté J. (dissenting):**

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

Generally — referred to

s. 4(1) — considered

s. 4(1)(a) — considered

s. 4(1)(c) — considered

ss. 29-34 — referred to

*Clayton Antitrust Act of 1914*, Pub.L. 63-212; 38 Stat. 730

s. 4 — referred to

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

Pt. VI — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 36 — considered

s. 36(1) — considered

s. 36(1)(a) — considered

s. 36(2) — considered

s. 36(4) — considered

s. 36(4)(a)(i) — considered

s. 36(4)(a)(ii) — considered

s. 45 — considered

s. 52 — referred to

s. 62 — considered

*Land Titles Act*, R.S.A. 2000, c. L-4

Generally — referred to

*Limitation Act*, S.B.C. 2012, c. 13

s. 21 — referred to

*Limitations Act*, R.S.O. 1970, c. 246

s. 45(1) — referred to

*Securities Act*, R.S.O. 1990, c. S.5

s. 138.14 [en. 2002, c. 22, s. 185] — considered

*Statute of Limitations*, R.S.B.C. 1960, c. 370

s. 3 — referred to

*Survival of Actions Act*, R.S.N. 1990, c. S-32

s. 5 — referred to

#### **Words and phrases considered:**

##### **discoverability**

Discoverability is a judge-made rule of statutory interpretation that assists in determining whether the event triggering the commencement of a limitation period depends upon the state of the plaintiff's knowledge.

##### **fraudulent concealment**

Fraudulent concealment is an equitable doctrine that prevents limitation periods from being used "as an instrument of injustice" (*M. (K.) [M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6], at pp. 58-59). Where the defendant fraudulently conceals the existence of a cause of action, the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 390). It is a form of "equitable fraud" (*Guerin*, at p. 390; *M. (K.)*, at pp. 56-57), which is not confined to the parameters of the common law action for fraud (*M. (K.)*, at p. 57).

##### **fraudulent concealment doctrine**

The fraudulent concealment doctrine is a doctrine that operates to prevent a limitation clause from being used as an instrument of injustice in circumstances where a defendant conceals the facts giving rise to a potential cause of action from a plaintiff. Because it would be unconscionable for that defendant to then rely on the limitation clause as a defence to the claim, equity "suspend[s] the running of the limitation clock until such time as the injured party can reasonably discover the cause of action" (*Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), at para. 28).

##### **limitation clauses**

Limitation clauses are statutory provisions that place temporal limits on a claimant's ability to institute legal proceedings.

##### **Termes et locutions cités:**

##### **dispositions de prescription**

Les dispositions de prescription sont des dispositions statutaires qui visent à fixer des limites temporelles à la faculté du demandeur de se pourvoir devant les tribunaux.

### **dissimulation frauduleuse**

La doctrine de la dissimulation frauduleuse est une doctrine d'equity qui vise à empêcher que les délais de prescription servent « à créer une injustice » ([*M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6], p. 58-59). Si le défendeur a dissimulé frauduleusement l'existence d'une cause d'action, le délai de prescription est suspendu jusqu'au moment où le demandeur découvre, ou aurait raisonnablement dû découvrir, la fraude (*Guerin c. La Reine*, [1984] 2 R.C.S. 335, p. 390). Il s'agit d'une forme de « fraude d'equity » (*Guerin*, p. 390; *M. (K.)*, p. 56-57), qui n'est pas limitée par les paramètres de l'action pour fraude de la common law (*M. (K.)*, p. 57).

### **doctrine de la dissimulation frauduleuse**

La doctrine de la dissimulation frauduleuse vise à empêcher que le délai de prescription serve à créer une injustice lorsque le défendeur cache au demandeur les faits à l'origine d'une cause d'action potentielle. Puisqu'il serait abusif pour le défendeur d'invoquer la prescription comme défense, l'equity [TRADUCTION] « permet de suspendre l'écoulement du délai de prescription jusqu'à ce que la partie lésée puisse raisonnablement découvrir l'existence de la cause d'action » (*Giroux Estate c. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), par. 28).

### **règle de la possibilité de découvrir**

La règle de la possibilité de découvrir est une règle prétorienne d'interprétation statutaire qui aide à déterminer si l'événement qui marque le point de départ du délai de prescription dépend de la connaissance qu'en avait le demandeur.

APPEALS by defendants from judgment reported at *Godfrey v. Sony Corporation* (2017), 2017 BCCA 302, 2017 CarswellBC 2245, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448 (B.C. C.A.), dismissing defendants' appeals from decision certifying action as class proceeding subject to certain exceptions and conditions.

POURVOIS formés par les défenderesses à l'encontre d'une décision publiée à *Godfrey v. Sony Corporation* (2017), 2017 BCCA 302, 2017 CarswellBC 2245, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448 (B.C. C.A.), ayant rejeté les appels interjetés par les défenderesses à l'encontre de la décision d'autoriser l'action en tant que recours collectif, sous réserve de certaines exceptions et conditions.

***Brown J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ. concurring):***

### **I. Introduction**

1 The proposed representative plaintiff, Neil Godfrey, applied for certification of a class proceeding under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The defendants manufacture Optical Disc Drives ("ODDs"—a memory storage device that uses laser light or electromagnetic waves near the light spectrum to read and/or record data on optical discs), and ODD products (products that contain ODDs). Godfrey alleges that the defendants conspired to fix prices of ODDs and ODD products.

2 The certification judge granted Godfrey's application. Two sets of defendants — one led by Pioneer Corporation, and the other by Toshiba Corporation — each appealed from that decision, unsuccessfully, to the British Columbia Court of Appeal. At stake in these appeals is, principally, whether it is plain and obvious that the claim under s. 36(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34, of so-called "umbrella purchasers" who bought ODDs or ODD products manufactured and supplied by someone *other than* the defendants, but who allege that the defendants' price-fixing conduct raised the market price of the product, cannot succeed. This depends on whether these umbrella purchasers have a cause of action under s. 36(1)(a). For the reasons that follow, I agree with the courts below that they do, and it therefore follows that it is not plain and obvious that their claim cannot succeed.

3 These appeals also present an occasion to clarify the operation of the statutory limitation period for claims under s. 36(1)(a) of the *Competition Act*, to affirm the availability of common law and equitable actions in respect of claims also brought under s. 36(1)(a) of the *Competition Act*, and to reiterate the standard required to certify loss-related questions as common issues in class proceedings.

4 As I will explain below, my disposition of all these matters would lead me to dismiss the appeals.

## II. Background

5 Godfrey applied for certification of a class proceeding against 42 defendants (collectively, "Toshiba"), alleging a conspiracy to raise, maintain, fix and/or stabilize the price of ODDs between January 1, 2004 and January 1, 2010 ("class period"). He deposed that he purchased ODD products during the class period, and that he seeks to bring the proposed class proceeding on behalf of all British Columbia residents who purchased an ODD or an ODD product during the class period. The proposed class consists of:

- (a) *direct purchasers*, whose ODD or ODD product was manufactured or supplied *by a defendant* and purchased *from that defendant*,
- (b) *indirect purchasers*, whose ODD or ODD product was manufactured or supplied *by a defendant* and purchased *from a non-defendant*; and
- (c) *umbrella purchasers*, whose ODD or ODD product was manufactured *and supplied by a non-defendant*.

## III. Judicial History

### A. British Columbia Supreme Court, 2016 BCSC 844 (B.C. S.C.) — *Masuhara J.*

6 The certification judge certified the action as a class proceeding, subject to certain exceptions and conditions (para. 221 (CanLII)). One condition was that the class definition be amended so as to satisfy s. 4(1)(b) of the *Class Proceedings Act*. The certification judge held that the class definition ("[a]ll persons resident in British Columbia who purchased [ODDs and ODD products] in [the class period]") was insufficiently precise, as it was unclear which products were included (paras. 128-31).

7 In his reasons, the certification judge resolved a number of matters, only two of which are relevant to these appeals: whether the pleadings disclose a cause of action, and whether Godfrey's proposed questions relating to loss suffered by the class are certifiable as common questions.

#### (1) Do the Pleadings Disclose a Cause of Action?

8 The certification judge first considered whether Godfrey's pleadings satisfy s. 4(1)(a) of the *Class Proceedings Act*, which conditions certification upon the pleadings disclosing a cause of action.

#### (a) The Pioneer Claim

9 A subset of the named defendants ("Pioneer") opposed Godfrey's certification application, arguing that the action was bound to fail because it was barred by the two-year limitation period in s. 36(4) of the *Competition Act* (although the action against the other defendants was filed on September 27, 2010, the action against Pioneer was not filed until August 16, 2013). The certification judge held, however, that this argument could not be considered at the certification stage (para. 46). Further, it was not plain and obvious in any event that the limitation period could *not* be extended in this case by applying principles of discoverability or fraudulent concealment.

#### (b) Umbrella Purchasers

10 Toshiba argued that the umbrella purchasers had no cause of action under s. 36(1)(a) of the *Competition Act*, because their inclusion would expose it to indeterminate liability. For four reasons, however, the certification judge held that the umbrella purchasers had a cause of action:

1. While "allowing umbrella claims is inconsistent with restitutionary law", restitutionary law does not determine the scope of the *Competition Act* claims, since s. 36 exists to compensate for losses, not to restore wrongful gains (para. 73).
2. The possibility of indeterminate liability does not militate against affording umbrella purchasers a cause of action, since the defendants' liability exposure, while significant, would not be indeterminate (paras. 75-76).
3. While umbrella claims expose the defendants to liability for the pricing decisions of non-defendants, the pricing decisions of non-defendants, under the theory of umbrella effects, are not truly "independent" (para. 77).
4. The umbrella purchaser claims would further the goals of the *Competition Act*, including compensation and deterrence (para. 78).

### (c) "Unlawfulness" Element

11 The certification judge then considered Toshiba's argument that a breach of the *Competition Act* could not constitute the "unlawful" element of civil causes of action, such as the tort of unlawful means conspiracy (para. 83). He held that he was bound by *Watson v. Bank of America Corp.*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1 (B.C. C.A.), such that it could. While, for other reasons, the pleadings did not disclose a cause of action for the unlawful means tort, Godfrey was permitted to amend his pleadings (paras. 109-10). And, while finding that Godfrey's pleadings *did* disclose a cause of action in civil conspiracy (both predominant purpose conspiracy and unlawful means conspiracy), unjust enrichment and waiver of tort (paras. 100, 102, 115 and 119), the certification judge also found that the umbrella purchasers' claims in unjust enrichment and waiver of tort were bound to fail (paras. 116 and 120).

#### (2) Do the Claims Raise Common Issues?

12 Godfrey sought to have 25 questions certified as common questions under s. 4(1)(c) of the *Class Proceedings Act* (several of which related to loss alleged to have been suffered by the proposed class (para. 143)). Godfrey's expert, Dr. Keith Reutter, opined that (1) all the proposed class members would have been impacted by Toshiba's alleged conspiracy, and (2) there are methods available to estimate any overcharge that resulted from the alleged conspiracy, as well as aggregate damages (paras. 151-52). Some of the defendants, however, retained their own expert, Dr. James Levinsohn, who opined that it would not be possible to determine the fact of injury for the proposed class members using common evidence and analysis (para. 153).

13 After examining Dr. Reutter's opinion in detail, the certification judge concluded that his was a plausible methodology which satisfied the standard set in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.), for evidence to support certifying loss as a common issue. Specifically, it could establish that overcharges were passed on to the indirect purchaser level (paras. 167 and 179).

14 The certification judge therefore certified all of the common issues with respect to the direct purchasers and indirect purchasers, except those relating to the unlawful means tort (para. 199). With respect to the umbrella purchasers, he certified all of the common issues except those relating to the unlawful means tort, unjust enrichment, waiver of tort (para. 200) and aggregate damages (para. 188).

#### **B. British Columbia Court of Appeal, 2017 BCCA 302, 1 B.C.L.R. (6th) 319 (B.C. C.A.) — per Savage J.A.**

15 Pioneer appealed, arguing the certification judge erred in holding: (1) that the limitation period defence cannot be considered at the certification stage; (2) that it is not plain and obvious that the discoverability rule never applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act*; and (3) that it is not plain and obvious that the doctrine of fraudulent concealment cannot toll the limitation period in this case (para. 45).

16 Toshiba also appealed, arguing the certification judge erred by: (1) recasting the standard for certifying loss as a common issue; (2) holding that a breach of s. 45 of the *Competition Act* can furnish the "unlawfulness" element for common law actions; and (3) allowing the umbrella purchasers' causes of action to proceed (para. 44).

17 The Court of Appeal dismissed both sets of appeals.

(1) *Pioneer's Appeal*

18 Agreeing with the certification judge, the Court of Appeal held that limitations arguments should, generally, not be considered at the certification stage. Further, and that aside, the limitations issue in this case was "intimately connected with the facts of the alleged conspiracy" and should be reserved for trial (paras. 67-68). Alternatively, were discoverability properly considered at the certification stage, it would not be plain and obvious that discoverability does not apply to delay the running of the limitation period in s. 36(4)(a)(i) of the *Competition Act*. While recognizing that some courts have declined to apply discoverability to s. 36(4)(a)(i) (at para. 72), the Court of Appeal read this Court's decision in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.) , as directing that discoverability applies where the limitation period is explicitly linked to the injured party's knowledge or the basis of the cause of action (para. 89).

19 Further, the certification judge was correct, said the Court of Appeal, to conclude that it is not plain and obvious that the doctrine of fraudulent concealment could not apply (para. 110). Equitable fraud was sufficient to invoke the doctrine, and a purely commercial relationship could support the requirement for a "special relationship" (paras. 102-3) between the parties so as to toll the applicable limitation period. Accordingly, Godfrey's failure to plead a "special relationship" would not preclude the doctrine's application here (para. 104).

(2) *Certifying Loss as a Common Issue*

20 Toshiba argued that, since Dr. Reutter's proposed methodology could neither demonstrate that loss was suffered by each class member nor identify the class members who did not suffer harm, the certification judge erred in certifying questions relating to harm as common questions (para. 113). It also saw error in the certification judge's reference (at para. 169) to the *Class Proceedings Act*'s aggregate damages provisions as supporting the possibility of liability, even where some class members have not demonstrated actual loss.

21 The Court of Appeal rejected these arguments, noting that *Microsoft* allows loss to be certified as a common issue if "the methodology [is] able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain" (para. 149, citing *Microsoft*, at para. 115). Certifying an issue as common does not create an ultimate right to recovery; it is merely a procedural step that does not change the substantive rights of the parties (para. 158). And, while the aggregate damages provisions in the *Class Proceedings Act* are applicable only once liability is established, they do indeed demonstrate that the statute contemplates recovery where certain class members have not proven that they suffered loss (paras. 160-61).

(3) *Unlawfulness Element*

22 The Court of Appeal agreed with the certification judge that a breach of s. 45 of the *Competition Act* could represent the unlawfulness element of the various causes of action advanced by Godfrey (para. 186).

(4) *The Umbrella Purchasers*

23 Here, too, the Court of Appeal found no error in the certification judge's reasons. Umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* based on a breach of s. 45(1) (paras. 247-48). Toshiba's arguments that the certification judge did not expressly consider whether the umbrella purchasers have claims at common law, and that the certification judge erred in his interpretation of s. 36, were rejected (paras. 188-89).

24 Finally, the Court of Appeal agreed with the certification judge that Toshiba's concerns about indeterminate liability did not support denying certification of the umbrella purchasers' claims. An action under s. 36(1)(a) based on a breach of s. 45(1)

is subject to internal limitations within ss. 36(1) and 45(1) which address indeterminacy such that it does not arise as a concern in this case (paras. 230-31). Further, Toshiba's additional potential liability to the umbrella purchasers would be significantly less, relative to its potential liability to non-umbrella purchasers (para. 236).

#### **IV. Issues on Appeal**

25 Pioneer's appeal raises the issue of whether it is plain and obvious that the claim against it will not succeed because it is statute-barred by s. 36(4)(a)(i) of the *Competition Act*. In answering this question, we must decide:

1. whether the principle of discoverability applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act*; and
2. whether, for fraudulent concealment to toll the limitation period in s. 36(4)(a)(i) of the *Competition Act*, a special relationship between the parties must be established.

26 The appeals, taken together, raise three common issues:

1. whether it is plain and obvious that the umbrella purchasers' claim under s. 36(1)(a) of the *Competition Act* cannot succeed;
2. whether it is plain and obvious that s. 36(1) of the *Competition Act* bars a plaintiff from bringing concurrent common law and equitable claims; and
3. the required standard to certify loss as a common issue, and whether Dr. Reutter's evidence satisfies that standard.

#### **V. Analysis**

27 Section 4(1) of the *Class Proceedings Act* contains the requirements for certification of a class proceeding in British Columbia. At issue is whether Godfrey has satisfied s. 4(1)(a), which requires that the pleadings disclose a cause of action, and s. 4(1)(c), which requires that the claims of the class members raise common issues. The former requirement is satisfied unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at para. 20; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 25; *Microsoft*, at para. 63). The latter is satisfied where there is "some basis in fact" to support a common issue (*Hollick*, at para. 25; *Microsoft*, at paras. 99-100).

28 Although at certification the plaintiff must satisfy s. 4(1)'s requirements that I have just described, the standard of review on appeal for each particular question depends on the nature of the question, and will be identified in turn.

##### **A. Pioneer's Appeal**

29 Noting that the alleged conspiracy is said to have ended on January 1, 2010, and that the action against Pioneer was not commenced until August 16, 2013, Pioneer argues that Godfrey's claim is statute-barred, as it was commenced after the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act* expired. As I will explain, I agree that the discoverability rule applies to extend the limitation period in s. 36(4)(a)(i). It is not plain and obvious that Godfrey's claim against Pioneer will fail on this basis. Although it is therefore unnecessary to opine on whether the doctrine of fraudulent concealment would apply, I take this opportunity to briefly discuss why its application is not conditioned upon a special relationship between the parties.

30 Determining whether discoverability applies to the limitation period in s. 36(4)(a)(i) is a question of law subject to a standard of correctness, as is the question of whether fraudulent concealment requires a special relationship to be established between the parties. The applicability of either doctrine is, however (and as noted by the Court of Appeal), "bound up in the facts" and must be left to the certification judge to decide (C.A. reasons, at para. 68).

##### *(1) Discoverability*

###### **(a) Limitation Periods Run From the Accrual or Knowledge of the Cause of Action**

31 This Court has recognized that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purposes of the running of a limitation period until "the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (*Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at p. 224; *Ryan*, at paras. 2 and 22).

32 This discoverability rule does not apply automatically to every limitation period. While a "rule", it is not a universally applicable rule of *limitations*, but a rule of *construction* to aid in the interpretation of statutory limitation periods (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 37). It can therefore be displaced by clear legislative language (*Ermineskin Indian Band & Nation v. Canada*, 2006 FCA 415, [2007] 3 F.C. 245 (F.C.A.), at para. 333, aff'd 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.)). In this regard, many provincial legislatures have chosen to enact statutory limitation periods that codify, limit or oust entirely discoverability's application, particularly in connection with ultimate limitation periods (see e.g. *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4-5 and 15; *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1), *Limitation Act*, S.B.C. 2012, c. 13, ss. 6-8 and 21; *The Limitations Act*, S.S. 2004, c. L-16.1, ss. 5-7, *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, s. 5, *Limitation of Actions Act*, S.N.S. 2014 c. 35, s. 8; see also *Bowes v. Edmonton (City)*, 2007 ABCA 347, 425 A.R. 123 (Alta. C.A.), at paras. 146-58).

33 Further, absent legislative intervention, the discoverability rule applies only where the limitation period in question runs from the accrual of the cause of action, or from some other event that occurs when the plaintiff has knowledge of the injury sustained:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at para. 22, cited in *Peixeiro*, at para. 37.)

34 Two points flow from this statement. First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had knowledge of the existence of his or her legal rights before such rights expire (*Peixeiro*, at para. 39).

35 Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff's knowledge of his or her injury, the rule of discoverability will not apply. In *Ryan*, for example, this Court held that discoverability did not apply to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which stated that an action against a deceased could not be brought after one year from the date of death. As the Court explained (para. 24):

The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action. [Emphasis added; citation omitted.]

By tying, then, the limitation period to an event unrelated to the cause of action, and which did not necessitate the plaintiff's knowledge of an injury, the legislature had clearly displaced the discoverability rule (*Ryan*, at para. 27).

36 In determining whether a limitation period runs from the accrual of a cause of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from "the accrual of the cause of action", discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury. Indeed, clear statutory text is

necessary to oust its application. In *Peixeiro*, for example, this Court applied the discoverability rule to s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, which stated that an action must be commenced within two years of the time when "damages were sustained" (para. 2). The use of the phrase "damages were sustained" rather than "when the cause of action arose" was a "distinction without a difference", as it was unlikely that the legislature intended that the limitation period should run without the plaintiff's knowledge (para. 38).

37 It is therefore clear that the "the judge-made discoverability rule will apply when the requisite limitation statute indicates that time starts to run from when the cause of action arose (*or other wording to that effect*)" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016), at p. 103, emphasis added). And, while my colleague Côté J. claims to disagree with my analysis, I am fortified by the endorsement in her reasons of this formulation of discoverability (paras. 140 and 149).

38 The issue raised by this appeal is what constitutes sufficiently clear legislative expression in this regard, such that discoverability will apply. In my view, where the event triggering the limitation period is an element of the cause of action, the legislature has shown its intention that the limitation period be linked to the cause of action's accrual, such that discoverability will apply. As this Court stated in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), the accrual of a cause of action is a "gradatio[n]" (p. 34). Where all the elements of a cause of action occur simultaneously, the cause of action accrues contemporaneously with the occurrence of each element (*M. (K.)*, at p. 34). Where, however, the occurrence of each element is separated in time, the accrual of the cause of action is a continuing (but not continual) process. That is, the cause of action will continue to accrue as each element of the cause of action occurs.

39 This was what the Court in *Ryan* was referring to when it said that discoverability does not apply where the limitation period "is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge *or the basis of the cause of action*" (para. 24, emphasis added). In *Ryan*, discoverability did not apply because the action was "complete in all its elements" before the operation of the event triggering the limitation period (para. 18). The limitation period was not dependent upon the accrual of the cause of action and thus the limitation period would begin to run independent of the accrual of the cause of action (see *Ryan*, at paras. 16, 18, 20, 29 and 32). Citing the trial judge with approval, the Court added this:

The fact of death is of no relevance to the cause of action in question. It is not an element of the cause of action and is not required to complete the cause of action. Whatever the nature of the cause of action, it is existing and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves only to provide a time from which the time within which to bring the action is to be calculated. [Emphasis added; para. 32.]

40 Had, however, the event triggering the limitation period been an *element* of the cause of action, or had it been required to occur before the cause of action could accrue, discoverability *could* apply (*Ryan*, at paras. 29-30, citing *Burt v. LeLacheur*, 2000 NSCA 90, 189 D.L.R. (4th) 193 (N.S. C.A.)). I do not see my colleague Côté J. as disagreeing on this point: she is quite right when she says that "the words 'basis of the cause of action' in para. 24 of *Ryan* should be understood as essentially synonymous with the 'arising or accrual of the cause of action'" (para. 148). As this Court held in *Peixeiro*, where the limitation period is based on an event that can be construed as synonymous with the accrual of the cause of action, discoverability will apply (para. 38).

41 From all this, it is evident that discoverability continues to apply where the legislature has shown its intent that a limitation period shall run from "when the cause of action arose (or other wording to that effect)" or where the event triggering the limitation period requires the plaintiff's knowledge of his or her injury (Mew et al., at p. 103). Conversely, discoverability does not apply where that triggering event does not depend on the plaintiff's knowledge or is independent of the accrual of the cause of action. This is not, as my colleague suggests, a modified test for discoverability (para. 154), but rather is the product of this Court's application of *Fehr* in *Peixeiro* (regarding when discoverability *does* apply) and *Ryan* (regarding when discoverability *does not* apply).

## (b) The Statutory Scheme, and the Objects of Statutory Limitation Periods

42 Bearing in mind that, as I have explained, the discoverability rule is a rule of *construction*, its application depends on an examination of the pertinent statutory text to assess what triggers the running of the limitation period in question, supplemented by consideration of the statutory scheme within which it operates, and of the legislature's purpose in enacting limitation periods (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21).

43 Turning first to the statutory text, the relevant provisions of s. 36 of the *Competition Act* state:

**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, ...

.....

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.

.....

**(4)** No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later ....

44 The text of s. 36(4)(a)(i) provides that no action may be brought under s. 36(1)(a) after two years from a day *on which conduct contrary to Part VI occurred*. From this, it is clear that the event triggering this particular limitation period is an element of the underlying cause of action. That is, the limitation period in s. 36(4)(a)(i) is triggered by the occurrence of an element of the underlying cause of action — specifically, conduct contrary to Part VI of the *Competition Act*. Therefore, it is subject to discoverability (*Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81 (Ont. C.A.), at para. 18).

45 The scheme of s. 36(4) also supports the view that discoverability was intended to apply to the limitation period in s. 36(4)(a)(i). Section 36(4)(a) sets out two limitation periods — s. 36(4)(a)(i), which runs from the day on which the conduct occurred and s. 36(4)(a)(ii), which runs from the day on which criminal proceedings are disposed of. The applicable limitation period is whichever event occurs later. Pioneer argues that Parliament enacted s. 36(4)(a)(ii) to revive a cause of action where the limitation period has expired under s. 36(4)(a)(i), which revival would mitigate any unfairness created by the operation of the limitation period in s. 36(4)(a)(i) (A.F. (Pioneer), at para. 92). I do not view s. 36(4)(a)(ii)'s operation in this way. It is simply an example of a limitation period to which discoverability does not apply because, as the Court of Appeal for Ontario said in *Fanshawe College of Applied Arts and Technology*, the event triggering the limitation period under s. 36(4)(a)(ii) — the disposition of criminal proceedings — is "not connected to a plaintiff's cause of action or knowledge" (para. 47). When s. 36(4)(a)(i) is contrasted with s. 36(4)(a)(ii), it is likely that Parliament intended that discoverability apply to the former limitation period and not the latter. Further, where criminal proceedings are *not* brought against a wrongdoer, the putative mitigating effect of s. 36(4)(a)(ii) would be of no assistance to plaintiffs whose right of action has expired by operation of s. 36(4)(a)(i).

46 So much for the statutory text and scheme. I turn, then, to consider this limitation period's relation to the overall object of the *Competition Act*, which is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy ... and in order to provide consumers with competitive prices and product choices" (*Competition Act*, s. 1.1). Anti-competitive agreements — which represent "conduct that is contrary to ... Part VI" (s. 36(1)(a)) — are invariably conducted through secrecy and deception (*Fanshawe College of Applied Arts and Technology*, at para. 46; C.A. reasons, at para.

93), meaning that they are, by their very nature, *unknown* to s. 36(1)(a) claimants. Parliament would have known this when enacting the limitation provision contained in s. 36(4)(a)(i). It would therefore be absurd, and would render the cause of action granted by s. 36(1)(a) almost meaningless, to state that Parliament did not intend for discoverability to apply, such that the plaintiff's right of action would expire prior to his or her acquiring knowledge of the anti-competitive behaviour. I agree with the Court of Appeal that "it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule in s. 36(4)" (C.A. reasons, at para. 93).

47 The application of discoverability to the limitation period in s. 36(4)(a)(i) is also supported by the object of statutory limitation periods. This Court has recognized that three rationales underlie limitation periods (*M. (K.)*, at pp. 29-31), which courts must consider in deciding whether the discoverability rule applies to a particular limitation period. The first is that limitation periods foster *certainty*, in that "[t]here comes a time ... when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.)*, at p. 29). This concern must be balanced against the unfairness of allowing a wrongdoer to escape liability while the victim of injury continues to suffer the consequences (*M. (K.)*, at p. 29). The second rationale is *evidentiary*: limitation periods are intended to help prevent evidence from going stale, to the detriment of the plaintiff or the defendant (*M. (K.)*, at p. 30). Finally, limitation periods serve to encourage *diligence* on the part of plaintiffs in pursuing their claims (*M. (K.)*, at p. 30).

48 Consideration of these rationales for limitation periods affirms discoverability's application here. Even recognizing that shorter limitation periods indicate that Parliament put a premium on the certainty that comes with a limitation statute's function of repose (*Peixeiro*, at para. 34), balancing all of the competing interests underlying s. 36(4)(a)(i) weighs in favour of applying discoverability. The ability of plaintiffs to advance claims for loss arising from conduct contrary to Part VI of the *Competition Act* outweighs defendants' interests in barring them, especially where such conduct is, as I have already noted, concealed from plaintiffs (*Fanshawe College of Applied Arts and Technolog*, at para. 46) (such that the evidentiary rationale — that is, the concern about evidence going "stale" — has no place in the analysis). To hold otherwise would create perverse incentives, encouraging continued concealment of anti-competitive behaviour until the two-year limitation period has elapsed. It would therefore not only bar plaintiffs from pursuing their claims, but reward concealment that has been "particularly effective" (*Fanshawe College of Applied Arts and Technolog*, at para. 49).

49 In contrast, applying discoverability to s. 36(4)(a)(i) would not unduly affect the defendant's interests, as discoverability does not excuse the plaintiff from moving matters along, such that the rationale of encouraging diligence is still served (*Peixeiro*, at para. 39). Where plaintiffs sleep on their rights or otherwise do not diligently pursue their claims, discoverability will not operate to extend the limitation period (Mew et al., at p. 83).

50 For all of these reasons, I find that the discoverability rule applies to the limitation period in s. 36(4)(a)(i), such that it begins to run only when the material facts on which Godfrey's claim is based were discovered by him or ought to have been discovered by him by the exercise of reasonable diligence.

## (2) Fraudulent Concealment

51 In light of my finding that discoverability applies to s. 36(4)(a)(i), it is, strictly speaking, unnecessary to consider the doctrine of fraudulent concealment. Given, however, the submissions and attention given to this issue at the courts below, I will comment briefly here on whether fraudulent concealment requires establishing a special relationship between the parties.

52 Fraudulent concealment is an equitable doctrine that prevents limitation periods from being used "as an instrument of injustice" (*M. (K.)*, at pp. 58-59). Where the defendant fraudulently conceals the existence of a cause of action, the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud (*Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at p. 390). It is a form of "equitable fraud" (*Guerin*, at p. 390; *M. (K.)*, at pp. 56-57), which is not confined to the parameters of the common law action for fraud (*M. (K.)*, at p. 57). As Lord Evershed, M.R. explained in *Kitchen v. Royal Air Force Assn.*, [1958] 2 All E.R. 241 (Eng. C.A.), at p. 249, cited in *M. (K.)*, at pp. 56-57:

It is now clear ... that the word "fraud" in s. 26(b) of the *Limitation Act, 1939*, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added.]

53 While it is therefore clear that equitable fraud *can* be established in cases where a special relationship subsists between the parties, Lord Evershed, M.R. did not limit its establishment to such circumstances, nor did he purport to define exhaustively the circumstances in which it would or would not apply (see *Photinopoulos v. Photinopoulos*, 1988 ABCA 352, 92 A.R. 122 (Alta. C.A.), at para. 10). Indeed, he expressly refused to do so: "[w]hat is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and *I certainly shall not attempt to do so now*" (*Kitchen*, at p. 249, emphasis added).

54 When, then, does fraudulent concealment arise so as to delay the running of a limitation period? Recalling that it is a form of *equitable* fraud, it becomes readily apparent that what matters is *not* whether there is a *special relationship* between the parties, but whether it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action. This was the Court's point in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] S.C.R. 678 (S.C.C.), at para. 39:

[Equitable fraud] "... refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken" [Emphasis added.]

It follows that the concern which drives the application of the doctrine of equitable fraud is not limited to the unconscionability of taking advantage of a special relationship with the plaintiff. Nor is the doctrine's application limited, as my colleague suggests, to cases where there is something "tantamount to or commensurate with" a special relationship between the plaintiff and the defendant (paras. 171 and 173-74). While a special relationship is a means by which a defendant might conceal the existence of a cause of action, equitable fraud may also be established by pointing to other forms of unconscionable behaviour, such as (for example) "some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts" (*M. (K.)*, at p. 57, citing *Halsbury's Laws of England* (4th ed. 1979), vol. 28, para. 919). In short, the inquiry is not into the *relationship* within which the conduct occurred, but into the *unconscionability* of the conduct itself.

55 The question of whether Pioneer's alleged conduct amounts to fraudulent concealment will, of course, fall to be decided by a trial judge. Nevertheless, I agree with the Court of Appeal and the certification judge that it is not "plain and obvious" that fraudulent concealment could not delay the running of the limitation period in this case (C.A. reasons, at para. 110).

#### **B. Umbrella Purchasers' Cause of Action Under Section 36(1) of the Competition Act**

56 Toshiba argues that the certification judge erred by certifying the umbrella purchasers' claims brought under s. 36(1)(a) of the *Competition Act*. For the following reasons, I disagree.

57 Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of law, reviewable on a standard of correctness. Since, as I explain below, I have concluded that umbrella purchasers *do* have a cause of action under s. 36(1)(a), it is *not* plain and obvious that their claim cannot succeed. Godfrey's pleadings disclose a cause of action for umbrella purchasers, thereby satisfying the conditions under s. 4(1)(a) of the *Class Proceedings Act* for certification.

58 The theory behind holding price-fixers liable to umbrella purchasers — who, it will be recalled are in this case persons who purchased ODDs or ODD products neither manufactured nor supplied by the defendants — is that the defendants' anti-competitive cartel activity creates an "umbrella" of supra-competitive prices, causing non-cartel manufacturers to raise their

prices (*Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87 (Ont. S.C.J.) ("Shah (Ont. S.C.J.)"), at para. 159). Additionally, the European Court of Justice in *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12, ECLI:EU:C:2014:1317, explained umbrella pricing as:

Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules. [Emphasis added; para. 29.]

59 In short, a rising tide lifts all boats; under the theory of umbrella pricing, the entire market for the subject product is affected:

Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders.... [T]he increase demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market ... or in neighboring markets.

(R. Inderst, F. Maier-Rigaud & U. Schwalbe, "Umbrella Effects" (2014) 10 *J. Competition L. & Econ.* 739, at p. 740.)

60 Several decisions of lower courts have certified umbrella purchaser actions brought under s. 36(1)(a) without expressly considering whether such purchasers had a cause of action (see: *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 (B.C. S.C.); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (B.C. C.A.); *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (Ont. S.C.J.); *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 1682, 54 C.P.C. (7th) 111 (Ont. S.C.J.)). Appellate decisions in British Columbia and Ontario have, however, expressly considered the issue and concluded that they *do* (see: C.A. reasons, at para. 247; *Shah v. LG Chem Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721 (Ont. C.A.) ("Shah (ONCA)"), at para. 52).

61 Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of statutory interpretation. The text of s. 36(1)(a) must therefore be read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme and objects of the *Competition Act*.

#### (I) Text of Section 36(1)

62 As already noted, s. 36(1)(a) of the *Competition Act* creates a statutory cause of action which allows for the recovery of damages or loss that resulted from conduct contrary to Part VI. The relevant portion states:

#### Recovery of damages

**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...

may ... sue for and recover from the person who engaged in the conduct ... 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.

63 Godfrey relies on "conduct that is contrary to ... Part VI" ("Offences in Relation to Competition"), since he alleges that Toshiba acted contrary to ss. 45(1)(b), (c), and (d) of the *Competition Act*. During the class period<sup>1</sup>, s. 45(1) stated:

#### Conspiracy

45 (1) Every one who conspires, combines, agrees or arranges with another person

.....

- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million dollars or to both.

64 The text of s. 36(1)(a) supports the view that umbrella purchasers have a cause of action thereunder for conduct contrary to s. 45(1) of the *Competition Act*. Section 36(1)(a) provides a cause of action to *any person* who has *suffered loss or damage* as a result of conduct contrary to s. 45. Significantly, Parliament's use of "any person" does not narrow the realm of possible claimants. Rather, it empowers *any* claimant who can demonstrate that loss or damage was incurred as a result of the defendant's conduct to bring a claim. On this point, the following paragraph from the Court of Appeal for Ontario's decision in *Shah (ONCA)* (at para. 34) is apposite, and I adopt it as mine:

On a plain reading, if the umbrella purchasers can prove loss resulting from a proven conspiracy under s. 45, s. 36(1) grants those purchasers a statutory means by which to recover those losses. Taking the language at face value, the umbrella purchasers' right of recovery is limited only by their ability to demonstrate two things: (1) that the respondents conspired within the meaning of s. 45; and (2) that the losses or damages suffered by the appellants resulted from that conspiracy.

(2) *Purpose of the Competition Act*

65 As I have already recounted, the purpose of the *Competition Act* is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices" (s. 1.1). A conspiracy to price-fix is the "very antithesis of the *Competition Act's* objective" (*Shah (ONCA)*, at para. 38). Monetary sanctions for such anti-competitive conduct therefore further the *Competition Act's* purpose. This Court has also recognized two other objectives of the *Competition Act* of particular relevance here, being deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour (*Option consommateurs c. Infineon Technologies AG*, 2013 SCC 59, [2013] 3 S.C.R. 600 (S.C.C.) ("Infineon"), at para. 111; *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] 3 S.C.R. 545 (S.C.C.) ("Sun-Rype"), at paras. 24-27; *Microsoft*, at paras. 46-49). Interpreting s. 36(1)(a) so as to permit umbrella purchaser actions furthers both of these objectives.

66 Allowing umbrella purchaser actions furthers deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour (*Shah (ONCA)*, at para. 38). Here, Godfrey alleges that four of the named defendants controlled 94% of the global ODD market (A.R., vol. II, at para. 70). While this means that Toshiba's potential liability to the umbrella purchasers would only marginally increase its existing liability to non-umbrella purchasers, I accept that any increase in potential liability will likely carry a correspondingly deterrent effect.

67 The objective of compensation is also furthered by allowing umbrella purchaser actions, because doing so affords umbrella purchasers recourse to recover from loss arising from what, for the purposes of these appeals, is assumed to have been anti-competitive conduct. Barring a class of purchasers who were, on the theory pleaded, intended by the defendants to pay higher prices as a result of their price-fixing is inconsistent with the compensatory goal of the *Competition Act*.

68 Relatedly, and while far from determinative, departmental and parliamentary statements fortify my view that Parliament intended that the cause of action in s. 36(1)(a) be broadly available, such that anyone who suffers a loss from anti-competitive behaviour could bring a private action. The briefing document accompanying the first stage of the modernization amendments (which introduced the original civil remedies provision) stated:

Under the existing law there is no civil recourse under the Act for persons injured by reason of the fact that others have participated in violation of the Combines Investigation Act. The provision dealing with civil damages, although it is expected to be of particular value to small businessmen who have been hurt by conduct contrary to the Act, will be equally available to consumers and to any other members of the public who have been so damaged.

The amendment provides that anyone who has suffered loss or damage because of such a violation ... may ... sue for and be awarded damages equal to the actual loss incurred .... [Emphasis added.]

(Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada* (1973), at pp. 48-49)

This is further supported by parliamentary committee discussions on the introduction of a private cause of action. In committee, the responsible minister explicitly stated that there was no reason to limit consumers' recourse under the private cause of action to direct loss or damage (House of Commons, Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence*, 1st Sess., 50th Parl., May 8 1975, at p. 45:18).

### (3) Indeterminate Liability

69 Toshiba argues that recognizing the umbrella purchasers as having a cause of action would expose Toshiba to a "potentially limitless scope of liability" (A.F. (Toshiba), at para. 97). This raises the question, first of all, of whether indeterminate liability is relevant *at all* to deciding the scope of possible s. 36(1)(a) claimants for conduct contrary to s. 45(1) of the *Competition Act*. On this point, the Court of Appeal considered that it might be relevant (on the express assumption that concerns about indeterminate liability might properly be considered outside the context of a negligence action) (C.A. reasons, at para. 227). I note, parenthetically, that whether that assumption is valid — that is, whether indeterminate liability might properly be considered *at all* in the context of a claim under s. 36(1)(a) of the *Competition Act* — I am content to leave for another day since, for the reasons that follow, I am of the view that indeterminate liability would not arise in this case in any event.

70 Toshiba argues that indeterminate liability is a relevant consideration here because the umbrella purchasers seek to recover for pure economic loss. Toshiba relies upon this Court's statement in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), that "[t]he risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss" (para. 100). In *Imperial Tobacco*, a class proceeding was brought against Imperial Tobacco by persons who purchased "light" or "mild" cigarettes. Imperial Tobacco issued third-party notices to the Government of Canada, alleging it was liable to tobacco companies for, *inter alia*, negligent misrepresentation. This Court held that "the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation", since "Canada had no control over the number of people who smoked light cigarettes" (para. 99). Similarly, Toshiba argues that it had no control over the quantity of ODDs sold to the umbrella purchasers by non-defendant manufacturers or the number of purchasers to whom it may be liable, such that the extent of its liability is indeterminate (A.F. (Toshiba), at para. 102).

71 Several features of this case, however, lead me to the view that recognizing the umbrella purchasers' cause of action under s. 36(1)(a) does not risk exposing Toshiba to indeterminate liability.

72 First, Toshiba's liability is limited by the class period, and by the specific products whose prices are alleged to have been fixed. Whereas in *Imperial Tobacco*, Canada had no control over who smoked light cigarettes (para. 99), the theory of umbrella effects links the pricing decisions of the non-defendant manufacturers to Toshiba's anti-competitive behaviour (C.A. reasons, at para. 239). I have already noted that Godfrey's pleadings allege that, during the class period, four of the named defendants collectively controlled 94% of the global ODD market. Godfrey also alleges that Toshiba intended to raise prices across that market (A.R., vol. II, at pp. 21-22). This allegation is rooted in the theory that, in order for Toshiba to profit from the conspiracy, the entire market price for ODDs had to increase. Otherwise, Toshiba would have lost market share to non-defendant manufacturers (Transcript, at pp. 56-57, A.R., vol. III, at p. 166).

73 This supports the submission made before us by Godfrey's counsel that umbrella effects are "not just a known and foreseeable consequence of what the defendants are doing, it's an intended consequence" (Transcript, at p. 61). The point is that

the results of Toshiba's alleged anti-competitive behaviour are not indeterminate. Intended results are *not indeterminate*, but *pre-determined*. I therefore agree with the Court of Appeal that there is "no reason why defendants who intend to inflict damage on umbrella purchasers should be exonerated from liability on the basis that they exercised no control over their liability" (C.A. reasons, at para. 241).

74 Secondly, and as I have already recounted, s. 36(1)(a) limits recovery to only those purchasers who can show that they suffered a loss or damage "as a result of" the defendants' conspiratorial conduct. In order to recover under s. 36(1)(a), then, the umbrella purchasers will have to demonstrate that Toshiba engaged in anti-competitive behaviour, that the umbrella purchasers suffered "loss or damage", and that such loss or damage was "as a result of" such behaviour. The statutory text "as a result of" imports both factual and legal causation into s. 36(1). Recovery under s. 36(1) is therefore limited to claimants with a loss that is not too remote from the conduct.

75 Thirdly, the text of s. 45(1) in force during the class period is instructive. The elements of the wrongful conduct outlined therein were described by the British Columbia Court of Appeal in *Watson* (at paras. 73-74):

[T]he *actus reus* elements of former s. 45 are:

- i) the defendant conspired, combined, agreed, or arranged with another person; and
- ii) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.

The *mens rea* element of former s. 45 as defined in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at 659-660, (1992) 93 D.L.R. (4th) 36, requires:

- i) the defendant had a subjective intention to agree and was aware of the agreement's terms; and
- ii) the defendant had the required objective intention, that is, a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly.

See also: *Shah (ONCA)*, at para. 50; *R. c. Proulx*, 2016 QCCA 1425 (C.A. Que.), at para. 20.

While the subjective *mens rea* does not require that the defendants' conduct be directed specifically towards the claimant, s. 45(1) "limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct" (*Shah (ONCA)*, at para. 51).

76 Taken together, these features of ss. 36(1)(a) and 45(1) of the *Competition Act* limit the availability of this cause of action to those claimants who can demonstrate: (1) a causal link between the loss suffered and the conspiratorial conduct; and (2) that the defendants' conduct satisfies the *actus reus* and *mens rea* elements of s. 45(1) of the *Competition Act*.

77 This is not to say that umbrella purchasers' actions will not be complex or otherwise difficult to pursue. Marshalling and presenting evidence to satisfy the conditions placed by Parliament on recovery under ss. 36(1)(a) and 45(1) — showing a causal link between loss and conspiratorial conduct, and proving the *actus reus* and *mens rea* of s. 45(1) — represents a significant burden. That said, this Court's statement in *Microsoft* (at paras. 44-45) regarding indirect purchaser claims is, in my view, equally applicable to claims brought by umbrella purchasers:

Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However, ... these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case. ...

In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to

meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.

And, of course, in this case it will be for the trial judge to determine whether the umbrella purchaser claimants have presented sufficient evidence to establish that, in the circumstances of the case and in the relevant market, Toshiba caused umbrella pricing.

78 In view of the foregoing, it is not plain and obvious that the umbrella purchasers' cause of action under s. 36(1)(a) of the *Competition Act* cannot succeed, and I would reject this ground of appeal.

### **C. Section 36(1) of the Competition Act Does Not Bar Common Law or Equitable Claims**

79 In addition to his statutory claims under the *Competition Act*, Godfrey advances claims in, *inter alia*, civil conspiracy.

80 Toshiba argues that the courts below erred in two respects concerning the relationship between a statutory claim under the *Competition Act* and the tort of civil conspiracy. First, it says that the tort of civil conspiracy based on a breach of the predecessor statute to the *Competition Act* (the *Combines Investigation Act*, R.S.C. 1970, c. C-23) was never available to plaintiffs prior to the enactment in 1975 of the private right of action. Secondly, and in any event, the courts below failed to recognize that, by legislating ss. 36(1) and 45(1) of the *Competition Act*, Parliament intended to oust the common law tort of civil conspiracy (A.F. (Toshiba), at para. 119).

81 These arguments raise questions of law, and are therefore reviewed on a standard of correctness. For the reasons below, I reject both arguments, and it is therefore not plain and obvious that Godfrey's common law and equitable claims cannot succeed, except as was otherwise held by the certification judge<sup>2</sup>.

#### *(1) The Tort of Civil Conspiracy Based on the Breach of a Statute Existed Prior to the Enactment of the Statutory Cause of Action*

82 To be clear, I do not dispute Toshiba's submission that the 1975 amendments were significant. The predecessor to the *Competition Act* (the *Combines Investigation Act*) was exclusively penal — indeed, its constitutionality as an exercise of Parliament's legislative authority over the criminal law was upheld in *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] A.C. 310 (Jud. Com. of Privy Coun.). In 1975, Parliament supplemented this penal function with regulatory and civil enforcement provisions, including a civil remedy provision (now s. 36(1)) (*Watson*, at para. 36).

83 All this said, our law had recognized the tort of civil conspiracy based on the breach of a statute long before Parliament legislated a civil right of action in 1975. In *I.B. of T.C.W. & H. of A., Local 213 v. Therien*, [1960] S.C.R. 265 (S.C.C.), and *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435 (S.C.C.), this Court imposed liability on trade unions for unlawful means conspiracy for conduct prohibited by statute (*Therien*, at p. 280; *Gagnon*, at p. 446). And, in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), which was decided on the basis of the *Combines Investigation Act*, this Court affirmed not only the existence of the tort of civil conspiracy, but also that a breach of the *Combines Investigation Act* could satisfy the "unlawful" element of unlawful means conspiracy (pp. 471-72). Any question on this point was settled when *Lafarge* was cited in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 64, for the same proposition — that a breach of statute could satisfy the "unlawful means" component of the tort of unlawful means conspiracy.

84 The law admits of no ambiguity on this point. Prior to the enactment of the cause of action contained in what is now s. 36(1) of the *Competition Act*, a breach of s. 45(1) of the *Competition Act* was, as it still is, able to satisfy the "unlawful means" element of the tort of civil conspiracy.

#### *(2) The Enactment of the Statutory Cause of Action Did Not Oust Common Law and Equitable Actions*

85 Turning to Toshiba's other argument, the starting point in deciding whether a common law right of action has been legislatively ousted is the presumption that Parliament does not intend to abrogate common law rights (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 538). While s. 36(1) does not by its express terms oust common law causes

of action, legislation may rebut this presumption by ousting the common law either expressly or by necessary implication (*Gendron v. Supply & Services Union of the P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 (S.C.C.), at pp. 1315-16).

86 In *Gendron*, this Court held, for three reasons, that the *Canada Labour Code*, R.S.C. 1970, c. L-1 (as amended by S.C. 1972, c. 18; S.C. 1977-78, c. 27) ousted the common law duty of fair representation by necessary implication. First, the content of the duty in the *Canada Labour Code* was co-extensive with the common law duty such that "[t]he common law duty is ... not in any sense additive; it is merely duplicative" (p. 1316). Secondly, in enacting the *Canada Labour Code*, Parliament enacted a comprehensive and exclusive code, which indicated an intention for the *Canada Labour Code* to "occupy the whole field in terms of a determination of whether or not a union has acted fairly" (p. 1317). Finally, the *Canada Labour Code* provided a "new and superior method of remedying a breach" of the duty of fair representation (p. 1319).

87 None of these considerations apply to s. 36(1) of the *Competition Act*, relative to the common law tort of civil conspiracy. Section 36(1) is neither duplicative of the tort of civil conspiracy nor does it provide a "new and superior" remedy. Claims under s. 36(1) are subject to the limitation period stated in s. 36(4), whereas the tort of civil conspiracy is subject to provincial limitations statutes. Additionally, the tort of civil conspiracy allows for a broader range of remedies than is available under s. 36(1), such as punitive damages (*Watson*, at para. 57).

88 Nor does s. 36(1) represent a comprehensive and exclusive code regarding claims for anti-competitive conspiratorial conduct. That this is so is made plain by s. 62 of the *Competition Act* ("Civil rights not affected") which contemplates the subsistence of common law and equitable rights of action by providing that "nothing in this Part [which includes s. 45(1), in respect of which s. 36(1) creates a statutory right of action] shall be construed as depriving any person of any civil right of action." This is also consistent with this Court's conclusion in *Infineon* (at para. 95) that it was open for a plaintiff to proceed with its claim under art. 1457 of the *Civil Code of Québec* ("C.C.Q.") for the alleged violation of s. 45(1) of the *Competition Act*. Were s. 36(1) a complete and exclusive code, no such claim under the C.C.Q. would have been possible.

89 I therefore would reject this ground of appeal. The courts below correctly decided that it is not plain and obvious that Godfrey is precluded from bringing common law and equitable causes of action alongside his s. 36(1)(a) claim. Additionally, a breach of s. 45(1) of the *Competition Act* can supply the "unlawful" element of the tort of civil conspiracy. I see nothing in my colleague's reasons (at paras. 193-203) that deviates in any respect from my own on this point.

#### **D. Certifying Loss as a Common Issue**

90 Toshiba's final ground of appeal relates to the requirement in s. 4(1)(c) of the *Class Proceedings Act* that class members' claims raise common issues.

91 Godfrey sought to certify several loss-related questions as common issues, principally whether the class members suffered economic loss. (Sup. Ct. reasons, at para. 143). These questions were stated broadly enough that they could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss. And, because they could be taken in two different ways they might, following the common issues trial, be answered in different ways.

92 The certification judge certified the common issues relating to loss on the basis that the standard outlined in *Microsoft* requires that a plaintiff's expert methodology need only establish loss at the indirect-purchaser level (Sup. Ct. reasons, at paras. 167 and 179). The questions, therefore, of whether *any* class members suffered loss and of whether *all* class members suffered loss, fulfill the requirements of a common question. Toshiba says that he erred, and argues that *Microsoft* requires, for loss to be certified as a common issue, that a plaintiff's expert's methodology be capable either of showing loss to *each and every class member*, or of distinguishing between those class members who suffered loss from those who did not (A.F. (Toshiba), at para. 63). Dr. Reutter's methodology, Toshiba says, does not meet this standard (A.F. (Toshiba), at para. 76).

93 Godfrey responds that the courts below correctly held that *Microsoft* requires, as a condition of certifying loss as a common issue, only a methodology capable of establishing that overcharges were passed on to the indirect-purchaser level (R.F. (Toshiba Appeal), at para. 93). This standard is consistent with the principles underlying the commonality requirement,

since a single answer to whether loss reached the indirect-purchaser level significantly advances the litigation. Dr. Reutter's methodology meets this standard (R.F. (Toshiba Appeal), at para. 94).

94 The appropriate standard for certifying loss as a common issue at the certification stage is a question of law, to be reviewed on appeal for correctness. If I conclude that the certification judge identified the correct standard, then the certification judge's decision to certify the issues as common may not be disturbed absent a palpable and overriding error.

(I) *Dr. Reutter's Methodology*

95 Application of the *Microsoft* standard here requires some review of Dr. Reutter's report. In that report, he drew two conclusions:

1. All members of the proposed Class would have been impacted by the actions of defendants as alleged in the *Amended Notice of Civil Claim*, and
2. There are acceptable methods available to estimate any overcharge and aggregate damages that resulted from the alleged wrongdoing using evidence common to the proposed Class.

(A.R., vol. III, at p. 119).

96 These conclusions were based on the presence of four economic factors during the period of the alleged conspiracy that suggest that the ODD industry was vulnerable to collusive conduct (A.R., vol. III, at pp. 122-23 and 136). These factors are:

1. ODDs are commodity-like and manufactured to conform to industry standards;
2. During the proposed Class period [the] defendants accounted for a majority of all ODDs manufactured worldwide;
3. There are no economic substitutes for ODDs, and;
4. The manufacture of ODDs exhibits barriers to entry.

(A.R., vol. III, at pp. 119-20).

Because of the presence of these four factors, and the laws of supply and demand, Dr. Reutter concluded that "any conspiratorial overcharge would have been absorbed in part and passed-through in part at each level of the distribution chain, thus impacting all members of the proposed Class" (A.R., vol. III, at pp. 120 and 148).

97 In order to estimate overcharges and aggregate damages arising from the alleged price-fixing, Dr. Reutter developed a methodology to estimate the "but-for" price of the products subject to the anticompetitive conduct (A.R., vol. III, at p. 150). This involves use of mainstream and accepted economic methodologies based on multiple regression (Sup. Ct. reasons, at para. 158). In particular, it entails three steps:

First, for the matter at hand, an economic model describing the interaction of the supply of and demand for [ODDs] must be developed. Second, based on the economic model, data will need to be collected from various sources, including defendants (when available), as well as public and third party vendors. Third, standard statistical and econometric techniques are used to determine the extent to which the alleged conspiracy resulted in supra-competitive prices for [ODDs].

(A.R., vol. III, at p. 150).

98 In order to quantify the aggregate damages suffered by the proposed class, Dr. Reutter proposes to quantify the damages suffered by direct and indirect purchasers in the proposed class, which quantification can occur on a class-wide basis, using accepted economic and statistical methods (Sup. Ct. reasons, at para. 159). Overcharge, once estimated, can then be allocated among the class members (A.R., vol. III, at p. 167). Both aggregate damages and overcharge can be estimated using defendant transaction data, supplemented with data collected from public and private sources (A.R., vol. III, at p. 120).

99 The question of whether a plaintiff's methodology must show loss at the indirect purchaser level or loss to each and every class member appears to be moot, since Dr. Reutter opines that all class members were impacted by Toshiba's anti-competitive behaviour; his methodology therefore satisfies either standard. Toshiba, however, points to its cross-examination of Dr. Reutter at the certification hearing as obtaining the concession that his methodology cannot demonstrate that all class members suffered a loss (A.F. (Toshiba), at paras. 86-87). At the hearing before this Court, counsel for Godfrey argued that Toshiba's counsel mischaracterized what emerged from that cross-examination (Transcript, at p. 59). Because of this dispute, it is important to examine what actually occurred.

100 After confirming that Dr. Reutter would use an average selling price across the ODD market to estimate overcharge, the following exchange took place:

399 Q. And implicit in the average is the fact that some class members may not have suffered any loss, but they would be compensated by the amount of the average overcharge in relation to the purchase that they made?

A. It's an empirical question and I don't want to sound flippant, but it depends. There may be some — there may be some small subset or subset, I don't want to put an adjective in front of it. There may be some subset that were not impacted. I don't, from an economic standpoint, understand how that would be if there was, in fact, a conspiracy that fixed the price at the upstream and then that was, in fact, passed through.

.....  
403 Q. But if you conclude that some members were not impacted once you do the analysis, then they would be compensated even though they suffered no loss?

A. Again, it depends on how finely or where we want to draw the line of what we're analyzing or what we're measuring.

.....  
A. Someone could — the average is an average and if you want to throw a zero in there, as Dr. Levinsohn does, and say that there could be zero damages, I can't deny that, you know, if you average zero with some other numbers you get something other than zero by the definition of mathematics.

.....  
407 Q. ... Does the methodology which produces an average, is that average overcharge then applied to all class members irrespective of whether the average reflects the overage that they, in fact, incurred?

A. Yes.

408 Q. All right. And is there anything in the methodology that you are proposing that allows one to determine who those people are that suffered more or less? They're simply compensated on average?

.....  
A. In identifying him, no.

(A.R., vol. V, at pp. 216-19, emphasis added).

Dr. Reutter went on to explain that his methodology is capable of creating subgroups within the class. For example, if the evidence after discovery suggests that Toshiba stopped price-fixing for a few months and then resumed again, the class members who purchased ODDs during that time would be excluded from the model (A.R., vol. V, at pp. 220-21).

101 It is not at all apparent that this exchange shows Dr. Reutter resiling from his opinion that *all* class members would be impacted. On the contrary, he stated that he did not understand, from an economic standpoint, how it would be possible for some members of the class *not* to have suffered a loss if there was a conspiracy and the fixed price was passed through. Dr. Reutter's methodology therefore satisfies both the standards argued for by Toshiba and Godfrey.

102 In any event, even were Dr. Reutter's methodology incapable of showing loss to every class member, as I explain below, it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish

that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level. This leaves the only question being whether the courts below were correct in finding that Dr. Reutter's proposed methodology satisfies that required standard of commonality (C.A. reasons, at paras. 125 and 149). I see no reason to interfere with the certification judge's determination that Dr. Reutter's methodology satisfies this standard.

(2) *What is the Standard Required to Certify Loss as a Common Issue?*

103 The *Class Proceedings Act* provides that in order for an issue to be common, the issue need not "predominate over issues affecting only individual members" (s. 4(1)(c)). Section 1 of the *Class Proceedings Act* defines "common issues" as meaning:

- (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

104 In *Microsoft*, this Court reaffirmed the principles of "common issues" for the purpose of certification, as they were explained in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), at para. 108:

In ... *Dutton* ... this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

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

105 In *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1, [2014] 1 S.C.R. 3 (S.C.C.), this Court clarified that the "common success" requirement in *Dutton* should be applied flexibly. "Common success" denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another (para. 45). A question is considered "common", then, "if it can serve to advance the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

106 In *Microsoft*, the representative plaintiff sought to certify a class proceeding wherein the proposed class members consisted of the end consumers of products whose prices were allegedly fixed ("indirect purchasers"). After concluding that indirect purchasers have a cause of action for price-fixing, the Court considered the standard of expert methodology required to certify loss-related questions as common issues for indirect purchaser class proceedings. The key passage from the Court's reasons states:

One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.

The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha [v. Bayer Inc. (2003), 63 O.R. (3d) 22]*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis. The B.C.C.A. in *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 29, [2013] 3 S.C.R. 600 called for the plaintiff to show "only a credible or plausible methodology" and held that "[i]t was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases" (para. 68)....

.....

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied. [Emphasis added; paras. 114-18.]

107 While there may be some room for debate arising from the references to "class-wide basis" in the above passages, in my view, the Court was employing the term "class-wide basis" synonymously with "indirect purchaser level". *Microsoft*, therefore, directs that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers — that is, claimants at the "purchaser level". For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.

108 Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon Toshiba and will result in "common success" as explained in *Vivendi*, given that success for one class member will not result in failure for another. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level.

109 When thinking about whether a proposed common question would "advance the litigation", it is the perspective of *the litigation*, not the plaintiff, that matters. A common issues trial has the potential to *either* determine liability *or* terminate the litigation (W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 108). Either scenario "advances" *the litigation* toward resolution. Here, if it cannot be shown that loss was suffered by *any* purchasers at the indirect purchaser level, then *none* of the indirect purchasers have a cause of action and the action with respect to *all* the indirect purchasers would fail. I endorse, in this regard, this statement of the Ontario Superior Court in *Shah (Ont. S.C.J.)* (at para. 69):

Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff's expert's methodology failed in proof at trial, then the class members' claim would fail across the indirect class members' class because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or "level" of the distribution channel, and the Defendants would secure a discharge of liability against all the class

members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution channel, then there might have to be individual issues trials to determine each class member's entitlement.

*(3) Does Dr. Reutter's Methodology Meet the Standard?*

110 The certification judge identified the correct standard to certify commonality of loss as a common issue. As Toshiba acknowledges, the issue of whether the certification judge erred in applying that standard to Dr. Reutter's evidence is "subject to [...] deference from an appellate court" (A.F. (Toshiba), at para. 42). The certification judge's analysis of Dr. Reutter's methodology as supporting certification should not be overturned absent a palpable and overriding error.

111 I agree with the Court of Appeal that the reasoning of the certification judge reveals no basis for interfering with his common issues determination (C.A. reasons, at para. 163). There is no palpable and overriding error in the certification judge's conclusion that Godfrey showed some basis in fact for finding the loss issues to be common (Sup. Ct. reasons, at para. 180). I would therefore reject this ground of appeal.

*(4) Availability of Aggregate Damages*

112 I turn, finally, to Toshiba's final argument, which goes to the availability of the aggregate damages provisions found in Division 2 of the *Class Proceedings Act*, s. 29(1)(b), which states:

**Aggregate awards of monetary relief**

**29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

.....

(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.

113 Because all other issues of fact and law must be decided before the aggregate damages provisions could apply, it is plain that aggregate damages under s. 29(1)(b) are purely remedial, available only after all other common issues have been determined, including liability (see *Microsoft*, at para. 134). Irrespective, then, of whether aggregate damages are certified as a common issue, it is for the trial judge to determine, following the common issues trial, whether the statutory criteria are met such that the aggregate damages provisions can be applied to award damages (*Microsoft*, at para. 134; Winkler et al., at p. 121).

114 Here, the certification judge certified the following common issues related to aggregate damages for the non-umbrella purchasers (para. 143):

.....

(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

.....

(w) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

As I will explain below, I would not disturb the certification judge's decision to certify these issues as common issues. Again, it is important to remember that the certification of these issues in relation to the non-umbrella purchasers and the lack of certification in relation to the umbrella purchasers neither mandates nor forecloses the possibility of the trial judge awarding aggregate damages following the common issues trial. As this Court said in *Microsoft* (para. 134): "... the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found."

115 Toshiba has not appealed the certification of these issues as common issues. Rather, it takes issue with the certification judge's statement when discussing certification of the loss-related common issues that "the aggregate damage provisions [...] allow for an aggregate award even where some class members have suffered no financial loss" (Sup. Ct. reasons, at para. 169). Toshiba argues that this statement contradicts this Court's direction in *Microsoft* regarding the purely procedural quality of rights conferred by the *Class Proceedings Act* (A.F. (Toshiba), at para. 54). More particularly, Toshiba says that, by not

confining its liability to class members who are able to show actual loss, the certification judge used the *Class Proceedings Act* to confer substantive (and not merely procedural) rights so as to grant a remedy to persons who cannot prove a loss. In this way, Toshiba argues that the certification judge treated the indirect and umbrella purchasers as "juridical entities" and eliminated the distinction between proof of harm and aggregate damages (A.F. (Toshiba), at para. 7).

116 On this point, I agree with Toshiba that the certification judge's statement that the aggregate damages provisions allow for an award of damages for class members that suffered no loss is inconsistent with this Court's jurisprudence. This Court has repeatedly affirmed that the advantages conferred by class proceeding legislation are purely procedural, and that they do not confer substantive rights (see: *Hollick*, at para. 14; *Bisaillon c. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 (S.C.C.), at para. 17; *Microsoft*, at para. 131-32; *Sun-Rype*, at para. 75). In *Microsoft*, this Court could not have been clearer that the aggregate damages provisions cannot be used to establish liability:

With respect, I do not agree with this reasoning. The aggregate damages provisions of the CPA relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the CPA. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the B.C.S.C. in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (CanLII), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno's*, that "[t]he majority clearly recognized that s. 24 [of the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6] is procedural and cannot be used in proving liability" (para. 55). [Emphasis added; paras. 131-32.]

117 The foregoing signifies that, where (as here) loss is an element of the cause of action, using the aggregate damages provisions to distribute damages to class members who did not suffer a loss would be inconsistent with the purely procedural quality of the advantages conferred by the *Class Proceedings Act*. It follows that the reliance by the courts below (Sup. Ct. reasons, at para. 169; C.A. reasons, at para. 161) on s. 31(1)(a)(i) of the *Class Proceedings Act* (which provides that the court may order an aggregate damages award where it would be impractical or inefficient to identify the class members entitled to share in the award) as indicating that the plaintiff need not establish loss to each and every class member was, in my respectful view, mistaken. Section 31(1)(a)(i) is applicable only once liability has been established; otherwise, it would effectively confer substantive rights.

118 To be clear, I agree that the *Class Proceedings Act* permits individual members of the class to obtain a remedy where it may be difficult to demonstrate *the extent* of individual loss. What the jurisprudence of this Court maintains, however, is that, in order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has *actually suffered* a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that *all* class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have.

119 At this stage, it therefore remains possible that issues will arise, once it is determined that loss reached the indirect purchaser level, that affect individual class members' claims (*Microsoft*, at para. 140). In other words, while it was sufficient *for the purposes of certifying loss as a common issue* for Dr. Reutter's methodology to show merely that loss reached the indirect purchaser level, whether this methodology is sufficient *for the purposes of establishing* Toshiba's liability to *all* class members

will depend on the findings of the trial judge. In this case, Godfrey intends to use Dr. Reutter's methodology to prove that all class members suffered loss. It follows from the foregoing that, if he is successful in doing so, the same methodology can be used to establish both that Toshiba is liable to all class members and that aggregate damages are available to be awarded.

120 It should be borne in mind that the trial judge, following the common issues trial, might reach any one of numerous possible conclusions on the question of whether the class members suffered loss. For example, the trial judge might accept Dr. Reutter's evidence that *all* class members suffered a loss, in which case it would be open to the trial judge to use the aggregate damages provisions to award damages to all class members. Alternatively, the trial judge might conclude that *no* purchasers suffered a loss — for example, if the trial judge does not accept that Dr. Reutter's methodology demonstrates that loss reached the direct and indirect purchaser levels. Were that the case, the action would fail. Or, it might be that the trial judge finds that an *identifiable subset* of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom Toshiba is liable and who are therefore entitled to share in the award of damages. At the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach. I outline these possibilities and the availability of aggregate damages merely to provide guidance.

121 But again, to be clear — neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue. As was the case in *Microsoft*, "[t]he aggregate damages questions [the certification judge] certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount" (para. 135). The certification judge's decision to certify the questions related to aggregate damages for the non-umbrella purchasers should therefore not be disturbed.

## VI. Conclusion

122 I would dismiss the appeals.

123 Section 37(1) of the *Class Proceedings Act* provides that "neither the [British Columbia] Supreme Court nor the Court of Appeal may award costs to any party to an application for certification". The parties appear to take this as precluding this Court from awarding costs at those courts, and seek only their costs at this Court. I would therefore award Godfrey costs in this Court only.

### *Côté J. (dissenting in part):*

124 These appeals raise a fundamental question: are courts at a stage where the balance struck by Parliament in Canada's competition law should be upset by applying new principles of liability for price-fixing cases, resulting in near-automatic certification of class actions? In doing so, are courts going a bridge too far?

## I. Overview

125 These appeals concern the certification of a proposed class action brought in British Columbia by representative plaintiff Neil Godfrey (the "Plaintiff", respondent in these appeals) against a number of defendants (the "Defendants", appellants in these appeals) that manufacture or supply devices known as optical disc drives ("ODDs"). The Plaintiff alleges that the Defendants conspired to fix the prices of ODDs between January 1, 2004 and January 1, 2010 (the "Class Period"). He relies on five causes of action against the Defendants: a contravention of s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34 (which is actionable pursuant to s. 36(1) of that statute), the tort of unlawful means conspiracy, the tort of predominant purpose conspiracy, unjust enrichment, and waiver of tort.

126 The proposed class is essentially comprised of three groups. Direct purchasers are the class members who purchased an ODD or an ODD product manufactured or supplied by a Defendant *from that Defendant*. Indirect purchasers are the class

members who purchased an ODD or an ODD product manufactured or supplied by a Defendant *from a non-Defendant*. Neil Godfrey is one of those indirect purchasers. Finally, class members who purchased from a non-Defendant an ODD or an ODD product *that was not manufactured or supplied by a Defendant* are known as "Umbrella Purchasers". The Plaintiff alleges that all of the class members in these three groups have claims against the Defendants in respect of the alleged price-fixing conspiracy.

127 The Plaintiff's action against most of the Defendants was commenced on September 27, 2010. He brought a separate action against certain additional Defendants — Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc. (the "Pioneer Defendants") — on August 16, 2013, roughly three and a half years following the end of the Class Period.

128 At the certification stage, Masuhara J. (the "Certification Judge") consolidated the two actions and conditionally certified them as class proceedings, in accordance with the criteria set out in s. 4(1) of British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ([2016 BCSC 844](#) (B.C. S.C.)). The Defendants' appeals to the British Columbia Court of Appeal were unanimously dismissed ([2017 BCCA 302](#), [1 B.C.L.R. \(6th\) 319](#) (B.C. C.A.)).

129 The Defendants that challenge the Court of Appeal's order before this Court in file no. 37810 (the "Toshiba Appeal") contend that both the Certification Judge and the Court of Appeal erred in three respects: (a) by permitting the Umbrella Purchasers to claim under the statutory cause of action in s. 36(1) of the *Competition Act*; (b) by allowing common law and equitable relief based on a breach of the anti-competitive prohibitions in Part VI of the *Competition Act*; and (c) by finding that loss-related issues were common among the indirect purchasers based on the expert methodology proposed by the Plaintiff.

130 The appeal brought by the Pioneer Defendants in file no. 37809 (the "Pioneer Appeal") raises those same issues, as well as two unique issues pertaining to the treatment of the limitation defence by the courts below. The Pioneer Defendants argue that the Certification Judge erred in holding that the action against them can proceed — notwithstanding that it was commenced more than two years following the end of the Class Period — based on the application of the discoverability rule and the doctrine of fraudulent concealment. In this Court, the Pioneer Defendants submit (a) that the discoverability rule does not apply to postpone the commencement of the limitation period in s. 36(4)(a)(i) of the *Competition Act*, and (b) that the doctrine of fraudulent concealment cannot toll that limitation period unless the Plaintiff can establish that he and the other class members stand in a "special relationship" with the Pioneer Defendants. It follows, in their submission, that the Plaintiff's pleadings do not disclose a cause of action against them in accordance with s. 4(1)(a) of the *Class Proceedings Act*.

131 I would allow both appeals in part. With respect to the limitations issues raised in the Pioneer Appeal, my view is that the discoverability rule does not apply to the limitation period in s. 36(4)(a)(i) because the event that triggers the commencement of the limitation period occurs without regard to the state of a plaintiff's knowledge. As for the doctrine of fraudulent concealment, my view is that it is not plain and obvious that it will toll the operation of the limitation period in this case only if the Plaintiff is capable of demonstrating a special relationship existed. It may be that something tantamount to or commensurate with the existence of a special relationship would be sufficient to toll the limitation period. However, simply establishing the existence of the conspiracy will not suffice.

132 With respect to the issues raised in the Toshiba Appeal, which are common to both appeals, I agree with my colleague Brown J. — although for different reasons — that the *Competition Act* does not prevent a plaintiff from advancing a claim at common law or in equity together with, or instead of, a claim pursuant to the statutory cause of action in s. 36(1) in respect of the same anti-competitive prohibitions. I disagree with my colleague on the other two issues raised in that appeal, however. In my view, the Umbrella Purchasers cannot succeed in their claims against the Defendants under s. 36(1) of the *Competition Act*. Likewise, I cannot accept that a methodology capable of proving only that loss reached the indirect purchaser level in the distribution chain (and incapable of establishing loss in any individualized manner) is sufficient for the purpose of certifying the loss-related questions proposed by the Plaintiff as "common issues", pursuant to s. 4(1)(c) of the *Class Proceedings Act*.

## II. The Pioneer Appeal

133 The two unique issues raised in the Pioneer Appeal are as follows:

- (a) Does the discoverability rule apply to the limitation period established by s. 36(4)(a)(i) of the *Competition Act*?
- (b) Must there be a special relationship between the parties to an action in order for the doctrine of fraudulent concealment to toll the limitation period?

134 The statutory cause of action under s. 36(1)(a) of the *Competition Act*, which allows a claimant to recover for loss or damage resulting from conduct contrary to any provision of Part VI of that Act, is subject to the limitation period established by s. 36(4). These two provisions read as follows:

**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.

.....

**(4)** No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

- (i) a day on which the conduct was engaged in, or
- (ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later...

135 The Plaintiff's action against the Pioneer Defendants, which is based in part on s. 36(1) of the *Competition Act*, was commenced on August 16, 2013 — more than two years following the end of the Class Period, which is the period during which the alleged price-fixing conspiracy took place. The Pioneer Defendants take the position that the Plaintiff's claim for recovery under s. 36(1) of the *Competition Act* is time-barred by the limitation period in s. 36(4)(a)(i). The Plaintiff, for his part, says that both the discoverability rule and the doctrine of fraudulent concealment apply to toll that limitation period. If either applies, then the limitation clock will have begun ticking on the date that he discovered, or ought to have discovered, the existence of the alleged conspiracy.

136 In order to succeed, therefore, the Pioneer Defendants must persuade this Court that *neither* the discoverability rule *nor* the doctrine of fraudulent concealment has any application in this case.

**A. Does the Discoverability Rule Apply to the Limitation Period Contained in the Statutory Cause of Action in Section 36 of the Competition Act?**

137 On this first limitations issue raised in the Pioneer Appeal, my colleague takes the view that the discoverability rule postpones the commencement of the limitation period in s. 36(4)(a)(i) until the time at which the potential claimant discovers, or is reasonably capable of discovering, the existence of the impugned conduct that forms the basis of a claim under s. 36(1). I respectfully disagree, for the reasons that follow.

**(1) The Discoverability Rule**

138 Limitation clauses are statutory provisions that place temporal limits on a claimant's ability to institute legal proceedings. The expiry of a limitation period has the effect of "extinguish[ing] a party's legal remedies and also, in some cases, a party's legal

rights" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016) ("Mew et al."), at p. 3). As this Court explained in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), statutory limitation clauses reflect the balance struck by the legislature between three distinct policy rationales: granting repose to defendants, avoiding evidentiary issues relating to the passage of time, and encouraging diligence on the part of plaintiffs.

139 As statutory provisions, limitation clauses give rise to a number of interpretative issues. One important issue is the point at which the limitation period begins running — and in particular, whether the legislature intended that it commence only when the plaintiff has knowledge that the event which sets the clock ticking (sometimes referred to as the "triggering event") has in fact occurred. This is key, because a determination of when a limitation period expires depends on both its duration and its commencement (Mew et al., at pp. 69-70).

140 Discoverability is a judge-made rule of statutory interpretation that assists in determining whether the event triggering the commencement of a limitation period depends upon the state of the plaintiff's knowledge. In *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.) [hereinafter Central Trust Co.], this Court recognized a "general rule that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (p. 224). What this means is that a limitation period that commences upon "the accrual of the [plaintiff's] cause of action", or wording to that effect, will begin running only when the plaintiff discovers, or is reasonably capable of discovering, the facts giving rise to the cause of action (Mew et al., at p. 69). That is the point at which that plaintiff's ability to sue the defendant crystallizes.

141 This Court expanded upon the principles applicable to the discoverability rule in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.). In that case, Major J. clarified that discoverability is not a general rule that applies *despite* the wording of a legislative enactment, but rather an "interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue" (para. 37). In so doing, he endorsed the approach to this rule that had been taken by the Manitoba Court of Appeal in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.):

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [para. 22]

142 The limitation period in *Peixeiro* ran for two years from the time when "damages were sustained" by the plaintiff (para. 2). Applying the test in *Fehr*, Major J. found it "unlikely that by using the words 'damages were sustained', the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge" (para. 38). In his view, "[t]he use of the phrase 'damages were sustained' rather than 'cause of action arose' ... is a distinction without a difference" (*ibid.*). He therefore concluded that the discoverability rule applied to the limitation period at issue in that case.

143 A different conclusion was reached by this Court on the facts in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.). That dispute turned, in part, on the interpretation of a limitation period that "prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death" (para. 18, referring to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32). Bastarache J., writing for a unanimous Court, once again affirmed the test set out in *Fehr* and reiterated that discoverability is not a general rule but rather an "interpretative tool for construing limitation statutes" (para. 23). Applying the *Fehr* test to the limitation provision at issue in that case, Bastarache J. concluded as follows:

Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and the injured party's knowledge. I

agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies. [Emphasis added; para. 27.]

144 The Plaintiff in the instant case agrees that *Fehr* sets out the test for whether a limitation period is subject to the discoverability rule (R.F. (Pioneer Appeal), at para. 29), and my colleague affirms this approach at paras. 31-35 of his reasons. However, he goes on to opine that "where the event triggering the limitation period is an *element* of the cause of action, the legislature has shown its intention that the limitation period be linked to the cause of action's accrual, such that discoverability will apply" (Brown J.'s reasons, at para. 38 (emphasis added)). In other words, he equates language referring to the *accrual* or *arising* of the cause of action in its entirety with language referring to the *occurrence of an element* of the cause of action; in his view, both evidence a legislative intent that the discoverability rule apply.

145 Although this approach accords with the view expressed by the British Columbia Court of Appeal in this case (paras. 89-90), as well as by the Ontario Court of Appeal in *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81 (Ont. C.A.), at paras. 40, 43 and 45, my respectful view is that it expands the scope of the discoverability rule in a manner that is neither consistent with precedent nor justifiable in principle.

146 First, the suggestion that discoverability applies in all cases where the triggering event is "the occurrence of an element of the underlying cause of action" (Brown J.'s reasons, at para. 44) broadens the test set out by the Manitoba Court of Appeal in *Fehr* — a test which my colleague purports to endorse at paras. 33-35 of his reasons. In that case, Twaddle J.A. was very clear in explaining that the discoverability rule applies "[w]hen time runs from 'the accrual of the cause of action' or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained" (para. 22). Only these two situations were identified; there was no indication whatsoever that the discoverability rule ought to apply *automatically* in circumstances where the triggering event is merely the occurrence of a component element of the cause of action (and not the accrual of the cause of action in its entirety).

147 Not only did this Court endorse *Fehr* in both *Peixeiro* and *Ryan*, but both appeals were resolved on a fairly straightforward application of this approach to discoverability. In *Peixeiro*, this Court reasoned that the limitation period — which commenced when "damages were sustained" — fell within the first category outlined in *Fehr* (to which the discoverability rule applies), given that this triggering event did *not* occur without regard to the plaintiff's knowledge. Likewise, *Ryan* was decided on the basis that the events triggering the commencement of the limitation period at issue — the death of the defendant or the granting of letters of administration or probate — occurred regardless of the plaintiff's state of mind and therefore fell within the second category in *Fehr*, to which the discoverability rule has no application (para. 27). Put simply, neither case was resolved by determining whether the triggering event was "related to", "linked to the basis of" or "an element of" the plaintiff's cause of action.

148 It is true that this Court in *Ryan* stated that the discoverability rule does not apply where the limitation period "is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge *or the basis of the cause of action*" (para. 24 (emphasis added)). The Court of Appeal in the present case characterized this as an "unequivocal statement ... that the rule can apply where the limitation period is linked to 'the basis of the cause of action'" (para. 89). With respect, the Court of Appeal's narrow focus on this specific statement ignores the broader context in which it was made. In the immediately preceding paragraph in *Ryan* (i.e. para. 23), Bastarache J. reaffirmed — and reproduced in full — the approach to discoverability set out in *Fehr*, and the statement in question appears to be nothing more than a paraphrased summary of this well-accepted approach. Moreover, in the same paragraph (i.e. para. 24), Bastarache J. explained that the discoverability rule *does* apply where the commencement of the limitation period is "related by the legislation to the arising or accrual of the cause of action". From my reading of *Ryan*, I see no intent on the part of this Court to broaden the traditional approach to discoverability, and for this reason, my view is that the words "basis of the cause of action" in para. 24 of *Ryan* should be understood as essentially synonymous with the "arising or accrual of the cause of action".

149 In any event, principle also commands that the discoverability rule apply *only* where the limitation period runs from the "accrual of the cause of action" (or wording to that effect) or from the occurrence of some event that is related to the state of the plaintiff's knowledge. This is because discoverability is nothing more than a tool of statutory interpretation. Where a legislature provides that a limitation period is triggered by an event whose occurrence depends on the plaintiff's knowledge, courts give effect to this legislative direction by calculating the running of the limitation period from the point at which the plaintiff acquired or was capable of acquiring such knowledge. Conversely, where the legislature provides that a limitation period is triggered by an event that occurs without regard to the plaintiff's state of mind, the courts do not — and indeed, cannot — apply the discoverability rule to postpone the commencement of the limitation period until such time as the plaintiff discovered, or ought to have discovered, that the event had taken place. Courts are bound to interpret and apply statutory law; they cannot rewrite it (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (S.C.C.), at paras. 54-55 and 58).

150 Limitation periods that begin running upon the accrual of the plaintiff's cause of action evidently fall within the first category outlined in the preceding paragraph. Mew et al. note that a cause of action arises only "when all of the elements of a wrong existed, such that an action could be brought" (p. 69), and conversely, that "no cause of action can be said to have accrued unless there is a plaintiff available who is capable of commencing an action and a defendant in existence who is capable of being sued" (p. 70 (footnotes omitted)). Because a cause of action cannot accrue before the plaintiff discovers that they have the right to commence proceedings against the defendant, a legislature which provides for a limitation period that begins running at that point in time necessarily intends the discoverability rule to apply. This explains the reasoning behind the "general rule" set out by this Court in *Central Trust Co.* (see para. 140 above) and affirmed in *M. (K.)*. It is essential to recognize that the limitation period in each case was triggered by the accrual or arising of the plaintiff's cause of action.

151 Conversely, "the occurrence of an element of the underlying cause of action" (Brown J.'s reasons, at para. 44) will not always fit within either category outlined above at para. 149. It may be that the occurrence of such an event does in fact depend on the state of the plaintiff's knowledge, but unlike the accrual of a cause of action, this does not invariably follow as a matter of logical necessity. In *Peixeiro*, for example, this Court held that the point at which damages are sustained — a constituent element of (among other things) the tort of negligence — depends on when the plaintiff actually has knowledge of his or her injury. Knowledge will not form part of every element of the cause of action in negligence, however. A breach of a standard of care, for example, may occur years or even decades before the plaintiff first learns about it. Although such a breach is a prerequisite to a successful claim in negligence, it is also something that takes place without any regard to the plaintiff's state of mind.

152 It is for this reason that I disagree in principle with the proposition that the discoverability rule must *always* apply where the triggering event "is related to", "is linked to the basis of" or "constitutes an element of" the plaintiff's cause of action. My position is instead consistent with that stated by Marshall J.A. of the Newfoundland Court of Appeal in *Snow (Guardian ad litem of) v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.):

Where the limitation period is set by the terms of the statute to run from the time when an action arises or accrues, as in *Kamloops [v. Nielsen*, [1984] 2 S.C.R. 2] and *Central Trust*, there is room to imply that the legislation does not intend the period to commence until the injured party has, or ought to have, an awareness of the claim's existence. The criteria under such legislation provisions, therefore, imports a mental element. However, when the limitation statute explicitly ties the prescription period to a specific occurrence, such as the termination of professional services, knowledge of the claimant cannot be construed as a factor. In such instances it is the happening of the factual event which is explicitly relevant and any interpretation implying the period to be related to the claimant's consciousness of the circumstances is precluded. No scope exists to imply the discoverability rule into the legislative intent. [Emphasis added; para. 38.]

153 With this in mind, I am respectfully of the view that my colleague's approach is undermined by the well-settled principle that the discoverability rule is fundamentally a rule of statutory interpretation. The fact that a limitation period begins running upon the *occurrence of an element* (and not upon the *accrual* or *arising*) of the plaintiff's cause of action is not, on its own, indicative of any legislative intent regarding the applicability of the discoverability rule. As I have already indicated, my colleague's conclusion is the same as the one reached by the Court of Appeal in this case and by the Ontario Court of Appeal in *Fanshawe College of Applied Arts and Technology*: in such circumstances, according to him, discoverability applies

automatically. This, however, creates an arbitrary distinction between triggering events that are related to the cause of action and those that are not, despite the fact that both may occur independently of the plaintiff's state of mind. How can it fairly be said that the legislature *intended* the discoverability rule to apply to one and not the other? Although knowledge is necessary for a cause of action to fully accrue to the plaintiff, it does not follow that an element of the cause of action also occurs only when the plaintiff has knowledge thereof.

154 A preferable approach is instead one that considers each statutory limitation clause on its own terms, recognizing that a triggering event that relates to a cause of action can, *but need not*, be dependent upon the plaintiff's state of mind. This approach is faithful to this Court's jurisprudence, and respectful of the notion of discoverability as an interpretative tool and not a general rule that allows clear statutory wording to be disregarded. For my part, I would reaffirm the approach laid out in *Fehr* without any modification.

#### (2) Application of the Discoverability Rule to the Limitation Period in Section 36(4)(a)(i)

155 Given the foregoing, it is no surprise that I disagree with my colleague that the discoverability rule applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act* on the basis that "the event triggering this particular limitation period is an element of the underlying cause of action" (Brown J.'s reasons, at para. 44). Rather, the conclusion that results from applying the law as I explained it in the preceding section is that this limitation period commences on the day on which the conduct contrary to Part VI actually takes place, and not the day on which a potential claimant discovers, or is reasonably capable of discovering, that it took place.

156 Section 36 of the *Competition Act* was "carefully constructed" to create a limited cause of action in respect of serious criminal offences under Part VI of the *Competition Act* (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (S.C.C.), at p. 689). For example, Parliament limited recovery to an amount "equal to the loss or damage proved to have been suffered" by the plaintiff as a result of the prohibited conduct, thereby foreclosing the availability of other types of damages, such as aggravated or punitive damages. Section 36(2) provides plaintiffs with a shortcut to proving conspiracy where the defendant was convicted of the underlying offence. And of significance for our purposes is the fact that this cause of action is circumscribed by a complex twofold limitation period at s. 36(4) that reflects the balance struck by Parliament among the certainty, evidentiary and diligence rationales that underlie this area of the law.

157 The wording of the limitation period set out in s. 36(4)(a)(i) provides ample support for the proposition that the two-year period commences independently of when the plaintiff first learns of the wrongdoing. Rather than having the limitation period commence upon the accrual of the cause of action (as was the case in *Central Trust Co. and M. (K.)*), Parliament decided that it would instead commence on "a day on which the conduct was engaged in" — which, contrary to the position taken by my colleague, is *not* "wording to [the same] effect" as "accrual of the cause of action" (paras. 37 and 41). There is simply no link between this triggering event and the plaintiff's state of mind; it is, in short, an "event which clearly occurs without regard to the injured party's knowledge". The Certification Judge's reading of this provision led him to the same conclusion (para. 54 (CanLII)). It was the existence of conflicting jurisprudence on this point that caused him "not [to be] satisfied that it is plain and obvious that the discoverability principle can never apply to the limitation period in s. 36(4)" (para. 58).

158 I acknowledge that the "discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule" (*Peixeiro*, at para. 38). However, a consideration of the context surrounding s. 36(4)(a)(i) lends further support to the conclusion that the discoverability rule does not apply.

159 First, the cause of action in s. 36(1)(a) is based on two essential elements: (i) the defendant engaging in conduct contrary to any provision of Part VI, and (ii) the plaintiff suffering loss or damage as a result of such conduct. It is only upon the occurrence of both events that the plaintiff can commence proceedings on the basis of this statutory cause of action. Cognizant of this, and of the fact that conspiracies of this nature take place in secret, Parliament decided that the limitation period would not begin when the plaintiff actually sustained loss or damage, but rather when the defendant engaged in the prohibited conduct. It is important to keep in mind that the point at which the conduct is engaged in necessarily precedes the point at which a claimant

will suffer loss or damage as a result of such conduct. I would also note that the offence under s. 45 is complete as soon as an unlawful agreement is made, meaning that the "conduct" is "engaged in" even if the agreement is not actually implemented or prices do not actually increase. It follows as a direct consequence of this legislative choice that the limitation period can in fact expire before the plaintiff is in a position to commence proceedings under s. 36(1)(a).

160 Second, s. 36(4)(a)(ii) provides a mechanism for the plaintiff to advance a claim that may be barred by s. 36(4)(a)(i): even if two years have expired from the day on which the prohibited conduct was engaged in, the limitation period will restart on the day on which criminal proceedings relating to the impugned conduct are finally disposed of. While s. 36(4)(a)(ii) applies only where the alleged conduct contrary to Part VI is the subject of criminal prosecution, it nevertheless provides an indication that Parliament was aware of the strictness of s. 36(4)(a)(i) and chose to enact this provision as the *only* means of relieving against it.

161 Third, and unlike claims subject to the general limitation period in British Columbia's *Limitation Act*, S.B.C. 2012, c. 13, s. 21, Parliament has not subjected claims under s. 36(1)(a) to any ultimate limitation period. Interpreting s. 36(4)(a)(i) as commencing only when the underlying conduct becomes discoverable will therefore have the effect of leaving defendants at risk of lawsuit indefinitely. As Paul-Erik Veel helpfully observes, the result would be that "companies could face claims decades later, well after the employees involved in the alleged conspiracy may have left and documents lost, without any ability to defend themselves" (*Waiting forever for the axe to drop? Discoverability and the limitation period for Competition Act claims*, *Lenczner Slaght*, August 12, 2016 (online)). This runs contrary to the certainty and evidentiary rationales that underlie the law of limitations.

162 Fourth, the two-year limitation period was enacted by Parliament at a time when limitation periods were comparatively much longer. For example, the provincial limitations statutes that were in force at the time in Ontario and British Columbia set out a general limitation period of six years (*The Limitations Act*, R.S.O. 1970, c. 246, s. 45(1); *Statute of Limitations*, R.S.B.C. 1960, c. 370, s. 3). The relatively short limitation period at issue here, which commences even before the cause of action fully crystallizes, provides a further indication of the premium that Parliament placed on granting repose to defendants and encouraging diligence by potential plaintiffs.

163 The statutory provision at issue here is therefore akin to s. 138.14 of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, which this Court recently considered in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 (S.C.C.); because there is no suspension mechanism built into that statutory limitation clause, "the limitation period begins to run regardless of knowledge on the plaintiff's part, be it on when a document containing a misrepresentation is released, when an oral statement containing a misrepresentation is made, or when there is a failure to make timely disclosure" (para. 79). Under both provisions, the limitation period is triggered by an event that is unrelated to the state of the plaintiff's knowledge. This is consistent with a number of judicial decisions that considered this issue as it pertains to s. 36 of the *Competition Act* (see *CCS Corp. v. Secure Energy Services Inc.*, 2014 ABCA 96, 575 A.R. 1 (Alta. C.A.), at para. 4; *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825, 67 C.P.R. (4th) 241 (F.C.), at para. 488; *Garford Pty Ltd. v. Dywidag Systems International Canada Ltd.*, 2010 FC 996, 88 C.P.R. (4th) 7 (F.C.), at paras. 28-33; *Eli Lilly & Co. v. Apotex Inc.*, 2009 FC 991, 80 C.P.R. (4th) 1 (F.C.) at para. 729; *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONSC 1252 (Ont. S.C.J.), at paras. 643-46 (CanLII)).

164 On a different note, I am not persuaded that a short limitation period, to which the discoverability rule does not apply, will defeat the purpose for which Parliament enacted s. 36 and the rest of the *Competition Act*. Civil liability under s. 36 is not the exclusive means by which persons are held to account for anti-competitive conduct: the statute also provides for a variety of penal and administrative consequences for activities that reduce competition in the marketplace. Moreover, as I will explain later in these reasons, alleged wrongdoers may also be liable at common law or in equity for conduct that constitutes an offence under Part VI. A short limitation period for the cause of action under s. 36(1) therefore does not defeat Parliament's objective of "maintain[ing] and encourag[ing] competition in Canada ... in order to provide consumers with competitive prices and product choices" (*Competition Act*, s. 1.1).

165 As a result, I disagree with my colleague that the limitation period in s. 36(4)(a)(i) begins to run on the date that the conduct contrary to Part VI is either discovered or discoverable by the plaintiff. Properly interpreted, the triggering event in this statutory provision "clearly occurs without regard to the injured party's knowledge", and the provision does not contain

"wording to [the same] effect" as "accrual" of the s. 36 cause of action. A proper application of the *Fehr* test therefore leads to the conclusion that the discoverability rule does not apply. Applying discoverability would make the limitation period chosen by Parliament virtually meaningless and create uncertainty around the likelihood and timing of significant litigation.

**B. Must There be a Special Relationship Between the Parties to an Action in Order for the Doctrine of Fraudulent Concealment to Toll the Limitation Period?**

166 The fraudulent concealment doctrine is a doctrine that operates to prevent a limitation clause from being used as an instrument of injustice in circumstances where a defendant conceals the facts giving rise to a potential cause of action from a plaintiff. Because it would be unconscionable for that defendant to then rely on the limitation clause as a defence to the claim, equity "suspend[s] the running of the limitation clock until such time as the injured party can reasonably discover the cause of action" (*Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (Ont. C.A.), at para. 28). The Canadian approach to this doctrine has its origin in the England and Wales Court of Appeal's decision in *Kitchen v. Royal Air Force Assn.*, [1958] 2 All E.R. 241 (Eng. C.A.), in which Lord Evershed, M.R., wrote as follows:

It is now clear ... that the word "fraud" in s. 26(b) of the *Limitation Act, 1939*, is by no means limited to common law fraud or deceit. Equally, it is clear ... that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added; p. 249.]

167 The Pioneer Defendants, relying on *Kitchen* and the jurisprudence that followed, argue that the existence of a "special relationship" between the plaintiff and the defendant is a necessary precondition to the application of the doctrine of fraudulent concealment. Because such a relationship was not pleaded by the Plaintiff, they say that this doctrine cannot operate to toll the limitation period and that the claim against them must fail accordingly.

168 I would note that this Court has only ever considered the operation of fraudulent concealment in the context of a special relationship between the plaintiff and the defendant. This Court applied that doctrine in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), after Dickson J. (as he then was) found that the conduct of the Indian Affairs Branch of the federal government was "unconscionable, having regard to the fiduciary relationship between the Branch and the [Musqueam Indian] Band" (p. 390). Likewise, this Court recognized the existence of a special relationship between a parent and a child in *M. (K.)*, a case concerning incest. There, La Forest J. explained that such cases necessarily involve "a grievous abuse of a position of confidence", since "incest is really a double wrong — the act of incest itself is followed by an abuse of the child's innocence to prevent recognition or revelation of the abuse" (p. 58). Canadian courts have also found special relationships to exist between lawyers and clients, physicians and patients, employers and terminated employees, and trustees and beneficiaries (Mew et al., at p. 234).

169 That said, I am not prepared to go so far as to say that a special relationship — which I understand to be one that is based on trust and confidence — is always a prerequisite or a necessary element for the operation of the fraudulent concealment doctrine. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.), Binnie J. explained that fraud in equity is broader than it is at common law, as it captures "transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (para. 39 (emphasis added), citing *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C. S.C.), at p. 37). He further noted that this ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", adding that "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken" (*ibid.* (emphasis added), citing *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19). What constitutes "unconscionable conduct" for the purposes of the doctrine of equitable fraud will vary from case to case and will depend in part on the connection between the parties. This is helpfully explained by Ian Spry in his leading textbook, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th ed. 2014):

Fraud in this sense includes, not only fraud in the sense of active dishonesty that gave rise to an action of deceit at law, but also the taking of active steps with the intention of concealing the existence of the material cause of action. The better view is that it includes also, in cases where the defendant is under a special duty to the plaintiff, a failure to disclose the events which have taken place and which give rise to the cause of action in question. So it was said by Lord Evershed that in this context fraud includes "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other". [p. 440.]

170 In effect, in the commercial context, limiting the application of the fraudulent concealment doctrine to only those situations where there is a special relationship between the parties presupposes that, in that context, there can be no injustice resulting from the application of a limitation period *unless* a special relationship exists. Put differently, insofar as there may be situations in which the fraudulent concealment doctrine would rectify an injustice caused to a plaintiff by the application of a limitation period, *even though there exists no special relationship* between the parties, then limiting the doctrine by requiring such a relationship could be seen as contradicting the very spirit of a doctrine that aims to protect against unconscionable conduct.

171 Based on this understanding of fraudulent concealment, my view is that it is not plain and obvious that equity can intervene to toll the applicable limitation period only in cases where there exists a special relationship; it may be that it can also intervene in cases — at least in the commercial context, as here — where the plaintiff can demonstrate something commensurate with or tantamount to a special relationship.

172 To be sure, the mere allegation of a price-fixing agreement among defendants is not sufficient *on its own* for the fraudulent concealment doctrine to toll the applicable limitation period. If it were, the limitation period for which Parliament specifically provided in s. 36(4) of the *Competition Act* would be meaningless in these circumstances, given the fact that price-fixing agreements are, in practice, carried out in secret.

173 In the case at hand, the Plaintiff did not plead that there was a special relationship between the class members and the Pioneer Defendants. However, as I explained above, it is not plain and obvious that this is fatal to the Plaintiff's fraudulent concealment claim, since a special relationship may not be a necessary precondition to the application of the fraudulent concealment doctrine. While the mere allegation of a price-fixing agreement among the Pioneer Defendants is not sufficient *on its own* for this doctrine to toll the applicable limitation period, in the commercial context, a showing of fraud in equity tantamount to or commensurate with the existence of a special relationship could be enough.

174 The Plaintiff pleaded that the Pioneer Defendants "took active steps to, and did, conceal the unlawful conspiracy from their customers" (R.F. (Pioneer Appeal)). Given that we are at the certification stage, I am prepared to conclude that it is not "plain and obvious" that the fraudulent concealment doctrine has no application in this case. Whether or not the Plaintiff will be successful in relying on this doctrine to toll the applicable limitation period in these circumstances, however, will depend on what he can prove at trial — that is, whether he can establish a special relationship, or maybe something tantamount to or commensurate with one could suffice.

175 On the basis of the foregoing, while the discoverability rule does not apply to toll the limitation period, it may be that the fraudulent concealment doctrine does, and, accordingly, I would dismiss the Pioneer Appeal regarding that question. However, there remain three more issues, common to all Defendants, and because the Pioneer Defendants have adopted the submissions of the Toshiba Appeal with regards to these common issues, I will consider them together in the subsequent section. For the aforementioned reasons and for the reasons that follow, I would allow the Pioneer Appeal in part.

### **III. The Toshiba Appeal**

176 The issues in the Toshiba Appeal, which are common to both appeals, are threefold:

- (a) Is it plain and obvious that the Umbrella Purchasers' claims under s. 36(1)(a) of the *Competition Act* cannot succeed?

(b) Is it plain and obvious that s. 36(1) bars a plaintiff from alleging common law and equitable causes of action in respect of conduct that breaches the prohibitions in Part VI of the *Competition Act*?

(c) What standard must a representative plaintiff meet in order to have loss-related questions certified as "common issues" among indirect purchasers, and has the Plaintiff met this standard in the present case?

177 I write separately because my views diverge from those of my colleague on all three of these issues. I will address each in turn.

**A. Is it Plain and Obvious That the Umbrella Purchasers' Claims Under Section 36(1) of the Competition Act Cannot Succeed?**

178 The first issue in the Toshiba Appeal is whether the Certification Judge erred in holding that the Umbrella Purchasers can advance claims under s. 36(1) of the *Competition Act* against the Defendants. The Defendants submit that the Certification Judge did so err, and that upholding his conclusion on this point will have the effect of opening up "a potentially limitless scope of liability that could not have been contemplated by Parliament and is contrary to the scheme of the *Competition Act*" (A.F. (Toshiba Appeal), at para. 97).

179 I agree with my colleague that resolving this issue requires an exercise in statutory interpretation, under which the words of the *Competition Act* are to "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). However, we must not lose sight of the fact that our contextual approach to statutory interpretation also draws on the relevant legal principles and norms (see *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967 (S.C.C.), at para. 31; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at para. 43; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 48).

180 On its face, s. 36(1) appears to be worded broadly enough to capture claims by umbrella purchasers, so long as they can prove that they "suffered loss or damage as a result of" the conduct specified in para. (a) or (b). According to the Defendants, however, this statutory provision must be interpreted in a manner that is consistent with the principles that limit the extent of liability at common law (A.F. (Toshiba Appeal), at paras. 97-99). They point specifically to two legal principles that are relevant for the purposes of liability to umbrella purchasers: indeterminacy and remoteness. At its core, therefore, the issue under this heading raises the question of whether those principles can inform our interpretation of s. 36(1) of the *Competition Act* — and in particular, the extent of a defendant's liability thereunder in the context of a price-fixing claim brought by persons whose ODD or ODD product was manufactured or supplied by a non-Defendant.

181 *Indeterminacy* is a policy consideration that negates the imposition of a duty of care in negligence where it would expose the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp. v. Touche* (1931), 174 N.E. 441 (U.S. N.Y. Ct. App. 1931), at p. 444, per Cardozo C.J.). This concern arises where finding a duty of care between a plaintiff and a defendant would open the floodgates, resulting in "massive, uncontrolled liability" (A. M. Linden et al., *Canadian Tort Law* (11th ed., 2018), at p. 278). *Remoteness* is a related principle that limits the scope of liability in negligence where "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 12, citing A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 360). According to the authors of the 11th edition of that text:

The losses or injuries incurred by plaintiffs must not be "too remote" a consequence of the defendants' negligent act, in order for compensation to ensue. In other words, to use the older language, negligent defendants who owe a general duty of care are not liable unless their conduct is the "proximate cause" of the plaintiff's losses. Causation alone is not enough; it must be demonstrated that the conduct was the *proximate* cause of the damage. This issue is better described as the scope or extent of liability issue. [p. 307]

182 Although both indeterminacy and remoteness relate primarily to liability in negligence, I agree with the Defendants that the same underlying concerns can inform our analysis of the issue at hand, which involves claims under s. 36 of the *Competition Act* for pure economic losses. In *Taylor v. 1103919 Alberta Ltd.*, 2015 ABCA 201, 602 A.R. 105 (Alta. C.A.), at para. 50, for example, the Alberta Court of Appeal discerned "no principled reason why [the principle of remoteness] ought not to apply" to the statutory cause of action in Alberta's *Land Titles Act*, R.S.A. 2000, c. L-4. In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.), Rothstein J. considered the principle of remoteness, among other legal norms, in his analysis of whether indirect purchasers have a cause of action under s. 36 of the *Competition Act* (paras. 42-45).

183 Similarly, in *Associated General Contractors of California Inc. v. California State Council of Carpenters*, 459 U.S. 519 (U.S. Sup. Ct. 1983), the United States Supreme Court held that common law principles — including foreseeability and proximate cause, directness of injury, certainty of damages and privity of contract — can operate to limit the scope of a defendant's liability under the statutory cause of action for anti-competitive conduct in § 4 of the *Clayton Act*, 15 U.S.C. § 15.<sup>3</sup> In that case, the majority held that a plaintiff could not recover under that provision for harm allegedly suffered by reason of the defendants' coercion of third parties. Although Stevens J. recognized that "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation" (p. 529), he nevertheless held that

the question whether the [plaintiff] may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of [the applicable statutory provision]. Instead ... the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. [p. 535]

184 The issue in the instant case turns on whether the Defendants can be held liable for loss or damage of an economic nature suffered by the Umbrella Purchasers, a group of claimants who bought from non-Defendants ODDs that were manufactured or supplied by non-Defendants. Can the Umbrella Purchasers recover as against the Defendants — companies with which they have no commercial relationship whatsoever? In my view, the answer is no. Any overcharges that those claimants may have incurred were ultimately the direct result of pricing choices *made by those non-Defendant manufacturers and suppliers*, regardless of whether or not those choices were influenced by broader trends in the market. In short, the Defendants have control over their own business decisions, but not over those of non-Defendant manufacturers and suppliers. For this reason, and bearing in mind the principles underlying indeterminacy and remoteness, I am of the view that it would be unfair to hold the Defendants liable to the Umbrella Purchasers where they had no control over such liability. Indeed, interpreting s. 36(1) in the manner suggested by the Plaintiff might well expose the Defendants to unbounded liability — capable of encompassing not only the losses of those Umbrella Purchasers themselves, but also the losses of "[a]nyone who was affected by the economic ripples downstream of umbrella purchasers" (A.F. (Toshiba Appeal), at para. 105). In my opinion, this provision must be construed in a manner that prevents such a cascade of liability.

185 This is consistent with the views expressed by Perell J. of the Ontario Superior Court of Justice in *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87 (Ont. S.C.J.), and by a unanimous Divisional Court, in *Shah v. LG Chem, Ltd.*, 2017 ONSC 2586, 413 D.L.R. (4th) 546 (Ont. Div. Ct.). *Shah* involved the certification of a price-fixing class action brought by direct, indirect and umbrella purchasers of lithium ion batteries ("LIBs") manufactured by various defendants. On the question of whether the umbrella purchasers in that case could succeed in their claim under s. 36(1) of the *Competition Act*, Perell J. held as follows:

... the Umbrella Purchasers' claim would impose indeterminate liability on the Defendants and the claim would be unfair because the law, generally speaking, does not impose liability on one person for the conduct of others, and in the instance of the Umbrella Purchasers, the Plaintiffs seek to make the Defendants liable for the advertent, inadvertent, voluntary or involuntary conduct of the non-Defendants in taking advantage of the price-fixing. [para. 175]

The Divisional Court unanimously upheld Perell J.'s conclusion on this point. As Nordheimer J. (as he then was) explained:

What is alleged here is that the non-defendant [LIB] manufacturers took advantage of the higher market prices being set by the [defendants] through their conspiracy, to similarly increase the prices of their LIBs or LIB products. Assuming that that occurred, the [defendants] had no control over the actions of the non-defendant manufacturers. First and foremost, they had no control over whether the non-defendant manufacturers chose to match prices. Second, they had no control over the volume of LIBs or LIB products, that the non-defendant manufacturers chose to produce and sell. [para. 34]

186 Both Perell J. and Nordheimer J. analogized the issue of liability to umbrella purchasers in *Shah* to the issue of indeterminacy that had arisen in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.). In that case, a number of tobacco companies were facing lawsuits relating to the sale of "light" or "mild" cigarettes. Those companies, in turn, brought third-party claims against the Government of Canada, alleging that if they were found liable to the plaintiffs, they would be entitled to compensation from Canada for (among other things) negligent misrepresentation. The argument was that Canada had negligently misrepresented the health attributes of low-tar cigarettes to consumers and to those tobacco companies. Canada countered that allowing the tobacco companies' claims in negligent misrepresentation "would result in indeterminate liability", as "Canada had no control over the number of cigarettes being sold" (para. 97). This Court accepted Canada's argument; McLachlin C.J., writing for a unanimous Court, explained as follows:

I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. ...

The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate. [Emphasis added; paras. 99-100.]

187 Although that case concerned indeterminacy in relation to the imposition of a duty of care in negligence, I agree with Nordheimer J. that "the fundamental principle is the same" (para. 32): s. 36(1) should not be interpreted in a manner that makes the Defendants liable to an indeterminate class of people for losses of an indeterminate nature that occurred as a result of business decisions over which they had no control. This accords with the approach taken by the United States Supreme Court in respect of a similar statutory cause of action for anti-competitive conduct: "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 [of the *Clayton Act*], there is a point beyond which the wrongdoer should not be held liable'" (*Associated General Contractors of California Inc.*, at pp. 534-35, citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (U.S. Sup. Ct. 1982), at pp. 476-77, citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (U.S. Ill. S.C. 1977), at p. 760, per Brennan J. dissenting). In my view, a preferable reading of the statutory cause of action in s. 36(1) of the *Competition Act* is one that, consistent with the principles underlying indeterminacy and remoteness which operate at common law, limits the potential scope of liability faced by defendants of price-fixing claims to losses flowing from their own pricing decisions, not those of third parties. This promotes the value of certainty so that commercial enterprises "have some appreciation of what risk is to be borne by whom" (*Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at p. 1139).

188 The Ontario Divisional Court's decision in *Shah* was subsequently overturned by the Court of Appeal, for reasons substantially similar to those set out by my colleague (*Shah v. LG Chem Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721 (Ont. C.A.)). The unanimous panel in that case took the position that "normative concerns about indeterminate liability" in negligence do not apply in the context of the statutory claim under ss. 36 and 45 of the *Competition Act*, since those concerns "have already been taken care of by Parliament" (para. 47). Like my colleague, the panel stated that, first, the scope of s. 36(1) limits recovery to persons who can prove that they suffered loss or damage "as a result of" the alleged conspiratorial conduct and that, second, the subjective *mens rea* in s. 45 "limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct" (*ibid.*, at para. 51, cited in Brown J.'s reasons, at para. 75).

189 In my respectful view, neither of those considerations actually protects against the risk of limitless liability that would flow from recognizing the availability of umbrella purchaser claims under s. 36(1). On the first point, the fact that the text of this provision reads as permitting recovery for any person capable of proving that their loss was sustained "as a result of" an alleged price-fixing conspiracy does not end the interpretative exercise. As I explained above, the dispute here concerns whether those words should be taken as allowing recovery for any and all losses that can conceivably be linked to the alleged wrongdoing, or whether relevant legal norms and principles can assist in construing the provision so as to circumscribe what might otherwise be potentially indeterminate liability. And on the second point, while I accept that the *mens rea* in s. 45 limits liability to defendants who intend to agree upon anti-competitive conduct, this still tells us nothing about the scope of their liability under s. 36(1) — in other words, it tells us *who* is liable but not for *what* they are actually liable.

190 Before concluding, I will add one final thought. Permitting umbrella purchaser claims under s. 36(1) opens up the possibility of recovery for overcharges that result from "conscious parallelism" — a phenomenon which occurs when parties not involved in a price-fixing conspiracy deliberately *choose* to adjust their prices in order to match those of their competitors, in the absence of any actual collusion between them. As recently observed by the Quebec Court of Appeal in *R. c. Proulx*, 2016 QCCA 1425 (C.A. Que.), at para. 32 (CanLII), "[a]dopting a comparable or identical pricing policy without an agreement — which by definition requires a meeting of minds — does not fall within the scope of s. 45 of the *Competition Act*".<sup>4</sup> An interpretation of s. 36(1) that allows umbrella purchaser claims for these kinds of independent pricing decisions would effectively grant a right to recover (a) in circumstances where those decisions — to which the umbrella purchasers' alleged overcharges are directly attributable — are neither criminally prohibited nor actionable in and of themselves, and (b) from parties who neither made nor benefitted from those decisions.

191 All of this leads me to conclude that s. 36(1) of the *Competition Act* should not be interpreted in a manner that would permit claimants to recover from defendants for *any* losses that in some way flowed from the alleged conspiracy. Doing so would have the undesirable effect of exposing defendants to liability that is potentially limitless in scope for loss and damage that are too remote from any price-fixing that occurred. I do not think that this could have been Parliament's intention when it enacted this statutory right of action.

192 In light of the principles to which I have referred above, my view is that the line should be drawn at loss and damage that flowed from the pricing decisions of the Defendants themselves (that is, the loss claimed by the direct and indirect purchasers), and not those that are attributable to third parties who did not participate in — but who nevertheless would have benefitted from — the alleged price-fixing conspiracy. Because the Umbrella Purchasers' losses are indeed attributable to the pricing decisions of non-Defendant ODD manufacturers and suppliers, I find it plain and obvious that their claims in this action under s. 36(1) of the *Competition Act* cannot succeed.

#### ***B. Is it Plain and Obvious That Section 36(1) Bars a Plaintiff From Alleging Common Law and Equitable Causes of Action in Respect of Conduct That Breaches the Prohibitions in Part VI of the Competition Act?***

193 The second issue raised in the Toshiba Appeal turns on whether the cause of action in s. 36(1) of the *Competition Act* is the exclusive civil remedy for conduct that breaches the criminal offence provisions in Part VI of that statute. The Defendants argue that it is, and that allowing claims in respect of such conduct under common law and equitable causes of action undermines the principle of parliamentary sovereignty. The Plaintiff, by contrast, says that Parliament did not intend to preclude private law remedies for such conduct when it enacted s. 36(1) of the *Competition Act*.

194 At its core, the issue under this heading is whether a claimant can rely on the common law and equity *as a supplement* to the right of action under s. 36(1) of the *Competition Act* — or put differently, whether a claimant can advance a common law or equitable cause of action instead of, or together with, the statutory cause of action in respect of the same allegation of anti-competitive conduct.

195 In her leading textbook, *Sullivan on the Construction of Statutes* (6th ed. 2014), Professor Ruth Sullivan explains that "[t]he issue of supplementation arises when there is overlap between legislation and the common law such that both may apply

to a particular set of facts and also when legislation is incomplete in that it says nothing of, or does not fully address, a matter relating to the subject of the legislation" (p. 549). On this point, she adds the following:

When the issue of supplementing legislation arises, the focus may be on the application of common law rules, entitlement to common law remedies or access to common law courts. Although rules, remedies and jurisdiction raise distinct concerns, in each case the fundamental question is the same: is it permissible in the circumstances to supplement the legislation by resorting to the common law? If there is a conflict, the answer is clearly no. In the absence of conflict, the answer to the question depends first of all on legislative intent, which is discovered using the usual methods of interpretation. However, the courts pay particular attention to whether the legislation in question constitutes a complete or exhaustive code. The adequacy of the legislation and the continuing usefulness of the common law rule, remedy or jurisdiction are important considerations. [Emphasis added; p. 549.]

196 As with the Umbrella Purchasers issue, resolving this issue requires an exercise in statutory interpretation: it must be determined, based on a proper reading of the *Competition Act*, whether Parliament intended s. 36(1) to provide the exclusive civil remedy for persons claiming to have suffered loss or damage as a result of conduct contrary to Part VI.

197 Like my colleague, I begin my analysis with the presumption against interpreting legislation in a manner that would interfere with common law rights. According to Professor Sullivan, such a presumption allows "the courts to insist on precise and explicit direction from the legislature before accepting any change", so as to shield the law "from inadvertent legislative encroachment" (p. 539). Such an intention can be found either in the express wording of the statute or by necessary implication (*Gendron v. Supply & Services Union of the P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 (S.C.C.), at pp. 1315-16).

198 I agree with my colleague that the *Competition Act* does not expressly preclude claimants from supplementing the right of action in s. 36(1) with claims based on causes of action at common law or in equity. However, I am not convinced that the reasoning in *Gendron* applies to the case at hand; while that case dealt with a statutory provision that *codified* a common law right, s. 36 of the *Competition Act* is distinguishable in that it *created* a new right that did not exist before. Instead, I would resolve this issue simply on the basis that the coexistence of statutory and common law or equitable claims arising from conduct contrary to Part VI of the *Competition Act* is in fact contemplated by s. 62 of that statute, which reads as follows:

**62** Except as otherwise provided in [Part VI], nothing in [Part VI] shall be construed as depriving any person of any civil right of action.

199 In my view, this provision evinces a legislative intention that the provisions of Part VI (which is titled "Offences in Relation to Competition") not abrogate any right of action a claimant has — which might include a right of action founded on the tort of unlawful means conspiracy or in unjust enrichment — that is predicated upon a breach of the offence provisions of the *Competition Act*. As the Manitoba Court of Appeal recognized in *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335 (Man. C.A.), the inclusion of this provision in the statutory framework suggests that Parliament did not intend the provisions of the *Competition Act* to intrude upon the provinces' jurisdiction over civil rights and liberties.

200 The fact that s. 62 applies only to Part VI of the *Competition Act* — and therefore is not *directly* applicable to s. 36(1), which is instead located in Part IV — is not, in my view, consequential. The cause of action created by s. 36(1)(a) is expressly tied to conduct that would constitute an offence under Part VI of the statute. This Court recognized in *General Motors of Canada Ltd.*, at p. 673, that the purpose of this remedial provision is to "help enforce the substantive aspects of the Act", such as the prohibitions against anti-competitive conduct.

201 It is also essential to note that s. 62 uses the phrase "*any* civil right of action", which suggests that Parliament contemplated the preservation of the various civil rights of action that may exist in respect of conduct prohibited under Part VI, beyond the one provided for in s. 36(1). Indeed, the former provision would be redundant and pointless if it merely affirmed what the latter already states: that perpetrators of conduct prohibited by Part VI are subject *both* to criminal prosecution *and* to civil proceedings under s. 36(1)(a). This is especially the case given that s. 36(2) and s. 36(4)(a)(ii) indicate that statutory claims can be brought against defendants even after any criminal proceedings against them were finally disposed of.

202 Therefore, when I read the words of s. 62 "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (Driedger, at p. 87; *Bell ExpressVu Ltd.*, at para. 26), I am led to the conclusion that this provision has the effect of preserving all civil rights of action that a claimant may have — over and above the right of action available under s. 36(1) of the *Competition Act* — in respect of anti-competitive conduct that would constitute an offence under Part VI of that Act. Indeed, s. 62 would be meaningless if s. 36(1) were to be interpreted as exhaustive in respect of civil claims for such conduct.

203 On the basis of this reasoning, I agree with the result reached by my colleague: the courts below did not err in permitting the Plaintiff to advance the pleaded common law and equitable causes of action together with the statutory cause of action under s. 36(1) in this case.

**C. What Standard Must a Representative Plaintiff Meet in Order to Have Loss-Related Questions Certified as "Common Issues" Among Indirect Purchasers, and Has the Plaintiff Met This Standard in the Present Case?**

204 The final issue on appeal relates to the requirement of common issues in s. 4(1)(c) of the *Class Proceedings Act*. What is it that the Plaintiff must be capable of establishing at the certification stage in order to provide the necessary assurance that his loss-related questions are capable of resolution on a common basis, and does his proposed methodology for establishing loss satisfy this requirement?

*(1) Background*

205 The existence of common issues among the individual class members lies at the very heart of a class proceeding. The procedural ability to aggregate these issues and to consider them at once, and for all class members, during a common issues trial is what alleviates the need for each class member to seek redress via separate actions (M. A. Eizenga et al., *Class Actions Law and Practice* (2nd ed. (loose-leaf)), at p. 3-101). The authors of *The Law of Class Actions in Canada* explain the importance of commonality in the following terms:

The presence of significant common issues provides the access to justice and judicial economies that ultimately justify certifying a class proceeding. Common issues are what actually unite and define the class. The mere fact that a group of people suffers a wrong does not justify certifying a class proceeding unless there are common issues to be decided for the defendant and the members of the group.

(W. K. Winkler et al. (2014), at p. 107)

For this reason, the determination of what constitute the common issues in any proposed class action is a key aspect of a certification motion.

206 In his Proposed Litigation Plan, the Plaintiff submitted a number of questions for resolution on a common basis at trial (A.R., vol. II, at pp. 125-27), including questions that essentially relate to whether the class members suffered a loss in connection with the alleged price-fixing conspiracy.

207 In order to satisfy the Certification Judge that these loss-related questions were capable of resolution on a common basis, the Plaintiff adduced evidence from an expert economist named Dr. Keith Reutter. In his expert report, Dr. Reutter took the position that "all members of the proposed Class would have been impacted" by the alleged price-fixing conspiracy and that "there are accepted methods available to estimate any overcharge and aggregate damages that resulted from the alleged wrongdoing using evidence common to the proposed Class" (A.R., vol. III, at p. 119). His methods would involve constructing an economic model to estimate the "but-for" price of the ODDs, that is, their price if the alleged anti-competitive conduct had not occurred (Certification Judge's reasons, at para. 156), and would include "econometric methods based on multiple regression to determine the overcharge and pass-through rates" (*ibid.*, at para. 158).

208 The suggestion that Dr. Reutter's methodology could establish that all class members would have been impacted by the alleged price-fixing conspiracy was called into question during his cross-examination, however (see A.R., vol. V, at pp.

210-25). The Defendants therefore resisted certification of the loss-related questions, arguing that the Plaintiff's methodology could not address the issue of loss *on a class-wide basis* because it would not make it possible to answer the Plaintiff's proposed questions at trial in respect of every class member — either by establishing that all of them were overcharged for their ODDs, or by identifying those who were, and distinguishing them from those who were not. In the Defendants' submission, unless it could be determined at the common issues trial that a loss had actually been incurred by at least some specific indirect purchasers, then those loss-related questions could not be decided on a common basis at trial and should therefore not be certified as common issues.

209 For his part, the Plaintiff argued that, from a factual standpoint, his expert's methodology would be capable of establishing that all class members (including the indirect purchasers) had suffered a loss. As an alternative legal argument, he submitted that he was not required to demonstrate to the Certification Judge that, using his expert's methodology, he would be able to prove at trial that all class members were harmed or to distinguish those who were from those who were not in an individualized fashion (R.F. (Toshiba Appeal), at para. 96). Instead, his position was that it would be sufficient, at the certification stage, if the methodology were simply capable of proving that loss had reached the indirect purchaser *level* in the distribution chain — that is, that some overcharges were passed on to some indirect purchasers, without having to identify which ones.

210 What is key, for the purposes of the commonality issue, is the difference between demonstrating that loss reached the indirect purchaser *level* — that is, that some overcharges were passed on to some *unidentified* indirect purchasers — and proving that loss reached *all* or *an identified group* of indirect purchasers.

211 My colleague seems to accept that there is some basis in fact for finding that Dr. Reutter's methodology will have a reasonable prospect of establishing, at the common issues trial, that all of the indirect purchasers suffered a loss. In his view, however, nothing turns on this given his conclusion as to the law:

... it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level. [Emphasis added; para. 102.]

212 For the purposes of my analysis, I am prepared to accept that there is some basis in fact on which the Certification Judge could have found that the proposed methodology would be capable of proving at trial that loss had reached the indirect purchaser level. My disagreement with my colleague lies elsewhere. In my view, a methodology that is incapable of establishing at trial that at least some *identifiable* indirect purchasers actually suffered a loss, but that can instead show only that loss occurred somewhere at the indirect purchaser *level* in the distribution chain, does not allow any of the loss-related questions proposed by the Plaintiff in this case to be answered on a "common" or "class-wide" basis.

## (2) Analysis

213 In *Microsoft*, this Court affirmed that, in order to have a question certified as a common issue, the representative plaintiff must show that there is some basis in fact for the commonality requirement in s. 4(1)(c) of the *Class Proceedings Act* — that is, that the question be capable of resolution *on a class-wide basis* (see paras. 99-114). What the "some basis in fact" standard requires in any given case depends on what it is that the proposed question asks; different questions will impose different requirements upon the representative plaintiff.

214 In the case at hand, the loss-related questions proposed by the Plaintiff include the following: What damages, if any, are payable to the Class Members pursuant to s. 36 of the *Competition Act*? Did the Class Members suffer economic loss? Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of ODDs?

215 The term "Class Member" or "Class Members" is defined in the Plaintiff's Proposed Litigation Plan as "one or more members of the proposed class", which is comprised of:

All persons resident in British Columbia who, during the period commencing at least as early as January 1, 2004 and continuing through January 1, 2010 (the "Class Period"), purchased optical disc drives ("ODD") or products that contained ODD. [A.R., vol. II, at p. 114]

216 The broad definition of the term "Class Members", and the use of that term in stating the proposed loss-related questions, reflects the possibility that the Plaintiff might not be able to prove at trial that *everyone* who purchased an ODD or an ODD product actually suffered a loss in connection with the alleged price-fixing conspiracy. Rather, the evidence might be such that loss is provable only in respect of *some* class members. My colleague says that these questions are stated in such a way that they "could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss", and adds that "because they could be taken in two different ways they might, following the common issues trial, be answered in different ways" (para. 91 (emphasis in original)).

217 Regardless of how flexible these questions might be, however, they cannot be answered on a "class-wide" or "common" basis at trial if the Plaintiff's methodology is incapable of establishing loss in any identifiable manner. This is because mere proof that some loss reached the indirect purchaser level in the distribution chain does not dispose of any element of liability for any indirect purchaser, nor does it otherwise advance the litigation in any meaningful way.

**(a) Proof at trial that loss reached the indirect purchaser level, without anything more, does not dispose of any element of liability for any indirect purchaser**

218 As my colleague seems to implicitly acknowledge in his reasons, proof that loss reached the indirect purchaser *level* is insufficient for any finding of liability to be made at the common issues trial. This is because loss or deprivation suffered by the claimant is an essential element of the causes of action under s. 36 of the *Competition Act*, under the common law tort of civil conspiracy, and in unjust enrichment. This is key: the Defendants can be held liable under these causes of action only to those class members who (among other things) are found to have suffered a loss in connection with the price fixing.<sup>5</sup> For this reason, the common issues trial judge cannot impose any liability on the Defendants if the Plaintiff cannot show which class members actually suffered a loss. Individual trials will then be necessary (see Brown J.'s reasons, at para. 120; C.A. reasons, at para. 158; *Shah* (Ont. S.C.J.), at para. 69). Indeed, the Plaintiff acknowledges as much in his Proposed Litigation Plan, when he states the following:

The common issues trial will determine the existence and scope of the alleged conspiracy. The common issues trial may also determine on a class-wide basis whether Class Members were injured, leading to a finding of liability and a determination of aggregate damages. If the common issues trial does not determine injury on a class-wide basis, liability and damages will be determined on an individual basis in a manageable process. [Emphasis added; A.R., vol. II, at p. 118.]

219 This, of course, makes sense when we consider the fact that a class action is essentially an aggregation of individual actions that share common issues of fact and law (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), at para. 27). In *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214 (S.C.C.), this Court reiterated that the class proceeding is merely a procedural vehicle which "cannot be used to make up for the absence of one of the constituent elements of the cause of action", adding that such a proceeding "can succeed *only if each claim it covers, taken individually, could serve as a basis for court proceedings*" (para. 52 (emphasis added)). By way of illustration, a claimant in an individual trial would not be entitled to a remedy under s. 36(1) of the *Competition Act* merely upon establishing that loss had reached some unidentified persons at his or her level in the distribution chain; that claimant would likewise have no such entitlement in a class proceeding (see *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] 3 S.C.R. 545 (S.C.C.), at para. 75).

220 Moreover, and again as my colleague's reasons make clear, the aggregate damages provisions of the *Class Proceedings Act* (ss. 29 to 34) cannot be of any assistance to the Plaintiff in establishing liability to all of the class members in a case like this, where proof of loss is a constituent element of the cause(s) of action. As Rothstein J. explained in *Microsoft*:

The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the CPA. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability. [Emphasis added; para. 131.]

221 The aggregate damages provisions of the *Class Proceedings Act* therefore cannot be interpreted and applied in such a way as to give a remedy to class members who could not obtain a remedy in an individual trial due to their inability to show that they suffered a loss in connection with the alleged conspiracy. It is important not to conflate the assessment of aggregate damages with the rationale for awarding them.

222 What all of this means is that a determination at a common issues trial of whether loss reached the indirect purchaser *level* in the distribution chain is of no assistance in resolving the question of whether the Defendants are actually liable to any or all of the indirect purchasers under the causes of action listed above. From the Plaintiff's perspective, the best case scenario is that there is a need for individual trials on the question of which indirect purchasers actually suffered a loss. His worst case scenario is that it cannot be proved that any indirect purchasers suffered a loss at all, which would terminate the litigation altogether as it pertains to those class members. Contrary to what the Certification Judge stated in his reasons (at para. 168), establishing at trial that "the defendants took part in a conspiracy, that they sometimes or always overcharged direct purchasers, and that at least some direct purchasers passed on these overcharges" to the indirect purchasers will *not* be "sufficient to establish the fact of the defendants' liability". It follows, therefore, that the Certification Judge did not identify the correct standard for certifying loss as a common issue (see Brown J.'s reasons, at para. 110).

**(b) Proof at trial that loss reached the indirect purchaser level, without anything more, does not allow for any loss-related determination that would advance the litigation in a manner that satisfies the commonality requirement**

223 My colleague states that the loss-related questions proposed by the Plaintiff in this case satisfy the commonality requirement in s. 4(1)(c) of the *Class Proceedings Act*, based on a methodology that is capable of proving that overcharges were passed on somewhere at the indirect purchaser level, *even though* such a methodology cannot allow any finding of liability to be made at trial (see paras. 109 and 120). Similarly, the Plaintiff takes the position that a "single analysis of whether there was an overcharge and whether that overcharge was passed on to the indirect purchaser level would significantly advance the claim for all class members by avoiding repetition of the collection and analysis of large quantities of economic data" (R.F. (Toshiba Appeal), at para. 106).

224 In light of the legal principles set out by my colleague at paras. 103-5 of his reasons, however, I cannot agree. To begin with, the fact that losses might have occurred somewhere at the indirect purchaser level in the distribution chain does not assist us in determining which specific indirect purchasers suffered losses in order to identify the class members to whom the Defendants might be liable. If the common issues trial judge finds that overcharges were passed on to at least one unidentifiable indirect purchaser, there would still be a need for individual trials; therefore, duplication of fact-finding would not be eliminated (*Dutton*, at para. 39). And if such individual trials are indeed required, then proof that loss occurred somewhere at the indirect purchaser level is not truly "necessary to the resolution of *each class member's claim*", is not a "*substantial common ingredient*" of their causes of action, and cannot in fact result in "success" for any of those indirect purchasers (*ibid.*, at paras. 39-40 (emphasis added)).

225 My colleague nevertheless opines that the requisite commonality derives from the fact that failure to show that loss was suffered by *any* indirect purchasers would mean that *none* of them could succeed against the Defendants (para. 108). With respect, however, the function of the common issues trial is not to screen out unmeritorious claims; it is to allow issues of fact and law that are common among many claimants to be determined *at once*, so as to avoid the need for individual determinations

for each and every class member. Furthermore, it is unclear why any representative plaintiff would seek the certification of a question that can meaningfully "advance the litigation" only if it results in failure for all indirect purchasers (see Brown J.'s reasons, at para. 109). In any event, I agree that "it would be a gross waste of private and public resources to litigate if the only prospective 'benefit' was to show that there was no point bringing the case in the first place" (K. Wright, T. Shikaze and E. Snow, "On the 'Level' After *Godfrey*: Proving Liability in Canadian Price Fixing Class Actions" (2017), 12 *C.A.D.Q.* 13, at p. 18).<sup>6</sup>

226 All of this leads me to the conclusion that proof that loss reached the indirect purchaser *level* in the distribution chain would not, without more, allow the common issues trial judge to make any loss-related determinations on a class-wide basis so as to permit the proposed questions to be certified as common issues for trial.

**(c) Microsoft does not indicate that loss-related questions are certifiable in indirect purchaser class actions so long as the representative plaintiff has a plausible methodology for proving solely that some overcharges were passed on to the indirect purchaser level**

227 Like the courts below, my colleague relies on this Court's decision in *Microsoft* to support his conclusion that loss-related questions in indirect purchaser class actions are certifiable even if the representative plaintiff's methodology can show only that loss reached the indirect purchaser *level* (but cannot establish loss on any individualized basis). Because that case raised a number of issues that are similar to those in the case at hand, it is worth analyzing it in some depth.

228 As in this case, the class action in *Microsoft* was based on an allegation of price manipulation by the defendants, Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE (collectively, "Microsoft"). The representative plaintiffs — Pro-Sys Consultants Ltd. and Neil Godfrey (collectively, "Pro-Sys") — specifically alleged, on behalf of all class members, that Microsoft had engaged in unlawful conduct by overcharging for its operating systems. The class was made up of indirect purchasers who had acquired Microsoft products from resellers that had themselves purchased the products from Microsoft or another reseller higher up in the distribution chain. Pro-Sys pleaded causes of action under the common law torts of intentional interference with economic interests and conspiracy, sought damages pursuant to ss. 36, 45 and 52 of the *Competition Act*, and claimed in unjust enrichment and waiver of tort.

229 Although the loss-related questions in that case are very similar to those proposed in the case at hand, they explicitly asked whether losses or overcharges had been passed on to *all* of the indirect purchaser class members.<sup>7</sup> Among the issues at the certification stage was "whether Pro-Sys' proposed methodology will be able to show the initial overcharges and the pass-through to the proposed class members" (*Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2010 BCSC 285 (B.C. S.C.) ("Microsoft (BCSC)"), at para. 8 (CanLII) (emphasis added)).

230 Rothstein J., writing for a unanimous Court, clarified that the onus on the representative plaintiff at the certification stage is to establish that there is some basis in fact for the commonality requirement. In the context of loss-related questions, he observed that this requires the proposed methodology to "offer a realistic prospect of establishing loss *on a class-wide basis*" (para. 118 (emphasis added)). Importantly, Rothstein J. also expanded on how commonality can be established in indirect purchaser class actions where expert evidence is adduced to show that the issue of loss is resolvable on a class-wide basis:

The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain. [Emphasis added; para. 115.]

231 In the case at hand, the courts below interpreted this passage as meaning that loss-related questions will always be certifiable as common issues in the context of indirect purchaser class actions so long as the representative plaintiff's methodology is capable of showing loss at the indirect purchaser level of the distribution chain. Respectfully, this reading of *Microsoft* — which focuses almost exclusively on the final sentence in the above-reproduced passage — is not consistent with the reasons as a whole, when read alongside those of the motion judge in that case.

232 For our purposes, it is significant that the loss-related questions in *Microsoft* concerned whether *all* of the indirect purchasers had suffered a loss. Rothstein J. agreed that the class members' claims raised common issues because the resolution of those issues "would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis" (para. 111). He also declined to interfere with the motion judge's finding that Pro-Sys "has a credible or plausible methodology to show that *all* class members were harmed by Microsoft's alleged illegal activities" (*Microsoft* (BCSC), at para. 122 (emphasis in original); see also *Microsoft*, at para. 126). This led Rothstein J. to conclude as follows:

Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of [the motion judge] that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. [Emphasis added; para. 140.]

233 A careful reading of *Microsoft* therefore makes it clear that Pro-Sys's loss-related questions were found to be resolvable on a "class-wide" basis because there was a credible and plausible methodology capable of answering them in respect of *all of the class members* at the common issues trial. Rothstein J. most likely referred to a methodology that is "able to establish that the overcharges have been passed on to the indirect purchaser level in the distribution chain" (para. 115) because of the motion judge's observation that, in order to succeed, Pro-Sys "must show that the alleged increased charges to the direct customers were not absorbed by any subsequent level in the distribution channel" before reaching the indirect purchasers who formed part of the class (*Microsoft* (BCSC), at para. 6). Indeed, Rothstein J. went so far as to say that "[t]he role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole", and that what the plaintiff "must demonstrate [is] that 'sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class' ([*In Re:Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002)], at p. 155)" (para. 115 (emphasis added)).

234 *Microsoft* is therefore a case in which the representative plaintiffs obtained the certification of questions asking whether *all* indirect purchasers had suffered a loss, by providing the motion judge with some basis in fact on which to find that the representative plaintiffs would be capable of proving at trial that they all had. Because the methodology made it possible for the common issues trial judge to resolve a necessary component of everyone's claim at once, without the need for individual trials, the commonality requirement was clearly met. As I have explained, however, *Microsoft* does not support the proposition that loss-related questions concerning indirect purchasers are certifiable, as a matter of course, so long as the plaintiff's methodology can show that some loss reached their level in the distribution chain. My colleague provides no reason for reading *Microsoft* in any other way (see Brown J.'s reasons, at para. 107).

### (3) Conclusion on the Commonality Issue

235 The legal dispute between the parties turns on whether loss-related questions that pertain to indirect purchasers in a price-fixing class action can be certified as common issues *even if* the representative plaintiff's methodology is capable only of establishing at trial that loss was occasioned somewhere at the indirect purchaser level of the distribution chain. I would respectfully answer this question in the negative. If the methodology is such that the common issues trial judge will be unable to make any findings as to which class members actually suffered a loss (for the purpose of making determinations as to liability),

then those loss-related questions proposed by the plaintiff will not be capable of resolution on a "class-wide" or "common" basis. Indeed, this Court explained in *Sun-Rype* that "where the proposed certified causes of action require proof of loss as a component of proving liability, *the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss*" (para. 76 (emphasis added)). No two persons can prove that *they* are the ones who incurred a loss if a representative plaintiff's methodology can demonstrate only that loss reached some unidentified persons at their level in the distribution chain; by itself, such a methodology does not establish an essential element of liability for anyone. The need for individual trials in those circumstances is indicative of the absence of commonality.

236 That being said, what is required of the Plaintiff in this case is a methodology capable of answering the loss-related questions on an individualized basis, either by showing that all of the indirect purchasers suffered a loss or at least by identifying those who did and separating them from those who did not or those about whom we cannot be sure (and for whom individual hearings will therefore be necessary). In light of "Dr. Reutter's admissions on cross-examination that there may be some subset of class members who were not impacted, and that it would not be possible, using his methodology, to determine which class members were actually harmed" (C.A. reasons, at para. 125), the loss-related questions should not have been certified as common issues under s. 4(1)(c) of the *Class Proceedings Act*.

#### IV. Conclusion

237 Regarding the limitations issues raised in the Pioneer Appeal, I respectfully disagree that the discoverability rule has any application to s. 36(4)(a)(i). As for the doctrine of fraudulent concealment, the Plaintiff did not plead that there is any special relationship between the Pioneer Defendants and the class members, but did plead that the Pioneer Defendants took active steps to conceal the existence of the alleged conspiracy. While these pleadings are sufficient for the purposes of s. 4(1)(a) of the *Class Proceedings Act*, whether any such steps are sufficient to trigger the operation of this equitable doctrine will depend on what the Plaintiff actually proves at trial. As I explained earlier, what is necessary in the commercial context, such as here, could be the demonstration of the existence of *either* a special relationship, *or* something tantamount to or commensurate with one.

238 Regarding the issues in the Toshiba Appeal, which are common to both appeals, I agree with my colleague — though for different reasons — that the existence of the statutory cause of action in s. 36(1) of the *Competition Act* does not preclude claimants from also advancing claims at common law or in equity based on the same conduct prohibited by Part VI. However, I part ways with my colleague in two important respects. First, I do not agree that the Umbrella Purchasers have a claim against the Defendants under s. 36(1) of the *Competition Act*. Second, I cannot accept that the questions proposed by the Plaintiff that pertain to the commonality of loss among indirect purchasers can be certified where his proposed methodology will be capable of showing nothing more than the fact that some overcharges reached the indirect purchaser level of the distribution chain. In class actions where loss is an essential element of liability (as here), my view is that loss-related questions can be certified as common issues only if the representative plaintiff will be able to actually identify which class members suffered a loss at trial — either by proving that they all did or by distinguishing those who did from those who did not. Because Dr. Reutter admitted on cross-examination that his methodology would be incapable of allowing the Plaintiff to make such an identification at trial, it follows that the loss-related questions proposed by the Plaintiff in this case should not have been certified.

239 I would therefore allow the appeals in part.

*Appeals dismissed.*

*Pourvois rejetés.*

#### Footnotes

<sup>1</sup> Section 45(1) was amended by the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 410. The amendments are not material to these reasons for judgment.

<sup>2</sup> As recounted at para. 11, the certification judge held that the pleadings did not disclose a cause of action for unlawful means tort, or (in respect of the umbrella purchasers) for unjust enrichment and waiver of tort.

- 3 That provision read as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."
- 4 In its *Competitor Collaboration Guidelines* (December 2009), the Competition Bureau of Canada explains that it does not consider that the mere act of independently adopting a common course of conduct with awareness of the likely response of competitors or in response to the conduct of competitors, commonly referred to as "conscious parallelism", is sufficient to establish an agreement for the purpose of subsection 45(1). However, parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices, may be sufficient to prove that an agreement was concluded between the parties. [p. 7]
- 5 The degree of "connection" varies among the different causes of action. For example, the cause of action under s. 36 of the *Competition Act* is for loss or damage that has occurred "as a result of" anti-competitive conduct. Recovery in unjust enrichment is available to a claimant who suffered a deprivation that "corresponds" to the defendant's enrichment in circumstances where there is no juristic reason for either the enrichment or the deprivation.
- 6 One of the authors of this article served as counsel for certain defendants in this litigation (although not before this Court) and in *Shah*.
- 7 The loss-related questions proposed by Pro-Sys included the following: Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount? Did the Class Members suffer economic loss? Did the Class Members suffer economic loss as a result of the Defendants' interference? Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge? (See *Microsoft*, Appendix.) The term "Class Members" was defined in Pro-Sys's proposed litigation plan to mean "all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing" (Pro-Sys A.R., vol. III, at p. 196 (emphasis added)).

**TAB 27**

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Bodnar v. Community Savings Credit Union](#) | 2019 BCSC 1885, 2019 CarswellBC 3205 | (B.C. S.C., Nov 4, 2019)

2013 SCC 57  
Supreme Court of Canada

Pro-Sys Consultants Ltd. v. Microsoft Corp.

2013 CarswellBC 3257, 2013 CarswellBC 3258, 2013 SCC 57, [2013] 3 S.C.R. 477, [2013] B.C.W.L.D. 9020, [2013] B.C.W.L.D. 9021, [2013] B.C.W.L.D. 9027, [2013] B.C.W.L.D. 9028, [2013] S.C.J. No. 57, [2014] 1 W.W.R. 421, 12 C.C.L.T. (4th) 171, 19 B.L.R. (5th) 177, 235 A.C.W.S. (3d) 552, 345 B.C.A.C. 1, 364 D.L.R. (4th) 573, 40 N.R. 201, 45 C.P.C. (7th) 1, 50 B.C.L.R. (5th) 219, 589 W.A.C. 1, J.E. 2013-1905

**Pro-Sys Consultants Ltd. and Neil Godfrey, Appellants and  
Microsoft Corporation and Microsoft Canada Co./Microsoft Canada  
CIE, Respondents and Attorney General of Canada, Intervener**

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: October 17, 2012

Judgment: October 31, 2013

Docket: 34282

Proceedings: reversing [Pro-Sys Consultants Ltd. v. Microsoft Corp. \(2011\)](#), 2011 CarswellBC 930, 2011 BCCA 186, 331 D.L.R. (4th) 671, 304 B.C.A.C. 90, 513 W.A.C. 90 (B.C. C.A.); reversing [Pro-Sys Consultants Ltd. v. Microsoft Corp. \(2010\)](#), 2010 CarswellBC 508, 2010 BCSC 285 (B.C. S.C.)

Counsel: J.J. Camp, Q.C., Reidar Mogerman, Melina Buckley, Michael Sobkin, for Appellants  
Neil Finkelstein, James Sullivan, Catherine Beagan Flood, Brandon Kain, for Respondents  
John S. Tyhurst, for Intervener

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

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.A](#) Pleadings disclose cause of action

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.H](#) Miscellaneous

Commercial law

[VI](#) Trade and commerce

[VI.5](#) Competition and combines legislation

[VI.5.c](#) Competition offences and reviewable practices

[VI.5.c.ii](#) Conspiracy

[VI.5.c.ii.A](#) General principles

Commercial law

[VI](#) Trade and commerce

[VI.5](#) Competition and combines legislation

[VI.5.c](#) Competition offences and reviewable practices

[VI.5.c.iv](#) Price maintenance

[VI.5.c.iv.A](#) General principles

#### **Headnote**

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — General principles

Representative plaintiffs in action, corporation PSC Ltd. and NG, brought class action against M Corp. and M Canada Co. (collectively M) alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its computer operating systems and applications software — PSC Ltd. sought certification of action as class proceeding — PSC Ltd. filed its original statement of claim in British Columbia Supreme Court — Trial judge found causes of action in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort — M appealed with Court of Appeal — Appeal judges allowed appeal, set aside certification order and dismissed action — Plaintiffs appealed with Supreme Court of Canada — Appeal allowed; action was certified as class proceeding with exception that pleadings based on constructive trust were struck — Allowing indirect purchaser actions was consistent with remediation objective of restitution law because it allowed for compensating parties who have actually suffered harm rather than merely reserving actions for direct purchasers who may have in fact passed on overcharge — Risks of multiple recovery and concerns of complexity and remoteness were insufficient bases for precluding indirect purchasers from bringing actions against defendants responsible for overcharges that may have been passed on to them — It was not plain and obvious that there was no cause of action in unlawful means conspiracy or in intentional interference with economic interests — It was not plain and obvious that claim in unjust enrichment would be made out only where relationship between plaintiff and defendant was direct.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous

Representative plaintiffs in action, corporation PSC Ltd. and NG, brought class action against M Corp. and M Canada Co. (collectively M) alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its computer operating systems and applications software — PSC Ltd. sought certification of action as class proceeding — PSC Ltd. filed its original statement of claim in British Columbia Supreme Court — Trial judge found causes of action in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort — M appealed with Court of Appeal — Appeal judges allowed appeal, set aside certification order and dismissed action — Plaintiffs appealed with Supreme Court of Canada — Appeal allowed; action was certified as class proceeding with exception that pleadings based on constructive trust were struck — Allowing indirect purchaser actions was consistent with remediation objective of restitution law because it allowed for compensating parties who have actually suffered harm rather than merely reserving actions for direct purchasers who may have in fact passed on overcharge — Risks of multiple recovery and concerns of complexity and remoteness were insufficient bases for precluding indirect purchasers from bringing actions against defendants responsible for overcharges that may have been passed on to them — It was not plain and obvious that there was no cause of action in unlawful means conspiracy or in intentional interference with economic interests — It was not plain and obvious that claim in unjust enrichment would be made out only where relationship between plaintiff and defendant was direct.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Representative plaintiffs in action, corporation PSC Ltd. and NG, brought class action against M Corp. and M Canada Co. (collectively M) alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its computer operating systems and applications software — PSC Ltd. sought certification of action as class proceeding — PSC Ltd. filed its original statement of claim in British Columbia Supreme Court — Trial judge found causes of action in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort — M appealed with Court of Appeal — Appeal judges allowed appeal, set aside certification order and dismissed action — Plaintiffs appealed with Supreme Court of Canada —

Appeal allowed; action was certified as class proceeding with exception that pleadings based on constructive trust were struck — Allowing indirect purchaser actions was consistent with remediation objective of restitution law because it allowed for compensating parties who have actually suffered harm rather than merely reserving actions for direct purchasers who may have in fact passed on overcharge — Risks of multiple recovery and concerns of complexity and remoteness were insufficient bases for precluding indirect purchasers from bringing actions against defendants responsible for overcharges that may have been passed on to them — It was not plain and obvious that there was no cause of action in unlawful means conspiracy or in intentional interference with economic interests — It was not plain and obvious that claim in unjust enrichment would be made out only where relationship between plaintiff and defendant was direct.

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Price maintenance — General principles

Representative plaintiffs in action, corporation PSC Ltd. and NG, brought class action against M Corp. and M Canada Co. (collectively M) alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its computer operating systems and applications software — PSC Ltd. sought certification of action as class proceeding — PSC Ltd. filed its original statement of claim in British Columbia Supreme Court — Trial judge found causes of action in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort — M appealed with Court of Appeal — Appeal judges allowed appeal, set aside certification order and dismissed action — Plaintiffs appealed with Supreme Court of Canada — Appeal allowed; action was certified as class proceeding with exception that pleadings based on constructive trust were struck — Allowing indirect purchaser actions was consistent with remediation objective of restitution law because it allowed for compensating parties who have actually suffered harm rather than merely reserving actions for direct purchasers who may have in fact passed on overcharge — Risks of multiple recovery and concerns of complexity and remoteness were insufficient bases for precluding indirect purchasers from bringing actions against defendants responsible for overcharges that may have been passed on to them — It was not plain and obvious that there was no cause of action in unlawful means conspiracy or in intentional interference with economic interests — It was not plain and obvious that claim in unjust enrichment would be made out only where relationship between plaintiff and defendant was direct.

Droit commercial --- Échange et commerce — Législation en matière de concurrence et de coalitions — Infractions liées à la concurrence et pratiques pouvant faire l'objet d'une révision — Complot — Principes généraux

Demandeuses représentantes dans le cadre de l'action, la société PSC Ltd. et NG, ont déposé un recours collectif à l'encontre de la société M et la société M Canada Co. (collectivement M) faisant valoir qu'à partir de 1988, M s'était comportée de manière illégale en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur — PSC Ltd. a demandé l'autorisation de déposer un recours collectif — PSC Ltd. a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique — Juge de première instance a conclu à l'existence de causes d'action en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers, et en restitution pour renonciation au recours délictuel — M a interjeté appel — Juges de la Cour d'appel ont accueilli l'appel, annulé l'ordonnance d'autorisation et rejeté l'action — Demandeuses ont formé un pourvoi auprès de la Cour suprême du Canada — Pourvoi accueilli; le recours collectif a été autorisé, mais les allégations fondées sur la fiducie par interprétation ont été radiées — Permettre à l'acheteur indirect d'intenter une action en justice s'accordait avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, pouvait ainsi être indemnisée — Risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituaient pas des considérations suffisantes pour priver l'acheteur indirect d'un recours contre l'auteur de la majoration dont le montant lui aurait été transféré — Inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle aux intérêts financiers n'était pas manifeste — Il n'était pas manifeste que l'enrichissement sans cause ne serait susceptible d'être établi que si le lien entre la demandeuse et la défenderesse était direct.

Procédure civile --- Parties — Recours collectifs intentés en vertu d'une loi relative aux recours collectifs — Autorisation — Recours collectif du demandeur — Divers

Demandeuses représentantes dans le cadre de l'action, la société PSC Ltd. et NG, ont déposé un recours collectif à l'encontre de la société M et la société M Canada Co. (collectivement M) faisant valoir qu'à partir de 1988, M s'était comportée de manière illégale en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur — PSC Ltd. a demandé l'autorisation de déposer un recours collectif — PSC Ltd. a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique — Juge de première instance a conclu à l'existence de causes d'action en responsabilité délictuelle pour complot et

atteinte intentionnelle aux intérêts financiers, et en restitution pour renonciation au recours délictuel — M a interjeté appel — Juges de la Cour d'appel ont accueilli l'appel, annulé l'ordonnance d'autorisation et rejeté l'action — Demanderesses ont formé un pourvoi auprès de la Cour suprême du Canada — Pourvoi accueilli; le recours collectif a été autorisé, mais les allégations fondées sur la fiducie par interprétation ont été radiées — Permettre à l'acheteur indirect d'intenter une action en justice s'accordait avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, pouvait ainsi être indemnisée — Risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituaient pas des considérations suffisantes pour priver l'acheteur indirect d'un recours contre l'auteur de la majoration dont le montant lui aurait été transféré — Inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle aux intérêts financiers n'était pas manifeste — Il n'était pas manifeste que l'enrichissement sans cause ne serait susceptible d'être établi que si le lien entre la demanderesse et la défenderesse était direct.

Procédure civile --- Parties — Recours collectifs intentés en vertu d'une loi relative aux recours collectifs — Autorisation — Recours collectif du demandeur — Procédures écrites révèlent une cause d'action

Demandeeresses représentantes dans le cadre de l'action, la société PSC Ltd. et NG, ont déposé un recours collectif à l'encontre de la société M et la société M Canada Co. (collectivement M) faisant valoir qu'à partir de 1988, M s'était comportée de manière illégale en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur — PSC Ltd. a demandé l'autorisation de déposer un recours collectif — PSC Ltd. a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique — Juge de première instance a conclu à l'existence de causes d'action en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers, et en restitution pour renonciation au recours délictuel — M a interjeté appel — Juges de la Cour d'appel ont accueilli l'appel, annulé l'ordonnance d'autorisation et rejeté l'action — Demanderesses ont formé un pourvoi auprès de la Cour suprême du Canada — Pourvoi accueilli; le recours collectif a été autorisé, mais les allégations fondées sur la fiducie par interprétation ont été radiées — Permettre à l'acheteur indirect d'intenter une action en justice s'accordait avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, pouvait ainsi être indemnisée — Risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituaient pas des considérations suffisantes pour priver l'acheteur indirect d'un recours contre l'auteur de la majoration dont le montant lui aurait été transféré — Inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle aux intérêts financiers n'était pas manifeste — Il n'était pas manifeste que l'enrichissement sans cause ne serait susceptible d'être établi que si le lien entre la demanderesse et la défenderesse était direct.

Droit commercial --- Échange et commerce — Législation en matière de concurrence et de coalitions — Infractions liées à la concurrence et pratiques pouvant faire l'objet d'une révision — Détermination des prix — Principes généraux

Demandeeresses représentantes dans le cadre de l'action, la société PSC Ltd. et NG, ont déposé un recours collectif à l'encontre de la société M et la société M Canada Co. (collectivement M) faisant valoir qu'à partir de 1988, M s'était comportée de manière illégale en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur — PSC Ltd. a demandé l'autorisation de déposer un recours collectif — PSC Ltd. a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique — Juge de première instance a conclu à l'existence de causes d'action en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers, et en restitution pour renonciation au recours délictuel — M a interjeté appel — Juges de la Cour d'appel ont accueilli l'appel, annulé l'ordonnance d'autorisation et rejeté l'action — Demanderesses ont formé un pourvoi auprès de la Cour suprême du Canada — Pourvoi accueilli; le recours collectif a été autorisé, mais les allégations fondées sur la fiducie par interprétation ont été radiées — Permettre à l'acheteur indirect d'intenter une action en justice s'accordait avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, pouvait ainsi être indemnisée — Risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituaient pas des considérations suffisantes pour priver l'acheteur indirect d'un recours contre l'auteur de la majoration dont le montant lui aurait été transféré — Inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle aux intérêts financiers n'était pas manifeste — Il n'était pas manifeste que l'enrichissement sans cause ne serait susceptible d'être établi que si le lien entre la demanderesse et la défenderesse était direct.

The representative plaintiffs in the action, corporation PSC Ltd. and NG, brought a class action against M Corp. and M Canada Co. (collectively M) alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its computer operating

systems and applications software. PSC Ltd. claimed that as a direct consequence of M's unlawful conduct, it and all the class members paid and continue to pay higher prices for M operating systems and applications software than they would have paid absent the unlawful conduct. PSC Ltd. sought certification of the action as a class proceeding. The proposed class was made up of ultimate consumers who acquired M products from re-sellers, re-sellers who themselves purchased the products either directly from M or from other re-sellers higher up the chain of distribution. PSC Ltd. filed its original statement of claim in the British Columbia Supreme Court. M sought an order striking out the claim altogether and an order dismissing the action. Trial judge found causes of action under s. 36 of the Competition Act, in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort. M appealed with the Court of Appeal. The appeal judges allowed the appeal, set aside the certification order and dismissed the action, finding it plain and obvious that the class members had no cause of action. The plaintiffs appealed with the Supreme Court of Canada.

**Held:** The appeal was allowed, and the action was certified as a class proceeding with the exception that the pleadings based on constructive trust were struck.

Per Rothstein J. (McLachlin C.J.C., LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): Allowing indirect purchaser actions was consistent with the remediation objective of restitution law because it allowed for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge. The risks of multiple recovery and the concerns of complexity and remoteness were insufficient bases for precluding indirect purchasers from bringing actions against the defendants responsible for overcharges that may have been passed on to them. The deterrence function of the competition law in Canada was not likely to be impaired by indirect purchaser actions. It was not plain and obvious that there was no cause of action in unlawful means conspiracy or in intentional interference with economic interests. It was not plain and obvious that a claim in unjust enrichment would be made out only where the relationship between the plaintiff and the defendant was direct. As PSC Ltd.'s claim neither explained why a monetary award was inappropriate or insufficient nor showed a link to specific property, the claim did not satisfy the conditions necessary to ground a constructive trust. The pleadings based on constructive trust were struck. It was not plain and obvious that a cause of action in waiver of tort would not succeed.

Les demanderesses représentantes dans le cadre de l'action, la société PSC Ltd. et NG, ont déposé un recours collectif à l'encontre de la société M et la société M Canada Co. (collectivement M) faisant valoir qu'à partir de 1988, M s'était comportée de manière illégale en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur. PSC Ltd. a fait valoir qu'à la suite du comportement illégal de M, elle ainsi que tous les membres du recours collectif avaient payé et continuaient de payer, pour les systèmes d'exploitation et les logiciels d'application de M, un prix supérieur à celui qu'ils auraient payé n'eût été ce comportement illégal. PSC Ltd. a demandé l'autorisation de déposer un recours collectif. Le groupe proposé était composé de consommateurs ayant acheté les produits de M auprès de revendeurs, lesquels avaient eux-mêmes acheté les produits soit directement de M ou auprès de revendeurs situés en amont dans la chaîne de distribution. PSC Ltd. a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique. M a demandé la radiation de la demande et le rejet de l'action. Le juge de première instance a conclu, pour les besoins de l'art. 36 de la Loi sur la concurrence, à l'existence de causes d'action en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers, et en restitution pour renonciation au recours délictuel. M a interjeté appel. Les juges de la Cour d'appel ont accueilli l'appel, annulé l'ordonnance d'autorisation et rejeté l'action au motif qu'il était manifeste que les membres du groupe n'avaient pas de cause d'action. Les demanderesses ont formé un pourvoi auprès de la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été accueilli et le recours collectif a été autorisé, mais les allégations fondées sur la fiducie par interprétation ont été radiées.

Rothstein, J. (McLachlin, J.C.C., LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Permettre à l'acheteur indirect d'intenter une action en justice s'accordait avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, pouvait ainsi être indemnisée. Le risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituaient pas des considérations suffisantes pour priver l'acheteur indirect d'un recours contre l'auteur de la majoration dont le montant lui aurait été transféré. Le recours de l'acheteur indirect ne porterait vraisemblablement pas atteinte à l'effet dissuasif qu'étaient censées avoir les dispositions canadiennes sur la concurrence. L'inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle aux intérêts financiers n'était pas manifeste. Il n'était pas manifeste que l'enrichissement sans cause ne

serait susceptible d'être établi que si le lien entre la demanderesse et la défenderesse était direct. Comme la demande de PSC Ltd. n'indiquait pas en quoi une réparation pécuniaire serait inappropriée ou insuffisante, et comme elle n'établissait pas de lien avec un bien en particulier, elle ne satisfaisait pas aux conditions d'imposition d'une fiducie par interprétation. Les allégations fondées sur la fiducie par interprétation ont été radiées. Il n'était pas manifeste que le demandeur qui fonde son action sur la renonciation au recours délictuel serait débouté.

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s. 4(1) — considered

s. 4(1)(a) — considered

s. 4(1)(b) — considered

s. 4(1)(b)-4(1)(e) — referred to

s. 4(1)(c) — considered

s. 4(1)(d) — considered

s. 4(1)(e) — considered

s. 4(2) — considered

s. 5(4) — considered

s. 5(7) — considered

s. 10(1) — considered

s. 29(1) — considered

s. 29(2) — considered

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

s. 24 — considered

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

Pt. VI — referred to

s. 36 — considered

s. 36(1)(a) — considered

s. 36(4) — considered

s. 36(4)(a) — considered

s. 45 — referred to

s. 45(1) — considered

s. 45(2) — considered

s. 52 — referred to

s. 52(1) — considered

APPEAL from judgment reported at *Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2011), 2011 CarswellBC 930, 2011 BCCA 186, 331 D.L.R. (4th) 671, 304 B.C.A.C. 90, 513 W.A.C. 90 (B.C. C.A.), setting aside certification order and dismissing action in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort.

POURVOI à l'encontre d'un jugement publié à *Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2011), 2011 CarswellBC 930, 2011 BCCA 186, 331 D.L.R. (4th) 671, 304 B.C.A.C. 90, 513 W.A.C. 90 (B.C. C.A.), ayant annulé l'ordonnance d'autorisation et ayant rejeté l'action en responsabilité délictuelle invoquant un complot et une atteinte intentionnelle aux intérêts financiers et en restitution pour renonciation au recours délictuel.

**Rothstein J. (McLachlin C.J.C. and LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

## **Introduction**

1 It is no simple task to assess liability and apportion damages in situations where the wrongdoer and the harmed parties are separated by a long and complex chain of distribution, involving many parties, purchasers, resellers and intermediaries. Such is the problem presented by indirect purchaser actions in which downstream individual purchasers seek recovery for alleged unlawful overcharges that were passed on to them through the successive links in the chain.

2 The complexities inherent in indirect purchaser actions are magnified when such actions are brought as a class proceeding. When that happens, the courts are required to grapple with not only the difficulties associated with indirect purchaser actions, but are also then asked to decide whether the requirements for certification of a class action are met. These are the questions the Court is faced with in this appeal.

## **Background**

3 The representative plaintiffs in this action, Pro-Sys Consultants Ltd. and Neil Godfrey (collectively "Pro-Sys"), brought a class action against Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE (collectively "Microsoft") alleging that beginning in 1988, Microsoft engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. Pro-Sys claims that as a direct consequence of Microsoft's unlawful conduct, it and all the class members paid and continue to pay higher prices for Microsoft operating systems and applications software than they would have paid absent the unlawful conduct.

4 Pro-Sys sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("CPA").

5 The proposed class is made up of ultimate consumers who acquired Microsoft products from re-sellers, re-sellers who themselves purchased the products either directly from Microsoft or from other re-sellers higher up the chain of distribution. These consumers are known as the "indirect purchasers". The proposed class was defined in the statement of claim as

all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing.

([2010 BCSC 285](#) (B.C. S.C.), at para. 16)

## The Proceedings Below

### *Certification Proceedings in the British Columbia Supreme Court*

6 Pro-Sys filed its original statement of claim in the British Columbia Supreme Court ("BCSC") in December 2004. Thereafter numerous amendments to the Statement of Claim were made with the approval of Tysoe J., ultimately resulting in the Third Further Amended Statement of Claim. A Fourth Further Amended Statement of Claim has not officially been filed.

7 In 2006, Microsoft sought an order striking out the claim altogether and an order dismissing the action. In the alternative, it sought to strike out only portions of the claim. The parties agreed that the outcome of the application to strike would be determinative of the certification requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action.

8 Tysoe J. found causes of action under s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort ([2006 BCSC 1047, 57 B.C.L.R. \(4th\) 323](#) (B.C. S.C.)). He ordered that the portions of the pleadings dealing with unjust enrichment and constructive trust should be struck out as they were not sufficient to support such claims, unless they were amended by Pro-Sys. Upon further motion to amend the claims ([2006 BCSC 1738, 59 B.C.L.R. \(4th\) 111](#) (B.C. S.C.)), Tysoe J. allowed amendments to support the claims of unjust enrichment and constructive trust.

9 Following his rulings on the applications to strike and to amend, Tysoe J. was appointed to the British Columbia Court of Appeal ("BCCA"), and Myers J. assumed management of the case. Myers J. assessed the remaining certification requirements set out in s. 4(1) of the *CPA*, namely (i) whether there was an identifiable class (s. 4(1)(b)); (ii) whether the claims of the class members raised common issues (s. 4(1)(c)); (iii) whether the class action was the preferable procedure (s. 4(1)(d)); and (iv) whether Pro-Sys and Neil Godfrey could adequately represent the class (s. 4(1)(e)). Myers J. certified the action, finding that all four of the remaining requirements for certification were met ([2010 BCSC 285](#) (B.C. S.C.)). The common issues certified by Myers J. are listed in the appendix to these reasons.

### *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 186, 304 B.C.A.C. 90 (B.C. C.A.)*

10 Microsoft appealed from the decisions of Tysoe and Myers JJ. The majority of the BCCA, *per* Lowry J.A. (Frankel J.A. concurring), allowed the appeal, set aside the certification order and dismissed the action, finding it plain and obvious that the class members had no cause of action under s. 4(1)(a) of the *CPA*. The majority reached this conclusion after determining that indirect purchaser actions were not available as a matter of law in Canada. As such, it did not consider the other certification requirements.

11 Donald J.A., dissenting, would have dismissed the appeal and certified the action, finding indirect purchaser actions to be permitted in Canada, and finding sufficient grounds for the action.

12 In the BCCA, the present case was heard together with another case dealing with substantially similar issues (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55 (B.C. C.A.)). Counsel for the plaintiffs was the same in both appeals and the appeals were heard by the same panel of judges. As in the present appeal, in *Sun-Rype*, the issue of whether indirect purchaser actions are available in Canada was determinative. In reasons released simultaneously with the reasons in this appeal, the majority of the BCCA disposed of *Sun-Rype* in the same manner, decertifying and dismissing the indirect purchasers' class action on the basis that indirect purchaser actions were not available under Canadian law. Donald J.A. dissented, finding, as in this appeal, that indirect purchaser actions were permitted.

13 Leave to appeal was granted in both cases by this Court. They were heard with another indirect purchaser class action originating in Quebec, *Option consommateurs v. Infineon Technologies AG*, 2013 SCC 59 (S.C.C.), which this Court has addressed in separate reasons, *per* LeBel and Wagner JJ. Reasons in *Sun-Rype* can be found at 2013 SCC 58 (S.C.C.).

## Analysis

14 The issues are addressed in the following order:

- (1) Did the majority of the BCCA err in finding that indirect purchaser actions were not available as a matter of law in Canada?
- (2) Were the findings of Tysoe J. as to the requirement that the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* correct?
- (3) Were the findings of Myers J. as to the balance of the certification requirements under s. 4(1) of the *CPA* correct?

### ***Indirect Purchaser Actions (the "Passing-On" Issue)***

15 In this appeal, the parties have introduced numerous issues. The one occupying the largest portion of the factums and the oral argument was the question of whether indirect purchasers have the right to bring an action to recover losses that were passed on to them. Some sources have treated this issue as one of standing. I think it more appropriate to treat it as a threshold issue to be determined before moving into the specific causes of action alleged in the certification application.

16 As I have described above, indirect purchasers are consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger's direct purchasers, or from some other intermediary in the chain of distribution. The issue is whether indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured them indirectly as the result of the overcharge being "passed on" down the chain to them.

17 Microsoft argues that indirect purchasers should have no such cause of action. Its submits that permitting indirect purchasers to bring an action against the alleged overcharger to recover loss that has been "passed on" would be inconsistent with this Court's jurisprudence, which it says rejected passing on as a defence. Microsoft says that the rejection of the "passing-on" *defence* necessarily entails a rejection of the *offensive* use of passing on by indirect purchasers to recover overcharges that were passed on to them. I begin with a description of the passing-on defence and then deal with its impact on indirect purchaser actions.

### ***Rejection of Passing On as a Defence***

18 The passing-on defence was typically advanced by an overcharger at the top of a distribution chain. It was invoked under the proposition that if the direct purchaser who sustained the original overcharge then passed that overcharge on to its own customers, the gain conferred on the overcharger was not at the expense of the direct purchaser because the direct purchaser suffered no loss. As such, the fact that the overcharge was "passed on" was argued to be a defence to actions brought by the direct purchaser against the party responsible for the overcharge.

19 The passing-on defence has been rejected in both Canadian and U.S. jurisprudence. It was first addressed by the Supreme Court of the United States in 1968 in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (U.S. Pa. S.C. 1968). In that case, Hanover sued United for damages under U.S. antitrust laws because United would only lease, not sell, its shoe machinery, which Hanover claimed resulted in an overcharge to it. United argued that Hanover had passed on the overcharge to its own customers and had therefore suffered no harm. The U.S. Supreme Court (*per* White J., Stewart J. dissenting) rejected the passing-on defence to overcharging. It cited difficulties in ascertaining the nature and extent of the passing on of the overcharge as the reason for rejecting the defence:

Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. [p. 493]

20 The court added that to leave the only actionable causes in the hands of the indirect purchasers who "have only a tiny stake in a lawsuit and little interest in attempting a class action", would mean that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality" (*Hanover Shoe*, at p. 494). The court thus rejected the passing-on defence. Since *Hanover Shoe*, defendants who effectuate illegal overcharges have been precluded from employing the passing-on defence as a means of absolving themselves of liability to their direct purchasers.

21 The passing-on defence was rejected in Canada in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 (S.C.C.), in the context of a claim for the recovery of taxes paid pursuant to *ultra vires* legislation. The dispute in that case arose out of a claim for the recovery of *ultra vires* user charges on liquor levied by the province of New Brunswick against Kingstreet Investments, whose business, among other things, involved the operation of night clubs. Bastarache J., writing for a unanimous Court, held that a public authority who had illegally overcharged a taxpayer could not reduce its liability for the overcharge simply by establishing that some or all of the overcharge was passed on to the taxpayer's customers.

22 Bastarache J. found the passing-on defence to be inconsistent with the basic premise of restitution law. Basic restitutionary principles "provide for restoration of 'what has been taken or received from the plaintiff without justification'.... Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall precisely because it is not founded on the concept of compensation for loss" (*Kingstreet*, at para. 47, quoting *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 (Australia H.C.) at p. 71). Accordingly, "[a]s between the taxpayer and the Crown, the question of whether the taxpayer has been able to recoup its loss from some other source is simply irrelevant" (*Kingstreet*, at para. 45, quoting P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf updated September 2005), at p. 11-45).

23 Bastarache J. also found the passing-on defence to be "economically misconceived" (*Kingstreet*, at para. 48). By this he accepted that the task of determining the ultimate location of the harm of the overcharge is "exceedingly difficult and constitutes an inappropriate basis for denying relief" (para. 44). Echoing the misgivings expressed in *Hanover Shoe*, he cited the inherent difficulty in accounting for the effects of market elasticities on the prices charged by direct purchasers as the basis for this conclusion. He found these complexities made it impossible to tell what part, if any, of the overcharge was actually passed on (*Kingstreet*, at para. 48).

24 Pro-Sys says that *Kingstreet* stands only for the rejection of the defence in the context of *ultra vires* taxes. In my view, however, there are three reasons that lead to the conclusion that Bastarache J.'s rejection of the passing-on defence in *Kingstreet* was not limited to that context.

25 First, this Court's jurisprudence supports the broader rejection of the passing-on defence. In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 (S.C.C.) ("Carfor"), the Crown claimed "diminution of the value of

the timber" that it sold, following a forest fire caused largely by Canfor. Though the Court ultimately held in that case that the Crown had not in fact suffered loss because it was able to recover its damages through the regulatory scheme it had instituted, Binnie J. stated (albeit in *obiter*) that "[i]t is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been 'passed on' by the plaintiff" because this would burden courts with "the endlessness and futility of the effort to follow every transaction to its ultimate result" (para. 111, quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (U.S. Tenn. S.C. 1918), at p. 534). Likewise, in the same decision LeBel J., dissenting, though not on this point, said that "the passing-on defence, on the facts of this case and generally, must not be allowed to take hold in Canadian jurisprudence" (para. 197). To allow otherwise, LeBel J. indicated, would force a difficult burden of proof on the plaintiff to demonstrate not only that it had suffered a loss, but that it did not engage in any other transactions that would have offset the loss (para. 203).

26 In *Kingstreet*, Bastarache J. endorsed the reasons for rejecting the passing-on defence advanced by LeBel J. in the tort law context in *Canfor*, saying such rejection was of equal if not greater consequence in restitution law (para. 49).

27 Second, in *Kingstreet*, Bastarache J. found that the rejection of the passing-on defence was consistent with basic restitutionary law principles. Specifically, the rejection of the defence accords with the principle against unjust enrichment or *nullus commodum capere potest de injuria sua propria* (barring wrongdoers from benefiting from their unlawful actions). Preventing defendants from invoking passing on as a defence helps to ensure that wrongdoers are not permitted to retain their ill-gotten gains simply because it would be difficult to ascertain the precise extent of the harm. Likewise, it is important as a matter of restitutionary law to ensure that wrongdoers who overcharge their purchasers do not operate with impunity, on the grounds that complexities in tracing the overcharge through the chain of distribution will serve to shield them from liability.

28 Finally, there is support in the academic commentary for the broader rejection of the passing-on defence. Maddaugh and McCamus have stated that *Kingstreet* was an "authoritative and apparently comprehensive rejection" of the passing-on defence in Canada, and that "[i]n reaching this conclusion, the Supreme Court reflected a broad international consensus with respect to the unsuitability of this defence" (p. 11-46 of 2013 update).

29 For these reasons, I conclude that the rejection of the passing-on defence in *Kingstreet* is not limited to the context of the imposition of *ultra vires* taxes. There is no principled reason to reject the defence in one context but not another; the passing-on defence is rejected throughout the whole of restitutionary law.

### ***Significance of the Passing-On Defence in This Appeal***

30 As described above, the offensive use of passing on would provide the basis for indirect purchaser actions. Microsoft argues that this Court's rejection of the passing-on defence carries, as a necessary corollary, a corresponding rejection of the offensive use of passing on. The rationale is that the rejection should apply equally so that if overchargers are not permitted to rely on passing on in their own defence, indirect purchasers should also not be able to invoke passed on overcharges as a basis for their cause of action.

31 Microsoft relies on the 1977 decision of the U.S. Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (U.S. Ill. S.C. 1977). Illinois Brick manufactured concrete block and sold it to masonry contractors who in turn provided their services to general contractors. The general contractors incorporated the concrete block into buildings and sold the buildings to customers such as the State of Illinois. The State was therefore an indirect purchaser of the products of Illinois Brick (p. 726). The State alleged that Illinois Brick had engaged in a conspiracy to fix the prices of concrete block, contrary to U.S. antitrust legislation, and brought an indirect purchaser action against the company (p. 727).

32 The U.S. Supreme Court found against the State of Illinois. It held that since, according to *Hanover Shoe*, passing on may not be used defensively, it should not be available to indirect purchasers to use offensively by bringing an action alleging that an overcharge was passed down to them. The court explained that "whatever rule [was] to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants" (*Illinois Brick*, at p. 728).

33 Microsoft argues that, just as the prohibition on the offensive use of passing on in *Illinois Brick* was considered a necessary corollary to the rejection of the passing-on defence in *Hanover Shoe*, the same result should flow in Canada from the rejection

of the passing-on defence in *Kingstreet*. The passing on issue was not raised before either of the applications judges because those decisions were released prior to *Kingstreet*. However, the majority of the BCCA accepted this argument in dismissing the Pro-Sys claim.

#### *Analysis of the "Necessary Corollary" Argument*

34 As I will explain, despite the rejection of the passing-on defence, the arguments advanced by Microsoft as to why there should be a corresponding rejection of the offensive use of passing on are not persuasive. Symmetry for its own sake without adequate justification cannot support the "necessary corollary" argument. In my view, the arguments advanced by Microsoft do not provide such justification.

#### *Double or Multiple Recovery*

35 Microsoft submits that the offensive use of passing on through indirect purchaser actions leaves it exposed to liability from all purchasers in the chain of distribution. It says that its inability to employ the passing-on defence means that direct purchasers would be able to seek recovery for the entire amount of the overcharge. If, at the same time, indirect purchasers bring actions, this would result in both direct and indirect purchasers seeking recovery of the same amount. Microsoft argues that this potential for double or even multiple recovery should be a sufficient reason to reject the offensive use of passing on.

36 In *Illinois Brick*, the U.S. Supreme Court considered multiple recovery to be a "serious risk" and said that it was "unwilling to 'open the door to duplicative recoveries'" (pp. 730-31, *per* White J.):

A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications — and therefore of unwarranted multiple liability for the defendant — by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff ....

[Emphasis deleted; p. 730.]

37 This concern cannot be lightly dismissed. However, in my view, there are countervailing arguments to be considered. Practically, the risk of duplicate or multiple recoveries can be managed by the courts. Brennan J., dissenting in *Illinois Brick*, indicated that the risk of overlapping recovery exists only where additional suits are filed after an award for damages has been made or where actions by direct and indirect purchasers are pending at the same time. In both cases, he said, the risk is remote (pp. 762-64).

38 In the first situation, Brennan J. stated that the complex and protracted nature of antitrust actions, coupled with the short four-year statute of limitations, "make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit" (*Illinois Brick*, at p. 764). With respect to actions under the *Competition Act*, the same reasoning would apply in Canada where our competition actions are similarly complex and where legislation restricts individual recovery for damages for violations to just two years (see *Competition Act*, at s. 36(4)(a)).

39 As for the risk of double recovery where actions by direct and indirect purchasers are pending at the same time, it will be open to the defendant to bring evidence of this risk before the trial judge and ask the trial judge to modify any award of damages accordingly. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), in discussing the risk of a plaintiff seeking double recovery under separate legal provisions, Dickson J. (as he then was), writing for the majority, held that

[t]he courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions. ... [t]he Court at the final stage of finding and quantifying liability could prevent double recovery if in fact compensation and an accounting had already been made by a defendant. No court would permit double recovery. [p. 191]

If the defendant is able to satisfy the judge that the risk is beyond the court's control, the judge retains the discretion to deny the claim.

40 Likewise, if the defendant presents evidence of parallel suits pending in other jurisdictions that would have the potential to result in multiple recovery, the judge may deny the claim or modify the damage award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery.

41 In view of these practical tools at the courts' disposal, I would agree with Donald J.A. of the BCCA, dissenting in *Sun-Rype*, that "the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided" (para. 30). At this stage of the proceeding, Microsoft has not produced evidence to demonstrate that the courts in B.C. could not preclude double or multiple recovery. I would thus not reject indirect purchaser actions because of the risk of multiple recovery.

#### *Remoteness and Complexity*

42 Microsoft's second argument is that the remoteness of the overcharge and the complexities associated with tracing the loss constitute "'serious' and 'inherent' difficulties of proof associated with pass-on" (R.F., at para. 20). These difficulties are said to give rise to confusion and uncertainty and place a burden on the institutional capacities of the courts tasked with following each overcharge to its ultimate result.

43 Microsoft relies on the reasoning of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.). In *Chadha*, that court denied certification of an indirect purchaser action citing "the many problems of proof facing the appellants ... , including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price" (para. 45 (adopting the findings of the Divisional Court)). Microsoft argues that if any part of the overcharge was absorbed by any party in the chain, "the chain would be broken" and the extent of the overcharge would become increasingly difficult to trace (R.F., at para. 22, quoting *Chadha*, at para. 45). The reasons on this point in *Illinois Brick*, on which Microsoft relies heavily, point out that there are significant "uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model'" (pp. 731-32). The court lamented the "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom" (p. 732).

44 Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However, Brennan J., dissenting in *Illinois Brick*, observed that these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case:

Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] 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." ... Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages. [Text in brackets in original; pp. 759-60.]

45 In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.

#### *Deterrence*

46 A third argument, which was not raised by Microsoft, but which was discussed in *Illinois Brick* and is particularly relevant to competition actions, is that allowing the offensive use of passing on frustrates the enforcement of competition laws, thus reducing deterrence. While enforcement of competition laws is generally a question for the government, private individuals are engaged in the enforcement by way of s. 36 which gives them a right of recovery for breaches of Part VI of the *Competition Act*.

47 The majority in *Illinois Brick* understood *Hanover Shoe* to stand for the proposition that "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it" (p. 735). The majority in *Illinois Brick* agreed, finding that direct purchasers would be in the best position to bring an action because the "massive evidence and complicated theories" that are characteristic of indirect purchaser actions impose an unacceptable burden on those plaintiffs, making success of such actions unlikely and thereby defeating the deterrence objectives of antitrust laws (p. 741).

48 In my opinion, allowing the offensive use of passing on should not frustrate the deterrence objectives of Canadian competition laws. I agree with Brennan J., dissenting in *Illinois Brick*, that the offensive use of passing on, unlike the passing-on defence, creates little danger that the overcharger will escape liability and frustrate deterrence objectives but, "[r]ather, the same policies of insuring the continued effectiveness of the [antitrust] action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them" (p. 753). The rationale for rejecting the passing-on defence because it frustrates enforcement is not a reason for denying an action to those who have a valid claim against the overcharger.

49 Further, despite evidence advanced by the respondents in the *Sun-Type* appeal that direct purchasers are often the parties most likely to take action against the overchargers, there may be some situations where direct purchasers will have been overcharged but will be reticent to bring an action against the offending party for fear of jeopardizing a valuable business relationship. In this case, it is alleged that Microsoft's direct purchasers are parties to the overcharging arrangements and would themselves not be likely plaintiffs. Indirect purchaser actions may, in such circumstances, be the only means by which overcharges are claimed and deterrence is promoted. The rejection of indirect purchaser actions in such cases would increase the possibility that the overcharge would remain in the hands of the wrongdoer. For these reasons, I would be of the view that an absolute bar on indirect purchaser actions, thus leaving any potential action exclusively to direct purchasers, would not necessarily result in more effective deterrence than exclusively direct purchaser actions.

#### *Restitutionary Principles*

50 Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing (see Maddaugh and McCamus, at pp. 3-1 to 3-3). In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.

#### *Departure From the Rule in Illinois Brick in the United States*

51 Although *Illinois Brick* remains the law at the federal level, it has been made inapplicable at the state level in many states through so-called "repealer statutes" or by judicial decisions. In 2007, the Antitrust Modernization Commission issued a report to Congress indicating that "more than thirty-five states permit indirect, as well as direct, purchasers to sue for damages under state law" (*Antitrust Modernization Commission: Report and Recommendations* (2007) (online), at p. 269). It recommended to Congress that the rule in *Illinois Brick* be statutorily repealed at the federal level (p. 270). The validity of the "repealer statutes" came before the U.S. Supreme Court in *California v. ARC America Corp.*, 490 U.S. 93 (U.S. Cal. Sup. Ct. 1989). That court held that *Illinois Brick* did not preempt the enactment of state antitrust laws, even if they had the effect of repealing the rule in *Illinois Brick*. These developments cast doubt on the "necessary corollary" approach in *Illinois Brick*.

#### *Doctrinal Commentary*

52 Doctrinal discussions of indirect purchaser actions are still shaped by the initial exchange that occurred directly following the release of *Illinois Brick*. Shortly after the judgment was issued, American scholars William M. Landes and Richard A. Posner (now a judge of the U.S. Court of Appeals for the Seventh Circuit) published an article defending the rule barring indirect purchaser actions (see "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*" (1979), 46 U. Chi. L. Rev. 602, at pp. 634-35). They argued that reserving the right to bring an action against overchargers to the direct purchasers alone would best promote the antitrust laws. They wrote that allowing indirect

purchasers to bring actions would have little to no effect on the objectives of compensation and deterrence because direct purchasers would be more likely to discover the overcharges in the first place and would be more likely to have the information and resources required to bring a successful antitrust action. They called the direct purchaser a more "efficient enforcer" of antitrust laws, and opined that with indirect purchasers, apportionment of the damages is so costly that it becomes a disincentive to sue and that sharing the right to sue among multiple parties has the effect of making the claims small and of weakening the deterrence effect (pp. 608-9). As to compensation, they argued that even if indirect purchasers had no independent right of action, they were nonetheless compensated by the ability of direct purchasers to bring an action because the benefit accruing to the direct purchaser as a result of an anticipated successful antitrust action against the overcharger would be reflected in the prices charged by the direct purchasers to the indirect purchasers (p. 605).

53 Shortly after the publication of Posner and Landes's article, two other antitrust authorities, Robert G. Harris and Lawrence A. Sullivan, expressed an opposing viewpoint (see "[Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis](#)" (1979), 128 *U. Pa. L. Rev.* 269, at pp. 351-52). Harris and Sullivan argued that direct purchasers would be reluctant to disrupt valued supplier relationships and would thus be more likely to pass on the overcharge to their own customers. They would not therefore serve as efficient enforcers of the antitrust laws and, rather, it would be more suitable to vest standing in the indirect purchasers in order to best achieve deterrence.

54 Posner and Landes published a direct response to Harris and Sullivan the next year (see "[The Economics of Passing On: A Reply to Harris and Sullivan](#)" (1980), 128 *U. Pa. L. Rev.* 1274). In response to Harris and Sullivan's argument that direct purchasers would be reticent to sue so as not to compromise valuable commercial relationships, they stated that "any forbearance by the direct purchaser to sue will be compensated. The supplier must pay something to bind the direct purchaser to him and this payment is, functionally, a form of antitrust damages" (p. 1278). In other words, the direct purchaser is receiving a financial inducement to be a part of the conspiracy and this benefit could be passed along to the indirect purchasers.

55 In the years since the exchange between Posner and Landes and Harris and Sullivan, the literature has reflected an ongoing debate on the issue of indirect purchaser actions and specifically the rule in *Illinois Brick*. A survey of the literature reveals that most recently, however, there is a significant body of academic authority in favour of repealing the decision in *Illinois Brick* in order to best serve the objectives of the antitrust laws.

56 Some authors, including Gregory J. Werden and Marius Schwartz, joined Harris and Sullivan in their critique of Posner and Landes, stating specifically that the notion that indirect purchasers would see any of the benefits accruing to a direct purchaser as the result of an anticipated recovery was "quite implausible" ("[Illinois Brick and the Deterrence of Antitrust Violations — An Economic Analysis](#)" (1984), 35 *Hastings L.J.* 629, at p. 638-39).

57 The theory that direct purchasers may be unwilling to sue for fear of disrupting an important supplier relationship has also found favour among academics (see e.g. K. J. O'Connor, "Is the *Illinois Brick* Wall Crumbling?" (2001), 15:3 *Antitrust* 34, at p. 38 (noting that indirect purchasers are perhaps more likely to sue than are direct purchasers because they do not risk severing a "direct business relationship with the alleged violator"); A. Thimmesch, "[Beyond Treble Damages: Hanover Shoe and Direct Purchaser Suits After \*Comes v. Microsoft Corp.\*](#)" (2005), 90 *Iowa L. Rev.* 1649, at p. 1668 and fn. 127 (stating that in many situations the direct purchaser is in fact dependent upon the supplier and as such would be reticent to sue)). As recently as 2012, the same opinion has been expressed: "This is especially true if direct purchasers are able to pass on any overcharges that result from antitrust violations to consumers.... [T]he Supreme Court [of the United States]'s all-or-nothing 'Indirect Purchaser Rule' sweeps too broadly" (J. M. Glover, "[The Structural Role of Private Enforcement Mechanisms in Public Law](#)" (2012), 53 *Wm. & Mary L. Rev.* 1137, at p. 1187).

58 As to the objective of compensation, several authors have commented that the rule in *Illinois Brick* in fact runs contrary to the goal of compensation, with one author calling it "[t]he most far-reaching deviation from the compensatory rationale" (C. C. Van Cott, "[Standing at the Fringe: Antitrust Damages and the Fringe Producer](#)" (1983), 35 *Stan. L. Rev.* 763, at p. 775). Likewise, Andrew I. Gavil, an antitrust scholar, has stated that "providing compensation to all victims of unlawful conduct for the harms inflicted by the wrongdoer is a secondary but also essential goal of a comprehensive remedial system, one that *Illinois*

*Brick* disserves in many common circumstances" ("Thinking Outside the *Illinois Brick* Box: A Proposal for Reform" (2009), 76 *Antitrust L.J.* 167, at p. 170).

59 As can be seen from this overview, despite initial support from well-reputed antitrust scholars, it cannot be said that the rule in *Illinois Brick* still finds favour in the academic literature.

### ***Conclusion on the Offensive Use of Passing On***

60 Although the passing-on *defence* is unavailable as a matter of restitution law, it does not follow that indirect purchasers should be foreclosed from claiming losses passed on to them. In summary:

- (1) The risks of multiple recovery and the concerns of complexity and remoteness are insufficient bases for precluding indirect purchasers from bringing actions against the defendants responsible for overcharges that may have been passed on to them.
- (2) The deterrence function of the competition law in Canada is not likely to be impaired by indirect purchaser actions.
- (3) While the passing-on defence is contrary to basic restitutive principles, those same principles are promoted by allowing passing on to be used offensively.
- (4) Although the rule in *Illinois Brick* remains good law at the federal level in the United States, its subsequent repeal at the state level in many jurisdictions and the report to Congress recommending its reversal demonstrate that its rationale is under question.
- (5) Despite some initial support, the recent doctrinal commentary favours overturning the rule in *Illinois Brick*.

For these reasons, I would not agree with Microsoft's argument that this Court's rejection of the passing-on defence in previous cases and affirmed here precludes indirect purchaser actions.

### ***Certification of the Class Action***

61 Having answered the threshold question and determined that indirect purchasers may use passing on offensively to bring an action, I turn to the question of whether the present action should be certified as a class action. Because the majority of the BCCA disposed of the appeal based on its finding that indirect purchaser actions were not available in Canada, it did not consider the certification requirements dealt with by Tysoe J. (causes of action under s. 4(1)(a) of the *CPA*) and Myers J. (balance of the certification requirements under s. 4(1)(b) to (e) of the *CPA*). It therefore remains for this Court to review the certification analysis carried out by the two applications judges. Microsoft contests their findings as to only three of the certification requirements: (1) whether the pleadings disclose a cause of action; (2) whether the claims raise common issues; and (3) whether a class action is the preferable procedure.

### ***The Requirements for Certification Under the British Columbia Class Proceedings Act***

62 Section 4(1) of the *CPA* provides:

- 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
- (a) the pleadings disclose a cause of action;
  - (b) there is an identifiable class of 2 or more persons;
  - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

***Do the Pleadings Disclose a Cause of Action?***

63 The first certification requirement requires that the pleadings disclose a cause of action. In *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.) ("Alberta Elders"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta Elders*, at para. 20; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 25).

64 Pro-Sys has alleged causes of action (1) under s. 36 of the *Competition Act*, (2) in tort for conspiracy and intentional interference with economic interests, and (3) in restitution for unjust enrichment, constructive trust and waiver of tort. For the reasons that follow, I would agree with Tysoe J. that the pleadings disclose causes of action that should not be struck out at this stage of the proceedings.

***Section 36 of the Competition Act***

65 Under s. 36 of the *Competition Act*, any person who has suffered loss or damage as a result of conduct engaged in by any person contrary to Part VI of the Act may sue for and recover that loss or damage. Section 36 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 ...

.....

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.

66 Part VI of the *Competition Act* is entitled "Offences in Relation to Competition". The Part VI offences alleged in this appeal are (1) conspiracy, contrary to s. 45(1), and (2) false or misleading representations, contrary to s. 52(1). At the time of the hearing before Tysoe J., those provisions read as follows:

**45.** (1) [Conspiracy] Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

**52.** (1) [False or misleading representations] No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

67 The bulk of Microsoft's objections to the cause of action under s. 36 of the *Competition Act* are tied to the theory that offensive passing on is not permitted. In view of my earlier finding that indirect purchaser actions are permitted, those arguments are no longer of consequence in this appeal.

68 However, Microsoft also argues that the s. 36 cause of action is not properly pleaded before this Court because it was not included in Pro-Sys's statement of claim. It argues that any attempt to add it now would be barred by the two-year limitation period contained in s. 36(4) of the Act. However, Donald J.A., dissenting in the BCCA, found Microsoft's contention to be a purely technical objection, and not one that would form a basis to dismiss the claim. I would agree. The Third Further Amended Statement of Claim alleges that the unlawful conduct was continuing, a fact that must be accepted as being true for the purposes of this appeal. As a result, it cannot be said that the action was not filed in a timely manner.

69 Moreover, the Third Further Amended Statement of Claim states specifically that "[t]he plaintiffs plead and rely upon .... Part VI of the *Competition Act*" (para. 109, A.R., vol. II, at p. 48) and seeks damages accordingly. Although the Third Further Amended Statement of Claim does not expressly refer to s. 36, recovery for breaches under Part VI of the *Competition Act* may only be sought by private individuals through a claim under s. 36. I agree with Donald J.A. that "the parties put their minds to s. 36 at the certification hearing and so no surprise or prejudice can be complained of" (BCCA, at para. 59). For these reasons, I would not accede to Microsoft's argument that the claim should be barred by the limitation provision of the *Competition Act*.

70 Microsoft made other brief arguments objecting to the cause of action under s. 36. Before Tysoe J., it argued that the Competition Tribunal should have jurisdiction over the enforcement of the competition law. I agree that a number of provisions of the *Competition Act* assign jurisdiction to the Competition Tribunal rather than the courts. However, that is not the case with s. 36, which expressly provides that any person who suffered loss by virtue of a breach of Part VI of the Act may seek to recover that loss. The section expressly confers jurisdiction on the court to entertain such claims.

71 For all these reasons, it is not plain and obvious that a claim under s. 36 of the *Competition Act* would be unsuccessful. For the purposes of s. 4(1)(a) of the *CPA*, it cannot be said that the pleadings do not disclose a cause of action under s. 36 of the *Competition Act*.

#### *Tort*

72 Pro-Sys alleges that Microsoft combined with various parties to commit the economic torts of conspiracy (both predominant purpose conspiracy and unlawful means conspiracy) and unlawful interference with economic interests. A conspiracy arises when two or more parties agree "to do an unlawful act, or to do a lawful act by unlawful means" (*Mulcahy v. R. (1868)*, L.R. 3 H.L. 306 (U.K. H.L.), at p. 317). Despite the fact that the tort of conspiracy traces its origins "to the Middle Ages, [it] is not now a well-settled tort in terms of its current utility or the scope of the remedy it affords" (*Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54 (B.C. C.A.), at para. 42).

73 Nonetheless, in Canada, two types of actionable conspiracy remain available under tort law: predominant purpose conspiracy and unlawful means conspiracy. I first address the arguments related to predominant purpose conspiracy. I then turn

to unlawful means conspiracy and unlawful interference with economic interests and deal with them together, as the arguments against these causes of action relate to the "unlawful means" requirement common to both torts.

### Predominant Purpose Conspiracy

74 Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (*Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), at pp. 471-72).

75 It is worth noting that in *Cement Lafarge*, Estey J. wrote that predominant purpose conspiracy is a "commercial anachronism" and that the approach to this tort should be to restrict its application:

The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho, supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise. [p. 473]

Notwithstanding these observations, whether predominant purpose conspiracy should be restricted so as not to apply to the facts of this case is not a matter that should be determined on an application to strike pleadings.

76 At para. 91 of its Third Further Amended Statement of Claim, in a section discussing both predominant purpose and unlawful means conspiracy, Pro-Sys states that "[t]he defendants were motivated to conspire" and then lists the defendants' three "predominant purposes and predominant concerns": (1) to harm the plaintiffs by requiring them to purchase Microsoft products rather than competitors' products; (2) to harm the plaintiffs by requiring them to pay artificially high prices; and (3) to unlawfully increase their profits (A.R., vol. II, at p. 43).

77 Microsoft argues that the tort of predominant purpose conspiracy is not made out because Pro-Sys's statement of claim fails to identify one true predominant purpose and instead lists several "overlapping purpose[s]" (R.F., at para. 93). Microsoft submits that by pleading that it was "motivated solely by economic considerations" (R.F., at para. 94), Pro-Sys in effect concedes that the predominant purpose of Microsoft's alleged conduct could not have been to cause injury to the plaintiff as required under the law.

78 There is disagreement between the parties as to what the pleadings mean. Microsoft says that Pro-Sys failed to identify injury to the plaintiffs as the one true predominant purpose. Pro-Sys argues that its pleadings state that Microsoft acted with the predominant purpose of injuring the class members which resulted in, among other things, increased profits. While the pleadings could have been drafted with a more precise focus, I would hesitate on a pleadings application to rule definitively that the predominant purpose conspiracy pleading is so flawed that no cause of action is disclosed. At this stage, I cannot rule out Pro-Sys's explanation that Microsoft's primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention. For this reason, I cannot say it is plain and obvious that Pro-Sys's claim in predominant purpose conspiracy cannot succeed.

79 Microsoft also argues that this claim should be struck to the extent it applies as between corporate affiliates because "[p]arent and wholly-owned subsidiary corporations always act in combination" (R.F., at para. 95). Pro-Sys says that "[t]his is not true as a matter of law" (appellants response factum, at para. 55). Both parties cite, among other cases, para. 19 of *Smith v. National Money Mart Co. (2006)*, 80 O.R. (3d) 81 (Ont. C.A.), leave to appeal refused, [2006] 1 S.C.R. xii (note) (S.C.C.), which says that "there can be a conspiracy between a parent and a subsidiary corporation". In my view, this statement appears to leave open a cause of action in predominant purpose conspiracy even when the conspiracy is between affiliated corporations. Again, it would not be appropriate on a pleadings application to make a definitive ruling on this issue. In the circumstances, I cannot say it is plain and obvious that the predominant purpose conspiracy claim as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should be struck at this phase of the proceedings.

### **Unlawful Means Conspiracy and Intentional Interference With Economic Interests**

80 The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur (*Cement LaFarge*, at pp. 471-72).

81 The tort of intentional interference with economic interests aims to provide a remedy to victims of intentional commercial wrongdoing (*Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353 (Ont. C.A.), at para. 98; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1 (U.K. H.L.)). The three essential elements of this tort are (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result (see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 336).

82 Microsoft argues that the claims for unlawful means conspiracy and intentional interference with economic interests should be struck because their common element requiring the use of "unlawful means" cannot be established.

83 These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215 (N.B. C.A.), leave to appeal granted, [2012] 3 S.C.R. v (note) (S.C.C.). Suffice it to say that at this point it is not plain and obvious that there is no cause of action in unlawful means conspiracy or in intentional interference with economic interests. I would therefore not strike these claims. Depending on the decision of this Court in *Bram*, it will be open to Microsoft to raise the matter in the BCSC should it consider it advisable to do so.

#### *Restitution*

84 Pro-Sys makes restitutionary claims alleging causes of action in unjust enrichment, constructive trust and waiver of tort.

### **Unjust Enrichment**

85 The well-known elements required to establish an unjust enrichment are (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason (such as a contract) for the enrichment (see *Alberta Elders*, at para. 82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 30; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 455; *Becker v. Pettikus*, [1980] 2 S.C.R. 834 (S.C.C.)). Pro-Sys says that Microsoft was unjustly enriched by the overcharge to its direct purchasers that was passed through the chain of distribution to the class members.

86 Microsoft argues that any enrichment it received came from the direct purchasers, and not from the class members, and that this lack of a direct connection between it and the class members forecloses the claim of unjust enrichment. Additionally, it says that the contracts between Microsoft and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers (the existence of which are undisputed) constitute a juristic reason for the enrichment.

87 In support of its first argument, Microsoft cites *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.). In *Peel*, McLachlin J. (as she then was) held, at p. 797, that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant". A claim in unjust enrichment must be based on "more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice — once from the person who is the immediate beneficiary of the payment or benefit ..., and again from the person who reaped an incidental benefit" (*Peel*, at p. 797). The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude

that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.

88 With regard to Microsoft's juristic reason justification, Pro-Sys pleads that these contracts are "illegal and void" because they constitute a restraint of trade at common law, they violate U.S. antitrust law, they are prohibited by Microsoft's own corporate policies and they violate Part VI of the *Competition Act*. It submits that the contracts cannot therefore constitute a juristic reason for the enrichment. The question of whether the contracts are illegal and void should not be resolved at this stage of the proceedings. These are questions that must be left to the trial judge.

89 I am thus unable to find that it is plain and obvious that the claim in unjust enrichment cannot succeed.

### **Constructive Trust**

90 As a remedy for the alleged unjust enrichment, Pro-Sys submits that an amount equal to the overcharge from the sales of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members. In other words, Pro-Sys is asking that Microsoft be constituted a constructive trustee in favour of Pro-Sys.

91 *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), is the relevant controlling authority on constructive trusts. In *Kerr*, Justice Cromwell explains that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property:

... the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). [para. 50]

92 In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient" (*Kerr*, at para. 50). As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck.

### **Waiver of Tort**

93 As an alternative to the causes of action in tort, Pro-Sys waives the tort and seeks to recover the unjust enrichment accruing to Microsoft. Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, "thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct" (Maddaugh and McCamus, at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia Ltd. v. Barclays Bank Ltd.* (1940), [1941] A.C. 1 (U.K. H.L.), at p. 18). Waiver of tort is based on the theory that "in certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages" (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that "it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).

94 Microsoft advances two arguments as to why this claim should be struck. First, it states that Pro-Sys has pleaded waiver of tort as a remedy and not a cause of action, and therefore proof of loss is an essential element. Second, if indeed waiver of tort is pleaded as a cause of action, the underlying tort must therefore be established, including the element of loss. In my view, neither argument provides a sufficient basis upon which to find that a claim in waiver of tort would plainly and obviously be unsuccessful.

95 In *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.), Epstein J. (as she then was) performed an extensive review of the doctrine of waiver of tort. Her analysis found numerous authorities accepting the viability of waiver of tort as its own cause of action intended to disgorge a defendant's unjust enrichment gained through wrongdoing, as opposed to merely a remedy for unjust enrichment. These authorities differed, however, as to the question of whether the underlying tort needed to be established in order to sustain the action in waiver of tort.

96 The U.S. and U.K. jurisprudence as well as the academic texts on the subject have largely rejected the requirement that the underlying tort must be established in order for a claim in waiver of tort to succeed (see *Serhan*, at paras. 51-68, citing Maddaugh and McCamus at p. 24-20 of 2005 update; J. Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (1991); D. Friedmann, "Restitution for Wrongs: The Basis of Liability", in W. R. Cornish, et al., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998), 133; *National Trust Co. v. Gleason*, 77 N.Y. 400 (U.S. N.Y. Ct. App. 1879); *Federal Sugar Refining Co. v. United States Sugar Equalization Board Inc.*, 268 F. 575 (U.S. D.C. N.Y. 1920); *Mahesan v. Malaysia Housing Society* (1977), [1979] A.C. 374 (Malaysia P.C.); *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* (1982), [1983] 1 A.C. 366 (U.K. H.L.)). Another line of cases would find a cause of action in waiver of tort to be unavailable unless it can be established that the defendant has committed the underlying tort giving rise to the cause of action (see *United Australia*, at p. 18; *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (Ont. S.C.J.), at para. 14; *Reid v. Ford Motor Co.*, 2006 BCSC 712 (B.C. S.C.)). At least one of these cases (*Reid*) suggests that a reluctance to eliminate the requirement of proving loss as an element of the cause of action is part of the reason for requiring the establishment of the underlying tort (para. 17).

97 Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, it cannot be said that an action based on waiver of tort is sure to fail" and that the questions "about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involv[e] matters of policy that should not be determined at the pleadings stage" (*Serhan*, at para. 68). I agree. In my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.

### ***The Remaining Certification Requirements***

98 The causes of action under s. 36 of the *Competition Act*, in tort and in restitution (except for constructive trust) have met the first certification requirement that the pleadings disclose a cause of action. I now turn to Microsoft's argument that the claims should nevertheless be rejected because they do not meet two of the remaining certification requirements: that the claims of the class members raise common issues and that a class action is the preferable procedure in this case.

#### ***Standard of Proof***

99 The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: "... the class representative must show *some basis in fact* for each of the certification requirements set out in ... the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (B.C. C.A.) ("Infineon") at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), at para. 50).

100 The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).

101 Microsoft, while accepting the "some basis in fact" standard, argues that "in order for the Plaintiffs to meet the standard of proof, the evidence must establish that the proposed class action raises common issues and is the preferable procedure *on a balance of probabilities*" (R.F., at para. 41 (emphasis in original)). Microsoft relies on the academic writings of Justice Cullity of the Ontario Superior Court of Justice. Cullity J. expressed the view that "[t]o the extent that some basis in fact reflects a concern that certification motions are procedural and should not be concerned with the merits of the claims asserted, there seems no justification for applying the lesser standard to essential preconditions for certification that will not be within the jurisdiction of the court at trial" ("Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 422). In other words, Cullity J. suggests that because certification requirements are procedural, they will not be revisited at a trial of the common issues. As such, there is no reason to assess them on a standard lower than the traditional civil standard of "balance of probabilities". Microsoft further submits that this Court should endorse the American approach of making factual determinations at the certification stage on a preponderance of the evidence and should require certification judges to weigh the evidence so as to resolve all factual or legal disputes at certification, even if those disputes overlap with the merits (see R.F., at para. 42, citing *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (U.S. C.A. 3rd Cir. 2008), at p. 307, and para. 43).

102 I cannot agree with Microsoft's submissions on this issue. Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (Ont. S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

103 Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

104 In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

105 Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

#### *Do the Claims of the Class Members Raise Common Issues?*

106 The commonality requirement has been described as "[t]he central notion of a class proceeding" (M. A. Eizenga, et al., *Class Actions Law and Practice* (loose-leaf), at p. 3-34.6). It is based on the notion 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" (*Ibid.*).

107 Section 4(1)(c) of the *CPA* states that the court must certify an action as a class proceeding if, among other requirements, "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members". Section 1 of the *CPA* defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

108 In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), this Court addressed the commonality question, stating that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

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

109 Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.

110 The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

111 Myers J. concluded that the claims raised common issues. I agree that their resolution is indeed necessary to the resolution of the claims of each class member. Their resolution would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis. Those findings are entitled to deference from an appellate court.

112 The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54).

113 In addition to the common issues relating to scope and existence of the causes of action pleaded, the remaining common issues certified by Myers J. relate to the alleged loss suffered by the class members and as to whether damages can be calculated on an aggregate basis. The loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established. The standard upon which that evidence should be assessed is contested and I turn to it first below. A question was also raised regarding whether the aggregate damages provision can be used to establish liability. I also address this below.

## Expert Evidence in Indirect Purchaser Class Actions

114 One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.

115 The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *Linerboard Antitrust Litigation, Re*, 305 F.3d 145, 53 Fed. R. Serv. 3d 999 (U.S. C.A. 3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

116 The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis. The BCCA in *Infineon* called for the plaintiff to show "only a credible or plausible methodology" and held that "[i]t was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases" (para. 68). This was the standard adopted by Myers J. in the present case. Under this standard, he found the plaintiffs' methodologies to be adequate to satisfy the commonality requirement.

117 Microsoft submits that the "credible or plausible methodology" standard adopted by Myers J. was too permissive and allowed for a claim to be founded on insufficient evidence. It argues that under s. 5(4) of the *CPA*, the parties are required to file affidavits containing all material facts upon which they intend to rely, and as such Myers J. was under an obligation to weigh the evidence of both parties where a conflict arises. Microsoft alleges that despite this requirement, Myers J. failed to weigh Pro-Sys's expert evidence against Microsoft's expert evidence, merely concluding that Pro-Sys's expert evidence was "not implausible" and that assessing competing evidence was "not something that can and should be done in a certification application" (R.F., at para. 43, citing reasons of Myers J., at para. 144). Microsoft argues that this approach was in error and is inconsistent with the standard required at certification. Once again relying on U.S. case law, Microsoft urges this Court to weigh conflicting expert testimony at certification and to perform this review in a "robust" and "rigorous" manner (R.F., at paras. 45-48, citing *Hydrogen Peroxide*, at p. 323, and *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (U.S. Sup. Ct. 2011), at p. 2551).

118 In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

119 To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage. In Canada, unlike the U.S., pre-certification discovery does not occur as a matter of right. Although document production may be ordered at the discretion of the applications judge, Microsoft objected and Myers J. acceded to Microsoft's position and refused to order it in this case (2007 BCSC 1663, 76 B.C.L.R. (4th) 171 (B.C. S.C. [In Chambers])). Microsoft can hardly argue for rigorous and robust scrutiny when it objected to pre-certification discovery and was successful before the applications judge.

120 Here, the Pro-Sys expert evidence consists of methodologies proposed by two economists, Professor James Brander and Dr. Janet Netz. Professor Brander's affidavit identified him as the Asia-Pacific Professor of International Business in the Sauder School of Business at the University of British Columbia and senior consultant in the Delta Economics Group. Dr. Netz's affidavit described her as an economist, a founding partner of ApplEcon LLC, an economics consulting firm based in Ann Arbor, Michigan, a tenured Associate Professor of Economics at Purdue University and a Visiting Associate Professor at the University of Michigan. Dr. Netz acted as expert witness in several similar cases brought against Microsoft in the United States. Dr. Netz's testimony drew heavily from the evidence she had prepared in her role as expert in those U.S. cases.

121 It is Dr. Netz's evidence that the same methodology that applied in the U.S. would apply equally to the case at bar. She testified that the methodologies can demonstrate the initial overcharges by Microsoft to its direct purchasers as well as the pass-through to the indirect purchasers. Dr. Netz outlines three alternative methods by which harm and damages can be calculated. The first two methods, called the "rate of return method" and the "profit margin method", identify the overcharge at the first level of the distribution chain — that is, the overcharge in the sales made directly by Microsoft to its own customers. The first two models do not on their own establish that the overcharge was passed on but are intended to prove the total amount received by Microsoft as a result of the overcharge. The third methodology, the "price premium method", begins the analysis at the other end of the distribution chain, at the ultimate-purchaser level.

122 Dr. Netz describes the price premium method as follows:

Under this method, one calculates the *retail* price premium that Microsoft products have relative to competing products for the products at issue and for a set of benchmark products where there have not been allegations of anticompetitive conduct. The overcharge equals the percentage decrease in the *retail* price of the products at issue such that Microsoft would still realize the same *retail* price premium as it does on the benchmark products (i.e., products in markets not affected by Microsoft's unlawful conduct). [2010 BCSC 285, at para. 26]

123 Once the retail price overcharge is calculated, the total class member expenditure on the products should then be multiplied by the overcharge percentage in order to arrive at the quantum of damages.

124 Dr. Netz testified that regression analysis could be employed to ascertain the extent of passing on in order to establish loss at the indirect-purchaser level. Relying on the successful application of the methods in the U.S., Dr. Netz testified that "[t]here is no theoretical reason, in my opinion, why the methods described above cannot be applied to the sales of Microsoft software in Canada" (Netz affidavit, at para. 49 (A.R., vol. II, at p. 177)). Implicit in this evidence is that the data necessary to apply the methodologies in Canada is available.

125 Myers J. dealt with Microsoft's criticisms of Dr. Netz's testimony at paras. 131-64 of his reasons. Microsoft's criticisms pertained to her alleged failure to take Canadian context into account, the lack of an evidentiary basis for her findings, alleged flaws in the benchmark products she selected, and a lack of workability in her proposed methodology. Myers J. found that despite these criticisms, Dr. Netz had demonstrated a plausible methodology for proving class-wide loss. He therefore did not proceed to address Professor Brander's proposed methods (para. 164).

126 It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be stronger and more credible than the evidence of Dr. Netz and Professor Brander. However, resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification (see *Infineon*, at para. 68; *Irving*, at para. 143). The trial judge will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology. For the purposes of certification and having regard to the deference due the applications judge on this issue, I would not interfere with the findings of Myers J. as to the commonality of the loss-related issues.

### Aggregate Assessment of Damages

127 The issue raised here is whether the question of aggregate assessment of damages is properly certified as a common issue. The aggregate damages provisions in the *CPA* provide for the quantification of the monetary award on a class-wide basis. Sections 29(1) and 29(2) of the *CPA* are relevant:

**29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

- (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) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

- (a) submissions that contest the merits or amount of an award under that subsection, and
- (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

128 In this case, the common issues that were certified are whether damages can be determined on an aggregate basis and if so, in what amount. For the reasons below, I would not disturb the applications judge's decision to certify these common issues. However, while the aggregate damages common issues certified by Myers J. deal only with the assessment of damages and not proof of loss, there is some confusion in his reasons about whether the aggregate damages provisions of the *CPA* may be relied on to establish proof of loss where proof of loss is an essential element of proving liability. That question has been resolved differently by various courts in Ontario and British Columbia, where the aggregate damages provisions are sufficiently similar to allow comparison.

129 In this case, Myers J. concluded that the aggregate damages provisions can be used to establish what I interpret to be the proof of loss element of proving liability. He stated that: "... the aggregate damages section of the *Class Proceedings Act* allow the harm to be shown in the aggregate to the class as a whole" (para. 126), and also that "the Court of Appeal must be taken to have accepted that for certification of the damage claims, a method of showing harm to all class members need not be demonstrated and, further, that the aggregate damages sections can be used to establish liability" (BCSC, at para. 125).

130 In finding that the aggregate damages provisions of the *CPA* can be used to establish proof of loss to the class as a whole, Myers J. followed a line of jurisprudence of the British Columbia Court of Appeal. This reasoning appears in *Infineon*:

In *Knight*, this Court affirmed the certification of an aggregate monetary award under the *CPA* as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct without an antecedent liability finding — rather, the aggregate assessment would establish concurrently both that the defendant benefited from its wrongful conduct and the extent of the benefit. [para. 39]

(see also *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389 (B.C. C.A.), at paras. 50-52).

131 With respect, I do not agree with this reasoning. The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721 (Ont. C.A.), at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding

of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

132 I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the BCSC in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "that question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (B.C. S.C.), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno's*, that "[t]he majority clearly recognized that s. 24 [of the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6] is procedural and cannot be used in proving liability" (para. 55).

133 This reasoning reflects the intention of the Attorney General of British Columbia. When he introduced the *CPA* in the British Columbia legislature, he stated that the goal of the legislation was to allow individuals who have similar claims to come together and pursue those individual claims collectively: "In simple terms, all we are doing here is finding a way to enable the access that individuals have to the court to be an access that individuals combining together can have to the court" (Hon. C. Gabelmann, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, 15078). The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.

134 The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found.

135 However, as stated above, the determination that the aggregate damages provisions cannot be used to establish proof of loss does not affect Myers J.'s decision to certify aggregate damages as a common issue. Despite his erroneous finding that aggregate damages provisions may be invoked to establish liability, he stated that invoking these provisions for that purpose was not necessary in this case (see paras. 119-20 and 127). The aggregate damages questions he certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount. Having not actually relied on the proposition that aggregate damages provisions can be used to determine liability, Myers J.'s decision to certify questions related to aggregate damages should not be disturbed.

#### *Is a Class Action the Preferable Procedure?*

136 The provision of the *CPA* relevant to the preferable procedure requirement is s. 4(2). It reads:

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

137 In *Hollick*, this Court said that preferability must be examined in reference to the three principal aims of the class action regime: "... judicial economy, access to justice, and behaviour modification" (para. 27).

138 Microsoft argues that the lack of commonality between the class members and the abundance of individual issues signifies that a class proceeding will not be a "fair, efficient and manageable method of advancing the claim" as required by *Hollick* (R.F., at para. 84, citing *Hollick*, at para. 28). It argues that the access to justice function of class actions will not be served by certifying the action because it will inevitably break down into numerous individual trials, subjecting the class members to delays. It also argues that the tendency of indirect purchaser action to result in *cy-près* awards — made where it would be impractical to distribute the award to the individual plaintiffs — further frustrates the access to justice aim. As to the objective of behaviour modification, Microsoft contends that it is more properly a concern for the Competition Commissioner and that the procedures that can be initiated by that body are the preferable forum in which to deal with the wrongs alleged in this case.

139 I am unable to accept these arguments. In *Hollick*, McLachlin C.J. was of the view that the plaintiff had not satisfied the certification requirements on the grounds that a class proceeding was not the preferable procedure. In that case, she found that the question of whether or not the defendant had unlawfully emitted methane gas and other pollutants was common to all class members. However, as to whether loss could be established on a class-wide basis, she found too many differences among the class members to consider loss a common issue. In other words, while she found that there was a common issue related to the existence of the cause of action, she did not consider the loss-related issues to be common to all the class members. She dismissed the class action on the basis that "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action" (*Hollick*, at para. 32).

140 In the present case, there are common issues related to the existence of the causes of action, but there are also common issues related to loss to the class members. Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of Myers J. that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. I would agree. In the circumstances, I would not interfere with his finding that the class action is the preferable procedure.

141 It is also premature to assume that the award in this case will result in *cy-près* distribution or that the objective of access to justice will be frustrated on this account. Further, while under the *Competition Act* the Competition Commissioner is the primary organ responsible for deterrence and behaviour modification, the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives.

### ***Conclusion on the Certification of the Action***

142 I would restore the orders of the applications judges allowing for certification of this action as a class proceeding with the exception that the pleadings based on constructive trust be struck.

### **Conclusion**

143 For the above reasons, I would allow the appeal with costs throughout.

*Appeal allowed.*

*Pourvoi accueilli.*

### **Appendix**

**Common Issues Certified by Myers J.**

Breach of *Competition Act*, R.S.C. 1985, c. C-34

- (a) Did the Defendants, or either of them, engage in conduct which is contrary to s. 45 and or s. 52 of the *Competition Act*?
- (b) Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?
- (c) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Conspiracy

- (d) Did the Defendants, or either them, conspire to harm the Class Members?
- (e) Did the Defendants, or either of them, act in furtherance of the conspiracy?
- (f) Was the predominant purpose of the conspiracy to harm the Class Members?
- (g) Did the conspiracy involve unlawful acts?
- (h) Did the Defendants, or either of them, know that the conspiracy would likely cause injury to the Class Members?
- (i) Did the Class Members suffer economic loss?
- (j) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?
- (k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Tortious Interference with Economic Interests

- (l) Did the Defendants, or either of them, intend to injure the Class Members?
- (m) Did the Defendants, or either of them, interfere with the economic interests of the Class Members by unlawful or illegal means?
- (n) Did the Class Members suffer economic loss as a result of the Defendants' interference?
- (o) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?
- (p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment, Waiver of Tort and Constructive Trust

- (q) Have the Defendants, or either of them, been unjustly enriched by the receipt of an Overcharge? "Overcharge" means the difference between the prices the Defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the Defendants would have been able to charge in the absence of their wrongdoing.
- (r) Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge?
- (s) Is there a juridical reason why the Defendants, or either of them, should be entitled to retain the Overcharge?

- (t) What restitution, if any, is payable by the Defendants, or either of them, to the Class Members based on unjust enrichment?
- (u) Should the Defendants, or either of them, be constituted as constructive trustees in favour of the Class Members for the Overcharge?
- (v) What is the quantum of the Overcharge, if any, that the Defendants, or either of them, hold in trust for the Class Members?
- (w) What restitution, if any, is payable by the Defendants to the Class Members based on the doctrine of waiver of tort?
- (x) Are the Defendants, or either of them, liable to account to the Class Members for the wrongful profits, if any, that they obtained on the sale of Microsoft Operating Systems or Microsoft Applications Software to the Class Members based on the doctrine of waiver of tort?
- (y) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

Punitive Damages

- (z) Are the Defendants, or either of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, in what amount and to whom?

Interest

- (aa) What is the liability, if any, of the Defendants, or either of them, for court order interest?

Distribution of Damages and/or Trust Funds

- (bb) What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution? [A.R., vol. I, at pp. 167-69.]

**TAB 28**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Union des consommateurs c. Magasins Best Buy ltée](#) | 2015 QCCS 5168, 2015 CarswellQue 10541, EYB 2015-258454 | (C.S. Qué., Nov 10, 2015)

**1994 CarswellOnt 66**  
Supreme Court of Canada

R. v. Mohan

1994 CarswellOnt 1155, 1994 CarswellOnt 66, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36, 114 D.L.R. (4th) 419, 166 N.R. 245, 18 O.R. (3d) 160 (note), 23 W.C.B. (2d) 385, 29 C.R. (4th) 243, 71 O.A.C. 241, 89 C.C.C. (3d) 402, J.E. 94-778, EYB 1994-67655

**R. v. CHIKMAGLUR MOHAN**

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 9, 1993

Judgment: May 5, 1994

Docket: Doc. 23063

Counsel: *Jamie C. Klukach*, for the Crown.

*Brian H. Greenspan* and *Sharon E. Lavine*, for respondent.

Subject: Criminal; Evidence

**Related Abridgment Classifications**

Evidence

XIII Opinion

[XIII.2 Experts](#)

[XIII.2.a Purpose](#)

Evidence

XIII Opinion

[XIII.2 Experts](#)

[XIII.2.b Admissibility](#)

[XIII.2.b.iii Miscellaneous](#)

**Headnote**

Criminal Law --- Evidence — Expert evidence — Purpose of testimony

Evidence --- Opinion evidence — Expert evidence — Admissibility

Evidence — Opinion evidence — Expert witnesses — Expert opinion having to be necessary in sense of providing information likely to be outside experience and knowledge of judge or jury — Expert evidence advancing novel scientific theory or technique to be subjected to special scrutiny.

Evidence — Character evidence — Bad character — Evidence of defence psychiatrist that perpetrator of sexual offence would be of limited and unusual group of individuals in which accused did not belong rightly excluded by trial judge — Person committing sexual assaults on young women could not be said to belong to group possessing sufficiently distinctive behavioural characteristics — Expert's group profiles not sufficiently reliable to be considered helpful.

The accused, a practising paediatrician, was charged with four counts of sexual assault on four of his female patients, aged 13 to 16 years old at the relevant time. The alleged sexual assaults were perpetrated during the course of medical examinations.

Counsel for the accused sought to call a psychiatrist who would testify that the perpetrator of the offences alleged to have been committed would be one of a limited and unusual group of individuals, and that the accused did not fall within that narrow

class because he did not possess the characteristics belonging to that group. The trial judge held a voir dire and ruled that the evidence tendered on the voir dire would not be admitted.

The jury found the accused guilty as charged. The Court of Appeal allowed the accused's appeal, quashed the convictions and ordered a new trial, upon a finding that the rejected evidence was admissible on two bases. On the first basis, given that similar fact evidence was admitted showing that the acts compared were so unusual and strikingly similar that their similarities could not be attributed to coincidence, the testimony was admissible to show that the offences alleged were unlikely to have been committed by the same person. On the second basis, it was admissible to show that the accused was not a member of either of the unusual groups of aberrant personalities that could have committed the offences alleged. The Crown appealed.

**Held:**

The appeal was allowed and the convictions were restored.

On the basis of the principles relating to exceptions to the character evidence rule and the principles governing the admissibility of expert evidence, the limitations on the use of this type of evidence required that the evidence in this case be excluded.

To be admissible, an expert's opinion must be necessary in the sense that it provide information that is likely to be outside the experience and knowledge of a judge or jury. However, the need for the evidence must be assessed in light of its potential to distort the fact-finding process. Presented in scientific language that the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept. Expert evidence that advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle. The Crown cannot lead expert evidence in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. In order to be relevant on the issue of identity, the evidence must tend to show that the accused shared a distinctive and unusual behavioural trait with the perpetrator of the crime. The trait must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. When, however, the evidence is tendered by the accused, other considerations apply. The accused is permitted to adduce evidence as to disposition both in his or her own evidence or by calling witnesses. The general rule is that evidence as to character is limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testimony, however, may rely on specific acts of good conduct. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories.

A further exception, however, has developed that is limited in scope. An expert's opinion may be admitted as evidence, if the trial judge is satisfied that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile that the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Where the scientific community has developed a standard profile for the offender who commits this type of crime, the criteria of relevance and necessity will be satisfied. Not only will the expert evidence tend to prove a fact in issue, but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability that will generally ensure that the trier of fact does not give it more weight than it deserves.

The findings of the trial judge in this case were that a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioural characteristics that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences charged. Moreover, the fact that the alleged perpetrator was a physician did not advance the matter because there is no acceptable body of evidence that doctors who commit sexual assaults fall into a distinctive class with identifiable characteristics. There was no material in the record to support a finding that the profile of a paedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, the evidence would not be necessary to clarify a matter otherwise inaccessible, nor would any value it may

have had be outweighed by its potential for misleading or diverting the jury. Given these findings and applying the principles referred, the trial judge had rightly decided as a matter of law that the evidence was inadmissible.

## Table of Authorities

### Cases considered:

- Director of Public Prosecutions v. Jordan*, [1977] A.C. 699 at 708, [1976] 3 All E.R. 775 (H.L.) — referred to  
*Kelliher (Village) v. Smith*, [1931] S.C.R. 672, [1931] 4 D.L.R. 102 — considered  
*Lowery v. R.*, [1974] A.C. 85, 58 Cr. App. R. 35, [1973] 3 All E.R. 662 (P.C.) — considered  
*R. v. Abbey*, [1982] 2 S.C.R. 24, 29 C.R. (3d) 193, [1983] 1 W.W.R. 251, 39 B.C.L.R. 201, 68 C.C.C. (2d) 394, 138 D.L.R. (3d) 202, 43 N.R. 30 — referred to  
*R. v. B. (G.)*, [1990] 2 S.C.R. 30, 77 C.R. (3d) 347, 56 C.C.C. (3d) 200, (sub nom. *R. v. B. (G.) (No. 2)*) 111 N.R. 31, 86 Sask. R. 111 — referred to  
*R. c. Béland*, [1987] 2 S.C.R. 398, (sub nom. *Béland v. R.*) 60 C.R. (3d) 1, 79 N.R. 263, 9 Q.A.C. 293, 36 C.C.C. (3d) 481, 43 D.L.R. (4th) 641 — applied  
*R. v. Bourguignon* (January 14, 1991), Doc. Ottawa, Flanigan J. (Ont. Gen. Div.) [unreported] — considered  
*R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, 4 C.R. (4th) 1, 63 C.C.C. (3d) 385, 123 N.R. 63 — referred to  
*R. v. Chard* (1971), 56 Cr. App. R. 268 (C.A.) — considered  
*R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.) [affirmed [1980] 1 S.C.R. 158, 28 N.R. 100, 47 C.C.C. (2d) 411, 98 D.L.R. (3d) 385] — referred to  
*R. v. Garfinkle* (1992), 15 C.R. (4th) 254 (Que. C.A.) — referred to  
*R. v. Lafferty*, [1993] 4 W.W.R. 74, [1993] N.W.T.R. 218, 80 C.C.C. (3d) 150 (S.C.) — referred to  
*R. v. Lavallee*, [1990] 1 S.C.R. 852, 76 C.R. (3d) 329, [1990] 4 W.W.R. 1, 55 C.C.C. (3d) 97, 108 N.R. 321, 67 Man. R. (2d) 1 — referred to  
*R. v. Lupien*, [1970] S.C.R. 263, 9 C.R.N.S. 165, 71 W.W.R. 110, 71 W.W.R. 655, [1970] 2 C.C.C. 193, 9 D.L.R. (3d) 1 — considered  
*R. v. Lyons*, (sub nom. *R. v. L. (T.P.)*) [1987] 2 S.C.R. 309, 61 C.R. (3d) 1, (sub nom. *R. v. L.*) 80 N.R. 161, 82 N.S.R. (2d) 271, 207 A.P.R. 271, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, 32 C.R.R. 41 — referred to  
*R. v. Marquard*, [1993] 4 S.C.R. 223, 25 C.R. (4th) 1, 159 N.R. 81, 66 O.A.C. 161, 85 C.C.C. (3d) 193, 108 D.L.R. (4th) 47 — referred to  
*R. v. McMillan* (1975), 29 C.R.N.S. 191, 7 O.R. (2d) 750, 23 C.C.C. (2d) 160 (C.A.), affirmed [1977] 2 S.C.R. 824, 33 C.C.C. (2d) 360, 15 N.R. 20, 73 D.L.R. (3d) 759 — considered  
*R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) [affirmed (sub nom. *R. v. Canadian Dredge & Dock. Co.*) [1985] 1 S.C.R. 662, 45 C.R. (3d) 289, 9 O.A.C. 321, 19 C.C.C. (3d) 1, 19 D.L.R. (4th) 314, 59 N.R. 241] — referred to  
*R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.) — considered  
*R. v. Morin*, [1988] 2 S.C.R. 345, 66 C.R. (3d) 1, 88 N.R. 161, 30 O.A.C. 81, 44 C.C.C. (3d) 193 — considered  
*R. v. Morris*, [1983] 2 S.C.R. 190, 36 C.R. (3d) 1, [1984] 2 W.W.R. 1, 48 N.R. 341, 7 C.C.C. (3d) 97, 1 D.L.R. (4th) 385 — referred to  
*R. v. Robertson* (1975), 29 C.R.N.S. 141, 21 C.C.C. (2d) 385 (Ont. C.A.) [leave to appeal to S.C.C. refused (1975), 21 C.C.C. (2d) 385n] — considered  
*R. v. T. (S.)* (1986), 55 C.R. (3d) 321, (sub nom. *R. v. T.*) 18 O.A.C. 219, 57 O.R. (2d) 737, 31 C.C.C. (3d) 1 (C.A.) — referred to  
*R. v. Turner*, [1975] Q.B. 834, 60 Cr. App. R. 80, [1975] 1 All E.R. 70 (C.A.) — referred to  
*Thompson v. R.*, [1918] A.C. 221, 26 Cox C.C. 189, 13 Cr. App. R. 61 (H.L.) — referred to

### Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46 —

s. 693

Appeal from judgment reported at (1992), 13 C.R. (4th) 292, 8 O.R. (3d) 173, 55 O.A.C. 309, 71 C.C.C. (3d) 321 (C.A.) allowing appeal from conviction on four counts of sexual assault and ordering new trial.

**The judgment of the court was delivered by *Sopinka J.*:**

1 In this appeal we are required to determine under what circumstances expert evidence is admissible to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. Resolution of this issue involves an examination of the rules relating to expert and character evidence.

**I. Facts**

**A. The Events**

2 The respondent, a practising paediatrician in North Bay, was charged with four counts of sexual assault on four of his female patients, aged thirteen to sixteen at the relevant time. The alleged sexual assaults were perpetrated during the course of medical examinations of the patients conducted in the respondent's office. The complainants had been referred to the respondent for conditions which were, in part, psychosomatic in nature.

3 Evidence relating to each complaint was admitted as similar fact evidence with respect to the others. The complainants did not know one another. Three of them came forth independently. Following a mistrial, which was publicized, the fourth victim came forward, having heard about the other charges. Three of the four complainants had been victims of prior sexual abuse. With respect to two of them, the respondent knew about their sexual abuse at the hands of others. The alleged assaults consisted of fondling of the girls' breasts and digital penetration and stimulation of their vaginal areas, accompanied by intrusive questioning of them as to their sexual activities. All of the complainants testified that the respondent did not wear gloves while examining them internally. The respondent, who testified in his own defence, denied the complainants' evidence.

4 At the conclusion of the respondent's examination in chief, counsel for the respondent indicated that he intended to call a psychiatrist who would testify that the perpetrator of the offences alleged to have been committed would be part of a limited and unusual group of individuals and that the respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The Crown sought a ruling on the admissibility of that evidence. The trial judge held a voir dire and ruled that the evidence tendered on the voir dire would not be admitted.

5 The jury found the respondent guilty as charged on November 16, 1990. He was sentenced to nine months' imprisonment on each of the four counts, to be served concurrently, and to two years' probation. The respondent appealed his convictions and the Crown appealed the sentence. The Court of Appeal allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal found it was not necessary to deal with the Crown's sentence appeal and refused the Crown leave to appeal.

6 The appellant sought leave to appeal to this court against the decision of the Ontario Court of Appeal pursuant to s. 693 of the *Criminal Code*, R.S.C. 1985, c. C-46. On December 10, 1992 leave to appeal was granted by this court.

**B. The Excluded Evidence**

7 In the voir dire, Dr. Hill, the expert, began his testimony by explaining that there are three general personality groups that have unusual personality traits in terms of their psychosexual profile perspective. The first group encompasses the psychosexual who suffers from major mental illnesses (e.g. schizophrenia) and engages in inappropriate sexual behaviour occasionally. The second and largest group contains the sexual deviation types. This group of individuals shows distinct abnormalities in terms of the choice of individuals with whom they report sexual excitement and with whom they would like to engage in some type of sexual activity. The third group is that of the sexual psychopaths. These individuals have a callous disregard for people around them, including a disregard for the consequences of their sexual behaviour towards other individuals. Another group would include paedophiles who gain sexual excitement from young adolescents, probably pubertal or post-pubertal.

8 Dr. Hill identified paedophiles and sexual psychopaths as examples of members of unusual and limited classes of persons. In response to questions hypothetically encompassing the allegations of the four complainants, the expert stated that the psychological profile of the perpetrator of the first three complaints would likely be that of a paedophile, while the profile of the

perpetrator of the fourth complaint would likely be that of a sexual psychopath. Dr. Hill also testified that, if but one perpetrator was involved in all four complaints described in the hypothetical questions, he would uniquely categorize that perpetrator as a sexual psychopath. He added that such a person would belong to a very small, behaviourally distinct category of persons. Dr. Hill was asked whether a physician who acted in the manner described in the hypothetical questions would be a member of a distinct group of aberrant persons. His answer was that such behaviours could only flow from a significant abnormality of character and would be part of an unusual and limited class. In cross-examination, Dr. Hill said: "You bring an extra abnormal, extra component for the abnormality when you talk about a physician in his or her office." According to Dr. Hill, physicians who were also sexual offenders would be a small group because not only would they be breaking the usual norms of society, but they would also be breaking out against the norms of the medical profession which are very strict given the intimate contact necessary to treat patients. It was contemplated that Dr. Hill would go on to testify "to the effect that Doctor Mohan does not have the characteristics attributable to any of the three groups in which most sex offenders fall."

## II. Judgments Below

### A. Ontario Court of Justice (Ruling on Voir Dire) (Bernstein J.)

9 In ruling on the admissibility of Dr. Hill's evidence, the trial judge stated the issues as follows:

One: Did the offences alleged to have been committed by the accused have unusual features which would indicate that anyone who committed them was a member of a limited and distinguishable group?

Two: Did the psychiatrist have the necessary qualifications and expertise to venture an opinion on the first issue so as to be helpful to the jury?

10 The trial judge noted that Dr. Hill had personally interviewed and treated three doctors who engaged in criminal sexual misconduct with their patients. He also noted that Dr. Hill admitted that he was not aware of any scientific study or literature related to the psychiatric make-up of doctors who sexually abuse their patients and that his experience with three admitted offenders who were doctors was not a sufficient basis to allow him to make any generalizations on the subject. Dr. Hill acknowledged that he, as a psychiatrist, is unable to diagnose individuals as having the distinct characteristics of a paedophile or of a homosexual until the patient has performed an overt act which suggests the existence of the characteristic.

11 The trial judge reviewed the case law in which the use of such psychiatric evidence had been discussed (i.e., *R. v. Lupien*, [1970] S.C.R. 263; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 [29 C.R.N.S. 141] (Ont. C.A.); *R. v. McMillan* (1975), 23 C.C.C. (2d) 160 [29 C.R.N.S. 191] (Ont. C.A.); *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.); *R. v. T. (S.)* (1986), 31 C.C.C. (3d) 1 [55 C.R. (3d) 321] (Ont. C.A.)). From these cases, the trial judge concluded that the use of psychiatric evidence has been greatly expanded since *Lupien*. He cited the following words of Martin J.A. in *Robertson* (at p. 423 [C.C.C., p. 183 C.R.N.S.]):

Evidence that the offence had distinctive features which identified the perpetrator as a person possessing unusual personality traits constituting him a member of an unusual and limited class of persons would render admissible evidence that the accused did not possess the personality characteristics of the class of persons to which the perpetrator of the crime belonged.

The trial judge also relied on the following passage of *McMillan* (at p. 175 [C.C.C., p. 207 C.R.N.S.]):

I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, e.g., rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, e.g., that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible.

After relying on *McMillan*, the trial judge held:

Doctor Hill is of the opinion that sexual assault is a crime committed by a distinguishable group. As I read the cases, I came to the conclusion that it is the size and the degree of distinctiveness of the "unusual and limited class of persons" which determines whether expert opinion will be helpful in defining the class and categorizing accused persons within or without the group. These days it is trite to say that a large number of men from all walks of life commit sexual offences on young women. While all may have some type of character disorder, I doubt that expert evidence regarding the normality of any given accused would be of assistance to a trier of fact absent some more distinguishing within the wide spectrum of sexual assault.

The evidence of Doctor Hill is not sufficient, I believe, to establish that doctors who commit sexual assaults on patients are in a significantly more limited group in psychiatric terms than are other members of society. There is no scientific data available to warrant that conclusion. A sample of three offenders is not a sufficient basis for such a conclusion. Even the allegations of the fourth complainant ... are not so unusual, as sex offenders go, to warrant a conclusion that the perpetrator must have belonged to a sufficiently narrow class.

I conclude that if the evidence was received as proposed, it would merely be character evidence of a type that is inadmissible as going beyond evidence of general reputation, and does not fall within the proper sphere of expert evidence.

**B. Ontario Court of Appeal (1992), 8 O.R. (3d) 173**

12 It was apparent for Finlayson J.A., who wrote the court's judgment, that the trial judge's conclusions were based on a misapprehension of the evidence of Dr. Hill. Finlayson J.A. stated that Dr. Hill did not base his opinion on case studies of the three physicians he had as patients who were accused of sexual crimes. Rather, Finlayson J.A. was of the view at p. 177 that, in concluding that the perpetrators in the hypothetical examples would fall into an unusual and limited class of persons, and that, if the perpetrator were a physician, the class into which he would fall would be even narrower, Dr. Hill based his opinion on all of his experience:

With respect, I think the learned trial judge was in error, in that he ruled on the sufficiency of the evidence of Dr. Hill, not its admissibility. It was up to the jury to consider what weight should be given to the expert opinion. Crown counsel suggested on appeal that the trial judge was ruling on the qualifications of the expert witness to give the opinion that he did. I do not think that is a correct interpretation of the trial judge's reasons. Dr. Hill's qualifications are outstanding and no attempt was made at trial to challenge them. I think the trial judge was saying that Dr. Hill's personal experience in dealing with sex-offending physicians and the lack of scientific literature specific to such physicians did not justify Dr. Hill giving the opinion that he did. In my opinion, in restricting his interpretation of Dr. Hill's testimony to "doctors who commit sexual assaults on patients", the trial judge misapprehended the opinion of Dr. Hill and the broad psychiatric experience upon which it was based.

13 Finlayson J.A. went on to say that the evidence of Dr. Hill was admissible on two bases. On the first basis, given that similar fact evidence was admitted showing that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, Dr. Hill's testimony was admissible to show that the offences alleged were unlikely to have been committed by the same person (*R. v. C. (M.H.)*, [1991] 1 S.C.R. 763).

14 On the second basis, it was admissible to show that the respondent was not a member of either of the unusual groups of aberrant personalities which could have committed the offences alleged. Referring to *R. v. Lupien*, supra, at pp. 275-78, *R. v. Robertson*, supra, at p. 425 [C.C.C., pp. 184-85 C.R.N.S.], and *R. v. McMillan*, supra, Finlayson J.A. held that it is settled law that opinion evidence showing that the accused did or did not possess the distinguishing characteristics of an abnormal group is admissible in a criminal case, where it would appear that the perpetrator of the crime alleged is a person with an abnormal propensity or disposition which stamps him or her as being a member of that special and extraordinary class (or group). In this case, the psychiatrist showed that paedophiles and sexual psychopaths are members of special and extraordinary classes. Considering also the issues put to the jury in the case at bar (complex psychological issues, testimonial trustworthiness), Finlayson J.A. held that evidence of persons with professional psychiatric experience in dealing with sexual offences would

be of assistance (based on: *R. v. Lyons*, (sub nom. *R. v. L. (T.P.)*) [1987] 2 S.C.R. 309; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee*, supra; *R. v. B.(G.)*, [1990] 2 S.C.R. 30).

15 The court allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal refused leave to the Crown's sentence appeal.

### III. Analysis

16 The admissibility of the rejected evidence was analyzed in argument under two exclusionary rules of evidence: (1) expert opinion evidence, and (2) character evidence. I have concluded that, on the basis of the principles relating to exceptions to the character evidence rule and under the principles governing the admissibility of expert evidence, the limitations on the use of this type of evidence require that the evidence in this case be excluded.

#### (1) Expert Opinion Evidence

17 Admission of expert evidence depends on the application of the following criteria:

18 (a) relevance;

19 (b) necessity in assisting the trier of fact;

20 (c) the absence of any exclusionary rule;

21 (d) a properly qualified expert.

##### *(a) Relevance*

22 Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost-benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *R. v. Morris*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

23 There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. c. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.), in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific technique or body of scientific knowledge". Moldaver J. also mentioned two other factors, *inter alia*, which should be considered in such circumstances (at p. 353):

- (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?

(2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

24 A similar approach was adopted in *R. v. Bourguignon*, [1991] O.J. No. 2670 (Q.L.), where, in ruling upon a voir dire concerning the admissibility of DNA evidence, Flanigan J. admitted most of the evidence but excluded statistical evidence about the probability of a match between the DNA contained in samples taken from the accused and those taken from the scene of a crime. The learned judge explained:

This Court does not think that the criminal jurisdiction of Canada is yet ready to put such an additional pressure on a jury, by making them overcome such fantastic odds and asking them to weigh it as just one piece of evidence to be considered in the overall picture of all the evidence presented. There is a real danger that the jury will use the evidence as a measure of the probability of the accused's guilt or innocence and thereby undermine the presumption of innocence and erode the value served by the reasonable doubt standard. As said in the Schwartz case: "dehumanize our justice system".

I would therefore, rule admissible the DNA testing evidence but not the statistic probabilities. This restriction can be easily overcome by evidence that "such matches are rare" or "extremely rare" or words to the same effect, which will put the jury in a better position to assess such evidence and protect the right of the accused to a fair trial.

It should be noted that, subsequently, other courts have rejected the distinction drawn by Flanigan J. and have admitted both DNA evidence and the evidence regarding statistical probabilities of a match. (See, e.g., *R. v. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.) [reported at [1993] 4 W.W.R. 74]). I rely on *R. v. Bourguignon*, supra, simply to illustrate the mode of approach adopted there and leave the specific issue decided by Flanigan J. to be considered when it arises.

**(b) Necessity in Assisting the Trier of Fact**

25 In *R. v. Abbey*, supra, Dickson J., as he then was, stated, at p. 42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.).

26 This precondition 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*, supra. 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." More recently, in *Lavallee*, supra, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

27 As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699 at 708, at p. 718:

An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then

the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

28 There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

29 These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquard*, [1993] 4 S.C.R. 223, per McLachlin J.

#### **(c) The Absence of any Exclusionary Rule**

30 Compliance with criteria (a), (b) and (d) will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. For example, in *R. v. Morin*, [1988] 2 S.C.R. 345, evidence elicited by the Crown in cross-examination of the psychiatrist called by the accused was inadmissible because it was not shown to be relevant other than as to the disposition to commit the crime charged. Notwithstanding, therefore, that the evidence otherwise complied with the criteria for the admission of expert evidence it was excluded by reason of the rule that prevents the Crown from adducing evidence of the accused's disposition unless the latter has placed his or her character in issue. The extent of the restriction when such evidence is tendered by the accused lies at the heart of this case and will be discussed hereunder.

#### **(d) A Properly Qualified Expert**

31 Finally the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

32 In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

### **(2) Expert Evidence as to Disposition**

33 In order to decide what principles should govern the admissibility of this kind of evidence, it is necessary to consider the limitations imposed by the rules relating to character evidence, having regard to the restrictions imposed by the criteria in respect of expert evidence.

34 I have already referred to *R. v. Morin*, supra, wherein a unanimous court decided that the Crown cannot lead such evidence in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. As I stated, at p. 371:

In my opinion, in order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the crime. The trait must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. The judgment of Lord Hailsham in *Boardman*, quoted above, provides one illustration of the kind of evidence that would be relevant.

Conversely, the fact that the accused is a member of an abnormal group some of the members of which have the unusual behavioural characteristics shown to have been possessed by the perpetrator is not sufficient. In some cases it may, however,

be shown that all members of the group have the distinctive unusual characteristics. If a reasonable inference can be drawn that the accused has those traits then the evidence is relevant subject to the trial judge's obligation to exclude it if its prejudicial effect outweighs its probative value. The greater the number of persons in society having these tendencies, the less relevant the evidence on the issue of identity and the more likely that its prejudicial effect predominates over its probative value.

35 When, however, the evidence is tendered by the accused, other considerations apply. The accused is permitted to adduce evidence as to disposition both in his or her own evidence or by calling witnesses. The general rule is that evidence as to character is limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testimony, however, may rely on specific acts of good conduct. See *R. v. McNamara (No. I)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at p. 348; leave to appeal refused, [1981] 1 S.C.R. xi. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories. A further exception, however, has developed that is limited in scope. I propose to examine the extent of this exception.

36 In England, with the exception of non-insane automatism, expert psychiatric and psychological evidence is not admissible to show the accused's state of mind unless it is contended that the accused is abnormal in the sense of suffering from insanity or diminished responsibility. In *R. v. Chard* (1971), 56 Cr. App. R. 268 (C.A.), the trial judge refused to allow medical evidence that the accused who was not alleged to be suffering from a disease of the mind lacked the necessary mens rea. In the Court of Appeal, Roskill L.J. stated at p. 271 that it was "not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind — assuming a normal mind — operated at the time of the alleged crime ..."

37 In *Lowery v. R.*, [1974] A.C. 85 (P.C.), such evidence was admitted when tendered by one co-accused against another. It was a case involving the sadistic murder of a young girl. Lowery and King were both charged, and it was obvious that one, the other, or both of them were guilty. In this context, King sought to prove that he feared Lowery and that Lowery dominated him. The Privy Council held that the trial judge acted properly in allowing King to call a psychiatrist to swear that he was less likely to have committed the crime than Lowery. That is, character evidence tendered by a psychiatrist was held to be admissible. Lord Morris of Borth-y-Gest of the Privy Council stated, at p. 103:

Lowery and King were each asserting that the other was the completely dominating person at the time Rosalyn Nolte was killed: each claimed to have been in fear of the other. In these circumstances it was most relevant for King to be able to show, if he could, that Lowery had a personality marked by aggressiveness whereas he, King, had a personality which suggested that he would be led and dominated by someone who was dominant and aggressive ... Not only however was the evidence which King called relevant to this case: its admissibility was placed beyond doubt by the whole substance of Lowery's case.

Moreover, in *R. v. Turner*, supra, the accused unsuccessfully pleaded provocation in answer to a charge of murder of his girlfriend whom he alleged that he had killed in a fit of rage caused by her sudden confession of infidelity. He appealed on the grounds that the trial judge had wrongly refused to admit the evidence of a psychiatrist. That psychiatrist was to testify to the effect that the accused was not mentally ill, that he had a great affection toward the victim and that he deeply regretted his act of murder. The evidence was rejected on the basis that it was not the proper subject of expert evidence. As for *Lowery*, it was confined to its own facts.

38 C. Tapper in *Cross on Evidence* (7th ed. 1990), at p. 492, reconciled *Lowery* and *Turner* using a principled approach:

Juries do not need to be told that normal men are liable to lose control of themselves when their women admit to infidelity, but they require all the expert assistance they can get to help them determine which of two accused has the more aggressive personality.

Tapper then proceeded to reconcile the two cases using a more technical approach:

Another way of reconciling the cases would be to treat the fact that Lowery had put his character in issue as crucial to the decision of the Privy Council, the psychiatric evidence then being admissible to impugn the credibility of his testimony. Unfortunately we are left without any guidance on the subject from the Court of Appeal who contented themselves with saying that *Lowery's* case was decided on its special facts.

39 With respect to the development of the exception in Canada, *R. v. Lupien*, supra, is a good starting point. It involved a respondent who was convicted of attempting to commit an act of gross indecency, and whose defence was that he lacked the requisite intent to commit the act because he thought his companion was a woman. He sought to prove his "lack of intent" by tendering psychiatric evidence which showed that he reacted violently against any type of homosexual activity and, therefore, could not have knowingly engaged in an act of gross indecency. Ritchie J. concluded, at pp. 277-78, that the evidence was admissible for the following reasons:

I am far from saying that as a general rule psychiatric evidence of a man's disinclination to commit the kind of crime with which he is charged should be admitted, but the present case is concerned with gross indecency between two men and I think that crimes involving homosexuality stand in a class by themselves in the sense that the participants frequently have characteristics which make them more readily identifiable as a class than ordinary criminals. See *Reg. v. Thompson* [(1917), 13 Cr. App. R. 61 at 81]. In any event, it appears to me that the question of whether or not a man is homosexually inclined or otherwise sexually perverted is one upon which an experienced psychiatrist is qualified to express an opinion and that if such opinion is relevant it should be admitted at a trial such as this even if it involves the psychiatrist in expressing his conclusion that the accused does not have the capacity to commit the crime with which he is charged.

It is this passage that created the abnormal group exception which is often sought to be applied to various contexts other than the homosexual context.

40 The Ontario Court of Appeal, and specifically Martin J.A., further looked into this exception of proving the disposition of the accused through psychiatric evidence in the following two cases: *R. v. McMillan*, supra, affirmed [1977] 2 S.C.R. 824, and *R. v. Robertson*, supra.

41 *R. v. McMillan* involved an accused who was charged with the murder of his infant child and whose defence was that it was in fact his wife and not he who killed the child. The trial judge allowed the accused to call a psychiatrist who testified that the accused's wife had a psychopathic personality disturbance with brain damage. This psychiatric evidence showed that a third party, the accused's wife, was more likely to have committed the crime because of her abnormal personality/disposition. Martin J.A., speaking for the court, found that disposition to commit a crime is generally relevant since it goes to the probability/propensity of the person doing or not doing the act charged. He then referred to *R. v. Lupien*, at p. 169 [C.C.C., p. 201 C.R.N.S.], as creating the following exception:

One of the exceptions to the general rule that the character of the accused, in the sense of disposition, when admissible, can only be evidenced by general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.

After having noted the applicability of *R. v. Lupien*, Martin J.A. engaged in a lengthy discussion of the exception and in fact extended *R. v. Lupien*. This extension, at pp. 173-75 [C.C.C., pp. 205-207 C.R.N.S.], was affirmed by the Supreme Court of Canada:

I do not consider that, because the crime under consideration was not one that could only be committed by a person with a special or abnormal propensity, psychiatric evidence with respect to Mrs. McMillan's disposition, was, therefore, inadmissible, in the circumstances of this case.

All evidence to be admissible must, of course, be relevant to some issue in the case. Psychiatric evidence with respect to the personality traits or disposition of a person, whether of the accused or another, may be admissible for different purposes. While those purposes are not mutually exclusive, evidence which is relevant for one purpose may not be for another.

Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:

- (a) the evidence is relevant to some issue in the case;
- (b) the evidence is not excluded by a policy rule;
- (c) the evidence falls within the proper sphere of expert evidence.

One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime.

Where the offence is of a kind that is committed only by members of an abnormal group, for example, offences involving homosexuality, psychiatric evidence that the accused did or did not possess the distinguishing characteristics of that abnormal group is relevant either to bring him within, or to exclude him from, the special class of which the perpetrator of the crime is a member. In order for psychiatric evidence to be relevant for that purpose, the offence must be one which indicates that it was committed by a person with an abnormal propensity or disposition which stamps him as a member of a special and extraordinary class.

Psychiatric evidence with respect to the personality traits or disposition of the accused, or another, if it meets the three conditions of admissibility above set out, is also admissible, however, as bearing on the *probability* of the accused, or another, having committed the offence.

It would appear that it was upon this latter ground that the psychologist's evidence was held to be admissible in *Lowery v. The Queen, supra*, although the features of the offence in that case were sufficiently indicative of the possession of an abnormal propensity by the perpetrator, that the expert evidence might have been relevant to the issue of identity as well. Since in that case the evidence was offered by the accused King, it was not excluded by the policy rule which prevents the prosecution from introducing evidence to prove that the accused by reason of his criminal propensities is likely to have committed the crime charged. Both accused in *Lowery v. The Queen* had psychopathic personalities (although the features of King's psychopathic personality were less severe than Lowery's) and hence their personality traits fell within the proper sphere of expert evidence.

Where the crime under consideration does not have features which indicate that the perpetrator was a member of an abnormal group, psychiatric evidence that the accused has a normal mental make-up but does not have a disposition for violence or dishonesty or other relevant character traits frequently found in ordinary people is inadmissible. The psychiatric evidence in the circumstances postulated is not relevant on the issue of identity to exclude the accused as the perpetrator any more than the possession of violent or dishonest tendencies by the accused or a third person would be admissible to identify the accused or the third person as the perpetrator of the crime.

"So common a characteristic is not a recognisable mark of the individual." (*Per Lord Sumner in Thompson v. Director of Public Prosecutions (1918)*, 26 Cox C.C. 189 at p. 199.)

While such evidence is relevant as bearing on the probability of the accused having committed the crime, the psychiatric evidence proffered in such circumstances really amounts to an attempt to intro duce evidence of the accused's good character, as a normal person, through a psychiatrist. Such evidence does not fall within the proper sphere of expert evidence and is subject to the ordinary rule applicable to character evidence which, in general, requires the character of the accused to be evidenced by proof of general reputation.

I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible. [Emphasis in original.]

The evidence of the psychiatrist was held to be admissible.

42 Martin J.A. elaborated on the reasoning set out above in *R. v. Robertson*, *supra*. That case involved a 16-year-old accused charged with brutally murdering a nine-year-old girl by kicking her. The defence sought to introduce expert psychiatric evidence to show that a propensity for violence or aggression was not a part of the accused's psychological make-up. This tended to rebut evidence led by the Crown as to the accused's violent character. Martin J.A. summed up, at p. 426 [C.C.C., p. 186 C.R.N.S.]:

While the judgment of Ritchie J. deals only with the admissibility of psychiatric evidence with respect to disposition in offences involving homosexuality, there would appear to be no logical reason why such evidence should not be admitted on the same principle in other cases where there is evidence tending to show that, by reason of the nature of the offence, or its distinctive features, its perpetrator was a person who, in the language of Lord Sumner, was member of "a specialized and extraordinary class", and whose psychological characteristics fall within the expertise of the psychiatrist, for the purpose of showing that the accused did not possess the psychological characteristics of persons of that class. Obviously, where such evidence is adduced by the accused, the prosecution is entitled to call psychiatric evidence in order to rebut the evidence introduced by the defence.

In my view, however, the judgment of Ritchie J. in *Regina v. Lupien* provides no support for a conclusion that, in the case of ordinary crimes of violence, psychiatric evidence is admissible to prove that the accused's psychological makeup does not include a tendency or disposition for violence.

Martin J.A. further stated, at pp. 429-30 [C.C.C., pp. 189-90 C.R.N.S.]:

In my view psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes a characteristic feature of an abnormal group falling within the range of study of the psychiatrist, and from whom the jury can, therefore, receive appreciable assistance with respect to a matter outside the knowledge of persons who have not made a special study of the subject. A *mere* disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused. [Emphasis in original.]

Given this reasoning, Martin J.A. concluded that the crime was not specially marked and so the conditions for the admissibility of psychiatric evidence were not met.

43 A useful summary of the principles that emerge from the cases is made by Alan W. Mewett, "Character as a Fact in Issue in Criminal Cases" (1984-85) 27 Crim. L.Q. 29, at pp. 35-36 of his article, where he points out the various contexts in which an accused can tender character evidence by way of an expert:

There are thus three basic requirements that must be met before such psychiatric evidence can even be considered as potentially admissible. First, it must be relevant to an issue. Second, it must be of appreciable assistance to the trier of fact and third, it must be evidence that would otherwise be unavailable to the ordinary layman without specialized training, but these requirements only set forth the general requirements for the admissibility of expert testimony.

Once these hurdles have been passed, a number of different scenarios may be postulated. The crime may be an "ordinary" one (which I take to mean a crime for which no special mental characteristics on the part of the perpetrator would be required) and the accused is an "ordinary" person; the crime may be an "ordinary" one, but the accused an "extraordinary" person (*i.e.*, having some peculiar mental make-up that would tend to show that he would not commit that "ordinary"

crime); the crime may be "extraordinary", but the accused "ordinary"; or the crime may be "extraordinary" and the accused "extraordinary", in a different direction.

In the first scenario, the evidence is irrelevant because it is simply not probative of anything. In the second it is probative and admissible but only if the extraordinary characteristic of the accused tends to show that he would not commit an ordinary crime of that nature (such as a homosexual being charged with a heterosexual offence). In the third, if it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess, it would be admissible. In the last scenario, the situation is the same provided that the difference in the abnormalities tends to exclude the accused from the probable group of perpetrators.

44 I question whether use of the terms "abnormal" and "normal" is the best way to describe the concept that underlies their use. The term "abnormal" is derived from the English cases in which it usually connotes the mental state of insanity or diminished responsibility. See *R. v. Chard*, *supra*, at p. 270. The basic rationale of these cases is that "normal" human behaviour is a matter which a judge or jury can assess without the assistance of expert evidence. Canadian cases have extended the exception to include what has been described as sexually deviant behaviour. See Rosemary Pattenden, "Conflicting Approaches to Psychiatric Evidence in *Criminal Trials: England, Canada and Australia*" [1986] *Crim. L.R.* 92, at p. 100. The rationale underlying this extension is the relevance of the evidence based on the distinctiveness of the behavioural traits of either the putative perpetrator of the crime or the accused. This distinctiveness tends to exclude the accused from the category of persons that could or would likely commit the crime.

45 There are other reasons why the use of the term "abnormal" is no longer satisfactory. Even in medical circles there are differing views as to what constitutes abnormality. See Pattenden, *supra*, at p. 100, and David C. Rimm and John W. Sommerville, *Abnormal Psychology* (1977), at pp. 31 and 32. Moreover, it imports a value judgment on the lifestyle of some groups in society. This is aptly illustrated by considering the statement of Lord Sumner in *Thompson v. R.*, [1918] *A.C.* 221, at p. 235:

The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.

46 The difficulty in defining what is abnormal was recently referred to by McCarthy J.A. in *R. v. Garfinkle* (1992), 15 C.R. (4th) 254 (Que. C.A.). At pp. 256-57, speaking for the court, he stated:

What dispositions are to be classified as abnormal, as outside ordinary human experience, for the purpose of admitting psychiatric evidence may be a difficult question. A disposition for sadism is clearly abnormal. Dispositions for violence (short of sadism or something akin thereto), or for dishonesty, are clearly too common to be classified as abnormal. In sexual offences, classification is less easy. However, it seems to me that, whether it be called pedophilia or something else, a disposition in an adult to use boys of 10 and 11 for sexual gratification must be classified as abnormal. Accordingly, in the present case, psychiatric evidence is admissible to show that Garfinkle does not have such a disposition.

47 In my opinion, the term "distinctive" more aptly defines the behavioural characteristics which are a precondition to the admission of this kind of evidence.

48 How should the criteria for the admission of this type of evidence be applied? I find the following statement of Professor Mewett, *supra*, at p. 36, to be an apt characterization of the nature of the decision which the trial judge must make:

The categorization of crimes into the "ordinary" and the "extraordinary" is therefore a legal question to be determined by the judge, as is the "normality" or "abnormality" of the accused — to the despair, no doubt, of psychiatrists. But admissibility of evidence is a legal question and depends primarily upon relevance, that is, upon its assistance to the trier of fact in his inference-drawing process, and this is governed, not by expertise, but by common sense and experience; words like "ordinary", "extraordinary" or "abnormal" are not meant to be scientific expressions but assessments of relevance and are thus clearly within the domain of the judge.

49 Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

### (3) Application to This Case

50 I take the findings of the trial judge to be that a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioural characteristics that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences charged. Moreover, the fact that the alleged perpetrator was a physician did not advance the matter because there is no acceptable body of evidence that doctors who commit sexual assaults fall into a distinctive class with identifiable characteristics. Notwithstanding the opinion of Dr. Hill, the trial judge was also not satisfied that the characteristics associated with the fourth complaint identified the perpetrator as a member of a distinctive group. He was not prepared to accept that the characteristics of that complaint were such that only a psychopath could have committed the act. There was nothing to indicate any general acceptance of this theory. Moreover, there was no material in the record to support a finding that the profile of a paedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, it cannot be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury. Given these findings and applying the principles referred to above, I must conclude that the trial judge was right in deciding as a matter of law that the evidence was inadmissible.

51 The Court of Appeal also supported the admissibility of the evidence on the basis that Dr. Hill's evidence tended to rebut alleged similarities between the evidence on the respective counts. On this point, Finlayson J.A. stated at p. 178:

Where, as here, the Crown alleges that the probative value of the similar fact evidence arises from the circumstance that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, the defence is equally entitled to lead evidence as to features of the alleged acts which demonstrate dissimilarities ...

The judgment of the Court of Appeal was not supported on this ground either in the respondent's factum or in the oral argument.

52 The use to which the jury could put the evidence was explained by the trial judge in his charge to the jury. The key passage in the charge in this respect was the following:

If you conclude when considering any of the specific counts that evidence relating to any or all of the other counts is *so similar that common sense dictates the relevancy of such evidence* to one or more of the issues I mentioned earlier, then you may, not must, draw the inferences to which I have referred. [Emphasis added.]

The similarities, which were detailed by the judge, were with respect to the modus operandi of the perpetrator of the acts which were the subject of the individual counts. No objection was taken to this aspect of the charge. This use of the similar fact evidence relates to a different issue from the subject matter of the proposed evidence of Dr. Hill. As discussed above, the dissimilarities addressed in Dr. Hill's proposed evidence are not as to modus operandi but rather with respect to the comparative psychological make-up of the respondent on the one hand and the alleged perpetrator of the acts charged, on the other. Furthermore, whether a crime is committed in a manner that identifies the perpetrator by reason of striking similarities in the method employed in the commission of other acts is something that a jury can, generally, assess without the aid of expert evidence. As stated by the trial judge, it is a matter of common sense.

53 I would allow the appeal, set aside the judgment of the Court of Appeal, restore the convictions and remit the matter to the Court of Appeal for disposition of the sentence appeal.

*Appeal allowed.*

**TAB 29**

2009 CarswellOnt 6337  
Ontario Superior Court of Justice

Robinson v. Medtronic Inc.

2009 CarswellOnt 6337, [2009] O.J. No. 4366, 181 A.C.W.S. (3d) 427, 80 C.P.C. (6th) 87

**SHERRY MARIE ROBINSON, GREGORY ROBERT HORNING, DAN  
AUSTEN and GLENDA AUSTEN (Plaintiffs) and MEDTRONIC,  
INC. and MEDTRONIC OF CANADA LTD. (Defendants)**

Perell J.

Heard: September 30, October 1, 2, 2009  
Judgment: October 20, 2009  
Docket: 07-CV-341755CP

Proceedings: allowed leave to appeal *Peter v. Medtronic Inc.* (2010), 2010 CarswellOnt 2151 ((Ont. Div. Ct.))

Counsel: Won J. Kim, James C. Orr, Victoria Paris, Joel Rochon for Plaintiffs  
Patrick O'Kelly, Danielle Royal, Samaneh Hosseini, Paloma Ellard for Defendants

Subject: Civil Practice and Procedure; Torts; Family

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

Civil practice and procedure

**V** Class and representative proceedings

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.E Fair and adequate representation**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.F Litigation plan**

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiffs alleged that defendants manufactured and sold defective leads, which were operative part of defibrillators, conspired to conceal defect, and failed to warn doctors and persons implanted with defibrillators — Plaintiffs brought action, pleading negligence, conspiracy, waiver of tort, derivative claims under family law legislation, and subrogated claims of provincial health insurers — Plaintiffs proposed main class of all persons implanted in Canada with specified leads, and family law class of all family members of implant class entitled to assert claim under Family Law Act and related legislation — Plaintiffs brought motion to certify action as class proceeding under Class Proceedings Act, 1992 — Action partially and conditionally certified — Plaintiffs pleaded cause of action in negligence for product liability and failure to warn — Current pleading was adequate to advance claims of members of family law class — With respect to claim of provincial health insurers, while it may be true that plaintiffs could not assert "subrogated" claim for Alberta pursuant to Alberta Hospitals Act, plaintiffs could still assert claim on behalf of province of Alberta or other provincial health insurers — Additional class for claims of provincial health insurers should be added, and leave was granted to amend statement of claim accordingly — Claim of waiver of tort was satisfactorily pleaded — With respect to claim in conspiracy, motion was adjourned sine die, and plaintiffs granted 20 days to amend statement of claim to plead claim of conspiracy — Special damages were necessary ingredient of conspiracy plea and had to be expressly pleaded, and plaintiffs failed to identify special damages.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiffs alleged defendants manufactured and sold defective leads, which were operative part of defibrillators, conspired to conceal defect, and failed to warn doctors and those implanted with defibrillators — Plaintiffs brought action for negligence, conspiracy, waiver of tort, derivative claims under family law legislation, and subrogated claims of provincial health insurers — Plaintiffs proposed main class of all persons implanted in Canada with specified leads, and family law class of all family members of implant class entitled to assert claim under Family Law Act and related legislation — Plaintiffs brought motion to certify action as class proceeding under Class Proceedings Act, 1992 (CPA) — Action partially and conditionally certified — Proposed class definitions satisfied requirements of CPA, but additional class for provincial health insurers should be added, and leave granted to amend statement of claim accordingly — Since Medical Devices Regulations required manufacturers, importers and distributors of medical devices to maintain records of patients implanted with device, defendants had records to determine number and identity of individuals implanted with leads in Canada — All proposed implant class members had defibrillators that were subject matter of product recall with respect to life-saving medical device and there was basis in fact for proposed class definitions — Whether or not implant class members met threshold for emotional distress claims was matter for trial — All persons implanted with allegedly defective leads ought to be bound by outcome of class action unless they opted out — There was no operative conflict of interest and alleged conflicts of interest were merely speculative.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiffs alleged defendants manufactured and sold defective leads, which were operative part of defibrillators, conspired to conceal defect, and failed to warn doctors and persons implanted with defibrillators — Plaintiffs brought action for negligence, conspiracy, waiver of tort, derivative claims under family law legislation, and subrogated claims of provincial health insurers — Plaintiffs brought motion to certify action as class proceeding under Class Proceedings Act, 1992 — Action partially

and conditionally certified — With regard to conspiracy claim, motion adjourned sine die, so consideration of conspiracy questions adjourned — With exclusion of punitive damages question, common issues for negligence, waiver of tort, costs of administration, and pre-judgment interest raised common issues of fact or law — Examinations for discovery and trial of two common issues concerning quantification of waiver of tort claim should be divided from and follow trial of other common issues — With individual issues of causation and damages outstanding, determination of common issues regarding negligence would not determine liability, but would substantially advance proceedings and avoid duplication of fact finding and legal analysis — With respect to waiver of tort, if wrongdoing was proven, availability of disgorgement was common issue of law for all victims of wrongdoing — Proposed common issue with respect to punitive damages should not be certified as common issue — Preconditions to determining liability for punitive damages would not be satisfied until after individual assessments of causation and damages — Punitive damages could not be determined until after individual trials.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiffs alleged that defendants manufactured and sold defective leads, which were operative part of defibrillators, conspired to conceal defect, and failed to warn doctors and persons implanted with defibrillators — Plaintiffs brought action, pleading negligence, conspiracy, waiver of tort, derivative claims under family law legislation, and subrogated claims of provincial health insurers — Plaintiffs brought motion to certify action as class proceeding under Class Proceedings Act, 1992 — Action partially and conditionally certified — Conditional upon certain amendments being made to litigation plan, class proceeding was preferable procedure — Certifying action and trial of common issues would significantly advance litigation and advance policy objectives underlying class action legislation, namely, access to justice, judicial economy and behaviour modification — Defendants' submission that substance and complexity of individual issues of causation and damages overwhelmed common issues and that certification would result in unmanageable proceeding was rejected — Common issues trial would achieve efficiencies in adjudication that would justify effort — For many class members, there was no viable alternative to class proceeding — Many would not have resources to commence individual actions — Holding that it would be preferable for each class member to initiate separate proceedings would have practical effect of denying access to justice to most or all class members and would not promote judicial economy or behaviour modification purposes of Act — Plaintiffs satisfied preferable procedure criterion of Act.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Plaintiffs alleged that defendants manufactured and sold defective leads, which were operative part of defibrillators, conspired to conceal defect, and failed to warn doctors and persons implanted with defibrillators — Plaintiffs brought action, pleading negligence, conspiracy, waiver of tort, derivative claims under family law legislation, and subrogated claims of provincial health insurers — Plaintiffs brought motion to certify action as class proceeding under Class Proceedings Act, 1992 — Action partially and conditionally certified — Proposed representative plaintiffs were representative plaintiffs who would adequately represent interests of class without conflict of interest.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Plaintiffs alleged that defendants manufactured and sold defective leads, which were operative part of defibrillators, conspired to conceal defect, and failed to warn doctors and persons implanted with defibrillators — Plaintiffs brought action, pleading negligence, conspiracy, waiver of tort, derivative claims under family law legislation, and subrogated claims of provincial health insurers — Plaintiffs brought motion to certify action as class proceeding under Class Proceedings Act, 1992 — Action partially and conditionally certified — Litigation plan was deficient with respect to its treatment of individual issues that would follow common issues trial — As matter of access to justice, it was not adequate to provide that class members would be entitled to retain personal lawyer to conduct assessment if so desired — Many class members might not have resources to retain lawyer to prosecute individual claims — Class members required, at least, assurances that they would have representation of class counsel and willingness to provide services pursuant to contingency fee agreement — Litigation plan should be amended accordingly — Other amendments would make for better litigation plan, but deficiencies did not go so far as to establish that plaintiffs had not produced workable litigation plan — Deficiencies could be addressed by adding provision that within 60 days of certification, parties would make best efforts to establish timetable for action and discovery plan, failing which parties could move for order

establishing timetable and discovery plan — With these amendments, and amendment recognizing bifurcation of two common issue questions, litigation plan satisfactory.

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Generally — referred to

s. 5(1) — referred to

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

Generally — referred to

ss. 61-63 — referred to

*Fatal Accidents Act*, R.S.A. 2000, c. F-8

s. 2 — referred to

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s. 2 — referred to

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s. 62 — considered

**Regulations considered:**

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Generally — referred to

ss. 52-56 — referred to

ss. 66-68 — referred to

MOTION by plaintiffs to certify action as class proceeding under *Class Proceedings Act, 1992*.

**Perell J.:**

**Introduction and Overview**

1 The Plaintiffs, Sherry Marie Robinson, Gregory Robert Horning, Dan Austen, and Glenda Austen make a motion to certify an action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and for incidental relief including their appointment as Representative Plaintiffs.

2 The Plaintiffs allege that the Defendants, Medtronic, Inc. and Medtronic of Canada Ltd., (collectively "Medtronic") manufactured and sold defective electronic wires known as "Leads," which are an operative part of implantable heart defibrillators. It is alleged that the Leads were prone to fracture causing the defibrillators to malfunction. It is alleged that the failure rate is accelerating. The Plaintiffs allege that the Defendants conspired to conceal the defect from regulators and that they failed to warn doctors and the persons implanted with heart defibrillators.

3 The Plaintiffs claim damages for negligence and conspiracy. They advance a plea of waiver of tort claiming disgorgement of the Defendants' gains from the sale of the defective Leads.

4 The Plaintiffs propose that there be two classes; (1) the Implant Class; and (2) the Family Law Class, defined as follows:

Implant Class - All persons implanted in Canada with one of the following Medtronic Spirit Fidelis Leads: 6949, 6948, 6931, and 6930.

Family Law Class - All family members of the Implant Class who are entitled to assert a claim pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and related provincial and territorial legislation.

5 It is estimated that there are approximately 6,000 Implant Class Members.

6 It is proposed that Kim Orr Barristers PC and Rochon Genova LLP be appointed as Class Counsel.

7 Medtronic submits that although other defective medical device actions have been certified as class proceedings, the Plaintiffs in this case have not met the evidentiary burden for certification and a class proceeding is not the preferable procedure. In particular, Medtronic submits: (1) several causes of action have not been properly pleaded; (2) the plea of conspiracy is redundant and makes the action inefficient and unmanageable as a class proceeding; (3) the class definition is overbroad and contains inherent conflicts amongst class members; (4) the necessity for complex individual damage assessments will overwhelm the common issues; (5) the class action is not a preferable proceeding; and (6) the Litigation Plan is not workable.

8 As an alternative submission, Medtronic submits that the common issues about the quantification and allocation (but not the entitlement) of the waiver of tort claim be severed from the other common issues with a divided discovery and a bifurcated common issues trial.

9 Here, it should be mentioned that in *Peter v. Medtronic Inc.* (which is a different action, which I will discuss below), Medtronic made a motion for a similar bifurcation order. Its motion was heard at the same time as this certification motion. Reasons for Decision in *Peter v. Medtronic Inc.* are being released contemporaneously with these Reasons. In the *Peter v. Medtronic Inc.* action, I make a bifurcation order.

10 For the Reasons that follow, I conclude that this action should be partially and conditionally certified as a class proceeding under the *Class Proceedings Act, 1992*. In particular, I conclude that:

- In so far as the Plaintiffs' motion seeks to certify a claim in conspiracy, the motion should be adjourned *sine die* to be brought on again by either party, and the plaintiffs shall be granted 20 days to amend their statement of claim to properly plead a claim in conspiracy failing which the claim for conspiracy is struck out.
- The Plaintiffs' statement of claim discloses causes of action in negligence, waiver of tort, and claims of Family Law Class Members and provincial health insurers.
- The proposed class definitions satisfy the requirements of the Act, but an additional class for the claims of provincial health insurers should be added, and leave is granted to amend the statement of claim accordingly.
- With the revisions noted later in these Reasons for Decision, the common issues for negligence, waiver of tort, the costs of administration, and pre-judgment interest raise common issues of fact or law. (The common issues for conspiracy are deferred by the adjournment.)
- Examinations for discovery and the trial of the two common issues with respect to the quantification of the waiver of tort claim should be divided from and follow the common issues trial of the other common issues.
- The proposed common issue with respect to punitive damages should not be certified as a common issue.
- Conditional upon the Litigation Plan being amended, as set out later in these Reasons for Decision, a class proceeding is the preferable procedure.
- There are Representative Plaintiffs who would adequately represent the interests of the class without conflict of interest.
- Conditional upon the Litigation Plan being amended, as set out later in these Reasons for Decision, the Representative Plaintiffs have produced a workable litigation plan.
- The amended Litigation Plan should provide, among other things, for a divided discovery and a bifurcated common issues trial with respect to the quantification and allocation (but not the entitlement) of the waiver of tort claim.

11 By way of general organization of these Reasons for Decision, after this introduction, I shall describe the factual background and then I shall discuss the various elements of the test for certification found in s.5 (1) of the *Class Proceedings Act, 1992*, along with the arguments of the parties about the various elements of the test.

### **Factual Background-Introduction**

12 In this and the following two parts of my Reasons for Decision, I shall describe most of the factual background that is necessary to decide this motion for certification. I, however, shall defer the discussion of several factual matters, including the discussion of *Peter v. Medtronic Inc.*, until later in these Reasons, when I discuss the five elements of the test of certification.

13 In this first part of the discussion of the factual background, I will describe the nature of the evidence relied on by the parties for the certification motion. In the second part, I shall describe some background medical information about the functioning of the heart and the operation of implanted defibrillators and Leads. In the third part, I shall describe the background to the claims of the plaintiffs as individuals and as representatives of the classes for the proposed class proceeding.

14 By way of evidence for the certification motion, the Plaintiffs relied on the affidavit evidence of:

- the proposed Representative Plaintiffs, Sherry Marie Robinson, Gregory Robert Horning, Dan Austen, and Glenda Austen, who I shall refer to collectively as the Plaintiffs;
- Sakie Tambakos, who is a lawyer at Rochon Genova LLP, one of the proposed Class Counsel. Mr. Tambakos produced court judgments, academic articles, documents from the U.S. Food and Drug Administration, medical research studies or reports, and newspaper articles;
- Dr. Geddes Frank Owen Tyers, a cardiovascular, thoracic, and general surgeon from Vancouver, British Columbia. He is Professor Emeritus at the University of British Columbia. Previously, he has held posts at the University of Texas, the Pennsylvania State University, and the University of Pennsylvania. Dr. Tyers deposes to having had extensive experience with the implementation of pacemakers, defibrillators, and all types of Leads. His affidavit provided information on seven topics: (1) the heart and heart failure; (2) heart rhythm disorders; (3) ICDs and Leads; (4) Sprint Fidelis Leads; (5) Implementation of replacement Leads with or without prior extraction; (6) risks of device failure; and (7) reporting of device failures.

15 By way of evidence for the certification motion, Medtronic delivered an affidavit from James McAuley, who is a partner with KPMG LLP. Mr. McAuley provided a report with respect to what would be involved in quantifying a disgorgement of Medtronic's gains. Mr. McAuley's evidence was directed to the issue of whether there should be divided discovery and a divided common issues trial for the quantification of Medtronic's disgorgement. Mr. McAuley's affidavit was also filed for the bifurcation motion in *Peter v. Medtronic Inc.*.

16 Medtronic also delivered an affidavit from Kelly Hearnden who is a legal administrative assistant at Stikeman Elliott LLP, the lawyers for Medtronic. She attaches as an exhibit to her affidavit, a copy of the decision of Justice Kyle of the United States District Court District of Minnesota dated January 5, 2009 in the Multidistrict Litigation *Medtronic Inc. v. Sprint Fidelis Leads Product Liability Litigation* [(January 5, 2009), Kyle (U.S. Dist. Ct. D. Minn.)]. During argument, Medtronic's counsel indicated that for the purposes of the motion now before the court, Justice Kyle's judgment was just background information. There is no reason for me to comment further about this judgment or the situation in the United States litigation.

17 As will shortly appear, in their affidavit evidence, the Plaintiffs make very serious allegations of wrongdoing by Medtronic, but for the most part, Medtronic has restrained itself from responding to the allegations and apart from general denials and directing the court's attention to particular matters supportive of its innocence, Medtronic has not attempted to prove the falsity of the allegations and has confined itself to arguments about whether the conditions for certification have been satisfied.

18 In my opinion, it was appropriate for Medtronic to proceed in this way. A motion for certification is not the place for the Plaintiffs to prove their allegations or for the Defendants to disprove them or for the court to make any determination of the merits of the Plaintiffs' claim or the Defendants' defence.

19 It should be noted that it follows from the nature of a certification motion that my description of the factual background goes no farther than necessary to decide the certification motion and my statements are not and should not be taken as a binding determination of any factual matter.

#### ***Heart Function and Defibrillator and Lead Operation***

20 The heart is a muscular organ composed of four chambers. The function of the heart is to circulate blood throughout the body. The upper two chambers of the heart are atria and the lower two chambers are ventricles. The right atrium receives partially deoxygenated blood and pumps it into the right ventricle. The right ventricle pumps the deoxygenated blood to the lungs where oxygen is added and carbon dioxide removed. The left atrium receives the newly oxygenated blood and pumps it into the left ventricle, which then pumps the blood through the body.

21 The heart has an electrical system that keeps the pumping of blood regular and that helps to keep the cardiac chambers contracting in a coordinated fashion.

22 An irregularity in the heart's electrical system is called an arrhythmia, or heart rhythm disorder. When the heart beats too quickly, it is called a tachycardia or a tachyarrhythmia. When the heart beats too slowly, it is called a bradycardia or bradyarrhythmia. Both types of abnormal heart rhythms can decrease the delivery of blood and can cause death.

23 An implantable cardioverter defibrillator (ICD) is a life-saving medical device for persons with heart problems. It consists of two parts: (1) the defibrillator; and (2) one or more Leads. The defibrillator is approximately the size and shape of an old-fashioned pocket watch and is usually surgically implanted within the upper front chest wall of a patient.

24 The Leads perform two functions: (1) they send information about heart rhythm to the defibrillator; and (2) they convey electrical energy pulses from the defibrillator to the heart as medical therapy to correct or prevent heart malfunction or failure. A Lead is a complex insulated wire that runs from the defibrillator to a location in the heart. Leads must be extremely flexible to withstand the twisting and bending caused by body movement and by the movement of the heart itself.

25 The defibrillator and its Lead(s) are designed to detect and correct arrhythmia. When the heart is afflicted by a dysrhythmia, the function of an implanted pacemaker or defibrillator is to deliver through the Leads corrective electrical energy to the heart.

26 Medtronic's Sprint Fidelis Leads are among the thinnest Leads available, with a diameter of 2.2 millimeters. Over 270,000 people worldwide have implants with these Leads.

27 Implanting or explanting a Lead is surgery with attendant risks, including the risk of injury to blood vessels, nerves or organs, infection, and even death.

#### **The Claims of the Proposed Representative Plaintiffs**

28 The Plaintiff Sherrie Marie Robinson was born on March 7, 1973. She has three children and a spousal relationship with the Plaintiff Gregory Robert Horning. They live in Sechelt, British Columbia.

29 The Plaintiff Dan Austen was born on March 6, 1946. He is married to the Plaintiff Glenda Austen. They have two children. The Austens live in Hastings, Ontario.

30 Medtronic, Inc., which employs 38,000 people, and carries on business throughout the world, is a medical technology company. Medtronic of Canada Ltd. is a wholly-owned subsidiary. Among other products, Medtronic manufactures Leads for implantable heart defibrillators, including Sprint Fidelis Leads.

31 In June 2004, in the United States, the Food and Drug Administration ("FDA") approved for patient use the Sprint Fidelis Leads that are the subject of this action.

32 In or around July and November 2004, the Leads were approved by Health Canada for commercial sale in accordance with the licensing application and amendment processes under the *Medical Device Regulations SOR/98-282*, which is a regulation of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 as amended.

33 In April 2005, Ms. Robinson was implanted with a defibrillator. One of the defibrillators Leads was a Medtronic Lead, the Sprint Fidelis 6949.

34 By the summer of 2005, Medtronic had knowledge of four instances where Sprint Fidelis Leads had fractured or malfunctioned. During the months that followed, additional information about the performance of the Leads came to the attention of Medtronic.

35 On January 10, 2007 and for the following days, Ms. Robinson's defibrillator malfunctioned both while she was at home and also while she was undergoing emergency medical treatment at several hospitals.

36 Just a part of her agonizing experience at several hospitals is described in paragraphs 21 and 24 of her affidavit where she deposes:

21. [W]hile I was in St. Mary's again hooked up to a heart monitor, my ICD fired six consecutive times. However, on each occasion, the shocks were determined to be inappropriate as the heart monitor detected no arrhythmia. The doctors had no idea why my ICD was firing. Furthermore, they did not know how to deactivate it. I remember the hospital room being very chaotic, with the doctors and nurses yelling, and everyone appeared to be panicking, as was I. ....

24. When I arrived at St. Paul's Hospital [she was transported by air ambulance], I was taken into a room in the Intensive Care Unit. ... [T]he doctor simply placed an ICD programmer on top of the magnet previously taped to my chest [the magnet turned off the defibrillator]. A programmer, which is normally kept at the hospital is a specialized computer used to monitor and change the instructions of the implanted ICD. Almost immediately, the ICD began to fire, giving me several more shocks in quick succession. The doctor was unable to shut off the ICD. He began to yell for assistance. He seemed to be panicking. While this was happening, Greg was holding me to cushion the impact of the shocks.

37 As a response to the ongoing malfunctioning of her defibrillator, on January 10, 2007, Ms. Robinson's defibrillator was shut down, and it was determined that its Lead was the cause of her problems. Two weeks later, on January 24, 2007, Ms. Robinson underwent surgery, and the Sprint Fidelis 6949 Lead was replaced.

38 It was replaced with another Sprint Fidelis 6949 Lead.

39 In February 2007, doctors at the Minneapolis Heart Institute informed Medtronic that Sprint Fidelis Leads implanted in six patients had fractured and misfired within two years of implant. Doctors from other medical centres communicated concerns to Medtronic, and a Dr. Hauser from the Minneapolis Heart Institute conducted a study that indicated that the Sprint Fidelis Leads were ten times more likely to fail than the Medtronic Quattro Lead.

40 In March 2007, Medtronic advised physicians that it had received reports from several physicians that indicated higher than expected fracture rates with Sprint Fidelis Leads and that Medtronic had investigated these reports and reviewed them with its Independent Physician Quality Panel and wished to share the information. Medtronic advised that overall, Sprint Fidelis performance was consistent with other Leads.

41 From March 2007 to October 2007, Medtronic monitored the performance of the Sprint Fidelis Leads. Among other things, Medtronic used a proprietary algorithm to analyze data from over 25,000 devices enrolled on Medtronic's CareLink Network, a remote monitoring system, which is used to determine the integrity of Leads implanted in patients.

42 In May 2007, Medtronic sought and received approval from the FDA for design and manufacturing changes to the Sprint Fidelis Leads. The Plaintiffs allege that the changes were to fix defects to the Leads but that this information was not disclosed to the regulator or to patients already implanted with Leads.

43 On July 31, 2007, Mr. Austen underwent surgery at the Kingston General Hospital in Kingston, Ontario, and he was implanted with a defibrillator with a Medtronic Sprint Fidelis 6949 Lead.

44 On October 15, 2007, the following happened:

- Medtronic voluntarily suspended sales of the Sprint Fidelis Leads and it issued a statement advising that the Leads might fracture and cause a defibrillator to not function or to malfunction by sending unnecessary electrical pulses to the heart. The statement disclosed a 2.3% failure rate over a 30-month period. Medtronic recommended that physicians not use the Leads.
- Medtronic released a letter to Heart Device Patients, which stated in part:

We have found that there is a small chance of fractures in particular locations on the Sprint Fidelis Lead. If you have a Sprint Fidelis Lead, the chance there is a problem with your lead is small. Patients with a Sprint Fidelis Lead are more likely to experience complications from removal than from a problem with a Sprint Fidelis Lead. However, doctors may choose to change the way a device is programmed to help reduce any potential problems. An independent panel of physician experts recommends against removing Sprint Fidelis Leads except in very unusual circumstances.

- The director of the Center for Devices and Radiological Health of the FDA issued a statement stating that the FDA considered Medtronic's action to be a product recall, as defined by FDA regulations. The statement, however, indicated that the FDA recognized that some patients and health care professionals might inappropriately interpret the word "recall" to mean that the devices must be surgically removed and returned to the manufacturer. The statement indicated that the FDA did not mean to imply that the Leads should be surgically removed.

- The action now before the court was commenced by the issuance of a notice of action.

45 On October 17, 2007, The U.S. Food and Drug Administration (FDA) classified the suspension of sales of the Leads as a "Class I Recall." This is the most serious type of recall, reserved for situations in which there is a reasonable probability that use of the product will cause serious injury or death.

46 On October 17, 2007, Ms. Robinson received a letter from St. Paul's Hospital advising her of the potential problem with the Lead in her defibrillator.

47 On October 25, 2007, Mr. Austin received a letter from the Kingston General Hospital advising him that the Lead in his defibrillator had a risk of fracturing.

48 On November 3, 2007, Ms. Robinson attended an information session at St. Paul's Hospital where she was advised that: (1) there was a small chance of the Lead fracturing; (2) the risks associated with removing the Lead were greater than the risks associated with the Lead malfunctioning; and (3) the defibrillator would be reprogrammed so that it would warn of an imminent problem.

49 On November 27, 2007, Mr. Austen underwent surgery to remove and replace the Sprint Fidelis 6949 Lead. It was replaced with a Medtronic Bipolar Dual-coil Lead (model No. 6947). There were complications that necessitated further surgery.

50 Ms. Robinson and Mr. Austen both allege that they would not have had the original Leads implanted if they had known the Leads were defective. They both allege that as a consequence of the Leads' defects, they have suffered personal injuries, damages and loss, including mental anguish, pain and suffering. They each claim special damages including medical costs and lost income.

51 It was Dr. Tyers' evidence that every person with one of the recalled Leads was at increased risk of sudden failure of a life-sustaining device including an increased risk of permanent injury and death. It was further his view that there was also a greater health risk to patients because of possible complications during any procedures to replace the Leads.

52 Relying on the information provided by Dr. Tyers and Mr. Tambakos and relying on their own personal experiences, the Plaintiffs submit that there is some basis in fact for their allegations that the Defendants engaged in a conspiracy to submit false, inaccurate, incomplete, and misleading information to Health Canada and the FDA, to conceal the defects from patients, physicians and regulators, and to mislead the Class Members and others about the safety of the Leads. Similarly, the Plaintiffs submit that there is some basis in fact for their allegations of negligence and conspiracy and the allegations that Medtronic intentionally did not disclose and did not act upon its knowledge of the dangerous defect in the Leads in order to maintain its market share.

53 Relying on the affidavit evidence, the Plaintiffs allege that: (a) Medtronic knew of Lead failures but failed to report them to the regulators and the class members in accordance with FDA requirements; (b) Medtronic failed to warn the regulators and the class members of the risks of Lead failure even after several failure modes were identified; (c) Medtronic blamed the fracture problem on physician technique rather than acknowledging design and manufacturing defects; (d) Medtronic implemented design and manufacturing changes to the Leads without obtaining the proper approvals from the FDA; (e) Medtronic continued to sell its inventory of defective Leads despite having made design and manufacturing changes, and failed to inform the regulators and the class members that their Leads were defective, and, (f) Medtronic under-reported the failure rates of the Leads.

54 Medtronic denies the Plaintiffs' allegations and intends to vigorously defend its reputation and the action. Its position is that it was not negligent in the manufacturing and distribution of the Leads and that it responded responsibly to the information provided to it about the performance of its product. It denies any conspiracy. However, at this juncture of the proceeding, it has not attempted to disprove the allegations and rather has focused its attention of whether the criteria for the certification of this action as a class proceeding have been satisfied.

55 The Plaintiffs, of course, submit that the action must be certified as a class proceeding and Medtronic, not surprisingly, submits that the action does not qualify to be a class proceeding.

56 The proposed class proceeding includes claims brought on behalf of family members pursuant to Ontario's *Family Law Act* and similar legislation from other provinces, and subrogated claims are brought on behalf of provincial and territorial health insurers in respect of past and future medical expenses incurred in the treatment of Implant Class Members.

57 The Plaintiffs seek compensation for both physical and emotional injury. As a class proceeding, the Plaintiffs seek general and punitive damages in the amount of \$750,000,000, and damages for mental anguish and pain and suffering in the amount of \$50,000,000.

58 Alternatively, relying on waiver of tort, the Plaintiffs seek damages equal to the gross revenue, or in the further alternative, the net income received by the Defendants as a result of the sale of the Leads.

59 I end this account of the factual background with three factual observations that are pertinent to several of the issues that I must address.

60 The first observation is that while the predicament of the Class Members is the same in so far as they all have been implanted with the Sprint Fidelis Leads and they all have been advised that the Sprint Fidelis Leads have been recalled, nevertheless, the Implant Class Members' individual experiences may differ. Some class members have not experienced Lead malfunctions.

Some class members have experienced malfunctions. Some class members have not replaced the Leads. Other class members have had surgery to replace the Leads. The current health of Class Members and their recovery and complications, if any, from surgery will, of course, be unique to each class member.

61 The second observation, which is related to the first, is that the intensity of any physical or emotional harm from their predicament will vary from class member to class member. Where class members have suffered physical or psychological injury, the range of harm would range from modest to very serious, including possibly death, although I was not told of any deaths occurring in Canada. The Plaintiffs submit that all Implant Class Members satisfy the standard set by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) for compensable damages for stress and anxiety. Medtronic submits that some class members would not satisfy the standard.

62 The third observation is that the predicament of the class members is dynamic. Leads were never perfect. Even apart from any negligence, if any, in the manufacture of the Leads that would exacerbate their failure rate, some class members might experience malfunctions between now and the time of any trial.

### **The Criteria for Certification**

63 I turn now to an analysis of whether the proposed class action satisfies the criteria for certification set out in the Act.

64 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, 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.

65 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: *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, (Ont. Div. Ct.).

66 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

67 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 28-9.

68 Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would be determined at a trial when the merits of the claims of class members are in issue: *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at para. 82.

69 For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25; *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.).

### **Disclose Cause of Action**

70 For certification, the Plaintiffs' statement of claim must disclose a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), discussed further below, is used to determine whether the proposed class proceeding discloses a cause of action; thus, a claim will be satisfactory unless it has a radical defect or it is plain and obvious that it could not succeed: *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) (S.C.C.); *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. S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

71 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 a pleading will be struck out only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 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. ref'd, (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdoor v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

72 The Plaintiffs' Amended Amended Statement of Claim purports to plead causes of action in: (1) negligence; (2) derivative claims under to the *Family Law Act* and similar statutes; (3) subrogated claims of provincial health insurers; (4) waiver of tort; and (5) conspiracy.

### **Claims in Negligence**

73 Medtronic does not dispute, and I find as a fact, that the Plaintiffs have pleaded a cause of action in negligence both for product liability and for failure to warn.

### **Claims of Family Law Class**

74 The Plaintiffs bring the action "on behalf of all family members who are entitled to assert a claim pursuant to the *Family Law Act* and related provincial and territorial legislation."

75 Medtronic challenges this claim because only Class Members in Ontario have a derivative claim under the *Family Law Act*, R.S.O. 1990, c. F.3, ss. 61-63. Class members in other jurisdictions would have claims under their respective jurisdiction's *Fatal Accidents Acts*, but those claims are restricted to family members of deceased persons for wrongful death, and the amended statement of claim does not plead that any Class Members have died. (See: *Fatal Accidents Act*, R.S.P.E.I. 1988 c. F-5, s. 2; *Fatal Accidents Act*, R.S.A. 2000, c. F-8, s. 2; *Fatal Accidents Act*, R.S.S. 1978, c. F-11, s. 3; *Fatal Accidents Act*, C.C.S.M. c. F50, s. 2; *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7, s. 2; *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, s. 3; *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, s. 3; *Fatal Accidents Act*, R.S.N.W.T 1988, c. F-3, s. 2; *Fatal Accidents Act*, R.S.Y. 2002, c. 86I, s. 2.)

76 I reject Medtronic's challenge for the same reason that Justice Cullity rejected a similar argument in *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) at paras. 53-58. The question of whether an individual member of the Family Law Class qualifies for a claim pursuant to the *Family Law Act* and related provincial and territorial legislation is an individual issue to be determined after a common issues trial. The current pleading is adequate to advance the claims of the members of the Family Law Class.

### **Claim of Provincial Health Insurers**

77 Medtronic challenges the Plaintiffs' claim on behalf of the Province of Alberta.

78 The Plaintiffs bring their action "on behalf of all provincial and territorial health insurers." Medtronic, however, submits that the Plaintiffs cannot assert a subrogated claim pursuant to the *Alberta Hospitals Act*, R.S.A. 2000, c. H-12, s. 62, which provides that "the Crown has the right to recover from the wrongdoer the Crown's costs of health services."

79 It may be true that the Plaintiffs cannot assert a "subrogated" claim for Alberta, but I see no reason why the Plaintiffs cannot still assert a claim on behalf of the Province of Alberta or the other provincial health insurers.

80 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: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 22, leave to appeal granted, (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.) at paras. 41, 48, varied

(Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-77; *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. Thus, the Representative Plaintiffs in the case at bar may assert a claim on behalf of the Province of Alberta, which may opt-out if it does not wish to participate in the class action.

81 As a technicality, to assert a claim on behalf of Alberta, an additional class is required for the purposes of the class proceedings as follows:

Health Insurer Class - All provincial or territorial health insurers who are entitled to assert a claim pursuant to the *Alberta Hospitals Act*, R.S.A. 2000, c. H-12, s. 62 and related provincial and territorial legislation.

82 I grant leave for the statement of claim to be amended accordingly. The Representative Plaintiffs may stand as the Representative Plaintiffs for this additional class.

### **Claim of Waiver of Tort**

83 In its factum, Medtronic submits that the claim for recovery under restitutionary principles; namely, the claim of waiver in tort, is not properly pleaded. However, at the oral argument, Medtronic did not press this point, and it rather focused its argument on the significance of the claim of waiver of tort on the other certification criteria, which are matters that I will discuss below.

84 I am satisfied from my review of the statement of claim that its claim of waiver of tort has been satisfactorily pleaded. I note that similar pleas have passed muster in the medical device cases of: *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) and (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.) and *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), aff'd (Ont. Div. Ct.); *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), leave to appeal granted (Ont. Div. Ct.), aff'd (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.), leave to appeal to C.A. ref'd Oct. 16, 2006 [(October 16, 2006), Doc. M33963 (Ont. C.A.)], leave to appeal to S.C.C. ref'd, (2007) (S.C.C.)

### **Claim of Conspiracy**

85 In its factum, Medtronic submitted that the Plaintiffs have not pleaded a cause of action in conspiracy, and in oral argument, Medtronic drilled down on the point that the Plaintiffs had failed to plead the special damages caused by the alleged conspiracy, which it was submitted is a fatal defect.

86 Relying on the proximate circumstance that in the case at bar the Plaintiffs' pleading has had three iterations and on the extraneous circumstance that in *Peter v. Medtronic Inc.*, which is an action with the same legal counsel as in the case at bar, a similar pleading about defects in a defibrillator had undergone seven iterations, Medtronic submitted that the conspiracy pleadings should be struck out without leave to amend.

87 For their part, the Plaintiffs defended their conspiracy pleading by relying on the doctrine of *stare decisis* and on: *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) and (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); and *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.). Based on these authorities, the Plaintiffs submitted that I had no choice and must certify the conspiracy pleading.

88 As I advised the parties at the outset of the oral argument, my initial view was that there were problems with the conspiracy pleading, but I thought that they could be resolved by ordering the Plaintiffs to provide particulars so that Medtronic could plead its statement of defence.

89 I was, however, persuaded by Medtronic's oral argument that the problems with the conspiracy pleading were more serious and that they could not be addressed simply by ordering particulars. For the Reasons that follow, I came to the view that in so far as this motion seeks to certify a claim in conspiracy, the motion should be adjourned *sine die* to be brought on by again by

either party and the plaintiffs shall be granted 20 days to amend their statement of claim to plead a claim in conspiracy, failing which the claim for conspiracy should be struck out.

90 I begin my explanation of this conclusion by saying that before I consider Medtronic's submission and also *Peter v. Medtronic Inc.*, *supra*, *LeFrancois v. Guidant Corp.*, *supra*, and *Lambert v. Guidant Corp.*, *supra*, I shall make my own analysis of the statement of claim and of the law of conspiracy, and I shall measure the adequacy of the Plaintiffs' conspiracy pleading using authorities that are undoubtedly binding on me, beginning with the Supreme Court of Canada's decision in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.).

91 *Canada Lafarge Ltd.* is authority that there are two types of civil conspiracy: (1) conspiracy to injure; and (2) conspiracy to perform an unlawful act.

92 The elements of conspiracy to injure are: (1) the defendants acted in combination; (2) the defendants intended to harm the plaintiff; and (3) the defendants' conduct caused harm to the plaintiff.

93 The elements of conspiracy to perform an unlawful act are (1) the defendants acted in combination; (2) the defendants committed an unlawful act, i.e. a crime, tort, or breach of statute; (3) the defendants knew or should have known that injury to the plaintiffs was likely to occur from their misconduct; and (4) the defendants' misconduct in furtherance of the conspiracy caused harm to the plaintiff.

94 I pause here to say that there is no pleading in the case at bar that Medtronic, Inc. and Medtronic of Canada Ltd. conspired to injure. The allegations are that they conspired to perform unlawful acts.

95 In *Canada Lafarge Ltd.*, in breach of the *Combines Investigation Act*, the defendants, Canada Lafarge and Ocean Construction Supplies Ltd., combined together to control the concrete and concrete product market in British Columbia. The plaintiff, British Columbia Lightweight Aggregate Ltd., which had gone out of business, sued the defendants for the tort of conspiracy to perform an unlawful act, the unlawful act being the breach of the *Combines Investigation Act*. The Supreme Court of Canada dismissed the action because the acts of the defendants, admittedly contrary to the *Act*, were not the cause of the Plaintiff going out of business. The action was dismissed because the conspiracy had not caused the plaintiff to suffer damages.

96 Following *Canada Lafarge Ltd.*, in *Lombardo v. Caiazzo*, [2006] O.J. No. 2286 (Ont. C.A.), the Ontario Court of Appeal dismissed a conspiracy action because the plaintiffs had not proven any special damages from the defendants unlawful conduct of breaching the *Fraudulent Conveyances Act*. In *Lombardo*, the plaintiffs led no evidence to show that they would have been in a different position had the wrongful acts not occurred.

97 The Supreme Court of Canada considered both types of civil conspiracy in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.). In this case, between 1940 and 1967, the defendants mined asbestos and produced a variety of asbestos products. The plaintiff, Mr. Hunt, alleged that from exposure to asbestos fibres over the course of his employment, he had contracted cancer. Mr. Hunt alleged that the defendants had conspired with each other with the predominant purpose of injuring him. In the alternative, he alleged that the defendants had conspired to prevent by unlawful means their knowledge of the dangers of asbestos from becoming public in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others would result from the defendants' acts. Mr. Hunt alleged, among other things, that the defendants' acts in furtherance of the conspiracy included fraudulently, deceitfully, or negligently suppressing, distorting, and misrepresenting the results of medical and scientific research on the health effects of asbestos and fraudulently, deceitfully, or negligently attempting to discredit doctors and scientists who claimed that exposure to asbestos caused disease.

98 Arguing that the tort of conspiracy did not extend beyond the area of commercial harm to the area of personal injuries, several of the defendants made a motion to have Mr. Hunt's action dismissed for not showing a reasonable cause of action. The Supreme Court of Canada held that it was not plain and obvious that the law of conspiracy would not develop to encompass Mr. Hunt's personal injury claim.

99 Justice Wilson, who wrote the judgment of the Court, was careful to leave it open to the trial court to develop the law on conspiracy on a full factual record. She, however, commented about the state of the law of conspiracy in Canada. She stated at para. 43 of her judgment:

.... Fridman goes on to observe at pp. 265-66

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

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

100 In *Hunt v. T & N plc*, Justice Wilson also commented about the doctrine of merger, which posits that when a tort has been committed by two or more persons, a conspiracy to commit the tort merges in the nominate tort: *Ward v. Lewis* (1954), [1955] 1 All E.R. 55 (Eng. C.A.) at p. 56.

101 In *Hunt v. T & N plc*, the defendants submitted that the doctrine of merger precluded the plaintiff's conspiracy claim. Justice Wilson, however, held that there were problems with this submission. In para. 54 of her judgment, she stated that it was not possible to decide whether merger had taken place without first deciding whether Mr. Hunt had proved that the other tortious acts had been committed, which would only occur after a trial. In para. 55 of her judgment, she held that it was inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts would be successful. She also stated:

If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

102 The Ontario Court of Appeal considered several aspects of the tort of conspiracy in *Knoch Estate v. Jon Picken Ltd.* (1991), 4 O.R. (3d) 385 (Ont. C.A.). For present purposes, it is not necessary to say much about the facts of this case other than that the plaintiff, Knoch Estate, entered into a conditional agreement to sell a property to a developer, Mantella Limited, for \$2.1 million unless a better offer was received before court approval of the estate sale. While the agreement was conditional, Mantella Ltd.'s real estate agents arranged to resell the property for \$3.5 to Caterpillar Ltd., for whom the real estate agents had also been retained to find a property for a factory. The real estate agents did not tell Knoch Estate about Caterpillar Ltd.'s and did not tell Caterpillar Ltd. that the agents were taking a share of the resale of the property or that it would have been possible to purchase the property directly from Knoch Estate. After both transactions closed, Knoch Estate sued the real estate agents and Mantella Ltd. A plea of conspiracy was advanced for the first time during the appeal from the trial judgment.

103 The Court of Appeal saw no merit in the conspiracy claim because the conduct of the real estate agents and Mantella Ltd. was directed at exploiting Caterpillar Ltd., not Knoch Estate. Justice Griffith stated that "where the conduct of the defendants is "unlawful", it must be unlawful in the sense that the conduct is directed towards the plaintiff and the defendant should know in the circumstances that the plaintiff is likely to be injured." Moreover, Justice Griffith was of the view that Knoch Estate had not demonstrated that it suffered a pecuniary loss. Justice Griffith reasoned that if the availability of the property had been disclosed

to Caterpillar Ltd., it might not have offered to pay more to Knoch Estate than had Mantella Ltd. For present purposes, the point to note is that proof of damages is fundamental to a conspiracy claim.

104 The Ontario Court of Appeal considered whether the tort of conspiracy had been properly pleaded against the directors of two corporations in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.). In this case, the plaintiff Normart had a 25% interest in a joint venture to develop lands along with two other corporations. A mortgage on the lands went into default, and when the mortgagee exercised its power of sale, the defendants purchased the lands to the exclusion of Normart. In response, Normart sued the two corporations for breach of fiduciary duty and the directors of the two corporations for conspiracy. The Court of Appeal struck out the pleading of conspiracy against the corporate directors with leave to amend.

105 The claim for conspiracy was struck out on the grounds that the wrongful acts alleged against the directors were no more than the acts of their corporations. Justice Finlayson, who wrote the judgment of the court stated at p. 105: "This bare allegation of a conspiracy involving the directing minds of the respondent corporations is an impermissible legal proposition" and thus the *Normart* case is an important case about the liability of corporate directors acting in the course of their role, which is not an issue in the case at bar.

106 What is helpful from *Normart* is that before he granted leave to Normart to deliver an amended statement of claim, Justice Finlayson provided guidance about a proper pleading of conspiracy. Justice Finlayson stated at p. 104 of the judgment:

In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from *Bullen, Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:

The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

The above is still good law.

107 As a matter of pleadings, numerous cases have held that special damages are a necessary ingredient in a cause of action based upon conspiracy and must be expressly pleaded: *Cineplex Corp. v. Viking Rideau Corp.*, [1985] O.J. No. 304 (Ont. H.C.); *Harcourt v. Solloway Mills & Co.* (1931), 40 O.W.N. 214 (Ont. H.C.); *McLaughlin v. Solloway Mills & Co.* (1931), 40 O.W.N. 149 (Ont. H.C.). In *Dionisio v. Lucas*, [2006] O.J. No. 1212 (Ont. S.C.J.) and in *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (Ont. Gen. Div.), aff'd (1995), 125 D.L.R. (4th) 534 (Ont. C.A.), leave to appeal to S.C.C. ref'd (1996) (S.C.C.), a conspiracy pleading was struck out for failure to plead the constituent element of damages.

108 With this review of the law about conspiracy and about pleading a claim of conspiracy, I come now to consider the conspiracy pleading in the case at bar. The Plaintiffs' pleading of conspiracy is set out in paragraphs 74 to 82 of the Amended Amended Statement of Claim and their claim to damages is set out in paragraphs 83 to 85.

109 In paragraphs 74 to 82, the Plaintiffs plead that Medtronic conspired to mislead and mis-inform patients, physicians, and regulators and to conceal from them the defects in the Leads. The Plaintiffs plead the following unlawful conduct: (1) concealing the defects in the Leads from patients, physicians, and regulators; (2) failing to recall the Leads; (3) failing to take steps to cure the defects in the Leads; (4) failing to warn patients, physicians, and regulators that the Leads were defective; (5) breaching the Canadian *Food and Drugs Act* and the *Medical Devices Regulations* (6) breach of the and (7) breaching U.S. legislation and regulations, including the *Food, Drug and Cosmetic Act* and related medical device reporting regulation.

110 I am satisfied from my review of these paragraphs that apart from some want of particularity in a few instances, the Plaintiffs have adequately pleaded an agreement to conspire and the objects of the conspiracy and unlawful acts in furtherance of the conspiracy. However, in my opinion, the Plaintiffs have not identified the special damage caused by the conspiracy.

111 For example, the special damage suffered by Implant Class Members from the alleged breaches of the Canadian and American legislation is not identified. The Plaintiffs' description of their damages treats the damages for negligence and for the conspiracy as if they were one and the same thing. As mentioned above, special damages are a necessary ingredient of a conspiracy plea and must be expressly pleaded. Breaching the U.S. legislation may be wrongful conduct, but what special damage this caused to the Plaintiffs is not identified.

112 It is important to point out that the deficiency in the Plaintiffs' pleading is not a matter arising from the doctrine of merger, where the tort of conspiracy might merge into a judgment for the tort of negligence. It is possible to have a conspiracy that will not merge because it is based on a wrong that is not a tort. Thus, the problem here is with the pleading of conspiracy as such, because the Plaintiffs do not plead what special damages they suffered as a result of the alleged conspiracy, which may or may not be the same as the damages suffered from other torts. The scope of the wrongful acts of the alleged conspiracy would not appear to be commensurate with the scope of the alleged negligence and it remains necessary to plead the constituent elements of both torts.

113 As Justice Wilson noted in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), if the Plaintiffs are unsuccessful with respect to their nominate tort claims, then the trial judge can consider whether they might still succeed in conspiracy, which observation makes the point that it becomes important to determine whether the conspiracy itself caused any special damages.

114 It is also important to note that the question of whether Medtronic ought to have known that by concealing information from Health Canada and by violating the *Medical Devices Regulations* it would likely cause injury to the Class Members is proposed as a common issue for the conspiracy claim. Again, it becomes important to identify the special damages alleged to have been caused by this conspiracy.

115 Further, it is also important to identify the special damages from the conspiracy because the scope of the tort of conspiracy is not settled and the court may be confronted with the situation of having to determine whether it extends to provide redress for the injuries suffered by the Plaintiffs. The scope of the tort of conspiracy was left undecided in the cases, discussed above, about the adequacy of the plaintiff's pleading of conspiracy. In *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), Justice Estey stated at p.473:

In fact, the action [for conspiracy] may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

In *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), Justice Wilson stated at para. 48:

In my view, it would be highly inappropriate for this Court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

116 Finally, it is important to plead the special damages because once they are made visible, it may appear that the court will not be asked to extend the tort of conspiracy to new contexts. A clear pleading will notify the defendant of the claim it must meet, and a clear pleading may encourage the parties to settle their dispute.

117 My reading of *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) and (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.) and *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.), which are medical devices cases where claims for conspiracy were certified is that the above points were not brought home and I would, if necessary, distinguish those cases on this basis, but, in any event,

I am bound by the higher authorities that hold that damages caused by the conspiracy is a fundamental element of the tort of civil conspiracy and that the Plaintiff must plead his or her special damages.

118 In the context of a class proceeding, the Representative Plaintiffs should plead the categories of special damages that they have individually suffered and they should plead the heads or categories of special damages that may be provable by class members. The particulars and the quantification of each class member is a matter for the individual issues trial and it is *not* necessary for the Representative Plaintiffs to plead beyond the bare material facts of a constituent element of the tort of civil conspiracy. If they are not up to this task, then the defendants should not be put up to the task of defending a conspiracy claim that wants for a constituent element.

119 Since it is not beyond doubt that the Plaintiffs will not be able to perfect their pleading in conspiracy, I have concluded that the proper course is to adjourn the request to certify the conspiracy claim *sine die* to be brought on again by either party and the plaintiffs shall have 20 days from the Release of these Reasons for Decision to amend their statement of claim to plead a claim in conspiracy, failing which the claim for conspiracy should be struck out.

120 If the Plaintiffs decide to amend their pleading, they should also consider providing particulars of some of their allegations. For example, in paragraph 77 (b) the Plaintiffs plead that "In furtherance of the conspiracy ... Defendants directed their servants, agents and employees to perform wrongful or unlawful acts in furtherance of the conspiracy." The Defendants need to know what were the wrongful or unlawful acts in order to respond to this paragraph.

### **Identifiable Class**

121 I turn now to the matter of the class definition. 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; (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

122 The class must be defined without elements that require a determination of the merits of the claim: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 19, rev'd (2005), 78 O.R. (3d) 39, which aff'd (2004), 71 O.R. (3d) 741, leave to appeal to S.C.C. ref'd, (S.C.C.); *Ragoonian Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.).

123 Class membership identification is not commensurate with the elements of the cause of action; there simply must be a rational connection between the class member and the common issue(s): *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 32, leave to appeal to Div. Ct. refused, (Ont. Div. Ct.).

124 There must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'd (Ont. Div. Ct.), which had aff'd (Ont. S.C.J.).

125 A proposed class is not overbroad because it may include persons who ultimately will not have a claim against the defendants: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at para. 10; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22, leave to appeal ref'd (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 (Ont. Div. Ct.).

126 As already noted in the introduction to these Reasons for Decision, the Plaintiffs' proposed main class consists of all persons implanted in Canada with one of the following Spring Fidelis Leads: 6949, 6948, 6931 and 6930. The Plaintiffs also propose a class of Family Law Claimants, which comprises all family members who are entitled to assert a claim pursuant to the *Family Law Act*, *Family Law Act*, R.S.O. 1990, c.F.3 and related provincial and territorial legislation. (As discussed above, I have granted leave to add a class for provincial health insurers.)

127 The *Medical Device Regulations* require manufacturers, importers and distributors of medical devices to maintain records with respect to patients who are implanted with a device: *Medical Devices Regulations*, ss. 52-56, 66-68. Thus, Medtronic has records to determine the exact number and identity of individuals who were implanted with Leads in Canada.

128 Medtronic submits that the main class definition is overbroad and that it contains inherent conflicts of interest amongst class members.

129 Medtronic's argument against the proposed class definition is set out in detail in paragraph 74 of its factum, which states:

74. A class definition which includes "all persons implanted in Canada with one or more of the Leads" is fundamentally flawed for the following reasons:

(a) The proposed class definition is overly broad.

(i) As indicated above, only a small fraction of individuals with the Leads may experience any damage or may have a claim under the Amended Claim. .... As a vast majority of class members will continue to receive the benefit of the Leads, the proposed class definitions include a large number of individuals who will never have a claim and will never share an interest in the resolution of the proposed common issues.

(ii) To the extent the Plaintiffs propose that persons whose Leads are functioning properly and who have suffered no injury should be included as part of the class on the basis that such persons may have suffered "stress and anxiety" there is no basis in fact provided to support that such alleged stress and anxiety reaches the requisite standard set by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 so as to form the basis of a claim for damages. ....

(iii) Any suggestion by the Plaintiffs that the proposed class definition should include all persons who received the Leads regardless of whether they have suffered damages to address the possibility that such persons could subsequently develop a claim for damages does not warrant certifying an overly-broad class.

(iv) At a minimum, the class definition should be "claim-based" and limited to those individuals who claim personal injuries or an entitlement to disgorgement as a result of having the Leads as opposed to including all persons with the Leads. There is considerable support in the case law for claims-based class definitions. .... *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147 (S.C.), leave to appeal denied, [2005] N.J. No. 124 (S.C.) and *Walls v. Bayer Inc. Walls v. Bayer Inc.*, [2005] M.J. No. 4 (Q.B.), leave to appeal denied, [2005] M.J. No. 286 (C.A.), .... See also *Attis v. Canada*, [2007] O.J. No. 1744 (S.C.J.) at paras. 54-59 in which Justice Winkler (as he then was) commented that the use of "claims made" limiters is acceptable. .... *Merck Frosst Canada Ltd. v. Wuttunee*, [2009] S.J. No. 179 (C.A.) at para. 102.

(b) The proposed class definition when viewed in connection with the common issues intended to be resolved in the proposed class proceeding, creates an untenable conflict amongst members of the class.

(i) There is a clear conflict between members of the proposed class who allege they have sustained personal injury as a result of the Leads and those who have sustained no personal injury. .... Any decision by the class to pursue disgorgement on the basis of waiver of tort as opposed to damages stands to adversely impact the interests of any injured class members who could perceive it to be in their interests to pursue individual damages for their personal injuries. ....

(ii) Similarly, if the implant class of Lead recipients proceeds by waiver of tort, they may also be in a position of conflict with Family Law class members and other affected persons including the provincial health insurers, who are only entitled to statutory remedies for damages and who under their statutory causes of action have no statutory ability to relinquish those remedies in lieu of an accounting or disgorgement. ....

130 A critical element of Medtronic's argument is that although all class members have now been alerted to the possibility of Lead fractures, only a percentage of the class members have actually experienced fractures and any physical injury from the operation of the Leads. Put somewhat differently, Medtronic submits that only a small percentage of the class members *now* have claims and many of the class will never experience any problem with their defibrillator. Therefore, to include as class members persons with inchoate claims is to define the class over-broadly.

131 Relying on the Supreme Court of Canada decision in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.), Medtronic also argues that the Plaintiffs have failed to show a basis in fact for emotional distress claims existing for all persons within the proposed definition of the class.

132 Medtronic's ultimate submission is that the class definition criteria has not been satisfied or alternatively that the definition should be amended with a claims-based qualifier.

133 My opinion, however, is that the proposed class definitions satisfy the requirements of the Act. I begin my explanation for my conclusion with several general observations about the dynamics of class proceedings that help explain the role of the class definition.

134 By way of an observation, on a contested certification motion, it is not uncommon for defendants, as they do in the case at bar, to submit that the class definition is overbroad and to seek to have it narrowed. However, if the class proceeding moves to a motion to approve a settlement, it is also not uncommon for both parties to seek to expand the previously disputed class definition.

135 For the present purposes of analyzing the appropriateness of the class definitions, it is informative to question why these phenomena occur, and the answer is that one of the most significant aspects of a class definition is that it identifies and hence quantifies the numbers of persons who will be bound by the court's determination of the common issue or be bound by the court's approval of a settlement. The above phenomena occur because there is power in increasing or decreasing the number of persons who are bound by the class proceedings.

136 Increasing or decreasing the number of persons who will be bound by the determinations in a class proceeding has a powerful effect. The Representative Plaintiffs may have little choice about how to define the class, but when there are choices, it is not surprising that Representative Plaintiffs will submit a broad definition that increases the defendant's exposure to liability, and it is not surprising that a defendant would seek to reduce the number of persons to whom it may be liable. Further, it is not surprising that if the action settles that the defendant seeks to increase the number of persons who will be bound by releases in exchange for their receiving a share of the distribution of the settlement proceeds.

137 The Court's concern in all this, however, is to ensure that the class definition accords with the design and purposes of the *Class Proceedings Act, 1992*. The court's concern about a class definition is that it binds the persons who ought to be bound (a concern about under-inclusiveness) and that it does not bind persons who ought not to be bound (a concern about over-inclusiveness). Viewed from the court's perspective, an over-inclusive class definition will bind persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable. It is to be remembered that until individual trials, if necessary, class members are not direct participants in the action, but they will be bound by the common issues trial and the settlement if approved by the court. The court is concerned about a proper class definition both as a matter of procedural and substantive justice.

138 Turning now to the case at bar, I add the particular observation that if, as may be anticipated, Medtronic takes the position that it did not breach any duty of care or conspire to injure the class members then, as a matter of access to justice, judicial economy, and behaviour modifications, all of the persons who have defibrillators with Sprint Fidelis Leads *ought to be* bound by the adjudication or settlement of this case and this is true regardless of whether the outcome favours the Plaintiffs or Medtronic.

139 All of the proposed class members have defibrillators that are the subject matter of a product recall with respect to a life-saving medical device and in my view in the circumstances of this case, there is a basis in fact for the proposed class definitions.

140 Whether or not Implant Class Members meet the threshold of *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) is a matter for trial. It is open to Medtronic to deny liability and to deny that the criteria for an emotional distress claim by those who have not yet experienced any Lead malfunction, but as a matter of access to justice, judicial economy, and behaviour modifications, all persons with defibrillators with Sprint Fidelis Leads ought to have the opportunity to prove their claims to the extent that they are able and desirous of doing so.

141 During oral argument, Medtronic indicated that if the action was certified, it envisioned that all persons who had been implanted with the Leads would be given notice of the class action including notice of the claims-based qualifier in the class definition. For me, this expectation exposed the inutility and paradox of a claims-based qualifier. If all the class members who have been implanted with the Leads are to be given notice, then they ought not to receive a notice that they are not a class member unless they have a claim. Such a notice would be akin to Bertrand Russell's paradox of set theory of answering the question of who shaves the barber in a town where the law was that those who don't shave themselves are shaved by the barber.

142 The simple point is that all persons implanted with allegedly defective Leads ought to be bound by the outcome of the class action unless they exercise their right to opt-out.

143 I turn now to Medtronic's objection to the class definition based on their being alleged conflicts of interest: (a) between Class Members in whose interest it would be to recover damages and Class Members in whose interest it would be to recover a share of the disgorgement of Medtronic's profits pursuant to a waiver of the tort compensation; (b) between Class Members electing disgorgement and members of the Family Law Class; and (c) between Class Members electing disgorgement and provincial health insurers.

144 The substance of the alleged conflict of interest is the prospect that if the class recovers a disgorgement of Medtronic's profits as its remedy for Medtronic's wrongdoing, then some members of the class, including especially class members with derivative or statutory claims, will not be entitled to a share of the disgorgement or their share of the disgorgement will be less than if the remedy was compensatory damages.

145 At this juncture of the class proceeding, there is no operative conflict of interest and the alleged conflicts of interest are entirely speculative. At this time, it is unknown whether the waiver of tort choice of disgorgement even will be available. At this juncture, assuming that the waiver of tort choice would be available, the effect of that choice is unknown. It is at least conceivable that all class members may be advantaged and or at least not disadvantaged by the availability of disgorgement as an alternative to the traditional compensatory remedies for wrongdoing.

146 The alleged (and speculative) conflicts of interest do not change my opinion that the proposed class definitions in the case at bar are satisfactory.

## Common Issues

147 I turn now to the matter of the common issues criterion.

148 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: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 18.

149 The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, (S.C.C.) rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

150 The underlying question of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

151 For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 39-40.

152 The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 65, leave to appeal to the S.C.C. ref'd, (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 33.

153 After several adjustments made during the course of the argument, the Plaintiffs propose the following common issues:

#### **Negligence**

- (i) Did the Defendants, or either of them, owe a duty of care to the Class in respect of the design, development, testing, manufacturing, licensing, assembling, distribution and sale of the Leads?
- (ii) If so, did the Defendants, or either of them, breach such duty? If so, what was the nature of the breach?
- (iii) Did the Defendants, or either of them, owe a duty to the Class to warn of the risk of fracture associated with the Leads, and if so, when did such duty arise?
- (iv) If so, did the Defendants, or either of them, fail to warn the Class of the existence of the risk of fracture associated with the Leads?

#### **Conspiracy**

- (v) Did Medtronic, Inc. and Medtronic of Canada Ltd., act in combination to conceal information from Health Canada relating to the risk of fracture associated with the Leads?
- (vi) Did the Defendants' conduct violate the *Medical Devices Regulations* promulgated pursuant to the *Food and Drugs Act*?
- (vii) Should the Defendants have known that, in the circumstances, injury to the Class was likely to occur as a result of the Defendants' actions described in subparagraphs (v) and (vi) above?

#### **Waiver of Tort**

- (viii) Does the law permit the Class in whole or in part to elect disgorgement of Medtronic's gains instead of damages for negligence or conspiracy?
- (ix) If part, but not all, of the Class can so elect, which part or parts of the Class can so elect?
- (x) Is the consent of the Ontario Health Insurance Plan ("OHIP") or any other provincial health insurer required to any such an election?
- (xi) If an election of elections may be made, what is the amount and how is it to be allocated?
- (xii) If an election or elections may be made, what share, if any is the OHIP or other provincial health insurer's entitlement?
- (xiii) If an election or election may be made, (a) is the consent of the Family Law Class required and (b) if made, are the Family Law Class Members, precluded from recovery?

#### **Miscellaneous**

(xiv) Should one or both of the Defendants pay punitive damages to the Class?

(xv) Should one or both of the Defendants pay the costs of administering and distributing any recovery? If so, in what amount?

(xvi) Should one or both of the Defendants be ordered to pay prejudgment interest? If so, who should pay, and at what annual rate? Should the payment be simple or compound interest? How is the prejudgment interest to be calculated?

154 In light of my decision about the pleading of the conspiracy claim, I am adjourning the consideration of the conspiracy questions.

155 With respect to the remaining proposed common issues, subject to one exclusion - the punitive damages question - I am satisfied that the claims of the class members raise common issues of fact or law and satisfy the third part of the test for certification.

156 In their factum, much of Medtronic's argument about the common issues is that they would not be dispositive of Medtronic's culpability for negligence or conspiracy and that a multitude of individual issues would arise in order to determine causation and the quantum of damages. Medtronic sets out at some length the reasons why causation and the experience of injury and damages are individual and idiosyncratic issues. Medtronic argues that "Any theoretical common issues relating to negligence or conspiracy would be overwhelmed by the necessity to resolve these individual issues for each individual with an alleged claim, before any finding of liability could be made."

157 Although, it is true that causation and damages are individual issues and with these issues outstanding, the determination of the common issues associated with negligence will not determine Medtronic's liability, nevertheless, the determination of the common issues would substantially advance the proceedings and avoid duplication of fact finding and legal analysis, and it should be noted that several common issues, if they went Medtronic's way, would exonerate them from liability and end the litigation.

158 Most of Medtronic's arguments about the intensity, subjectivity, and diversity of the individual issues are pertinent to the issue of whether a class proceeding is the preferable procedure, but they do not stand against my conclusion that the resolution of these questions would serve the purposes of the *Class Proceedings Act, 1992*.

159 Medtronic's argument against the waiver of tort questions is somewhat different, and it submits that the waiver of tort questions lack commonality because the class members are differently situated with respect to the potential bases of Medtronic's liability, of which there are numerous combinations; visualize Medtronic might be liable for some combination of: (1) products liability; (2) failure to warn; and (3) conspiracy. There are also differences because of the different legal status of class members, with members of the Implant Class having direct claims against Medtronic and members of the Family Law Class and the Health Insurer Class having derivative or statutory claims.

160 In my opinion, notwithstanding this argument that there is no real commonality, the waiver of tort questions remain common questions, because whatever the combination of wrongdoing (with the exception of the combination that yields no liability), the issue will be whether or not the victim of the wrongdoing can elect disgorgement instead of the remedy provided by the common-law or statute. If wrongdoing is proven, then the availability of disgorgement is a common issue of law for all the victims of the wrongdoing.

161 In *Peter v. Medtronic Inc.*, *supra*, Justice Hoy stated at para. 59, "In my view, it is not plain and obvious that the plaintiffs' claim in waiver of tort cannot succeed because subrogated claims are advanced." See also *LeFrancois v. Guidant Corp.*, *supra*, at paras. 59-60. The claims for damages asserted by the Family Class include claims under the *Family Law Act* for loss of guidance, care and companionship. Any argument that these claims conflict with the Plaintiffs' ability to elect waiver of tort should be determined on a full evidentiary record as part of the common issues trial. This approach was confirmed in: *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008]

O.J. No. 1397 (Ont. S.C.J.) and (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.) and *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.).

162 The amount to be disgorged if waiver of tort is available has been certified as a common issue in a number of Ontario class proceedings. See: *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) and (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.) and *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.); *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), leave to appeal granted (Ont. Div. Ct.), aff'd (2006), 85 O.R. (3d) 665, leave to appeal to C.A. ref'd Oct. 16, 2006, leave to appeal to S.C.C. ref'd, (2007) (S.C.C.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), aff'd (Ont. Div. Ct.); and *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.). However, as I will indicate, the questions associated with the quantification of the disgorgement should be bifurcated from the other common issue.

163 For these reasons, I conclude that the Plaintiffs have shown common issues with respect to negligence and waiver of tort. The miscellaneous questions are also satisfactory with the exception of the question about punitive damages, which I discuss below.

### **The Common Issue Question about Punitive Damages**

164 Proposed Common Question (xiv) is: Should one or both of the Defendants pay punitive damages to the Class?

165 The question of whether a defendant's conduct justifies an award of punitive damages has been accepted as a common issue in other class actions, including the following cases relied on by the Plaintiffs: *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22, leave to appeal ref'd (Ont. Div. Ct.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, (S.C.C.), rev'd (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), aff'd (Ont. Div. Ct.); *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd [ (Ont. Div. Ct.); *Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Ont. S.C.J.) at para. 81, leave to appeal ref'd (Ont. Div. Ct.); and *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), leave to appeal granted (Ont. Div. Ct.), aff'd (2006), 85 O.R. (3d) 665, leave to appeal to C.A. ref'd Oct. 16, 2006, leave to appeal to S.C.C. ref'd, (2007) (S.C.C.).

166 Given this impressive list of cases, it would seem that the defendant's liability to pay punitive damages is inevitably a suitable common issue. However, as I will explain, that view is incorrect, and the correct position is that punitive damages only sometimes have the commonality necessary for a common issue.

167 In explaining my reasons for this opinion, I repeat at the outset that the entitlement to and the quantification of punitive damages may be a common issue in some cases. However, it is my opinion that the case at bar is not one of those cases because in the case at bar the entitlement and quantification of punitive damages requires a quantification of the compensatory damages and an appreciation of the extent of the harm caused by the defendant's misconduct, if proven. Therefore, in the case at bar, the pre-conditions to determining liability for punitive damages will not be satisfied until after individual assessments of causation and damages.

168 Justice Binnie examined the liability for and the quantification of punitive damages in the leading case of *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.). In this case, the Supreme Court of Canada restored a punitive damages award of \$1 million made by a jury in an action against an insurer who had breached its duty of good faith and fair dealing to its insured.

169 Justice Binnie's judgment is a *tour de force* analysis of the law of punitive damages, but for present purposes, the points I wish to make can be extracted in his advice about how to charge a jury about punitive damages. This advice is found in para. 94 of his judgment, where Justice Binnie stated (with my emphasis added):

[I]t would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs

to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

170 It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives of retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.

171 In order to rationally determine whether punitive damages should be awarded and to determine the quantum of them, the court needs to know the quantum of compensation that will be awarded. Earlier in his judgment, at para. 74, Justice Binnie stated: "[T]he governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation)." Later in his judgment, at para. 100, he stated: "The rationality test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of quantum."

172 In the case at bar, the common issues associated with negligence and with conspiracy (assuming that the conspiracy questions eventually are certified) will *not* be dispositive of Medtronic's liability because proof of causation and proof of damages will depend on individual trials that will follow the common issues trial. Whether Medtronic caused any harm and the amount of it will not be known until the individual issues are determined.

173 I appreciate that if the court determines at the common issues trial that Medtronic breached its duty of care or committed wrongful acts that the Plaintiffs would be well on their way to proving the torts of negligence and conspiracy; however, some of the Class Members might not succeed in proving that the negligence or conspiratorial conduct caused them injury.

174 Turning to the case law, in *Chace v. Crane Canada Inc.*, [1997] B.C.J. No. 2862 (B.C. C.A.), the British Columbia Court of Appeal upheld the certification as common issues the questions of whether the defendant, who allegedly negligently manufactured toilet tanks, should be liable for punitive damages and, if so, what amount of punitive damages should be awarded. In *Chace*, the court accepted that the amount of punitive damages could not be assessed until compensatory damages were determined, but noted at para. 27 that the trial judge would have the "entire picture before him" and would be in a position to determine whether punitive damages are warranted. *Chace* is thus distinguishable from the case at bar where the whole picture will not be before the judge at the common issues trial.

175 In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.), the Supreme Court of Canada upheld as a common issue whether the defendant should be liable for punitive damages. In this case, the plaintiff sued the province for systemic negligence in its failure to have in place procedures that would have prevented abuse at a residential school for deaf children. On the common issue of punitive damages, Chief Justice McLachlin stated at para. 34:

As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue — whether JHS breached a duty of care or fiduciary duty to the complainants — will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. .... Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence — that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace, supra*, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] ... as a general proposition" rather than by reference to conduct specific to any one plaintiff).

176 As may be noted from the Chief Justice's comments, both *Rumley* and Chace are different from the case at bar, where it will be necessary to determine causation and damages of individual class members in order to determine punitive damages.

177 The pattern that for the court to certify punitive damages as a common issue, the court must have a means to determine the compensatory damages holds for *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.), which, like *Rumley*, was a case of systemic negligence at a residential school. The Court of Appeal upheld Justice Cullity's judgment certifying the action as a class proceeding. On the issue of punitive damages, in the Court of Appeal, Justice Goudge stated at para. 70 of his judgment (with emphasis added):

I also agree with Cullity J. that in a trial of these common issues the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can also properly assess whether this conduct towards the members of the three classes as a whole should be sanctioned by means of punitive damages.

178 In *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.), Justice Macdonald certified punitive damages as a common issue. On this issue, she stated at para. 48 of her judgment:

The defendants assert that it would be unfair to determine the entitlement to and quantum of punitive damages at a common issues trial before compensatory damages have been assessed, since punitive damages require a finding of compensatory damages. It is the defendants' position that if punitive damages are to be certified as a common issue, it should be certified for a second common issues trial that would follow the individual issues trial. The representative plaintiff concedes that it may be appropriate to assess the quantum of punitive damages following an assessment of compensatory damages, but that a *prima facie* entitlement to punitive damages can be certified as a common issue for the first common issues trial. I accept the submission of the representative plaintiff in this regard, though I emphasize that I make no finding on the merits of the claim for punitive damages.

179 As appears, in *Boulanger*, the representative plaintiff conceded that the quantification of punitive damages should follow the assessment of compensatory damages, a point with which I agree, but successfully argued that the issue of the entitlement to punitive damages could be severed and certified as a common issue, which for the reasons set out above is a point with which I disagree, because it is contrary to the leading case of *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.), which does not appear to have been argued in *Boulanger*.

180 *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), aff'd (Ont. Div. Ct.) is another case where punitive damages was certified as a common issue, and *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.) adopts the *Heward* judgment on this point.

181 In *Heward*, the action was against a drug manufacturer for the failure to disclose serious side effects from the drug. A claim for punitive damages was certified as a common issue. In certifying the claim, Justice Cullity stated at para. 98 of his judgment:

I believe that reasoning is equally applicable to the claims, and the facts pleaded, in this case and that common issue #7 should be included in any order certifying the proceedings. I note, also, that in *Rumley*, the Chief Justice contemplated the possibility that the quantum of - as well as the liability to pay - punitive damages might properly be determined at the trial of common issues. The possibility that, because of the requirement that compensatory damages have been found to be inadequate, the inquiry might be bifurcated between a preliminary consideration by the trial judge of the defendants' conduct and a subsequent final determination of the liability for, and the quantum of, punitive damages after the individual issues had been decided was accepted by the British Columbia Court of Appeal in *Fakhri v. Alfalfas Construction Inc.*, [2004] B.C.J. No. 2200.

182 As I read this passage, although Justice Cullity accepts that liability for punitive damages may be determined at a common issues trial, he recognizes that the quantification of punitive damages would not be possible until the individual issues had been decided. Based on my reading of *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.), my opinion is that the determinations of liability and quantum cannot be severed and both should occur after the compensatory damages are ascertained.

183 In *Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Ont. S.C.J.) at para. 81, leave to appeal ref'd (Ont. Div. Ct.), Justice Cullity certified liability for punitive damages as a common issue. This negligence action was against a manufacturer of mechanical heart valves. Although causation and damages for individual class members would require individual trials, Justice Cullity noted at para. 56 of his judgment that "if the common issues relating to causation are answered in accordance with the plaintiff's submissions, there would be immediate damage to all members of the class." On the certification of the punitive damages question, Justice Cullity stated:

I accept the submission of plaintiff's counsel that the issue relating to punitive damages can properly be included as a common issue as had been done in several previous cases. The issue depends exclusively on the conduct of the defendants and the answers given to the other common issues, and it should not be affected by individual issues - including the assessment of general or special damages - for each class member.

184 *Andersen v. St. Jude Medical Inc.* may be distinguishable from the case at bar because the common issues judge would determine causation and compensatory damages for the whole class and thus would have a basis to determine punitive damages for the whole class. If the case is not distinguishable on this basis, I would not follow it, because it would be inconsistent with the directives from *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.) as to how both liability and quantum of punitive damages should be determined.

185 In *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), leave to appeal granted (Ont. Div. Ct.), aff'd (2006), 85 O.R. (3d) 665, leave to appeal to C.A. ref'd Oct. 16, 2006, leave to appeal to S.C.C. ref'd, (2007) (S.C.C.), Justice Cullity certified punitive damages as a common issue in the context of a case in which the plaintiffs had no claim for compensatory damages but were relying on waiver of tort to obtain a disgorgement of the defendants' profits from the sale of a defective medical device designed to monitor blood glucose levels. Four questions were certified as common issues, and all of the questions were premised on the availability of the remedy of a constructive trust or the remedy of an accounting and disgorgement of profits. The common questions were designed to quantify the disgorgement.

186 Justice Cullity's judgment was appealed to the Divisional Court. Justice Epstein (Justice Jennings concurring, Justice Chapnik dissenting) wrote the majority judgment, and she discussed the claim for punitive damages in paragraphs 126-127, 129-130, which I will set out below. However, before I do, it should be noted that Justice Epstein's ultimate decision in para. 130 was that punitive damages could be certified as a common issue because the defendant's possible liability was not specific to any one victim but was rather to the class of victims as a group. Justice Epstein stated:

126. [The defendants] raise the issue of the identification of punitive damages as a common issue. Mr. Barrack essentially argues that the issue of punitive damages is premature and for this reason should not have been certified as a common issue. He says that punitive damages may only be awarded where they serve a rational purpose and

represent a proportionate response to the defendants' behaviour and the harm caused. They therefore can only be determined after a court has decided whether a tort has been committed and whether the objectives of punishment and deterrence have been accomplished. The defendants contend that the effect of the decision is to avoid the requirements for awarding punitive damages since it would determine the issue without reference to the underlying liability and damages.

127. The claim for punitive damages is based on allegations that include the defendants' conduct in the development and marketing of the System, the delayed recall, and disregard of and indifference toward the plaintiffs' rights and safety — conduct that the plaintiffs assert was economically motivated.

129. Common issues relating to punitive damages have been accepted in a number of cases including *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, *Cloud, supra*, *Carom v. Bre-X Minerals Ltd., supra*, and *Chace v. Crane Canada Inc.*, [1996] B.C.J. No. 1606, 26 B.C.L.R. (3d) 339 (S.C.), affd [1997] B.C.J. No. 2862, 44 B.C.L.R. (3d) 264 (C.A.). One author speaks approvingly of these cases, noting that an award of punitive damages to the class as a whole furthers the objective of behaviour modification without giving a punitive damages windfall to a single plaintiff. (Michael A. Eizenga et al., *Class Actions Law and Practice*, looseleaf (Markham, Ont.: LexisNexis Canada, 2005) at para. 3.37.) He states further that in *Rumley, supra*, the Supreme Court of Canada has "explicitly stated that punitive damages are appropriately addressed as a common issue in a class proceeding" At para. 34, McLachlin C.J., writing for the court, stated as follows:

Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence — that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace*, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] . . . as a general proposition" rather than by reference to conduct specific to any one plaintiff). [page 696]

130. In my view, the possible grounds of liability in this case are not specific to any one victim, but rather to the class of victims as a group. Based on these observations, in addition to the deference owed to the motion judge in determining the common issues, I see no reason to interfere with this aspect of the motion judge's decision.

187 As appears, Justice Epstein viewed the *Serhan* case as a case like *Rumley* and *Chace* where the question of punitive damages was amenable to resolution as a common issue. The case at bar, however, is different from *Rumley* and *Chace* and the extent of the culpable harm caused by Medtronic remains to be determined after individual trials to determine causation and damages.

188 In my opinion, the fact that the Class Members' entitlement to elect waiver of tort instead of compensatory damages may be determined at the common issues trial does not change the situation that punitive damages in the case at bar cannot be determined until after the individual trials.

189 Indeed, if the Class Members are entitled to the remedy of a disgorgement of Medtronic's profits, it is arguable that it would not be rational, proportionate, or just to award punitive damages because the disgorgement by itself would (as it is designed to do) accomplish the purposes of retribution, deterrence, and denunciation. In other words, the doctrinal rationale for disgorgement is the same as for punitive damages and it would not be rationale or fair for the defendant to disgorge and also pay punitive damages. These are matters for a trial court to determine, but the point remains that in the case at bar, both the entitlement to punitive damages and the quantification of the punitive damages depends upon an appreciation of matters that will be determined at common issues trials.

190 I see no unfairness in this conclusion. Class members are not denied access to justice nor are they being denied what Justice Binnie described as the "windfall" of punitive damages. Just as it cannot be said that class members are being denied

compensatory damages because they must prove causation and damages individually, it cannot be said that they are being denied punitive damages in a case in which punitive damages are not amenable to being proven as a common issue.

191 There may be cases where at the common issues trial, the court is in a position to rationally and proportionately decide the questions of whether a defendant should pay punitive damages to the class and the amount of those punitive damages. In my opinion, however, this is not one of those cases.

### **The Bifurcation of the Quantification of the Disgorgement**

192 In the event that the waiver of tort questions are certified as common issues, Medtronic asks that two questions be bifurcated for the purposes of discovery and for the purposes of the common issues trial. The two questions are:

- (xi) If an election of elections may be made, what is the amount and how is it to be allocated?"
- (xii) If an election or elections may be made, what share, if any is the OHIP or other provincial health insurer's entitlement?

193 In a motion made in *Peter v. Medtronic Inc.*, Medtronic sought an order to bifurcate the identical questions in an already certified class proceeding. As I have mentioned above, the motion in *Peter v. Medtronic Inc.* was argued at the same time as this certification motion, and for the purposes of the certification motion, both parties relied on but did not repeat the arguments that they had made in the companion motion.

194 I am releasing my Reasons for Decision *Peter v. Medtronic Inc.*, which I incorporate here by reference, at that same time as these Reasons.

195 In *Peter v. Medtronic Inc.*, I order bifurcation. For the same reasons (but without the added difficulty of the action already having been certified as a class proceeding), I order bifurcation for questions (xi) and (xii) in the case at bar.

### **Preferable Procedure**

196 I move on to the preferable procedure criterion.

197 The Plaintiffs submit that certifying the action and a trial of the common issues will significantly advance the litigation and will also advance the policy objectives underlying class action legislation, namely, access to justice, judicial economy and behaviour modification. I agree.

198 Further, the Plaintiffs submit that certifying this action as a class proceeding will be in keeping with similar recent decisions: *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) and (Ont. S.C.J.), leave to appeal ref'd (Ont. Div. Ct.) and *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), aff'd (Ont. Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (Ont. S.C.J.), leave to appeal ref'd (Ont. S.C.J.).

199 Medtronic submits that in the case at bar, the substance and complexity of the individual issues of causation and damages overwhelm the common issues and that certification would result in an unmanageable and inefficient proceeding. Although some amendments, discussed below, are required to the litigation plan to address the individual issue trials, I disagree with Medtronic's submission. In my opinion, this is a case where the common issues trial would achieve efficiencies in adjudication that would justify the effort. If Medtronic succeeds, there will not be individual issues trials and if the Representative Plaintiffs succeed the individual class members will be well advanced to achieving access to justice.

200 For many Class Members there is no viable alternative to a class proceeding. Many will not have the resources to commence individual actions. Ms. Robinson and Mr. Austen testified that that the vast majority of Class Members do not have the resources to prosecute individual actions against Medtronic. Further, they testified that many Class Members, who it should be recalled are already suffering from a heart condition, do not have the fortitude to undertake litigation individually.

201 In the case at bar, as a matter of the preferable procedure criterion, holding that it would be preferable for each of the approximately 6,000 Class Members to initiate separate proceedings would have the practical effect of denying access to justice to most or all Class Members and would not promote judicial economy or the behaviour modification purposes of the *Class Proceedings Act, 1992*.

202 In my opinion, the Plaintiffs have satisfied the preferable procedure criterion of the Act.

### **Representative Plaintiffs**

203 Medtronic raised no objection to the suitability of the Plaintiffs as Representative Plaintiffs, and I find as a fact that Sherry Marie Robinson, Gregory Robert Horning, Dan Austen, and Glenda Austen are Representative Plaintiffs who would adequately represent the interests of the class without conflict of interest.

### **Litigation Plan**

204 Medtronic submits, however, that the Plaintiffs have not satisfied the requirement of producing a workable litigation plan. It submits that the Plaintiffs' plan is inadequate in several ways. More particularly, Medtronic submits that the plan fails to address the steps the Plaintiffs would take to gather evidence from witnesses and from documents and that the plan is deficient in addressing the necessary and inevitable individual issues, determinations of causation, and damages that would follow the common issues trial.

205 Medtronic says that the Plaintiffs' plan fails to address: (a) who would preside over such hearings; (b) will there be individual discovery of each claimant; (c) will there be an appeals procedure; (d) the location and forum of the proceedings; and the cost of administrating such proceedings.

206 I agree with Medtronic that the litigation is deficient with respect to its treatment of the individual issues that would follow the common issues trial. To these deficiencies, I add what I regard as a very serious matter not identified by Medtronic, which is the matter of the representation of class members at any common issues trial.

207 The current Litigation Plan contains the following provision with respect to the Resolution of Individual Issues:

51. The findings of fact and conclusions on the common issues will allow the common issues trial judge to give directions and establish procedures, pursuant to section 25 of the *CPA* to resolve remaining individual issues not determined at the common issues trial, including any related to causation.

52. Class Members who require individual assessments or otherwise participate in a mini-hearing process will be entitled to retain a personal lawyer to conduct the assessment if so desired.

208 In my opinion, as a matter of access to justice, it is not adequate to provide as a part of the litigation plan that class members "will be entitled to retain a personal lawyer to conduct the assessment if so desired."

209 In the context of the preferable procedure debate, the Plaintiffs submitted that many Class Members will not have the resources to commence individual actions, and similarly, they may not have the resources to retain a lawyer to prosecute their individual claims. Class Members require, at least, the assurances that they will have the representation of Class Counsel and a willingness to provide services pursuant to a contingency fee agreement. In *Glover v. Toronto (City)*, [2009] O.J. No. 1523 (Ont. S.C.J.), Justice Lax stated at para. 94:

In a class proceeding, a client does not have a right to choose his or her lawyer or have a right to terminate the retainer. If a class member is dissatisfied with counsel of record, he or she may opt out of the class, but by the time this proceeding reaches the stage of individual assessments, that time will have long passed. In my opinion, class counsel cannot unilaterally choose to terminate representation, but is bound to represent those class members who wish to pursue individual claims on the same basis as the retainer agreement provides until the class member or the court directs otherwise. It seems to me that

the proposed abandonment of class members following the determination of common issues is completely at odds with the fiduciary duty that a lawyer has to a client, which includes the duty of loyalty: *R. v. Neil*, [2002] 2 S.C.R. 631 (S.C.C.). It is also completely at odds with the goals of class proceedings. Earlier I made reference to Chief Justice Winkler's remarks in *Cassano* and I repeat them here: "the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice.".

210 The Litigation Plan should be amended accordingly.

211 There are other amendments that would make for a better Litigation Plan, including amendments that would address the deficiencies identified by Medtronic. The deficiencies, however, do not go so far as to establish that the Plaintiffs have not produced a workable litigation plan, and the deficiencies can be addressed by adding a provision to the plan that within 60 days of the certification of the action as a class proceeding, the parties will make their best efforts to establish a timetable for the action and a discovery plan, failing which the Representative Plaintiffs or the Defendants may move for an order from the case management judge establishing a timetable and a discovery plan.

212 I conclude that with the above amendments, and also with an amendment recognizing the bifurcation of the two common issue questions, the litigation plan is satisfactory.

### **Conclusion**

213 For the above reasons and with the qualifications and conditions set out above, the motion for certification is granted.

214 If the parties cannot agree about the matter of costs, then they may make submissions in writing beginning with the Plaintiffs within 20 days of the release of these Reasons for Decision followed by the Defendants within a further 20 days.

215 Order accordingly.

*Order accordingly.*

**TAB 30**

2010 ONSC 463  
Ontario Superior Court of Justice

Robinson v. Rochester Financial Ltd.

2010 CarswellOnt 206, 2010 ONSC 463, [2010] O.J. No. 187, 184 A.C.W.S. (3d) 905, 89 C.P.C. (6th) 91

**KATHRYN ROBINSON AND RICK ROBINSON (Plaintiffs) and  
ROCHESTER FINANCIAL LIMITED, PROMITERRE CAPITAL GROUP  
INC., PROMITERRE ASSET MANAGEMENT LTD., BANYAN TREE  
FOUNDATION and FRASER MILNER CASGRAIN LLP (Defendants)**

Lax J.

Heard: June 23-25, 2009

Judgment: January 19, 2010 \*

Docket: Toronto 08-CV-349792

Proceedings: additional reasons at *Robinson v. Rochester Financial Ltd.* (2010), 2010 CarswellOnt 2153, 2010 ONSC 1899 (Ont. Div. Ct.)

Counsel: D. Thompson, M.G. Moloci, M.B. Stanton for Plaintiffs

T. Pinos, R. Cohen for Defendants, Rochester Financial Group, Promiterre Capital Group Inc., Promiterre Asset Management Ltd., Banyan Tree Foundation

P. Griffin, G. Smith, P. Calce for Fraser Milner Casgrain LLP

Subject: Civil Practice and Procedure

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiffs brought action against promoters of gift program and law firm as result of determination by Canada Revenue Agency that program was sham, and that resulted in disallowance of tax benefits — Plaintiffs brought motion for certification of action as class proceeding, program promoters brought cross-motion to stay action, and law firm brought cross-motion to dismiss claims against it — Law firm disputed existence of cause of action against it since plaintiffs did not read or rely on its opinion about legitimacy of gift program — Motion granted; cross-motions dismissed; action certified as class proceeding — Law firm provided legal opinion with intention that gift program promoters use it to market program to plaintiffs who expected to receive charitable tax receipt — Claim was properly pleaded in negligence, not negligent misrepresentation — Law firm ought

reasonably to have foreseen that its tax opinion would be used to market gift program and that its participants would suffer damages if firm was negligent in giving opinion — Other requirements for certification were met.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiffs brought action against promoters of gift program and law firm as result of determination by Canada Revenue Agency (CRA) that program was sham, and that resulted in disallowance of tax benefits — Plaintiffs brought motion for certification of action as class proceeding, program promoters brought cross-motion to stay action, and law firm brought cross-motion to dismiss claims against it — Defendants' main objection was that insufficient commonality existed to permit class proceeding — Motion granted; cross-motions dismissed; action certified as class proceeding — There was sufficient evidentiary basis raising common issues that law firm's tax opinion was considered part of gift program and was necessary to launch it — It was also common issue that participants entered into common contracts on express or implied terms expecting to receive charitable tax receipt recognized by CRA — Certified common issues would not determine liability for compensatory damages since individual determinations would be needed to assess damages — However, whether award of punitive damages was justified was appropriate common issue since it focused on defendants' conduct — Resolution of common issues would be substantially determinative of defendants' liability, and other requirements for certification were met.

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**Statutes considered:**

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 6 — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 106 — referred to

s. 138 — referred to

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

s. 245 — referred to

*Indian Act*, R.S.C. 1985, c. I-5

s. 87 — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20 — referred to

R. 21 — referred to

R. 21.01(1)(b) — considered

R. 51.06 — considered

R. 51.06(1) — considered

R. 51.06(2) — considered

MOTION by plaintiffs seeking certification of action as class proceeding; CROSS-MOTION by defendants seeking to dismiss or stay action.

**Lax J.:**

1 The plaintiffs bring this proposed class proceeding on behalf of 2,825 individuals who participated in the Banyan Tree Foundation Gift Program (the "gift program") for the taxation years 2003 through 2007. The action is brought claiming damages and declaratory relief against the promoters of the gift program (collectively, the "gift program defendants") and the law firm, Fraser Milner Casgrain LLP ("FMC") as a result of the disallowance by the Canada Revenue Agency ("CRA") of the tax benefits that the plaintiffs allege they were to have received. CRA has determined that the gift program was a sham and proposed class members have been or will be reassessed and required to pay taxes and interest on tax arrears arising from the reassessments.

2 The plaintiffs allege that the gift program defendants are in breach of contract and were negligent in failing to provide a charitable donation receipt recognized by CRA and in failing to ensure that class members would not be at risk to repay the loans that were obtained in order to facilitate their participation in the program. They allege that FMC's tax opinions were necessary and instrumental to the marketing of the gift program and the law firm was negligent in the preparation of these opinions.

3 Before the court are three motions: (1) the plaintiffs move for certification of the action as a class proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("CPA"); (2) the gift program defendants move for a stay of the action under sections 106 and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; (3) FMC moves to dismiss the claims against it under rule 51.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. For the reasons that follow, I conclude that the defendants' motions for stay and for dismissal of the claims against FMC should be dismissed and the plaintiffs' motion for certification granted.

**Background**

**The Parties**

4 The gift program was structured as a mechanism to provide donations to various charities and to enable taxpayers to obtain charitable tax receipts. Banyan Tree Foundation is a private charitable foundation registered December 18, 1987, and formerly known as the Ronald and Joan Ball Foundation. In 2002, Robert Thiessen, a chartered accountant, became president and director of Banyan Tree. Promittere Capital Group Inc. ("Promittere Capital"), Promittere Asset Management Ltd ("Promittere Asset") and Rochester Financial Limited ("Rochester") are Ontario corporations. Mr. Thiessen is also an officer and director of these corporations. FMC is a limited liability partnership of lawyers with offices in Toronto and elsewhere who provided legal opinions in 2002 and 2003 that the gift program complied with applicable tax rules for charitable donations.

5 The plaintiffs, Kathryn and Rick Robinson, are husband and wife. Kathryn participated in the gift program in 2003, 2004 and 2005. Rick participated indirectly through Kathryn in 2003 and directly in 2004 and 2005.

### ***The Gift Program***

6 The gift program was marketed to Canadians who had taxable income in excess of \$75,000 and was offered in each of the taxation years 2003 through 2007. Of the 2,825 proposed class members, 2,291 or the vast majority participated in 2003 and 2004. A significant number of individuals, including the plaintiffs, participated in more than one year. The structure of the gift program remained essentially unchanged over the course of its life. Participants were solicited by a network of financial advisors who promoted and sold the program to individuals. Each participant completed a pledge, loan application, power of attorney and promissory note. Each made a pledge of a donation in a specified amount to Banyan Tree and received a charitable donation receipt for the full amount of the pledge. Approximately 85 per cent of the pledge was borrowed from Rochester and evidenced by a promissory note. The participant contributed the remaining amount in cash and paid Rochester a security deposit in respect of the loan, which was to be invested and used to pay interest, income taxes and principal due at the end of the loan period.

### ***The Claims***

7 The plaintiffs allege that the gift program was structured as a mechanism to provide donations to various charities and to enable taxpayers to obtain charitable tax receipts. They claim that it was developed, promoted and administered by Thiessen on behalf of Promittere Capital, Promittere Asset, Rochester and Banyan Tree with the advice and assistance of FMC. The plaintiffs allege that it was an express or implied term of the contracts between the participants and the gift program defendants that the participants would receive a charitable tax receipt that would be recognized by CRA and that they would not be at risk to repay the loans obtained from Rochester. As against these defendants, the plaintiffs plead breach of contract and negligence and seek a declaration that the promissory notes in favour of Rochester are void and unenforceable.

8 As against FMC, the plaintiffs allege that the FMC legal opinions were a necessary prerequisite for the promotion and sale of the gift program, without which the gift program could not have been launched. They plead that FMC intended participants to rely on the existence of the opinions in deciding whether or not to participate in the gift program, that FMC owed participants a duty of care and that it was negligent in the preparation of the opinions. The plaintiffs seek damages on their own behalf and on behalf of class members for interest paid or payable arising from CRA's reassessments, for the security deposits and cash donations paid by participants to gift program defendants and for out-of-pocket expenses incurred by participants to retain professional advisors.

### ***Evidence on the Motions***

9 Mr. and Mrs. Robinson provided their own evidence on the motions as well as producing evidence from several other gift program participants who, like them, each participated in one or more years and either has been reassessed or expects to be reassessed for the years they participated. The plaintiffs also produced evidence from John Loukidelis, a tax lawyer and partner with Simpson Wigle LLP. He represents approximately 200 gift program participants and proposed class members. His evidence was mainly tendered in response to the motion for stay. The plaintiffs and their witnesses were cross-examined. As well, the plaintiffs produced an opinion from Professor Vern Krishna, a senior tax expert at the law firm of Borden Ladner Gervais LLP, but as it was not relied on, I do not propose to refer to it.

10 The gift program defendants filed two affidavits of Robert Thiessen. FMC produced the opinion of Margaret Sanderson, an economics expert, with respect to the approach to determining damages in this action. Neither was cross-examined.

11 I will discuss this in more detail below, but by way of overview, the gift program defendants oppose certification on a number of fronts, but their main attack is the assertion that there is insufficient commonality to make this action one that is suitable for class treatment. They submit that the distinguishing factors pertaining to the gift program on both an individual and year to year basis makes it necessary to look to the particular circumstances of each class member, including the circumstances of the point-of-sale representations of the agents who sold the gift program to individual participants. They also submit that

the action is premature and should be stayed pending the disposition of tax proceedings, which if successful, will render the action moot.

12 Neither the plaintiffs nor the witnesses they put forward on the motion claim to have read the FMC opinions. FMC submits that this is fatal to certification. FMC asserts that a duty of care cannot be created based on the fact that an opinion was prepared when its contents were never read or relied upon and therefore the claim as pleaded fails to disclose a cause of action. FMC brings a cross-motion to dismiss the claim against it based on the admissions under rule 51.06(1) and (2) of the *Rules of Civil Procedure*.

### **The Test for Certification**

13 Section 5(1) of the CPA sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

- (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;
- (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 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.

14 These requirements are linked: "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": *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (Ont. S.C.J.) at para. 14.

#### **5(1)(a) - Cause of action**

15 The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):

- no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25.
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;
- the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi (note) (S.C.C.).
- matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 17(e).

- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), at 679.

16 The gift program defendants do not dispute that the statement of claim discloses causes of action against them in contract and negligence, and I am satisfied that it does. The contested issue is whether the pleading discloses a cause of action in negligence against FMC.

17 The plaintiffs plead that the opinion letters were a necessary prerequisite to the promotion and sale of the gift program, without which, the gift program could not have been launched. They plead that all class members were advised of their existence, that some received copies, that the opinion letters were referred to in promotional materials marketing the program and that they were an express term of the loan arrangements between the gift program participants and Rochester. The particulars of the claim in negligence against FMC are pleaded in paragraph 69(B) of the statement of claim:

### **Negligence**

69. The plaintiffs and class members state that the defendants were negligent, particulars of which are as follows:

(B) FMC,

(i) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program Defendants, without due care and consideration, when it knew or ought to have known that the Gift Program Defendants would rely upon and publish the existence of the Opinion Letters in promoting the Gift Program;

(ii) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program Defendants, without due care and consideration, when it knew or ought to have known that the Gift Program Defendants would rely upon the accuracy and reliability of the Opinion Letters in promoting the Gift Program;

(iii) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program participants as well as their authorized representatives, without due care and consideration, when it knew or ought to have known that the Gift Program participants would rely upon the existence of the Opinion Letters in deciding whether to participate in the Gift Program;

(iv) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program participants as well as their authorized representatives, without due care and consideration, when it knew or ought to have known that the Gift Program participants would rely upon the accuracy and reliability of the Opinion Letters in deciding whether to participate in the Gift Program;

(v) failed to properly investigate and consider the income tax consequences of participation in the Gift Program;

(vi) was negligent in the preparation of the Opinion Letters;

(vii) knew or ought to have known that the Opinion Letters were a necessary prerequisite for the promotion and sale of the Gift Program and that but for the Opinion Letters the Gift Program could not be undertaken, yet it failed to fully and properly investigate and accurately opine;

(viii) knew or ought to have known that the Opinion Letters were no longer accurate or reliable following: the issuance by Canada Revenue Agency of its Fact Sheets in November and December, 2003, and November, 2005, the legislative changes announced on December 5, 2003; and, the Canada Revenue Agency issued Taxpayer Alerts in November, 2005 and October, 2006;

(ix) failed to notify the Gift Program Defendants, prospective donors and existing participants in the Gift Program that its Opinion Letters were no longer accurate and reliable; and

(x) knew or ought to have known that the Gift program Defendants continue to rely upon and publish the existence and content of the Opinion Letters for the promotion and sale of the Gift Program to prospective donors and participants despite its knowledge that these Opinion Letters are no longer accurate or reliable.

18 The plaintiffs also plead in the following paragraphs that

70. FMC was negligent in the issuance of the Opinion Letters, the issuance of which was a necessary prerequisite for the promotion of the Gift Program by the Gift Program Defendants. Accordingly, the FMC's issuance of the Opinion Letters was the proximate cause of damages to Class Members.

71. FMC owed a duty of care to those whom it intended to, or knew or ought to have known would, rely upon the existence and/or accuracy and reliability of the content of the Opinion Letters it issued.

78. FMC had a duty to warn the Gift Program Defendants and Class Members and to make full disclosure to them as to the facts and circumstances set out above and failed to do so. Particularly, FMC failed to notify the Gift Program Defendants and Class members that the Opinion Letters were no longer accurate or reliable.

81. All defendants failed to take proper steps to fully investigate the Gift Program to ensure that the Canada revenue Agency would in fact recognize the charitable donation receipts issued and tax credits claimed.

19 On a motion under rule 21 and in considering s. 5(1)(a) of the CPA, no evidence is admissible. However, a motions judge may have regard to documents specifically referred to and incorporated by reference into the pleading in order to assess the substantive adequacy of the claim: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (Ont. C.A.); *Corktown Films Inc. v. Ontario* (1996), 18 O.T.C. 308, 66 A.C.W.S. (3d) 868 (Ont. Gen. Div.); *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.). As the opinion letters are specifically referred to and relied on in the pleading, I may consider them.

20 The opinion letters are dated October 23, 2002, and September 5, 2003, and are addressed to the attention of Mr. Thiessen as President of Promiterre Asset. FMC did not structure the gift program, but the program's structure was integral to the opinion FMC rendered that the donation made partly in cash from the participant's own resources and partly from a loan from Rochester would qualify as a valid charitable donation for tax purposes. If that opinion was given negligently as is alleged, it could, subject to the arguments discussed below, support the plaintiffs' claim in negligence against FMC.

21 FMC submits that a duty of care cannot be created based on the fact that an opinion was prepared, when its contents were never read or relied upon by anyone. They say that the allegations against FMC arise from the existence and the contents of the letters and that, in substance, the claim is made for negligent misrepresentation. I disagree. The claim is not pleaded on the basis that the plaintiffs read or relied upon the FMC letters, but on the basis that FMC issued the opinion letters with the expressed intention that they be relied upon by the gift program defendants and knowing that the gift program defendants would rely upon and publish the existence of the opinions in promoting the gift program.

22 FMC points out that the letters contained express qualifications on the opinion and authorized reliance by a very limited category of individuals and disclaimed reliance by any other person, without FMC's prior written consent. The letters state:

The opinions expressed in this letter may be relied upon by you, and by a Donor who is provided a copy of this letter by you, or the Donor's authorized representative, and may not be relied on by anyone else without our written permission.

23 FMC submits that, given this language, it could not be reasonably foreseeable to FMC that individuals like the plaintiffs who did not receive or read the FMC letters would sustain damages as a result of the opinions expressed in them. It says that the result is that there was no relationship between FMC and the plaintiffs sufficiently close to satisfy the first part of the *Anns* test

for duty of care (*Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.)). This submission overlooks that the limitation on reliance does not qualify in any way Promiterre's ability to rely on the opinions expressed in the letters. In fact, the letters specifically permit Promiterre's reliance and it is alleged that the gift program defendants did rely on the opinions to launch and sell the program.

24 The allegation is not that FMC provided the letters intending that they be read and relied upon by the plaintiffs and proposed class members, although some may have done so, but rather that FMC provided the letters (1) with the intention that they be used by the gift program defendants in the manner the plaintiffs allege, namely to market the program as one in which proposed class members would receive a charitable tax receipt recognized by CRA; and (2) with the intention and knowledge that the existence of a tax opinion would inform the decision of class members about whether or not to participate in the gift program. If these allegations are made out at trial, it is not plain and obvious that they could not support a duty to take care that the opinions expressed in the letters were accurate and reliable and that a failure to take such care or a failure to warn was the proximate cause of the losses the plaintiffs allege they suffered.

25 To put this in a different way, the reliance the plaintiffs allege is not on the tax opinion *per se*, but on there being a tax opinion that FMC intended and knew would be used by the gift program defendants to support the legitimacy of the gift program for income tax purposes and would be relied upon by the class members in deciding whether or not to participate. I would therefore not give effect to FMC's argument that this is a negligent misrepresentation claim "dressed up" as a negligence claim. It is properly pleaded as a negligence claim and the essential elements of the cause of action - duty, foreseeability, proximity, breach, and damage - are present. The express qualifications on the opinion are not matters to be considered at the certification stage.

26 The question then is whether it is plain and obvious that a claim in negligence against FMC cannot possibly succeed. The plaintiffs have not pleaded and cannot plead any direct relationship with FMC, but there is precedent, as discussed below, for advancing a class action claim in negligence against a law firm even though generally, a lawyer owes a duty of care only to the lawyer's client: *Baypark Investments Inc. v. Royal Bank* (2002), 57 O.R. (3d) 528 (Ont. S.C.J.) at paras. 23 and 33, aff'd, [2002] O.J. No. 4377 (Ont. C.A.); *Elms v. Laurentian Bank of Canada*, 2004 BCSC 1013, 35 B.C.L.R. (4th) 373 (B.C. S.C.) at paras. 63-65, aff'd, 2006 BCCA 86 (B.C. C.A.).

27 In *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (Ont. S.C.J.) ["YBM"], the plaintiffs advanced claims in both negligent misrepresentation and negligence against a law firm and one of its lawyers for alleged misrepresentations in a prospectus. Cumming J. rejected the negligent misrepresentation claim because the plaintiffs' investment preceded the public offering negating any reliance on the prospectus. However, applying the principles set out in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) and *Anns v. Merton London Borough Council*, he held that the pleading disclosed sufficient facts to give rise to a *prima facie* duty of care and that by enabling the public offering to come to fruition through the prospectus, it was arguable that the law firm and the lawyer could be found negligent. He concluded that a factual record was necessary to decide whether there were policy considerations that ought to negative or limit the scope of any duty of the law firm and lawyer in question.

28 In the earlier decision of *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (Ont. Gen. Div.), Sharpe J. (now, Sharpe J.A.), similarly found that a negligence claim in a class action brought against a solicitor on behalf of investors disclosed a cause of action. In doing so, he reviewed the "developing line of authority" holding that a solicitor may place himself or herself in a sufficient relationship of proximity to a third party to owe that party a duty of care: *Filipovic v. Upshall* (1998), 19 R.P.R. (3d) 88 (Ont. Gen. Div.); *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C. S.C.); *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632 (B.C. C.A.); *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495 (B.C. S.C.).

29 In *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195 (B.C. C.A.), affirming (2000), 73 B.C.L.R. (3d) 366 (B.C. S.C. [In Chambers]), which was also a class action brought by investors against a solicitor and relied upon by Cumming J. in *YBM*, the British Columbia Court of Appeal affirmed the decision of the motions judge to certify the action. The court also reviewed the so-called "disappointed beneficiary" cases such as *Whittingham* and *Tracy* and quoted liberally from Justice Sharpe's reasons in *Delgrosso* in concluding that although the investors' argument was novel, it could not be said that it was plain and obvious that it would fail.

30 Notwithstanding the efforts of counsel for FMC to confine these cases to their facts and to distinguish them, there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed. FMC pointed to no authority that rejected a third party negligence claim against lawyers at the certification stage. I regard *Hurst v. PriceWaterhouseCoopers (PWC) LLP, Canada*, [2009] O.J. No. 1415 (Ont. S.C.J.) on which FMC relies as entirely distinguishable. This was a claim for negligent misrepresentation, reckless misrepresentation, and negligence in which the allegedly wrongful act by PWC amounted only to having its name appear as auditor on an offering memorandum. This was found insufficient to establish a relationship giving rise to a *prima facie* duty of care.

31 Whether or not the plaintiffs and proposed class members are akin to disappointed beneficiaries, it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.

#### **FMC's Cross-Motion under Rule 51.06**

32 In cross-examination, the plaintiffs and their witnesses admitted that they did not read the FMC letters. FMC submits that it is entitled to judgment dismissing the action against it based on these admissions. FMC is unable to rely on this evidence for the purposes of s. 5(1)(a) of the CPA, but under rule 51.06, the court may grant an order based on a clear admission of facts.

33 There are at least three reasons to reject this submission and dismiss FMC's motion. First, as I have already discussed, the claim is not advanced on the basis of a direct relationship with FMC and whether or not the plaintiffs read and relied on the letters is irrelevant to the claim that is pleaded. Second, the evidence that is relied upon was obtained in cross-examination on a pending certification motion and goes only to whether the certification criteria are met. It cannot be used for a collateral purpose as evidence that goes to the merits of the action. Third, according to the Ontario Court of Appeal, it would appear that rule 51.06 and Rule 20 serve a similar purpose and are used in combination to obtain summary judgment for part of a claim if there is an admission that satisfies the no genuine issue for trial test and, in the language of rule 51.06, the order sought (a partial summary judgment consistent with the admission) is an order to which "the party may be entitled without waiting for the determination of any question between the parties" (rule 51.06(2)): *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (1997), 36 O.R. (3d) 384, 153 D.L.R. (4th) 33 (Ont. C.A.) at para. 50. FMC has not brought a motion for summary judgment and the admissions cannot be used in the manner proposed to obtain a dismissal of the action.

34 The plaintiffs have therefore satisfied the first requirement for certification.

#### **5(1)(b) - Identifiable class**

35 Section 5(1)(b) requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of a class definition is (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10. Class members are not required to have identical claims and class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 45, leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi (note) (S.C.C.). However, the class definition must be rationally connected to the common issues raised by the cause of action as an issue will be common only where its resolution is necessary to the resolution of each class member's claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

36 The plaintiffs propose and the gift program defendants do not dispute the following class definition: "all individuals who participated in the Banyan Tree Gift Program for the taxation years 2003, 2004, 2005, 2006, and 2007." FMC accepts that the definition is satisfactory for those who participated in 2003 and possibly also 2004, but suggests that it is "over-inclusive" with respect to subsequent years as FMC provided no tax opinion after September 2003. I would not give effect to this objection. For

one thing, the vast majority of class members participated in 2003 and 2004. As well, the 2003 tax opinion does not state that it is limited to any particular taxation year. In any event, the court has the power to create sub-classes where this is necessary.

37 I am satisfied that the class definition meets the requirement of s. 5(1)(b) of the CPA in that it is clear, defined by objective criteria and rationally connected to the common issues to which I turn next.

**5(1)(c) - Common Issues**

38 The core of a class action is commonality. For an issue to be common, 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: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.) at para. 18. An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Ont. S.C.J.), aff'd, [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Ont. Div. Ct.). The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping* at para. 39.

39 Section 6 of the CPA is clear that where the relief claimed includes a claim for damages, certification should not be refused because this would require individual assessment after the determination of the common issues or because the relief claimed relates to separate contracts involving different class members or because different remedies are sought for different class members. Common issues need not determine liability, but need only be issues of fact or law that will move the litigation forward. Many individual issues may remain to be decided after the resolution of a common issues trial: *Hollick* at para. 16; *Cloud* at para. 52; *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.) at paras. 60-63, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15 (S.C.C.). The common issues requirement is not a high legal hurdle, but a plaintiff must adduce some evidence to show that there is a basis in fact that issues are common: *Hollick* at para. 25.

40 The plaintiffs propose the following common issues:

**Relating to Gift Program Defendants**

- (a) Was it a term of the contract of participation in the Gift Program that participants would receive a charitable donation receipt that would be recognized by Canada Revenue Agency for tax credit purposes?
- (b) Was it a term of the contract of participation in the Gift Program that participants would not be at risk to repay loans obtained from Rochester?
- (c) If the answer to (a) and/or (b) is yes, has the contract been breached by the Gift Program Defendants?
- (d) Did the Gift Program Defendants owe a duty of care to participants?
- (e) If the answer to (d) is yes, what was the nature and extent of that duty?
- (f) Has the duty of care owed by the Gift Program Defendants to participants been breached?
- (g) Are all promissory notes executed by Class Members in favour of Rochester in connection with participation in the Gift Program void and unenforceable?

**Relating to FMC**

- (h) Did FMC owe a duty of care to participants in the Gift Program?
- (i) If the answer to (h) is yes, what was the nature and extent of that duty?
- (j) Has FMC breached its duty of care to participants in the Gift Program?

### Relating to Relief Claimed

- (k) Are the defendants or any of them liable to Class Members for damages?
- (l) If the answer to (k) is yes, what is the amount of that liability?
- (m) Does the conduct of the defendants, or any of them, justify an award of punitive damages in the circumstances?
- (n) If the answer to (m) is yes, what is the amount of punitive damages to be awarded?

41 The gift program defendants argue that this is a point-of-sale representation case as in *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (Ont. S.C.J.); *Kumar v. Mutual Life Assurance Co. of Canada*, [2003] I.L.R. I-4181 (Ont. C.A.), and *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 (Ont. S.C.J.). See also, *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350, 72 O.T.C. 351 (Ont. Gen. Div.).

42 In each of these cases, certification was refused. *Williams* and *Kumar* were pleaded on the basis of negligent misrepresentation, which the plaintiffs acknowledge can be problematic in a class action. *Controltech* was also a misrepresentation case. In *Bellaire*, the plaintiffs alleged breach of contract and sought to certify common issues on contractual interpretation, but Nordheimer J. found that the claims, at their heart, were claims of negligent misrepresentation. In coming to that conclusion, he referred to the plaintiff's evidence that the plaintiff had been "induced" to purchase the life insurance policy in question based on representations made to him by the defendant's agent. As well, the draft litigation plan explicitly stated that the "the substantive and determinative common issue turns on whether or not there was a misrepresentation which induced the plaintiff to enter the contract." Nordheimer J. found that the case suffered from the same problem which Cumming J. found to exist in *Kumar* and with which Rosenberg J.A. expressly agreed when he referred with approval at para. 48 of *Kumar* to Cumming J.'s statement:

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

43 Although certification of misrepresentation claims can present obstacles for plaintiffs, these kinds of claims are not fatal to certification. As Sharpe J. pointed out in *Controltech* at paras. 9-11 and 14, it is possible to imagine claims resting on various misrepresentations being certified as was the case in *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 (Ont. Gen. Div.) and *Maxwell v. MLG Ventures Ltd.* (1995), 7 C.C.L.S. 155 (Ont. Gen. Div.). In *Peppiatt*, the claims of all class members rested on misrepresentations contained in an information package developed to promote the sale of equity shares in a golf club. In *Maxwell*, the claims rested on alleged misrepresentations in a securities offering circular. In *Abdoole v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), all members of the court were of the opinion that the need to prove individual reliance did not preclude certification of a class proceeding involving a claim of misrepresentation, although certification in that case was refused on other grounds. It may be possible in some cases to move the litigation forward by deciding certain elements of the misrepresentation claim common to all class members, leaving the element of individual reliance to be determined on an individual basis (*per* Sharpe J. at para. 10 in *Controltech*). Justice Sharpe gives this example in para. 14 in *Controltech*:

... For example, it may be that a common issue would be found where a defendant developed and deployed a standard deceptive sales pitch for a consumer product, repeated time and again in nearly identical circumstances to various consumers by various sales people: see, eg. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), appeal quashed (1998) 165 D.L.R. (4<sup>th</sup>) 482 (Ont. C.A.), leave to appeal dismissed (October 22, 1998), Doc. 26855 (S.C.C.).

44 The plaintiffs do not plead misrepresentation (presumably to avoid the pitfalls of *Kumar* and *Bellaire*), but the defendants urge me to see this as a misrepresentation case that will require evidence as to who said what to whom in respect to each and every transaction. The plaintiffs rely only upon the contractual documents and the evidence of Robert Thiessen on behalf of

the gift program defendants as to what they say the terms of the contract were. They submit they can satisfy the commonality requirement on the basis of this evidence. Whether a defendant was in a contractual relationship with members of the class, the terms of that contract, and whether the defendant breached the contract may constitute common issues: *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (Ont. C.A.).

45 According to Mr. Thiessen, the structure of the gift program was "essentially unchanged" from its inception in 2003 through and including 2007 whereby participants executed standard prescribed documents in order to participate in it. The documents are linked and comprise the contract between a class member and the gift program defendants. Each participant was required to execute a loan application, power of attorney, promissory note and pledge. The pledge expressly provides for an income tax receipt. Class members used the receipt in filing their income tax returns and have now been reassessed for 2003 and 2004. CRA has disallowed the full donation credit and it is anticipated that this will apply to subsequent years. Under Schedule "A" to the loan application, Rochester agreed to retain competent financial advisors to invest and manage the security deposits given by participants, but there is evidence that the security deposits have been severely compromised and also that they have proved to be insufficient to pay interest and taxes.

46 The gift program defendants produced the brochures and gift program information that they prepared and that were used to market and sell the gift program as well as the 2003 FMC tax opinion. The FMC opinion is based on a transaction that contemplates that the lender will acquire an insurance policy that will insure the risk that the security deposits given by participants will not be sufficient to repay the loan. It is also based on a transaction that contemplates a charitable donation tax receipt recognized by CRA. Mr. Thiessen deposes that the FMC opinion was made available for inspection by the various participants. The plaintiffs and their witnesses were aware of it. In December 2003, full documentation respecting the gift program, including the FMC opinion and the brochure, was available online. The 2003 brochure expressly states that the loan terms include performance insurance and a tax opinion from FMC. The 2004 brochure refers to "the favourable legal opinion" of FMC. When CRA began its investigation of the gift program, Banyan Tree communicated with participants on a uniform basis with suggested responses to the inquiries from CRA, including the suggestion that participants provide CRA with the brochures they received.

47 The gift program was sold through a network of "Donor Representatives" with whom the gift program defendants contracted for a finders' fee and by "Sub-Donor Representatives." The defendants assert that they did not control what was said at point-of-sale and point to the evidence of the plaintiffs and their witnesses who, on cross-examination, agreed they relied on their respective financial advisors to explain the gift program. However, Mr. Thiessen deposes that he was frequently involved in presenting information to professional financial advisors, many of whom became Sub-Donor Representatives. These presentations drew on gift program information that was prepared by Banyan Tree and used in the promotion of the program.

48 Appended to Mr. Thiessen's March 30, 2009 affidavit is the gift program information for 2003 through 2007. The 2003 gift program information expressly states that an insurance policy will be arranged by the lender (*i.e.* Rochester) to cover any deficit that may exist if the security deposit is not sufficient to retire the loan at the end of ten years. It also refers to the FMC legal opinion that "clarifies" that "GAAR is not an issue."<sup>1</sup> Although neither the insurance policy nor the FMC opinion is explicitly referred to in the gift program information in subsequent years, these documents as well as the brochures for these years provide examples that purport to demonstrate to proposed donors that they will not be at risk to repay the loans and that the tax credit they received would produce a net positive cash position.

49 In coming to the conclusion that the gift program was a sham and the tax credit should be disallowed, CRA, in its detailed letter to proposed class members explaining the reasons for the reassessment, commented:

In addition, the participants were never at risk to repay the loan. Participants entered into the Program on the condition that they were not at risk for any more than their cash outlay. In fact, it was promoted to the participants that, if they participated in the Program and provided the cash portion of the donation and the security deposit, participants would receive a tax credit that would produce a net positive cash position.

50 This evidence, together with the brochures and program information that were distributed, the contract language, and the evidence of the plaintiffs and their witnesses, is sufficient to provide the minimum evidential basis for the existence of class members' claims that raise common issues that the tax opinion was considered to be part of the gift program, that it was necessary to launch the program, and that participants entered into common contracts on express or implied terms that they would receive a charitable donation tax receipt recognized by CRA and a risk-free loan.

51 While misrepresentation is not pleaded, this action could be seen as one that is similar to *Peppiatt* in that there is evidence to support a class-wide representation as to the contractual terms and a class-wide breach of contract, resulting in loss to all class members. *Peppiatt* was founded upon allegations of breach of contract, misrepresentation and negligence against the developer of a golf course and one of the fundamental allegations was that class members purchased memberships in the club in reliance on the written representations contained in the membership information package. After the golf course was constructed, the developer could not meet its financial commitment and the bank assumed ownership of the golf club. The claim was amended to allege that the bank was at all times aware of the representations and subject to the same contractual and other obligations as the developer.

52 It is of interest that after certification and during the course of discovery in *Peppiatt*, evidence emerged that there were substantial differences in the membership information package that contained the alleged misrepresentations, that different versions had been distributed and that some class members had applied for membership in the club before the information packages were distributed. The bank moved to decertify the action, arguing that it was not a party to the individual dealings between the developers and the members and that the evidence obtained on discovery demonstrated that the claims did not raise common issues. The court accepted that there were at least 140 members of the certified class who received no version of the membership information package and that different versions had been distributed. As a result, there may have been no common issue of fact as to the nature and content of the alleged representations. This raised significant individual issues of reliance. Nonetheless, the court refused to decertify the action and instead created sub-classes to take account of the different factual circumstances of class members.<sup>2</sup>

53 The gift program in this case was marketed in common to all class members and sold by agents, many of whom were trained in a standardized way and who were provided with program information that the defendants prepared and intended be used in promoting and selling the gift program. Any variations from year to year do not detract from commonality, particularly in light of Mr. Thiessen's evidence that the structure remained the same and the documents that constitute the contract were the same. On the basis of the record before me, I am satisfied that proposed common issues (a), (b), (c) and (g) are appropriate common issues to certify. As the gift program defendants did not raise any different arguments with respect to the common issues in negligence, I am also satisfied that common issues (d), (e) and (f) are appropriate. These issues are common to all class members and meet the requirements for certification in that they are substantial ingredients of the claims of each class member, their resolution is necessary to resolve each claim and a resolution of these common issues would significantly advance the litigation.

54 By and large, FMC opposed certification of the common issues against it by relying on the submissions that were made in opposing certification of a cause of action in negligence and by adopting the submissions of the gift program defendants with respect to certification of the common issues against it. I have already addressed these arguments. For reasons already given, the proposed common issues in negligence relating to FMC, common issues (h), (i) and (j), are appropriate for certification.

55 This brings me to the proposed common issues on damages. It is clear that there will need to be individual determinations to assess the damages of class members and although the fact of loss could possibly be addressed in common, it would not sufficiently advance the litigation. I would therefore not certify proposed common issues (k) and (l).

56 With respect to the proposed common issues on punitive damages, in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.), the Supreme Court of Canada held that punitive damages are awarded "if, but only if" all other penalties, including compensatory damages are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.

57 The certified common issues in this action will not determine liability for compensatory damages. In certifying common issues in respect of punitive damages in cases where it is foreseeable that individual proceedings might be necessary to quantify compensatory damages, courts have recognized the potential for a future bifurcation at trial of the punitive damages issue. So, for example, in *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404, 47 C.C.L.T. (3d) 114 (Ont. S.C.J.); leave to appeal granted, [2007] O.J. No. 2709 (Ont. S.C.J.); appeal dismissed, (2008), 91 O.R. (3d) 691 (Ont. Div. Ct.), Justice Cullity, relying on *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) included a common issue on punitive damages in the certification order, but said at para. 98:

... The possibility that, because of the requirement that compensatory damages have been found to be inadequate, the inquiry might be bifurcated between a preliminary consideration by the trial judge of the defendants' conduct and a subsequent final determination of the liability for, and the quantum of, punitive damages after the individual issues had been decided was accepted by the British Columbia Court of Appeal in *Fakhri v. Alfalfa's Canada Inc.* [2004] B.C.J. No. 2200 (B.C.C.A.).

58 The same approach, namely the certification of a common issue on *prima facie* entitlement to punitive damages with quantification and final determination following an assessment of compensatory damages, was accepted in *Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6th) 170 (Ont. S.C.J.) at para. 48, leave to appeal refused, [2007] O.J. No. 1991 (Ont. Div. Ct.); *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.); leave to appeal denied, [2008] O.J. No. 1916 (Ont. Div. Ct.) at para. 105; *MacKinnon v. National Money Mart Co.*, 2007 BCSC 348, [2007] B.C.J. No. 520 (B.C. S.C.) at paras. 67-68; *Bodnar v. Payroll Loans Ltd.*, 2006 BCSC 1132, [2006] B.C.J. No. 1705 (B.C. S.C.) at para. 45 and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018, [2006] B.C.J. No. 1639 (B.C. S.C.) at paras. 55-56.

59 In her certification reasons in *Peter*, Justice Hoy accepted the defendants' submission, relying on *Heward* and *Boulanger* on this point, that the punitive damages inquiry could be bifurcated between a preliminary consideration of the defendants' conduct and plaintiffs' entitlement, and a subsequent and final determination of liability for, and quantum of, punitive damages after an assessment of the compensatory damages. In her view, the common issue as phrased did no more than speak to entitlement and would also determine entitlement to punitive damages in the event the plaintiffs were successful in the waiver of tort claim and elected disgorgement. The punitive damages question that was certified in that case was: "Should one or both of the defendants pay punitive damages to the class?"

60 However, in the recent decision in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.), Justice Perell, relying on *Whiten*, refused to certify punitive damages as a common issue on the basis that it was not an appropriate common issue in circumstances in which individual causation and damages issues will not be resolved at the common issues trial. He acknowledged the "impressive list of cases" in which it had been held that punitive damages were a suitable common issue, but declined to follow them either because they were distinguishable or had been wrongly decided on his interpretation of *Whiten*.

61 The above discussion on punitive damages is drawn from my reasons in *Andersen v. St. Jude Medical Inc.*, [2010] O.J. No. 8 (Ont. S.C.J.) where the defendants moved to bifurcate the certified common issue on punitive damages, which was: "Does the defendants' conduct merit an award of punitive damages, and if so, in what amount?" In this case, proposed common issue (m) asks: "Does the conduct of the defendants, or any of them, justify an award of punitive damages in the circumstances?" In my view, this is an appropriate common issue to certify as it focuses on the defendants' conduct and the plaintiffs' presumptive entitlement to an award. Proposed common issue (n) asks: "If the answer to (m) is yes, what is the amount of punitive damages to be awarded?" I would slightly amend proposed common issue (m) to read: "Should an award of punitive damages be made against the defendants? If so, in what amount?" This issue can be certified, but it can only be answered after the conclusion of all proceedings by individual class members and the quantification of compensatory damages. In my view, this approach, which is the one I adopted in *St. Jude*, is consistent with the approach contemplated by Ontario courts in *Heward*, *Boulanger* and *Peter* and by the courts of British Columbia and is the one that should be followed here.

#### 5(1)(d) - Preferable Procedure

62 In *Hollick*, Chief Justice McLachlin, said that the CPA is to be construed generously and directed lower courts to avoid taking an overly restrictive approach to its interpretation at the certification stage. The court found that the preferability requirement can be met even where there are substantial individual issues. At least since the 2004 decision of the Ontario Court of Appeal in *Cloud*, it has been recognized that determining preferability requires a qualitative and not quantitative inquiry and that it is essential to assess the importance of the common issues in relation to the claim as a whole. The *Hollick* principles were summarized by Rosenberg J.A. in *Markson v. MBNA Canada Bank*, 85 O.R. (3d) 321, [2007] O.J. No. 1684 (Ont. C.A.) at paras. 69 - 70:

- a) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
- b) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
- c) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

63 This is a case where the resolution of the common issues is substantially determinative of the liability of the defendants to the class and would achieve each of the above objectives of a class proceeding. The defendants' objections essentially reprise the arguments I have already rejected, namely that the claims are overwhelmingly individual rather than common. Individual proceedings to resolve the claims would be unnecessarily duplicative, expensive and inefficient. The only other procedure that is proposed is to stay the class proceeding until such time as the tax appeals in the Tax Court have been finally determined. In support of this submission, the defendants rely on my decision in *Hester v. Canada*, [2007] O.J. No. 4719, [2008] 3 C.T.C. 44 (Ont. S.C.J.), leave to appeal refused, [2008] O.J. No. 634 (Ont. Div. Ct.), aff'd, [2008] O.J. No. 3557, 2008 ONCA 634 (Ont. C.A.). Reliance on this decision is misplaced.

64 The claims in *Hester*, which is a proposed class action not yet certified, related to the availability of tax exemption rights for aborigines under s. 87 of the *Indian Act*, R.S.C. 1985, C. I-5. Initially, these claims were joined in an individual action brought by Roger Obonsawin. In 2002, an order was made severing these actions. The actions had their genesis in a decision of CRA in 1993 that it intended to change the manner in which it administered s. 87 of the *Indian Act*, following the decision of the Supreme Court of Canada in *Williams v. R.*, [1992] 1 S.C.R. 877 (S.C.C.). In 1994, CRA issued new guidelines effective for the 1995 taxation year. The change affected the availability of tax exemption rights for some members of the aboriginal community. Members of the community protested, but an agreement was reached between them and CRA to, among other things, expedite the consideration by the courts of challenges to the 1994 guidelines. Between 1998 and 2007, four test cases made their way to the Federal Court and some of them, through various appeals, to the Supreme Court of Canada. The cases resulted in the tax exemption claims being denied. Appeals in two of the test cases may still be pending in the Federal Court of Appeal.

65 Beginning in February 2006, CRA sent letters to those aboriginal taxpayers who were affected by CRA's 1994 guidelines on the understanding that they intended to be governed by the outcome of the test cases. They were asked to advise which of the test cases was reflective of their situation. When they declined to do so, CRA issued Notices of Confirmation that confirmed the income tax assessments to Mr. Hester and about 1200 other aboriginal taxpayers. This resulted in the taxpayers filing Notices of Appeal. The Chief Justice of the Tax Court is case managing all of these appeals, which were proceeding at the time of the hearing of the motions in *Hester*.

66 In *Hester*, the plaintiff moved to amend the statement of claim as a result of the severance of the class action from the Obansawin action. The defendants objected to certain of the amendments and moved to stay the action on the basis that the matters covered in the claim were the subject of the other proceedings that I have referred to. In granting the motion for stay until the tax appeals in the Tax Court and any appeals arising from them were finally determined, it was my finding that each of the causes of action asserted in the *Hester* action was founded on the entitlement of the plaintiff and class members to tax exemption rights and that the tort and equitable claims had no independent foundation, but were derivative of the determination of liability for tax. I said at para. 59:

In my view, this action represents an attempt by Hester [and class members] to turn a question of tax liability into a mass tort claim against the Crown and 15 of its employees when two other courts - the Federal Court and the Tax Court - are already adjudicating the real dispute between the parties.

67 This is a completely different case. For one thing, there are no tax appeals pending before the Tax Court of Canada, although class members were entitled to file Notices of Appeal 90 days after receiving a notice of reassessment and could have pursued tax appeals, with or without the assistance of Banyan Tree more than two years ago. Banyan Tree has taken some initial steps to assist class members with the filing of Notices of Objection, including retaining counsel, but has made no commitment to assist class members financially with the legal costs of individual appeals once the fund it established for legal expenses is exhausted. In September 2008, Banyan Tree's charitable status was revoked. Rochester admits and informed donors that the security deposit account investments were subject to a fraud resulting in a significant loss on these investments. This raises concerns about staying this action in favour of a lengthy and uncertain outcome in another forum that has not yet begun and that Banyan Tree has told donors will be litigated all the way to the Supreme Court of Canada and "will take years to clear the courts." *Hester* illustrates that this prospect is not far-fetched

68 While class actions may not be speedy, they do have the advantage of case management and the ongoing supervision of a dedicated judge. More fundamentally, the ultimate disposition of any tax appeals will not be determinative of the causes of action or compensate class members for the damages they seek. Clearly, the Tax Court cannot adjudicate the enforceability of the promissory notes that class members executed. It cannot adjudicate claims for damages for negligence and breach of contract or for punitive damages. Unlike *Hester*, these are independent causes of action and remedies that are not derivative of entitlement to a tax exemption. Contrary to the submission of the defendants, it is not the class action that is premature. Rather, it is the motion for stay that is premature.

69 The issues in this action do not become moot if the Tax Court determines that the reassessments are proper and that CRA's determination that the gift program is a sham is correct. If, on the other hand, tax appeals are pursued and finally determined in favour of class members, it is possible that some aspects of this action may be resolved through that process. In that event, the motion for stay can be renewed, but at this point, that prospect is sufficiently speculative and uncertain that a class action is very clearly the preferable procedure for resolving the claims of class members. Even if I were to accept that the outcome of the tax appeals is determinative of the claims advanced in this action (which I do not), a class action achieves judicial economy by make binding determinations affecting the rights of 2,825 individuals in one proceeding. It achieves behaviour modification by holding corporations and law firms accountable for the promotion of allegedly sham investments and it facilitates access to justice for litigants who would not bring individual claims.

70 The plaintiffs have therefore satisfied this requirement for certification.

*5(1)(e) - A representative plaintiff with a workable litigation plan*

71 The final requirement for certification is that there be a representative plaintiff who would fairly and adequately represent the interest of class members, has produced a suitable litigation plan and does not have a conflict of interest, on the common issues, with other class members.

72 There are two objections to the adequacy of the proposed representative plaintiffs: (1) that they did not participate in the gift program in 2006 and 2007; and (2) alleged conflicts between their evidence and the evidence of their witnesses as

to representations that were made concerning the liability for repayment of the loans. As to the first objection, Mr. Thiessen acknowledged that there were no material differences in the gift program during the years it was sold or in the contracts between class members and the gift program defendants. A finding in the plaintiffs' favour on the common issues on breach of contract and/or negligence would resolve these issues for all years of the program. As to the second objection, the trial of this action will focus on the conduct of the defendants - whether they were negligent, and whether the gift program defendants entered into contracts with class members on the express or implied terms that are alleged. The so-called differences arising from the evidence does not impact on the common issues that will resolve these claims and therefore does not affect the plaintiffs' ability to adequately and fairly represent the class. If I am wrong, sub-classes can be created as in *Peppiatt* or the defendants can bring a motion to decertify the action.

73 In my view, the main purpose of a litigation plan at certification is to demonstrate to the court that the plaintiffs have turned their minds to how the action will proceed and be managed. Defendants frequently raise arguments on manageability as an obstacle to certification both under the preferable procedure requirement and also as a deficiency in the litigation plan. A deficient litigation plan that cannot be remedied can reveal that the action is unmanageable and therefore is not the preferable procedure. In *Bellaire* at para. 53, Nordheimer J. provided a non-exhaustive "shopping list" of matters that ought to be addressed in a litigation plan. The litigation plan attached as an exhibit to the affidavit of Kathryn Robinson addresses many of these matters and provides a reasonable framework for the prosecution of this action. A litigation plan is not intended to determine the procedures that will be actually employed in resolving individual issues. The litigation plan is sufficient so long as it provides enough detail to satisfy the court that the plaintiffs have given the procedures some thought and that the plan's suggestions are workable. The litigation plan here provides an adequate proposal for the efficient, fair and manageable prosecution of this action. The plaintiffs have therefore met the final requirement for certification.

#### *Conclusion*

74 As I am satisfied that the plaintiffs have met each of the requirements of s. 5 of the CPA, this action will be certified as a class proceeding on such terms as these reasons provide. The motions for stay and for an order under rule 51.06 are dismissed. If the parties are unable to agree on the costs of the motions, they are to agree on a schedule for the exchange of written submissions and arrange to have these delivered to me within 60 days.

*Motion granted; cross-motions dismissed; action certified as class proceeding.*

#### *Footnotes*

\* Leave to appeal refused at *Robinson v. Rochester Financial Ltd.* (2010), 89 C.P.C. (6th) 118, 2010 CarswellOnt 2153, 2010 ONSC 1899, 262 O.A.C. 148 (Ont. Div. Ct.).

1 General Anti-Avoidance Rule ("GAAR") under s. 245 of the *Income Tax Act*, R.S.C. 1985, c. 1.

2 *Peppiatt v. Royal Bank* (1996), 27 O.R. (3d) 462 (Ont. Gen. Div.).



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1481, 188 A.C.W.S. (3d) 40, 262 O.A.C. 148, 89 C.P.C. (6th) 118

**KATHRYN ROBINSON and RICK ROBINSON (Plaintiffs / Respondents) and  
ROCHESTER FINANCIAL LIMITED, PROMITTERE CAPITAL GROUP INC.,  
PROMITTERE ASSET MANAGEMENT LTD., BANYAN TREE FOUNDATION  
AND FRASER MILNER CASGRAIN LLP (Defendants / Moving Parties)**

M. Dambrot J.

Heard: March 24, 2010

Judgment: April 1, 2010

Docket: 56/10, 71/10

Proceedings: refusing leave to appeal *Robinson v. Rochester Financial Ltd.* ([2010](#), 2010 CarswellOnt 206, 2010 ONSC 463 (Ont. S.C.J.)

Counsel: David Thompson, Mathew G. Moloci for Plaintiffs / Respondents

Peter Griffin, Paola Calce for Fraser Milner Casgrain LLP

Robert Cohen for Remaining Defendants / Moving Parties

Subject: Civil Practice and Procedure; Torts; Contracts

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.A](#) Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.C](#) Common issue or interest

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiffs brought action against promoters of gift program and law firm as result of determination by Canada Revenue Agency that program was sham, and that resulted in disallowance of tax benefits — Plaintiffs brought motion for certification of action as class proceeding, program promoters brought cross-motion to stay action, and law firm brought cross-motion to dismiss claims against it — Law firm disputed existence of cause of action against it since plaintiffs did not read or rely on its opinion about legitimacy of gift program — Motion was granted and cross-motions were dismissed; action was certified as class proceeding — Defendants brought application for leave to appeal certification — Application dismissed — No reason to doubt correctness of orders in issue — Further, mere decision to let action stand and to certify as class action should not unduly trouble profession.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiffs brought action against promoters of gift program and law firm as result of determination by Canada Revenue Agency (CRA) that program was sham, and that resulted in disallowance of tax benefits — Plaintiffs brought motion for certification of action as class proceeding, program promoters brought cross-motion to stay action, and law firm brought cross-motion to dismiss claims against it — Defendants' main objection was that insufficient commonality existed to permit class proceeding — Motion was granted and cross-motions were dismissed; action was certified as class proceeding — Defendants brought application for leave to appeal certification — Application dismissed — No reason to doubt correctness of orders in issue — Further, mere decision to let action stand and to certify as class action should not unduly trouble profession.

#### **Table of Authorities**

##### **Cases considered by *M. Dambrot J.*:**

*Anns v. Merton London Borough Council* (1977), (sub nom. *Anns v. London Borough of Merton*) [1977] 2 All E.R. 492, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — referred to

*Corktown Films Inc. v. Ontario* (1996), 1996 CarswellOnt 4078, 34 B.L.R. (2d) 168, 18 O.T.C. 308 (Ont. Gen. Div.) — referred to

*Delgrossos v. Paul* (1999), 1999 CarswellOnt 4561, 45 O.R. (3d) 605, 48 C.C.L.T. (2d) 315, 41 C.P.C. (4th) 390 (Ont. Gen. Div.) — followed

*Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389, 1992 CarswellOnt 1131 (Ont. Gen. Div.) — referred to

*Web Offset Publications Ltd. v. Vickery* (1999), 1999 CarswellOnt 2270, 123 O.A.C. 235, 43 O.R. (3d) 802 (Ont. C.A.) — referred to

##### **Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

s. 5 — referred to

s. 5(1)(a) — referred to

s. 5(1)(c) — referred to

##### **Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 21 — pursuant to

R. 51.06 — pursuant to

APPLICATION for leave to appeal judgment at *Robinson v. Rochester Financial Ltd.* (2010), [2010] O.J. No. 187, 2010 CarswellOnt 206, 2010 ONSC 463 (Ont. S.C.J.).

#### ***M. Dambrot J.:***

1 The defendants (the "gift program defendants") other than Fraser Milner Cosgrain ("Fraser") seek leave to appeal to the Divisional Court the order of Lax J. dated January 19, 2010 granting the plaintiffs' motion to certify an action pursuant to s. 5 of the *Class Proceedings Act, 1992* (the "CPA"). Fraser brings a motion for the identical relief, and also for leave to appeal the order of Lax J. of the same date dismissing Fraser's motions to dismiss the action under rules 21 and 51.06 of the *Rules of Civil Procedure*.

#### **Background**

2 The plaintiffs brought the proposed class proceedings on behalf of 2,855 individuals who participated in a charitable gift program for the taxation years 2003 to 2007. They seek damages and declaratory relief against the promoters of the program and Fraser as a result of the disallowance by the Canada Revenue Agency ("CRA") of the tax benefits that the plaintiffs allege

they were to have received. CRA has determined that the gift program was a sham. As a result, proposed class members have been or will be reassessed and required to pay taxes and interest on arrears arising from the reassessment.

3 The plaintiffs allege that the gift program defendants are in breach of contract and were negligent in failing to provide a charitable donation receipt that would be recognized by CRA and in failing to ensure that class members would not be at risk to repay the loans that were obtained in order to facilitate their participation in the program. They allege that Fraser's tax opinions were necessary and instrumental to the marketing of the gift program and that the law firm was negligent in the preparation of these opinions.

4 The program was structured as a mechanism for Banyan Tree, which was a charitable foundation, to provide donations to various charities using donations from participants in the gift program. The program was marketed and promoted by Promittere Capital and Promittere Asset.

5 Participants were solicited by a network of financial advisors who promoted and sold the gift program to individuals on behalf of Banyan Tree. Each year, Banyan Tree produced information about the program which it provided to soliciting agents. It did not instruct the soliciting agents to distribute the information documents to potential participants. In fact, some participants did not receive any such documents.

6 Each participant in the program executed a pledge, loan application, power of attorney and promissory note which set out the terms and conditions of the program. Through these documents, the participant would pledge a donation of a specified amount to Banyan Tree, and would borrow approximately 85% of the pledge from Rochester. The pledge would be evidenced by the promissory note. The participant would also pay a "security deposit" in respect of the loan to Rochester. The security deposit would be invested to create growth. The growth of the security deposit, if any and if sufficient, would be used to pay interest and income taxes owed on the growth and to reduce the principal amount of the loan. It was contemplated that Rochester would acquire an insurance policy that would insure the risk that the security deposit would not be sufficient to repay the loans. The participant would receive a charitable donation tax receipt for the full amount of the pledge.

7 Fraser delivered opinion letters dated October 23, 2002 and September 5, 2003 to Promittere Asset relating to the tax status of the program for 2003. According to the opinion letters, Fraser was permitting Promittere Asset and prospective participants who were provided a copy of the letter by Promittere Asset or by the participant's authorized representative, and no one else, to rely on the letters. After describing the proposed transactions and summarizing its assumptions, Fraser stated its opinion in each letter as follows:

### **Opinion**

Although the matter is not free from doubt, in our opinion, as of the date hereof, the Cash Donation will constitute a gift to a registered charity for purposes of the Act and will entitle the Donor to a tax credit in respect of the Cash Donation under section 118.1 of the Act.

8 Fraser then proceeded to explain the basis of its position in each letter.

9 Fraser warned readers of the letter that no assurances were being given, that CRA might not agree with its opinion, that CRA might change its practices retroactively, that no advanced ruling had been obtained, that the opinion was based on assumptions of fact and law that Fraser had not verified, and that each participant should review the opinion and their circumstances with their professional tax advisor.

10 Fraser gave no opinions in respect of the 2004 to 2007 gift programs.

11 The Robinsons admitted in cross-examination that they did not obtain or read the Fraser opinions. They relied on their financial advisor's advice about the program. Their advisor did show them a copy of one of Fraser's letters, but only in 2003, and told them that "a large lawyer company" had signed it saying that they believed that the program was a safe way to go, and

there would be no problems. They were not told that there were limitations or qualifications in the letter. Other potential class members who swore affidavits in support of the certification motion gave similar evidence during cross-examination.

12 It is the position of CRA that the program involved no valid gift; that the program is a tax shelter; that the loan is a limited-recourse loan; that the program avoids the General Anti-Avoidance Rules; that the participants agreed to participate on the understanding that they were not at risk for more than their cash outlay; that the program was promoted on the basis that the participants would receive a tax credit that would result in a net positive cash position; that the *gift program defendants* acted in concert and not at arms length; that they had a common intention to deceitfully give the appearance of legal relations that masked the true purpose of the scheme: to sell tax credits at a profit and that the program was a sham involving a circular flow of funds that occurred on the same day calculated to give the appearance of a legitimate loan and donation when in fact this did not occur.

## The Issues

13 The gift program defendants raised numerous issues in their factum. In argument, however, they took a much more limited approach. In essence, they argued that Lax J. erred in concluding that this was an appropriate case for certification because the five part test for certification was not met. Specifically, they argued that s. 5(1)(c) was not met: the claims of the class members did not raise common issues. The fundamental basis for their submission was the argument that there was uncontradicted evidence of significant divergent practices by multiple advisors at the point of sale and no evidence to support an inference of the development and deployment of a standard sales pitch. The plaintiffs' effort to repackage a point-of-sale misrepresentation scheme as a uniform breach of contract case must fail.

14 The core of Fraser's argument related to the question whether the pleadings raised a cause of action against them. They submitted that Lax J. erred in concluding that they did. They argued that no facts were pleaded to support either reasonable foreseeability or sufficient proximity between the plaintiffs and Fraser to justify the imposition of a duty of care by Fraser to the plaintiffs. They further argued that since the plaintiffs neither read nor relied on their opinions, causation cannot be established. This is really a negligent misrepresentation claim that founders for lack of reliance on the shoals of causation.

## Analysis

### *The gift program defendants*

15 Lax J. well understood the argument raised by the gift program defendants. She began by discussing the law in relation to the requirement of commonality in class actions. She said:

38 The core of a class action is commonality. For an issue to be common, 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: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 18. An issue will not be common if its resolution is independent upon individual findings of fact that have to be made with respect to each individual claimant. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Sup. Ct.), aff'd, [2003] O.J.No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.). The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping* at para. 39.

39 Section 6 of the CPA is clear that where the relief claimed includes a claim for damages, certification should not be refused because this would require individual assessment after the determination of the common issues or because the relief claimed relates to separate contracts involving different class members or because different remedies are sought for different class members. Common issues need not determine liability, but need only be issues of fact or law that will move the litigation forward. Many individual issues may remain to be decided after the resolution of a common issues trial: *Hollick* at para. 16; *Cloud* at para. 52; *Cassano v. Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.) at paras. 60-63, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15. The common issues requirement is not a high legal hurdle, but a plaintiff must adduce some evidence to show that there is a basis in fact that issues are common: *Hollick* at para. 25.

16 After listing the proposed common issues, she identified the argument made by the gift program defendants, stating:

41 The gift program defendants argue that this is a point-of-sale representation case as in *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (Sup. Ct.); *Kumar v. The Mutual Life Assurance Co. of Canada et al.*, [2003] O.J. No. 1160, [2003] I.L.R. I-4181 (Ont. C.A.) and *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 (Ont. Sup. Ct.). See also, *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350, 72 O.T.C. 351 (Sup. Ct.).

42 In each of these cases, certification was refused. *Williams* and *Kumar* were pleaded on the basis of negligent misrepresentation, which the plaintiffs acknowledge can be problematic in a class action. *Controltech* was also a misrepresentation case. In *Bellaire*, the plaintiffs alleged breach of contract and sought to certify common issues on contractual interpretation, but Nordheimer J. found that the claims, at their heart, were claims of negligent misrepresentation. In coming to that conclusion, he referred to the plaintiff's evidence that the plaintiff had been "induced" to purchase the life insurance policy in question based on representations made to him by the defendant's agent. As well, the draft litigation plan explicitly stated that the "the substantive and determinative common issue turns on whether or not there was a misrepresentation which induced the plaintiff to enter the contract." Nordheimer J. found that the case suffered from the same problem which Cumming J. found to exist in *Kumar* and with which Rosenberg J.A. expressly agreed when he referred with approval at para. 48 of *Kumar* to Cumming J.'s statement:

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

17 She then explained, with great care, and with a detailed examination of the evidence, why she did not accept the argument of the gift program defendants, and concluded that the proposed common issues in both contract and negligence relating to the gift program defendants were appropriate for certification. (See paragraphs 43-53 of her reasons.)

18 The gift program defendants dispute her conclusions. They say that she erred in her appreciation of critical facts, distinguished analogous and applicable cases and inappropriately relied on *obiter* comments in other cases. I do not propose to rehearse the details of this argument. It is sufficient to say that I am not satisfied that there is good reason to doubt the correctness of her analysis, or that the cases she distinguished are necessarily in conflict with her decision. More importantly, I do not believe that it is desirable that leave to appeal this highly fact-driven judgment be granted, or that the proposed appeal, again bearing in mind its highly fact-driven nature, involves matters of such importance that leave to appeal should be granted.

#### ***Fraser***

19 Lax J. had a clear understanding of Fraser's argument as well. She summarized it as follows:

16 The gift program defendants do not dispute that the statement of claim discloses causes of action against them in contract and negligence, and I am satisfied that it does. The contested issue is whether the pleading discloses a cause of action in negligence against FMC.

17 The plaintiffs plead that the opinion letters were a necessary prerequisite to the promotion and sale of the gift program, without which, the gift program could not have been launched. They plead that all class members were advised of their existence, that some received copies, that the opinion letters were referred to in promotional materials marketing the program and that they were an express term of the loan arrangements between the gift program participants and Rochester. The particulars of the claim in negligence against FMC are pleaded in paragraph 69(B) of the statement of claim:

#### **Negligence**

69. The plaintiffs and class members state that the defendants were negligent, particulars of which are as follows:

**(B) FMC**

- (i) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program Defendants, without due care and consideration, when it knew or ought to have known that the Gift Program Defendants would rely upon and publish the existence of the Opinion Letters in promoting the Gift Program;
- (ii) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program Defendants, without due care and consideration, when it knew or ought to have known that the Gift Program Defendants would rely upon the accuracy and reliability of the Opinion Letters in promoting the Gift Program;
- (iii) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program participants as well as their authorized representatives, without due care and consideration, when it knew or ought to have known that the Gift Program participants would rely upon the existence of the Opinion Letters in deciding whether to participate in the Gift Program;
- (iv) issued the Opinion Letters with the expressed intention that the Opinion Letters be relied upon by the Gift Program participants as well as their authorized representatives, without due care and consideration, when it knew or ought to have known that the Gift Program participants would rely upon the accuracy and reliability of the Opinion Letters in deciding whether to participate in the Gift Program;
- (v) failed to properly investigate and consider the income tax consequences of participation in the Gift Program;
- (vi) was negligent in the preparation of the Opinion Letters;
- (vii) knew or ought to have known that the Opinion Letters were a necessary prerequisite for the promotion and sale of the Gift Program and that but for the Opinion Letters the Gift Program could not be undertaken, yet it failed to fully and properly investigate and accurately opine;
- (viii) knew or ought to have known that the Opinion Letters were no longer accurate or reliable following: the issuance by Canada Revenue Agency of its Fact Sheets in November and December, 2003, and November, 2005, the legislative changes announced on December 5, 2003; and, the Canada Revenue Agency issued Taxpayer Alerts in November, 2005 and October, 2006;
- (ix) failed to notify the Gift Program Defendants, prospective donors and existing participants in the Gift Program that its Opinion Letters were no longer accurate and reliable; and
- (x) knew or ought to have known that the Gift program Defendants continue to rely upon and publish the existence and content of the Opinion Letters for the promotion and sale of the Gift Program to prospective donors and participants despite its knowledge that these Opinion Letters are no longer accurate or reliable.

18 The plaintiffs also plead in the following paragraphs that

70. FMC was negligent in the issuance of the Opinion Letters, the issuance of which was a necessary prerequisite for the promotion of the Gift Program by the Gift Program Defendants. Accordingly, the FMC's issuance of the Opinion Letters was the proximate cause of damages to Class Members.

71. FMC owed a duty of care to those whom it intended to, or knew or ought to have known would, rely upon the existence and/or accuracy and reliability of the content of the Opinion Letters it issued.

78. FMC had a duty to warn the Gift Program Defendants and Class Members and to make full disclosure to them as to the facts and circumstances set out above and failed to do so. Particularly, FMC failed to notify the Gift Program Defendants and Class members that the Opinion Letters were no longer accurate or reliable.

81. All defendants failed to take proper steps to fully investigate the Gift Program to ensure that the Canada revenue Agency would in fact recognize the charitable donation receipts issued and tax credits claimed.

19 On a motion under rule 21 and in considering s. 5(1)(a) of the CPA, no evidence is admissible. However, a motions judge may have regard to documents specifically referred to and incorporated by reference into the pleading in order to assess the substantive adequacy of the claim: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (Ont. C.A.); *Corktown Films Inc. v. Ontario* (1996), 18 O.T.C. 308, 66 A.C.W.S. (3d) 868 (Ont. Gen. Div.); *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.). As the opinion letters are specifically referred to and relied on in the pleading, I may consider them.

20 The opinion letters are dated October 23, 02, and September 5, 03, and are addressed to the attention of Mr. Thiessen as President of Promiterre Asset. FMC did not structure the gift program, but the program's structure was integral to the opinion FMC rendered that the donation made partly in cash from the participant's own resources and partly from a loan from Rochester would qualify as a valid charitable donation for tax purposes. If that opinion was given negligently as is alleged, it could, subject to the arguments discussed below, support the plaintiffs' claim in negligence against FMC.

21 FMC submits that a duty of care cannot be created based on the fact that an opinion was prepared, when its contents were never read or relied upon by anyone. They say that the allegations against FMC arise from the existence and the contents of the letters and that, in substance, the claim is made for negligent misrepresentation. I disagree. The claim is not pleaded on the basis that the plaintiffs read or relied upon the FMC letters, but on the basis that FMC issued the opinion letters with the expressed intention that they be relied upon by the gift program defendants and knowing that the gift program defendants would rely upon and publish the existence of the opinions in promoting the gift program.

22 FMC points out that the letters contained express qualifications on the opinion and authorized reliance by a very limited category of individuals and disclaimed reliance by any other person, without FMC's prior written consent. The letters state:

The opinions expressed in this letter may be relied upon by you, and by a Donor who is provided a copy of this letter by you, or the Donor's authorized representative, and may not be relied on by anyone else without our written permission.

23 FMC submits that, given this language, it could not be reasonably foreseeable to FMC that individuals like the plaintiffs who did not receive or read the FMC letters would sustain damages as a result of the opinions expressed in them. It says that the result is that there was no relationship between FMC and the plaintiffs sufficiently close to satisfy the first part of the *Anns* test for duty of care (*Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.)). This submission overlooks that the limitation on reliance does not qualify in any way Promiterre's ability to rely on the opinions expressed in the letters. In fact, the letters specifically permit Promiterre's reliance and it is alleged that the gift program defendants did rely on the opinions to launch and sell the program.

20 In response to this submission, in addition to what she said in paragraphs 21 and 23 in the course of summarizing Fraser's argument, Lax J. stated:

24 The allegation is not that FMC provided the letters intending that they be read and relied upon by the plaintiffs and proposed class members, although some may have done so, but rather that FMC provided the letters (1) with the intention that they be used by the gift program defendants in the manner the plaintiffs allege, namely to market the program as one in which proposed class members would receive a charitable tax receipt recognized by CRA; and (2) with the intention and knowledge that the existence of a tax opinion would inform the decision of class members about whether or not to participate in the gift program. If these allegations are made out at trial, it is not plain and obvious that they could not support a duty to take care that the opinions expressed in the letters were accurate and reliable and that a failure to take such care or a failure to warn was the proximate cause of the losses the plaintiffs allege they suffered.

25 To put this in a different way, the reliance the plaintiffs allege is not on the tax opinion *per se*, but on there being a tax opinion that FMC intended and knew would be used by the gift program defendants to support the legitimacy of the gift program for income tax purposes and would be relied upon by the class members in deciding whether or not to participate. I would therefore not give effect to FMC's argument that this is a negligent misrepresentation claim "dressed up" as a negligence claim. It is properly pleaded as a negligence claim and the essential elements of the cause of action - duty, foreseeability, proximity, breach, and damage - are present. The express qualifications on the opinion are not matters to be considered at the certification stage.

26 The question then is whether it is plain and obvious that a claim in negligence against FMC cannot possibly succeed. The plaintiffs have not pleaded and cannot plead any direct relationship with FMC, but there is precedent, as discussed below, for advancing a class action claim in negligence against a law firm even though generally, a lawyer owes a duty of care only to the lawyer's client: *Baypark Investments Inc. v. Royal Bank* (2002), 57 O.R. (3d) 528 at paras. 23 and 33 (Sup. Ct.), aff'd, [2002] O.J. No. 4377 (C.A.); *Elms v. Laurentian Bank of Canada*, 2004 BCSC 1013, 35 B.C.L.R. (4th) 373 (S.C.) at paras. 63-65, aff'd, 2006 BCCA 86.

27 In *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (Sup. Ct.) ["YBM"], the plaintiffs advanced claims in both negligent misrepresentation and negligence against a law firm and one of its lawyers for alleged misrepresentations in a prospectus. Cumming J. rejected the negligent misrepresentation claim because the plaintiffs' investment preceded the public offering negating any reliance on the prospectus. However, applying the principles set out in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 and *Anns v. Merton*, he held that the pleading disclosed sufficient facts to give rise to a *prima facie* duty of care and that by enabling the public offering to come to fruition through the prospectus, it was arguable that the law firm and the lawyer could be found negligent. He concluded that a factual record was necessary to decide whether there were policy considerations that ought to negative or limit the scope of any duty of the law firm and lawyer in question.

28 In the earlier decision of *Delgrossio v. Paul* (1999), 45 O.R. (3d) 605 (Gen. Div.), Sharpe J. (now, Sharpe J.A.), similarly found that a negligence claim in a class action brought against a solicitor on behalf of investors disclosed a cause of action. In doing so, he reviewed the "developing line of authority" holding that a solicitor may place himself or herself in a sufficient relationship of proximity to a third party to owe that party a duty of care: *Filipovic v. Upshall* (1998), 19 R.P.R. (3d) 88 (Ont. Gen. Div.); *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C.S.C.); *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632 (B.C.C.A.); *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495 (B.C.S.C.).

29 In *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195, affirming (2000), 73 B.C.L.R. (3d) (S.C.), which was also a class action brought by investors against a solicitor and relied upon by Cumming J. in *YBM*, the British Columbia Court of Appeal affirmed the decision of the motions judge to certify the action. The court also reviewed the so-called "disappointed beneficiary" cases such as *Whittingham* and *Tracy* and quoted liberally from

Justice Sharpe's reasons in *Delgrosso* in concluding that although the investors' argument was novel, it could not be said that it was plain and obvious that it would fail.

30 Notwithstanding the efforts of counsel for FMC to confine these cases to their facts and to distinguish them, there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed. FMC pointed to no authority that rejected a third party negligence claim against lawyers at the certification stage. I regard *Hurst v. Price Waterhouse Coopers (PWC) LLP, Canada*, [2009] O.J.No. 1415 on which FMC relies as entirely distinguishable. This was a claim for negligent misrepresentation, reckless misrepresentation, and negligence in which the allegedly wrongful act by PWC amounted only to having its name appear as auditor on an offering memorandum. This was found insufficient to establish a relationship giving rise to a *prima facie* duty of care.

31 Whether or not the plaintiffs and proposed class members are akin to disappointed beneficiaries, it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.

21 I confess to having difficulty in the understanding the rationale relied on by Lax J. for her conclusion that this is not a negligent misrepresentation case dressed up as a negligence case. I have reference, in particular, to the following:

To put this in a different way, the reliance the plaintiffs allege is not on the tax opinion *per se*, but on there being a tax opinion that FMC intended and knew would be used by the gift program defendants to support the legitimacy of the gift program for income tax purposes and would be relied upon by the class members in deciding whether or not to participate.

22 I find it impossible to separate reliance on the opinion, and reliance on there being an opinion. In the circumstances of this case, one can only take comfort from the existence of an opinion if one is told, or reasonably infers, that the opinion is a positive one, that is, one that supports the appropriateness of the scheme. This takes us full circle in short order. Reliance on there being an opinion can only mean reliance on the assumed content of the opinion.

23 That said, I do not believe that the passage in the reasons of Lax J. that concerns me is determinative of this application. In the end, I think that my quibble is probably mere semantics. It does not undermine her conclusion that this is not a negligent misrepresentation case dressed up as a negligence case. It is arguable that reliance by the plaintiffs on the existence of a positive opinion given by Fraser to the gift program defendants supports their claim against Fraser in negligence. In my view, the words of Sharpe J., as he then was, at paragraph 10 of his judgment in *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (Ont. Gen. Div.), one of the many cases relied on by Lax J., are apposite:

The defendant also submits that there can be no cause of action for breach of duty, whether as a solicitor or as a fiduciary, absent a plea of reliance by the plaintiff on his advice. While the plaintiff does not allege direct reliance on the solicitor, it seems to me at least arguable that where a party invests money in an RRSP to be invested in mortgages, the reliance the party places on the trustee or other advisors to ensure that adequate steps are taken to protect his interests may be adequate to support a claim against the solicitor retained by the trustee or advisor, particularly where the solicitor is aware of the identity of the party and the nature of the party's interest: see *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).

24 Here, equally, the absence of direct reliance by the plaintiffs on the solicitor's advice may not be determinative. Even without direct reliance on the advice, it remains arguable that when the plaintiffs entered the scheme, they were relying on the legal advisors of the architects of the scheme to ensure that their pledges would qualify as valid charitable donations for tax purposes. If the legal advisors acted negligently in giving their advice to the gift plan defendants, the plaintiffs could have a claim in negligence against those legal advisors.

25 While it may be, particularly taking into account the qualifications and reservations expressed in Fraser's opinion, that the claim against Fraser will ultimately fail, I cannot say that there is good reason to doubt the correctness of the orders in issue,

namely, the order to certify as against Fraser, the order to decline to strike the pleadings against Fraser and the order refusing to strike the claim against Fraser.

26 What is more, and in any event, I am not of the view that this appeal involves matters of such importance that leave to appeal should be granted. Fraser raised the concern that this judgment is dismaying to lawyers. It signals to them that they may be in greater jeopardy of being sued by persons who are not their clients, and have not read their opinions, than by clients who have read their opinions. While I have some sympathy for this concern, I do not think that the mere decision to let this action stand, and to certify it as a class action should unduly trouble the profession.

### **Disposition**

27 The motions for leave to appeal are dismissed. The respondents will have 15 days from the date of release of this decision to serve and file brief written submissions as to costs. The respondents will have 15 days from the receipt of those submissions to serve and file their brief written submissions.

*Application dismissed.*

**TAB 31**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Robinson v. Medtronic Inc.](#) | 2009 CarswellOnt 6337, 181 A.C.W.S. (3d) 427, [2009] O.J. No. 4366, 80 C.P.C. (6th) 87 | (Ont. S.C.J., Oct 20, 2009)

2001 SCC 69, 2001 CSC 69

Supreme Court of Canada

Rumley v. British Columbia

2001 CarswellBC 2166, 2001 CarswellBC 2167, 2001 SCC 69, 2001 CSC 69, [2001] 11 W.W.R. 207, [2001] 3 S.C.R. 184, [2001] A.C.S. No. 39, [2001] S.C.J. No. 39, 108 A.C.W.S. (3d) 775, 10 C.C.L.T. (3d) 1, 157 B.C.A.C. 1, 205 D.L.R. (4th) 39, 256 W.A.C. 1, 275 N.R. 342, 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, J.E. 2001-1970, REJB 2001-26160

**Her Majesty The Queen in Right of the Province of British Columbia, Appellant  
and Leanne Rumley, John Pratt, Sharon Rumley, J.S. and M.M., Respondents**

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

Heard: June 13, 2001

Judgment: October 18, 2001

Docket: 27721

Proceedings: additional reasons to (2001), [2001 CarswellBC 1223](#), [2001 CarswellBC 1224](#) (S.C.C.); affirming (1999), [1999 CarswellBC 2581](#), [180 D.L.R. \(4th\) 639](#), [48 C.C.L.T. \(2d\) 1](#), [72 B.C.L.R. \(3d\) 1](#), [38 C.P.C. \(4th\) 1](#), [131 B.C.A.C. 68](#), [214 W.A.C. 68](#), [1999 BCCA 689](#), [1999] B.C.J. No. 2633 (B.C. C.A.); reversing in part (1998), [1998 CarswellBC 2343](#), [25 C.P.C. \(4th\) 186](#), [1998] B.C.J. No. 2588, [65 B.C.L.R. \(3d\) 382](#) (B.C. S.C. [In Chambers])

Counsel: *James M. Sullivan, D. Clifton Prowse, Suzanne M. Kennedy*, for Appellant  
*Patrick G. Guy, Anne Sheane*, for Respondents

Subject: Torts; Civil Practice and Procedure; Public

**Related Abridgment Classifications**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.C Common issue or interest**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.D Preferable procedure**

Civil practice and procedure

**V Class and representative proceedings**

**V.2 Representative or class proceedings under class proceedings legislation**

**V.2.b Certification**

**V.2.b.i Plaintiff's class proceeding**

**V.2.b.i.H Miscellaneous**

Civil practice and procedure

**VII** Limitation of actions

**VII.5** Actions in tort

**VII.5.a** Specific actions

**VII.5.a.iii** Other actions in negligence

Education law

**VII** Educational malpractice

**Headnote**

Practice --- Parties — Representative or class actions — General

Plaintiffs met requirements for certification of class proceeding by former students in provincial residential school under s. 4 of Class Proceedings Act — Both commonality and preferability requirements were satisfied — All class members shared interest in question of whether province breached duty of care — Appropriateness and amount of punitive damages was amenable to resolution as common issue — Class proceeding would be fair and efficient method of advancing claim — Common issues predominated over those affecting individual class members, and individual actions would require proof of common elements — Individual compensation program established by province did not provide adequate alternative — Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4, 4(1)(c), 4(1)(d).

Practice --- Parties — Representative or class actions — Procedural requirements

Plaintiffs met requirements for certification of class proceeding by former students in provincial residential school under s. 4 of Class Proceedings Act — Both commonality and preferability requirements were satisfied — All class members shared interest in question of whether province breached duty of care — Appropriateness and amount of punitive damages was amenable to resolution as common issue — Class proceeding would be fair and efficient method of advancing claim — Common issues predominated over those affecting individual class members, and individual actions would require proof of common elements — Individual compensation program established by province did not provide adequate alternative — Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4, 4(1)(c), 4(1)(d).

Procédure --- Parties — Recours collectifs — En général

Demandeurs d'un recours collectif intenté par les anciens étudiants d'un pensionnat respectaient les exigences de la certification en vertu de l'art. 4 de la Class Proceedings Act — Tant le critère de la question commune que celui de la meilleure procédure étaient respectés — Tous les membres du groupe avaient un intérêt commun dans la question de savoir si la province avait manqué à son obligation de diligence — L'octroi et le montant des dommages-intérêts exemplaires sont des questions susceptibles d'être résolues en tant que questions communes — Recours collectif représenterait une façon juste et efficace de faire progresser la réclamation — Questions communes l'emportaient sur celles touchant les membres individuels du groupe, et des poursuites individuelles exigeraient la preuve des éléments communs — Programme d'indemnisation individuelle mis sur pied par la province ne constituait pas une mesure de rechange adéquate — Class Proceedings Act, R.S.B.C. 1996, c. 50, art. 4, 4(1)c), 4(1)d).

Procédure --- Parties — Recours collectifs — Exigences procédurales

Demandeurs d'un recours collectif intenté par les anciens étudiants d'un pensionnat respectaient les exigences de la certification en vertu de l'art. 4 de la Class Proceedings Act — Tant le critère de la question commune que celui de la meilleure procédure étaient respectés — Tous les membres du groupe avaient un intérêt commun dans la question de savoir si la province avait manqué à son obligation de diligence — L'octroi et le montant des dommages-intérêts exemplaires sont des questions susceptibles d'être résolues en tant que questions communes — Recours collectif représenterait une façon juste et efficace de faire progresser la réclamation — Questions communes l'emportaient sur celles touchant les membres individuels du groupe, et des poursuites individuelles exigeraient la preuve des éléments communs — Programme d'indemnisation individuelle mis sur pied par la province ne constituait pas une mesure de rechange adéquate — Class Proceedings Act, R.S.B.C. 1996, c. 50, art. 4, 4(1)c), 4(1)d).

From the early 1950s until 1992, British Columbia operated a residential school for deaf children and, until 1979, blind children. Investigations by the provincial Ombudsman and a special counsel subsequently established that sexual, physical, and emotional abuse of children by staff and other students was widespread at the school over a period of many years. The province acknowledged responsibility for the abuse that occurred and established an individual compensation scheme for those who had

suffered abuse while under its care, awarding compensation to current and former students in three tiers, with a minimum of \$3,000 and a maximum of \$60,000.

The plaintiffs commenced a class proceeding against the province for compensatory and punitive damages on behalf of a class consisting of current and former students who suffered abuse or failed to receive a proper education; family members of students who suffered damage as a result of abuse; and family members and others who were abused by students who had been abused. The chambers judge found that there were no issues common to the proposed class and denied certification. The Court of Appeal disagreed, holding that whether the defendant was negligent or in breach of fiduciary duty in failing to take reasonable measures to protect students from sexual misconduct and punitive damages were common issues to all those who alleged that they had been sexually abused at the school, and certified the claims relating to sexual abuse of the students only. The province appealed the certification of this narrow class. The sole issue on appeal was whether, given the Court of Appeal's redefinition of the class and common issues, the class certification requirements in s. 4 of the *Class Proceedings Act* were met.

**Held:** The appeal was dismissed.

Under s. 4 of the *Class Proceedings Act*, the court must certify a proceeding as a class proceeding if the pleadings disclose a cause of action; if there is an identifiable class of two or more persons; if the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members; and if a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. The issues in dispute were whether there were questions common to the class, as required by s. 4(1)(c); and whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, as required by s. 4(1)(d).

Both the commonality and preferability requirements were satisfied in this case. The issues of duty and breach were common to the class. On claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach. Accordingly, all class members shared an interest in the question of whether the province had breached a duty of care. In framing commonality, the guiding question should be whether allowing the suit to proceed as a representative one would avoid duplication of fact-finding or legal analysis. The plaintiffs' argument based on alleged systemic negligence — that is, negligence not specific to any one victim but rather to the class of victims as a group — was not overly broad, since it could be determined without reference to the circumstances of individual class members. Moreover, the necessary inquiry was not inescapably individualistic. That the relevant standard of care, if framed at the appropriate level of specificity, might have varied over time was not an obstacle to proceeding as a class action. It simply meant that the court might find it necessary to provide a nuanced answer to the common question. The report of the special counsel suggested that it was feasible to divide the years into discrete subperiods; and the Act, which specifically contemplates the possibility of subclasses, provides ample flexibility for dealing with limited differences between class members. In any event, the commonality requirement may be satisfied whether or not the common issues predominate over issues affecting only individual members. The Court of Appeal's finding with respect to the issue of punitive damages was also upheld. Assessing the knowledge and conduct of those in charge of the school over a long period of time was the kind of fact-finding necessary to determine whether punitive damages were justified, and was required to resolve the primary common issue. While the appropriateness and amount of punitive damages is not always amenable to determination as a common issue, the fact that the plaintiffs had limited the possible grounds of liability to systemic negligence rendered the appropriateness and amount of punitive damages a question amenable to resolution as a common issue. The preferability inquiry is directed at two questions: first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and second, whether the class proceeding would be preferable to other procedures. It was likely that there would be relevant differences between class members. However, since the plaintiffs were claiming "systemic negligence," the central issue was whether the school should have prevented the abuse or responded to it differently. This was amenable to resolution in a class proceeding. While the issues of injury and causation would have to be litigated in individual proceedings following resolution of the common issues in favour of the class, this would be a relatively minor aspect of the case. The essential question was whether the school should have prevented the abuse which occurred at the school or responded to it differently. Thus, the common issues predominated over those affecting only individual class members. Since no class member could prevail without an individual showing of injury and causation, it could not be said that allowing the suit to proceed as a class action would force complainants into a passive role. Each class member would retain control over his or her individual action, and his or her ultimate recovery would be determined by the outcome of the individual proceedings on injury and causation. There was little evidence to suggest that a significant number of class members would prefer to proceed individually.

With respect to other means of resolving the claims, individual actions would be less practical and less efficient than a class proceeding. Issues related to school policy and administration, the qualification and training of staff, and dormitory conditions would likely have common elements, and the overall history and evolution of the school would likely be important. It would be needlessly expensive to require proof in separate cases. Moreover, the individual compensation program, which limited the recovery of individual complainants to \$60,000 and did not permit them to be represented by counsel before the panel, did not provide an adequate alternative to a class proceeding. Finally, it could not be said that the administration of the class proceeding would create greater difficulties than if relief were sought by other means. On this point it was necessary to emphasize the particular vulnerability of the plaintiffs. The individual class members were deaf and/or blind, and litigation would be an extraordinarily difficult process for them. Allowing the suit to proceed as a class action might help mitigate the difficulties that they would face. The communications barriers faced by the students, at the time of the alleged assaults and in the litigation process, favoured a common process to explain the significance of those barriers and to elicit relevant evidence.

À partir du début des années 50 et jusqu'en 1992, la Colombie-Britannique exploitait un pensionnat pour enfants sourds; jusqu'en 1979, le pensionnat comptait également des enfants aveugles. Des enquêtes faites par l'ombudsman de la province et par un conseiller juridique spécial ont subséquemment établi que les enfants avaient fait l'objet d'agressions sexuelles, physiques et émotionnelles de la part du personnel et de certains autres étudiants, et que ces agressions avaient été généralisées dans le pensionnat pendant plusieurs années. La province a reconnu qu'elle était responsable de ces agressions et a mis sur pied un régime d'indemnisation individuelle à l'intention de ceux qui avaient subi des agressions alors qu'ils étaient à la charge de la province. L'indemnisation était accordée aux anciens étudiants et aux étudiants actuels en fonction de trois niveaux, allant d'un minimum de 3 000 \$ à un maximum de 60 000 \$.

Les demandeurs ont intenté un recours collectif contre la province, sollicitant des dommages-intérêts compensatoires et exemplaires, au nom d'un groupe composé comme suit: des étudiants actuels et d'anciens étudiants ayant subi des agressions ou n'ayant pas reçu une éducation adéquate; des membres de la famille des étudiants qui avaient subi des dommages en raison des agressions; et des membres de la famille ainsi que d'autres personnes qui avaient été agressés par des étudiants eux-mêmes ayant été agressés. La juge a conclu que le groupe suggéré n'avait aucune question en commun et a refusé la certification. La Cour d'appel n'était pas d'accord et a statué que les questions de savoir si la défenderesse avait été négligente ou avait manqué à son obligation fiduciaire lorsqu'elle avait fait défaut de prendre des mesures raisonnables pour protéger les étudiants d'une inconduite sexuelle, ainsi que la question des dommages-intérêts exemplaires, constituaient toutes des questions communes à tous ceux qui alléguait avoir fait l'objet d'agressions sexuelles au pensionnat. La Cour n'a certifié que les réclamations se rapportant à l'agression sexuelle des étudiants. La province a interjeté appel à l'encontre de la certification pour ce groupe restreint. La seule question qui faisait l'objet de l'appel était celle de savoir si, vu la nouvelle définition de la Cour d'appel quant au groupe et aux questions communes, les exigences de l'art. 4 de la *Class Proceedings Act* relatives à l'octroi de la certification étaient respectées.

**Arrêt:** Le pourvoi a été rejeté.

En vertu de l'art. 4 de la *Class Proceedings Act*, le tribunal ne doit certifier un recours en tant que recours collectif que : si les procédures écrites révèlent une cause d'action; s'il existe un groupe identifiable de deux personnes ou plus; si les réclamations des membres du groupe soulèvent des questions communes, que ces questions communes l'emportent sur des questions touchant des membres individuels ou non; et si une poursuite collective s'avère la meilleure procédure pour en arriver à une résolution juste et efficace des questions communes. Les questions en litige étaient celle de savoir s'il y avait des questions communes au groupe, comme le requiert l'art. 4(1)c), et celle de savoir si le recours collectif constituait la meilleure procédure pour la résolution juste et efficace des questions communes, comme l'exige l'art. 4(1)d).

Tant l'exigence de la question commune que celle de la meilleure procédure étaient respectées en l'espèce. Le groupe avait en commun les questions relatives à l'obligation et à la violation. Dans le cadre de réclamations pour négligence et manquement à une obligation fiduciaire, aucun des membres du groupe ne peut obtenir gain de cause sans avoir démontré l'existence de l'obligation et de la violation. Par conséquent, tous les membres du groupe avaient un intérêt commun dans la question de savoir si la province avait manqué à son obligation de diligence. Lorsqu'il s'agit de formuler les questions communes, la question directrice devrait être celle de savoir si le fait d'autoriser la poursuite à titre de recours collectif permettrait d'éviter de répéter l'appréciation des faits et l'analyse juridique. Les arguments des demandeurs, fondés sur une allégation de négligence systémique, soit que la négligence ne visait pas une victime spécifiquement mais plutôt le groupe des victimes en tant que groupe, n'avaient pas une trop grande portée puisque la négligence pouvait être déterminée sans faire de référence aux circonstances des

membres individuels du groupe. De plus, l'examen nécessaire n'était pas inévitablement de nature individuelle. Le fait que la norme de diligence pertinente, si elle était formulée au niveau voulu de spécificité, ait pu varier à travers le temps ne constituait pas un obstacle au recours collectif. Cela voulait simplement dire que le tribunal pourrait décider qu'il était nécessaire de donner une réponse nuancée à la question commune. Le rapport du conseiller spécial suggérait qu'il était possible de diviser les années en sous-périodes distinctes, et la loi, qui envisage spécifiquement la possibilité de sous-groupes, permet assez de souplesse pour traiter des différences réduites entre les membres du groupe. De toute façon, le critère de la question commune peut être respecté, que les questions communes l'emportent ou non sur les questions touchant uniquement les membres individuels. La conclusion de la Cour d'appel en ce qui a trait à la question des dommages-intérêts exemplaires a elle aussi été maintenue. L'appréciation de la connaissance et de la conduite de ceux qui étaient responsables du pensionnat pendant une longue période de temps constituait le genre d'appréciation des faits qui était nécessaire pour déterminer si des dommages-intérêts exemplaires étaient justifiés et s'il était nécessaire de résoudre la question commune principale. Même si l'octroi et le montant des dommages-intérêts exemplaires ne sont pas toujours des questions susceptibles d'être résolues en tant que questions communes, le fait que les demandeurs avaient limité les motifs possibles de responsabilité à la négligence systémique faisait que l'octroi et le montant des dommages-intérêts exemplaires étaient des questions susceptibles d'être résolues en tant que questions communes.

L'examen relatif à la meilleure procédure porte sur deux questions: premièrement, le recours collectif constitue-t-il le moyen le plus juste, efficace et le plus facile à administrer pour faire progresser la réclamation? Deuxièmement, le recours constitue-t-il le meilleur moyen par rapport à d'autres? Il était fort probable qu'il y aurait des différences pertinentes entre les membres du groupe. Cependant, puisque les demandeurs invoquaient la « négligence systémique », la question centrale était celle de savoir si le pensionnat aurait pu empêcher les agressions ou y répondre différemment. Cette question était susceptible d'être résolue dans le cadre d'un recours collectif. Même si les questions relatives au préjudice et au lien de causalité devraient faire l'objet de poursuites individuelles à la suite de la résolution des questions communes en faveur du groupe, cela ne représenterait qu'un élément relativement mineur de l'affaire. La question essentielle était celle de savoir si le pensionnat eût pu prévenir les agressions qui avaient eu lieu dans l'école ou s'il aurait pu y répondre différemment. Par conséquent, les questions communes l'emportaient sur celles touchant seulement les membres individuels du groupe. Puisque aucun membre du groupe ne pourrait obtenir gain de cause sans démontrer individuellement le préjudice et le lien de causalité, on ne pouvait dire qu'autoriser la poursuite à titre de recours collectif forcerait les plaignants à occuper un rôle passif. Chaque membre du groupe garderait le contrôle sur sa poursuite, et l'indemnité éventuellement touchée dépendrait de l'issue de l'instance individuelle relativement au préjudice et au lien de causalité. Rien dans la preuve n'indiquait qu'un nombre important des membres du groupe préférerait poursuivre individuellement.

En ce qui a trait à d'autres moyens de résoudre les réclamations, des poursuites individuelles seraient un moyen moins pratique et efficace que ne le serait le recours collectif. Les questions relatives à la politique et à l'administration du pensionnat, aux compétences et à la formation du personnel et aux conditions de vie du dortoir auraient probablement des éléments en commun et l'historique ainsi que l'évolution de l'école seraient probablement importants. Exiger cette preuve dans le cadre d'affaires distinctes serait inutilement dispendieux. De plus, le programme d'indemnisation individuelle, lequel limitait l'indemnisation des plaignants individuels à 60 000 \$ et ne leur permettait pas d'être représenté par avocat devant le comité, ne constituait pas une solution de rechange adéquate au recours collectif. Finalement, on ne pouvait dire que l'administration du recours collectif créerait de plus grandes difficultés que si la réparation était recherchée par d'autres moyens. Sur ce point, il était nécessaire de mettre l'accent sur la vulnérabilité particulière des plaignants. Les membres individuels du groupe étaient soit sourds, soit aveugles ou les deux à la fois, et une poursuite serait un processus extrêmement difficile pour eux. Autoriser l'action à titre de recours collectif pourrait aider à atténuer les difficultés qu'ils pourraient éprouver. L'obstacle de la communication auquel faisaient face les étudiants lors des agressions alléguées et pendant le processus judiciaire militait en faveur d'une procédure commune afin d'expliquer l'importance de cet obstacle et de recueillir de la preuve pertinente.

## Table of Authorities

### Cases considered by/Jurisprudence citée par *McLachlin C.J.C.*:

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**Statutes considered/Législation citée:**

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

s. 5 — referred to

s. 5(1)(d) — referred to

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s. 4(2)(d) — considered

s. 4(2)(e) — considered

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s. 7(e) — considered

s. 8(3) — referred to

s. 10(1) — referred to

*School Act*, R.S.B.C. 1996, c. 412

Generally — referred to

**Words and phrases considered**

**systemic negligence**

. . . systemic negligence . . . [is] negligence not specific to any one victim but rather to the class of victims as a group.

ADDITIONAL REASONS to appeal by Crown from judgment reported at [1999 CarswellBC 2581, 180 D.L.R. \(4th\) 639, 48 C.C.L.T. \(2d\) 1, 72 B.C.L.R. \(3d\) 1, 38 C.P.C. \(4th\) 1, 131 B.C.A.C. 68, 214 W.A.C. 68, 1999 BCCA 689, \[1999\] B.C.J. No. 2633](#) (B.C. C.A.), allowing appeal by plaintiffs from judgment reported at [65 B.C.L.R. \(3d\) 382, 1998 CarswellBC 2343, 25 C.P.C. \(4th\) 186, \[1998\] B.C.J. No. 2588](#) (B.C. S.C. [In Chambers]) which denied certification of class action.

RAISONS SUPPLÉMENTAIRES pour le pourvoi de la Couronne à l'encontre du jugement publié à [1999 CarswellBC 2581, 180 D.L.R. \(4th\) 639, 48 C.C.L.T. \(2d\) 1, 72 B.C.L.R. \(3d\) 1, 38 C.P.C. \(4th\) 1, 131 B.C.A.C. 68, 214 W.A.C. 68, 1999 BCCA 689, \[1999\] B.C.J. No. 2633](#) (B.C. C.A.), qui a accueilli le pourvoi des plaignants à l'encontre du jugement publié à [65 B.C.L.R. \(3d\) 382, 1998 CarswellBC 2343, 25 C.P.C. \(4th\) 186, \[1998\] B.C.J. No. 2588](#) (B.C. S.C. [En chambre]) qui avait refusé d'accorder la certification du recours collectif.

**The judgment of the court was delivered by *McLachlin C.J.C.*:**

1 Like *Hollick v. Metropolitan Toronto (Municipality)*, [2001 SCC 68](#) (S.C.C.), this case raises the question of whether the plaintiffs below (respondents here) meet the certification requirements set out in provincial class action legislation. In this case the respondents seek to represent current and former students who were abused at the Jericho Hill School, a residential school for the deaf and blind operated by the province of British Columbia. At the end of the hearing, the Court concluded that the respondents had satisfied the certification requirements set out in s. 4 of the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50, and dismissed the appeal, reasons to follow. These are those reasons.

**I. Facts**

2 From the early 1950s until 1992, Jericho Hill School operated as a residential school for deaf children. Until 1979, the school also enrolled blind children. Whereas most schools in British Columbia are managed by district school boards, JHS was a "provincial school" under British Columbia's governing legislation, currently the *School Act*, R.S.B.C., 1996, c. 42, and was operated and maintained by British Columbia's Ministry of Education. It is now clear that sexual and physical abuse of children took place at the school throughout its history. The first thorough investigation of abuse at the school was conducted by the British Columbia Ombudsman in 1992. His report, issued in 1993, concluded that sexual, physical and emotional abuse of students by staff and peers occurred over a period of many years. In response to the Ombudsman's report and to lawsuits initiated against the province after the report was issued, the Attorney General appointed Thomas Berger, Q.C., as special counsel. Berger's report was issued in March 1995. The Berger report concluded that "sexual abuse was at times widespread at the residence at Jericho Hill School, and ... it went on over a period of many years" (p. 14).

3 The findings of the Berger report are disturbing, to say the least. Berger interviewed 35 students who were at JHS in the 1950s, 1960s, 1970s, and 1980s. He found that "[m]any of these persons allege[d] that they were sexually abused or witnessed sexual abuse by staff or other students" (p. 13). Berger focussed principally on abuse that took place after 1980. According to the Berger report, two male students complained separately about abuse at the school in the early 1980s. The first complained that he had been sexually abused by a female child care counsellor and that students at the school were encouraged and even forced to have sex with one another; the second alleged that two male child care counsellors had abused him. After the second complaint, a social worker with the Ministry of Human Resources conducted interviews with a number of boys resident at the schools. Some of the boys admitted having abused girls at the school, some as young as seven years old. The boys also alleged that they had been abused by two male child care counsellors.

4 According to the Berger report, there is compelling evidence that abuse was rampant throughout the 1980s. Some of the abuse took place at the residence associated with the school, but there were also indications of abuse in a group home run by a psychologist hired by JHS in 1983. In 1984 one student at group the group home stabbed another to death. At the subsequent trial, the judge expressed concern about the adequacy of supervision in the group home, stating that the accused "was receiving what I can only characterize as the most inappropriate form of care and guidance in that foster home". In 1986 one of the male students at JHS who had resided in the group home committed suicide after sexually abusing his niece at home.

5 The Berger report speaks separately about the period between 1987 and 1990. In January 1987 the student who had brought the first complaint in the early 1980s attempted suicide after abusing his younger siblings. After his suicide attempt, the student repeated his allegation of abuse at the hands of a female counsellor. He also admitted that he and other boys had abused elementary-age girls at the school. Around the same time, another male student was arrested for molesting a young boy. He stated that he himself had been abused by a child care worker at JHS and stated that he had engaged in sexual activity with boys and girls at the residence. He listed ten female students whom he had sexually abused and named three other boys who he said had alleged female students. After these new allegations, the Ministries of Education and Social Services conducted an investigation, interviewing some 35 students beginning in early 1987. The students interviewed provided names of other children who they said had been forced to have sex or had forced others to have sex. One member of the investigative team, in reviewing the findings, identified "a pervasive culture at the residence that required students to submit to a sexual rite of passage if they were to successfully cohabit with their peers".

6 The Berger report did not go into detail about individual cases; its principal goal was to determine the prevalence of abuse at the school, not to determine whether any particular resident had been abused. The report stated (at p. 14):

I make no findings here regarding individual cases. I am instead confining myself to stating my finding, applying generally to the state of affairs at Jericho Hill School, that from the 1950s, extending over about a 35-year period, there was sexual abuse by some child care staff, sexual abuse by some older children against younger children, and that some of these younger children (once they became senior students) sexually abused new entrants.

The case histories can be shocking. There is no need to go into them in detail. But they do indicate that sexual abuse at the school may not entirely have come to an end even in 1987. One former student states that she was assaulted by a female child care worker from 1981 to 1990. Another former student states she was sexually assaulted many times, from 1980 to 1991. It remains to be seen whether these particular allegations will be made out, but they do indicate that the possibility of incidents of sexual abuse even after 1987 cannot be dismissed.

In this report I do not go into detail about individual cases. ... I am not ... engaged in determining the impact of abuse in any individual case, but rather setting out the whole picture.

7 The Berger report found that JHS's response to allegations of abuse was often inadequate, noting, for example, that "[e]xcept in a few cases, Jericho Hill School failed to report the disclosures to the parents of the boys or the girls, failed to identify the student offenders and to remove them from the school, and failed to ensure that the students who had been abused received appropriate therapy" (p. 9). The report found that "[a]lthough it had responsibility for the management of the school, the Ministry of Education had no policies and procedures laid down for running a residence for deaf children" (p. 15). It also noted that in 1978, all students — boys and girls of all ages — were placed together in a single dormitory and observed that "[i]t is certainly arguable that these arrangements were not in keeping with reasonable standards of care at the time" (p. 16).

8 The Berger report also emphasized the exceptional vulnerability of the children at the school. The report stated (at p. 7):

[T]he vulnerability of the children at Jericho Hill School was the product of their failure to acquire language early; this meant that they did not have values instilled in them in the same way as hearing children do; it often meant increased vulnerability to any staff at the school who may have been disposed to abuse the children; it meant that the institution was more susceptible to the development of a culture of abuse; and it meant that the children usually did not have the ability or the means to communicate with or complain effectively to parents, teachers, physicians, police or social workers about sexual abuse.

9 The recommendations of the Berger report were that the province accept responsibility for the abuse that occurred at JHS; that the province establish a scheme to compensate those who had suffered abuse at the school; and that the compensation scheme should award compensation, for those claims accepted, in three tiers, with a minimum of \$3,000 and a maximum of \$60,000.

10 The government responded to the Berger report by acknowledging responsibility for abuse that occurred at JHS. In a ministerial statement made in June 1995, the Attorney General acknowledged the allegations of sexual abuse at the school, acknowledged that "[t]he province was responsible for the care and well-being of these people when they were children", and stated that "[t]o the extent that the province failed them, [it] must see that they are now compensated". The province also established the Jericho Individual Compensation Program (JICP), which is structured according to the recommendations of the Berger report. The program is open to students and former students who allege abuse as a result of attending or having attended the school, and provides for awards according to the three-tier system. As of March 31, 1998, the JICP had heard 49 claims.

11 The respondents commenced this action in January 1998. The suit seeks compensatory and punitive damages on behalf of a class consisting of:

- all current and former JHS students who have suffered abuse or who failed to receive a proper education while students of the school
- all family members of current or former JHS students who suffered damage as a result of the abuse of a JHS student
- all family members or others who were themselves abused by current or former JHS students as a result of the prior abuse of the JHS student

The respondents asserted that the following issues are common to the class:

- whether the defendant breached the standard of care it owed to the plaintiffs between 1950 and 1992
- whether the defendant made negligent, reckless and/or fraudulent misrepresentations regarding the school
- whether the defendant's conduct justified an award of punitive damages and, if so, what amount of punitive damages is appropriate

(Initially the respondents also asserted that vicarious liability constituted a common issue, but the respondents abandoned their vicarious liability argument early in the proceedings.)

12 The only issue on this appeal is whether the respondents have satisfied the class certification requirements set out in s. 4 of British Columbia's *Class Proceedings Act*.

## **II. Judgments**

13 In the Supreme Court of British Columbia, Kirkpatrick J. denied certification: ([1998](#), [65 B.C.L.R. \(3d\) 382](#) (B.C. S.C. [In Chambers]). First addressing s. 4(1)(a), Kirkpatrick J. found that the statement of claim did not disclose a cause of action based on misrepresentation, emotional harm and mental suffering, breach of fiduciary duty owed to parents or other third parties, or educational malpractice. She found, however, that the statement of claim did disclose causes of action based on the claims of abuse of students, the claims of "secondary" abuse committed by students against other students or third parties, and breach of fiduciary duty owed to the students. Kirkpatrick J. also found that respondents had stated an identifiable class, as required by s. 4(1)(b).

14 Kirkpatrick J. rejected the contention, however, that there were issues common to the class as required by s. 4(1)(c). She addressed each of the asserted common issues in turn. As to the negligence issues, she reasoned that the standard of care owed by the defendant would not have been constant over the 42-year period identified in the statement of claim and, while this problem could be partially addressed by subdividing the 42-year period and determining the standard of care for each subdivision, "[s]uch an approach would not resolve the anticipated problems of individuals who spanned one or more periods, or whose own individual circumstances changed along with the standard of care during the times in question" (p. 402). Further, variations in the standard of care would "not necessarily relate only to when the claim is alleged to have arisen, but will likely

depend also on who advances the claim, who is alleged to have perpetrated the wrong, and, perhaps, the nature of the abuse alleged" (p. 403).

15 Kirkpatrick J. rejected the misrepresentation issues as common to the class for similar reasons, writing that these issues were "individualistic in the sense that each plaintiff must demonstrate that [he or she] relied upon the defendant's alleged misrepresentation such that the representation had a real and substantial effect on the individual plaintiff's decision to enrol and continue to enrol the student at the school" (p. 404).

16 Finally, Kirkpatrick J. rejected the punitive damages issue as common to the class, reasoning that assessing punitive damages would require an individualized showing on the part of each plaintiff and noting that "the conduct of the defendant in relation to individual plaintiffs may aggravate or mitigate the assessment of punitive damages, which would fail to be considered in the determination of entitlement to punitive damages as a common issue" (p. 406). Kirkpatrick J. noted that even if punitive damages were certified as a common issue, the amount of punitive damages could not be a common issue because traditionally "[p]unitive damages are [awarded only] if compensatory damages are insufficient to deter or punish the defendant" (p. 406). The amount of punitive damages, therefore, could not be assessed until individual proceedings were completed.

17 Kirkpatrick J. determined that there were no common issues as required by s. 4(1)(c) and, as there were no common issues, a class action could not be "the preferable procedure for the fair and efficient resolution of the common issues", as required by s. 4(1)(d). She conceded, however, that the JICP is not an adequate alternative to judicial resolution of the dispute. She noted that the JICP limits awards to \$60,000, does not compensate family members, and does not provide compensation for loss of income, opportunity, or future care. Further, the JICP prohibits applicants from being represented by counsel before the compensation panel. In Kirkpatrick J.'s view, however, the absence of common issues meant that individual litigation was nonetheless preferable to a class proceeding.

18 The Court of Appeal for British Columbia, *per* Mackenzie J.A., allowed the appeal, disagreeing with the chambers judge with respect to commonality and preferability: ([1999](#), 72 B.C.L.R. (3d) 1 (B.C. C.A.). In Mackenzie J.A.'s view, the chambers judge had erred in failing to recognize the "limited grounds" on which the respondents sought certification. While he conceded that there were relevant differences amongst the class members, Mackenzie J.A. reasoned that the "duty of the school to reasonably protect its students from sexual abuse is clear and immutable throughout the period that the school was in operation" (p. 8). He wrote (at pp. 8-9):

It is true that the claims of class members may span a period of 42 years and that standards of operation and management of the school may have changed several times over that lengthy period. Nevertheless, ... the duty of the school to reasonably protect its students from sexual abuse is clear and immutable throughout the period that the school was in operation. ...

Claimants will not have to prove that the abuse was caused by a particular staff member or other student in the absence of a claim for vicarious liability. In essence the claims will be based on systemic negligence, the failure to have in place management and operations procedures that would reasonably have prevented the abuse.

Mackenzie J.A. concluded that the standard-of-care issue — an aspect of both the negligence claim and the fiduciary duty claim — was common to all those who alleged that they had been sexually abused at JHS. He also found that the preferability requirement had been satisfied, holding that the JICP was an inadequate alternative.

19 The issue of punitive damages was also common to all those who alleged that they had themselves been abused at JHS, Mackenzie J.A. concluded. "Any award for punitive damages," he wrote, "should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment." He continued: "[a] global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate" (p. 17).

20 Mackenzie J.A. rejected, however, the other common issues asserted by the respondents. He rejected abuse claims of a non-sexual nature, finding that non-sexual abuse was not a central concern of the pleadings and that there was some uncertainty as to whether non-sexual abuse falls within the definition of assault. He also rejected "secondary" abuse claims — that is, abuse by a

JHS student who had himself or herself been abused at the school. On this issue he agreed with the chambers judge that questions of duty, foreseeability, and proximity rendered secondary-abuse claims prohibitively complicated and individualized. Mackenzie J.A. also rejected the educational malpractice claims, finding no precedent suggesting that such claims could be prosecuted successfully and stating that "any attempt to litigate these issues in the same class proceedings as the sexual abuse claims would complicate the proceedings immensely" (p. 15). Finally he rejected claims for family members' emotional harm and suffering — claims that relied in part on an allegation of negligent misrepresentation, reasoning that the claims were "amorphous" and in any event "[i]ssues of reliance and causation linking representations to the harm alleged will undoubtedly vary from claimant to claimant" (p. 16).

21 Ultimately Mackenzie J.A. defined the class as follows:

Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.

He certified the following questions as common issues:

1. Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measure in the operation or management of the school to protect students from misconduct of a sexual nature by employees, agents or other students at the school?
2. If the answer to common issue no. 1 is "yes", was the defendant guilty of conduct that justifies an award of punitive damages?
3. If the answer to common issue no. 2 is "yes", what amount of punitive damages is awarded?

22 The appellant now challenges Mackenzie J.A.'s decision, contending that he erred in certifying even the narrower class.

### III. Legislation

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

4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

.....

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known;
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

#### IV. Issues

24 Have the respondents satisfied the certification requirements set out in British Columbia's *Class Proceedings Act*?

#### V. Analysis

25 The only issue in this case is whether the Court of Appeal erred in granting certification. As the respondents do not cross-appeal from the decision of Mackenzie J.A., we need not consider whether certification could have been granted on a *broader* basis than was recognized by the Court of Appeal. The only question is whether, given the Court of Appeal's redefinition of the class and common issues, the certification requirements were met. Those requirements are set out in s. 4 of the British Columbia *Class Proceedings Act* and are similar to the certification requirements set out in Ontario's class action legislation, which I discuss at some length in [Hollick](#). These reasons discuss the specifics of the British Columbia certification requirements only insofar as they differ materially from those set out in s. 5 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and only to the extent that those differences bear directly on my analysis in this case.

26 Not all of the certification requirements are at issue on this appeal. The appellant does not dispute that the respondents have met the requirements of s. 4(1)(a), (b), and (e) — that is, the appellant does not dispute that the pleadings disclose a cause of action, that the respondents have stated an identifiable class, and that the respondents would serve as satisfactory representatives of the class. The issues in dispute are whether there are questions common to the class, as required by s. 4(1)(c), and whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, as required by s. 4(1)(d).

27 In my view, both the commonality and preferability requirements are satisfied in this case. With regard to commonality, I agree with Mackenzie J.A. that all class members share an interest in the question of whether the appellant breached a duty of care. On claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach. Resolving those issues, therefore, is "necessary to the resolution of each class member's claim": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#) (S.C.C.), at para. 39. Accordingly I would conclude that Mackenzie J.A. was correct to find that the issues of duty and breach are common to the class.

28 The appellant concedes that none of the class members can prevail without showing that the appellant's conduct fell below an acceptable standard, but contends that the nature of the required showing is inescapably individualistic and not amenable to resolution in general terms applicable to all class members. The appellant does not dispute Mackenzie J.A.'s statement that

the "duty of the school to reasonably protect its students from sexual abuse is clear and immutable throughout the period that the school was in operation". However in the appellant's view, "[t]he result of this litigation depends not on the definition of the standard of care, but rather the *application* of that standard to the facts found in respect of the circumstances of each claimant" (Appellant's factum, at para. 64 (emphasis in original)). The appellant argues that in this case "[l]iability turns not on the breach of a standard of care in the abstract, but on whether the standard of care was breached with respect to the school's supervision of the particular class member in a way that contributed materially to his/her abuse" (Appellant's factum, at para. 64). The theory of the appellant is essentially that the Court of Appeal was able to find a common issue within the meaning of s. 4(1)(c) only by framing the commonality between the class members in overly general terms.

29 There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres Inc.*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

30 I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence — "the failure to have in place management and operations procedures that would reasonably have prevented the abuse". The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her *own* complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had *as a general matter* failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

31 In arguing that the necessary inquiry is inescapably individualistic, the appellant's principal contention is that the relevant standard of care, if framed at the appropriate level of specificity, would have varied over time. I am not persuaded that this should be an obstacle to the suit's proceeding as a class action. It is true that there has been a "dramatic ... evolution" in law relating to sexual abuse between 1950 and 1992 and it is quite possible that the nature of a school's obligations to its students has changed over time. However, courts have often allowed class actions to proceed in similar circumstances: see, e.g., *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) (certifying class action for medical malpractice even though the action "concern[ed] allegations of a general practice over a number of years falling below acceptable standards" (p. 683)); *Chace v. Crane Canada Inc.* (1996), 26 B.C.L.R. (3d) 339 (B.C. S.C. [In Chambers]) (certifying class action for negligent manufacture and sale over 11-year period on grounds that, if the defendant were "partially successful in its defence and ultimately found to have been negligent over part of the period only, that result c[ould] be accommodated in the answer to the common question" (p. 347)); *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C. S.C.) (certifying class action for negligence and spoliation over four-year period notwithstanding defendant's argument that "the standard of care would have been in flux throughout the material time" (p. 168)).

32 That the standard of care may have varied over the relevant time period simply means that the court may find it necessary to provide a nuanced answer to the common question. The structure of the Berger report, which explicitly divides the years between 1982 and 1991 into three discrete subperiods, suggests that such an approach would not be infeasible. I further note that the *Class Proceedings Act* contemplates the possibility of subclasses and that the court may amend the certification order at any time: see s. 6(1) (permitting court to recognize subclasses under certain conditions); s. 7(e) (stating that the court "must not refuse to certify a proceeding as a class proceedings merely because ... the class includes a subclass whose members have claims that raise common issues not shared by all class members"); s. 8(3) (stating that "[t]he court, on the application of a

party or class member, may at any time amend a certification order"); s. 10(1) (stating that "[w]ithout limiting section 8(3), at any time after a certification order is made ..., the court may amend the certification order"). In my view the *Class Proceedings Act* provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident.

33 As the Court of Appeal noted (at p. 9), it is in fact quite likely that there will be relevant differences between the class members:

Limiting the ground of liability to systemic negligence does not eliminate all differences among class members. As the Berger report noted, the duty owed may vary over time depending upon the state of knowledge of those in charge of the school, the reasonably informed educational standards and policies of the day, the measures implemented to prevent abuse and other factors. At the end of the case, liability could be imposed for abuse during certain periods of the school's operation and not in others. It is conceivable that liability might be differentiated in other ways, for example abuse inflicted by staff but not by other students.

For the reasons stated above, however, I agree with Mackenzie J.A. that these differences are not insurmountable. In any event I question the extent to which differences between the class members should be taken into account at this stage. The British Columbia *Class Proceedings Act* explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members": s. 4(1)(c). (This distinguishes the British Columbia legislation from the corresponding Ontario legislation, which is silent as to whether predominance should be a factor in the commonality inquiry.) While the British Columbia *Class Proceedings Act* clearly contemplates that predominance will be a factor in the preferability inquiry (a point to which I will return below), it makes equally clear that predominance should not be a factor at the commonality stage. In my view the question at the commonality stage is, at least under the British Columbia *Class Proceedings Act*, quite narrow.

34 As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue — whether JHS breached a duty of care or fiduciary duty to the complainants — will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified: see, e.g., *Endean*, *supra*, at para. 48 ("An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."). Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence — that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace*, *supra*, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] ... as a general proposition" rather than by reference to conduct specific to any one plaintiff).

35 The question remains whether a class action would be the preferable procedure. Here I would begin by incorporating my discussion in *Hollick* as to the meaning of preferability: see *Hollick*, *supra*, at paras. 28-31. While the legislative history of the British Columbia *Class Proceedings Act* is of course different from that of the corresponding Ontario legislation, in my view the preferability inquiry is, at least in general terms, the same under each statute. The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures": *Hollick*, at para. 28. I would note one difference, however, between the British Columbia *Class Proceedings Act* and the corresponding Ontario legislation. Like the British Columbia legislation, the Ontario legislation requires that a class action be "the preferable procedure" for the resolution of the common issues: see Ontario *Class Proceedings Act*, 1992, s. 5(1)(d); British Columbia *Class Proceedings Act*, s. 4(1)(d). Unlike the Ontario legislation, however, the British Columbia legislation provides express guidance as to how a court should approach the preferability question, listing five factors that the court must consider: see s. 4(2). I turn, now, to these factors.

36 The first factor is "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members": s. 4(2)(a). As I noted above, it seems likely that there will be relevant differences between class members here. It should be remembered, however, that as the respondents have limited their claims to claims of "systemic" negligence, the central issues in this suit will be the nature of the duty owed by JHS to the class members and whether that duty was breached. Those issues are amenable to resolution in a class proceeding. While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members.

37 The second factor is "whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions", and the third is "whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 4(2)(b), (c). On these factors I would note again that no class member will be able to prevail without making an individual showing of injury and causation. Thus it cannot be said that allowing this suit to proceed as a class action will force complainants into a passive role. Each class member will retain control over his or her individual action, and his or her ultimate recovery will be determined by the outcome of the individual proceedings on injury and causation (assuming, again, that the common issue is resolved in favour of the class). Further there is little evidence here to suggest that any significant number of class members would prefer to proceed individually.

38 I turn next to the fourth factor, which asks "whether other means of resolving the claims are less practical or less efficient": s. 4(2)(d). On this point I would agree with the Court of Appeal that individual actions would be less practical and less efficient than would be a class proceeding. As Mackenzie J.A. noted (at pp. 9-10), "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements". Further, "[t]he overall history and evolution of the school is likely to be important background for the claims generally and it would be needlessly expensive to require proof in separate cases" (p. 10). I would also agree with Mackenzie J.A. (and indeed with Kirkpatrick J.) that the JICP does not provide an adequate alternative to a class action. Amongst other limitations, the JICP program limits the recovery of any one complainant to \$60,000, and it does not permit complainants to be represented by counsel before the panel. The JICP simply cannot be said to be an adequate alternative to a class proceeding.

39 The final factor is "whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means": s. 4(2)(e). On this point it is necessary to emphasize the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members. I am in full agreement, therefore, with Mackenzie J.A.'s conclusion that "[t]he communications barriers faced by the students both at the time of the assaults alleged and currently in the litigation process favour a common process to explain the significance of those barriers and to elicit relevant evidence." As he wrote, "[a] group action should assist in marshalling the expertise required to assist individual students in communicating their testimony effectively" (p. 9).

40 I conclude that the respondents have satisfied the certification requirements set out in s. 4 of the British Columbia *Class Proceedings Act*.

41 The appeal is dismissed. The respondents shall have costs throughout.

*Appeal dismissed.*

*Pourvoi rejeté.*

**TAB 32**

2009 CarswellOnt 7873  
Ontario Superior Court of Justice

Silver v. Imax Corp.

2009 CarswellOnt 7873, [2009] O.J. No. 5585, 184 A.C.W.S. (3d) 28, 86 C.P.C. (6th) 273

**Marvin Neil Silver and Cliff Cohen, Plaintiffs and Imax Corporation,  
Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce, Defendants**

K. van Rensburg J.

Judgment: December 14, 2009

Docket: CV-06-3257-00

Counsel: A.D. Lascaris, W. Sasso, M. Robb, J. Strosberg, for Plaintiffs  
R.P. Steep, D.M. Peebles, for Defendants, Proposed Defendants

Subject: Corporate and Commercial; Securities; Civil Practice and Procedure; Torts; Contracts; International

**Related Abridgment Classifications**

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.D** Preferable procedure

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.E** Fair and adequate representation

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.F** Litigation plan

Civil practice and procedure

**X** Pleadings

**X.2** Statement of claim

**X.2.f** Striking out for absence of reasonable cause of action

**X.2.f.ii** Plain and obvious

Securities

**III** Trading in securities

**III.3** Civil liability for secondary market disclosure

Torts

**III** Conspiracy

**III.2** Practice and procedure

**III.2.a** Pleadings

Torts

**VII** Fraud and misrepresentation

**VII.7** Pleadings

**VII.7.a** Pleading fraud and fraudulent misrepresentation

**VII.7.a.i** Sufficiency

**VII.7.a.i.D** Miscellaneous

Torts

**VII** Fraud and misrepresentation

**VII.7** Pleadings

**VII.7.c** Pleading innocent or negligent misrepresentation

**VII.7.c.i** Sufficiency

**VII.7.c.i.B** Miscellaneous

Torts

**XVI** Negligence

**XVI.7** Vicarious liability

**XVI.7.b** Miscellaneous

Torts

**XVI** Negligence

**XVI.14** Practice and procedure

**XVI.14.b** Pleadings

**XVI.14.b.i** Amendment

**XVI.14.b.i.A** Adding or striking out claim

## Headnote

Securities --- Trading in securities — Civil liability for secondary market disclosure

Representative or class proceedings under class proceedings legislation — Public company sold and leased theatre systems — Company issued press release in 2006 stating that it completed 14 theatre installations in fourth quarter of 2005 and expected to meet its full year earnings guidance for 2005 — Company filed 2005 Form 10-K and issued press release announcing decision to explore sale or merger — Company issued another press release that no buyer interested in acquiring company at valuation sought by board of directors and that company was responding to informal inquiry from US Securities and Exchange Commission regarding timing of revenue recognition — Company stated that it had recognized revenue in fourth quarter of 2005 on ten installations in theatres which did not open in that quarter, but that this was in accordance with generally accepted

accounting principles (GAAP) — Company's share price dropped 40 per cent — In 2007, company restated 2005 financial statements, acknowledging it erred in recognizing revenue for theatre systems that were not completely installed and that it had not complied with GAAP — Shareholders brought action under s. 138.3 of Securities Act for misrepresentation in secondary market and for common law claims — Shareholders brought motion for certification of action as class proceeding — Company acknowledged that statutory claims were suitable for certification but opposed certification of common law claims — Company brought motion to strike out part of common law claims — Shareholders' motion granted; company's motion granted in part — Cause of action pleaded in respect of statutory claim and certain common law claims — Identifiable class — Appropriate to certify global class — Common issues included misrepresentations in Form 10-K and press releases, defendants' personal involvement, and statutory defences — Class proceeding preferable procedure — Leave granted to amend statement of claim and to provide revised litigation plan.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders brought motion for certification of action as class proceeding — Company acknowledged that pleadings disclosed cause of action under s. 138.3 of Securities Act for misrepresentation in secondary market but opposed certification of common law claims — Motion granted — Not plain and obvious that *prima facie* duty, if any, of company to investing public regarding secondary market disclosure was negated or limited by policy considerations — Not inconsistent to pursue statutory remedy for secondary market misrepresentation which imposed liability without proof of reliance, and to pursue claim for common law duty of care for negligent misrepresentation arising out of same circumstances where reliance is element of tort — Failure to plead individual and direct reliance not fatal — Pleadings adequate for claims of fraudulent misrepresentation, conspiracy, and vicarious liability — Concern as to indeterminate liability not applying to claim of fraudulent misrepresentation — Negligence simpliciter claims required amendment.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Proposed global class included persons who acquired company's securities on stock exchanges on or after February 17, 2006 and held some or all of those securities at close of trading on August 9, 2006 — Shareholders brought motion for certification of action as class proceeding — Motion granted — Class members identified by objective and readily verifiable criteria — Class not over-broad for including persons who may have no claims — Commonality of interest existed between class members and proposed representative plaintiffs as core of common law misrepresentation was that defendants made single misrepresentation affecting share price — Real and substantial connection between Ontario and claims of foreign class members — Asserting justice consistent with principles of order and fairness — Certification of global class not precluded by pending application to certify foreign class action.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005

revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Proposed common issues included circumstances in which representations made and knowledge and participation of company and defendant individuals; whether statutory defences to statutory claim shown; whether shares' trading price incorporated and reflected misrepresentation; whether there was conspiracy to deceive class members — Proposed common issues also included what procedure was to be used to determine damages for common law liability; whether there was vicarious liability; whether damages could be assessed in aggregate; whether company and defendant individuals liable for punitive damages, costs of administering and distributing any monetary judgment and/or costs of determining eligibility, and prejudgment and post-judgment interest — Shareholders brought motion for certification of action as class proceeding — Motion granted — Common issues existed that would advance litigation — Claim was single defined representation communicated in different ways — Potential for different statutory regimes or varying standards of care applying to claims of different class members not impede certification.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders brought motion for certification of action as class proceeding — Motion granted — Class proceeding would be fair, efficient, and manageable means to advance claims and would be only viable means to advance claims of class members — Certification would avoid duplication of fact finding and legal analysis and potential for inconsistent results — Deterring misrepresentation in public company disclosures would be enhanced by permitting aggregated claims to proceed — Costs and time to litigate individual claims would greatly exceed potential individual recoveries.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders brought motion for certification of action as class proceeding — Motion granted — Shareholders put forth as proposed representative plaintiffs shared attributes with proposed class as at relevant time they purchased and continued to hold shares — Disposition of several common issues would affect them and other class members — Potential differences between legal regimes applying to common law claims of representative plaintiffs and other class members, as well as question of application of statutory claim to nonresident members not being disabling conflict of interest if it was asserted in statement of defence that laws of different legal jurisdictions apply to class members depending on where they had lived or had purchased their shares.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders brought motion for certification of action as class proceeding — Motion granted on other grounds — Litigation plan failed to address issues specific to global class — Plan did not include form, substance, and steps for distribution of notice to both resident and nonresident class members — Plan did not propose time for opting out of proceedings or any additional measures or steps in litigation that might be contemplated to address interests of nonresident class members.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for statutory and common law damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Company and defendant individuals brought motion under R. 21 of Rules of Civil Procedure to strike out part of common law claims — Motion granted in part — Substance of negligence pleading was pleading of negligent misrepresentation without reliance but as there was no pleading that alleged negligence caused damage to shareholders and no separate claim for remedy based on negligence, claims in negligence simpliciter required amendment.

Torts --- Conspiracy — Practice and procedure — Pleadings

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that it was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for statutory and common law damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders pleaded that company vicariously liable as alleged acts or omissions were authorized, ordered, and done by individual defendants while engaged in management, direction, control and transaction of company's business — Shareholders also alleged that actions of individual defendants were independently tortious and that such defendants were personally liable — Company and individual defendants objected that as conspiracy was alleged to have occurred between company and individual defendants who were directors and/or officers at relevant time, it was impossible for company to conspire with itself — Company and individual defendants brought motion under R. 21 of Rules of Civil Procedure to strike out portions of statement of claim — Motion granted in part on other grounds — All necessary elements of cause of action of conspiracy were pleaded as allegations may, if true, give rise to personal liability on part of individual defendants because their conduct was in issue both as agents for company and in their personal capacities.

Torts --- Fraud and misrepresentation — Pleadings — Pleading fraud and fraudulent misrepresentation — Sufficiency — Miscellaneous

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its

revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for statutory and common law damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders alleged that defendants made misrepresentation recklessly, not caring whether it was true or false — Shareholders brought motion for certification of action as class proceeding — Motion granted — All elements of fraudulent misrepresentation pleaded — Substance of claim for reckless misrepresentation being pleading of fraudulent misrepresentation — If company and defendant individuals acted recklessly in making representation with intention that class members rely upon it, there was no policy reason to limit liability.

Torts --- Fraud and misrepresentation — Pleadings — Pleading innocent or negligent misrepresentation — Sufficiency — Miscellaneous

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for statutory and common law damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders brought motion for certification of action as class proceeding — Motion granted — Prima facie duty of care, if any, owed by company to investing public in respect of negligent misrepresentation in secondary market disclosure not negated or limited by policy considerations — Continuous disclosure obligations of company as reporting issuer were prescribed by statute and intended recipients of such disclosure were investing public — Pursuing statutory remedy for secondary market misrepresentation imposing liability without proof of reliance not inconsistent with pursuing claim alleging common law duty of care for negligent misrepresentation arising out of same circumstances where reliance is element of tort — Failure to plead individual and direct reliance by each shareholder not fatal to claims of misrepresentation.

Torts --- Negligence — Vicarious liability — Miscellaneous

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Shareholders alleged that company was vicariously liable for acts and omissions of individual defendants that were authorized, ordered, and done by individual defendants and company's other agents, employees, and representatives while engaged in management, direction, control, and transaction of its business affairs — Company and individual defendants acknowledged that pleadings disclosed cause of action under s. 138.3 of Securities Act for misrepresentation in secondary market and that those claims were suitable for certification but opposed certification of common law claims — Company and individual defendants brought motion under R. 21 of Rules of Civil Procedure to strike out portions of statement of claim — Motion granted in part on other grounds — When read in context of entire pleading, claim for vicarious liability was adequately pleaded.

Torts --- Negligence — Practice and procedure — Pleadings — Amendment — Adding or striking out claim

Public company sold and leased theatre systems — Shareholders alleged that company's Form 10-K and 2006 press releases contained misrepresentations regarding compliance with generally accepted accounting principles (GAAP) and as to 2005 revenues meeting or exceeding company's previously issued earnings guidance — Company issued another press release in 2006 that company was responding to informal inquiry from US Securities Exchange Commission regarding timing of its revenue recognition for theatre systems that were not yet open — Share price dropped 40 per cent following day — Company restated 2005 financial statements in 2007, acknowledging noncompliance with GAAP and error in recognizing revenue for theatre systems that were not completely installed — Shareholders brought proposed class action for statutory and common law

damages for negligence, negligent and fraudulent misrepresentation, and conspiracy — Company and individual defendants brought motion under R. 21 of Rules of Civil Procedure to strike out part of common law claims — Motion granted in part — Substance of negligence pleading was pleading of negligent misrepresentation without reliance but as there was no pleading that alleged negligence caused damage to shareholders and no separate claim for remedy based on negligence, claims in negligence simpliciter required amendment.

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*Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306, 1970 CarswellOnt 208, 1970 CarswellOnt 208F, 15 D.L.R. (3d) 336 (S.C.C.) — considered

*Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 2005 CarswellOnt 544, 7 C.P.C. (6th) 60, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 250 D.L.R. (4th) 224, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 74 O.R. (3d) 321, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.*) 195 O.A.C. 244 (Ont. C.A.) — considered

*Pearson v. Boliden Ltd.* (2002), 2002 BCCA 624, 2002 CarswellBC 2769, 175 B.C.A.C. 104, 289 W.A.C. 104, 222 D.L.R. (4th) 453, 7 B.C.L.R. (4th) 245 (B.C. C.A.) — considered

*Queen v. Cognos Inc.* (1993), 1993 CarswellOnt 801, 1993 CarswellOnt 972, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — referred to

*Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373, 2007 CarswellOnt 1014, 47 C.C.L.I. (4th) 78 (Ont. S.C.J.) — considered

*Robertson v. Thomson Corp.* (1999), 1999 CarswellOnt 301, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 43 O.R. (3d) 161, 30 C.P.C. (4th) 182 (Ont. Gen. Div.) — referred to

*Rumley v. British Columbia* (2001), 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 10 C.C.L.T. (3d) 1 (S.C.C.) — considered

*Serhan Estate v. Johnson & Johnson* (2004), 49 C.P.C. (5th) 283, 2004 CarswellOnt 2809, 11 E.T.R. (3d) 226, (sub nom. *Serhan (Estate Trustee) v. Johnson & Johnson*) 72 O.R. (3d) 296 (Ont. S.C.J.) — distinguished

*Shaw v. BCE Inc.* (May 14, 2003), Doc. 02-CV-236453CP (Ont. S.C.J.) — considered

*Silber v. DDJ High Yield Fund* (2006), 2006 CarswellOnt 3784, 20 B.L.R. (4th) 134, 24 E.T.R. (3d) 211 (Ont. S.C.J.) — considered

*Smith v. National Money Mart Co.* (2007), 2007 CarswellOnt 29, 29 E.T.R. (3d) 199, 37 C.P.C. (6th) 171 (Ont. S.C.J.) — referred to

*Spring v. Guardian Assurance plc* (1994), [1994] 3 All E.R. 129, [1994] I.C.R. 596, [1994] I.R.L.R. 460, 40 L.S.G. 36, 138 Sol. Jo. LB 183, 16 C.C.E.L. (2d) 147, 1994 CarswellFor 1, [1994] 3 W.L.R. 354, [1995] 2 A.C. 296 (U.K. H.L.) — considered

*Tiboni v. Merck Frosst Canada Ltd.* (2008), 60 C.P.C. (6th) 65, 2008 CarswellOnt 4523, 295 D.L.R. (4th) 32 (Ont. S.C.J.) — referred to

*Tiboni v. Merck Frosst Canada Ltd.* (2009), 2009 CarswellOnt 1248, (sub nom. *Mignacca v. Merch Frosst Canada Ltd.*) 247 O.A.C. 322, (sub nom. *Mignacca v. Merch Frosst Canada Ltd.*) 95 O.R. (3d) 269, 71 C.P.C. (6th) 350 (Ont. Div. Ct.) — considered

*Tolofson v. Jensen* (1994), [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 100 B.C.L.R. (2d) 1, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 26 C.C.L.I. (2d) 1, 175 N.R. 161, 120 D.L.R. (4th) 289, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon*) [1994] 3 S.C.R. 1022, 77 O.A.C. 81, 51 B.C.A.C. 241, 84 W.A.C. 241, 1994 CarswellBC 1, 1994 CarswellBC 2578 (S.C.C.) — considered

*Vezina v. Loblaw Cos.* (2005), 2005 CarswellOnt 1942, 17 C.P.C. (6th) 307 (Ont. S.C.J.) — considered

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

*Wilson v. Servier Canada Inc.* (2000), 2000 CarswellOnt 3257, 50 O.R. (3d) 219, 49 C.P.C. (4th) 233 (Ont. S.C.J.) — considered

*Yorkshire Trust Co. v. Empire Acceptance Corp.* (1986), 69 B.C.L.R. 357, 22 E.T.R. 96, 1986 CarswellBC 225, 24 D.L.R. (4th) 140 (B.C. S.C.) — considered

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, 2002 CarswellOnt 4272 (Ont. S.C.J.) — considered

*1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 2008 CarswellOnt 1156, 89 O.R. (3d) 252, 56 C.P.C. (6th) 88 (Ont. S.C.J.) — considered

*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* ([\(2009\)](#), 70 C.P.C. (6th) 27, 2009 CarswellOnt 2533, 96 O.R. (3d) 252, 250 O.A.C. 87 (Ont. Div. Ct.) — referred to

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

s. 1 "common issues" — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(b)-5(1)(e) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 5(3) — considered

s. 6 — considered

s. 24 — considered

s. 24(1) — considered

s. 24(1)(b) — considered

s. 24(1)(c) — considered

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

*Securities Act*, R.S.O. 1990, c. S.5

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 75(1) — referred to

s. 138.3 [en. 2002, c. 22, s. 185] — considered

s. 138.5 [en. 2002, c. 22, s. 185] — referred to

s. 138.5(3) [en. 2002, c. 22, s. 185] — considered

s. 138.8 [en. 2002, c. 22, s. 185] — considered

s. 138.13 [en. 2002, c. 22, s. 185] — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 21 — considered

MOTION by plaintiff shareholders for certification as class proceeding of action for negligence, negligent and fraudulent misrepresentation, and conspiracy; MOTION by defendant company and defendant individuals for order pursuant to R. 21 of Rules of Civil Procedure striking out parts of common law claims as failing to disclose cause of action.

**K. van Rensburg J.:**

**The Motions and The Proceedings**

1 The plaintiffs have commenced a proposed class proceeding for misrepresentation in the secondary market. The defendant IMAX Corporation ("IMAX" or the "Company") is a reporting issuer whose securities are listed on the TSX and NASDAQ. The action arises out of the statement of IMAX's financial results for 2005 in its Form 10-K (which included its audited financial statements) released and filed with the Ontario Securities Commission ("OSC") and the U.S. Securities and Exchange Commission ("SEC") in March 2006. It is alleged that the Form 10-K, as well as press releases issued by IMAX in February and March 2006, contained misrepresentations as to IMAX's compliance with GAAP<sup>1</sup> and that its revenues for 2005 met or exceeded IMAX's previously issued earnings guidance.

2 On August 9, 2006, IMAX issued another press release in which it noted in part that the Company was in the process of responding to an informal inquiry from the SEC regarding the timing of its revenue recognition, and in particular its use of multiple element arrangement accounting to recognize revenue on theatre systems that were not yet open, including theatres where the 3D screen had not yet been installed. The following day IMAX's share price dropped 40%.

3 In 2007 IMAX restated its financial statements for a number of years, including 2005 (the "Restatement"). The Restatement acknowledged that the Company had erred in recognizing revenue for theatre systems that were not completely installed, and that the Company had not complied with GAAP in prematurely recording theatre system revenues in fiscal 2005.

4 The plaintiffs are Ontario residents who purchased shares in IMAX on the TSX. They are suing for the devaluation in their shares which they allege was due to the alleged misrepresentations. They allege that the defendants IMAX, its chief executive officers Richard Gelfond ("Gelfond") and Bradley Wechsler ("Wechsler") and its chief financial officer at the relevant time, Francis Joyce ("Joyce") (together the "Individual Defendants") are liable for common law damages.

5 The plaintiffs also sought leave to pursue a statutory claim under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "OSA") against the defendants and certain proposed defendants (the remaining members of the board of directors of IMAX at the relevant time and Kathryn Gamble, who was Vice-President, Finance and Controller). This is the first action to proceed under these provisions, which came into force on December 31, 2005,<sup>2</sup> and leave of the Court is required under s. 138.8 of the OSA to pursue the statutory claim (the "Leave Motion").

6 The plaintiffs seek certification of this action (including the common law and the statutory claims) as a class proceeding pursuant to s. 5(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "CPA"). The plaintiffs propose a global class, consisting of persons who acquired securities of IMAX on the TSX and on NASDAQ on or after February 17, 2006 and held some or all of those securities at the close of trading on August 9, 2006.

7 The defendants also brought a motion under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, seeking to strike parte of the common law claims as pleaded by the plaintiffs. This motion is properly considered part of the determination of the sufficiency of the pleading of the cause of action under s. 5(1)(a) of the CPA in the certification motion.

8 All three motions (the Leave Motion and the motions for class action certification and under Rule 21) were argued together. These reasons address the certification and Rule 21 motions. Separate reasons have been released contemporaneously with these reasons, granting leave to the plaintiffs to proceed with the statutory claims against all defendants and all but two of the proposed defendants.<sup>3</sup> Reference should be made to the reasons on the Leave Motion for the background and context of the action, including a detailed description of the facts giving rise to these motions and the statutory cause of action.

#### A. The Test for Certification

9 Section 5(1) of the CPA requires the court to certify a proceeding as a class proceeding 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;
- (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 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 Class actions offer three important advantages. They serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. By allowing fixed litigation costs to be divided over a large number of plaintiffs, access to justice is improved by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public (this is the "behaviour modification" element) (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), paras. 27-29). See also *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 14-16.

11 The certification motion is a procedural motion focusing on the form of the action rather than on whether the action is likely to succeed on the merits. The plaintiffs must establish a minimum evidentiary basis for a certification order. It is necessary that the plaintiffs show some basis in fact for each of the certification requirements, other than the requirement in s. 5(1)(a) to plead a proper cause of action (*Hollick*, paras. 16 and 25). On this motion, which was argued with the Leave Motion (in which the preliminary merits of the statutory claim were examined), there was before the court substantial evidence touching on all requirements of ss. 5(1)(b) to 5(1)(e).

#### B. The Principal Issues on the Certification Motion

12 There was little argument in this case directed toward the question of certification of the statutory cause of action. Rather, the focus was on whether leave should be granted to advance such a claim. In respect of the statutory claims, there is clearly a cause of action pleaded, and an identifiable class consisting of IMAX shareholders during the proposed class period. There are common issues as to the making of the misrepresentations in the Form 10-K and press releases, the personal involvement of the defendants and the application of the statutory defences (which, if available, would defeat the statutory claims of the entire class). A class proceeding is the preferable procedure, particularly where there is no requirement for the participation of individual class members in establishing liability, as reliance on the misrepresentation is not an element of the statutory claim. In oral argument counsel for the defendants indicated that they would not be opposing certification of the statutory claims subject to the court granting leave under the OSA to pursue such claims.

13 The acknowledgment that the statutory claims are suitable for certification is an important concession in this case. The remaining issues facing the court are the scope of the claims to be certified as a class action and the identification of the class members; that is, whether the claims will include common law claims relating to misrepresentation on the secondary market by IMAX and tine Individual Defendants, and whether it is appropriate to certify a global class.

14 The defendants assert that there are fatal deficiencies in the alleged causes of action that should prevent the court from certifying a common law claim for misrepresentation in the secondary market in this case. In particular they take issue with the recognition of a duty of care between IMAX, its directors and officers and the investing public. They also argue that reliance is an essential element of a misrepresentation claim, and that the claim as pleaded is deficient for not alleging individual reliance by each member of the proposed class.

15 The defendants contend that the common issues are of limited significance (i.e. they will not significantly advance the action) and that the individual issues (which they contend should include the question of reliance by each class member) are both numerous and significant, rendering a class proceeding not the preferable procedure. They argue against the certification of a global class where there are parallel proceedings pending in a U.S. Court<sup>4</sup> (the "U.S. Proceedings") and based on potential conflict of laws concerns (anticipating that the substantive laws of different jurisdictions may apply to the common law claims of various class members. The defendants also contend that the proposed representative plaintiffs are not in fact representative of the proposed class of investors and that their litigation plan is inadequate.

16 For the reasons that follow I have decided to certify these proceedings, including the statutory claims as pleaded and certain of the common law claims, as a class proceeding. I have also decided that the case is appropriate for a global class.

17 These reasons will address each of the five parts of the test for certification under the CPA, although as will become apparent, and, as is often the case in certification motions, some of the arguments of the parties applied to more than one part of the test.

#### **C. Section 5(1)(a) of the CPA: Do the pleadings disclose a cause of action?**

18 It is acknowledged that the pleadings disclose a cause of action under s. 138.3 of the OSA, that is for the statutory claim of misrepresentation in the secondary market. The focus for the application of section 5(1)(a) and the Rule 21 motion was on the common law claims. Whether the pleadings disclose a cause of action was addressed by the parties in their facts on certification as well as separate facts filed in support of the defendants' Rule 21 motion. The issues addressed in the Rule 21 motion are relevant to s. 5(1)(a) of the CPA and accordingly are addressed in this section of the reasons.

19 In their Fresh Statement of Claim (the "Claim")<sup>5</sup>, the plaintiffs assert common law claims sounding in negligence *simpliciter*, negligent and "reckless" misrepresentation and conspiracy, against IMAX and the Individual Defendants. They also claim that IMAX is vicariously liable for the acts and omissions of the Individual Defendants.

20 In determining whether pleadings disclose a cause of action, the court is required to examine the allegations in the Claim, which are assumed to be true. The test is whether it is plain, obvious and beyond doubt that the plaintiff cannot succeed with the claim (*Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)). A cause of action which is novel may nevertheless be permitted to proceed, however the claim must "have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law" (*Silber v. DDJ High Yield Fund*, [2006] O.J. No. 2503 (Ont. S.C.J.)).

21 If there is a deficiency in the pleading, the court may grant leave to amend (*Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.)).

22 The defendants argue the following with respect to the "cause of action" issue:

1. The pleadings of negligence and negligent misrepresentation are not distinct, and the former is completely subsumed by the latter. Regardless of whether or not these claims are treated as separate causes of action, they suffer from the same fatal defect, that the defendants did not owe a duty of care to the class members, and the plaintiffs have failed to plead any basis on which the court could find a duty to exist. Such a duty is novel, would result in indeterminate liability for pure economic loss, and is inconsistent with the tests enunciated by the Supreme Court of Canada in the context of both negligence *simpliciter* and negligent misrepresentation;

2. The Claim fails to properly plead reliance by any of the plaintiffs or the class members, although reliance is an essential element of misrepresentation. Instead, the Claim invokes the "fraud on the market" theory, which has been rejected by Ontario courts;

3. The pleading of conspiracy cannot succeed since the plaintiffs assert that IMAX's directors and officers conspired with (MAX itself, despite the fact that those directors and officers constitute the very directing mind of IMAX; and

4. The Claim also fails to plead facts which support personal liability against the individual directors and officers, and similarly facts to plead a basis for imposing vicarious liability against IMAX itself.

*1. The Misrepresentation Claims*

23 The plaintiffs plead that there was a "Representation" that "Imax's revenues for the 2005 fiscal year were reported in accordance with GAAP and that such revenues met or exceeded the earnings guidance previously issued by Imax." The Plaintiffs also plead that the Representation was false and, therefore, a misrepresentation (Claim, paras. 1(y) and 2(b)).

24 Negligent misrepresentation and "reckless" misrepresentation are pleaded in paras. 67 to 75 of the Claim as follows:

67. The February Press Release, the Form 10-K, the Annual Report and the March 9, 2006 press releases were prepared, in part, for the purpose of attracting investment and with the intention that members of the investing public would rely upon the documents in making the decision to purchase Imax securities.

68. Each of the documents referred to in paragraph 67 above contained the Representation. The Representation was untrue, inaccurate and misleading.

69. Imax and the Individual Defendants knew that by making the Representation, the price of Imax's publicly-traded securities would rise and remain at artificially high levels and that investors would rely upon the Representation in making their decisions to purchase Imax shares.

70. Imax made the Representation by issuing the:

- (a) February Press Release;
- (b) Form 10-K;
- (c) Annual Report; and
- (d) March 9, 2006 press releases.

71. The Individual Defendants made the Representation by authorizing, permitting and/or acquiescing in:

- (a) the February Press Release; and
- (b) signing the Form 10-K, the Annual Report and the March 9, 2006 press releases.

72. Imax and the Individual Defendants made the Representation negligently or, alternatively, recklessly, caring not whether it was true or false, intending that Neil, Cliff and the other Class Members would rely upon it, which they did to their detriment by purchasing Imax securities during the Class Period and holding the securities beyond the Class Period.

73. Neil relied upon the Representation by reading and relying upon the documents referred to in paragraph 70 above, which contained the Representation. Cliff relied upon the Representation by reading the Form 10-K and an article published by the Globe and Mail dated February 17, 2006 which stated that, "*Imax Corp. jumped 83 cents or 9.13 per cent to 9.92. Large screen movie maker said Friday it expects to meet or beat its 2005 earnings forecast between 35 and 38 cents a share after*

*a record number of installations in the fourth quarter. In the quarter, the company completed 14 theatre installations.*" Cliff also understood and relied on the fact that in preparing its financial statements, Imax was required to follow the applicable rules of accounting, in this, GAAP.

74. Given the relationship as pleaded between Imax's financial results and its publicly-traded securities, Neil, Cliff and each other Class Member relied upon the Representation and the other misstatements alleged herein by the act of purchasing or [acquiring] Imax securities.

75. Neil, Cliff and each other Class Member suffered damages and loss, as particularized below, as a result of relying on the Representation and purchasing the Imax shares.

#### (a) Negligent Misrepresentation and The Duty of Care

25 Generally, a defendant is liable in damages for negligent misrepresentation if (a) the defendant owed a duty of care to the plaintiff based on a "special relationship"; (b) the defendant made an untrue, inaccurate or misleading representation; (c) the misrepresentation was made negligently; (d) the plaintiff reasonably relied on the misrepresentation; and (e) the plaintiff suffered damages as a result of the misrepresentation (*Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110).

26 The defendants contend that there is no proper cause of action in negligent misrepresentation in this case. They ask the court to find that the Company and the Individual Defendants did not owe a duty of care to the plaintiffs, where this would be an improper extension of the existing law of misrepresentation. Whether or not a duty of care is pleaded, the existence of a duty of care is a question of law; if it is plain and obvious that no such duty of care can be recognized, the cause of action must be struck.

27 In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), the Supreme Court of Canada held that the two part test in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) applies in the context of all negligence actions, including claims for different forms of economic loss, such as negligent misrepresentation. The first step is to determine whether a *prima facie* duty of care could be owed and the second is to consider whether that duty, if it exists, is negated or limited by policy considerations (*Hercules Management* at para. 21).

28 The defendants acknowledge for the purpose of the motion, that the first part of the *Anns* test is satisfied. They assert that the court should strike the negligent misrepresentation claims on the second part of the test, based on the policy considerations that (a) to recognize a duty of care between the Company and the Individual Defendants and the investing public would lead to indeterminate liability to an unlimited number of persons, and (b) the recognition of a statutory duty of care is unnecessary in light of the statutory remedy for secondary market misrepresentation, and may conflict with that remedy.

29 While earlier cases suggested that a full factual record would be necessary to engage in the second part of the *Anns* test, such that its determination was inappropriate in a Rule 21 motion, (see, for example, *Anger v. Berkshire Investment Group Inc.* (2001), 141 O.A.C. 301 (Ont. C.A.)), the Supreme Court in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.) had no difficulty considering the second part of the *Anns* test in the appeal of a pleadings motion. The issue to be determined at this stage in the present case accordingly is whether it is plain and obvious that there are policy reasons for refusing to recognize a duty of care between IMAX, its directors and officers and the investing public in respect of negligent misrepresentations in secondary market disclosure.

30 In *Cooper*, at issue was whether a statutory regulator (the registrar of mortgage brokers) would owe a private law duty of care to members of the investing public for negligence in failing to properly oversee the conduct of an investment company licensed by the regulator.

31 McLachlin C.J. and Major J., for a unanimous Court, noted (at para. 36) the categories in which proximity has been recognized, including liability for negligent misstatement. With respect to the second stage of the *Anns* test, they stated (at para. 37):

These [residual policy considerations] are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

32 The Supreme Court noted that the second stage of *Anns* generally arises only in cases where the duty of care asserted does not fall within an established or analogous category of recovery. Where a duty of care in a novel situation is alleged, it is necessary to consider both stages of the *Anns* test to ensure that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make the imposition of a duty of care unwise (*Cooper* at para. 37).

33 In *Cooper* the Court disposed of the issue under the first branch of the *Anns* test, but went on to conclude that policy considerations would also preclude the recognition of a duty of care by the mortgage brokers regulators, under the second branch of the test.

34 In *Haskett v. Trans Union of Canada Inc.* (2003), 63 O.R. (3d) 577 (Ont. C.A.), the plaintiff, who was the subject of an inaccurate credit report, asserted a claim of negligence against the credit agency that had prepared the report. The defendant moved successfully before the motions judge to have the action dismissed for failure to disclose a cause of action.

35 On appeal Feldman J.A. (for a unanimous court) noted that in *Cooper* (and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (S.C.C.), a decision released the same day), the Supreme Court had restricted the application of the second part of the *Anns* test to situations where a new category is asserted. The second stage would not apply where the case falls within either an established or analogous category (*Haskett* at para. 42).

36 Although she viewed the cause of action pleaded in that case as analogous to the recognized category of negligent misrepresentation, so that it was unnecessary to consider the second part of the *Anns* test, Feldman J.A. considered and weighed the policy issues that concerned the motions judge, on the basis that the circumstances could be viewed as a new category.

37 Feldman J.A. concluded that recognizing a duty of care by a credit agency to the subject of a credit report would not create the spectre of unlimited liability to an unlimited class, that the legislation did not already provide an effective alternative remedy, and that at this stage of the proceedings, the recognition of such a duty would not encroach on the law of defamation (paras. 44 to 54). The negligence claim was permitted to proceed.

38 Applying the principle in *Cooper* and *Haskett*, that the second part of the *Anns* test applies only to truly novel categories of negligence and not to "analogous" categories, it may not be necessary in the present case to engage in the second stage of the *Anns* test in considering the common law claim of misrepresentation in the secondary market as pleaded against IMAX and the Individual Defendants.

39 The claim is based on negligent misrepresentation, which is a recognized cause of action, although the plaintiffs propose to extend the claim in circumstances the defendants contend are novel. The representations in question are alleged to have been contained in press releases and the Company's Form 10-K, documents that are prepared under the Company's continuous disclosure obligations, for the purpose of informing the investing public and to put into the public domain the information that permits sellers and buyers to have equal information on which to properly trade in the securities marketplace. It is alleged that the members of the class (who are shareholders who acquired and held their shares in IMAX during a defined period) relied on the representations through their actions in purchasing their shares on an efficient market (Claim, para. 74).

40 While there are no reported cases in Ontario where a common law claim of misrepresentation in the secondary market has been considered at trial, such claims have been permitted to proceed under a Rule 21 or class proceeding certification motion in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) ("Carom [Rule 21-C.A.]"); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.) ("Mondor [Rule 21]"), *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (Ont. S.C.J.) and *McCann v CP Ships Limited* (3 June 2009) London 46098 (S.C.).<sup>6</sup> These

cases will be considered below, together with certain authorities argued by the defendants in support of their argument that the court should refuse to recognize a duty of care or special relationship between the Company and the Individual Defendants and the investing public.

41 In *Mondor* [Rule 21], the proposed representative plaintiffs brought a class proceeding against a number of defendants, including auditors and financial advisors (the "intermediaries"), for losses suffered through the purchase of shares of YBM Magnex International Inc. on the TSE. The claim, among other matters, alleged negligent misrepresentation at common law, including, as against the auditors, in respect of Bre-X's audited financial statements. The defendants moved to strike the claim on the ground that it failed to disclose a reasonable cause of action. Cumming J. applied the two stage analysis from *Hercules Managements* and refused to strike the claim against the intermediaries.

42 The defendants rely on *Menegon v. Philip Services Corp.*, [2001] O.J. No. 5547 (Ont. S.C.J.) as authority that a duty of care to the secondary market should not be recognized on the second part of the *Anns* test where it would result in the prospect of indeterminate liability, and conflict with an existing statutory remedy.

43 In *Menegon*, Gans J. dismissed a motion to certify a shareholder class action and allowed the defendants' Rule 21 motion to strike, finding that there was no cause of action by purchasers in the secondary market against underwriters and auditors for negligent misrepresentation for errors and omissions contained in a prospectus.

44 The Court held that there was no "special relationship" between the underwriters and investors in the secondary market in circumstances where the underwriters had agreed specifically to assume liability to those who purchased shares offered under the prospectus. Applying the second branch of the *Anns* test, Gans J. found that the recognition of a duty of care in the circumstances would result in the exposure of the underwriters and auditors to liability of an indeterminate amount, for an indeterminate time, in respect to, theoretically, an indeterminate class. He also held that the extension of a duty of care to purchasers of shares in the secondary market would extend liability beyond what was recognized (at that time) in the OSA, and would accordingly be inconsistent with the statutory remedy already provided.

45 *Menegon* was appealed to the Court of Appeal (reported at [2003] O.J. No. 8 (Ont. C.A.)). The appellant asserted that the respondents' duty of care should not have been ruled out at the pleadings stage on the basis of policy concerns, relying on the reasoning of Cumming J. in *Mondor* [Rule 21]. In dismissing the appeal, the Court of Appeal explained the decision in *Mondor* as follows at paras. 13 and 14:

Cumming J. noted that whether a duty of care does or does not exist is a factual enquiry and concluded that "the plaintiff has pleaded material facts in support of the claim of proximity such as to give rise to a *prima facie* duty of care." On the second branch of the test in *Anns*, Cumming J. recognized that something more had to be shown, before imposing a duty on one party to care for the purely economic interest of another, than simply foreseeability that the conduct might cause loss or damage to those interests. He was satisfied, in the case at hand, that the case was sufficiently pleaded. Among other things, he noted that it was pleaded that the defendants intended that the public would rely upon the audited financial statements when making investment decisions.

On the issue of reliance, Cumming J. referred to the American "fraud on the market theory" which "has been described as a legal fiction which has the effect of overcoming the need to prove reliance." He noted that this theory was not part of the law of Canada and that proof of reliance is a necessary ingredient of actions based upon negligent misrepresentation. He noted further that the question of whether a plaintiff has actually relied upon a misrepresentation is a question of fact that may be inferred from all the circumstances and, hence, concluded that "it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage." Consequently, Cumming J. dismissed the motion to strike the pleading.

46 The Court of Appeal concluded that the motions judge in *Menegon* had followed essentially the same analytical framework as the court in *Mondor*. The different results in the two cases were warranted by differences in the pleadings, in particular, the absence of a proper pleading of negligent misrepresentation in *Menegon* against the underwriters and auditors, as opposed to other allegations of misrepresentation against the issuer and its directors, which were not the subject of the certification and

Rule 21 motions. (In fact, certification of the action as a class proceeding as against the issuer for settlement purposes had already taken place: *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (Ont. S.C.J. [Commercial List])).

47 The present case is similar to *Mondor* [Rule 21] and can be distinguished from *Menegon*. The Claim concerns representations made as part of a reporting issuer's continuous disclosure obligations, and not, as in *Menegon*, representations intended for the primary market that were made in a prospectus. The continuous disclosure obligations of a reporting issuer are prescribed by and under the OSA, and the intended recipients of such disclosure are the investing public.

48 Section 138.3 of the OSA provides for liability of issuers, their directors and in certain circumstances their officers and intermediaries to persons who acquired or disposed of an issuer's securities between the time a material misrepresentation in secondary market disclosure was made and its correction. While there is a specific statutory remedy, s. 138.13 of the OSA provides that the statutory right of action for damages and the defences to an action "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."

49 There is no inconsistency or conflict between the pursuit of a statutory remedy for secondary market misrepresentation that imposes liability without proof of reliance but subject to a damages cap and other limitations, and a claim alleging a common law duty of care for negligent misrepresentation arising out of the same circumstances, where reliance is an element of the tort. The public policy concern of conflict with an existing statutory regime or remedy does not arise in this case.

50 Concerns about potential indeterminate liability are also not obvious at the pleadings stage of this case. In both *Mondor* and *Menegon* the plaintiffs were suing intermediaries. It is such claims that typically raise the prospect of indeterminate liability to an indeterminate class of persons. In *Hercules Managements*, the Court found that the purpose of an auditor's report was typically to assist the collectivity of shareholders in overseeing management. Any duty of care was owed to the corporation, and not to individual shareholders. The Court refused to extend a duty of care to individual shareholders in respect of their investment decisions (at para. 54) as this would raise the spectre of indeterminate liability. The Court specifically anticipated however that a duty to shareholders in their individual capacity in respect of their investment decisions could arise in circumstances where an auditor knowingly provided to shareholders a negligent report for a specified purpose (at para. 63).

51 In the present case the allegation is that the issuer and the Individual Defendants made the Representation to the investing public with the intention that it would be relied upon to make decisions to purchase IMAX securities. That is, the plaintiffs allege that the intended recipients of the documents containing the Representation, were in fact the investing public, which would include the plaintiffs and the class members.

52 The defendants relied on two other cases that are not directly applicable. In *Alvi v. Misir* (2004), 73 O.R. (3d) 566 (Ont. S.C.J. [Commercial List]), claims by shareholders against certain directors of a corporation were based on fiduciary and statutory duties owed to the corporation. This was not a case involving allegations of misrepresentation; rather the shareholders alleged that certain decisions of the directors on behalf of the corporation had devalued their shares. The Court concluded that the claims were derivative (that is a claim of the corporation that could only be pursued by a shareholder or other party with leave under the applicable corporations statute).

53 In *NPV Management Ltd. v. Anthony*, 2003 NLCA 41 (N.L. C.A.), the Newfoundland Court of Appeal reversed the decision of a motions judge and struck a number of claims against individual directors of a corporation, Compak. Again, the principal reason for striking the claims was that they were derivative and involved harm to the corporation as a result of alleged breaches of fiduciary and other duties owed by the directors to the corporation. With respect to an alleged personal claim (that NPV had purchased more shares in Compak in reliance on certain representations by its directors) the Court of Appeal held that there was a prospect of indeterminate liability, where the statements had been made to the public at large, presumably pursuant to continuous disclosure obligations. The Court noted (at para. 57) that the statement of claim had not alleged that the representations were made for the purpose of providing information on which personal investment decisions could be made. The absence of such a pleading was fatal (para. 61).

54 In the present case there is no question of a derivative claim. The allegations in the Claim are with respect to duties alleged to have been owed by the Company and the Individual Defendants directly to the investing public. In contrast to the pleading in *NPV Management*, the Claim specifically alleges at para. 67 that the IMAX press releases, the Form 10-K and the Annual Report "were prepared in part for the purpose of attracting investment and with the intention that members of the investing public would rely upon the documents in making the decision to purchase IMAX securities".

55 I am not satisfied that it is plain and obvious that the claim of negligent misrepresentation against IMAX and the Individual Defendants would fail to meet the second part of the *Anns* test. Again, the defendants do not argue that there is no duty of care under the first stage of the test; rather they assert that there are policy reasons for not recognizing a duty of care by the Company and its directors with respect to a misrepresentation to the secondary market. In my view, it is not plain and obvious that the policy reasons asserted by the defendants should preclude the common law claims of misrepresentation in the secondary market from being pursued at this stage in the litigation.

#### **(b) Reliance as an Element of Misrepresentation**

56 The Claim pleads individual reliance on the Representation by the representative plaintiffs Silver and Cohen, in the case of Silver by reading and relying upon the Form 10-K and press releases and in the case of Cohen by reading the 10-K and a newspaper article (at para. 73). There is no allegation that other class members individually relied upon the alleged misrepresentations after reading documents in which they were contained. The Claim pleads however that Silver, Cohen and each other class member relied upon the Representation and the other misstatements "by the act of purchasing or [acquiring] IMAX securities" (at para. 74).

57 The defendants assert that the failure to plead individual and direct reliance by each of the plaintiffs is fatal to the claims of misrepresentation. The plaintiffs submit that they have properly pleaded reliance by each class member through the act of purchasing or acquiring IMAX securities, and that paras. 57 to 62 of the Claim are a pleading of the "efficient market theory", which has been accepted as a sufficient pleading of reliance in securities cases alleging misrepresentation to the investing public.

58 The defendants assert that the "efficient market" theory as pleaded by the plaintiffs is the same as the fraud on the market theory which was rejected by Winkler J. in *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (Ont. Gen. Div.) "*Carom [Motion to Amend]*" and in subsequent cases.

59 Paras. 57 to 62 and 74 of the Claim are as follows:

57. The price of Imax's publicly-traded securities was directly affected by the periodic disclosures regarding Imax's financial results. Imax and the individual Defendants were at all material times aware of the effect of Imax's disclosures about its financial results upon the price of its publicly-traded securities.

58. The February Press Release, the Form 10-K, the Annual Report, the March 9, 2006 press releases, each of which contained the Representation, were filed with SEDAR, the TSX and the NASDAQ and thereby became immediately available to, were reproduced for inspection by and were used by the Class Members, the public, financial analysts and the financial press through the internet and financial publications.

59. Imax and the Individual Defendants routinely transmitted the documents referred to above to the financial press, financial analysts and certain prospective and actual holders of the Imax securities.

60. Imax and the Individual Defendants regularly communicated with the public investors and financial analysts via established market-communication mechanisms, including through regular dissemination of press releases on newswire services in Canada and the United States. The price of Imax's publicly-traded securities were directly affected each time Imax and the Individual Defendants communicated new, material information about its financial results to the public.

61. Imax was the subject of analysts' reports that incorporated the material financial information in the documents referred to above, with the effect that any recommendation in such reports during the Class Period were based, in whole or in part, upon material over-statements of Imax's financial results.

62. Imax's securities were traded on the TSX and NASDAQ, which are efficient and automated markets. The price at which Imax securities traded on the TSX and NASDAQ incorporated material information about Imax's financial results which was disseminated to the public through the documents referred to above, distributed by Imax and the Individual Defendants as well as by other means.

.....  
74. Given the relationship as pleaded between Imax's financial results and its publicly-traded securities, Neil, Cliff and each other Class Member relied upon the Representation and the other misstatements alleged herein by the act of purchasing or [acquiring] Imax securities.

60 In *Carom [Motion to Amend]*, Winkler J. dismissed a motion by the plaintiffs, shareholders in Bre-X Minerals Ltd. ("Bre-X"), seeking to amend their statements of claim in seven intended class proceedings to add the "fraud on the market" theory from American law to their claims. The causes of action were framed in negligence, negligent and fraudulent misrepresentation, conspiracy, breach of fiduciary duty, and breach of the *Competition Act*

61 Winkler J. described the fraud on the market theory as creating a rebuttable presumption of reliance on certain misrepresentations, thus obviating the need to prove such reliance on an individual basis. Reliance is presumed when there is proof that the market price of the shares under consideration reflected the pleaded misrepresentations (at pp. 785-786). Winkler J. extensively reviewed the development of the fraud on the market theory in U.S. jurisprudence, and found that the conditions for recognizing such a theory in certain U.S. cases (procedural restrictions of limitations and the class action certification test requiring a "predominance of common issues") did not apply in Ontario.

62 Winkler J. held (at p. 790) that it is settled law in Canada that actual reliance is essential to a common law cause of action in fraudulent or negligent misrepresentation (citing *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), at 316; *Queen v. Cognos Inc.*, at 110 and *Hercules Managements* at para. 18). He noted (at p. 792) that the fraud on the market theory was rejected by the British Columbia Supreme Court in *Kripps v. Touche Ross & Co.* (1990), 52 B.C.L.R. (2d) 291 (B.C. S.C. [In Chambers]), at 307 (although the Court of Appeal left the issue open at (1992), 69 B.C.L.R. (2d) 62 (B.C. C.A.)), and that the common law provides no examples of the application of the fraud on the market theory in Canadian law.

63 *Carom [Motion to Amend]* was followed in *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (Ont. S.C.J.), striking out a claim for negligent misrepresentation in a prospectus where the plaintiff had not pleaded reliance on any public document issued by the defendants, and in *Deep v. M.D. Management*, [2007] O.J. No. 2392 (Ont. S.C.J.), aff'd [2008] O.J. No. 961 (Ont. C.A.) where the Court dismissed a misrepresentation claim by a Nortel shareholder where reliance on the alleged statements had not been pleaded.

64 *Carom* was also followed in *Mondor [Rule 21]*. In that case, Cumming J. held in *obiter* that the fraud on the market theory is not recognized under Canadian securities law, and that actual reliance is a necessary component under Canadian law concerning negligent and fraudulent misrepresentation.

65 In *Mondor [Rule 21]*, however, Gumming J. permitted the claims for negligent and fraudulent misrepresentation to proceed, notwithstanding the defendants' argument that individual reliance could not be proven. He referred to case law to the effect that whether or not a person relied on a misrepresentation may be inferred from all the circumstances (*NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.) and *Kripps v. Touche Ross & Co.* (C.A.)), and noted at para. 68:

The plaintiffs claim that if one were to assume for the purposes of this motion that the market price of YBM shares, from time to time, reflected the "Representation", it is open to a trial judge to infer that as a question of fact a putative class member relied on the "Representation" made by Parente, Deloitte and others when a class member purchased YBM shares in the secondary market.

66 Cumming J. concluded that it would be premature to foreclose the consideration of this issue at the pleadings stage. While rejecting the "deemed reliance" approach of the fraud on the market theory, Cumming J. permitted the claim to proceed. It would be open to the plaintiffs to attempt at trial to establish reliance by class members as a fact by reference to the efficient market theory. Later, when certifying the class for settlement in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002] O.J. No. 1855 (Ont. S.C.J.), at para. 22 ("Mondor [Settlement]"), Cumming J. noted, as part of his analysis in approving the certification and proposed settlement, that there was uncertainty whether reliance could be established "by the simple act of purchase of the shares or whether each shareholder would have to establish individually that he or she relied upon a misrepresentation".

67 In *Lawrence v. Atlas Cold Storage Holdings Inc.* [2006 CarswellOnt 5716 (Ont. S.C.J.)], Hoy J. permitted an "efficient market" misrepresentation claim to proceed in a pleadings motion in a proposed class proceeding. The action was based on allegations of misrepresentation in prospectuses under which units of Atlas Cold Storage Income Trust were sold to the public and in financial statements and a press release.

68 Hoy J. noted that the plaintiffs did not specifically plead that they received, read or relied on any of the prospectuses, the financial statements or a related press release. Instead, they pleaded that each class member relied on certain reports, opinions and statements by their conduct in purchasing units. These allegations were supplemented by various particulars in support of a direct factual inference of reliance.

69 Relying on Cumming J.'s analysis in *Mondor [Rule 21]*, Hoy J. concluded that whether or not a plaintiff has reasonably relied on a misrepresentation is a question of fact. The pleading that units were purchased and the plaintiffs' position that they would prove reliance by satisfying the trial judge that in all of the circumstances actual reliance on the alleged misrepresentation should be inferred, were sufficient to save the reliance-based claims.

70 In the present case, following the decisions of Cumming J. in *Mondor [Rule 21]* and Hoy J. in *Lawrence*, I find that the Claim discloses a cause of action in negligent misrepresentation against the Company and the Individual Defendants, notwithstanding the absence of a pleading of direct individual reliance by each class member. As Wilson J. stated in *Hunt v. T & N plc* at pp. 990-991:

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

71 I do not find it necessary to consider in detail the plaintiffs' alternative argument that negligent misrepresentation may be made out without proof of reliance where the plaintiff can prove that the defendants' conduct caused the plaintiff damages by some means other than reliance.

72 The plaintiffs rely on a number of cases, beginning with a statement of McLachlin J. (as a trial judge) in *Yorkshire Trust Co. v. Empire Acceptance Corp.* (1986), 24 D.L.R. (4th) 140 (B.C. S.C.), at p. 147:

It is my view that in the appropriate case, where proximity and the necessary causal connection between the negligence and the loss can be established apart from reliance, recovery may be had for a negligent statement without reliance whether on the basis of simple negligence or an extension of the doctrine propounded by *Hedley Byrne*.

73 Other cases where claims were permitted to proceed without the element of reliance involving what might be characterized as a negligent misstatement, are more properly examples of negligence and not negligent misrepresentation claims: In *Spring v. Guardian Assurance plc*, [1994] 3 All E.R. 129 (U.K. H.L.) and *Haskett*, the courts recognized that a duty of care could be owed by the defendants to the subjects of inaccurate reference letters and credit checks, notwithstanding that the statements contained in the documents were intended for other audiences and not to be relied upon by the plaintiffs. In *Lowe v. Guarantee Co. of*

*North America* (2005), 80 O.R. (3d) 222 (Ont. C.A.) the court recognized a duty of care owed by health care professionals in a designated assessment centre to the subject of an evaluation. In *Collette v. Great Pacific Management Co.*, 2004 BCCA 110 (B.C. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 174 (S.C.C.), the B.C. Court of Appeal held that reliance was not a necessary element in establishing a duty of care of financial advisers/investment brokers in respect of the plaintiffs' investments, where the tort alleged was a breach of duty in undertaking due diligence before offering the units for sale, and ultimately the claims in negligence (and not negligent misrepresentation) were certified.

74 Rady J. followed this line of cases in permitting claims of negligent misrepresentation and negligence to proceed in her certification decision in *McCann*, also involving common law claims for misrepresentation in the secondary market following a restatement of the defendant corporation's financial results. Rady J. held that it was not plain and obvious that the plaintiff had to plead reliance in order to advance a claim in negligent misrepresentation. She adopted the same approach as Rooke J. adopted in *Eaton v. HMS Financial Inc.*, 2008 ABQB 631 (Alta. Q.B.), where he held that a trial on the common issues would be necessary to determine whether, and to what extent, individual reliance would need to be proven.

75 While I do not find the cases relied on by the plaintiffs persuasive as to the ability of a court to find liability for negligent misrepresentation without proof of reliance in light of the repeated statements by our courts (including the Supreme Court of Canada in *Queen v. Cognos Inc.*) that reliance is an essential element of negligent misrepresentation, it is unnecessary to specifically rule on this issue at this stage in the proceedings. For the purpose of certification, the question is whether the Claim discloses a cause of action in negligent misrepresentation. I have concluded that it does disclose such a cause of action, notwithstanding the absence of a pleading of direct individual reliance by each class member. In the event that the plaintiffs are unable to prove reliance, it will remain open for them to argue at trial that reliance is not required.

### (c) "Reckless" Misrepresentation

76 Liability for fraudulent misrepresentation requires that (a) the defendant made the misrepresentation knowing that it was false, or recklessly, caring not whether it was true or false, (b) the defendant intended the plaintiff, or a class of persons including the plaintiff, to rely upon the misrepresentation, (c) the plaintiff and the other class members relied upon the representation to their detriment, suffering loss or damage (*Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 1428 (Ont. Gen. Div.) ("Carom [Rule 21-Gen. Div.]") at paras. 24-25 and *Mondor*[Rule 21] at para. 33).

77 The Claim pleads all of the required elements for fraudulent misrepresentation. Although the plaintiffs assert a claim for "reckless" misrepresentation, it is in substance a pleading of fraudulent misrepresentation, alleging the second branch of the knowledge element, that the defendants made the misrepresentation recklessly, not caring whether it was true or false.

78 In *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.), the Divisional Court concluded that the motions judge had erred in dismissing a claim for reckless misrepresentation (which was in substance a claim of fraudulent misrepresentation) on the grounds that the claim was bald, the plaintiff had failed to plead fraud with particularity, and where negligent and reckless misrepresentation were pleaded disjunctively on the same allegations of fact. The Court concluded that, given the low threshold to sustain a pleading at this stage, the motions judge erred in striking the claim for reckless misrepresentation (at para. 23). In *Mondor* [Rule 21] at para. 70, Cumming J. considered a claim of "reckless misrepresentation" to be tantamount to fraudulent misrepresentation, and permitted that claim to proceed. Rady J. adopted the same approach in *McCann* (at para. 43).

79 The concern as to indeterminate liability expressed in *Hercules Managements* has no application to a claim of fraudulent misrepresentation. If the defendants acted recklessly in making the Representation, with the intention that class members rely upon it, there is no policy reason to limit liability (*Mondor* [Rule 21], at para. 70; *Hercules Managements*, at paras. 40-41).

80 Accordingly, the Claim discloses a cause of action which is properly pleaded in fraudulent misrepresentation.

### 2. Negligence simpliciter

81 Negligence is pleaded in paras. 63 to 66 of the Claim as follows:

63. Imax and the Individual Defendants owed a duty to Neil, Cliff and the Class Members, at law and under the provisions of the *Securities Act*, to disseminate promptly, or to ensure the prompt dissemination of complete and accurate statements regarding Imax's business and affairs, and promptly to correct previously-issued, materially inaccurate information, to permit, Imax's publicly-traded securities to trade upon complete and accurate information.

64. The reasonable standard of care expected in the circumstances required Imax and the Individual Defendants to act fairly, reasonably, honestly, and candidly in fulfilling the duty described in paragraph 63.

65. Imax and the Individual Defendants failed to meet the standard of care required for the reasons particularized in the following paragraphs.

66. Imax and the Individual Defendants were negligent in that:

- (a) they failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances as required by law;
- (b) they signed the Form 10-K and the Annual Report when they knew or reasonably ought to have known that the documents contained the Representation which was false;
- (c) they authorized statements, announcements, press releases, filings and other public documents containing the Representation;
- (d) they failed to maintain appropriate internal policies, controls and procedures to ensure that the financial statements adequately and fairly presented the financial position of Imax;
- (e) they knew or ought to have known that the 2005 reported revenue, gross earnings, net earnings, retained earnings and earnings per share of Imax were not fairly stated;
- (f) they failed to properly consider all available information and reports respecting the revenue and net earnings of Imax; and
- (g) they failed to comply with the principles of GAAP, including the following:
  - (i) interim financial reporting should be based upon the same accounting principles and practices used to prepare annual financial statements;
  - (ii) financial reporting should provide information that is useful to present to potential investors and creditors and other users in making rational investment, credit, and similar decisions;
  - (iii) financial reporting should provide information about the economic resources of an enterprise, the claims to those resources, and effects of transactions, events, and circumstances that change resources and claims to those resources;
  - (iv) financial reporting should provide information about an enterprise's financial performance during a period;
  - (v) completeness, meaning that relevant information necessary to ensure the fair presentation of underlying events and conditions is provided;
  - (vi) consistency in the application of financial accounting and reporting policies;
  - (vii) financial reporting should be reliable in that it represents what it purports to represent; and

(viii) conservatism be used as a prudent reaction to uncertainty to try to ensure that uncertainties and risks inherent in business situations are adequately considered.

82 The defendants contend that there is no proper cause of action for negligence based on the pleadings in the Claim. The allegations of negligence are in relation to the same alleged disclosure of false information that underlies the misrepresentation claims. The pleading cannot proceed as a claim of negligence, as that would avoid the requirement in a negligent misrepresentation claim to prove reliance.

83 In *Deep*, D. Brown J. struck out pleadings of negligent misrepresentation and negligence by the plaintiff, a Nortel shareholder, for damages for losses sustained in his registered retirement investment plan resulting from the decline in the price of Nortel stock. Allegations in the statement of claim had already been struck, with leave to amend, and the Divisional Court had provided specific direction as to the pleading of misrepresentation and the need to assert reliance (*Deep v. M.D. Management*, [2006] O.J. No. 221 (Ont. Div. Ct.)). The claim was amended and expanded, and the Nortel defendants moved again to strike the pleading.

84 The negligence pleading was that the Nortel defendants owed a duty of care based on a special relationship between the parties - "they stood in a special relationship of proximity between the purchaser and holders of Nortel securities". The duty of care was "to accurately represent Nortel's financial situation and disclose any material changes promptly and truthfully". The alleged nature of the breach of this duty was twofold: (i) misrepresentation of Nortel's situation by the non-disclosure of facts and (ii) misrepresentations "by way of lack of disclosure in the second and third quarter and statements which were forward looking or projections were made for the specific purpose of inducing shareholders and investors to purchase shares, hold their shares and/or acquire more shares". The amended claim also relied in support of the negligence claim on the obligation imposed by s. 75(1) of the OSA on a reporting issuer to report material changes.

85 D. Brown J. struck the pleading of negligent misrepresentation, based on the failure of the plaintiff once again to plead reliance. He also struck the claim of negligence, finding that such pleading was in fact an alternative pleading of the same cause of action, negligent misrepresentation.

86 In *McCann*, Rady J. permitted claims of negligence and negligent misrepresentation to proceed notwithstanding that there was overlap in the pleadings. In that case, she found that a duty of care had been pleaded that was distinct from the duty to provide accurate information (that the defendants failed to properly integrate CP Ships' disparate lines and failed to acquire and use appropriate information technology). Rady J. would also have permitted the negligence claim to proceed in any event, as a novel claim.

87 In the present case I find that the pleadings of negligence are in substance a pleading of negligent misrepresentation. The duty of care is framed as a duty at law and under the OSA owed by IMAX and the Individual Defendants to the plaintiffs and class members to "disseminate promptly, or to ensure the prompt dissemination of complete and accurate statements regarding IMAX's business and affairs, and promptly to correct previously issued, materially inaccurate information, to permit IMAX's publicly-traded shares to trade upon complete and accurate information" (para. 63). The standard of care is pleaded as requiring IMAX and the Individual Defendants "to act fairly, reasonably, honestly, and candidly" in fulfilling the aforesaid duty. While some of the seven particulars of negligence pleaded in para. 66 appear to cast the net more broadly beyond negligent misrepresentation (for example, the pleading of a failure to maintain appropriate internal policies and procedures to ensure that the financial statements adequately and fairly presented the financial position of IMAX), they nevertheless are pleaded as particulars of the breach of duty of care to disseminate accurate information to the securities market.

88 The negligence pleading in this case is in substance a pleading of negligent misrepresentation without the ingredient of reliance. There is also no pleading that the alleged negligence caused damage to the plaintiffs and no separate claim for a remedy based on negligence. Accordingly, the claims sounding in negligence *simpliciter* (paras. 63 to 66 of the Claim) will not be permitted to proceed and the Claim shall be amended accordingly.

### 3. Conspiracy

89 Conspiracy is pleaded in paras. 52 to 56 of the Claim as follows:

52. From on or about October 1, 2005 to on or about August 9, 2006, at Mississauga, Ontario, New York, New York and elsewhere Imax, Gelfond, Wechsler and Joyce, wrongfully, unlawfully, maliciously and lacking bona fides, agreed together, the one with the other and with persons unknown, to, among other things, overstate the revenues and net earnings of Imax for the fourth quarter and fiscal year ending on December 31, 2005.

53. Some, but not all of Imax's, Gelfond's, Wechsler's and Joyce's predominant purposes, concerns and motivation were to:

- (a) injure the plaintiffs and the Class Members by causing them to purchase Imax shares at inflated prices;
- (b) attract an acquirer or merger partner;
- (c) inflate the price of Imax's shares;
- (d) obtain an artificially high purchase price for Imax; and
- (e) increase the value of their own holdings in Imax.

54. In furtherance of the conspiracy, the following are some, but not all of the acts carried out or caused to be carried out by Imax, Gelfond, Wechsler and Joyce, or some of them:

- (a) they recognized revenue in the fourth quarter of 2005 on ten theatre systems even though sufficient and appropriate evidence did not exist that such systems had been substantially installed as operational Imax facilities, that Imax had fulfilled its obligations as vendor or that revenues had been "earned" in accordance with GAAP;
- (b) they inappropriately implemented revenue recognition procedures that allowed Imax to segregate revenues from different elements of an Imax theatre system, and recognize those revenues in different quarters, even though the customer transactions were not suited to such accounting treatment;
- (c) they deviated from GAAP in the preparation of the financial statements;
- (d) they deviated from the accounting principle of consistency in the preparation of financial statements;
- (e) they authorized statements, announcements, press releases, filings and other public documents containing the Representation;
- (f) they engaged in a pattern of categorizing Imax theatre systems as being installed in circumstances when the location was not fit for installation;
- (g) they engaged in a pattern of categorizing Imax theatre systems as being installed in circumstances when essential components of the Imax system were absent;
- (h) they permitted Imax and the Individual Defendants to make the Representation which was false;
- (i) they made, or failed to take any steps to prevent Imax from making the Representation in statements, announcements, press releases, filings and other public documents;
- (j) they made, or caused Imax to make, announcements about its revenue and net earnings when they knew there was no reasonable foundation, in fact, for these net earnings;
- (k) they falsely stated that Imax had revenue of US\$49,310,000 for the fourth quarter of the fiscal year ended 2005;
- (l) they falsely stated that Imax had revenue of US\$144,930,000 for the fiscal year ended 2005;

- (m) they prepared and issued the February Press Release falsely stating that it expected to meet or exceed 2005 earnings guidance;
- (n) they prepared and issued the Form 10-K and the Annual Report falsely stating that Imax's revenue was US \$49,310,000 for the fourth quarter of fiscal 2005; and
- (o) they prepared and issued the Form 10-K and the Annual Report falsely stating that Imax's net earning was US \$0.29 per share for the fourth quarter of fiscal 2005 and US\$0.40 per share for the fiscal year 2005.

55. The conspiracy was unlawful because Imax, Gelfond, Wechsler and Joyce knowingly and intentionally overstated the revenue and net earnings of Imax and in doing so violated ss. 77(1) and 78(1) of the *Securities Act* and similar regulatory legislation in other jurisdictions, including ss. 12, 13 and 18 of the [*U.S. Securities Exchange Act of 1934*], and the reporting requirements of the NASDAQ and the TSX including Part IV(F) of the TSX Company Manual and Rule 4-201 of the TSX Rule Book.

56. The conspiracy was directed towards Neil, Cliff and the other Class Members. Imax, Gelfond, Wechsler and Joyce knew in the circumstances that the conspiracy would, and it did, cause loss to Neil, Cliff and the Class Members.

90 In *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), at p. 98, Finlayson J.A. for the Court of Appeal described the requirements for pleading the tort of conspiracy (citing *Bullen & Leake and Jacob's Precedents of Pleadings*<sup>7</sup>) as follows:

[T]he statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

91 The defendants' principal objection with respect to the pleading of conspiracy<sup>8</sup> is that the conspiracy is alleged to have occurred between IMAX and the Individual Defendants, each of which is identified as a director and/or officer at the time. It is impossible for a person (in this case the Company) to conspire with itself. See *Accord Business Credit Inc. v. Bank of Nova Scotia*, [1997] O.J. No. 2562 (Ont. Gen. Div.), at para. 34, where Cumming J. noted:

When an officer is acting within the scope of his authority in the best interests of the corporation such that the actions complained of are the actions of the corporation itself and not the actions of the officer, then it is not logical to say that there can be a civil conspiracy between the officer and his corporation.

92 The plaintiffs contend that the conspiracy allegations in the Claim are against IMAX and the Individual Defendants acting in an independently tortious manner; that is, for which they would be held personally liable. In *Normart Management* at p. 102, Finlayson J.A. set out the test for civil liability of directing minds as follows:

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds.

93 An action may proceed against employees and officers of a corporation, for acts and omissions which occurred in the course of their employment, if the conduct alleged amounts to "fraud, deceit, dishonesty or want of authority on the part of [the] employees or officers.": *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.), at para. 25.

94 In the present case, while the plaintiffs have alleged that the acts or omissions alleged in the Claim were authorized, ordered and done by the Individual Defendants while engaged in the management, direction, control and transaction of its business affairs and are therefore acts and omissions for which IMAX is vicariously liable (paras. 85 and 86), the plaintiffs have also alleged that the actions of the Individual Defendants are independently tortious and that such defendants are personally liable (para. 87).

95 The allegations against the Individual Defendants in the Claim include the assertion that they were acting "wrongfully, unlawfully, maliciously and lacking bona fides" (para. 52) and that they were motivated to increase the value of their own holdings in IMAX (para. 53(e)).

96 The Claim pleads all of the necessary elements of the cause of action of conspiracy. There are allegations in the Claim that may, if true, give rise to personal liability on the part of the Individual Defendants. Their conduct is at issue both as agents for the Corporation and in their personal capacities. It is not therefore plain and obvious that the conspiracy claim is deficient, and accordingly such claim will not be struck.

#### *4. Vicarious Liability*

97 In paragraphs 85 and 86 of the Claim, the plaintiffs plead that IMAX is vicariously liable for the acts and omissions of the Individual Defendants, that were authorized, ordered and done by the Individual Defendants and IMAX's other agents, employees and representatives while engaged in the management, direction, control and transaction of its business affairs. This pleading, when read within the Claim as a whole, is a sufficient pleading of vicarious liability, and accordingly such claim will not be struck.

### **D. Section 5(1)(b) of the CPA: Is there an identifiable class represented by the representative plaintiffs?**

#### *1. The Proposed Class Definition*

98 The plaintiffs propose the following worldwide class definition:

"Class" or "Class Members" means all persons, other than Excluded Persons, who acquired securities of Imax during the Class Period on the TSX and on NASDAQ and held some or all of those securities at the close of trading on August 9, 2006.

"Class Period" is defined in the Claim as "the period from and including the opening of trading on the TSX and NASDAQ on February 17, 2006 to and including the close of trading on the TSX and NASDAQ on August 9, 2006".

#### *2. The "Identifiable Class" Requirement*

99 Class definition "identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment." The definition should state objective criteria by which members of the class can be identified and should not depend on the outcome of the litigation (*Western Canadian Shopping Centres* at para. 38).

100 A class may be identifiable even if the identities of all of the prospective members are unknown to the representative plaintiffs. Indeed, s. 6 of the CPA provides that the court shall not refuse to certify a proceeding as a class proceeding solely on the ground that "the number of class members or the identity of each class member is not known".

101 Section 5(3) of the CPA requires each party to provide by affidavit its best information on the number of members in the class. I was unable to find any such statements in the affidavit materials filed in this case. The identity of IMAX shareholders as at specific dates may be ascertained from the Company's records, recognizing that shares may be held by brokers or other intermediaries.<sup>9</sup>

102 There is no question that the proposed class meets the requirement for an identifiable class under s. 5(1)(b). The proposed class members are identified by objective and readily verifiable criteria; that is, that they purchased on the TSX and on NASDAQ and held IMAX shares during the Class Period.

*3. Is the proposed class over-inclusive as including claims of persons who may have no claims?*

103 The defendants assert that the proposed class is over-inclusive because the class as proposed, of all shareholders of IMAX who acquired and held their shares during the Class Period, may include persons who have no claim because they may not have known of or relied upon the alleged misrepresentation or they may not have suffered damages as a result.

104 The defendants rely on *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.). In that case, Winkler J. refused to certify a proposed class consisting of all students who had attended the defendant's college within a period of six years in part because it would include people who had no claim against the defendant as they had not received or relied upon the alleged misrepresentations that formed the basis of the action. Underlying the court's decision however was the fact that there were numerous alleged representations published in a variety of different television commercials and newspaper advertisements, and communicated verbally by admissions officers during the six year period. The nature of the representations and whether they were made negligently or fraudulently would vary with the individual students' programs and the conditions existing at each campus. As such, there were no common issues respecting misrepresentation.

105 In this case, by contrast, the core of the common law misrepresentation claim is that a single misrepresentation (the "Representation") was made by the Defendants (albeit through four communications) that affected the market price of all IMAX securities during the Class Period, and that in all of the circumstances, reliance by all class members should be inferred as a question of fact. This is not a case where multiple misrepresentations in varied circumstances are alleged. There is clearly a commonality of interests between the class members in this case, that is shared by the proposed representative plaintiffs.

106 In any event, a proposed class will not be overbroad simply because it may include persons who ultimately will not have a claim against the defendants (*Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.), at paras. 10-11; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.), at para. 22, leave to appeal to the Divisional Court refused (Ont. Div. Ct.)).

107 The submission by the defendants in this case that the class is overbroad because some of the class members may not have claims depends on their contention that there will be individual issues (such as reliance and damages) to be decided after the common issues have been determined. While the plaintiffs assert that reliance (based on the efficient market theory) and damages (contending that an aggregate assessment will be appropriate) will not be individual issues in this case, even if they are wrong and individual issues remain after the determination of the common issues, this is not an impediment to certification. As Cullity J. noted in *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), at para. 69, "whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant's liability, it will always be possible - and invariably likely - that an acceptable class will include persons who will not have valid claims".

*4. Certification of a Global Class*

108 The principal challenge by the defendants to the proposed class definition is that it is overbroad because it includes non-residents of Canada, the resolution of whose claims may depend on the application of the laws of other jurisdictions. The question of whether a global class should be certified raises issues of the jurisdiction that may be exercised by an Ontario court over nonresident class members, and whether, as a matter of discretion, such jurisdiction should be exercised by certifying a global class. The defendants argued the question as part of the "preferable procedure" analysis<sup>10</sup>, and indeed the discussion that follows addresses the considerations relevant to both ss. 5(1)(a) and (d) of the CPA. For convenience, the issue of whether a global class can and should be certified will be addressed at this point in these reasons.

**(a) Positions of the Parties**

109 The plaintiffs assert that the Ontario court has clear jurisdiction over the subject matter of the litigation. IMAX is a Canadian corporation with its registered office in Mississauga. The alleged misconduct relates to the accuracy of the Company's financial statements which were prepared and audited in Ontario. The claims of all class members are related to claims that are properly asserted by the representative plaintiffs in Ontario. The class proceedings objectives of judicial economy, access to justice and behaviour modification would best be met by certifying a class defined to include all persons, including non-residents, who acquired IMAX securities on the TSX and NASDAQ and held such securities during the class period.

110 The defendants, while acknowledging the authority of the court to certify a class with non-resident members, submit that it would be wrong to certify a global class in the present case. According to IMAX's records as of February 14, 2005, there were 39,511,959 shares outstanding. Approximately 10-15% of the shareholders were Canadian residents, with the balance of outstanding common shares held by American or other non-Canadian residents.<sup>11</sup> From this, the defendants infer that the proposed global class would contain a similar percentage of non-Canadian resident shareholders. The defendants suggest that it would be extraordinary for the court to recognize a class where most members are from outside the jurisdiction.

111 The defendants propose that if a class is certified, it should consist of TSX purchasers of IMAX shares resident in Canada, and that it would be premature to certify a worldwide class, particularly where there is an existing proceeding in the U.S. They argue that it would be better to certify the Canadian class only, with leave to the plaintiffs to return to the court, depending on what may occur in the U.S. Proceedings (presumably if the U.S. court refuses certification).

112 The final argument of the defendants in opposition to the certification of a global class is based on anticipated conflict of laws concerns. A worldwide class would include class members who individually would have received and relied upon the misrepresentation, and suffered the consequences of the misrepresentation, in places other than Ontario. Their claims may be subject to the laws of various jurisdictions, adding complexity to the proceedings. As a result, a class proceeding including U.S. residents would not be the "preferable procedure".

113 The position taken by the defendants in this motion with respect to certification of a global class contradicts their arguments made in opposition to certification in the U.S. Proceedings.<sup>12</sup> (IMAX's brief and other documents in the U.S. Proceedings were filed on consent in these proceedings, and were the subject of argument in April 2009).

114 Relying on the fact that IMAX is a Canadian corporation organized under the laws of Canada with its principal place of business in Canada, IMAX asserted in the U.S. Proceedings that the Ontario court would have jurisdiction over the claims of a global class, and that the connection between the dispute and this jurisdiction is at least as strong as the connection between the dispute and the United States.<sup>13</sup> IMAX argued that it would be preferable to litigate the issues in dispute in the pending Ontario proceedings. IMAX asserted, "only the Canadian court is in a position to grant full relief to all purchasers of IMAX stock", implying that the statutory claim under the OSA, which does not require proof of reliance, would be available to all class members.<sup>14</sup>

115 IMAX appended to its argument against certification in the U.S. Proceedings the expert report of Professor Poonam Puri, of Osgoode Hall Law School<sup>15</sup>, that addressed among other things, the inherent authority of the Ontario court to certify a global class, and cited examples of cases where Ontario courts had exercised such jurisdiction to certify class actions comprising international class members. Professor Puri's report also detailed the statutory claim available to plaintiffs under the OSA, without discussion of whether the remedy would be available to class members resident outside Ontario or those who had purchased their shares on NASDAQ.<sup>16</sup>

116 While the contradiction in the positions taken by IMAX in responding to the certification motions in the two jurisdictions is not determinative of whether this court should certify a global class in these proceedings, it is nonetheless revealing. If IMAX is successful in the position it has taken in the U.S. Proceedings, the U.S. court may decide not to certify a global class or may decline certification altogether on the basis that a more effective remedy is available to the class in the Ontario proceedings. The inconsistency in the defendants' submissions in the two jurisdictions suggests that their opposition to certification of a global

class in Ontario is not in fact based on *bona fide* concerns about the appropriateness of this court determining the claims of non-residents. Rather, their objective appears to be to limit the size of the class and so reduce their potential liability for damages.

### (b) The Court's Authority to Certify National and international Classes

117 When national or international classes are proposed in class actions, the certifying court must consider whether it has jurisdiction *simpliciter* and whether it would be appropriate to assume jurisdiction over the claims of class members who reside outside the province. This issue has attracted significant attention in recent years and remains contentious. In a recent decision of the Supreme Court of Canada, *Lépine v. Société Canadienne des postes*, [2009] 1 S.C.R. 549 (S.C.C.) (at para. 57), LeBel J. urged the provinces to address through legislation the jurisdictional issues raised by national and international class actions.<sup>17</sup>

118 Class proceedings involving non-resident class members present challenges for both the assumption of jurisdiction (that is the decision to certify a class that includes non-residents) and the recognition and enforcement of judgments of other courts where jurisdiction over non-resident class members has been assumed. The issue has been described by Craig Jones and Angela Baxter as follows:

The unique aspect of opt-out class actions is that courts purport to take jurisdiction over absent *plaintiffs*. A certification binds a class of such persons to a decision of the court, or a settlement approved by the court, and it does it according to provincial law. In an opt-out action, it does so without their active consent, and in many cases without their actual knowledge that a proceeding affecting their rights is underway.<sup>18</sup> (Emphasis in original.)

119 The decision to certify a class with non-residents does not of course determine whether a settlement or other disposition within Ontario will be recognized outside the jurisdiction to bind non-resident class members. As Brockenshire J. noted at first instance in *Nantais v. Electronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), in certifying a class proceeding against a pacemaker manufacturer on behalf of a national class, the "potential problem" of recognition was "something to be resolved in another action [by a non-resident class member] before another court in another jurisdiction": at p. 346. In dismissing the application for leave to appeal, at 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.), Zuber J. noted at p. 350: "whether the result reached in an Ontario court in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out, remains to be seen".

120 Nevertheless, as recent decisions in Ontario demonstrate, the issues of certification and recognition of class proceedings including non-resident members involve consideration of the same factors. The court must have jurisdiction over the class members (through a "real and substantial connection" between the jurisdiction and their claims) and the court must find that the assertion of jurisdiction is consistent with the principles of "order and fairness".

121 Numerous national classes have been certified in Ontario. In *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.) ("Carom [Certification]"), aff'd 46 O.R. (3d) 315 (Ont. Div. Ct.), rev'd on other grounds 51 O.R. (3d) 236 (Ont. C.A.), Winkler J. certified a national class consisting of shareholders and former shareholders of various corporate defendants whose investment value had declined after it was revealed that the defendants had disseminated false information. The Court applied the "real and substantial connection" test from *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), finding that such a connection to Ontario existed on the basis of the incorporation and/or operation of the various corporate defendants in Ontario, the trading of their shares on the TSE, and the generation, public dissemination, and allegedly negligent verification of the false information in Ontario. Winkler J. also found that the notice requirements and opt-out provisions of the CPA prevented any prejudice to non-resident class members, thus making the assumption of jurisdiction consistent with the principles of order and fairness.

122 In *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.), Cumming J. certified a national class of patients who suffered from heart disease after being prescribed a weight loss drug. He cited, at para. 92, Professor Castel's *Canadian Conflict of Laws*, 4th ed.:<sup>19</sup>

[T]he test for determining whether a real and substantial connection exists is not demanding or rigid. The court needs to find only a real and substantial connection, not the *most* real and substantial connection, to assume jurisdiction."

[Emphasis in original].

123 Even in cases where the only connection between a non-resident class member and the jurisdiction is the sharing of common issues with resident class members, jurisdiction may be assumed. In *McCutcheon v. Cash Store Inc.* (2006), 80 O.R. (3d) 644 (Ont. S.C.J.), Cullity J. certified a national class of claimants in a payday loan class action, after conducting a comprehensive review of the authorities. Cullity J. observed that Ontario courts (in contrast to the courts of Saskatchewan and Québec) have taken an expansive approach to jurisdiction, even in cases where non-resident class members had no connection to the jurisdiction except their sharing of common issues with resident class members. His decision was consistent with a number of Ontario authorities, including *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (Ont. S.C.J.), where Winkler J. observed that where a class action involving intra-provincial plaintiffs could be certified, and the common issues forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a "real and substantial connection" of the non-residents to the forum in relation to the action.

124 Classes including international members have been certified by Ontario courts without any detailed consideration of the jurisdictional issues in *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Ont. Gen. Div.) (breast implant case — no territorial limitation on class members); *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.) (class comprised of creators and/or owners of copyright in and to certain works published in Canada in print media); *Cheung v. Kings Land Developments Inc.* (2001), 55 O.R. (3d) 747 (Ont. S.C.J.), leave to appeal refused [2002] O.J. No. 336 (Ont. Div. Ct.) (class included Hong Kong residents); *Brimner v. VIA Rail Canada Inc.* (2000), 50 O.R. (3d) 114 (Ont. S.C.J.) (class comprised of all persons traveling on a Windsor-Toronto train). International classes have been certified for settlement purposes in *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (Ont. S.C.J.) and *Mondor [Settlement]*.

125 While there are no reported Ontario appeal court decisions reviewing a decision to certify a global class, the issue of when a domestic court can assert jurisdiction over the claims of non-residents was addressed by the Court of Appeal in the context of the recognition and enforcement in Ontario of a foreign judgment incorporating a settlement of a class action: *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.).

126 *Currie* involved the enforcement in Ontario of a settlement of an international class proceeding from Illinois. The defendants moved to stay parallel class proceedings in Ontario based on the settlement that included Ontario residents. Sharpe J.A. affirmed the importance of national and international classes at paras. 14 and 15:

Ontario residents frequently engage in cross-border activities that may become the subject of class action litigation in Ontario, in another province or in a foreign jurisdiction. Several Ontario trial courts have authorized national and international classes: *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (S.C.J.) (international class), *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.) (national class) and *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.J.) (national class). In *Mondor v. Fisherman; CC & L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002] O.T.C. 317, Cumming J. approved a settlement in a class action where the class included American and other foreign plaintiffs. Legislation in several provinces specifically contemplates the inclusion of nonresident class members: *Class Proceedings Act*, S.A. 2003, c. C-16.5, ss. 7(1)(3) and 17(1)(b); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 6(2) and 16(2); *Class Proceedings Act*, C.C.S.M., c. C130, s. 6(3); Newfoundland and Labrador Class Actions Act, S.N.L 2001, c. C-18.1, ss. 7(2) and 17(2)-(5); *Class Actions Act*, S.S. 2001, c. C-12.01, ss. 8(2) and 18(2).

There are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation: *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2001), 6 C.P.C. (5th) 245 at para. 27 (Ont. S.C.J.), aff'd (2002), 20 C.P.C. (5th) 65 (Ont. Div. Ct.), aff'd (2003), 30 C.P.C. (5th) 107 (Ont. C.A.); *Wilson v. Servier Canada Inc.*, above at 243-4 (S.C.J.); *Wilson v. Servier Canada Inc.* (2002), 59 O.R. (3d) 656 (S.C.J.) at 664-670. Conflict of law rules

should recognize, in appropriate cases, the importance of having claims finally resolved in one jurisdiction. In some cases, Ontario courts will render judgments affecting the rights of non-residents and in other cases, Ontario residents will be affected by class action proceedings elsewhere. Ontario expects its judgments to be recognized and enforced, provided its courts assert jurisdiction in a proper manner and comity requires that, in appropriate cases, Ontario law should give effect to foreign class action judgments.

127 Sharpe J.A. went on to recognize three pre-conditions for the recognition of a judgment binding an unnamed plaintiff who has not opted out of an international class: (a) the existence of a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) adequate representation of the rights of non-resident class members, and (c) procedural fairness to nonresident class members, including adequate notice (at para. 30).

128 The Court found that a "real and substantial connection" to the Illinois jurisdiction existed by reason of the facts that the defendant's head office was located in that state and that the alleged wrongful conduct, the manipulation of the random selection of winners of high-value prizes to ensure that no such prizes would be awarded to contestants in Canada, had occurred there. Recognition of the Illinois judgment failed however on the third part of the test, procedural fairness, by reason of inadequacies in the notice given to the Canadian resident class members.

129 There is accordingly no doubt that this court has the authority to certify an international class if there is a "real and substantial connection" between the claims asserted on behalf of the foreign class members and this jurisdiction.

130 Such connection exists in this case. IMAX is a CBCA corporation with its head office in Ontario. It is a reporting issuer under the OSA and its shares are traded on the TSX. The alleged Representation was made in Ontario through the issuance of the Company's Form 10-K and press releases from IMAX's Mississauga head office (although arguably it may have been made in IMAX's offices in New York as well). The alleged wrongful actions of the Individual Defendants in connection with the preparation and reporting of IMAX's financial statements are alleged to have taken place in Ontario as well as New York. The proposed common issues respecting liability that concern the conduct of the defendants accordingly have a substantial connection to this jurisdiction.

#### **(c) Considerations of "Order and Fairness" — Should a global class be certified in this case?**

131 The next question is whether the principles of "order and fairness" would weigh against the certification of a global class in the present case. These factors are also relevant to the question of whether certification of a global class would be the "preferable procedure", that is "a fair, efficient and manageable method of advancing the claim" that is "preferable to other reasonably available means of resolving the claims of class members" (*Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.), at para. 69, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346 (S.C.C.)).

132 The defendants assert in opposition to certification of a global class: (1) that a comprehensive proceeding has been commenced in the U.S. that would be more appropriate for the pursuit of claims by U.S. residents and (2) that a global class should not be certified because of the likelihood that different laws will apply to the claims of class members depending on where they acquired their shares and where they reside, which will make the proceedings unduly complex and inefficient.

##### **(i) The Relevance of the U.S. Proceedings**

133 The fact that there is a pending application for certification in another jurisdiction is not an obstacle to certification of a class that includes non-resident members. It is not unusual for class proceedings to be commenced contemporaneously in different jurisdictions. Even where a class proceeding has been certified elsewhere, parallel proceedings may be permitted to continue. In *Tiboni v. Merck Frosst Canada Ltd.* (2009), 95 O.R. (3d) 269 (Ont. Div. Ct.) the Divisional Court dismissed an appeal from an order of Cullity J. refusing to stay a class action that had been certified in Ontario, where an action involving the same claims and the same class had been certified in Saskatchewan. The Court concluded that it would not be an abuse of process to permit two multi-jurisdictional class actions to proceed. The Court recognized that certification orders are not final judgments, but "interlocutory procedural orders that may be amended at any time as the cases proceed" (at para. 39).

134 There has been no determination to date of the certification issue in the U.S. Proceedings, and if the defendants are successful in their opposition, the U.S. Proceedings may never be certified. At this stage, the prospect that a similar proceeding might be certified in another jurisdiction is not sufficient to prevent the court from certifying a global class in Ontario.

**(ii) Conflict of Laws and Complexity**

135 The defendants argue that the claims of the various non-resident class members may be subject to the laws of various jurisdictions, and as such a global class proceeding will be unduly complex. In their Certification Factum, the defendants identify the problems that may arise in the following terms at paras. 16 and 17:

The Plaintiffs' common law claims, as pleaded, fail to note the multi-jurisdictional nature of the tortious misconduct of which the Defendants are accused. If established, this misconduct will almost certainly be found to have occurred partially (and perhaps primarily) in New York, and partially in Ontario, with the tort in question being directed towards, or "completed" in, each and every jurisdiction (that is, in each province, state or foreign country) where an individual investor felt the consequences of the Defendants' alleged misconduct.

These realities underline a fundamental complication which the Plaintiffs have entirely ignored in asserting common law tort claims on behalf of this proposed worldwide investor class. This complication is the necessity for this Court — **following** the certification of any of the Plaintiffs' tort-based "common issues," but **before** any common issue trial can be held — to undertake individual determinations of which body of substantive law (*i.e.*, the laws of which province, state or foreign county) properly governs each of the causes of action (*i.e.*, negligence *simpliciter*, negligent misrepresentation, fraudulent misrepresentation, conspiracy, vicarious liability, *etc.*) being asserted on behalf of each putative class member, or on behalf of each of the numerous geographically-defined subclasses which will need to be established.

[Emphasis in original.]

136 The defendants are correct in observing that the plaintiffs at the certification stage have not addressed the potential for conflict of laws issues. Indeed the defendants ignored such issues in their own submissions on certification in the U.S. Proceedings, and all parties appear to have proceeded on the assumption that the OSA statutory claim will be available to all class members in the Ontario proceedings.

137 There is authority that a court may refuse to certify a class containing non-resident members where the resolution of their claims would clearly involve the application of the statutory laws of multiple jurisdictions.

138 *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 466 (Ont. S.C.J.) involved a proposed class proceeding by the plaintiff insureds against defendant insurers alleging breach of a statutory condition in their policies of automobile Insurance concerning the calculation of salvage costs. In refusing certification, Haines J. observed that the claims of the proposed members of the class would entail the consideration of statutory provisions that differed between provinces, including different processes prescribed thereunder for the resolution of claims. While acknowledging that it would be open to an Ontario court to interpret and apply the laws of other jurisdictions, Haines J. concluded that the administration of justice would not be served by certifying a national class where: (1) the contract was made outside of Ontario pursuant to the laws of another jurisdiction that are materially different; (2) the defendant is licensed under and subject to the laws of the other jurisdiction; (3) the alleged breach occurred outside Ontario; (4) the claimants reside outside of Ontario; (5) the events which gave rise to the claim occurred outside Ontario; and (6) the damages were sustained outside Ontario. As such, he concluded that there was a demonstrated absence of any real connection between potential out-of-province class members and the Ontario forum and that order and fairness would not be served by assuming jurisdiction over claims of persons in those provinces and territories where the relevant statutory provisions were materially different from those in Ontario.

139 In *McNaughton* the claims asserted by the representative plaintiffs clearly relied on statutory provisions. It was manifest from the outset of the action (that is in the way that the plaintiffs had pleaded their action in reliance on statutory terms) that

the statutes of the various provinces differed in material ways that would affect the resolution of the claims of various members of a national class.

140 *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (Ont. S.C.J.) was also a case involving different provincial statutory regimes. Although he ultimately refused certification of the class proceeding for other reasons, Cullity J. would have addressed differences between provincial statutory defences by identifying subclasses of persons insured in New Brunswick and Alberta and including as an additional common issue the question whether the claims of such persons are precluded by the statutory conditions incorporated in their policies pursuant to the laws of those provinces. The existence of the special defence that the defendant insurer might have to the claims of such persons would not outweigh the values of order, fairness and access to justice that would militate in favour of the inclusion of non-resident members in the class.

141 *Pearson v. Boliden Ltd.*, 2002 BCCA 624 (B.C. C.A.), is a case where the conflict of laws question, that is, what statutes would apply to the determination of class members' claims, was considered at the certification stage in order to properly define the class.

142 In *Pearson*, the defendant corporation appealed the class definition in a shareholder class action. The plaintiffs alleged misrepresentation in a prospectus which had been filed with provincial securities regulators across Canada, asserting claims on behalf of shareholders who had purchased shares in the initial distribution as well as in the secondary market. By the time the case reached the Court of Appeal the plaintiffs had abandoned their common law claims, relying only on a statutory claim for prospectus misrepresentation.

143 At issue was whether the class should include (a) purchasers of shares from Alberta, where the securities legislation contained a limitation period, New Brunswick, which had no statutory cause of action, and the Territories, which had no securities legislation; and (b) persons resident outside Canada or who purchased their shares abroad not on the basis of the prospectus filed in Canada but on the basis of a different document prepared in accordance with U.S. or European securities laws.

144 The B.C. Court of Appeal held that the claims of shareholders for prospectus misrepresentation would be determined under the statutory laws that applied where the "distribution" of securities had occurred. Shareholders who purchased their shares pursuant to distributions occurring in New Brunswick, the Territories, Alberta and outside Canada were excluded. Since the prospectus misrepresentation provisions of the Manitoba legislation might permit claims by purchasers on the secondary market in that province, such persons would be included in the class, but other shareholders who had acquired their shares on the secondary market were excluded. The Court placed the secondary market purchasers in a separate subclass.

145 In contrast to the challenge by the defendants in *Pearson*, which was based on arguments respecting the proper law applicable to the claims of nonresident class members, the defendants in the present case did not argue for a narrower class or for a subclass of plaintiffs who might rely on the statutory cause of action under the OSA. As previously noted, the parties did not address any arguments as to whether and to what extent only Ontario residents or persons who had purchased IMAX shares on the TSX could properly assert such a claim.<sup>20</sup>

146 The defendants' submissions about potential differences in the applicable laws, and the anticipated complexity that would result in this litigation, were confined to the common law claims of the class members. They argued that the common law claims would be subject to the laws of different jurisdictions depending on where the Representation was received and acted upon.

147 The potential for the application of different common law principles to the determination of class member claims has received little attention in class action proceedings where national or international classes are proposed. As Patricia Jackson notes in "The National Class under the *Class Proceedings Act, 1992*: Unsettled Issues", The Law Society of Upper Canada, *Special Lectures 2004*, pp. 471-479, at p. 478:

One of the circumstances in which there has been restraint in the willingness to certify a national class is where significantly different statutory regimes apply to the questions raised by the proposed class proceeding [noting *McNaughton*]. However, there has been no evidence of such restraint in the face of potential differences in the common law. This is especially

significant because of the extent to which class actions are frequently brought in respect of matters where the law is significantly in transition.

148 According to the Supreme Court decision in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.) as a general rule, the substantive law governing a common law tort claim is the law of the place where the wrongful conduct occurred, that is, the *lex loci delicti*. *Tolofson* recognizes that the determination of the place of the wrongful conduct can present challenges in cross-border litigation. At p. 1050 LaForest J. for the majority of the Court noted:

There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role.

149 The defendants submit that, following *Tolofson*, where the alleged wrongdoing crossed borders the "most appropriate solution" is to identify the jurisdiction where the consequences of the wrongdoing were felt, and to apply the laws of that jurisdiction. They argue that where there are multiple plaintiffs who suffered harm in different jurisdiction, there are accordingly multiple governing laws.

150 The defendants also rely on certain cases in which the courts have found that the *lex loci delicti* for the tort of misrepresentation is the place where the representation was received and caused harm to the plaintiff (*ABN Amro Bank N.V. v. BCE Inc.*, [2003] O.J. No. 5418 (Ont. S.C.J. [Commercial List]) and *Kvaerner U.S. Inc. v. Amec E & C Services Ltd.*, 2004 BCSC 635 (B.C. S.C.)).

151 Rather than supporting the defendants' position, *Tolofson* clearly recognizes the complexities of trans-border torts and refrains from making a definitive statement that the place of the tort is always where the harm was suffered. As for the two cases relied upon by the defendants, these simply illustrate the willingness of Canadian courts to find that the place of the tort is the place where the representation was received and relied upon, in order to assert jurisdiction over a non-resident defendant, in the context of a *forum non conveniens* motion.

152 It is not obvious, in the context of a class action involving a global class and misrepresentations communicated from a single source, that the applicable law will be that of the place where each individual class member sustained damage. Such an approach would ignore the fact that a class proceeding is an aggregate action and not a collection of individual claims.<sup>21</sup> It is also not obvious that the applicable common law principles and defences would vary from place to place such that the court would have to consider the potential application of multiple laws.

153 The choice of law issue in any event is premature. Unless or until the defendants plead the laws of other jurisdictions in their statement of defence, the assumption at this stage of the proceedings is that the law of Ontario will apply to the determination of the common law claims. As T. Ducharme J. noted in *Caglar v. Moore*, [2005] O.J. No. 4606 (Ont. S.C.J.), at para. 15:

The approach of the courts to foreign law is well established. The existence of a foreign law is treated as a fact and the party seeking to rely upon it must both plead it and prove it. If the foreign law is not pleaded or not properly proven, the court will apply the *lex fori* as "it is the only law available." The existence of an applicable foreign law is a material fact, which must be pleaded under rule 25.06(1). Moreover, where, as in this case, the foreign law is the basis for an affirmative defence, rule 25.07(4) also requires that it be pleaded. The need to plead foreign law is a requirement of longstanding in Ontario that has been consistently applied. [Footnotes omitted.]

154 The defendants may well assert in their statement of defence that the laws of jurisdictions other than Ontario apply to the determination of the claims of various class members. At this stage however one can only speculate as to what arguments may be made and toward the claims of which class members they may be directed. For example, is the statutory cause of action

restricted to Ontario shareholders? Does it apply to non-resident shareholders who purchased their shares on the TSX? Does it apply to Ontario shareholders who purchased their shares on NASDAQ? As for the common law claims, what law would apply to the misrepresentation claims of class members residing outside of Ontario, or Canada? Would this depend on where they purchased their shares, reside or suffered damages? What particular defences would the defendants rely upon that would not be available to them under Ontario law? Are there in fact substantial differences between the common law principles and defences applicable in the other jurisdictions?

155 There is certainly the potential for greater complexity in this litigation as a result of potential conflicts of laws issues. This need not however constitute a bar to certification.

156 Our courts have identified similar challenges in cases where different standards of care may apply over time to members of a class which has been broadly defined. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. refused at [2005] S.C.C.A. No. 50 (S.C.C.), the proposed class was comprised of former students of residential schools over a period of 16 years. The Court of Appeal, in determining that certification was appropriate, concluded that the class action proceeding was sufficiently flexible to deal with whatever variation in the applicable standard of care over the 16 year period might arise on the evidence (at para. 59).

157 The Court in *Cloud* referred to the decision of the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.), where an analogous claim covered a period of 42 years. In *Rumley*, McLachlin C.J. for a unanimous court concluded (at para. 31) that the fact that the relevant standard of care would have varied over time was not an obstacle to the suit proceeding as a class action: "That the standard of care may have varied over the relevant time period simply means that the court may find it necessary to provide a nuanced answer to the common question" (at para. 32). McLachlin C.J. noted that class proceedings legislation, in contemplating the possibility of subclasses and permitting the amendment of the certification order at any time, "provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident".

158 In *Nantais*, the first Ontario case in which a national class was certified, there was no existing certification in another jurisdiction, although certification motions were pending elsewhere. The defendants argued that a court attempting to try the class proceeding would face a multiplicity of laws from all of the provinces, which might confuse the matter. While Zuber J. discounted the likelihood of differences between the applicable provincial laws, he observed at p. 350:

It is also argued that other class proceedings may be certified in other provinces relating to the matter which is the subject of this class proceeding. In my respectful view any of these practical difficulties which may develop as the matter proceeds can be met by amending the order in question to adjust the size of the class. If it is shown that the law of another province is so substantially different as to make the trial with respect to class members from that province very difficult, the class can be redefined. Additionally, if a class is certified in another province that group can be deleted from the Ontario class.

159 The approach in *Nantais* has been described as "wait and see" in relation to potential conflict of laws concerns.<sup>22</sup>

160 In the present case it is far from certain that a multiplicity of laws will apply to the determination of class members' claims or that any conflicting laws will affect the determination of the common issues. While the defendants have suggested that varying laws will apply, creating complexity, until they plead to the Claim, their position remains speculative. In respect of the one issue where the court might have been invited to make a determination limiting the scope of the class or to identify a subclass, that is in connection with the statutory claim, the defendants have not yet taken a position that the scope of the statutory remedy should be limited.

161 The decision to certify a global class requires the court to ensure fair treatment of non-resident class members in the litigation. This is part of the "order and fairness" requirement, which can be enhanced by paying careful attention to the notice and communications with non-resident class members, and to the potential need for subclasses as the action proceeds.

162 As Jones and Baxter have observed:

When asserting jurisdiction over a defendant, either in an individual or class proceeding, "order and fairness" will usually be satisfied by the demonstration of a "real and substantial" connection with the forum. But in the interjurisdictional class action context, "order and fairness" towards foreign plaintiffs imports further requirements. Just as defendants cannot be bound by a court's process and decision unless served and given an opportunity to answer the case against them, so too plaintiffs cannot be bound unless they also have an opportunity to "participate", at least as that word is understood in the world of opt-out class actions; that is, that there be notice adequate to serve the interests of justice.<sup>23</sup>

163 LeBel J. in *Lépine v. Société Canadienne des postes*, emphasized the importance of protection for the rights and interests of non-resident class members both through the notice procedure and through the recognition of subclasses where appropriate at paras. 42 and 56:

A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case.

...

The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

164 Accordingly, I have concluded that it would be appropriate to certify the global class as proposed by the plaintiffs. The prospect that the claims of nonresident class members may be subject to different laws adds complexity to the litigation, but does not weigh against certification. The appropriate approach in this litigation is to "wait and see" how the conflict of law issues may develop, and as noted below in the discussion under "common issues", the court can deal with any differences in the law that might arise by adjusting the common issues or recognizing subclasses as appropriate.

165 The court will also need to ensure that the interests of non-resident class members are protected by the form, content and distribution of the notice that is provided to them (this issue is addressed later in these reasons in considering the plaintiffs' proposed litigation plan.)

#### **E. Section 5(1)(c) of the CPA: Do the claims of the class members raise common issues?**

##### *1. General Principles*

166 Section 1 of the CPA defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts". Common issues, whether of law or fact, are those issues to be decided through the vehicle of the common issues trial such that the findings in the trial on such issues will be binding on all class members.

167 This definition "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high." The common issues need only "advance the litigation." "Resolution through the class proceeding of the entire action, or even resolution of particular legal claims ... is not required." (*Carom /Rule 21 — C.A.J* at paras. 40-42).

168 The common issues question should be approached purposively. There is no formulaic approach that determines this requirement. The underlying question is whether, if the action continues as a class proceeding, will "duplication of fact-finding

or legal analysis" be avoided? (*Western Canadian Shopping Centres* at para. 39). If necessary, the list of common issues can be further refined as the litigation moves forward (*Robertson v. Thomson Corp.*, at p. 173).

169 A class proceeding resolution of the common issues need not be determinative of the issue of liability for some or even all class members. As Goudge J.A. observed in *Cloud* (at para. 53):

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

170 There is a requirement for a minimal evidentiary foundation for the proposed common issues. In the present case, where the certification motion proceeded together with the Leave Motion (in which the parties filed voluminous affidavits and transcripts), there is no question that the evidentiary basis for the common issues is present.

## 2. The Proposed Common Issues

171 The plaintiffs have proposed a list of common issues as follows:

1. Did IMAX or the Individual Defendants, or any of them, represent that IMAX's revenues for the 2005 fiscal year were reported in accordance with GAAP and that such revenues met or exceeded earnings guidance previously issued by Imax? If so, who made the Representation, when, where and how?
2. Did IMAX or the Individual Defendants, or any of them make the Representation negligently, or recklessly, caring not whether it was true or false? If so, who made the Representation, when and how?
3. Did IMAX or the Individual Defendants, or any of them, make the Representation intending that the class members rely upon it and acquire IMAX shares?
4. Did some or all of IMAX's February 17, 2006 Press Release, Annual Report for the year ending December 31, 2005 or its two March 9, 2006 press releases contain a misrepresentation within the meaning of the OSA?
5. If the answer to (4) is yes, have the defendants (including the proposed defendants), or some of them, established a reasonable investigation or expert reliance defence under the OSA?
6. Did the traded price of IMAX shares during the Class Period incorporate and reflect the Representation?
7. If the answer to (6) is yes, did the acquisition of IMAX shares by the class members, on the TSX and NASDAQ, during the Class Period, constitute reliance upon the Representation?
8. Did IMAX or the Individual Defendants, or some of them, owe the class members a duty of care? If so, what was the standard of care? Did any of the defendants breach the standard of care?
9. If the answer to (8) is yes, were IMAX or the Individual Defendants, or some of them, negligent? If so, who, when and why?
10. Did IMAX or the Individual Defendants, or some of them, conspire one with the other, and with persons unknown to deceive the class members for the purpose of maintaining and increasing the price of Imax securities? If so, who conspired with whom, when, where, why and for what purpose?
11. If IMAX or the Individual Defendants, or some of them, are liable to the class for conspiracy, negligence, negligent or fraudulent misrepresentation, what is the procedure for assessing damages?

12. Can the court assess damages in the aggregate, in whole or in part, for the class? If so, what is the amount of the aggregate damage assessment and who should pay it to the class?

13. Is IMAX vicariously liable or otherwise responsible for the acts of the other defendants?

14. Should one or more of the defendants pay punitive damages to the Class? If so, who, why, in what amount and to whom?

15. Should the defendants, or any of them, pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

16. If the court determines that the defendants are liable to the class, and if the court considers that participation of individual class members is required to determine individual issues:

(a) are any directions necessary?

(b) should any special procedural steps be authorized?

(c) should any special rules relating to admission of evidence and means of proof be made?

(d) what directions, procedural steps or evidentiary rules ought to be given or authorized?

17. Should the defendants, or any of them, pay prejudgment and post-judgment interest, at what annual interest rate, and should the interest be compounded interest?

172 The defendants acknowledge that the issues regarding liability and damages under the OSA, if leave to proceed with such claims is granted, are properly the subject of a class action that is, that issues 1 and 2, only in so far as they relate to the statutory claim, and issues 4 and 5 would be properly certified as common issues.

173 The defendants also acknowledge that issues 11 and 13 to 17 as they relate to the common law claims are either strictly procedural or ancillary to the main allegations of liability. Such issues should be certified as common issues if the court is satisfied that other main issues respecting liability are properly certified.

174 The defendants assert that the balance of the common issues are "not sufficiently significant" to justify certification, and raise certain specific arguments in opposition to the recognition of such issues as common issues.

### *3. Proposed Common Issues - Common Law and Statutory Misrepresentation*

175 The defendants oppose the certification of issues 1, 2 and 3, as they relate to the common law claims of misrepresentation, as common issues. They submit that, since the plaintiffs have pleaded a number of statements in which the misrepresentations are alleged to have occurred, individual inquiries will be required to determine which of the class members received each individual representation. Some class members may not have read any of the representations; some may have received the information contained in the representations through sources other than IMAX.

176 In *Carom [Rule 21 — C.A.]* the court was faced with 160 alleged representations. It was recognized that individual determinations of which representations were received and relied upon by class members would be required. Nevertheless, it was appropriate to certify the negligent misrepresentation claims, including the issues of whether the defendants had made the alleged representations. MacPherson J.A., for the Court of Appeal, held that it was a mistake to overemphasize the number and diversity of the defendant's representations, and that resolution of the common issues would "move the litigation forward" and might serve to significantly reduce the number of relevant representations that the court would have to consider in the individual determinations (at para. 49). He stated (at para. 51): "The focus of these common issues is the knowledge and conduct of the defendants...the conduct, especially the reliance, of the plaintiffs stays on the sidelines at this juncture in the litigation."

177 In the present case, the plaintiffs' common law claims concern a single defined Representation that is alleged to have occurred in each of the February and March press releases and in the Company's Form 10-K. This is not a case where numerous different misrepresentations are alleged; rather, the plaintiffs allege a single misrepresentation, that was communicated to the public in different ways. The fact that class members may have received the misrepresentation in different ways, or may not have relied on the misrepresentation, is not relevant to whether issues 1, 2 and 3 would be common to the class.

178 Another concern raised by the defendants in opposition to the certification of the misrepresentation issues as common issues is the prospect that different legal regimes may apply to the determination of the common law claims of various class members.

179 As discussed above (at paras. 135 to 165), the potential for the application of different statutory regimes or varying standards of care applying to the claims of different class members is not an impediment to certification. In *Rumley* the potential for varying standards of care did not prevent the Court from certifying whether the defendants were negligent as a common issue. The Court anticipated the identification of subclasses later in the proceedings to address such issues as they might arise (at para. 32). See also *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (Ont. S.C.J.) (at paras. 84 and 92) where Cullity J. in a product liability case certified common issues that included whether the defendants owed a duty of care, the standard of care and whether the defendants were negligent, noting the potential for subclasses later in the proceedings if the defendants were to establish that different laws might apply to various members of the class.

180 More recently, in *Glover v. Toronto (City)*, [2009] O.J. No. 1523 (Ont. S.C.J.), concerning a class proceeding arising out of an outbreak of Legionnaires' disease at a City-owned and operated care facility, the proposed class included those who lived in, worked at, or visited the facility, as well as those living near the facility that contracted the disease. Lax J. rejected the defendants' arguments that questions of duty and standard of care could not be addressed on a class-wide basis. Citing *Rumley*, Lax J. noted at para. 46:

[The defendants] say that different duties may be owed at different times to different class members or may not be owed at all. I do not find this argument persuasive. Common issues include common but not necessarily identical issues of law that arise from common but not necessarily identical facts. The Class Proceedings Act gives the court the flexibility to deal with differentiation among class members. The trial judge has the power to adopt a nuanced approach and create subclasses when this is necessary.

181 Lax J. observed that the focus of the common issues respecting duty and standard of care was on the conduct of the defendants, which would not depend on evidence specific to each class member. She certified the common issues to include a reference to whether a duty of care was owed to the class members "or any subclass or subclasses" (at para. 61).

182 Ultimately, the question when determining the common issues is to distinguish between issues that might be common to the class (or a subclass) and individual issues, and to ensure that issues that will require individual determinations are not included in the list of common issues. The fact that not all members of the class may be affected in the same way by the determination does not prevent the issue from being included as a common issue. Again, the cases emphasize that a common issue is not necessarily one where success for one member of the class necessarily results in success for all members. An issue may still be a common issue, although the defendants may argue that the claims of some members of the class are subject to a different legal regime. The list of common issues may have to be amended to accommodate such a development, and subclasses may need to be identified.

183 Common issues 1 through 4 deal with the circumstances in which the alleged misrepresentations were made and the knowledge and participation of the various defendants. An evaluation of the conduct of the defendants is common to the class members, whether they are able to rely on the statutory cause of action (which is pleaded as applying to all members) or whether the common law causes of action are available to them. These issues will accordingly be included in the list of issues certified for the common issues trial.

184 In addition, I would include as common issues in relation to the misrepresentation claims the following common issues:

1(a). Was the Representation false?

1(b). Was the Representation publicly corrected? If so, when?

2(a). Did the Individual Defendants or any of them authorize, permit or acquiesce in the making of the Representation while knowing it to be a misrepresentation?

4(a). Did the defendants Joyce and Gamble or either of them authorize, permit or acquiesce in the release of any or all such documents?

185 Common issue 5 involves a consideration of whether the statutory defences to the OSA claim are made out. While the courts will often not certify defences as common issues, out of a concern that this would be premature and potentially limit the defences a defendant might assert (see for example the decision of the Court of Appeal in *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.); leave to appeal to the SCC refused [2008] S.C.C.A. No. 15 (S.C.C.)), in the present case, it would be appropriate to certify this question, where the OSA has prescribed the statutory defence and it is clear that this will be a common issue to be determined if issue 4 is answered in the affirmative.

186 The plaintiffs propose as common issues 6 and 7 whether the traded price of IMAX shares during the Class Period incorporated and reflected the Representation, and, if so, whether the acquisition of IMAX shares by the class members, on the TSX and NASDAQ, during the Class Period, constituted reliance on the Representation. These issues deal with the "efficient market" theory that has been pleaded by the plaintiffs as part of their common law misrepresentation claims.

187 The defendants oppose the certification of these issues, even if the court accepts that such a claim may proceed at the pleadings stage. They rely on the decision of Cullity J. in *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.). *Serhan* was a products liability case in which the plaintiffs proposed to certify the question of whether the members of the class relied upon a misrepresentation by acquiring the products in question. Plaintiffs' counsel had argued that this was a proper common issue as *Mondor [Settlement]* stood for the principle that reliance could be inferred from the conduct of a class member in making a purchase. Cullity J. properly noted that the inference of reliance could be rebutted through an inquiry into the circumstances of each individual, so that reliance would of necessity remain an individual and not a common issue.

188 In my view the reasoning in *Serhan* would not preclude the certification of proposed issues 6 and 7 in this case. *Serhan* did not involve an "efficient market" claim; that is, there was no allegation that the price of the product incorporated the misrepresentations and that accordingly the act of purchasing constituted reliance.

189 In *O.P.S.E.U. v. Ontario*, [2005] O.J. No. 1841 (Ont. S.C.J.), it was argued in a case involving alleged misrepresentations by the province to individuals whose employment had been transferred to Community Care Access Centre resulting in the loss of pensionable service, that of necessity reliance would be an individual issue, so that liability for negligent misrepresentation could not be determined in a trial of the common issues. Cullity J. (at para. 68), relying on *Mondor [Rule 21]* referred to the possibility that "group reliance" might in some circumstances be inferred from the facts. The question of whether reliance occurred could, on the facts alleged, be dealt with at a trial of the common issues.

190 In the present case the plaintiffs have pleaded that the individual class members relied on the Representation through their conduct in purchasing shares. It should be open to the plaintiffs to attempt to establish in the common issues trial that, as a factual matter, reliance has been established for all members of the class through proof of the common action of purchasing shares. It may be that the defendants will persuade the court that at best any inference of reliance is rebuttable through evidence that is individual to each class member. It may be that any inference of reliance is rebuttable through evidence applicable to the class at large. The question I need to determine is not whether the issues will be determined in the plaintiffs' favour, but whether they are "common" and not "individual" issues. I find that the issues as framed are common issues, and will be certified as such for the common issues trial.

#### 4. Proposed Common Issues — Negligence Simpliciter

191 Proposed common issues 8 and 9 relate to the claim of negligence *simpliciter* which I have already determined is not a cause of action on the facts pleaded in this case. Accordingly, they will not be certified as common issues in this case.

*5. Proposed Common Issue — Conspiracy*

192 Proposed common issue 10 deals with the pleading of conspiracy. No objection was taken to the certification of this issue as a common issue. Similar formulations of the issue were certified as common issues in *Smith v. National Money Mart Co., [2007] O.J. No. 46* (Ont. S.C.J.), Appendix A, para. 7 and *Carom Certification*] at p.195. Common issue 10 will be certified in the terms proposed by the plaintiffs.

*6. Proposed Common Issues — Damages*

193 Proposed common issue 11 deals with the procedure for determining damages if common law liability is established. This issue will be certified as a common issue, removing the reference to "negligence".

194 Common issue 12 addresses the question of whether aggregate damages should be assessed. Section 24 of the CPA provides for an aggregate assessment of damages as follows:

- (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.

195 Whether aggregate damages should be assessed and their determination is a typical common issue in class proceedings, which should be certified in the absence of compelling evidence that aggregate damages would not be available in a given case. The court must be satisfied only that there is a "reasonable likelihood" that the conditions specified in s. 24(1) of the CPA will be satisfied (*Markson* at paras. 44 and 45. See also *Cassano* at paras. 39-53.) Provided that there is evidence that an aggregate assessment would be warranted, the determination of whether this should occur is for the trial judge. It is not for the judge hearing the certification motion to weigh conflicting expert evidence on this issue (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2009)*, 96 O.R. (3d) 252 (Ont. Div. Ct.), at para. 102.

196 As Cullity J. noted in *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974 (Ont. S.C.J.), at para. 25:

As the question of an aggregate assessment is one for the trial judge to decide, it is not the function of a motions judge to determine whether an aggregate award would be made. It is, I believe, sufficient at this stage if there is a reasonable likelihood that the preconditions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues. I believe that is the case here. The appropriate methods of distributing any such award are, again, for the trial judge to determine pursuant to section 26.

197 In the present case, if the plaintiffs are successful in their statutory claim, damages will be assessed according to the formulas provided in s. 138.5 of the OSA. The OSA provides a relatively straightforward approach to the determination of damages and individual assessments are contemplated. A plaintiff is not required to prove that the misrepresentation caused a decline in the share value; rather the defendant may prove that all or part of a change in the market price of securities is unrelated to the misrepresentation (OSA, s. 138.5(3)). In their litigation plan, the plaintiffs propose a procedure for the efficient determination of such claims using a court-appointed administrator who will calculate the damages of each class member who makes a claim by reference to his or her share purchase and sale data.<sup>24</sup>

198 In contrast to the statutory measure of damages, the assessment of damages for common law misrepresentation on the secondary market is more complex. The parties have filed competing expert reports prepared by financial economists. The plaintiffs rely on the expert reports of Lawrence Kryzanowski<sup>25</sup> and Robert Comment<sup>26</sup>, while the defendants rely on the expert opinion of Denise Neumann Martin<sup>27</sup>. The experts offer opinions as to the extent to which the Representation affected the price of IMAX shares. The Kryzanowski report proposes an approach to the assessment of damages that is critiqued by the Neumann Martin report. The Comment report offers an alternative approach. Both of the plaintiffs' experts are of the opinion that an assessment of the class members' aggregate losses is feasible.

199 The defendants contend that there is no reasonable likelihood that the plaintiffs will satisfy s. 24 (1)(b) of the CPA. They argue that, after the determination of the common issues, individual issues will in fact remain to be determined, even if reliance is determined on a class basis, as to whether individual class members suffered any damage or loss.

200 An authority relied upon by the defendants (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252 (Ont. S.C.J.)) was reversed on appeal to the Divisional Court 96 O.R. (3d) 252 (Ont. Div. Ct.), Swinton J. dissenting; leave to appeal to the Court of Appeal granted September 24, 2009. At first instance certification was denied, in part on the basis that the determination of whether class members who were franchise owners had suffered damages would of necessity be an individual issue.

201 In their discussion of whether aggregate damages could be available, Hennessey and Karakatsanis JJ., for the majority of the Divisional Court, stated at para. 102:

A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.

202 The motions judge had concluded that the plaintiffs could not rely on expert reports respecting aggregate damages to establish the fact of loss, which would of necessity be an individual issue. He rejected aggregate damages as a common issue primarily because he concluded that s. 24(1)(b) would not be met in that, after determination of the common issues, the question of whether each member of the class had suffered a loss would need to be determined on an individual basis.

203 The Divisional Court disagreed with this analysis, concluding that the motions judge erred in principle in failing to consider whether, quite apart from the expert opinion evidence, there was some basis in fact in the record that the fact of loss, if not the quantum of loss, could be a common issue with respect to liability. The majority noted at para. 95:

The relationship between the franchisor, the distributor and each class member was the same; the class members purchased the same products, at the same prices within each region, pursuant to the same franchise contracts and distribution agreement. The class members did not have separate individual relationships with the respondents. Although there will be a differential impact on the class members depending on the specific products each ordered, if the plaintiffs ultimately prove overcharging, the fact of loss or damage must be common to all.

204 In the present case, there is also "some basis in fact in the record" that the fact of loss could be a common issue with respect to liability. As in *Quizno's*, each class member is similarly situated in relation to the defendants. The loss or damage that

is alleged is a devaluation of their shares on the secondary market. There is evidence that the price of IMAX's shares fell on the TSX and NASDAQ on August 9, 2006 when the Representation was allegedly corrected. As in *Quizno's*, if the plaintiffs prove the misrepresentation, the fact of loss or damage will be common to all, although the impact on individual shareholders will differ.

205 Accordingly, there is a reasonable likelihood that s. 24(1)(b) will be met, that is that no questions of fact or law other than those relating to the assessment of monetary relief will remain to be determined after the common issues trial in order to establish the amount of the defendants' monetary liability.

206 With respect to s. 24(1)(c), the requirement that the aggregate or a part of the defendants' liability to some or all class members can reasonably be determined without proof by individual class members, I am satisfied that the plaintiffs' expert reports provide a sufficient evidentiary foundation to conclude that there is a "reasonable likelihood" that such an aggregate determination may be made without proof by individual class members.

207 Accordingly proposed common issue 12 will be certified as a common issue in these proceedings.

#### 7. Other Proposed Common Issues

208 Issues 13 (vicarious liability) and 14 (punitive damages) involve considerations of the conduct of the defendants and will not entail evidence from individual class members. They are properly certified as common issues in these proceedings.

209 Issues 15 and 16 deal with the procedure for determining individual issues. Such issues have been certified recently in other cases as common issues, and in my view are proper common issues to be certified in this case. Similarly, issue 17 concerning prejudgment and post-judgment interest flows from the determination of any damages award and is a proper common issue for certification.

#### F. Section 5(1)(d) of the CPA: Is a class proceeding the preferable procedure for the resolution of the common issues?

210 The preferability requirement has two concepts at its core — the first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim and the second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members (*Markson* at para. 69).

211 The determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole. The preferability requirement can be met even where there are substantial individual issues and it is not necessary that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. Nevertheless, the common issues cannot be negligible. The critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action (*Hollick* and *Cloud*).

212 In *Carom [Certification]*, Winkler J. outlined the conditions present whenever a class proceeding is the preferable procedure at p. 239:

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 behaviour of wrongdoers.

213 The defendants have the burden of proving a preferable alternative process for resolving the common issues. They have not done so in this case, except to argue that litigation of the non-Ontario claims should proceed in the U.S. Proceedings, which is addressed above. "Arguments that no litigation is preferable to a class proceeding cannot be given effect." (*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 (Ont. Div. Ct.).

214 The plaintiffs contend that, if this action is not certified as a class proceeding, access to justice for many potential claimants will be thwarted because the costs to prosecute an individual action will be prohibitively expensive and is beyond the

reach of virtually all class members. According to Mr. Cohen's affidavit, the plaintiffs' counsel has estimated that the cost of litigating this matter through to a trial of the common issues will exceed \$750,000, exclusive of disbursements.<sup>28</sup>

215 In *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (Ont. S.C.J.), Lax J., in certifying a class action for the purpose of settlement (which included claims under s. 138.8 of the OSA) noted the advantages of class proceedings in cases involving secondary market misrepresentation at para. 9:

Individual litigation of securities cases can be difficult, time-consuming and expensive. Many claims would never be advanced because they are uneconomic for an individual investor to pursue. A class action is the optimal method of procuring a remedy for a group of investors who allege they have been harmed in similar ways as a single determination of the defendants' liability eliminates duplication of fact-finding and legal analysis. Further, a class action has the potential to act as an essential and useful supplement to the deterrent effects of regulatory oversight. It enhances the incentive for directors and officers to ensure that their disclosures to the investing public are materially accurate, thereby enhancing investor protection. Consequently, a class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issue, and advances the proceeding in accordance with the goals of access to justice, judicial economy and behaviour modification.

216 Such observations apply in the present case. Certifying the class proceeding, including a global class, would serve judicial economy by permitting common issues to be determined on a single occasion, thereby avoiding duplication of fact-finding and legal analysis, as well as the potential for inconsistent results if litigation were pursued individually or by groups of investors in various jurisdictions. The goal of behaviour modification (in this case to deter misrepresentations in public company disclosures) is enhanced by permitting aggregated claims to proceed. As evidenced by the proceedings to date, including the exchange of expert reports, the voluminous materials exchanged in the Leave Motion and various complex issues that have been raised by the defence even at this stage, the anticipated costs and time required to litigate individual claims would greatly exceed the potential individual recoveries. A class proceeding is the only viable method of advancing the claims in this action.

**G. Section 5(1)(e) of the CPA: Are the representative plaintiffs appropriate? Have they produced a workable litigation plan?**

217 Under s. 5(1)(e) of the CPA, the court must consider whether the proposed representative plaintiff (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 interests of other class members.

218 The court must be satisfied that the representative plaintiff will vigorously and capably prosecute the interests of the class, although he need not be "typical" of the class or the "best" possible representative (*Western Canadian Shopping Centres* at para. 41). The representative plaintiff does not have to have claims that are identical to those of all other members of the class; it is sufficient if the representative plaintiff has a cause of action against the defendant and that the causes of action all share a common issue of law or fact (Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.), at para. 97, citing *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (Ont. S.C.J.) and *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.), aff'd 64 O.R. (3d) 208 (Ont. Div. Ct.)).

219 There is no merit to the submission of the defendants that the plaintiffs Silver and Cohen would not adequately represent the interests of the class, and would have a conflict of interest because they do not share a common interest with the class. Silver and Cohen share the attributes of the proposed class in that they purchased shares in IMAX after February 17, 2006 and continued to hold shares on August 9, 2006. There are a number of issues that have been approved as common issues, the disposition of which will affect Silver and Cohen as well as the other class members.

220 At this stage the potential differences between the legal regimes applicable to the common law claims of representative plaintiffs and other class members, as well as the question of the application of the statutory claim to nonresident members do not constitute a disabling "conflict of interest". If the defendants assert in their statement of defence that the laws of different

legal jurisdictions apply to class members depending on where they purchased their shares or where they live, the court can consider the need for subclasses and additional representative plaintiffs at that time.

221 Accordingly, Marvin Neil Silver and Cliff Cohen shall be appointed representative plaintiffs in these proceedings.

222 The final requirement under this part of the certification test is that the plaintiffs have produced a plan that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding.

223 In *Griffin v. Dell Canada Inc.*, Lax J. identified the purposes and requirements for a workable litigation plan (at para. 100):

The production of a workable litigation plan serves a two-fold purpose: (a) it assists the court in determining whether the class proceeding is the preferable procedure; and (b) it allows the court to determine if the litigation is manageable: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Sup. Ct.), aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.). The plan must provide sufficient detail that corresponds to the complexity of the litigation. 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: *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Sup. Ct.) at para. 76.

224 At the certification motion, the litigation plan must necessarily be preliminary. Not all procedural details need to be particularized. The purpose of the litigation plan at the certification motion is to assist the motions judge to determine whether the action is manageable and whether the goals of the *CPA* will be served by certification of the action as a class proceeding. As the litigation progresses, the litigation plan can be modified as required (*Andersen v. St. Jude Medical Inc.*, [2004] O.J. No. 132 (Ont. S.C.J.)).

225 "The finding that a litigation plan is satisfactory for the purpose of certification does not bind the defendants to accept it after a trial of the common issues and, of course, it does not in any way bind the trial judge. Nor is it cast in stone before the trial as it can be amended from time to time with the approval of the court." (*Hedley v. Lakeridge Health Corp.*, at para. 4).

226 The plaintiffs' proposed litigation plan<sup>29</sup> was prepared as of February 22, 2007 and has not been revised. The plan details the proposed steps in the litigation, including the leave and certification motions, notice to class members, the opt-out procedure, and the trial of the common issues. The plan proposes a method to determine any remaining individual issues, including specifically the determination of damages under the OSA claim.

227 The defendants contend that the litigation plan is inadequate because it does not propose a mechanism for determining the governing law applicable to individual members' claims, or even contemplate that such determinations will be required.

228 In *Carom [Certification]*, Winkler J. rejected a litigation plan that was not sufficiently comprehensive and detailed, in particular where the plan did not disclose a method for dealing with the claims of extra-provincial plaintiffs (at para. 101).

229 I agree that the litigation plan is not sufficient because it fails to address issues specific to a global class. The plan, while reasonably detailed, is *pro forma*, except for the provisions dealing with the statutory claim. The plan does not advert to any steps that might need to be taken or measures that should be put in place in the litigation to address the interests of non-resident class members, and in this regard, lacks detail in particular in the area of the form, substance and distribution of notice to non-resident class members.

230 Until the defendants have pleaded, it will likely not be possible for the potential conflict of law issues to be fully explored, and for the parties and the court to consider whether subclasses and additional representative plaintiffs will be necessary. While the determination of these issues, including the specific procedures to be followed, is something that will need to be addressed between counsel and the court as the matter proceeds, the litigation plan should provide a roadmap of how the plaintiffs propose to proceed with all aspects of the proceedings. The litigation plan requires amendment to indicate how the plaintiffs propose to address the global aspects of the class certification. In particular, the plaintiffs should address the form and substance of notice to both resident and non-resident class members, the proposed time periods for opting out of the proceedings, as well any additional measures or steps in the litigation that may be contemplated to address the interests of non-resident class members.

231 Accordingly, the certification of these proceedings will be subject to the plaintiffs' delivery of an acceptable amended litigation plan.

## Conclusion

232 I have concluded that the plaintiffs have met the test for certification of a global class to assert the claims under s. 138.3 of the OSA, as well as certain of the common law claims as pleaded in the Claim.

233 Leave is granted to the plaintiffs to amend the Statement of Claim in the form of the Fresh as Amended Statement of Claim, without underlining, subject to the qualifications provided for in these reasons.

234 Subject to the submission of a revised litigation plan by the plaintiffs, this action will be certified as a class proceeding. The specific terms of the order (to be consistent with these reasons) and of the form, content and method of notice to class members, as well as any directions necessary to implement the orders in this motion and the Motion for Leave, shall be settled at an attendance of counsel to be arranged with the trial co-ordinator. If the parties are unable to agree on costs, this can also be addressed in the attendance.

*Order accordingly.*

## Footnotes

- <sup>1</sup> IMAX adopted U.S. GAAP; all references to GAAP in these reasons relate to U.S. GAAP.
- <sup>2</sup> While all of the other provincial and territorial jurisdictions in Canada have now incorporated the statutory cause of action into their securities legislation, Ontario was the only province to have such provisions in force when these proceedings were commenced.
- <sup>3</sup> Leave was granted to proceed with the s. 138.3 claim against IMAX Corporation, Gelfond, Wechsler, Joyce and Gamble, as well as members of the IMAX audit committee at the time (Copland, Lebron and Braun) and board member Girvan, but not against the two remaining external directors, Utay and Fuchs.
- <sup>4</sup> There is a parallel proceeding pending against IMAX, Gelfond, Wechsler, Joyce and Gamble, as well as PriceWaterhouseCoopers (both the Delaware and Ontario limited liability partnerships) in the United States District Court, Southern District of New York (the "U.S. Proceedings"). Initially several proceedings were commenced in the U.S., which were consolidated. A Consolidated Amended Class Action Complaint was filed in October 2007. The amended complaint, while alleging substantially the same facts as are pleaded in the Ontario proceedings, is broader in scope, dealing with IMAX's revenue recognition on theatre systems from 2002 to 2006. The defendants' motion to dismiss the claim was dismissed in September 2008 ([587 F.Supp.2d 471 \(U.S. Dist. Ct. S.D. N.Y., 2008\)](#).

The proposed class in the U.S. Proceedings is shareholders who purchased the Company's common stock between February 27, 2003 and July 20, 2007 on both NASDAQ and the TSX. In the U.S. Proceedings, the lead plaintiff Westchester Capital Management, Inc. ("Westchester") filed a motion seeking certification of a class encompassing both NASDAQ and TSX purchasers of IMAX securities, which motion was opposed by the defendants. By order dated March 13, 2009, the U.S. court denied the certification motion without prejudice," pending the resolution of the proposed motion of another purported class member, Snow Capital Investment Partners, L.P. ("Snow") for the court to reconsider its January 17, 2007 order appointing Westchester Capital Management, Inc. as lead plaintiff in the U.S. Proceedings. By order dated June 30, 2009, Snow replaced Westchester as the lead plaintiff. The certification issue remains to be determined in the U.S. Proceedings.

- <sup>5</sup> The Statement of Claim was issued in September 2006. There have been several changes to the pleading, resulting in a Fresh Statement of Claim (the "Claim") that was delivered shortly before the hearing of the motions. While the Claim has not been formally amended (an amendment is part of the relief sought in the motions), the allegations in the proposed pleading, that include both the common law claims against the named defendants and the statutory claims against the defendants and proposed defendants, were considered for the purpose of the leave, Rule 21 and certification motions.
- <sup>6</sup> Class proceedings based on misrepresentation to the secondary market have also been certified for the purpose of settlement in [CC&L Dedicated Enterprise Fund \(Trustee of\) v. Fisherman](#); [CC&L Dedicated Enterprise Fund \(Trustee of\) v. Fisherman](#), [2002] O.J. No.

1855 (Ont. S.C.J.), *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.), *Gould v. BMO Nesbitt Burns Inc.*, [2007] O.J. No. 1095 (Ont. S.C.J.), *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (Ont. S.C.J.) and *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.*, [2009] O.J. No. 4067 (Ont. C.A.).

- 7 *Bullen & Leake and Jacob's Precedents of Pleadings*, 12<sup>th</sup> ed. (London: Sweet & Maxwell, 1975).
- 8 Other objections (outlined at paras. 107 to 116 of the Respondents' Rule 21 Factum) appear to have been addressed by the plaintiffs' most recent changes to their pleadings which have been incorporated in the Claim.
- 9 IMAX has already identified the number of shares outstanding as of February 14, 2005, and was able to estimate the percentage of non-resident shareholders based on addresses contained in the shareholder register: Copland Affidavit, para. 107; Answers to Undertakings, Q. 115, Moving Parties' Fourth Supplementary Motion Record, Vol. 1, Tab 1-A.
- 10 Factum of the Defendants and the Proposed Defendants #3 as Responding Parties: to the Motion for Certification, paras. 219-265.
- 11 Copland Affidavit, para. 107; Answers to Undertakings, Q. 115, Moving Parties' Fourth Supplementary Motion Record, Vol. 1, Tab 1-A.
- 12 Memorandum of Law in Support of Defendants IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce and Kathryn A. Gamble's Opposition to Plaintiffs' Motion for Class Certification ("IMAX Brief in U.S. Proceedings"), Affidavit of Michael G. Robb, sworn April 1, 2009 ("Fourth Robb Affidavit"), Exhibit "B", Moving Parties' Sixth Supplementary Motion Record, Tab "B".
- 13 IMAX Brief in U.S. Proceedings, pp. 9 - 11.
- 14 IMAX Brief in U.S. Proceedings, p. 9.
- 15 Report of Professor Poonam Puri, Fourth Robb Affidavit, Exh. "C".
- 16 IMAX Brief in U.S. Proceedings, pp. 7 and 8.
- 17 The case involved an application to stay class proceedings in Québec and to recognize the preclusive effect of a settlement in a parallel Ontario class action that included in the class Québec residents. The Court's decision refusing to recognize the Ontario judgment was ultimately based on deficiencies in notice given to the Quebec residents which was insufficient and confusing in that it did not properly explain the impact of the judgment certifying the class proceeding on Québec members of the national class (para. 45).
- 18 Craig Jones and Angela Baxter, "Fumbling Toward Efficacy: Interjurisdictional Class Actions after *Currie v. McDonald's*", (2006) 3 *The Canadian Class Action Review* 405, p. 407.
- 19 Castel's *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997).
- 20 Philip Anisman and Garry Watson have suggested that, on the authority of the *Pearson* case, the statutory cause of action for secondary market misrepresentation under the OSA would be available only to investors who traded on the TSX In Ontario. (P. Anisman and G. Watson, "Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification and Costs", 3 *The Canadian Class Action Review* 467 at 522). *Pearson* however clearly depended on the court's finding that prospectus requirements are tied to the place of distribution, and that the shareholder's statutory right of action depended on the law of the province where the prospectus obligations arose. The "distribution" took place in each province where the prospectus was filed. The determination of the scope of persons who might assert a claim under s. 138.3 of the OSA does not fit neatly into the *Pearson* analysis.
- 21 Jones and Baxter, note 18, at p. 420. In a critique of the decision of the Québec Superior Court in *HSBC Bank Canada c. Hocking*, [2006] J.Q. No. 507 (C.S. Que.), refusing to bind Québec residents to a settlement reached on their behalf in Ontario, the authors comment on an "all-too-familiar application to the class action context of rules established in individual civil litigation", where "the court treats the class as a collection of individual claims, not as a truly aggregate action; as a result it does not consider the consequences of parsing the class into smaller and smaller units, and gives no weight to the real advantages that accrue to individual class members from participation in a larger, more efficient action."

- 22 M.A. Eizenga and M.T. Poland, "Conflict of Laws and National Class Actions", The Canadian Institute, The 2nd Annual National Forum on Litigating Class Actions, September 2001.
- 23 Jones and Baxter, note 18, p. 417.
- 24 Plaintiffs' Litigation Plan, Affidavit of Michael Robb sworn February 22, 2007, Exh. "O", Moving Parties' (First) Motion Record, Tab "2-O".
- 25 Affidavit of Lawrence Kryzanowski sworn May 30, 2007, Moving Parties' Supplementary Motion Record, Tab 2.
- 26 Affidavit of Robert Comment sworn September 17, 2007, Moving Parties' Reply Motion Record, Tab 1.
- 27 Affidavit of Denise Neumann Martin sworn September 7, 2007, Motion Record of the Responding Parties, Vol. I, Tab 10.
- 28 Cohen Affidavit paras. 7, 14 and 15, Moving Parties' First Motion Record, Tab 4.
- 29 Plaintiffs' Litigation Plan, Affidavit of Michael Robb sworn February 22, 2007, Exh. "O", Moving Parties' (First) Motion Record, Tab 2-0.

**TAB 33**

2018 ONSC 271  
Ontario Superior Court of Justice

Sondhi v. Deloitte Management Services LP

2018 CarswellOnt 364, 2018 ONSC 271, 287 A.C.W.S. (3d) 684, 45 C.C.E.L. (4th) 217

**SHIREEN SONDHI (Plaintiff) and DELOITTE MANAGEMENT SERVICES LP, DELOTTE & TOUCHE LLP, PROCOM CONSULTANTS GROUP LIMITED (Defendants)**

Perell J.

Heard: January 5, 2018

Judgment: January 16, 2018

Docket: CV-15-523524CP

Counsel: Andrew H. Monkhouse, Samuel S. Marr, for Plaintiff

Patricia D.S. Jackson, Rebecca Wise, Davida Shiff, for Defendants, Deloitte Management Services LP and Deloitte & Touche LLP

Subject: Civil Practice and Procedure; Public; Employment

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.b Certification

V.2.b.i Plaintiff's class proceeding

V.2.b.i.G Conflicts of interest

Labour and employment law

III Employment standards legislation

III.4 Applicability of legislation

III.4.c Contracting out

**Headnote**

Labour and employment law --- Employment standards legislation — Applicability of legislation — Contracting out D and ATD, whose assets D acquired provided document review services undertaken by lawyers — Proposed class action was launched by S alleging that putative class members were entitled to benefits under Employment Standards Act, 2000 such as overtime, vacation pay, and holiday pay — S was disqualified as representative class plaintiff and class counsel recruited P as representative class plaintiff — D argued that P was not qualified to be representative plaintiff as showing inadequate attention to responsibilities as representative plaintiff and that no avoiding conflict because right to opt out or the right to not opt into settlement were illusory because s. 5(1) of Act prohibited employee contracting out of or waiving any employment standard — Class action certified with P as representative plaintiff — Major qualities of representative plaintiff are independence and loyalty to class — Major responsibility to ensure that class counsel does not improvidently settle action — P worked for D for approximately 16 months and had personal interest in succeeding with declaratory and monetary claims — Given P's legal background, he had more than layman-plaintiff's knowledge of nature of employment law claims underlying common issues of proposed class action — For class members that opted out, there would be no determination whether or not they were employees, prerequisite for s. 5(1) of Act to operate — On certification motion court should not find conflict of interest because of what administrators of Act might do in future in response to court ruling not binding on class members that opted out — Uncertain how many class members would opt out and number of opt outs would not in itself provide basis for decertification.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Conflicts of interest

D and ATD, whose assets D acquired provided document review services undertaken by lawyers — Proposed class action was launched by S alleging that putative class members were entitled to benefits under Employment Standards Act, 2000 such as overtime, vacation pay, and holiday pay — S was disqualified as representative class plaintiff and class counsel recruited P as representative class plaintiff — D argued that P was not qualified to be representative plaintiff as showing inadequate attention to responsibilities as representative plaintiff and that no avoiding conflict because right to opt out or the right to not opt into settlement were illusory because s. 5(1) of Act prohibited employee contracting out of or waiving any employment standard — Class action certified with P as representative plaintiff — Major qualities of representative plaintiff are independence and loyalty to class — Major responsibility to ensure that class counsel does not improvidently settle action — P worked for D for approximately 16 months and had personal interest in succeeding with declaratory and monetary claims — Given P's legal background, he had more than layman-plaintiff's knowledge of nature of employment law claims underlying common issues of proposed class action — For class members that opted out, there would be no determination whether or not they were employees, prerequisite for s. 5(1) of Act to operate — On certification motion court should not find conflict of interest because of what administrators of Act might do in future in response to court ruling not binding on class members that opted out — Uncertain how many class members would opt out and number of opt outs would not in itself provide basis for decertification.

#### Table of Authorities

##### Cases considered by *Perell J.*:

*Allen v. Aspen Group Resources Corp.* (2009), 2009 CarswellOnt 7620, 81 C.P.C. (6th) 298, 67 B.L.R. (4th) 99 (Ont. S.C.J.) — referred to

*Attis v. Canada (Minister of Health)* (2003), 2003 CarswellOnt 347, 29 C.P.C. (5th) 242 (Ont. S.C.J.) — referred to

*Attis v. Canada (Minister of Health)* (2003), 2003 CarswellOnt 4868 (Ont. C.A.) — referred to

*Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 2007 CarswellOnt 5641, 46 C.P.C. (6th) 234, 87 O.R. (3d) 352 (Ont. S.C.J.) — referred to

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- Frohlinger v. Nortel Networks Corp.* (2007), 2007 CarswellOnt 240, 2007 C.E.B. & P.G.R. 8233 (headnote only), 40 C.P.C. (6th) 62 (Ont. S.C.J.) — referred to
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Generally — referred to

s. 5(1)(e) — considered

s. 10 — considered

s. 27 — considered

*Employment Standards Act, 2000*, S.O. 2000, c. 41

Generally — referred to

s. 5(1) — considered

*United States Constitution, Fourteenth Amendment*, 1868

s. 1 — referred to

**Rules considered:**

*Federal Rules of Civil Procedure*, 28 U.S.C., Appendix

R. 23(a)(4) — considered

MOTION in certification of class proceeding.

**Perell J.:**

'The time has come,' the Walrus said,  
    'To talk of many things;  
        Of shoes — and ships — and sealing wax —

Of cabbages — and kings —  
And why the sea is boiling hot —  
And whether pigs have wings.'

[Louis Carroll, *The Walrus and the Carpenter in Through the Looking Glass*, 1872]

## A. Introduction

1 The time has come to talk about putative class members that want nothing to do with a proposed class action under the *Class Proceedings Act, 1992*<sup>1</sup> and are likely to opt out.

2 The motion now before the court is a continuation of a certification motion in a proposed class proceeding. By decision released on April 13, 2017,<sup>2</sup> Justice Belobaba ruled that Ms. Sondhi was not suitable to be the representative plaintiff, and Class Counsel now seeks to have Tarrie Phillip substituted. However, the Defendants, Deloitte Management Services LP and Deloitte & Touche LLP (collectively "Deloitte"), submit that Mr. Phillip is also unsuitable, because he allegedly does not care that the putative Class Members want nothing to do with a class action that they believe will actually cause them financial harm. Deloitte asks that the certification motion be dismissed without waiting to see if any of the 418 putative Class Members will opt out.

3 However, for the reasons that follow, I find that all the certification criteria have been satisfied and accordingly, I substitute Mr. Phillip as the representative plaintiff and certify the action as a class proceeding.

## B. Factual and Procedural Background

4 Deloitte and ATD Legal Services, whose assets Deloitte acquired in January 2014, provided document review services undertaken by lawyers. Deloitte retained Procom Consultants Group Limited to provide payroll services for Deloitte.

5 Ms. Sondhi was one of the document reviewers. She worked less than 70 hours over a two-month period. She never worked more than 44 hours per week, and she never worked on a statutory holiday.

6 On March 9, 2015, Ms. Sondhi commenced a proposed class action.<sup>3</sup>

7 Landy Marr Kats LLP and Monkhouse Law are the proposed Class Counsel.

8 In her Statement of Claim, Ms. Sondhi seeks, among other things, a declaration that the individuals who provided document review services to Deloitte and ATD Legal Services; *i.e.*, the putative Class Members, were employees of Deloitte and or Procom Consultants. Ms. Sondhi alleges that the putative Class Members were entitled to the benefits provided under the *Employment Standards Act, 2000*<sup>4</sup> such as overtime, vacation pay, and holiday pay.

9 Justice Belobaba heard her certification motion. On the certification motion, but for Ms. Sondhi's singular evidence, the evidence was that the putative Class Members deliberately and calculatedly contracted with Deloitte to be independent contractors because of the perceived advantages to them personally of being an independent contractor and the perceived disadvantages of being an employee.

10 The certification motion was heard on March 28, and 29, 2017. Justice Belobaba refused to certify the class action as against Procom Consultants, finding that there was no basis in fact for the allegation that the document reviewers were employees of Procom. He refused to certify the proposed common issue that sought to make Deloitte liable for document reviewers who had provided services to ATD, finding that there was no basis in fact for the allegation that Deloitte was a common employer with ATD.

11 As against Deloitte, Justice Belobaba held that three of the five certification criteria (cause of action, common issues, and preferable procedure) had been satisfied. In his decision, Justice Belobaba certified the following common issues as against Deloitte:

1. Did the actual circumstances of the relationship between Deloitte and the class members constitute an employer/employee relationship such that class members were in fact employees of Deloitte and not "independent contractors"?
2. If the answer to 1) is "yes", is Deloitte liable to the class for employee benefits pursuant to the *Employment Standards Act* (including unpaid vacation pay and public holiday pay and overtime) and for compensation for improper remittances?
3. If liability is established, are aggregate damages available?

12 Justice Belobaba, however, decided that two criteria (prerequisites for certification), the class definition and the representative plaintiff criterion, had not been satisfied. Justice Belobaba adjourned the motion to allow Class Counsel to amend the class definition and to find a replacement representative plaintiff within 60 days.

13 Justice Belobaba rejected Ms. Sondhi's proposed class definition, which included document reviewers who had worked only at ATD, and ordered that the class definition be narrowed to include only document reviewers who provided their services to Deloitte.<sup>5</sup>

14 Class Counsel and Ms. Sondhi now propose the following revised proposed class definition, which they submit responds to Justice Belobaba's suggestions:

All persons having performed or currently performing document review or e-discovery services at Deloitte pursuant to an independent contractor agreement since January 16, 2014 to the date of certification, exclusive of any person who has only ever performed the duties of a Project Manager.

15 Deloitte does not dispute that this definition would satisfy the class definition criterion for certification. Deloitte estimates that the putative class comprises 418 individuals.

16 As already noted, Justice Belobaba was not satisfied that Ms. Sondhi was qualified to be the representative plaintiff; he stated:

37. The final requirement set out in s. 5(1)(e) of the CPA, a representative plaintiff who can "fairly and adequately represent the interests of the class" may be more difficult to satisfy.

38. My concern here is not that Ms. Sondhi never worked more than 44 hours per week and is not entitled to overtime. Other class members can make this claim. And all class members can claim for statutory and vacation pay as already noted. The fact that different remedies are sought for different class members is not a bar to certification. And there is no conflict of interest under s. 5(1)(e)(ii) just because some class members may not agree with the action or otherwise may decide to opt out.

39. I am also not overly concerned that Ms. Sondhi has moved to an island in British Columbia and no longer practices law. She is still entitled to pursue this action as the representative plaintiff if she can "fairly and adequately represent the interests of the class." The Supreme Court has described the qualities required of a representative plaintiff as follows:

The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied however, that the proposed representative will vigorously and capably prosecute the interests of the class.

40. The problem for me is this. I am not satisfied on the record before me that Ms. Sondhi will vigorously and capably prosecute the interests of the class. Or that she will do so in a diligent and responsible fashion.

41. Ms. Sondhi's evidence on this motion was at best unreliable and at worst untruthful. The affidavit provided by Ms. Sondhi in support of this motion, and sworn to be true, contains a number of significant misstatements that were recanted on cross-examination. For example, that every document reviewer worked the same number of hours and that Ms. Sondhi's work hours were pre-determined (she admitted on cross-examination that neither of these points was true); or that she was subject to quotas of documents to review (she admitted on cross-examination that this was not true.) Having recanted this incorrect evidence on cross, Ms. Sondhi nonetheless proceeded to repeat the same misstatements in her factum on this motion.

42. Even if her affidavit and factum were drafted by class counsel, as is often the case, it is obvious that neither document was reviewed by the plaintiff before it was sworn or filed with the court. Ms. Sondhi also chose not to review the defendants' responding motion records or the timetable for the certification motion. I find in all of this a disturbing level of unreliability, disinterest and even indifference on the part of the proposed representative plaintiff. The proposed class members are entitled at the very least to a representative plaintiff who can be counted on to take her job seriously, review key documents and demonstrate an appropriate level of interest in a class action that is being brought in her name and that is claiming hundreds of millions of dollars in damages.

43. In sum, I am not persuaded that Ms. Sondhi will "fairly and adequately represent the interests of the class." I direct that the proposed representative plaintiff must be replaced with another within 60 days.

17 Significant to the discussion below, it should be noted that Justice Belobaba would not have disqualified Ms. Sondhi for the reason that she did not inquire, canvass, or poll the putative Class Members to determine whether they supported the proposed class action. Justice Belobaba stated:

31. The fact that several document reviewers filed affidavits saying that they are not employees and prefer to work as independent contractors is not determinative of anything. As the Court of Appeal noted in [*Keatley Surveying Ltd. v. Teranet Inc., 2015 ONCA 248*] "the representative plaintiff does not have to conduct a referendum to determine how many class members want to sue." If document reviewers wish to disassociate themselves from Ms. Sondhi's allegations and opt out of the class action, they will have every right to do so. In any event, the views or intentions of any given worker, or even a majority of workers, however credible or heart-felt, do not decide the applicability of the ESA.

18 After the release of Justice Belobaba's decision, Class Counsel recruited Mr. Phillip to replace Ms. Sondhi.

19 Mr. Phillip is a lawyer. Between June 2015 and September 2016, Mr. Phillip worked as a document reviewer for Deloitte. During this time, he also provided document review services to another document review provider.

20 Before agreeing to be a representative plaintiff, Mr. Phillip read Justice Belobaba's decision and some material about the responsibilities of a representative plaintiff. He subsequently, before being cross-examined, read the pleadings and the material filed for the certification motion.

21 On cross-examination, Mr. Phillip revealed that he has not communicated with any putative Class Member. He made no attempt to communicate despite his understanding that there are numerous document reviewers who provided evidence on the certification motion that they do not want to be declared to be employees. Mr. Phillip stated that he had not considered making inquiries into how the relief sought in the claim would impact him or the putative Class Members. His view was that the proposed class action was in the best interests of the class. He formed this view based on his own assessment of the merits of the claim being advanced.

22 During his cross-examination, Mr. Phillip testified:

Q. 147. In your own words, sir, what are you seeking to accomplish in the action?

A. So I think I briefly kind of glossed over this earlier when you asked a previous question. I do think it's important for, especially for young lawyers coming out, to know exactly where they stand, and I don't think that there's enough clarity

around the issue. So, I really want this to be set out in such a manner that we can figure out exactly where we stand, like, if we're employed or what the case is, where does the law stand on that. So . . .

Q. 148. And do you have a position with respect to whether or not the lawyers and document reviewers for Deloitte are employees or independent contractors?

A. Yes, I have a position and that's part of the motivation for me coming forward. I do think that the nature it's very similar to, like, what I do now, for instance, like, you know, the flexibility you have, but where I am now, I am an employee, right? So, I can understand that, you know, at that time I was an employee, but throughout the whole process of just coming out of law school and you're desperate, you need a job, you just kind of go with what they tell you. But, you know, looking at the circumstances, I do think at the time I was an employee with Deloitte. So that's where I stand on that.

Q. 149. And at the time that you were providing services to Deloitte, did you think you were an independent contractor or an employee?

A. I wasn't thinking about that, to be honest. I was just trying to get a job to be employed to take care of my, you know, my wife and, you know, for us to take care of each other, that kind of thing.

Q. 150. And what order do you hope the Court will make in this action?

A. I hope the Court would make a favourable order for our side and certify this and, you know, I hope it can go forward and . . .

Q. 151. And at trial what order do you hope the Court would make?

A. Again, a favourable order for the plaintiff. I don't know specifically, like, what phraseology I want the Court to make but, you know, something favourable for the plaintiffs that, you know, they — the classes, you're considered an employee based on the nature of the work and the nature of the conditions around the employment with Deloitte.

Q. 152. And why do you think that would be — that order would be in the best interests of the class that you represent or that you seek to represent?

A. Because I think it's right. That's why.

Q. 153. Can you elaborate on that?

A. It might sound a bit abstract or like — I think it is the right thing. I think if you're — for example, if you have to work, right, and you have to be — you can only work between certain hours, for example, I think that's one of the things that I see as leaning towards you being, you know, an employee. Even though you have flexibility to take, like, lunches and things like that, I can do that right now with my employment. I'm not there now, like, but I'm a salaried employee. So, looking at those things, it makes me feel like, yeah, maybe Deloitte was trying to, you know, take advantage of some young lawyers just coming out, like, so — and that is why.

Q. 154. And you think on balance, that it would be in the class members' interest to be retroactively treated as employees rather than as independent contractors?

A. So based on what I said in the previous answer, I think that the right decision would be for them to be labelled as employees, you know, and, yeah, and I think that kind of answers this as well. It would be the right decision, I think.

. . .

Q. 156. Why are you willing to take on the role of representative plaintiff?

A. I don't want an important decision like this to just fall by the wayside.

Q. 157. Is your understanding that if you weren't putting yourself forward, that there would be no one else who would be prepared to do that?

A. I don't know how many — I don't know that, the details of that, like, how many people are willing to come forward or whatever the case may be, but I think there would be other people because I know when I was at Deloitte, for instance, a few of my coworkers, they would say, you know, they think it's a good case. They see — like, people that would be sitting next to me, and so I think there would be other people coming forward for a case like this.

....

Q. 165. You agree that if you are appointed as representative plaintiff, you would be required to fairly and adequately represent the interest of the class?

A. Yes.

Q. 166. And what do you perceive to be the interests of the class?

A. So just to kind of touch on something that I said before, I think the interests of the class is to have this solved so they can understand where they stand as employees and also, to have a favourable sediment in the sense of determining that at that time they were employees based on the nature of the circumstances around the work.

Q. 167. How do you know that is the interest of the class?

A. I don't know, because that's my perception. You asked what I perceived, right? So . . .

Q. 168. You are aware that a number of current or former document reviewers swore affidavits in the proceeding stating that they did not want to be held to be employees?

A. I read some of the affidavits, yeah.

Q. 169. And how do you reconcile those class members' affidavits with the claims being advanced by your counsel?

A. I reconcile it with it's just a fact of life. You never get any situation where a hundred percent of people agree, and the most popular person is never — so that's how I see it. Like, you'll always — they'll always get someone to say that can say otherwise and we can get people that, you know, believe otherwise, but it is my view and I think the view of a lot of the class that, you know, we were employees.

....

Q. 172. You had indicated that you believe that it is the view of a lot of the class that they are employees or were employees and I had asked you what was the basis of your view.

A. Yeah.

Q. 173. Have you given me the full extent of your answer?

A. I mean, there's a lot around that, but I think that is my answer. Like, that's why I think. If you look at the full circumstances of, like, how we are employed as in addition to things like on weekends, for instance, if it's a very busy project, you would be encouraged to, you know, come in on the weekends and things like that. The fact that, you know, the office was open, like, from eight till, like, six and you can only, like, work in that time period, things like that, in addition to what I said before, I think that lends to my view on the matter.

Q. 174. So your view is that this action is in the best interests of the class is based on your assessment of relative merits of the claim being advanced by counsel?

A. Yes, I think that's a fair summary.

23 There is no third-party funding or funding from the Ontario Law Foundation's Class Proceedings Fund, and Mr. Phillip refused to disclose whether he has an indemnity agreement from Class Counsel. He deposed that he has the financial means to be responsible for an adverse costs award but refused to answer any questions about his financial assets or resources.

## C. Positions of the Parties

### 1. Deloitte's Argument

24 Deloitte argues that Mr. Phillip has failed to conduct reasonable due diligence, agreed to being recruited with little understanding of the litigation and his responsibilities, does not appear to take the job of representative plaintiff seriously, has not properly instructed Class Counsel who have been dilatory in posting or disseminating information about the proposed class action, and has not demonstrated an appropriate level of interest in the action. Further, Deloitte submits that Mr. Phillip has not demonstrated that he has the financial resources to pay costs and prosecute the class action in the best interests of the putative Class Members.

25 Deloitte submits that Mr. Phillip has failed to ascertain the interests of the putative Class Members and made no inquiries in this regard. Deloitte submits that Mr. Phillip has a conflict with most if not all of the putative Class Members (with the exception of the disqualified Ms. Sondhi) and that Mr. Phillip is indifferent to the facts that: the overwhelming evidence from the putative Class Members is that the class action was not in their best interests; and that the putative Class Members cannot escape being impacted by the proposed class action, because, even if they opt out, they will be bound by the result, since the *Employment Standards Act, 2000* prohibits contracting out.

26 Deloitte submits that although a proposed representative need not conduct a referendum to determine how many Class Members want to sue, in the face of the evidence adduced on this certification motion, Mr. Phillip ought to have made some inquiry to satisfy himself that there are some proposed Class Members who are in favour of the relief sought.

27 Deloitte's attack against Mr. Phillip can be categorized under four headings: (1) inadequate attention to responsibilities; (2) inadequate litigation plan; (3) want of financial resources; and (4) conflict of interest, including a conflict of interest between the Class Members and the Class Members that opt out. Deloitte submits that Mr. Phillip is not qualified to be representative plaintiff and, therefore, the certification motion should immediately be dismissed.

### 2. Mr. Phillip's Argument

28 Mr. Phillip argues that as a factual matter Deloitte's submissions are false. He submits that he is eminently qualified to be a representative plaintiff being knowledgeable, motivated, committed, and keenly interested in pursuing the action with or without Ms. Sondhi. He submits that he has the necessary financial resources to prosecute the action, and, in any event, the financial wherewithal of the representative plaintiff is just a factor among other factors to be weighed.

29 As a legal matter, Mr. Phillip denies that he has any conflict with Class Members and he submits that putative Class Members do not decide the applicability of the *Employment Standards Act, 2000*, and, thus, any argument that Mr. Phillip has a conflict of interest is, as a legal matter, wrong.

30 Mr. Phillip argues that if some putative Class Members have expressed a desire not to be classified as employees, they can opt out.

31 Mr. Phillip submits that all of the certification criteria have been satisfied and therefore the court must certify the action as a class proceeding.

## D. Discussion and Analysis

### 1. Introduction

32 Deloitte takes no objection to the competence of the Class Counsel that recruited Mr. Phillip. Landy Marr Kats LLP has more than adequate class action expertise and Monkhouse Law has expertise in employment law matters. Deloitte does object to Mr. Phillip as a suitable representative plaintiff.

33 As noted above, Deloitte's attack against Mr. Phillip as a representative plaintiff can be categorized under four headings. In this section of my Reasons for Decision, I shall address Deloitte's attacks on Mr. Phillip's qualifications one by one. However, before doing so, I shall first describe the general law about the representative plaintiff criterion and also the general law about the decertification of a class action.

34 As will appear from the discussion below, the matter of decertification is a matter related to Deloitte's arguments about the representative plaintiff criterion and to the circumstance that putative Class Members predominately may opt out of the action if it were certified.

35 After the discussion of the background law and the four grounds of attack, I will conclude the discussion with an analysis of the significance, if any, should it happen that a preponderance of Class Members opt out of the class action.

### 2. The Representative Plaintiff Criterion

36 The sole remaining issue on this certification motion is whether Mr. Phillip satisfies the representative plaintiff criterion, which is set out in s. 5(1)(e) of the *Class Proceedings Act, 1992*, which states:

- 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if, . . . .
- (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.

37 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.<sup>6</sup> 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.<sup>7</sup>

38 Section 5(1)(e) of the Ontario *Class Proceedings Act, 1992*, the representative plaintiff criterion, is derived from Rule 23(a)(4) of the *United States Federal Rules of Civil Procedure*. In the United States, section 1 of the 14<sup>th</sup> Amendment to the U.S. Constitution provides, among other things, that no state shall deprive any person of life, liberty, or property, without due process of law. Since class actions involve so called "absent plaintiffs"; i.e., the class members who are represented by the representative plaintiff, United States legislators were concerned that to be constitutionally *infra vires*, class action legislation must ensure that class members received due process; i.e., that they were adequately represented.<sup>8</sup> Thus, Rule 23(a)(4) provides as one of the criterion for certification that "the representative parties will fairly and adequately protect the interests of the class."

39 This idea from the United States about the adequacy of representation in class proceedings was adopted by the Ontario legislators. The Ontario Law Reform Commission, in its *Report on Class Actions* describes the operation of Rule 23(a)(4) as follows:<sup>9</sup>

Although the case law in respect of Rule 23(a)(4) is abundant, the principles to be applied thereunder are relatively straightforward. For example, it is generally agreed that, before a court can conclude that the named plaintiff will fairly and adequately represent the class, it must be satisfied that his interests are not antagonistic to those of the class that he seeks to represent. In addition, because of the binding effect of a class action judgment, a court must be convinced that the suit is not the result of collusion between the plaintiff and the defendant. A third ingredient of the adequacy of representation requirement of Rule 23 upon which the courts would seem to be in agreement is a showing that counsel for the class is competent to conduct the litigation on behalf of the class. It even has been suggested by some that the adequacy of the representative plaintiff's counsel is of greater import than the adequacy of the representative plaintiff, since "in fact it is class counsel who protects the interests of the class". On the other hand, there are many cases in which the presence of competent counsel has not been sufficient to satisfy the requirements of Rule 23(a)(4); in these cases, the courts have emphasized the importance of a representative plaintiff capable of playing an active role in the litigation, although the level of understanding required of the representative plaintiff may vary from case to case.

40 The jurisprudence in Ontario and across Canada is similar to the American case law. The Canadian case law establishes that whether the representative plaintiff can provide adequate representation depends on such factors as: (a) his or her motivation to prosecute the claim; *i.e.*, the court must be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class; (b) the competence of his or her counsel to prosecute the claim; and (c) his or her ability to bear the costs of the litigation.<sup>10</sup>

41 Adequate representation is based on the notion that the representative plaintiff has a sufficient common interest with the class members and also the motivation and ability to pursue the action for their mutual benefit; however, a representative plaintiff need not share every characteristic of every member of the putative class or be typical of the class.<sup>11</sup>

42 However, because the plaintiff will have the advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff.<sup>12</sup> If the access to justice concerns of the *Class Proceedings Act, 1992* are to be accomplished, the court should not subject the proposed representative plaintiff to some sort of Class Action Aptitude Test and should be skeptical of the defendant's arguments based on the personality of the candidate.<sup>13</sup>

43 The court should be skeptical because the defendant's crocodile tears' argument about the adequacy of the representative plaintiff is made out of a desire to devour the class action and have the certification motion dismissed. As I noted in *Berg v. Canadian Hockey League*, defendants are not genuinely interested in ensuring that class members are adequately represented; rather, defendants are genuinely interested in ensuring that there is no class action.<sup>14</sup>

44 While the court should be skeptical of the defendant's attacks against the qualifications of the representative plaintiff, the court must nevertheless ensure that the proposed representative plaintiff is not a string-puppet of an entrepreneurial chameertous class counsel. The 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.<sup>15</sup> A proposed representative plaintiff must demonstrate autonomy and a minimum level of general knowledge about the nature of class proceedings and his or her responsibilities to give instructions on behalf of the class.<sup>16</sup> Thus, while not necessarily a disqualifying factor, the recruitment of the plaintiff is a relevant factor to be considered in determining whether the proposed representative plaintiff has the necessary interest, independence, and incentive to fulfill his or her duties to the class members.<sup>17</sup>

45 The proposed representative plaintiff must present a workable litigation plan. The quality of the litigation plan reveals something about the competence of class counsel, although over the years, the profession has developed more or less boilerplate litigation plans. The production of a workable litigation plan assists the court in determining whether the class proceeding is the preferable procedure, and it allows the court to determine whether the litigation itself is manageable in its constituted form.<sup>18</sup> Litigation plans are a work in progress; they are meant to be malleable and subject to revision and adjustment as the litigation progresses.<sup>19</sup>

46 The financial ability of the representative plaintiff to bear the expense that is necessarily involved for the proper prosecution of a class action is a relevant factor in determining whether he or she is qualified to be a representative plaintiff.<sup>20</sup>

47 A plaintiff with an interest in conflict with the interests of other class members does not qualify as a representative plaintiff.<sup>21</sup> However, a conflict in interest is not the same thing as there being differences in the circumstances of the representative plaintiff and the class members. To be a disqualifying conflict, the differences between the situation of the representative plaintiff and the class members must impact on the outcome of common issues and the differences must affect the representative plaintiff's ability to adequately and fairly represent the class.<sup>22</sup>

48 It may be possible to address the possibility of a conflict developing between a representative plaintiff and the members of a class by creating a subclass or it may be necessary to decertify the proceeding if the conflict cannot be resolved.<sup>23</sup>

### **3. Decertification**

49 The *Class Proceedings Act, 1992* provides for decertification where it appears that the conditions for certification are not satisfied. Section 10 of the *Act* provides:

*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.

....

50 Where the conditions for certification no longer exist because of changed circumstances a party may apply to have the action decertified or to have the certification order amended.<sup>24</sup> The same criteria relate to certification and decertification, and the question is whether the conditions for certification have been satisfied or not.<sup>25</sup>

51 If further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis; the statutory objectives of the *Class Proceedings Act, 1992* — access to justice, judicial economy and behavioural modification — would not be advanced by allowing the action to continue under the *CPA* in such cases, and the action may be decertified.<sup>26</sup> In *Pearson v. Inco Ltd.*,<sup>27</sup> Justice Cullity stated:

.... [Section 10] recognizes that the case-managed procedure under the CPA is necessarily somewhat fluid and that certification motions are decided at an early stage of the proceeding and before discoveries. In consequence, certification orders are not intended to be cast in stone and, whether or not they have been entered, they can be, in effect, revoked, or amended from time to time. It is not in the public interest - or in that of the litigants or the class - that a case should

be permitted to proceed to trial if further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis. The statutory objectives of the CPA — access to justice, judicial economy and behavioural modification — would not be advanced by allowing the action to continue under the CPA in such cases.

52 Except perhaps in an extreme case, the size of the class does not undermine the evidence satisfying the certification criteria and the class proceeding will continue regardless of the diminished size of the class.<sup>28</sup>

#### ***4. Inadequate Attention to Responsibilities***

53 I now turn to Deloitte's arguments that Mr. Phillip is not qualified to be representative plaintiff beginning with the argument that he has shown inadequate attention to his responsibilities as a representative plaintiff.

54 With respect to Ms. Sondhi, the case at bar is one of the rare examples, where a defendant is able to show that the proposed representative plaintiff's promise to do right by the class is a hollow promise and that the proposed representative plaintiff is no genuine representative of the class or is incapable of adequately representing the class. *Sullivan v. Golden Intercapital (GIC) Investments Corp.*,<sup>29</sup> *Frey v. BCE Inc.*,<sup>30</sup> *Wilkinson v. Coca-Cola Ltd.*,<sup>31</sup> and *Horse Lake First Nation v. R.*,<sup>32</sup> are other examples of an essentially clueless representative plaintiff candidate not qualifying to be a representative for the class.

55 Justice Belobaba disqualified Ms. Sondhi, but he gave Class Counsel the opportunity to recruit an adequate representative plaintiff. The issue then is whether Mr. Phillip is to suffer the same fate as Ms. Sondhi because, among other things, he has allegedly demonstrated a disinterest and a lack of due diligence for the class he is to represent.

56 The representative plaintiff does play a very important role in class actions, but, truth be told, the faraway greater responsibility to fairly and adequately represent the interests of the class by vigorously and capably prosecuting the action falls on class counsel. In some cases, truth be told, a representative plaintiff is a fungible, because there will be many potential candidates to be a plaintiff seeking compensation for a mass wrongdoing. Sometimes a proposed class action is the pure invention of class counsel and sometimes the proposed class action is class counsel's opportunistic response to a disaster, a product recall, a corrective disclosure, or a regulator's discovery of a conspiracy. While there is an air of ambulance chasing, there is also an air of class counsel being the champion for access to justice for the many victims of a mass wrongdoing, and thus in the case at bar neither proposed Class Counsel nor Mr. Phillip need be embarrassed by the circumstance that a representative plaintiff has been recruited.

57 At the beginning of a class action, there is little for the representative plaintiff to do but give the instruction to prosecute the action invented or opportunistically discovered by class counsel for the benefit of the victims of a mass wrongdoing. In the case at bar, Mr. Phillip was recruited, but he cannot be faulted for any want of due diligence or disinterest at the outset of this proposed class action.

58 And, if further truth be told, for the certification hearing, in order to satisfy the representative plaintiff criterion, class counsel prepares a standard form template affidavit attaching a standard form litigation plan where the plaintiff deposes to his or her virtues as a representative plaintiff and the virtues of his or her champion, class counsel. Truth be told, the affidavit is a kind of a standard form promise or ritual more than a proof of anything. In the case at bar, Mr. Phillip has made the ritualistic promises and the truth of those promises will be in the doing not the telling at the time of the certification motion.

59 And if the truth be told, the major qualities of the representative plaintiff are independence and loyalty to the class and the major responsibility of the representative plaintiff is to ensure that class counsel does not improvidently settle the action sacrificing access to justice and behaviour modification to the entrepreneurial motivations that encouraged class counsel in the first place to take on the enormous risks attendant on class action litigation. At this juncture, there is no reason to doubt that Mr. Phillip will be loyal to the putative Class Members that do not opt out of the action.

60 Given these truths, it is understandable that it is rare that a plaintiff will be disqualified from being a representative plaintiff for alleged inadequate attention to his or her responsibilities. Turning again to the case at bar, in my opinion, Deloitte has not succeeded in showing that Mr. Phillip cannot or will not fulfill his responsibilities as a representative plaintiff.

61 Mr. Phillip is not a placeholder plaintiff. He has a genuine claim that he wishes to pursue. He worked for Deloitte for approximately 16 months and has a personal interest in succeeding with his declaratory and monetary claims. He believes in the merits of his claims, and given his legal background, he has more than a layman-plaintiff's knowledge of the nature of the employment law claims that underlie the common issues of the proposed class action.

62 It is crocodile tears to denigrate him for not studying up before agreeing to be Ms. Sondhi's replacement. Clients are not expected to study their own cases; that's what lawyers are supposed to do. Clients just need to believe that they may be entitled to legal redress for having suffered some harm.

63 If one takes a step back and compares class actions to regular litigation, it is an oddity or aberration of the test for certification, which is not designed to be a merits test, that a defendant gets to test the sincerity of a plaintiff in his or her belief that they have a meritorious claim. In any event, in my opinion, Deloitte has not proven that Mr. Phillip has not nor that he will not keep his promise to adequately carry out his responsibilities as a representative plaintiff.

### **5. Inadequate Litigation Plan**

64 There is no merit to Deloitte's argument about the litigation plan, which argument largely focuses on the delay it took Class Counsel to update the class about the status of the certification motion and Mr. Phillip's failure to supervise the implementation of the plan.

65 In my opinion, any questions about the adequacy of the litigation plan that could be raised by Deloitte were spent once Justice Belobaba determined that the cause of action, common issues, and preferable procedure criteria were satisfied and the class definition criterion could be satisfied. Thereafter, the litigation plan became a work in progress whose inadequacies, if any, will be addressed by the court's case management of the action.

### **6. Want of Financial Resources**

66 That a representative plaintiff needs to demonstrate some financial capability to prosecute a class action — which is not the same thing as demonstrating that he or she is capable of paying costs — is another oddity of class action procedure in contrast to regular litigation, where save for the defined circumstances where security for costs may be ordered, a plaintiff is not required to show their ability to pay for the litigation or to pay an adverse costs award.

67 In the case at bar, if Mr. Phillip does not have an indemnity agreement from Class Counsel, then, no doubt, he understands that he may be responsible for an adverse costs award if the class action fails or is decertified.

68 The conventional wisdom is that class counsel do agree to indemnify representative plaintiffs, but there is nothing in the *Class Proceedings Act, 1992* that requires it, although it would be professionally irresponsible and negligent to not advise a representative plaintiff of the risks he, she, or it is exposed to by taking on the role of a representative plaintiff. I say "or it" because more frequently large institutions act as representative plaintiff, and I see no reason why they should expect an indemnity agreement from their lawyers, but like all clients, the institutional client should be advised about the downsides of litigation.

69 But even in the class action context, a plaintiff's want of financial resources is just a factor and not a determinative one as to whether a plaintiff qualifies to be a representative plaintiff. And, in the context of a class action, examining the financial resources of the plaintiff is more about protecting the class members' interest in access to justice than it is about protecting the defendant from a judgment-proof plaintiff unable to pay costs.

70 With these thoughts in mind, in my opinion, for the immediate case, there are no grounds for disqualifying Mr. Phillip based on any want of financial resources to adequately prosecute the class action. In the case at bar, Mr. Phillip need not undergo

a judgment debtor examination about his financial resources. Class Counsel will bear the brunt of marshaling the resources to prosecute the action.

### ***7. Conflict of Interest with the Class Members that Opt Out***

71 The most serious knock against Mr. Phillip is Deloitte's argument that Mr. Phillip has a disqualifying conflict of interest.

72 Under s. 5(1)(e) of the *Class Proceedings Act, 1992*, to qualify as a representative plaintiff, the plaintiff must "not have, on the common issues for the class, an interest in conflict with the interests of other class members." In the immediate case, Deloitte submits that Ms. Sondhi and Mr. Phillip have a conflict of interest because most of the putative Class Members do not wish to be declared to be employees, which is the thrust and purpose of Mr. Phillip's class action.

73 Now, typically, it is not a conflict for the representative plaintiff that some of the class members may not desire to pursue the claim because they will have the right to opt out of the action,<sup>33</sup> and even class members that do not opt out are not compelled to take-up their share of any settlement fund. However, Deloitte submits that in the case at bar, there is no avoiding a conflict because the right to opt out or the right to not opt into a settlement are illusory because s. 5(1) of the *Employment Standards Act, 2000* provides that an employee cannot contract out of or waive any employment standard. Section 5(1) states:

#### *No contracting out*

5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

74 Deloitte's argument that the putative Class Members' rights to opt out or to not opt into a settlement are illusory, however, is mistaken. The fallacy of the argument follows from the legal fact that the determination of the common issues is only binding on the class members who do not opt out.

75 Under the *Class Proceedings Act, 1992*, there are no positive or negative issue estoppels with respect to class members that opt out. A person who has opted out is not bound by the judgment on the common issues, and a person who has opted out cannot claim the benefit of a judgment against the class action defendant. In the case at bar, both Deloitte and the putative Class Members that opt out are lawfully entitled to carry on as independent contractors.

76 That a common issues decision is binding only on class members who do not opt out is made clear by s. 27 of the *Class Proceedings Act, 1992*, which states:

#### *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.

77 In the case at bar, for the class members that opt out, there will be no determination whether or not they are employees, which is a prerequisite for s. 5(1) of the *Employment Standards Act, 2000*, to operate. There will be no declaration of the status of the persons who opt out, be that status employee or independent contractor. Thus, the premise of Deloitte's conflict argument is false, and this argument is not a reason to disqualify Mr. Phillips. The general rule is that it is not a conflict for the representative plaintiff that some of the class members may not desire to pursue the claim applies.

78 The general rule is that the proposed representative plaintiff need not conduct a referendum to determine how many class members support the class action. In *Keatley Surveying Ltd. v. Teranet Inc.*,<sup>34</sup> Justice Sharpe stated for the Court of Appeal:

72. . . . It is in the very nature of class actions that many, if not most, individual class members lack the motivation or the will to commence proceedings. The access to justice and behavior modification goals of class proceedings will often depend upon a representative plaintiff taking the initiative in circumstances where other members of the class would be ignorant of their loss or acquiesce because of disinterest, lack of resources or fear of an adverse costs award. If multiple claims exist, the representative plaintiff does not have to conduct a referendum to determine how many class members want to sue. Ontario's class action regime features an opt-out procedure which affords class members who do not wish to have their claims advanced the right to disassociate themselves from the action. There is no corresponding requirement to establish a willing class.

79 In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,<sup>35</sup> discussed below, Chief Justice Winkler stated that once a class member has opted out of the class proceeding, he or she is a stranger to the lawsuit and has no standing before the court, and thus, the person who has opted out has no say about how the action is conducted or whether or not it will continue to go forward.

80 Nevertheless, relying on *Boucher v. P.S.A.C.*,<sup>36</sup> *MacDougall v. Ontario Northland Transportation Commission*,<sup>37</sup> and *Paron v. Alberta (Minister of Environmental Protection)*,<sup>38</sup> Deloitte, however, argues that Mr. Phillip has a conflict of interest because the putative Class Members predominately do not wish a class action declaring them to be employees.

81 In the immediate case, in my opinion, there are no conflicts of the type that existed in *Boucher*, *MacDougall*, and *Paron*. In the immediate case, the interests of Mr. Phillip are precisely the same as the interests of the Class Members that do not opt out. He is not a representative for the putative Class Members that opt out and has no relationship with those Class Members.

82 In *Boucher*, the plaintiffs sought to certify an action against their employer who administered a pension plan. The plaintiffs alleged that the defendant employer had wrongfully appropriated the surplus by taking a contribution holiday and providing new retirees early retirement incentives including pay equity payments while excluding the plaintiffs and others from the benefits. Justice Charbonneau, for a variety of reasons, refused to certify the action as a class proceeding, including the reason that the plaintiffs proposed to represent claimants with a conflicting interest because they were differently affected depending on what relief the plaintiffs sought. In the case at bar, all the Class Members are similarly situated; if the class action is successful, they

will all receive the benefits of the employment standards legislation. The putative Class Members that opt out will receive no benefits and they are not bound by the outcome of the class action.

83 In *MacDougall*, the plaintiffs sought to certify an action to challenge, among other things, amendments to a pension plan that provided for a contribution holiday, an early retirement program and enhanced retirement benefits. Justice Hennessy refused certification. She held that if the litigation was successful and the amendments were invalidated, the active employees *in the class* could face adverse consequences since the amendments actually benefited them and they would lose the contribution holiday, the early retirement program, and the enhanced retirement amendments. There was a direct link between the successful outcome of the litigation and the adverse consequences to the active employees. In the immediate case, a successful outcome of the litigation is not adverse to the Class Members that do not opt out because these Class Members support being classified as employees. The Class Members that do opt out are not affected at all by the class proceeding.

84 *Paron* was a class action about the water level of a lake. In *Paron*, the plaintiffs sought an order to raise the water level of the lake by 18 inches, which would permanently submerge portions of the lands of the putative class members who owned lower-lying properties. In that case, some putative class members would be helped and others would be harmed by the remedy sought regardless of whether they opted in or opted out of the litigation. In the immediate case, the remedy of the minimum protections of employment standards legislation causes no harm at all to the Class Members who do not opt out and the outcome of the litigation does not bind the putative Class Members who do opt out.

85 Deloitte, however, argues that whatever the legal reality may be about the non-binding effect of a judgment on the common issues, nevertheless, the practical reality is that if Mr. Phillip succeeds at the common issues trial and the Class Members are declared to be employees, then Deloitte and apparently the administrators of the *Employment Standards Act, 2000*, will have no choice in the future but to treat the putative Class Members that opted out as employees. Thus, Deloitte submits that, practically speaking, Mr. Phillip has a conflict of interest with the putative Class Members that opt out and therefore he is disqualified as a representative plaintiff.

86 Deloitte submits that practically speaking the conflict of interest is inherent and unavoidable. Although the relationship between a worker and his or her manager, be it an employment relationship or an independent contractor relationship, is a contractual relationship, where freedom of contract governs. Deloitte submits that in the case at bar, there is nothing more that can be done to create an independent contractor relationship with document reviewers. Deloitte submits that if Mr. Phillip succeeds, then all the document reviewers must be treated as employees in the future and there is nothing that they or Deloitte can do about this.

87 I do not accept this *in terrorem* argument. Assuming that the court were to determine in the case at bar that the Class Members are employees, it is likely that the court will also explain why the Class Members are classified as employees and this explanation will infuse Deloitte with the knowledge of what they need to do in the future to amend their retainer contracts. Standard form contracts and boilerplate provisions in contracts are frequently amended to respond to court rulings. I certainly do not accept the notion that a court ruling in the case at bar will declare *in rem* that all document reviewers are employees or that Deloitte's adroit lawyers will be unable to fashion the bullet proof independent contractor contract.

88 I also do not accept the notion that on a certification motion, the court should find the representative plaintiff has a conflict of interest because of what the administrators of the *Employment Standards Act, 2000* may do in the future in response to a court ruling that does not bind negatively or positively the putative Class Members that opted out of the class action.

89 In short, in the case at bar, Deloitte has not established that Mr. Phillip has a disqualifying conflict of interest.

## **8. The Significance of a Preponderance Opt Outs**

90 The conclusion that Mr. Phillip does not have a conflict of interest, however, begs the question of whether there is any significance to the feature of the immediate case that a preponderance of Class Members may opt out. The discussion so far reveals that the potential of many opt outs is not a bar to certification, but the discussion leaves open the question of what

significance, if any, there is to the circumstance that there may be a preponderance of opt outs. The answer to this question lies in the territory of decertification.

91 In the immediate case the answer is that it is premature to consider the significance of a preponderance of opt outs. If this action is certified and it turns out that the preponderance of the Class Members do opt out that in and of itself would not be a basis for decertifying the action. The Class Members who do not opt out are entitled to access to justice and the representative plaintiff is duty bound to advance their common interest.

92 However, a large number of opt outs may expose the action to decertification if the certification criteria are no longer satisfied. In the case at bar, it remains to be seen how many Class Members will opt out and the point to emphasize and to clarify is that the number of opt outs *does not in itself* provide a basis for decertifying a class action. And the potentiality of opt outs is not a reason to not certify an action in the first place.

93 In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,<sup>39</sup> Chief Justice Winkler explained that certification is not akin to labour arbitration nor is it a political process of voting for or against the class action. It that case, the case management judge, Justice Strathy, as he then was, out of concern that the opt out process had been politicized, invalidated the opt-out notices. The Court of Appeal, however, reversed the decision, and Chief Justice Winkler explained that the class action would proceed notwithstanding a diminished class size. He stated at paragraphs 48, 51:

48. If by the survival of the class action the motion judge was referring to the prospect of de-certification, he did not explain why the number of class opt-outs could undermine the evidence satisfying the certification criteria. Indeed, other than perhaps in the most extreme cases, I fail to see any reason why the number of opt-outs would be a basis for decertification. Alternatively, if he meant the viability of the class action somehow depends on the number of remaining class members, there is no basis for this concern. A certified class proceeding will continue regardless of the diminished size of the class and the correspondingly diminished damages award or settlement amount that might follow therefrom.

....

51. Given these misconceptions about the nature of the opt-out process, I think it is important to emphasize that the *CPA* does not contemplate the politicization of the opt-out process. The opt-out process is not analogous to the labour context where majority support or opposition is required to certify or decertify a union. Within the statutory framework of the *CPA*, there is no legitimate purpose that can be achieved by politicizing the opt-out process. As explained in *A&P [1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.)]* at para. 32, certification motions are not determined through a referendum of the class members. Nor is the viability of the class action dependent on majority support. Just as the percentage of support amongst class members is not an element of certification, opting out cannot stop a class action. The number of opt-outs does not in itself provide a basis for decertifying a class action.

94 In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*,<sup>40</sup> the proposed representative plaintiffs were franchisees, and the franchisor argued that they were disqualified because certification of the action would upset the existing arrangements with the franchisees and cause the franchisor to revisit each of these arrangements. On the certification motion, the franchisor proffered evidence from franchisors that opposed certification because they felt they had more to lose than to gain and they did not want a class proceeding brought that would upset the existing relationship between them and the franchisor. Justice Winkler, as he then was, rejected the argument and stated at paragraphs 32, 45-46:

32. .... To adduce evidence from individual class members as to the desirability of a class proceeding is to assume, as an underlying proposition, that certification motions are somehow determined through a referendum of the class members. Such is not the case. The legislature has spoken with respect to class proceedings in this province. The provisions dealing with opt outs and de-certification show that it was clearly alive to the prospect that not all members of a proposed class would wish to participate in a class proceeding or, alternatively, that a sufficient number of defections from the class would

render a class proceeding unnecessary. Conversely, there are no provisions that expressly or implicitly mandate, or even suggest, that the suitability of a class proceeding is to be determined by a polling of the class prior to the certification motion.

....

45. I find no merit in the contention that the independence of the plaintiffs disqualifies them as representatives. The fact that their circumstances may be different from some or all of the balance of the class does not represent a conflict "on the common issues" as that term is used in s. 5(1)(e) of the *CPA*. Nor do their different circumstances mean that they cannot fairly and adequately represent the class. In fact, the evidence is to the contrary.

46. A&P also contended that there is a conflict because certification of the action would upset the existing arrangements with the franchisees and cause A&P to revisit each of these arrangements. 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. Through this argument, A&P implies that if the plaintiffs are successful, that success entails a risk for the other franchisees. However, as counsel for A&P candidly admitted, a successful individual action would have the same effect with respect to the existing arrangements. The purpose of class proceedings legislation is to make the justice system accessible. To this end, the court must consider alternative procedures. However, as noted in [*Hollick v. Toronto (City)*, 2001 SCC 68] 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. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.

95 In the case at bar, as already noted several times above, the points to emphasize are that the potential number of opt outs is not a reason not to certify an action and the actual number of opt outs *does not in itself* provide a basis for decertifying a class action. The number of opt outs, however, may reveal that the class action no longer satisfies the certification criteria, which is the true basis for the decertification of a class action. For instance, in the case at bar, it remains to be seen whether a class action would remain the preferable procedure to the alternatives of individual actions or a joinder of claims or test cases if some large proportion of the 418 Class Members opted out. A large number of opt outs may mean that the synergies of the common issues are lost or that a class action is not the preferable procedure. On the other hand, a large number of opt outs may have no effect on whether the certification criteria remain satisfied.

96 This said, the question now before the court is that of certification, not decertification, and Mr. Phillip's action satisfies all the certification criteria.

## E. Conclusion

97 For the above reasons, I certify this action as a class proceeding.

98 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Phillip's submissions within 20 days of the release of these Reasons for Decision followed by Deloitte's submissions within a further 20 days.

*Proceeding certified.*

## Footnotes

<sup>1</sup> S.O. 1992, c. 6.

<sup>2</sup> *Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122 (Ont. S.C.J.).

<sup>3</sup> Her Statement of Claim was amended on April 13, 2016.

<sup>4</sup> S.O. 2000, c. 41.

- 5 Justice Belobaba suggested that: (a) the start date for the class definition should be the precise date in January 2014 when ATD was acquired by Deloitte; (b) the end date should be the certification date so that class members can exercise their statutory right to opt out; (c) the sub-classes proposed ought to be abandoned and that a general class definition would be suitable. In his decision, Justice Belobaba stated that if the suggestions were adopted then the class definition criterion would be satisfied.
- 6 *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.).
- 7 *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-77; *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. 44.
- 8 Ontario Law Reform Commission, *Report on Class Actions Vol. 2*, Toronto, Ministry of the Attorney General, 1982, p. 352.
- 9 Ontario Law Reform Commission, *Report on Class Actions Vol. 2*, Toronto, Ministry of the Attorney General, 1982, p. 353.
- 10 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 41; *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (Ont. S.C.J.) at para. 174, leave to appeal ref'd [2008] O.J. No. 1973 (Ont. Div. Ct.); *DeFazio v. Ontario (Ministry of Labour)*, [2007] O.J. No. 902 (Ont. S.C.J.).
- 11 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 44, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).
- 12 *Frey v. Bell Mobility Inc.*, [2007] S.J. No. 476 (Sask. Q.B.) at para. 7.
- 13 *Coulson v. Citigroup Global Markets Canada Inc.*, [2010] O.J. No. 1109 (Ont. S.C.J.) at para. 158, aff'd 2012 ONCA 108 (Ont. C.A.).
- 14 2017 ONSC 2608 (Ont. S.C.J.) at para. 229.
- 15 *Chartrand v. General Motors Corp.*, [2008] B.C.J. No. 2520 (B.C. S.C.) at paras. 99-112; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (Ont. S.C.J.) at paras. 208-29.
- 16 *Frey v. BCE Inc.*, 2006 SKQB 328 (Sask. Q.B.) at para. 86; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (Ont. S.C.J.) at paras. 208-29; *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 (Alta. Q.B.) at paras. 42-62; *Wilkinson v. Coca-Cola Ltd.*, 2014 QCCS 2631 (C.S. Que.); *Horse Lake First Nation v. R.*, 2015 FC 1149 (F.C.) at paras. 83-90.
- 17 *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (Ont. S.C.J.) at para. 221.
- 18 *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.) at p. 203, aff'd (1999), 46 O.R. (3d) 315 (Ont. Div. Ct.), varied on other grounds (2000), 51 O.R. (3d) 236 (Ont. C.A.), application for leave to appeal to the S.C.C. ref'd October 18, 2001 [2001 CarswellOnt 3609 (S.C.C.)]; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at paras. 76-78; *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (Ont. S.C.J.); *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée*, [2006] O.J. No. 4625 (Ont. S.C.J.) at para. 100, aff'd [2008] O.J. No. 4153 (Ont. Div. Ct.).
- 19 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 95, 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.); *Nantais v. Electronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.) at para. 15; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 28; *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.); *French v. Investia Financial Services Inc.*, 2012 ONSC 1150 (Ont. S.C.J.) at para. 96; *Ivany v. Financiere Telco Inc.*, 2013 ONSC 6347 (Ont. S.C.J.) at para. 104, leave to appeal ref'd 2013 ONSC 6969 (Ont. S.C.J.).
- 20 *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at paras. 95-96, rev'g [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Ont. S.C.J.) at para. 35, aff'd [2003] O.J. No. 3918 (Ont. Div. Ct.); *Mortson v. Ontario (Municipal Employees Retirement Board)*, [2004] O.J. No. 4338 (Ont. S.C.J.) at

paras. 91-94; *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.) at paras. 46-47; *MacKinnon v. Ontario (Municipal Employees Retirement Board)*, [2006] O.J. No. 1892 (Ont. S.C.J.); *Allen v. Aspen Group Resources Corp.*, [2009] O.J. No. 5213 (Ont. S.C.J.) at paras. 155-158.

21 *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (Ont. S.C.J.), aff'd [2007] O.J. No. 573 (Ont. Div. Ct.), motion for leave to appeal ref'd, July 31, 2007 [2007 CarswellOnt 8994 (Ont. C.A.)]; leave to appeal to S.C.C. ref'd (2008), [2007] S.C.C.A. No. 491 (S.C.C.); *Paron v. Alberta (Minister of Environmental Protection)*, [2006] A.J. No. 573 (Alta. Q.B.); *L. (T.) v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Alta. Q.B.), aff'd [2009] A.J. No. 512 (Alta. C.A.); 6323588 Canada Ltd. v. 709528 Ontario Ltd., 2012 ONSC 2985 (Ont. S.C.J.).

22 *Hoy v. Medtronic Inc.*, [2001] B.C.J. No. 1968 (B.C. S.C. [In Chambers]), aff'd [2003] B.C.J. No. 1251 (B.C. C.A.); *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 (B.C. S.C.), rev'd in part (1998), 157 D.L.R. (4th) 465 (B.C. C.A.), leave to appeal granted but appeal abandoned, [1998] S.C.C.A. No. 260 (S.C.C.); *L. (T.) v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Alta. Q.B.), aff'd [2009] A.J. No. 512 (Alta. C.A.); *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (B.C. S.C.).

23 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.), aff'g (2002), 62 O.R. (3d) 535 (Ont. S.C.J.), leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.); *Peppiatt v. Royal Bank* (1996), 27 O.R. (3d) 462 (Ont. Gen. Div.); *Dhillon v. Hamilton (City)*, [2006] O.J. No. 2664 (Ont. S.C.J.).

24 *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.); *Silver v. Imax Corp.*, 2013 ONSC 1667 (Ont. S.C.J.).

25 *Peppiatt v. Royal Bank* (1996), 27 O.R. (3d) 462 (Ont. Gen. Div.); *Lacroix v. Canada Mortgage & Housing Corp.*, [2001] O.J. No. 6251 (Ont. S.C.J.), aff'd [2004] O.J. No. 4348 (Ont. Div. Ct.), leave to appeal ref'd [2005] O.J. No. 484 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 164 (S.C.C.).

26 *Pearson v. Inco Ltd.*, [2009] O.J. No. 780 (Ont. S.C.J.); *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.), leave to appeal ref'd [2009] O.J. No. 4129 (Ont. Div. Ct.); Ontario Law Reform Commission, *Report on Class Actions Vol. 2*, Toronto, Ministry of the Attorney General, 1982, p. 434.

27 [2009] O.J. No. 780 (Ont. S.C.J.) at para. 26.

28 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 (Ont. C.A.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 44, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

29 2014 ABQB 212 (Alta. Q.B.).

30 2006 SKQB 328 (Sask. Q.B.).

31 2014 QCCS 2631 (C.S. Que.).

32 2015 FC 1149 (F.C.).

33 *Kranjcev v. Ontario* (2004), 69 O.R. (3d) 231 (Ont. S.C.J.) at para. 68; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)*, 2010 BCSC 1699 (B.C. S.C. [In Chambers]) at para. 131, rev'd on other grounds 2012 BCCA 193 (B.C. C.A.); *Chapman v. Benefit Plan Administrators Ltd.*, 2013 ONSC 3318 (Ont. S.C.J.) at para. 58.

34 2015 ONCA 248 (Ont. C.A.) at para. 72, aff'g 2014 ONSC 1677 (Ont. Div. Ct.), rev'g 2012 ONSC 7120 (Ont. S.C.J.).

35 2013 ONCA 279 (Ont. C.A.) at para. 52.

36 [2005] O.J. No. 2693 (Ont. S.C.J.), aff'd (2006), 51 C.C.P.B. 18 (Ont. Div. Ct.).

37 [2006] O.J. No. 5164 (Ont. S.C.J.), aff'd [2007] O.J. No. 573 (Ont. Div. Ct.), motion for leave to appeal ref'd July 31, 2007 [2007 CarswellOnt 8994 (Ont. C.A.)]; leave to appeal to S.C.C. ref'd (2008), [2007] S.C.C.A. No. 491 (S.C.C.).

38 [2006] A.J. No. 573 (Alta. Q.B.).

39 2013 ONCA 279 (Ont. C.A.).

40 (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 44, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd, (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

**TAB 34**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Douez v. Facebook, Inc.](#) | 2014 BCSC 953, 2014 CarswellBC 1487, [2014] B.C.J. No. 1051, 313 C.R.R. (2d) 254, 53 C.P.C. (7th) 302, [2014] B.C.W.L.D. 4013, [2014] B.C.W.L.D. 4014, [2014] B.C.W.L.D. 4015, [2014] B.C.W.L.D. 4025, [2014] B.C.W.L.D. 4026, 242 A.C.W.S. (3d) 774 | (B.C. S.C., May 30, 2014)

**2013 SCC 58**  
Supreme Court of Canada

Sun-Rype Products Ltd. v. Archer Daniels Midland Co.

2013 CarswellBC 3259, 2013 CarswellBC 3260, 2013 SCC 58, [2013] 3 S.C.R. 545, [2013] B.C.W.L.D. 8826, [2013] B.C.W.L.D. 8828, [2013] B.C.W.L.D. 8829, [2013] B.C.W.L.D. 8892, [2013] S.C.J. No. 58, [2014] 1 W.W.R. 477, 235 A.C.W.S. (3d) 323, 345 B.C.A.C. 87, 364 D.L.R. (4th) 626, 450 N.R. 287, 51 B.C.L.R. (5th) 1, 589 W.A.C. 87, J.E. 2013-1904

**Sun-Rype Products Ltd. and Wendy Weberg, Appellants/Respondents on cross-appeal and Archer Daniels Midland Company, Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., ADM Agri-Industries Company, Cargill Limited, Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America, Respondents/Appellants on cross-appeal and Attorney General of Canada and Canadian Chamber of Commerce, Intervenors**

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: October 17, 2012

Judgment: October 31, 2013

Docket: 34283

Proceedings: reversing in part [Sun-Rype Products Ltd. v. Archer Daniels Midland Co. \(2011\)](#), 2011 CarswellBC 931, 2011 BCCA 187, 331 D.L.R. (4th) 631, 305 B.C.A.C. 55, 515 W.A.C. 55 (B.C. C.A.); reversing [Sun-Rype Products Ltd. v. Archer Daniels Midland Co. \(2010\)](#), 2010 CarswellBC 1749, 2010 BCSC 922 (B.C. S.C.)

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D. Michael Brown, Gregory J. Nash, David K. Yule, for Respondents / Appellants on cross-appeal, Archer Daniels Midland Company and ADM Agri-Industries Company

J. Kenneth McEwan, Q.C., Eileen M. Patel, for Respondents / Appellants on cross-appeal, Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited

Stephen R. Schachter, Q.C., Geoffrey B. Gomery, Q.C., Peter R. Senkpiel, for Respondents / Appellants on cross-appeal, Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America

John S. Tyhurst, for Intervener, Attorney General of Canada

Davit D. Akman, Adam Fanaki, for Intervener, Canadian Chamber of Commerce

Subject: Civil Practice and Procedure; Estates and Trusts

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.A** Pleadings disclose cause of action

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.B** Identifiable class

Civil practice and procedure

**V** Class and representative proceedings

**V.2** Representative or class proceedings under class proceedings legislation

**V.2.b** Certification

**V.2.b.i** Plaintiff's class proceeding

**V.2.b.i.C** Common issue or interest

Estates and trusts

**II** Trusts

**II.3** Constructive trust

**II.3.e** Profit from criminal wrongdoing

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiff consumers and purchasers alleged that defendant corporation fixed prices of corn syrup, which was used in numerous food products — Corporation submitted that individual purchasers could not claim for overcharge and could not be certified as class — Corporation stated that purchasers were using constructive trust to avoid limitation period which had expired for damages remedy — Corporation claimed that there was no property in which plaintiffs could find constructive trust — Lower court certified class — Corporation appealed and appeal was allowed in part, with indirect purchasers' claim dismissed and direct purchasers' claim permitted to move forward — Matter was remitted to reconsider certification of direct purchasers alone — Indirect purchasers appealed finding that they had no cause of action, while corporation cross-appealed, requesting dismissal of purchasers' claim in constructive trust — Appeal dismissed and cross-appeal allowed — Identifiable class could not be established for indirect purchasers and thus class action as it related to indirect purchasers could not be certified — Pleadings did not disclose cause of action in constructive trust and thus claim of direct purchasers could not succeed and should be dismissed — Given findings, cross-appeal should be allowed with costs.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Plaintiff consumers and purchasers alleged that defendant corporation fixed prices of corn syrup, which was used in numerous food products — Corporation submitted that individual purchasers could not claim for overcharge and could not be certified as class — Corporation stated that purchasers were using constructive trust to avoid limitation period which had expired for damages remedy — Corporation claimed that there was no property in which plaintiffs could find constructive trust — Lower court certified class — Corporation appealed and appeal was allowed in part, with indirect purchasers' claim dismissed and direct purchasers' claim permitted to move forward — Matter was remitted to reconsider certification of direct purchasers alone — Indirect purchasers appealed finding that they had no cause of action, while corporation cross-appealed, requesting dismissal of purchasers' claim in constructive trust — Appeal dismissed and cross-appeal allowed — Identifiable class could not be established for indirect purchasers and thus class action as it related to indirect purchasers could not be certified — Pleadings did not disclose cause of action in constructive trust and thus claim of direct purchasers could not succeed and should be dismissed — Given findings, cross-appeal should be allowed with costs.

Estates and trusts --- Trusts — Constructive trust — Profit from criminal wrongdoing

Plaintiff consumers and purchasers alleged that defendant corporation fixed prices of corn syrup, which was used in numerous food products — Corporation submitted that individual purchasers could not claim for overcharge and could not be certified

as class — Corporation stated that purchasers were using constructive trust to avoid limitation period which had expired for damages remedy — Corporation claimed that there was no property in which plaintiffs could find constructive trust — Lower court certified class — Corporation appealed and appeal was allowed in part, with indirect purchasers' claim dismissed and direct purchasers' claim permitted to move forward — Matter was remitted to reconsider certification of direct purchasers alone — Indirect purchasers appealed finding that they had no cause of action, while corporation cross-appealed, requesting dismissal of purchasers' claim in constructive trust — Appeal dismissed and cross-appeal allowed — Identifiable class could not be established for indirect purchasers and thus class action as it related to indirect purchasers could not be certified — Pleadings did not disclose cause of action in constructive trust and thus claim of direct purchasers could not succeed and should be dismissed — Given findings, cross-appeal should be allowed with costs.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Plaintiff consumers and purchasers alleged that defendant corporation fixed prices of corn syrup, which was used in numerous food products — Corporation submitted that individual purchasers could not claim for overcharge and could not be certified as class — Corporation stated that purchasers were using constructive trust to avoid limitation period which had expired for damages remedy — Corporation claimed that there was no property in which plaintiffs could find constructive trust — Lower court certified class — Corporation appealed and appeal was allowed in part, with indirect purchasers' claim dismissed and direct purchasers' claim permitted to move forward — Matter was remitted to reconsider certification of direct purchasers alone — Indirect purchasers appealed finding that they had no cause of action, while corporation cross-appealed, requesting dismissal of purchasers' claim in constructive trust — Appeal dismissed and cross-appeal allowed — Identifiable class could not be established for indirect purchasers and thus class action as it related to indirect purchasers could not be certified — Pleadings did not disclose cause of action in constructive trust and thus claim of direct purchasers could not succeed and should be dismissed — Given findings, cross-appeal should be allowed with costs.

Procédure civile --- Parties — Recours collectifs intentés en vertu d'une loi relative aux recours collectifs — Autorisation — Recours collectif du demandeur — Groupe identifiable

Consommateurs et acheteurs demandeurs alléguaien que la société défenderesse fixait le prix du sirop de maïs à haute teneur en fructose, un composant de diverses denrées alimentaires — Société a fait valoir que les acheteurs ne pouvaient pas invoquer la surcharge sur une base individuelle et ne pouvaient pas être autorisés à déposer un recours collectif en tant que groupe — Société a déclaré que les demandeurs avaient eu recours à une fiducie par interprétation pour éviter le délai de prescription, lequel était échu en ce qui concernait la demande de dommages-intérêts — Société a fait valoir que les demandeurs ne pouvaient pas fonder la fiducie par interprétation sur un bien — Recours collectif a été autorisé par un tribunal d'instance inférieure — Société a interjeté appel et l'appel a été accueilli en partie, le recours des acheteurs indirects ayant été rejeté et le recours des acheteurs directs ayant été autorisé — Affaire a été renvoyée au tribunal aux seules fins de réexaminer l'autorisation des acheteurs directs — Acheteurs indirects ont formé un pourvoi à l'encontre de la conclusion selon laquelle ils n'avaient aucune cause d'action, tandis que la société a formé un pourvoi incident demandant le rejet de la demande des acheteurs concernant la fiducie par interprétation sur un bien — Pourvoi rejeté et pourvoi incident accueilli — Il n'était pas possible de réunir les acheteurs indirects en un groupe identifiable de sorte que les acheteurs indirects ne pouvaient pas être autorisés à déposer un recours collectif — Actes de procédure ne révélaient pas de cause d'action en imposition d'une fiducie par interprétation et la réclamation des acheteurs directs devait également échouer — Compte tenu de ces conclusions, le pourvoi incident devrait être accueilli avec frais.

Procédure civile --- Parties — Recours collectifs intentés en vertu d'une loi relative aux recours collectifs — Autorisation — Recours collectif du demandeur — Cause commune ou intérêt commun

Consommateurs et acheteurs demandeurs alléguaien que la société défenderesse fixait le prix du sirop de maïs à haute teneur en fructose, un composant de diverses denrées alimentaires — Société a fait valoir que les acheteurs ne pouvaient pas invoquer la surcharge sur une base individuelle et ne pouvaient pas être autorisés à déposer un recours collectif en tant que groupe — Société a déclaré que les demandeurs avaient eu recours à une fiducie par interprétation pour éviter le délai de prescription, lequel était échu en ce qui concernait la demande de dommages-intérêts — Société a fait valoir que les demandeurs ne pouvaient pas fonder la fiducie par interprétation sur un bien — Recours collectif a été autorisé par un tribunal d'instance inférieure — Société a interjeté appel et l'appel a été accueilli en partie, le recours des acheteurs indirects ayant été rejeté et le recours des acheteurs directs ayant été autorisé — Affaire a été renvoyée au tribunal aux seules fins de réexaminer l'autorisation des

acheteurs directs — Acheteurs indirects ont formé un pourvoi à l'encontre de la conclusion selon laquelle ils n'avaient aucune cause d'action, tandis que la société a formé un pourvoi incident demandant le rejet de la demande des acheteurs concernant la fiducie par interprétation sur un bien — Pourvoi rejeté et pourvoi incident accueilli — Il n'était pas possible de réunir les acheteurs indirects en un groupe identifiable de sorte que les acheteurs indirects ne pouvaient pas être autorisés à déposer un recours collectif — Actes de procédure ne révélaient pas de cause d'action en imposition d'une fiducie par interprétation et la réclamation des acheteurs directs devait également échouer — Compte tenu de ces conclusions, le pourvoi incident devrait être accueilli avec frais.

Successions et fiducies --- Fiducies — Fiducie par interprétation — Profits réalisés à la suite d'une activité criminelle Consommateurs et acheteurs demandeurs alléguent que la société défenderesse fixait le prix du sirop de maïs à haute teneur en fructose, un composant de diverses denrées alimentaires — Société a fait valoir que les acheteurs ne pouvaient pas invoquer la surcharge sur une base individuelle et ne pouvaient pas être autorisés à déposer un recours collectif en tant que groupe — Société a déclaré que les demandeurs avaient eu recours à une fiducie par interprétation pour éviter le délai de prescription, lequel était échu en ce qui concernait la demande de dommages-intérêts — Société a fait valoir que les demandeurs ne pouvaient pas fonder la fiducie par interprétation sur un bien — Recours collectif a été autorisé par un tribunal d'instance inférieure — Société a interjeté appel et l'appel a été accueilli en partie, le recours des acheteurs indirects ayant été rejeté et le recours des acheteurs directs ayant été autorisé — Affaire a été renvoyée au tribunal aux seules fins de réexaminer l'autorisation des acheteurs directs — Acheteurs indirects ont formé un pourvoi à l'encontre de la conclusion selon laquelle ils n'avaient aucune cause d'action, tandis que la société a formé un pourvoi incident demandant le rejet de la demande des acheteurs concernant la fiducie par interprétation sur un bien — Pourvoi rejeté et pourvoi incident accueilli — Il n'était pas possible de réunir les acheteurs indirects en un groupe identifiable de sorte que les acheteurs indirects ne pouvaient pas être autorisés à déposer un recours collectif — Actes de procédure ne révélaient pas de cause d'action en imposition d'une fiducie par interprétation et la réclamation des acheteurs directs devait également échouer — Compte tenu de ces conclusions, le pourvoi incident devrait être accueilli avec frais.

Procédure civile --- Parties — Recours collectifs intentés en vertu d'une loi relative aux recours collectifs — Autorisation — Recours collectif du demandeur — Procédures écrites révèlent une cause d'action

Consommateurs et acheteurs demandeurs alléguent que la société défenderesse fixait le prix du sirop de maïs à haute teneur en fructose, un composant de diverses denrées alimentaires — Société a fait valoir que les acheteurs ne pouvaient pas invoquer la surcharge sur une base individuelle et ne pouvaient pas être autorisés à déposer un recours collectif en tant que groupe — Société a déclaré que les demandeurs avaient eu recours à une fiducie par interprétation pour éviter le délai de prescription, lequel était échu en ce qui concernait la demande de dommages-intérêts — Société a fait valoir que les demandeurs ne pouvaient pas fonder la fiducie par interprétation sur un bien — Recours collectif a été autorisé par un tribunal d'instance inférieure — Société a interjeté appel et l'appel a été accueilli en partie, le recours des acheteurs indirects ayant été rejeté et le recours des acheteurs directs ayant été autorisé — Affaire a été renvoyée au tribunal aux seules fins de réexaminer l'autorisation des acheteurs directs — Acheteurs indirects ont formé un pourvoi à l'encontre de la conclusion selon laquelle ils n'avaient aucune cause d'action, tandis que la société a formé un pourvoi incident demandant le rejet de la demande des acheteurs concernant la fiducie par interprétation sur un bien — Pourvoi rejeté et pourvoi incident accueilli — Il n'était pas possible de réunir les acheteurs indirects en un groupe identifiable de sorte que les acheteurs indirects ne pouvaient pas être autorisés à déposer un recours collectif — Actes de procédure ne révélaient pas de cause d'action en imposition d'une fiducie par interprétation et la réclamation des acheteurs directs devait également échouer — Compte tenu de ces conclusions, le pourvoi incident devrait être accueilli avec frais.

The plaintiff consumers and purchasers alleged that the defendant corporation fixed the prices of high-fructose corn syrup, which was used in numerous food products. The corporation submitted that the individual purchasers could not make a claim for overcharge and could not be certified as a class. The corporation stated that the purchasers were using a constructive trust to avoid the limitation period which had expired for a damages remedy. The corporation claimed that there was no property in which the plaintiffs could find constructive trust.

The lower court certified the class. The corporation appealed and the appeal was allowed in part, with the indirect purchasers' claim dismissed and the direct purchasers' claim permitted to move forward. The matter was remitted to the court to reconsider the certification of the direct purchasers alone. The indirect purchasers appealed the finding that they had no cause of action, while the corporation cross-appealed, requesting a dismissal of the purchasers' claim in constructive trust.

**Held:** The appeal was dismissed and the cross-appeal was allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Fish, Abella, Moldaver, Wagner JJ. concurring): An identifiable class could not be established for the indirect purchasers and thus the class action as it related to the indirect purchasers could not be certified. The pleadings did not disclose a cause of action in constructive trust and thus the claim of the direct purchasers also could not succeed. Given the findings, the cross-appeal should properly be allowed with costs.

Per Karakatsanis J. (dissenting) (Cromwell J. concurring): The evidentiary difficulties relied upon by the majority opinion were not fatal to certification application. There was some basis in the fact that there was an identifiable class in accordance with s. 4(1)(b) of the Class Proceedings Act. The appeal should be allowed with costs and the matter remitted for trial.

Les consommateurs et acheteurs demandeurs alléguent que la société défenderesse fixait le prix du sirop de maïs à haute teneur en fructose, un composant de diverses denrées alimentaires. La société a fait valoir que les acheteurs ne pouvaient pas invoquer la surcharge sur une base individuelle et ne pouvaient pas être autorisés à déposer un recours collectif en tant que groupe. La société a déclaré que les demandeurs avaient eu recours à une fiducie par interprétation pour éviter le délai de prescription, lequel était échu en ce qui concernait la demande de dommages-intérêts. La société a fait valoir que les demandeurs ne pouvaient pas fonder la fiducie par interprétation sur un bien.

Le recours collectif a été autorisé par un tribunal d'instance inférieure. La société a interjeté appel et l'appel a été accueilli en partie, le recours des acheteurs indirects ayant été rejeté et le recours des acheteurs directs ayant été autorisé. L'affaire a été renvoyée au tribunal aux seules fins de réexaminer l'autorisation des acheteurs directs. Les acheteurs indirects ont formé un pourvoi à l'encontre de la conclusion selon laquelle ils n'avaient aucune cause d'action, tandis que la société a formé un pourvoi incident demandant le rejet de la demande des acheteurs concernant la fiducie par interprétation sur un bien.

**Arrêt:** Le pourvoi a été rejeté et le pourvoi incident a été accueilli.

Rothstein, J. (McLachlin, J.C.C., LeBel, Fish, Abella, Moldaver, Wagner, JJ., souscrivant à son opinion) : Il n'était pas possible de réunir les acheteurs indirects en un groupe identifiable de sorte que les acheteurs indirects ne pouvaient pas être autorisés à déposer un recours collectif. Les actes de procédure ne révélaient pas de cause d'action en imposition d'une fiducie par interprétation et la réclamation des acheteurs directs devait également échouer. Compte tenu de ces conclusions, le pourvoi incident devrait être accueilli avec frais.

Karakatsanis, J. (dissident) (Cromwell, J., souscrivant à son opinion) : Les difficultés soulevées par les juges majoritaires en ce qui avait trait à la preuve n'étaient pas fatales à la demande d'autorisation. Il était possible de démontrer l'existence d'un groupe identifiable en vertu de l'art. 4(1)b) de la Class Proceedings Act. Le pourvoi devrait être accueilli avec frais et le dossier renvoyé à procès.

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*Sauer v. Canada (Minister of Agriculture)* (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — distinguished

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*Hollick v. Metropolitan Toronto (Municipality)* (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — considered in a minority or dissenting opinion

*Lau v. Bayview Landmark Inc.* (1999), 1999 CarswellOnt 3442, 40 C.P.C. (4th) 301, 31 O.T.C. 220 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

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*Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373, 2007 CarswellOnt 1014, 47 C.C.L.I. (4th) 78 (Ont. S.C.J.) — considered in a minority or dissenting opinion

*Sauer v. Canada (Minister of Agriculture)* (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — referred to in a minority or dissenting opinion

*Steele v. Toyota Canada Inc.* (2011), 14 B.C.L.R. (5th) 271, [2011] 6 W.W.R. 40, 306 B.C.A.C. 132, 316 W.A.C. 132, 90 C.P.R. (4th) 450, 329 D.L.R. (4th) 389, 2 C.P.C. (7th) 374, 2011 CarswellBC 424, 2011 BCCA 98 (B.C. C.A.) — referred to in a minority or dissenting opinion

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered in a minority or dissenting opinion

**Statutes considered by Rothstein J.:**

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

Generally — referred to

s. 4(1) — considered

s. 4(1)(a) — considered

s. 4(1)(b) — considered

s. 4(1)(b)-4(1)(e) — referred to

s. 4(1)(c) — considered

s. 34(1) — considered

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

Pt. VI — referred to

s. 36 — considered

s. 36(1) — referred to

s. 45 — referred to

s. 45(1) — referred to

**Statutes considered by Karakatsanis J. (dissenting):**

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

Generally — referred to

s. 4(1)(b) — considered

s. 29 — considered

s. 29(1)(c) — considered

s. 31(1)(a)(i) — considered

s. 34 — considered

s. 34(3) — considered

s. 34(4)(a) — considered

*Class Proceedings Act*, 1992, S.O. 1992, c. 6

s. 26 — referred to

*Competition Act*, R.S.C. 1985, c. C-34

s. 36 — considered

APPEAL by plaintiffs and CROSS-APPEAL by defendants from judgment reported at *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* (2011), 2011 CarswellBC 931, 2011 BCCA 187, 331 D.L.R. (4th) 631, 305 B.C.A.C. 55, 515 W.A.C. 55 (B.C. C.A.).

POURVOI formé par les demandeurs et POURVOI INCIDENT formé par les défendeurs à l'encontre d'un jugement publié à *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* (2011), 2011 CarswellBC 931, 2011 BCCA 187, 331 D.L.R. (4th) 631, 305 B.C.A.C. 55, 515 W.A.C. 55 (B.C. C.A.).

**Rothstein J. (McLachlin C.J.C. and LeBel, Fish, Abella, Moldaver and Wagner JJ. concurring):**

## I. Introduction

1 In price-fixing cases, indirect purchasers are customers who did not purchase a product directly from the alleged price-fixers/overchargers but who purchased it indirectly from a party further down the chain of distribution. Those who say indirect purchasers should not be able to bring actions against their alleged overchargers cite complexities in tracing the overcharge, risks of double or multiple recovery and failure to deter anti-competitive behaviour as reasons why they should not be permitted in Canada. These were some of the issues before the Court in the companion case of *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) ("Pro-Sys"). In that case, a proposed indirect purchaser class action, those arguments were found to be insufficient bases upon which to deny indirect purchasers the right to bring an action against the alleged overcharger.

2 In this case, both the indirect and direct purchasers are class members. Having decided in *Pro-Sys* that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. If the Court finds that the action may proceed, it must then consider whether the class action should have been certified by the applications judge.

3 For the reasons that follow, I would find that the inclusion of indirect and direct purchasers in the proposed class does not produce difficulties that would warrant dismissing the action. However, I find this case cannot meet the certification requirements because there is not an identifiable class of indirect purchasers as required for certification under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("CPA"). I would dismiss the appeal on that basis. The case of the direct purchasers, which is restricted to constructive trust, is dismissed as I find there is no cause of action. The cross-appeal is therefore allowed.

## II. Background

4 Sun-Rype Products Ltd., a juice manufacturer, is the direct purchaser representative plaintiff and Wendy Bredin (formerly Wendy Weberg) is the indirect purchaser representative plaintiff in this action. The representative plaintiffs (referred to collectively as the "appellants"), brought the class action pursuant to the *CPA*. They allege that Archer Daniels Midland Company and ADM Agri-Industries Company (the "ADM respondents"), Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company, and Cargill Limited (the "Cargill respondents"), and Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America (the "Casco respondents") (collectively, the "respondents"), engaged in an illegal conspiracy to fix the price of high-fructose corn syrup ("HFCS") resulting in harm to manufacturers, wholesalers, retailers and consumers.

5 HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. The appellants claim that between January 1, 1988, and June 30, 1995, the respondents engaged in an "intentional, secret and illegal conspiracy to fix the price of HFCS", which allowed them to charge the class members more for HFCS than they would have charged but for the alleged illegal conduct (A.F., at paras. 9 and 11).

## III. Summary of the Proceedings Below

### A. Commencement of the Action

6 The appellants commenced this class action in June 2005 on behalf of "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the [respondents] (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" ([2010 BCSC 922](#) (B.C. S.C.), at para. 2). It alleged the following causes of action (*ibid.*, at para. 27):

- a) contravention of s. 45(1) of Part VI of the *Competition Act* giving rise to a right of damages under s. 36(1) of that Act;
- b) tortious conspiracy and intentional interference with economic interests;
- c) unjust enrichment, waiver of tort and constructive trust; and
- d) punitive damages.

### B. Pre-certification Motion to Strike

7 The respondents brought a pre-certification motion to strike the appellants' claims on the basis that they were statute-barred. In an order dated May 10, 2007, the motions judge only allowed the claim for a remedial constructive trust because it was subject to a longer (10-year) limitation period than the other claims ([2007 BCSC 640, 72 B.C.L.R. \(4th\) 163](#) (B.C. S.C.)). The respondents appealed the order to the British Columbia Court of Appeal ("BCCA") and the appellants cross-appealed ([2008 BCCA 278, 81 B.C.L.R. \(4th\) 199](#) (B.C. C.A.)). The result was that the BCCA found that the direct purchaser representative plaintiff, Sun-Rype, could maintain only its cause of action in remedial constructive trust and that all of its claims for damages, including damages under the *Competition Act*, R.S.C. 1985, c. C-34, were statute-barred. As to the indirect purchaser representative plaintiff, Wendy Bredin, the BCCA found that she could maintain all of her causes of action because the limitation period on her claims did not begin until "she received the telephone call from her lawyer advising her of the proposed class action" (para. 138).

### C. Certification Proceedings in the British Columbia Supreme Court, 2010 BCSC 922 (B.C. S.C.)

8 The British Columbia Supreme Court ("BCSC") dealt with the appellants' application for certification by its decision dated June 30, 2010. As to the issue of whether indirect purchasers could bring actions against their alleged overchargers, Rice J. found that it was "not plain and obvious" that indirect purchaser claims were unavailable as a matter of law in Canada (para. 58).

9 Rice J. then addressed the requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action. Excluding the portions of the claim struck by the pre-certification decision on the limitation periods, Rice J. found that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. Rice J. also found that the remaining certification requirements, namely (i) whether there were common issues; (ii) whether there was an identifiable class; (iii) whether the class action was the preferable procedure; and (iv) whether Sun-Rype and Wendy Bredin could adequately represent the class, were met. He certified the action identifying common issues relating to the indirect purchasers' claims seeking statutory, common law and equitable damages and restitution based on allegations that the respondents engaged in an international and unlawful conspiracy to fix the price of HFCS during the class period. The common issues certified by Rice J. are listed in the appendix to these reasons.

**D. Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 187, 305 B.C.A.C. 55 (B.C. C.A.)**

10 The majority of the BCCA (*per* Lowry J.A., Frankel J.A. concurring) held that it was "plain and obvious" that indirect purchasers did not have a cause of action (para. 97). The majority reached this conclusion for the same reasons as in its decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2011 BCCA 186, 304 B.C.A.C. 90 (B.C. C.A.): it held that the rejection of the passing on defence in Canada carried as its necessary corollary a corresponding rejection of the offensive use of passing on in the form of an indirect purchaser action. The majority found Canadian law "to be consistent with American federal law as established by the Supreme Court of the United States in *Hanover Shoe ... and Illinois Brick*" (*Pro-Sys*, at para. 74).

11 With respect to the indirect purchasers, the majority allowed the appeal and found that the pleadings did not disclose a cause of action on their part (para. 98). However, with respect to direct purchasers, the majority found that the appeal should be dismissed (para. 74). The BCCA set aside the certification order of Rice J. and remitted the matter to the BCSC to reconsider the certification of the action of the direct purchasers alone.

12 Donald J.A., dissenting as he did in *Pro-Sys*, would have found that indirect purchaser actions were permitted as a matter of law in Canada and would have certified the action for both direct and indirect purchasers, finding that all of the requirements in s. 4(1) of the *CPA* were met.

**IV. Analysis**

13 This appeal was brought concurrently with the appeal in the companion case of *Pro-Sys*. Counsel for the appellants are the same in both cases, and the appellants in this case rely heavily on the appellants' submissions in *Pro-Sys* to support their arguments. In view of the significant overlap in issues, these reasons will frequently refer to the reasons in *Pro-Sys*.

14 In this Court, the three groups of respondents filed separate factums. However, each adopt the pleadings of the others in the appeal and the cross-appeal. In the appeal, the respondents argue first and foremost that indirect purchasers do not have a cause of action. They also argue that the class action should be decertified in respect of the indirect purchasers because the class is not identifiable as required by s. (4)(1)(b) of the *CPA*. On the cross-appeal, the respondents request dismissal of the direct purchasers' claim in constructive trust on the grounds that the elements required to establish a constructive trust are not present. They also seek decertification of the class action on the basis that Rice J. applied the wrong standard of proof in his analysis of the certification requirements.

15 As indicated, I am unable to find an identifiable class as it relates to the indirect purchasers and would dismiss the appeal on that basis. Nonetheless, for completeness, the various arguments presented in this case are assessed below. I turn first to the indirect purchaser question and then consider the arguments pertaining to the certification of the class action.

**A. Indirect Purchaser Actions (the "Passing On" Issue)**

16 The appellants largely adopt the submissions of Pro-Sys Consultants Ltd. on the passing-on issue. As the offensive use of passing on has been analysed in the reasons in *Pro-Sys*, it is unnecessary to repeat it in its entirety here. I add only the

following to address the differences that arise with regard to passing on where indirect purchasers and direct purchasers are part of the same class.

#### (1) Double or Multiple Recovery as Between Indirect and Direct Purchasers

17 The respondents argue that the "fundamental difficulty with the case of the indirect purchasers is that they seek recovery of amounts to which the direct purchasers have a valid claim, such that, to recognize the claim of the indirect purchasers would be to recognize an overlapping claim to the same amount and the prospect of double recovery" (Cargill factum, at para. 54). They argue that, because the passing-on defence has been rejected in Canada, the direct purchasers are entitled to 100 percent of the amount of the overcharge. Consequently they say that indirect purchasers "make a duplicative and overlapping claim to an overcharge to which the direct purchasers are entitled based on settled principles" (Cargill factum, at para. 61).

18 For the reasons given in the *Pro-Sys* appeal, this argument is insufficient to deny indirect purchasers the right to be included in the class action. I agree with Rice J. that, by including both direct and indirect purchasers in the class and by using economic methodologies to ascertain the aggregate amount of the loss, there will be no over-recovery from the respondents (BCSC, at para. 53).

19 In this case, the appellants seek recovery of a defined sum equal to the aggregate of the overcharge. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. Recovery is limited to that aggregate amount, no matter how it is ultimately shared by the direct and indirect purchasers. This was the view of the BCCA in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (B.C. C.A.) ("Infineon"), at para. 78, and of the Quebec Court of Appeal in *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (Que. C.A.), at para. 114. The appeal of the latter decision was heard together with *Pro-Sys* and this case. See *Option consommateurs v. Infineon Technologies AG*, 2013 SCC 59 (S.C.C.).

20 To the extent that there is conflict between the class members as to how the aggregate amount is to be distributed upon the awarding of a settlement or upon a successful action, this is not a concern of the respondents and is not a basis for denying indirect purchasers the right to be included in the class action.

#### (2) Over-Recovery as Between Jurisdictions

21 In addition to concern of double recovery as between indirect and direct purchasers, the respondents also express concerns of over-recovery arising from actions in the U.S. Specifically, the respondents state that in the U.S. direct purchasers of HFCS have already reached a settlement with the respondents for the entire overcharge. They claim that if the rights of the indirect purchasers to bring an action are recognized in Canada, this will create "overlapping claims to the same loss between direct purchasers in the U.S. and indirect purchasers in British Columbia" (Cargill factum, at para. 70). As stated in the *Pro-Sys* reasons, the court is equipped to deal with these risks. The court possesses the power to modify settlement and damage awards in accordance with awards already received by plaintiffs in other jurisdictions if the respondents are able to satisfy them that double recovery may occur. If the respondents adduce relevant evidence, the court will be able to ensure that double recovery does not occur.

#### (3) Restitutionary Law Principles

22 The majority of the BCCA rejected the offensive use of passing on based on the theory that once the passing-on *defence* is rejected, the direct purchasers would be entitled to the whole amount by which they were overcharged:

... I am unable to see why the [direct purchasers] would not as a matter of law be entitled to the whole of the amount they overpaid regardless of any amount that may have been passed on to the [indirect purchasers] in the same way they would if they were the only plaintiffs in the action. Anything less would serve to disadvantage them because of the nature of the proceedings such that they would be deprived of what they would legally be entitled to recover. [para. 84]

23 I would agree that absent an action by indirect purchasers or absent the inclusion of indirect purchasers in the action, the direct purchasers would be able to recover the entire amount of the overcharge because the overcharger would be unable to invoke the passing-on defence. However, this is not the same as saying the direct purchasers are *entitled* to the entire amount of the overcharge. The disgorgement of amounts obtained through wrongdoing is one of the fundamental principles of restitutive law (P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), at p. 3-1). Restitutive law is "a tool of corrective justice" that seeks to take money away from the party who has unjustly taken it and return it to the party who unjustly lost it (*Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 (S.C.C.), at paras. 32 and 47). While a defendant cannot invoke the passing-on defence, the direct purchasers cannot deny that they have passed on the overcharge to the indirect purchasers. Where indirect purchasers are able to demonstrate that overcharges were passed on to them they are entitled to claim those overcharges.

#### (4) Deterrence and Compensation

24 As part of their argument that indirect purchaser actions should not be allowed, the respondents make much of the fact that in many other price-fixing cases in Canada, awards to indirect purchasers have been disbursed in the form of *cy-près* payments because the amounts in question were so small as to make identification of and distribution to each individual class member impractical. They claim that *cy-près* distributions do not advance the deterrence objective of the Canadian competition laws because any deterrence function could be achieved to an equal extent by a claim made solely by direct purchasers. They also argue that because the award would be distributed to a not-for-profit entity in place of the class members, the compensation goal of the Canadian competition laws is also frustrated.

25 There is merit to these arguments; however, the precedent for *cy-près* distribution is well established (see M.A. Eizenga et al., *Class Actions Law and Practice* (loose-leaf), at § 9.19). While *cy-près* distributions may not appeal to some on a policy basis, this method of distributing settlement proceeds or damage awards is contemplated by the *CPA*, at s. 34(1):

**34 (1)** The court may order that all or any part of an award under this Division 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 or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

26 It is also a method the courts have used in indirect purchaser price-fixing cases, as demonstrated by the respondents' summary of nine cases in which distribution of the settlement funds was made on a *cy-près* basis. And, while its very name, meaning "as near as possible", implies that it is not the ideal mode of distribution, it allows the court to disburse the money to an appropriate substitute for the class members themselves (see D. Lynn, "[Cy Pres Distributions: Ethics & Reform](#)" (2012), *25 Geo. J. Legal Ethics* 435, at p. 435).

27 As such, while the compensation objective is not furthered by a *cy-près* distribution, it cannot be said that deterrence is reduced by the possibility that a settlement will eventually be distributed in that manner. These factors do not preclude indirect purchasers from bringing an action or from being included in the class.

#### B. The Certification of the Class Action

28 Having determined that indirect purchasers may pursue actions against their alleged overchargers, the issue is now whether this action should be certified. The analysis of the certification requirements was carried out by the applications judge, Rice J., but was not addressed by the majority of the BCCA. The majority of the BCCA disposed of the action based solely on its finding that passing on could not be used offensively to allow indirect purchasers to bring an action.

29 The requirements for certification under the *CPA* are set forth in s. 4(1):

**4 (1)** The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;

- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

30 The respondents contest only three of the certification criteria. The first is whether the pleadings disclose a cause of action as required under s. 4(1)(a). They argue that the remaining cause of action of the direct purchasers in constructive trust should be struck and that the indirect purchaser causes of action in restitution and under s. 36 of the *Competition Act* should fail. They do not contest the indirect purchasers' causes of action in tort. Second, they say that the requirement under s. 4(1)(c) that the claims raise common issues is not met. Third, they argue that the class is not identifiable as it relates to the indirect purchasers as required under s. 4(1)(b).

*(1) Do the Pleadings Disclose a Cause of Action?*

31 Section 4(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. This requirement is judged on the standard of proof applied in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980, namely that a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at para. 20 ("Alberta Elders"); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 25).

32 I first consider the respondents' arguments in relation to the causes of action in restitution for both the indirect and direct purchasers (remedial constructive trust) and then turn to the arguments against the cause of action of the indirect purchasers under s. 36 of the *Competition Act*.

**(a) Restitution — Indirect Purchasers**

33 In the alternative, the appellants claim that the respondents have been unjustly enriched as a result of the alleged overcharge on the sale of HFCS and that the class members have suffered a deprivation in the amount of the overcharge attributable to the sale of HFCS in B.C. and in Canada. They plead that this overcharge resulted from wrongful or unlawful acts and that there can thus be no juristic reasons for the enrichment. The appellants seek the disgorgement of the alleged overcharge paid to the respondents by the class members.

34 The respondents argue that "both the benefit conferred and deprivation (or loss) suffered was that of the direct purchasers alone" and as such, it is the direct purchasers alone who can bring a claim for restitution for wrongful conduct. They submit that no benefit was conferred directly by the indirect purchaser to the overcharger and that the deprivation in question was suffered by the direct purchasers and *not* the indirect purchasers, because the passing on of losses is not recognized at law (Cargill factum, at para. 30).

35 I understand the respondents to be making two separate points: one, that a direct relationship between a plaintiff and a defendant is needed to ground a claim in unjust enrichment; and two, that because indirect purchasers cannot base a claim

on passed-on losses, they have no cause of action in unjust enrichment. Both of these arguments have been addressed in the reasons in *Pro-Sys*.

36 The requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. As indicated in the *Pro-Sys* reasons, *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), states only that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant" (p. 797 (emphasis added)). *Peel* requires only that a claim in unjust enrichment must be based on "more than an incidental blow-by" and that "[a] secondary collateral benefit will not suffice" (p. 797). These words would appear not to necessarily foreclose a claim where the relationship between the parties is indirect. However, as in *Pro-Sys*, this does not resolve the issue. First, it is not apparent here that the benefit received by the respondents was mere "incidental blow-by" or "collateral benefit". Second, the appellants in *Pro-Sys* argue that *Alberta Elders* is an example of a case where an unjust enrichment was found absent a direct relationship, calling the requirement into question. Accordingly, it cannot be said that it is plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone.

37 As to the recognition of passed-on losses, that question has been answered conclusively: the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. For the reasons previously explained, no insurmountable problem is created by allowing the claims in restitution to be brought by a class comprised of both direct and indirect purchasers. Unjustly obtained amounts are recoverable on the basis that they have been extracted at the plaintiffs' expense (Maddaugh and McCamus, at p. 3-9). That is what is alleged to have occurred in this case. The appellants allege that the respondents committed wrongful acts that were directed at both the direct *and the indirect purchasers* and as such both groups should be able to recover their losses.

38 It is true that, absent indirect purchasers, the rejection of the passing-on defence entitles direct purchasers to 100 percent of the amount of the overcharge. However, this entitlement is altered when indirect purchasers are included in the action. As explained above, this does not mean, as the respondents suggest, that to allow indirect purchasers to join the action would be "to admit of the possibility that a plaintiff could recover twice — once from the person who is the immediate beneficiary of the payment or benefit ... and again from the person who reaped an incidental benefit" (*Cargill* factum, at para. 32, citing *Peel*, at p. 797). Rather, it means that the indirect and direct purchasers will share the aggregate amount recovered in the event that the action is successful. To the extent that there are competing claims among the direct and indirect purchasers, I agree with Rice J. that this may be sorted out at a later stage of the proceeding (BCSC, at para. 195). At this stage, both groups share the common interest of maximizing the amount recoverable from the respondents. The indirect purchasers' cause of action in restitution should therefore not be struck out.

### **(b) Constructive Trust — Direct Purchasers**

39 On cross-appeal, with respect to the one cause of action remaining to the direct purchasers, the respondents argue that the cause of action in constructive trust should fail.

40 The respondents claim that neither the requirement of a "proprietary nexus" nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case: As such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding (See Casco cross-appeal factum, at para. 28, citing *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577 (B.C. C.A.), for the requirements of a constructive trust). I agree.

41 In *Pro-Sys*, noting that *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), was the relevant controlling authority, I found that the claim in constructive trust must fail because there was no referential property and no explanation by the appellants why a monetary remedy would be inappropriate or insufficient. For the same reasons, I find it plain and obvious that Sun-Rype's claim in constructive trust in this case must fail and should be struck.

### **(c) Section 36 of the Competition Act — Indirect Purchasers**

#### **(i) Passed-On Losses Recognized at Law**

42 Section 36 of the *Competition Act* provides a cause of action to "[a]ny person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI". The respondents, basing their argument on their fundamental position that passed-on losses are not recognized at law, assert that s. 36 was not intended to provide a right of action to indirect purchasers.

43 For the reasons explained in *Pro-Sys*, this argument is rejected. It is not plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed.

#### **(ii) Jurisdiction Over Extraterritorial Conduct**

44 The respondents argue that "an alleged conspiracy entered into outside Canada, among foreign defendants, to fix prices of products sold to foreign direct purchasers does not constitute an offence under the *Competition Act* giving rise to a right of civil action" (ADM factum, at para. 54). They claim that the jurisdiction of Canadian courts over violations of the *Competition Act* by foreign defendants "will have to be determined by reference to the presumptive connecting factors identified in *Club Resorts*, which determination is beyond the scope of the present appeal" (ADM factum, at para. 53) and that conduct cannot be contrary to Part VI of the *Competition Act* "unless there is a real and substantial link between that conduct and Canada" (para. 60).

45 I agree with the respondents that the framework proposed in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.), will need to be applied in establishing whether there is "real and substantial connection" sufficient to find that Canadian courts have jurisdiction in this case. However, I would question the respondents' characterization of the factual situation.

46 The conduct in question, while perpetrated by foreign defendants, allegedly involved each respondent's Canadian subsidiary acting as its agent. The sales in question were made in Canada, to Canadian customers and Canadian end-consumers. There is at least some suggestion in the case law that where defendants conduct business in Canada, make sales in Canada and conspire to fix prices on products sold in Canada, Canadian courts have jurisdiction (see *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.), at paras. 58, 63-86 and 101-02 ("It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad": para. 58); *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45 (B.C. C.A.), at para. 32 (BCCA refusing to deny certification of a class action based on the argument that Canadian courts had no jurisdiction over *Competition Act* violations occurring outside of Canada); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263 (B.C. C.A.), at paras. 32-45 ("A conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the 'wrongful conduct' occurred. On that basis, the court has jurisdiction over the *ex juris* defendants who are alleged to be parties to the conspiracy": para. 41)).

47 The respondents have not demonstrated that it is plain and obvious that Canadian courts have no jurisdiction over the alleged anti-competitive acts committed in this case. The cause of action under s. 36 of the *Competition Act* should not be struck out.

#### **(2) Are There Common Issues?**

48 Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues. The respondents' arguments as to the commonality requirement centre on the standard of proof to be applied to this and the other certification requirements other than the requirement that the pleadings disclose a cause of action. Here, as in *Pro-Sys*, the respondents urge the Court to resolve the remainder of the certification requirements on a balance of probabilities. They say the Court should adopt the U.S. approach of weighing conflicting evidence at the certification stage. For the reasons set out in *Pro-Sys*, the standard to be applied here is "some basis in fact" and not a balance of probabilities.

49 As to the standard to be applied to the expert evidence, the respondents do not argue that it is insufficient to demonstrate commonality, rather they submit that Rice J. erred in that he applied the wrong standard of proof to the expert methodologies that he examined.

50 The reasons in *Pro-Sys* have set out that the standard to be applied to expert evidence is one requiring a credible and plausible methodology capable of proving harm on a class-wide basis.

51 It is evident that on the certification application, Rice J. analysed the significant amount of expert evidence that was before him and that he applied the correct standard to both the certification requirements ("plain and obvious" for s. 4(1)(a) and "some basis in fact" for s. 4(1)(b) to (e)) and the expert methodology required to establish some basis in fact (whether the expert evidence consisted of a credible and plausible model capable of proving harm on a class-wide basis). There is no basis upon which to interfere with his common issues determination.

*(3) Is There an Identifiable Class?*

52 Section 4(1)(b) of the *CPA* provides that the court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. *Hollick* provides that this certification requirement will be satisfied by demonstrating "some basis in fact" to support it (para. 25).

53 The class definition proposed by the appellants is "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (BCSC, para. 2).

54 The respondents take issue with the inclusion of indirect purchasers in the class. They acknowledge that while impracticability or impossibility in distributing class action proceeds to indirect purchasers does not necessarily preclude finding an "identifiable class", the facts of this particular case are such that the class cannot be found to be "identifiable" to the extent that it includes indirect purchasers (ADM factum, at para. 85). The respondents argue that the inclusion of indirect purchasers in the class in the present case runs contrary to the purpose of the "identifiable class" requirement because indirect purchasers are not able, based on the class definition, to determine if they are members of the class. Relying on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), the respondents argue that the identifiable class requirement should allow for class membership to be determinable.

55 They argue that the proposed class definition does not allow for indirect purchasers to determine if they are in fact members of the class as defined. Contrary to the *Infineon* and *Pro-Sys* cases where there was evidence that class membership could likely be determined, here "it is simply impossible to make a determination of the presence, or lack of presence, of HFCS in particular products a consumer in British Columbia may have purchased between 1988 and 1995" (ADM factum, at para. 97). They argue that prominent direct purchasers such as Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in their products. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. They also point out that on cross-examination on her affidavit, the representative plaintiff Wendy Bredin stated that "she did not know whether any product she purchased during the class period actually contained HFCS" (ADM factum, at para. 18); They state that "[i]f the proposed representative Plaintiff in this action is unable to say whether any product she bought in the class period contained HFCS, it is difficult to see how any other potential class member could be aware of this fact" (ADM factum, at para. 103).

56 This is not a typical ground on which the "identifiable class" requirement is challenged. Here, there is no question whether the class definition is too narrow or too broad, whether the definition contains subjective criteria or whether the class definition creates a need to consider the merits. However, when the purpose for which there must be a class definition that designates an "identifiable class" is examined, the problems with the appellants' case become evident.

57 I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc. (1999)*, 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; *Bywater v. Toronto Transit Commission (1998)*, 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at para. 10; Eizenga et al., at § 3.31). *Dutton* states that "[i]t is necessary ... that any particular person's claim to membership in

the class be determinable by stated, objective criteria" (para. 38). According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§ 3.33).

58 I do not take issue with the class definition on its face. It uses objective criteria, it does not turn on the merits of the claim, and it cannot be narrowed without excluding members who may have a valid claim. Where the difficulty lies is that there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class.

59 The appellants claim that the respondents "attempt to use the complexity inherent in claims arising from a large-scale price-fixing conspiracy to deny those injured by the alleged conduct a legal remedy" and that "courts have found that class definitions similar or identical to that proposed in this case were appropriate" (response factum, at paras. 58 and 61). The appellants rely on the instruction in *Dutton*, at para. 38, that "[i]t is not necessary that every class member be named or known". They cite *Sauer v. Canada (Minister of Agriculture)* [2008 CarswellOnt 5081] (Ont. S.C.J.), 2008 CanLII 43774, in support of the proposition that courts can engage in a "relatively elaborate factual investigation in order to determine class membership" and that "[t]he fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable" (response factum, at para. 67, citing *Sauer*, at para. 28).

60 However, in *Sauer* the passage relied upon pertained to the issue of the objectivity of the criteria used in the class definition. In that case, a class action involving cows infected with bovine spongiform encephalopathy ("BSE") or "mad cow disease", the class was defined to include "all cattle farmers in Canada", except Quebec (para. 11). The representative plaintiff adduced evidence of his own personal losses as well as those of others in the community as a result of the BSE crisis. The defendants challenged the term "cattle farmers" as being too broad and creating a problem for those farmers seeking to self-identify. Lax J. of the Ontario Superior Court of Justice held that in such situations the court could engage in a factual investigation to determine class membership.

61 That is not the situation in this case. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified. Here, they have not met even this relatively low evidentiary standard.

62 This is not a case of mere difficulty in proving membership in a defined class. That is what distinguishes this case from *Pro-Sys*. In *Pro-Sys*, even if class membership is not immediately evident to potential class members based on the class definition, records of purchase or the presence of the application software or operating systems that form the subject of the appeal on the computers of the putative class members would serve to identify them as part of the identifiable class. Further, in *Pro-Sys*, Sam Leung, president and director of Pro-Sys Consultants Ltd., one of the representative plaintiffs, offered proof that he had purchased the product in question in the form of the invoice for the purchase of the computer. That evidence demonstrated that class membership was determinable and established some basis in fact that there was an identifiable class.

63 Conversely, in this case, the respondents' evidence is that HFCS and liquid sugar had been used interchangeably by direct purchasers during the class period. They also claim that

Canadian labelling requirements during the class period were such that food and beverage producers were not required to specify which of the two sweeteners was contained in their products. A generic label indicating "sugar/glucose-fructose" could be used for either liquid sugar or HFCS. The result is that a consumer who purchased such a product during the class period would have had no way of determining whether that product contained HFCS, even if they had bothered to check the label. [ADM factum, at para. 100]

64 The appellants say only that "hundreds of millions of dollars of HFCS was sold to Canadian direct purchasers during the Class Period" and that this HFCS was used in "products such as soft drinks, baked goods and other food products which are purchased by restaurants, grocery wholesalers, supermarkets, convenience stores, movie theatres and others" (response

factum, at para. 69). Their expert offers evidence that the amount of HFCS used and the specific products which contained it are identifiable (para. 69, citing Leitzinger Report, at paras. 10-11, 18-20 and 27 (A.R., vol. II, at pp. 85-86, 89-91 and 95-96)).

65 The question, however, is not one of whether the identified products contained HFCS, or even whether the overcharge would have reached the indirect purchaser level (i.e. whether passing on had occurred). The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.

66 Even Ms. Bredin testified that she is unable to state whether the products she purchased contained HFCS. This fact will remain unchanged because, as noted above, liquid sugar and HFCS were used interchangeably and a generic label indicating only "sugar/glucose-fructose" could be used for either type of sweetener. Ms. Bredin presented no evidence to show that there is some basis in fact that she would be able to answer this question. On the evidence presented on the application for certification, it appears impossible to determine class membership.

67 The appellants' claim that "although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the purchases made by each individual and the quantity of HFCS in the products purchased" (response factum, at para. 71). However, this is no answer to the self-identification problem. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would be impractical or unaffordable to bring a claim individually. In this case, class membership is not determinable.

68 Built into the class certification framework is the requirement that the class representative present sufficient evidence to support certification and to allow the opposing party to respond with its own evidence (*Hollick*, at para. 22). The goal at the certification stage is to ensure that this is an appropriate matter to proceed as a class proceeding (*Pro-Sys*, at para. 104). And while the certification stage is not a preliminary trial of the merits, "the judge must be satisfied of certain basi[c] facts required by [the CPA] as the basis for a certification order" (*Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), at p. 381).

69 In this case, the appellants argue that denying that there is an identifiable class is to confuse the ability to identify a class with the ability to identify each individual member of that class (response factum, at para. 72). I agree that it is not necessary for each individual class member to be identified at the outset of the litigation in order for the class to be certified. However, as set out in the legislation, the matter will only be certified if, *inter alia*, "there is an identifiable class of 2 or more persons" (s. 4(1)(b)). In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.

70 Justice Karakatsanis says that there is some basis in fact to conclude that some indirect purchasers could prove that they probably purchased products containing HFCS (para. 115). With respect, no evidence was provided to establish some basis in fact that any individual indirect purchasers could do so. Allowing the class to be certified in such circumstances would be to lower the evidentiary standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.

71 Justice Karakatsanis also states that "expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis" (para. 108). However, even if expert evidence satisfies the certification judge that the class as a whole was harmed, that does not obviate the need for the certification judge to be satisfied that there is some basis in fact indicating that at least two persons can prove they incurred a loss.

72 A key component in any class action is that at least two or more persons fit within the class definition. If, as in this case, there is no basis in fact to show that at least someone can prove they fit within the class definition, the class cannot be certified because the criteria of "an identifiable class of 2 or more persons" is not met. No amount of expert evidence establishing that the defendants have harmed the class as a whole does away with this requirement.

73 This is not to say that an identifiable class could never be found in similar circumstances as appear in this case. An identifiable class could be found if evidence was presented that provided some basis in fact that at least two persons could prove they had suffered individual harm. The problem in this case is that no such evidence was tendered.

74 Justice Karakatsanis writes that "if no individual seeks an individual remedy, it will not be necessary to prove individual loss" (para. 97), and that the aggregate damages provisions of the *CPA* allow class actions to proceed "where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine" (para. 102 (emphasis in original)).

75 As I understand it, Justice Karakatsanis's point is that where liability to the class has been proven there is no requirement to prove any person is a member of a class or that any person has suffered individual damage. The necessary implication is that class proceeding legislation alters existing causes of action. For example, s. 36 of the *Competition Act* creates a cause of action for "[a]ny person who has suffered loss or damage". My colleague's approach would suggest a class action claim could proceed under s. 36 of the *Competition Act* without any person establishing that they had suffered loss or damage. However, the *CPA* neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants with causes of action to unite and pursue their claims as a class.

76 The aggregate damages provisions of the *CPA* allow the court to dispense with the need to calculate the quantum of damages for each individual class member and permits distribution of the proceeds on a *cy-près* basis rather than to individual members of the class. However, where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss. Establishing that the class as a whole has suffered loss does not obviate this requirement.

#### (4) Conclusion on Identifiable Class

77 The goal of the certification stage, as indicated by McLachlin C.J. in *Hollick* is to determine if, procedurally, the action is best brought in the form of a class action (para. 16). In this case, given that the appellants did not show that there was some basis in fact to believe that at least two persons can establish they are members of the class, I am unable to answer that question in the affirmative.

78 An advantage of a class proceeding is that it serves judicial economy by allowing similar individual actions to be aggregated (*Hollick*, at para. 15; *Dutton*, at para. 27). In my view, implicit in this objective is that the foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here.

79 I do not disagree with Justice Karakatsanis that behaviour modification can be an objective of class proceedings. However, the circumstances here demonstrate that class proceedings are not always the appropriate means of addressing behaviour modification. In cases in which loss or damage due to price-fixing cannot be proven, the appropriate recourse may be for the Commissioner of Competition to charge the defendants under the *Competition Act*. A process commenced by the Commissioner requires only proof of price-fixing. There is no need to prove passing on or that any particular consumer overpaid for a particular product. Whether the Competition Bureau intends to prosecute the respondents in this case is not known. Regardless, it does not change the fact that in a case such as this, where certification criteria cannot be met, such prosecutions may have to be considered if behaviour modification is the objective.

## V. Conclusion

80 Given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified. I would dismiss the appeal with costs. Given the finding that the pleadings do not

disclose a cause of action in constructive trust, the claim of the direct purchasers cannot succeed and should be dismissed. The class action as it relates to the direct purchasers cannot be certified. The cross-appeal is allowed with costs.

**Karakatsanis J. (dissenting) (Cromwell J. concurring):**

**VI. Overview**

81 I disagree with my colleague's conclusion that the claim by the indirect purchasers fails to meet the certification requirement under s. 4(1)(b) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*). In my view, there is "some basis in fact" to find "an identifiable class of 2 or more persons". Accordingly, I would allow the appeal and remit the matter to the British Columbia Supreme Court for trial.

82 The appellants' proposed class definition includes "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" ([2010 BCSC 922](#) (B.C. S.C.), at para. 2).

83 This class includes both the direct and indirect purchasers of high-fructose corn syrup (HFCS) — the subject of alleged price fixing. At issue is the identification of a class which would include indirect purchasers — the retailers and consumers — who purchased products containing HFCS.

84 Justice Rothstein notes that this definition of the class appears to satisfy the requirements of an identifiable class on its face. It uses objective criteria; it does not turn on the merits of the claim; and it cannot be narrowed without excluding members who may have a valid claim (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#), [2001] 2 S.C.R. 534 (S.C.C.), at para. 38). However, the class of indirect purchasers is challenged on the basis that individuals will be unable to determine whether they purchased a product containing HFCS and thus whether they are a member of the class. The issue of the appropriateness of the representative plaintiff is not before the Court.

85 Justice Rothstein concludes that there is no basis in fact to identify a class because there is no or insufficient evidence that class members can be identified or can self-identify (paras. 58 and 65-67). He concludes that it is impossible for the indirect purchasers to prove they purchased a product containing HFCS and thus suffered loss.

86 I have two objections to this conclusion. First, I am not persuaded that the requirement that the class be identifiable includes the requirement that individual members of the class be capable of proving individual loss. Indeed, as discussed below, the *CPA* provides for remedies when the *class* has suffered harm that are available without proof of individual loss. Such an approach best serves the purposes of class proceedings, which are designed not only to provide enhanced access to justice and judicial economy, but also to motivate behaviour modification.

87 Second, even if proof of individual loss is necessary to establish an identifiable class under the *CPA*, I do not agree that, on this record, it will be impossible to determine whether an individual is a member of the class.

88 The application judge, Rice J., held that the appellants satisfied the requirement that there is an identifiable class ([2010 BCSC 922](#) (B.C. S.C.)). The Court of Appeal did not address this issue ([2011 BCCA 187](#), [305 B.C.A.C. 55](#) (B.C. C.A.)). For the reasons that follow, I conclude that there is no basis to set aside the decision of the application judge.

**VII. Class Requirements — General Principles**

89 Section 4(1)(b) of the *CPA* requires that there be "an identifiable class of 2 or more persons".

90 In *Dutton*, this Court addressed the specific certification requirement that there be an identifiable class (para. 38):

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

**TAB 35**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [R. v. Horseman](#) | 2016 CAF 238, 2016 FCA 238, 2016 CarswellNat 12134, 2016 CarswellNat 4975, 271 A.C.W.S. (3d) 707 | (F.C.A., Sep 23, 2016)

2014 SCC 1, 2014 CSC 1

Supreme Court of Canada

Dell'Aniello c. Vivendi Canada inc.

2014 CarswellQue 28, 2014 CarswellQue 29, 2014 SCC 1, 2014 C.E.B. & P.G.R. 8066  
 (headnote only), 2014 CSC 1, [2014] 1 S.C.R. 3, [2014] S.C.J. No. 1, 235 A.C.W.S. (3d) 326,  
 369 D.L.R. (4th) 195, 453 N.R. 150, 51 C.P.C. (7th) 1, 8 C.C.P.B. (2nd) 163, J.E. 2014-124

**Vivendi Canada Inc., Appellant and Michel Dell'Aniello, Respondent and Alliance of Manufacturers & Exporters of Canada, carrying on business as Canadian Manufacturers & Exporters, and Canadian Chamber of Commerce, Intervenors**

LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: April 24, 2013

Judgment: January 16, 2014

Docket: 34800

Proceedings: affirmed [Dell'Aniello c. Vivendi Canada inc. \(2012\)](#), 2012 CarswellQue 1613, 2012 QCCA 384, 95 C.C.P.B. 165, Chamberland J.C.A., Léger J.C.A., Rochon J.C.A. (C.A. Que.); reversed [Dell'Aniello c. Vivendi Canada inc. \(2010\)](#), 83 C.C.P.B. 22, 2010 CarswellQue 7870, 2010 QCCS 3416, Mayer J.C.S. (C.S. Que.)

Counsel: Sylvain Lussier, Michel Benoit, Julien Ranger-Musiol, for Appellant

Claude Tardif, Catherine Massé-Lacoste, for Respondent

Michael A. Feder, Pierre-Jérôme Bouchard, for Intervenors

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

**Related Abridgment Classifications**

Civil practice and procedure

[V](#) Class and representative proceedings

[V.2](#) Representative or class proceedings under class proceedings legislation

[V.2.b](#) Certification

[V.2.b.i](#) Plaintiff's class proceeding

[V.2.b.i.C](#) Common issue or interest

Pensions

[I](#) Private pension plans

[I.5](#) Practice in pension actions

[I.5.f](#) Miscellaneous

**Headnote**

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Purchaser acquired business and became new sponsor of employees' pension plan — Purchaser told plan's beneficiaries that it would be making several changes to plan that were adverse to their interests — Representative of beneficiaries applied for authorization to institute class action against purchaser, claiming that amendments were not valid — Motion judge dismissed motion on basis that there were no questions that were identical, similar or related for all members of group — Motion judge

held that, consequently, requirement set out in art. 1003(a) of Code of Civil Procedure was not met — Representative appealed — Quebec Court of Appeal unanimously found that validity of amendments was question common to all members of group, and it authorized institution of class action — Purchaser appealed — Appeal dismissed — Court noted that, at authorization stage, motion judge should only determine whether applicant has established *prima facie* case and should not deal with merits of case — In context of art. 1003(a) of Code, it was sufficient if claims of members raise some questions of law or of fact that were sufficiently similar or sufficiently related to justify class action — Here, Court found that motion judge erred in ruling on merits of case and by seeking common answers rather than merely identifying one or more questions that were common to claims of all members of proposed group — Court acknowledged that differences existed between members of proposed group — However, Court held that there was common question to claims of all members of proposed group, although common question may require nuanced and varied answers based on situations of individual members — Therefore, Court concluded that errors made by motion judge warranted intervention of Court of Appeal.

Pensions --- Private pension plans — Practice in pension actions — Miscellaneous

Purchaser acquired business and became new sponsor of employees' pension plan — Purchaser told plan's beneficiaries that it would be making several changes to plan that were adverse to their interests — Representative of beneficiaries applied for authorization to institute class action against purchaser, claiming that amendments were not valid — Motion judge dismissed motion on basis that there were no questions that were identical, similar or related for all members of group — Motion judge held that, consequently, requirement set out in art. 1003(a) of Code of Civil Procedure was not met — Representative appealed — Quebec Court of Appeal unanimously found that validity of amendments was question common to all members of group, and it authorized institution of class action — Purchaser appealed — Appeal dismissed — Court noted that, at authorization stage, motion judge should only determine whether applicant has established *prima facie* case and should not deal with merits of case — In context of art. 1003(a) of Code, it was sufficient if claims of members raise some questions of law or of fact that were sufficiently similar or sufficiently related to justify class action — Here, Court found that motion judge erred in ruling on merits of case and by seeking common answers rather than merely identifying one or more questions that were common to claims of all members of proposed group — Court acknowledged that differences existed between members of proposed group — However, Court held that there was common question to claims of all members of proposed group, although common question may require nuanced and varied answers based on situations of individual members — Therefore, Court concluded that errors made by motion judge warranted intervention of Court of Appeal.

Procédure civile --- Parties — Recours collectifs intentés en vertu d'une loi relative aux recours collectifs — Autorisation — Recours collectif du demandeur — Cause commune ou intérêt commun

Acheteur a acquis une entreprise et est devenu le nouveau promoteur du régime de retraite des employés — Acheteur a annoncé aux bénéficiaires du régime qu'il apportait à celui-ci plusieurs changements qui leur étaient défavorables — Représentant des bénéficiaires a demandé l'autorisation d'exercer un recours collectif contre l'acheteur, faisant valoir que les modifications n'étaient pas valides — Juge d'autorisation a rejeté la requête au motif qu'il n'y avait pas de questions identiques, similaires ou connexes pour l'ensemble des membres du groupe — Juge d'autorisation a ainsi estimé que l'exigence de l'art. 1003a) du Code de procédure civile n'était pas respectée — Représentant a interjeté appel — Cour d'appel du Québec a unanimement conclu que la question de la validité des modifications était une question commune à l'égard de tous les membres du groupe et a autorisé le dépôt d'un recours collectif — Acheteur a formé un pourvoi — Pourvoi rejeté — Cour a fait remarquer qu'à l'étape de l'autorisation, le juge d'autorisation devrait se limiter à déterminer si le requérant a, à première vue, établi qu'il avait une cause à défendre et ne devrait pas se prononcer sur le fond de l'affaire — Dans le cadre d'une analyse portant sur l'art. 1003a) du Code, il suffit que les réclamations des membres soulèvent certaines questions de droit ou de fait suffisamment similaires ou suffisamment connexes pour justifier un recours collectif — En l'espèce, la Cour a conclu que le juge d'autorisation avait commis une erreur en se prononçant sur le fond du litige et en cherchant des réponses communes au lieu de se limiter à cerner une ou plusieurs questions communes aux réclamations de l'ensemble des membres du groupe proposé — Cour a reconnu qu'il existait des différences entre les membres du groupe proposé — Toutefois, la Cour a conclu à l'existence d'une question commune aux réclamations de l'ensemble des membres du groupe proposé, bien que la réponse à cette question pourrait devoir être nuancée et adaptée en fonction des circonstances propres à chacun d'eux — Par conséquent, la Cour a conclu que les erreurs commises par le juge d'autorisation justifiaient l'intervention de la Cour d'appel.

Régimes de retraite --- Régimes de retraite privés — Procédure dans le cadre d'actions concernant des régimes de retraite — Divers

Acheteur a acquis une entreprise et est devenu le nouveau promoteur du régime de retraite des employés — Acheteur a annoncé aux bénéficiaires du régime qu'il apportait à celui-ci plusieurs changements qui leur étaient défavorables — Représentant des bénéficiaires a demandé l'autorisation d'exercer un recours collectif contre l'acheteur, faisant valoir que les modifications n'étaient pas valides — Juge d'autorisation a rejeté la requête au motif qu'il n'y avait pas de questions identiques, similaires ou connexes pour l'ensemble des membres du groupe — Juge d'autorisation a ainsi estimé que l'exigence de l'art. 1003a) du Code de procédure civile n'était pas respectée — Représentant a interjeté appel — Cour d'appel du Québec a unanimement conclu que la question de la validité des modifications était une question commune à l'égard de tous les membres du groupe et a autorisé le dépôt d'un recours collectif — Acheteur a formé un pourvoi — Pourvoi rejeté — Cour a fait remarquer qu'à l'étape de l'autorisation, le juge d'autorisation devrait se limiter à déterminer si le requérant a, à première vue, établi qu'il avait une cause à défendre et ne devrait pas se prononcer sur le fond de l'affaire — Dans le cadre d'une analyse portant sur l'art. 1003a) du Code, il suffit que les réclamations des membres soulèvent certaines questions de droit ou de fait suffisamment similaires ou suffisamment connexes pour justifier un recours collectif — En l'espèce, la Cour a conclu que le juge d'autorisation avait commis une erreur en se prononçant sur le fond du litige et en cherchant des réponses communes au lieu de se limiter à cerner une ou plusieurs questions communes aux réclamations de l'ensemble des membres du groupe proposé — Cour a reconnu qu'il existait des différences entre les membres du groupe proposé — Toutefois, la Cour a conclu à l'existence d'une question commune aux réclamations de l'ensemble des membres du groupe proposé, bien que la réponse à cette question pourrait devoir être nuancée et adaptée en fonction des circonstances propres à chacun d'eux — Par conséquent, la Cour a conclu que les erreurs commises par le juge d'autorisation justifiaient l'intervention de la Cour d'appel.

The former employer's pension plan covered the employees and their dependents. In December 2000, a purchaser acquired the former employer's business and became the successor of the former employer and the new plan's sponsor. In September 2008, the purchaser told the plan's beneficiaries that it would be making several changes to the plan that were adverse to their interests. As a result, the representative of the beneficiaries applied for authorization to institute a class action against the purchaser, claiming that the amendments were not valid.

The motion judge dismissed the motion on the basis that there were no questions that were identical, similar or related for all the members of the group. The motion judge held that, because there was a range of individual recourses, the requirement set out in art. 1003(a) of the Code of Civil Procedure was not met. The representative appealed.

The Quebec Court of Appeal unanimously authorized the institution of a class action. It found that the validity of the amendments was a question common to all the members of the group. The Court of Appeal noted that questions that are common to all the members of the group can coexist with questions that concern individuals. The purchaser appealed.

**Held:** The appeal was dismissed.

Per LeBel, Wagner JJ. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): Article 1003(a) of the Code provides that a class action may be authorized only if the court concludes that the recourses of the members raise identical, similar or related questions of law or fact. According to decisions rendered under the common law system and recognized in Quebec law, a question will be considered common if it can serve to advance the resolution of every class member's claim. The Court noted that the Quebec courts' approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces.

The Court of Appeal stated on many occasions that it should intervene in a decision on a motion for authorization to institute a class action only if the motion judge erred in law or if the judge's assessment with respect to the criteria of art. 1003 of the Code is clearly wrong. The Court noted that, at the authorization stage, the motion judge should only determine whether the applicant has established a *prima facie* case and should not deal with the merits of the case. In the context of art. 1003(a) of the Code, it is sufficient if the claims of the members raise some questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action.

Here, the Court found that the motion judge erred in ruling on the merits of the case and by seeking common answers rather than merely identifying one or more questions that were common to the claims of all the members of the proposed group. The Court acknowledged that differences existed between the members of the proposed group. However, the Court held that there was a common question to the claims of all the members of the proposed group, although the common question may require nuanced and varied answers based on the situations of individual members. Therefore, the Court concluded that the errors made by the motion judge warranted the intervention of the Court of Appeal.

Le régime de retraite de l'ex-employeur offrait une protection aux employés et les personnes à leur charge. En décembre 2000, un acheteur a acquis l'entreprise de l'ex-employeur et est devenu le successeur de l'ex-employeur et le nouveau promoteur du régime. En septembre 2008, l'acheteur a annoncé aux bénéficiaires du régime qu'il apportait à celui-ci plusieurs changements qui leur étaient défavorables. En réponse à cette annonce, le représentant des bénéficiaires a demandé l'autorisation d'exercer un recours collectif contre l'acheteur, faisant valoir que les modifications n'étaient pas valides.

Le juge d'autorisation a rejeté la requête au motif qu'il n'y avait pas de questions identiques, similaires ou connexes pour l'ensemble des membres du groupe. Le juge d'autorisation a estimé qu'en raison de la présence d'un faisceau de recours individuels, l'exigence de l'art. 1003a) du Code de procédure civile n'était pas respectée. Le représentant a interjeté appel.

La Cour d'appel du Québec a unanimement autorisé le dépôt d'un recours collectif. Elle a conclu que la question de la validité des modifications était une question commune à l'égard de tous les membres du groupe. La Cour d'appel a fait remarquer que des questions communes à tous les membres du groupe peuvent coexister avec des questions individuelles. L'acheteur a formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

LeBel, Wagner, JJ. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à leur opinion) : L'article 1003a) du Code prévoit qu'un recours collectif ne peut être autorisé que si le tribunal conclut que les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes. Selon la jurisprudence rendue sous le régime de la common law et reconnue en droit québécois, une question sera considérée comme commune si elle permet de faire progresser le règlement de la réclamation de chacun des membres du groupe. La Cour a fait remarquer que l'approche préconisée par les tribunaux québécois à l'égard du critère de la communauté de questions a souvent été plus large et plus flexible que celle des tribunaux des provinces de common law.

La Cour d'appel a affirmé à maintes reprises qu'elle ne devrait intervenir dans une décision sur une requête en autorisation d'exercer un recours collectif que si le juge d'autorisation a commis une erreur de droit ou si son appréciation des critères énoncés à l'art. 1003 du Code est manifestement non fondée. La Cour a fait remarquer qu'à l'étape de l'autorisation, le juge d'autorisation devrait se limiter à déterminer si le requérant a, à première vue, établi qu'il avait une cause à défendre et ne devrait pas se prononcer sur le fond de l'affaire. Dans le cadre d'une analyse portant sur l'art. 1003a) du Code, il suffit que les réclamations des membres soulèvent certaines questions de droit ou de fait suffisamment similaires ou suffisamment connexes pour justifier un recours collectif.

En l'espèce, la Cour a conclu que le juge d'autorisation avait commis une erreur en se prononçant sur le fond du litige et en cherchant des réponses communes au lieu de se limiter à cerner une ou plusieurs questions communes aux réclamations de l'ensemble des membres du groupe proposé. La Cour a reconnu qu'il existait des différences entre les membres du groupe proposé. Toutefois, la Cour a conclu à l'existence d'une question commune aux réclamations de l'ensemble des membres du groupe proposé, bien que la réponse à cette question pourrait devoir être nuancée et adaptée en fonction des circonstances propres à chacun d'eux. Par conséquent, la Cour a conclu que les erreurs commises par le juge d'autorisation justifiaient l'intervention de la Cour d'appel.

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**Words and phrases considered:**

**class action**

The class action . . . is "the procedure which enables one member to sue without a mandate on behalf of all the members" of a group.

**Termes et locutions cités:**

**recours collectif**

[L]e recours collectif est « le moyen de procédure qui permet à un membre d'agir en demande, sans mandat, pour le compte de tous les membres » d'un groupe.

APPEAL by new employer from judgment reported at *Dell'Aniello c. Vivendi Canada inc. (2012), 2012 CarswellQue 1613, 2012 QCCA 384, 95 C.C.P.B. 165* (C.A. Que.), allowing representative's appeal from motion judge's decision to dismiss his motion for authorization to institute class action challenging new employer's decision to modify terms of pension plan.

POURVOI formé par un nouvel employeur à l'encontre d'une décision publiée à *Dell'Aniello c. Vivendi Canada inc. (2012), 2012 CarswellQue 1613, 2012 QCCA 384, 95 C.C.P.B. 165* (C.A. Que.), ayant accueilli l'appel interjeté par le représentant à l'encontre de la décision du juge d'autorisation de rejeter sa requête en autorisation de déposer un recours collectif contestant la décision du nouvel employeur de modifier les termes du régime de retraite.

*LeBel, Wagner JJ. (Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring):*

**I. Overview**

1 The class action, which was introduced into Quebec law in 1979, is "the procedure which enables one member to sue without a mandate on behalf of all the members" of a group: *art. 999(d), Code of Civil Procedure*, R.S.Q., c. C-25 ("C.C.P."). This procedural vehicle has several objectives, including facilitating access to justice, modifying harmful behaviour and conserving judicial resources: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 15; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), at paras. 27-29.

2 In *art. 1003 C.C.P.*, the Quebec legislature has laid down the essential conditions that must be met for a court to authorize the bringing of a class action. One of these conditions is that there be one or more questions of law or fact that are "identical, similar or related" for all the members of the group. It is this criterion that is at the heart of this appeal. More specifically, a court hearing an application for authorization must decide whether *art. 1003(a) C.C.P.* requires a common answer, for all the members of the group in question, to the common question raised by their claims.

3 The litigation in this case arises out of a unilateral amendment made by Vivendi Canada Inc. to the health insurance plan ("Plan") of which it is the sponsor for its retirees and their surviving spouses. Mr. Dell'Aniello, the respondent in this appeal, filed a motion for authorization to institute a class action, on behalf of all the beneficiaries of the Plan, in order to challenge the validity of the amendment. The Superior Court dismissed the motion on the basis that the claims of all the members of the proposed group did not raise questions that were "identical, similar or related", having regard to each member's particular situation. The Court of Appeal concluded that the judge who heard the motion for authorization had erred in his assessment with respect to the criterion set out in *art. 1003(a) C.C.P.*, and that there was a question common to the claims of all the members of the group.

4 For the reasons that follow, we are of the opinion that the appeal must be dismissed. The Court of Appeal was right to intervene, as the motion judge had erred in inquiring into the possibility that the class action would lead to a common answer to the questions raised by the claims of all the members of the group. The *C.C.P.* requires not a common answer, but a common question that can serve to advance the resolution of the litigation with respect to all the members of the group. Moreover, by considering the merits of the dispute, the motion judge had also overstepped the bounds of his role of screening motions at the authorization stage.

## II. Facts

5 Seagram Ltd. was established in 1857 and over time became Canada's leading producer and distributor of wine and spirits. Seagram's employees had generous conditions of employment, including the Plan.

6 According to a description set out in a document dated 1977, the Plan covered Seagram's employees, and their dependents, both during the employees' working lives and after they retired. The employees were required to contribute to the Plan while they were working, but Seagram paid all the costs after they retired.

7 Over the years, the Plan was revised several times. In particular, in July 1985, Seagram inserted a unilateral amendment clause in a footnote in the document that set out the details of the Plan. This clause read as follows:

While Seagram expects to continue this Supplementary Health Insurance Plan indefinitely, future conditions cannot be foreseen, thus it necessarily reserves the right to modify or suspend the Plan at any time. [A.R., vol. II, at p. 104]

8 In December 2000, Vivendi S.A. acquired Seagram, which had about 700 employees at the time. In December 2001, Seagram's assets related to the production and distribution of wine and spirits were sold. As part of that transaction, Seagram became Vivendi Universal Canada Inc., which in turn became Vivendi Canada Inc. ("Vivendi"). Vivendi is therefore Seagram's successor and the Plan's sponsor.

9 Seagram, and later Vivendi, complied fully with the terms of the Plan for many years. In September 2008, however, Vivendi told the Plan's beneficiaries that it would be making several changes to the Plan that were adverse to their interests. These changes took effect on January 1, 2009 ("2009 amendments"). As of that date, the Plan's only remaining members were

retirees and surviving spouses, since Vivendi no longer had any operations in Canada related to the production and distribution of wine and spirits.

10 As a result of the 2009 amendments, the respondent applied to the Quebec Superior Court for authorization to institute a class action against Vivendi and asked that court to ascribe to him the status of representative of the following persons:

[TRANSLATION]

All retired officers and employees of the former Seagram Company Limited who are eligible for post-retirement medical care under Vivendi Canada Inc.'s health care plan ("Plan") and eligible dependents within the meaning of the Plan ("beneficiaries"), as well as, with regard to the damages claimed, the successors of any such officers, employees or beneficiaries who have died since January 1, 2009. [A.R., vol. II, at p. 2]

11 The identical, similar or related questions of law or fact for which the respondent seeks a decision through the class action are as follows:

[TRANSLATION]

- (a) For group members who are retirees, do the Plan's benefits constitute deferred compensation that is paid today in the form of benefits but was earned when they were active employees?
- (b) From the date of their retirement, pursuant to the Plan and other documents cited herein, did the group members who are retirees have rights with respect to health care under the Plan that had vested or crystallized as of their retirement date and that could not be diminished without their consent?
- (c) From the date of their retirement, in accordance with a general legal principle or a principle developed by the courts, did the group members who are retirees have rights with respect to health care under the Plan that had vested or crystallized as of their retirement date and that could not be diminished without their consent?
- (d) Is the clause unilaterally inserted into the Plan in 1985 one whose purpose is to make it possible to harmonize the Plan with and adapt it to legislative changes, or does it instead authorize the respondent to unilaterally reduce the coverage of health care under the Plan for group members who are retirees in the absence of any legislative change obliging the respondent to do so?
- (e) Assuming that the clause unilaterally inserted into the Plan in 1985 permitted the respondent to unilaterally reduce the coverage of health care under the Plan for group members who are retirees in the absence of any legislative change obliging the respondent to do so,
  - (1) is the clause purely potestative, and is it null for that reason?
  - (2) does the clause make the Plan contract non-binding, and is it null for that reason? or
  - (3) does the clause make all the Plan's contractual obligations indeterminate or indeterminable, and is it null for that reason?
- (f) Is the Plan a contract of adhesion, and if so, in case of doubt, must it be interpreted in favour of the adhering parties, that is, the members of the group? [A.R., vol. II, at pp. 15-16]

The purpose of all these questions is to answer the more general question whether the 2009 amendments are valid or lawful.

### **III. Judicial History**

#### **A. Quebec Superior Court (Mayer J.), 2010 QCCS 3416, 83 C.C.P.B. 22 (C.S. Que.)**

12 As we mentioned above, Mayer J. dismissed the motion for authorization to institute a class action on the basis that there were no questions that were identical, similar or related for all the members of the group. This conclusion was based on his opinion that too many factors specific to each member had to be considered for one or more of the questions to be decided collectively. Moreover, not all the group's members had in their possession, at the time they retired, the documents the respondent had in his.

13 Mayer J. considered whether the questions raised in the motion for authorization to institute a class action were identical, similar or related, within the meaning of art. 1003(a) *C.C.P.*, for all the members of the group. After identifying the principles established by the courts, he concluded that because of the large number of questions requiring individualized analyses, the claims of the members of the proposed group did not lend themselves to a collective resolution.

14 Mayer J.'s conclusion that numerous individualized analyses would be necessary arose out of his interpretation of the rules governing the right of retirees to insurance benefits. He stated that it must be determined whether the right to insurance benefits during retirement has vested, because it is settled that an employer cannot modify or abolish a vested right without the retiree's consent. In his view, because the right to insurance benefits "crystallizes" at the time of retirement, the intention of the parties with respect to the vesting of rights must be determined as of that time. For this, the contract in effect at the time of retirement must be examined together with the communications between the employer and each employee in order to determine whether any rights have vested.

15 According to Mayer J., the respondent's premise that the question of vested rights could be considered collectively was wrong. The employees covered by the action had retired on different dates between 1971 and 2003, and the various groups of retirees had not all received the same communications from the employer. In addition, individual communications had been sent to the retirees. In Mayer J.'s opinion, it was essential to rule on the rights of the various members of the proposed group on the basis of the communications each of them had actually received. To proceed in any other way would be unfair to Vivendi.

16 In support of his conclusion that it was necessary to conduct individual analyses, Mayer J. identified five subgroups. Subgroup 1 consisted of the surviving spouses of employees who had retired before January 1, 1977. According to Mayer J., the rights of these members could not be governed by the documents applicable to the respondent, since those documents had not existed at the time the employees in question retired. To determine the scope of the rights of the members of subgroup 1, it was instead necessary to consider the communications between the deceased employees and the employer before or at the time of their retirement. Mayer J. found that, according to the documents in the record, a surviving spouse was no longer eligible for insurance benefits after the retired employee died.

17 Subgroup 2 was made up of employees who had retired between January 1, 1977 and July 14, 1985, and the surviving spouses of such employees. When the employees in question retired, they had the 1977 benefit guide in their possession as well as the insurance policy issued by Sun Life of Canada. Mayer J. stated that because Seagram had reserved the right to terminate the insurance contract, the rights of the members of this subgroup to insurance benefits had not crystallized.

18 Subgroup 3 consisted of employees who had retired between July 15, 1985 and December 31, 1995, and the surviving spouses of such employees. At the time they retired, the employees in question had in their possession a letter from Mr. Kosiuk, a representative of Seagram, and the benefit guide prepared in 1985, which contained the unilateral amendment clause. As a result, Mayer J. found, that clause, according to which Vivendi could modify the insurance benefits, prevented the rights of the members of subgroup 3 from crystallizing.

19 Subgroup 4 was made up of employees who had retired between January 1, 1996 and June 20, 2000, and the surviving spouses of such employees. The employees in question had in their possession a letter from Mr. Wilson dated November 20, 1995 and the 1996 benefit guide. As with the members of subgroups 2 and 3, Mayer J. concluded that because Vivendi had retained the right to modify the Plan unilaterally, the rights of the members of subgroup 4 had not crystallized.

20 Finally, the members of subgroup 5, which included the respondent, were employees who had retired after June 21, 2000. A number of documents relating to the Plan, namely three emails from Mr. Borgia and a letter from Mr. Wilson, were sent, the first dated June 21, 2000, but not all the members of this subgroup had them in their possession when they retired.

21 This division into five subgroups of the group covered by the motion for authorization to institute a class action showed that not all the group's members had in their possession, at the time they retired, the documents the respondent had in his. As a result, Mayer J. found that the various group members had different rights. He also asserted that individual analyses would be required within each subgroup, since each member of a subgroup could have received documents or communications that the others had not received.

22 Mayer J. also noted that the unilateral amendment clause did not apply to those who had retired before July 15, 1985, who made up 20 percent of the group. It was therefore irrelevant to the analysis on the vesting of the rights of those retirees, and a decision concerning the interpretation or the validity of the clause would not serve to advance the resolution of the litigation with respect to those individuals.

23 Mayer J. also stated that the injury allegedly suffered by the group's members could be established only on an individual basis. This was another factor that weighed against authorizing the class action.

24 Finally, given that the proposed group's members had worked in six different provinces, this lack of homogeneity was, in Mayer J.'s view, another relevant factor that supported a refusal to authorize the class action. The law of the common law provinces would apply to the retirees who had worked in those provinces, whereas Quebec law would apply to those who had worked in Quebec. In light of the number of subgroups and different legislative schemes that would apply to the various questions, he concluded that a minimum of 22 separate analyses would be needed to answer the questions the respondent said to be "common".

25 Mayer J. therefore found that, because of this [TRANSLATION] "range of individual recourses", the requirement set out in art. 1003(a) C.C.P. was not met (para. 137). As a result, he dismissed the respondent's motion for authorization to institute a class action.

***B. Quebec Court of Appeal (Chamberland, Rochon and Léger JJ.A.), 2012 QCCA 384, 95 C.C.P.B. 165 (C.A. Que.)***

26 The Court of Appeal unanimously allowed the appeal, authorized the institution of a class action and ascribed the status of representative to the respondent. It held that Mayer J. had erred in finding that the condition set out in art. 1003(a) C.C.P. was not met. It also concluded that the question whether the 2009 amendments were valid or lawful was common to all the members of the group.

27 The Court of Appeal found that the motion judge had erred in law by ruling on the merits on the question whether the 2009 amendments were valid in relation to the members of the group. All the Superior Court had to do at the authorization stage was decide whether the questions relating to the validity or the legality of the 2009 amendments were identical, similar or related for the claims of all the members of the proposed group.

28 According to the Court of Appeal, Mayer J. had instead focused on the individual questions that might arise in light of the different rules governing each member's right to insurance benefits. In so doing, Mayer J. had ruled on the merits of the arguments raised by the appellant and the respondent, thereby overstepping the bounds of his function of screening motions at the authorization stage.

29 The Court of Appeal concluded that, [TRANSLATION] "by taking the fragmentation of the subgroups too far and deciding the question of vested rights, [Mayer J.] disregarded the *prima facie* case requirement and, without saying so, indirectly ruled on the validity of the 1985 clause in which the employer reserved the right to modify the Plan in the future": para. 53.

30 The Court of Appeal then considered whether the validity or the legality of the 2009 amendments was a question common to all the members of the group for the purposes of art. 1003(a) C.C.P. The court held that it was. First of all, the court stated

on the basis of this Court's decision in *Dutton* that questions that are common to all the members of the group can coexist with questions that concern individuals; all that is needed is that there be a common, related or similar question. In the context of the case at bar, the Court of Appeal accepted that the main question at issue was whether the 2009 amendments were valid or lawful and that this question applied to all the members of the group. The members had all entered into a contract of employment with Seagram, and subsequently Vivendi, that provided for certain benefits, including the Plan. According to the Court of Appeal, the main question raised by the motion could give rise to serious argument. If the analysis with respect to the criterion set out in art. 1003(a) C.C.P. is based on the questions actually at issue rather than on factual differences that are not relevant at the preliminary stage, it is inappropriate for the judge hearing the motion for authorization to create subgroups in order to decide the motion.

31 The Court of Appeal also stated that the *prima facie* case requirement of art. 1003(b) C.C.P. was met. Therefore, since the criteria of art. 1003(a) and (b) C.C.P. were met and the appellant had admitted that the motion met the criteria set out in art. 1003(c) and (d), the Court of Appeal set aside the motion judge's judgment and authorized the class action.

#### IV. Analysis

##### A. Issues

32 In this appeal, the Court must resolve two issues. First, did the motion judge make an error that justified the Court of Appeal's intervention? Second, if the motion judge erred, we will decide whether the respondent's questions are identical, similar or related within the meaning of art. 1003(a) C.C.P.

##### B. Did the Motion Judge Make an Error That Justified the Court of Appeal's Intervention?

33 Article 1003 C.C.P., which establishes the conditions for authorizing a class action, confers significant discretion on the court hearing a motion for authorization. In its opening words, the expression "if of opinion that" introduces an enumeration of the criteria to be met:

**1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

- (a) the recourses of the members raise identical, similar or related questions of law or fact;
- (b) the facts alleged seem to justify the conclusions sought;
- (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

34 The Quebec Court of Appeal, mindful of the importance of the motion judge's discretion with respect to the criteria set out in art. 1003 C.C.P., has stated on many occasions that its power to intervene in this regard is limited and that it must show deference to the motion judge's decision. It will therefore intervene in an appeal from a decision on a motion for authorization to institute a class action only if the motion judge erred in law or if the judge's assessment with respect to the criteria of art. 1003 C.C.P. is clearly wrong: *Bouchard c. Agropur coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349 (C.A. Que.), at para. 42; *Union des consommateurs c. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243 (C.A. Que.), at paras. 45-46; *Harmegnies c. Toyota Canada*, 2008 QCCA 380 (C.A. Que.), at paras. 25-26; *Union des consommateurs c. Bell Canada*, 2010 QCCA 351 (C.A. Que.), at para. 23.

35 A class action may be authorized only if the four criteria of art. 1003 C.C.P. are met. If the motion judge errs in law or if his or her assessment with respect to any criterion of art. 1003 C.C.P. is clearly wrong, the Court of Appeal can substitute its own assessment, but only for that criterion and not for the others. An error in relation to one criterion does not give the Court of Appeal carte blanche to reconsider all the other criteria to be met before the bringing of a class action may be authorized.

36 In the instant case, the appellant argues that the Court of Appeal erred in substituting its own assessment for that of the Superior Court on the basis that the Superior Court had decided certain aspects of the case on the merits. The appellant further argues that even if the motion judge did make such an error, the error did not authorize the Court of Appeal to substitute its own analysis with respect to the identical, similar or related question criterion of art. 1003(a) for that of the motion judge. For the reasons that follow, we are of the opinion that the Court of Appeal was right to intervene.

*i. Role of a Judge Hearing an Application for Authorization to Institute a Class Action*

37 The judge's function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits: *Option consommateurs c. Infineon Technologies AG*, 2013 SCC 59 (S.C.C.), at paras. 59 and 61. However, the law does not impose an onerous burden on the applicant at this stage, as he or she need only establish a "prima facie case", or an "arguable case": *Infineon*, at paras. 61-67; *Marcotte c. Longueuil (Ville)*, 2009 SCC 43, [2009] 3 S.C.R. 65 (S.C.C.), at para. 23. Thus, all the judge must do is decide whether the applicant has shown that the four criteria of art. 1003 C.C.P. are met. If the answer is yes, the class action will be authorized. The Superior Court will then consider the merits of the case. In considering whether the criteria of art. 1003 are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted: *Infineon*, at para. 68; *Marcotte*, at para. 22.

38 Article 1003(a) C.C.P. provides that a class action may be authorized only if the court concludes that "the recourses of the members raise identical, similar or related questions of law or fact". This commonality requirement applies not only in Quebec law, but also in that of all the common law provinces of Canada.

39 We will therefore turn now to the principles to be applied in deciding whether a class action raises a common question that meets the criterion of art. 1003(a). These principles can be found, *inter alia*, in the decisions of this Court and of the Quebec Court of Appeal.

**(a) Principles From Dutton and Rumley**

40 We must consider a few important decisions of this Court. Although they were rendered in cases based on the common law, they are nevertheless often relied on and discussed in decisions of the Quebec courts. However, a few caveats are in order as regards their application in Quebec civil procedure. We will return to this point below.

41 In *Dutton*, this Court laid down certain principles to be applied in deciding whether a class action raises one or more issues that are common to the claims of all the members of a class. McLachlin C.J., writing for the Court, stated the following:

Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

[Emphasis added; para. 39.]

42 Although *Dutton* was based on the procedural law of Alberta, the principles laid down by this Court with respect to the commonality requirement have been applied by the Quebec Court of Appeal on many occasions. In *Collectif de défense des droits de la Montérégie (C.D.D.M.) c. Centre hospitalier régional du Suroît du Centre de santé & des services sociaux du*

*Suroît, 2011 QCCA 826* (C.A. Que.), for example, the Court of Appeal noted that an issue will be considered common for the purposes of art. 1003(a) C.C.P. if addressing the issue enables all the claims to move forward:

[TRANSLATION]

A single common, related or similar issue of law suffices to meet the condition in article 1003(a) CCP if it is significant enough to affect the outcome of the class action; however, it need not be determinative of the final resolution of the case: *Comité d'environnement de la Baie inc. v. Société de l'électrolyse et de chimie de l'Alcan ltée*, [1990] R.J.Q. 655 (CA) at paragraphs 22 and 23. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis (Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice* (Cowansville, Que: Yvon Blais, 2006) at 92; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para 39).

It is quite possible that the determination of common issues does not lead to the complete resolution of the case, but that it results instead in small trials at the stage of the individual settlement of the claims. This does not preclude a class action suit. Professor Lafond, *supra*, writes at pages 88-89:

[TRANSLATION]

Differences in members' claims and the possible need for each member to prove the personal damages suffered no longer bar a class action suit. As pragmatically stated by a court magistrate: [TRANSLATION] "In the event of a monetary award, some accounting work would be inevitable, at the most." [paras. 22-23]

See also *Union des consommateurs* (2012), at paras. 67-68.

43 In *Dutton*, this Court also stated that, for there to be a "common issue", success for one member of the class must bring with it a benefit for all the others:

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. [para. 40]

44 In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.), this Court confirmed the principles from *Dutton*. In the case of the commonality requirement, the purpose of the analysis is to determine "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": para. 29, quoting *Dutton*, at para. 39. The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.

45 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 a 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.

46 *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.

47 There is nothing new about this flexible approach to the commonality requirement. It was adopted by the Saskatchewan Court of Appeal in *Frey v. Bell Mobility Inc.*, 2011 SKCA 136, 377 Sask. R. 156 (Sask. C.A.):

Having regard for these authorities, the common issue requirement, "success for one is success for all", may in appropriate cases be met in circumstances where different results may be possible for different class members, provided there is no

conflict among the class members, in the sense that success for one class member must not mean failure for another. [para. 60]

**(b) Application of the Principles in Light of the C.C.P.**

48 Caution must be exercised when applying the principles from *Dutton* and *Rumley* to the rules of Quebec civil procedure relating to class actions. Although those decisions have now been recognized in Quebec law and have been cited and applied many times by Quebec courts, the issue that is central to this appeal nonetheless shows that it is necessary to clarify the relevance and scope of the principles in question in the context of Quebec procedural law. *Dutton* and *Rumley* certainly provide a general framework for analyzing the application of the commonality requirement, but it must be borne in mind that tests established in a common law context cannot necessarily be imported without adaptation into Quebec civil procedure.

49 To determine how the principles from *Dutton* and *Rumley* apply in Quebec law, we will analyze the wording of the *C.C.P.* first, before considering the principles developed by the Quebec courts.

50 The source of the commonality requirement in Quebec civil procedure is art. 1003 *C.C.P.*, which requires that "the recourses of the members raise identical, similar or related questions of law or fact".

51 Two observations are in order with respect to the wording of art. 1003(a) *C.C.P.* First, this paragraph provides that a class action can be authorized only if the *questions* are common. Nowhere has the legislature stated that there must be common *answers*.

52 Second, if art. 1003(a) is compared with the legislation of the common law provinces, it can be seen that the wording used to establish the commonality requirement is different in the latter. For example, the requirement is expressed in broader and more flexible terms in Quebec's *C.C.P.* than in Ontario's legislation, which requires the existence not merely of similar or related questions, but of "common issues": *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 5(1)(c). Moreover, the wording of the Ontario statute is used in the legislation of all the other common law provinces of Canada that have legislated with respect to class actions: *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(c); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1)(c); *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 6(1)(c); *Class Proceedings Act*, C.C.S.M. c. C130, s. 4(c); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 7(1)(c); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 6(1)(c); *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5(1)(c).

53 Although the expression "common issues" is frequently used by Quebec judges and authors, its content is not exactly the same as that of the expression "identical, similar or related questions of law or fact". It would be difficult to argue that a question that is merely "related" or "similar" could always meet the "common issue" requirement of the common law provinces. The test that applies in Quebec law therefore seems to be less stringent. Because of the differences in the wording of the applicable legislation, the case law on class actions from the common law provinces is not determinative where the application of the criterion of art. 1003(a) is concerned.

54 In addition, it can be seen from the Quebec courts' interpretation of art. 1003(a) *C.C.P.* that their approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces. The Quebec courts propose a flexible approach to the common interest that must exist among the group's members: P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 408.

55 As this Court noted in *Marcotte*, at para. 22, the courts have, by interpreting and applying the criteria of art. 1003 *C.C.P.* broadly, favoured easier access to the class action: see also *Infineon*, at para. 60.

56 In the specific case of the commonality requirement, the Quebec Court of Appeal has consistently favoured a broad definition of the conditions that make it possible to satisfy the requirement of art. 1003(a). It laid the groundwork for this approach in *Comité d'environnement de La Baie Inc. c. Société d'électrolyse & de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A. Que.), in which it made the following comment:

But Article 1003 (a) does not require that *all* of the questions of law or of fact in the claims of the members be identical or similar or related. Nor does the article even require that the majority of these questions be identical or similar or related. From the text of the article, it is sufficient if the claims of the members raise *some* questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action. [Italics in original; underlining added; p. 659.]

57 Thus, the Quebec approach to authorization is more flexible than the one taken in the common law provinces, although the latter provinces do generally subscribe to an interpretation that is favourable to the class action. The Quebec approach is also more flexible than the current approach in the United States: *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (U.S. Sup. Ct. 2011). As Professor Lafond says, [TRANSLATION] "Quebec procedure surpasses in this regard the procedure of the other Canadian provinces, and of England and the United States, which struggle with the rigid concepts of 'same interest' or 'common interest', and of 'predominance of the common issues'": *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, at p. 408.

58 There is one common theme in the Quebec decisions, namely that the C.C.P.'s requirements for class actions are flexible. As a result, even where circumstances vary from one group member to another, a class action can be authorized if some of the questions are common: *Riendeau c. Cie de la Baie d'Hudson* [2000 CarswellQue 224 (C.A. Que.)], 2000 CanLII 9262, at para. 35; *Comité d'environnement de la Baie*, at p. 659. To meet the commonality requirement of art. 1003(a) C.C.P., the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute: *Harmegnies*, at para. 54; see also *Lallier c. Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490 (C.A. Que.), at paras. 17-21; *Del Guidice c. Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496 (C.A. Que.), at para. 49; *Kelly c. Communauté des Soeurs de la Charité de Québec*, [1995] J.Q. No. 3377 (C.S. Que.), at para. 33. All that is needed in order to meet the requirement of art. 1003(a) C.C.P. is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible: *Collectif de defense des droits de la Montérégie (CDDM)*, at paras. 22-23.

59 In short, it can be concluded that the common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(a) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

60 In light of these principles, we are of the opinion that the motion judge was mistaken in emphasizing the possibility that numerous individual questions would ultimately have to be analyzed. He should instead have inquired into whether the condition provided for in art. 1003(a) was met, that is, whether the applicant had established the existence of a common question that would serve to advance the resolution of the litigation with respect to all the members of the group, and that would not play an insignificant role in the outcome of the case.

### (c) Places of Residence of the Group's Members

61 The group proposed by the respondent includes 250 retirees or surviving spouses of employees who worked in six provinces: Quebec (134 members), Ontario (82 members), Alberta (3 members), British Columbia (16 members), Saskatchewan (2 members) and Manitoba (13 members). Since no applicable law was designated in the contracts of employment of the various employees, the law of the province where each employee worked would have to apply to that employee's case (art. 3118 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q.")). According to the motion judge, the multitude of legal schemes applicable to the individual claims is an additional difficulty that demonstrates the proposed group's lack of homogeneity.

62 However, the fact that the employees worked in six different provinces is not in itself a bar to the authorization of the class action. In a class action, the court can accept proof of the law applicable in the common law provinces or take judicial notice of that law: art. 2809 C.C.Q. Only substantial differences between the applicable legal schemes would cause a class action to lose its collective nature: *Union des consommateurs* (2012), at paras. 120 and 123.

63 In the case at bar, the fact that members of the group live in different Canadian provinces should not prevent the court from authorizing the class action. There are common questions in the claims of the members of the proposed group with respect to the legality or the validity of the 2009 amendments.

#### (d) Principle of Proportionality

64 The principle of proportionality, which is recognized in Quebec civil procedure, is set out in art. 4.2 C.C.P.:

**4.2** In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

65 The appellant submits that an interpretation of art. 1003(a) that encourages a multiplicity of substantive analyses is contrary to the principle of proportionality. It bases its position primarily on the reasons of the majority in *Marcotte*, in which LeBel J. stated that the principle of proportionality must not be limited "to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec": para. 42.

66 In our view, the approach proposed by the appellant is wrong. *Marcotte* confirmed the importance of the principle of proportionality in civil procedure, and as a source of the courts' power to intervene in the management of a case: paras. 42 and 43. In the class action context, however, the judge's discretion in respect of the application of the four criteria of art. 1003 C.C.P. must be reconciled with the power provided for in art. 4.2 C.C.P.: *Bouchard*, at paras. 37, 41 and 44; *Harmegnies*, at paras. 20-22. In our view, insofar as the four criteria set out in art. 1003 C.C.P. are exhaustive, and it is our opinion that they are, the principle of proportionality must be considered in the assessment with respect to each of these criteria. The proportionality of the class action is not a separate fifth criterion.

67 This conclusion is supported by the wording of the legislation and by the case law. In enacting the class action provisions of the C.C.P., the Quebec legislature did not consider it appropriate to require that a class action be the "preferable" procedure for the resolution of the dispute or the common issues, which is the criterion found in the legislation of other provinces. Caution therefore dictates that such a criterion not be introduced indirectly into Quebec's rules of civil procedure. Article 1003 is clear: the motion judge must authorize the class action if he or she is of the opinion that the four criteria are met. The judge does not have to ask whether a class action is the most appropriate procedural vehicle.

68 The Quebec case law leads to the same conclusion. As Baudouin J.A. stated in *Harmegnies*, the judge's discretion [TRANSLATION] "is exercised in the context, and only in the context, of the four requirements established by the legislature": para. 22; see also *Brown c. Roy*, 2012 QCCA 900 (C.A. Que.), at para. 67; *Billette c. Toyota Canada inc.*, 2009 QCCA 2476, [2010] R.J.Q. 66 (C.A. Que.), at para. 44; *St-Germain c. Apple Canada inc.*, 2010 QCCA 1376 (C.A. Que.), at paras. 55-57; P.-C. Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at pp. 153-54; É. M. David, "La règle de proportionnalité de l'article 4.2 C.p.c. en matière de recours collectif — Premières interprétations jurisprudentielles", in Service de la formation continue du Barreau du Québec, *Développements récents en recours collectifs* (2007), 315, at p. 335. The effect of the principle of proportionality is to reinforce the discretion judges are already acknowledged to have when considering each of the four criteria of art. 1003 C.C.P.: *Marcotte*, at para. 85. However, the motion judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the established criteria.

#### *ii. Errors Made by the Motion Judge*

69 In assessing the criterion of art. 1003(a) C.C.P., the motion judge made two errors. First, he ruled on the merits of the case by determining that the rights to insurance benefits of certain members of the group had not crystallized. Second, he adopted the wrong methodology by seeking common answers rather than merely identifying one or more questions that were common to the claims of all the members of the proposed group. We will consider each of these errors in turn.

70 It is clear from the motion judge's reasons that he ruled on the merits of the case. When discussing the reasons why the rules governing the retirees' right to insurance benefits would require an individualized analysis, he decided on the right of certain members to receive such benefits following the insertion of the unilateral amendment clause and the making of the 2009 amendments. It is clear from the following paragraphs from his reasons that he considered the merits on certain of the questions raised in the motion for authorization, thereby overstepping the bounds of the function of screening motions to which he should have limited himself:

[TRANSLATION]

The right of the members of Subgroup 2 to post-retirement insurance benefits did not crystallize, since the employer reserved the power to terminate the insurance coverage. A right to resiliate such as this is in fact inconsistent with an intention to confer a vested right.

The section of the 1977 benefit guide entitled "*Termination of Coverage*" / "*Cessation de l'assurance*" indicates clearly that the employer is free to terminate the insurance coverage at any time by resiliating the group insurance contract:

.....

The right of the members of Subgroup 3 to post-retirement insurance benefits did not crystallize, since the employer expressly reserved the right to modify or terminate the insurance coverage.

.....

The right of the members of Subgroup 4 to post-retirement insurance benefits did not crystallize, since the employer expressly reserved the right to modify or terminate the insurance coverage. [Emphasis added; paras. 92, 93, 98 and 103.]

71 The appellant argues that the motion judge expressly stated that he was not ruling on the *prima facie* case requirement of art. 1003(b) C.C.P. and that, as a result, the above-quoted passages cannot be interpreted as decisions on substantive questions. With respect, the appellant is confusing the conclusion required by art. 1003(b) — that the facts alleged in the motion for authorization seem to justify the conclusions being sought — with a ruling on the merits by the motion judge on certain questions. As we have already said, the motion judge performs a function of screening motions; this is a procedural stage that does not involve consideration of the questions on the merits. The motion judge must inquire into whether the four criteria of art. 1003 C.C.P. are met. The questions can be decided on the merits only by the trial judge, after authorization to institute the class action has been granted.

72 The motion judge also took the wrong approach in his analysis with respect to the criterion of art. 1003(a) C.C.P. Rather than determining whether the claims of all the members of the proposed group raised an identical, similar or related question that could serve to advance the resolution of the litigation, he asked whether there were common answers to the questions raised in the motion for authorization to institute a class action. This approach is clear from paras. 69 and 70 of his reasons:

[TRANSLATION]

In the case at bar, the Court finds that because of the large number of questions requiring an individualized analysis for each member of the proposed group, the Applicant's action does not lend itself to a collective resolution.

If the action is authorized, the trial judge will have to conduct a detailed review of a multitude of individual circumstances before he or she will be able to determine whether the 2009 amendments apply to each member of the group.

At the authorization stage, the judge must simply determine whether one or more questions exist that are common to the claims of all the members of the proposed group. As we mentioned above, at this stage, the threshold that must be met to find that there are common questions is a low one.

73 In this case, the errors made by the motion judge warranted the intervention of the Court of Appeal.

***C. Are the Questions Raised in the Motion for Authorization to Institute a Class Action Identical, Similar or Related Within the Meaning of Article 1003(a) C.C.P.?***

74 We have found that the motion judge erred in law in requiring answers that were common to the claims of all the members of the proposed group. As a result, this Court, like the Court of Appeal, must reopen the analysis under art. 1003(a) in light of the applicable principles.

75 In this case, the main question raised in the respondent's motion for authorization to institute a class action is whether the amendments made to the Plan in 2009 are valid or lawful. Those amendments had the effect of reducing, as of January 1, 2009, certain benefits promised to the retirees and surviving spouses. Since the claims of all the group's members are based on the Plan, the question of the validity or the legality of the 2009 amendments arises for all the members. The answer to this question can serve to advance the resolution of all the claims. Hence, there is a common question.

76 A few comments must be made about the existence of subgroups in light of the motion judge's conclusion that the large number of subgroups was a factor that supported the dismissal of the motion for authorization. With respect, that conclusion conflicts with the principles established by the courts regarding the relevance of subgroups at the authorization stage. In several Canadian provinces, including Quebec, the existence of subgroups within the proposed group does not on its own constitute a sufficient basis for refusing to authorize a class action: W. K. Branch, *Class Actions in Canada*, vol. 1 (loose-leaf), at p. 4-103; *Dutton*, at para. 54; *Rumley*, at para. 32. As we mentioned above, the circumstances of the various members of the group can differ as long as the members have no conflicting interests.

77 Moreover, as this Court stated in *Dutton*, if material differences emerge, the court will deal with them at trial: para. 54. The creation of subgroups will become relevant at that stage, when the judge answers the questions in light of the facts applicable to each member of the group. We therefore agree with the Court of Appeal that a subgroup analysis is neither necessary nor relevant at the authorization stage: para. 66.

78 In the instant case, if the review of the claims led to different outcomes for the different subgroups or for different members of the subgroups, that would not necessarily mean that their interests are in conflict. It is more likely that the success or failure of the claims will depend on a key date or a specific term in the subgroup's contract of employment. The possible answers are therefore not mutually exclusive. Success for one subgroup or one member does not mean failure for another. In other words, there are no conflicting interests among the members of the group.

79 In our opinion, there is in this case, as required by art. 1003(a) *C.C.P.*, a question common to the claims of all the members of the proposed group: whether the 2009 amendments are valid or lawful. The answer to this question may have to be nuanced on the basis of the retirement dates of the various members of the group, or of other circumstances specific to individual members.

#### **IV. Conclusion**

80 The validity or legality of the 2009 amendments and the other questions raised by the respondent in his motion for authorization to institute a class action are the type of questions referred to in art. 1003(a) *C.C.P.* Since Vivendi has admitted that the conditions of art. 1003(c) and (d) are met and has not contested the Court of Appeal's decision finding that the one set out in art. 1003(b) is met, all the criteria of art. 1003 *C.C.P.* are met.

81 We would therefore affirm the judgment of the Court of Appeal and dismiss the appeal with costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

# **TAB 36**

**Most Negative Treatment:** Check subsequent history and related treatments.

2001 SCC 46, 2001 CSC 46  
Supreme Court of Canada

Western Canadian Shopping Centres Inc. v. Dutton

2001 CarswellAlta 884, 2001 CarswellAlta 885, 2001 SCC 46, 2001 CSC 46, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534, [2001] A.W.L.D. 432, [2002] 1 W.W.R. 1, 106 A.C.W.S. (3d) 397, 201 D.L.R. (4th) 385, 253 W.A.C. 201, 272 N.R. 135, 286 A.R. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, J.E. 2001-1430, REJB 2001-25017

**Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, Appellants/ Respondents on cross-appeal and Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc., Respondents/Appellants on cross-appeal**

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour, LeBel JJ.

Heard: December 13, 2000  
Judgment: July 13, 2001  
Docket: 27138

Proceedings: additional reasons to (December 13, 2000), Doc. 27138 (S.C.C.); reversing in part (1998), [228 A.R. 188](#) (Alta. C.A.); affirming (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.)

Counsel: *Barry R. Crump, Brian Beck, David C. Bishop*, for Appellants/Respondents on Cross-Appeal  
*Hervé H. Durocher, Eugene J. Erler*, for Respondents/Appellants on Cross-Appeal

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

**Related Abridgment Classifications**

Business associations

[III](#) Specific matters of corporate organization

[III.1](#) Directors and officers

[III.1.g](#) Fiduciary duties

[III.1.g.ix](#) Miscellaneous

Civil practice and procedure

[V](#) Class and representative proceedings

[V.1](#) Representative or class proceedings not under class proceedings legislation

[V.1.a](#) Requirements

[V.1.a.i](#) Existence of cause of action

Civil practice and procedure

[V](#) Class and representative proceedings

[V.1](#) Representative or class proceedings not under class proceedings legislation

[V.1.a](#) Requirements

[V.1.a.vii](#) Miscellaneous

Civil practice and procedure

[V](#) Class and representative proceedings

**V.1** Representative or class proceedings not under class proceedings legislation

**V.1.f** Examination for discovery

Civil practice and procedure

**V** Class and representative proceedings

**V.1** Representative or class proceedings not under class proceedings legislation

**V.1.k** Miscellaneous

Civil practice and procedure

**XII** Discovery

**XII.4** Examination for discovery

**XII.4.e** Who may be examined

**XII.4.e.iv** Miscellaneous

Torts

**VII** Fraud and misrepresentation

**VII.3** Negligent misrepresentation (Hedley Byrne principle)

**VII.3.c** Particular relationships

**VII.3.c.iii** Fiduciary relationship

**Headnote**

Practice --- Parties — Representative or class actions — Procedural requirements

Appeal of dismissal of defendants' application to strike representative action on grounds that plaintiffs failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Discretion was exercised to strike balance between efficiency and fairness — No countervailing considerations existed that outweighed benefits of allowing action to proceed.

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Particular relationships — Fiduciary relationship

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Fiduciary duty issues raised by investors were common to all plaintiffs — Material differences between investors' rights could be dealt with if they arose — Class action was not foreclosed on ground that investors might be required to show individual reliance in order to establish breach of fiduciary duty.

Practice --- Discovery — Examination for discovery — Who may be examined — General

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed on further appeal — Plaintiffs cross-appealed decision on appeal that defendants were allowed to discover each individual class member — Cross-appeal allowed — Individualized discovery was premature at this stage of proceeding — Defendants were allowed to discover representative plaintiffs — Discovery of other class members was only available by order of court, upon establishment of reasonable necessity.

Corporations --- Directors and officers — Fiduciary duties — General

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Fiduciary duty issues raised by investors were common to all plaintiffs — Material differences between investors' rights could be dealt with if they arose — Class action was not foreclosed on ground that investors might be required to show individual reliance in order to establish breach of fiduciary duty.

Procédure --- Parties — Recours collectif — Exigences procédurales

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif parce que les plaignants n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Pouvoir discrétionnaire a été utilisé pour concilier l'efficacité et l'équité — Il n'existe pas d'autres considérations défavorables qui l'emportaient sur les avantages d'autoriser le recours.

Fraude et assertion inexacte --- Assertion négligente et inexacte (principe Hedley Byrne) — Relations particulières — Relation fiduciaire

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs

a été rejeté — Questions relatives à l'obligation fiduciaire soulevées par les investisseurs touchaient tous les demandeurs — Différences importantes entre les droits des investisseurs pouvaient être résolues si elles survenaient — Recours collectif n'a pas été interdit au motif qu'on exigerait peut-être des investisseurs qu'ils démontrent un lien de confiance individuel afin de prouver le manquement à l'obligation fiduciaire.

Procédure --- Communication préalable — Interrogatoire préalable — Qui peut être interrogé — En général  
Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Demandeurs ont formé un appel incident à l'encontre de l'appel des défendeurs, lesquels voulaient interroger chaque membre du groupe individuellement — Pourvoi incident accueilli — À ce stade des procédures, l'interrogatoire préalable individuel était prématuré — Défendeurs ne pouvaient qu'interroger les représentants des demandeurs — L'interrogatoire des autres membres du groupe ne pouvait être autorisé que par ordonnance du tribunal, après avoir établi que c'était raisonnablement nécessaire.

Sociétés par actions --- Administrateurs et dirigeants — Obligations fiduciaires — En général

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Questions relatives à l'obligation fiduciaire soulevées par les investisseurs touchaient tous les demandeurs — Différences importantes entre les droits des investisseurs pouvaient être résolues si elles survenaient — Recours collectif n'a pas été interdit au motif qu'on exigerait peut-être des investisseurs qu'ils démontrent un lien de confiance individuel afin de prouver le manquement à l'obligation fiduciaire.

The representative plaintiffs, together with 229 other investors, purchased debentures in a corporation under the federal government's business immigration program, in order to facilitate their qualification as Canadian permanent residents. They made their purchases at different times pursuant to different offering memoranda presented to them by different defendants. The corporation invested all of its proceeds into a gold mine, which failed. The plaintiffs lost all of their investment. The plaintiffs commenced a representative action pursuant to R. 42 of the *Alberta Rules of Court* against the defendants for breach of fiduciary duty. The defendants applied to strike the representative action on grounds that the plaintiffs as a group could not show the requisite element of reliance because they invested at different times under different offering memoranda. The application was dismissed on grounds that it was not plain and obvious that the plaintiffs failed to meet the requirements under R. 42 and that the existence of a fiduciary duty was an issue of fact that should be left for the trial judge. The defendants' appeal was dismissed. The defendants appealed.

**Held:** The appeal was dismissed and the cross-appeal was allowed.

Per McLachlin C.J.C. (Arbour, Binnie, Gonthier, Iacobucci, L'Heureux-Dubé and LeBel JJ. concurring): No comprehensive legislative framework currently exists in Alberta respecting class actions. Practice is governed by R. 42 of the *Alberta Rules of Court*, which allows representative actions where "numerous persons have a common interest in the subject of an intended action". Details of class action practice were left to the courts. The common law of Alberta identified four conditions in order for the class action to proceed. First, the class must be capable of clear definition. Secondly, there must be issues of fact or law common to all class members, and the resolution of those issues must be necessary to a resolution of each class member's claim. Thirdly, success for one class member must mean success for all, and no conflicting interests must exist. Finally, the class representatives must adequately represent the class. When these conditions are met, the court should then exercise its discretion to strike a balance between efficiency and fairness. Class actions should not be approached restrictively. The test was not whether it was plain and obvious that an action should not proceed as a class action, under R. 42. Denial of class status under R. 42 did not defeat the claim, it determined how the claim would proceed. No countervailing considerations outweighed the benefits of allowing the action to proceed in this case. The court retained the discretion to deal with any non-common issues among the plaintiffs. As the fiduciary duty issues raised were common to all the investors, the plaintiffs had satisfied the requirements of R. 42. If the court later determined that the investors were required to show individual reliance to establish breach of fiduciary duty, the court could consider at that time whether the action should continue as a class action.

Allowing individualized discovery at this stage of the proceedings was premature. One of the benefits of a class action was that discovery of the class representatives was usually sufficient. Individual discovery of all class members was the exception rather than the rule. The defendants were allowed to examine the representative plaintiffs as of right. Examination of other class members was only available by court order, upon the demonstration by the defendants of reasonable necessity.

Les demandeurs représentants, ainsi que 229 autres investisseurs, ont participé au programme d'immigration des gens d'affaires du gouvernement fédéral en achetant des débentures d'une compagnie, dans le but de faciliter leur obtention du statut de résident permanent du Canada. Ils ont effectué leurs achats à divers moments selon différentes notices d'offre qui leur ont été présentées par divers défendeurs. La compagnie a investi tous ses profits dans une mine d'or, qui a fait faillite. Les demandeurs ont tout perdu. Ils ont alors intenté un recours collectif, conformément à la règle 42 des *Alberta Rules of Court*, à l'encontre des défendeurs pour manquement à leur obligation fiduciaire. Les défendeurs ont demandé que le recours collectif soit radié sous prétexte que les demandeurs, en tant que groupe, ne pouvaient démontrer le lien de confiance requis parce qu'ils ont investi à divers moment selon différentes notices d'offre. La demande a été rejetée au motif qu'il n'était pas clair et évident que les demandeurs n'avaient pas satisfait à toutes les exigences de la règle 42 et aussi parce que l'existence d'une obligation fiduciaire constitue une question de fait qui devait être tranchée par le juge de première instance. Le pourvoi des défendeurs a été rejeté. Ils ont interjeté appel.

**Arrêt:** Le pourvoi a été rejeté et le pourvoi incident a été accueilli.

La juge en chef McLachlin (les juges Arbour, Binnie, Gonthier, Iacobucci, L'Heureux-Dubé et LeBel y souscrivant): À l'heure actuelle, il n'existe en Alberta aucun cadre législatif complet relatif aux recours collectifs. Cette procédure est régie par l'art. 42 des *Alberta Rules of Court* qui permet les recours collectifs lorsque « [traduction] de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée ». Les détails de la procédure à suivre pour les recours collectifs ont été laissés aux tribunaux. La common law de l'Alberta a identifié quatres conditions à respecter pour que le recours collectif puisse être exercé. Premièrement, le recours collectif doit pouvoir être clairement défini. Deuxièmement, tous les membres du groupe doivent avoir en commun des questions de fait ou de droit, et la résolution de ces questions doit être nécessaire pour résoudre la réclamation de chacun des membres du groupe. Troisièmement, le succès d'un membre du groupe doit se traduire par celui de tous les membres et il ne doit pas exister de conflits d'intérêts. En dernier lieu, les représentants du groupe doivent représenter adéquatement le groupe. Si toutes ces conditions sont réunies, le tribunal peut exercer son pouvoir discrétionnaire pour concilier l'efficacité et l'équité. Les recours collectifs ne devraient pas être abordés de façon restrictive. En vertu de la règle 42, le critère à respecter n'était pas de savoir s'il était clair et évident qu'une poursuite ne pouvait être intentée comme un recours collectif. Le refus du statut de recours collectif en vertu de la règle 42 n'empêchait pas la poursuite, cela ne faisait que déterminer de quelle façon la poursuite serait intentée. En l'espèce, il n'y avait aucune considération défavorable qui l'emportait sur les avantages que comportait l'autorisation du recours. Le tribunal conservait son pouvoir discrétionnaire lui permettant de trancher toutes questions qui n'étaient pas communes à tous les demandeurs. Les demandeurs avaient rempli toutes les conditions de la règle 42 parce que les questions soulevées relatives aux obligations fiduciaires étaient communes à tous les investisseurs. Si le tribunal venait à déterminer que les investisseurs doivent démontrer un lien de confiance individuel pour prouver le manquement à l'obligation fiduciaire, il pourrait, à ce moment-là, décider si le recours doit se poursuivre comme recours collectif.

À ce stade des procédures, il était prématuré de permettre des interrogatoires au préalable individuels. Un des avantages du recours collectif était que l'interrogatoire des représentants du groupe était habituellement suffisant. L'interrogatoire préalable individuel de tous les membres du groupe constitue l'exception et non la règle. Les défendeurs avaient l'autorisation, de plein droit, d'interroger les demandeurs représentants. L'interrogatoire des autres membres du groupe n'était possible que sur ordonnance du tribunal, une fois que les défendeurs auraient prouvé que cela était raisonnablement nécessaire.

## Table of Authorities

### Cases considered by/Jurisprudence citée par *McLachlin C.J.C.*:

- Bell v. Wood*, 38 B.C.R. 310, [1927] 1 W.W.R. 580, [1927] 2 D.L.R. 827 (B.C. S.C.) — referred to
- Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) — referred to
- Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265, 2 Eq. Ca. Abr. 168 (Eng. Ch.) — referred to
- City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (Eng. Ch.) — referred to
- Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094, [1970] 1 W.L.R. 688 (Eng. C.A.) — considered
- Duke of Bedford v. Ellis* (1900), [1901] A.C. 1 (U.K. H.L.) — referred to
- Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342, 219 A.P.R. 342 (N.B. Q.B.) — referred to
- Hodgkinson v. Simms*, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — referred to

*Horne v. Canada (Attorney General)* (1995), 39 C.P.C. (3d) 38, 129 Nfld. & P.E.I.R. 109, 402 A.P.R. 109 (P.E.I. T.D.) — referred to

*Hunt v. T & N plc*, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) — referred to

*International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Sask. Q.B.) — referred to

*International Corona Resources Ltd. v. Lac Minerals Ltd.*, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 26 C.P.R. (3d) 97, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574 (S.C.C.) — referred to

*Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337, 135 A.R. 389, 33 W.A.C. 389, 15 C.P.C. (3d) 109 (Alta. C.A.) — considered

*Langley v. North West Water Authority*, [1991] W.L.R. 711n (Eng. H.L.) — referred to

*Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (Eng. C.A.) — referred to

*Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321, 378 A.P.R. 321, [1995] G.S.T.C. 71 (N.B. Q.B.) — referred to

*Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021, 79 L.J.K.B. 939, 103 L.T. 369 (Eng. K.B.) — referred to

*N.A.P.E. v. Newfoundland (Treasury Board)* (1995), (sub nom. *Newfoundland Assn. of Public Employees v. Newfoundland*) 132 Nfld. & P.E.I.R. 205, (sub nom. *Newfoundland Assn. of Public Employees v. Newfoundland*) 410 A.P.R. 205 (Nfld. T.D.) — referred to

*Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385, 46 N.R. 139, 32 C.P.C. 138 (S.C.C.) — distinguished

*Pasco v. Canadian National Railway* (1989), (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway*) 102 N.R. 76, [1990] 2 C.N.L.R. 96, [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (S.C.C.) — referred to

*Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1984] 4 W.W.R. 706, 44 C.P.C. 159, 27 Man. R. (2d) 311 (Man. Q.B.) — referred to

*Shaw v. Vancouver Real Estate Board*, [1972] 5 W.W.R. 726, 29 D.L.R. (3d) 774 (B.C. S.C.) — referred to

*Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, 70 L.J.K.B. 905 (U.K. H.L.) — referred to

*Van Audenhove v. Nova Scotia (Attorney General)* (1994), 28 C.P.C. (3d) 305, 134 N.S.R. (2d) 294, 383 A.P.R. 294 (N.S. S.C.) — referred to

*Wallworth v. Holt* (1841), 41 E.R. 238, 4 My. & Cr. 619 (Eng. Ch. Div.) — considered

*353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.* (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master) — referred to

#### **Statutes considered/Législation citée:**

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

Generally — considered

s. 4(1) — considered

s. 7 — considered

s. 27 — considered

*Class Proceedings Act, 1992/Recours collectifs, Loi de 1992 sur les*, S.O./L.O. 1992, c. 6

Generally/en général — considered

s. 5(1) — considered

s. 6 — considered

s. 25 — considered

*Code de procédure civile*, L.R.Q., c. C-25

Livre IX — considered

art. 1003 — considered

art. 1039 — considered

*Supreme Court of Judicature Act, 1873* (36 & 37 Vict.), c. 66

Generally — considered

**Rules considered/Règles citées:**

*Alberta Rules of Court*, Alta. Reg. 390/68

R. 42 — considered

R. 129 — considered

R. 187 — considered

R. 201 — considered

Civil Practice Note 7 — referred to

*Civil Procedure Rules, 1998*, SI 1998/3132

R. 19.10-19.15 — considered

*Federal Rules of Civil Procedure*, 28 U.S.C., Appendix

R. 23 — referred to

*Supreme Court of Judicature Act, 1873* (36 & 37 Vict.), c. 66

Sched., R. 10 — considered

ADDITIONAL REASONS to judgment decided at (December 13, 2000), Doc. 27138 (S.C.C.), reversing in part judgment reported at [228 A.R. 188, 188 W.A.C. 188, \[1998\] A.J. No. 1364, 30 C.P.C. \(4th\) 1, 73 Alta. L.R. \(3d\) 227, 1998 ABCA 392](#) (Alta. C.A.), affirming judgment reported at 41 Alta. L.R. (3d) 412, [191 A.R. 265, 3 C.P.C. \(4th\) 329, 1996 CarswellAlta 690, \[1996\] A.J. No. 1165](#) (Alta. Q.B.), dismissing defendants' application to strike representative action.

MOTIFS SUPPLÉMENTAIRES de la décision rendue le 13 décembre 2000, Doc. 27138 (C.S.C.), infirmant en partie l'arrêt publié à [228 A.R. 188, 188 W.A.C. 188, \[1998\] A.J. No 1364, 30 C.P.C. \(4th\) 1, 73 Alta. L.R. \(3d\) 227, 1998 ABCA 392](#) (Alta. C.A.) qui a confirmé le jugement publié à 41 Alta. L.R. (3d) 412, [191 A.R. 265, 3 C.P.C. \(4th\) 329, 1996 CarswellAlta 690, \[1996\] A.J. No 1165](#) (Alta. Q.B.), qui avait rejeté le demande des défendeurs de radier le recours collectif.

**The judgment of the court was delivered by McLachlin C.J.C.:**

1 This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc., under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

**I. Facts**

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"). WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose

of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for \$5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further \$16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

6 To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of \$22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

7 In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton \$1.6 million in cash; (3) Claude advanced Dutton a \$1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of \$50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for \$200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

8 Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of \$2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of \$9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a *pro rata* claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Mu-Hin and Hoi-Wah commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

## II. Statutory Provisions

10 *Alberta Rules of Court*, Alta. Reg. 390/68

**42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

**129** (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

(a) it discloses no cause of action or defence, as the case may be, or

- (b) it is scandalous, frivolous or vexatious, or
- (c) it may prejudice, embarrass or delay the fair trial of the action, or
- (d) it is otherwise an abuse of the process of the court,

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

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

**187.** A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.

**201** A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

### III. Decisions

11 The appellants applied to the Court of Queen's Bench of Alberta ([1996](#), [41 Alta. L.R. \(3d\)](#) [412](#) (Alta. Q.B.) for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

12 On the first issue, the chambers judge relied on the decision of Master Funduk in *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.* ([July 31, 1989](#)), [Doc. JDE 8803-26537](#) (Alta. Master), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

13 On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on *353850 Alberta, supra*, and on the decision of the British Columbia Supreme Court in *Shaw v. Vancouver Real Estate Board* ([1972](#)), [29 D.L.R. \(3d\)](#) [774](#) (B.C. S.C.). He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or "beyond doubt" or "plain and obvious" that the claim is deficient — the standard applied to applications to strike pleadings for disclosing no reasonable claim: *Hunt v. T & N plc*, [[1990](#)] [2 S.C.R. 959](#) (S.C.C.).

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in *Korte v. Deloitte, Haskins & Sells* ([1993](#)), [8 Alta. L.R. \(3d\)](#) [337](#) (Alta. C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, *per* Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: ([1998](#)), [73 Alta. L.R. \(3d\)](#) [227](#) (Alta. C.A.). The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing *Pasco v. Canadian National Railway*, [[1989](#)] [2 S.C.R. 1069](#) (S.C.C.), in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it

granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

17 Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike *Pasco*, the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (*idem*).

#### IV. Issues

18

1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?
2. Did the courts below err in denying defendants' motion to strike under Rule 42?
3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

#### V. Analysis

##### A. The History and Functions of Class Actions

19 The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute to be made parties. The aim of the courts of equity was to render "complete justice" — that is, to "arrange[] all the rights, which the decision immediately affects": F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (1837), at p. 3; see also C.A. Wright, A.R. Miller and M.K. Cane, *Federal Practice and Procedure* (2nd ed. 1986), § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at s. 76a. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J.A. Kazanjian, "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265 (Eng. Ch.), members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be parties" (p. 265); see also Kazanjian, *supra*, at p. 401; G.T. Bispham, *The Principles of Equity* (8th ed. 1909), at para. 415; S.C. Yeazell, "[Group Litigation and Social Context: Toward a History of the Class Action](#)" (1977), 77 *Colum. L. Rev.* 866, at pp. 867 and 872; J.K. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

21 The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, *supra*, at p. 401; Yeazell, *supra*, at p. 867; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (Eng. Ch.) (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

22 The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace," which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, *supra*, at § 1751; Z. Chafee, *Some Problems of Equity* (1950), at p. 201, T.A. Roberts, *The Principles of Equity* (3rd ed. 1877), at pp. 389-92; Bispham, *supra*, at para. 417.

23 The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238 (Eng. Ch. Div.), at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the *Rules of Procedure*:

10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such actions, on behalf or for the benefit of all parties so interested.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., *Duke of Bedford v. Ellis* (1900), [1901] A.C. 1 (U.K. H.L.); *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (U.K. H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (Eng. K.B.)). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century — the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W.K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M.A. Eizenga, M.J.

Peerless and C.M. Wright, *Class Actions Law and Practice* (1999), at § 1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at § 1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law — The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at § 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

### ***B. The Test for Class Actions***

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, Federal Rule of Civil Procedure 28 U.S.C.A. § 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, *Civil Procedure Rules 1998*, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6; Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting such legislation: see Manitoba Law Reform Commission, Report #100, *Class Proceedings* (January 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act*, 1873 govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:

**42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

32 Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

33 Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario,

and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: *Bell v. Wood*, [1927] 1 W.W.R. 580 (B.C. S.C.), at pp. 581-82; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (Eng. C.A.), leave denied, [1991] W.L.R. 711n (Eng. H.L.); *N.A.P.E. v. Newfoundland (Treasury Board)* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. T.D.); W.A. Stevenson and J.E. Côté, *Civil Procedure Guide*, 1996, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

35 Alberta courts moved to fill the procedural vacuum in *Korte*, *supra*. *Korte* prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

36 The *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1984] 4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Sask. Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (N.B. Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (N.B. Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (N.S. S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I. T.D.), at para. 24.

37 The *Korte* criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario *Class Proceedings Act*, 1992, s. 5(1); British Columbia *Class Proceedings Act*, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec *Code of Civil Procedure*, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. 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: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *supra*, at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at paras. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class

members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

40 Third, with regard 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.

41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

42 While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally *not* constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario *Class Proceedings Act*, 1992, s. 6; British Columbia *Class Proceedings Act*, s. 7; see also Alberta Law Reform Institute, *supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account 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.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of *whether* the claim should be prosecuted at all, Rule 42 is directed at the question of *how* the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094 (Eng. C.A.), at pp. 1101-2 (quoted in *Hunt*, *supra*). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should

not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action *if* certain conditions are met.

46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), precludes a generous approach to class actions. I respectfully disagree. First, when *General Motors of Canada Ltd.* was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since *General Motors of Canada Ltd.* has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, *supra*, at pp. 3-4.

47 Second, *General Motors of Canada Ltd.* on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use." The statement of claim alleged breach of warranty and breach of representation, and sought \$1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario *Class Proceedings Act*, 1992, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

### C. Whether the Investors Have Satisfied Rule 42

52 The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors ... who each invested at least the sum of \$150,000.00 into a fund totalling \$34,065,000.00, the said sum to be managed, administered and secured by ... Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to

claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

55 The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

56 The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

57 I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

#### **D. Cross-Appeal**

58 The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

59 I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

#### **VI. Conclusion**

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

*Appeal dismissed; cross-appeal allowed.*

*Pourvoi rejeté; pourvoi incident accueilli.*

# **TAB 37**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [Éditions Québec Amérique inc. c. Druide informatique inc.](#) | 2017 QCCS 4092, 2017 CarswellQue 8069, EYB 2017-284413, 284 A.C.W.S. (3d) 609 | (C.S. Qué., Sep 14, 2017)

2015 SCC 23, 2015 CSC 23

Supreme Court of Canada

White Burgess Langille Inman v. Abbott and Haliburton Co.

2015 CarswellNS 313, 2015 CarswellNS 314, 2015 SCC 23, 2015 CSC 23, [2015] 2 S.C.R.

182, [2015] S.C.J. No. 23, 1135 A.P.R. 1, 18 C.R. (7th) 308, 251 A.C.W.S. (3d) 610, 360

N.S.R. (2d) 1, 383 D.L.R. (4th) 429, 470 N.R. 324, 67 C.P.C. (7th) 73, J.E. 2015-767

**White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess, Appellants and Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited, Respondents and Attorney General of Canada and Criminal Lawyers' Association (Ontario), Interveners**

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Wagner, Gascon JJ.

Heard: October 7, 2014

Judgment: April 30, 2015

Docket: 35492

Proceedings: affirming [Abbott and Haliburton Co. v. White Burgess Langille Inman \(2013\)](#), (sub nom. [Abbott and Haliburton Co. v. WBLI Chartered Accountants](#)) 330 N.S.R. (2d) 301, 1046 A.P.R. 301, 361 D.L.R. (4th) 659, 2013 CarswellNS 360, [2013] N.S.J. No. 259, 2013 NSCA 66, 36 C.P.C. (7th) 22, Beveridge J.A., MacDonald C.J.N.S., Oland J.A. (N.S. C.A.); reversing in part [Abbott and Haliburton Co. v. White Burgess Langille Inman \(2012\)](#), 26 C.P.C. (7th) 280, (sub nom. [Abbott & Haliburton Co. Ltd. v. WBLI Chartered Accountants](#)) 317 N.S.R. (2d) 283, 1003 A.P.R. 283, 2012 CarswellNS 376, 2012 NSSC 210, Arthur W.D. Pickup J. (N.S. S.C.)

Counsel: Alan D'Silva, James Wilson, Aaron Kreaden, for Appellants

Jon Laxer, Brian F. P. Murphy, for Respondents

Michael H. Morris, for Intervener, Attorney General of Canada

Matthew Gourlay, for Intervener, Criminal Lawyers' Association

Subject: Civil Practice and Procedure; Evidence; Public; Torts

**Related Abridgment Classifications**

Civil practice and procedure

**XVIII** Summary judgment

**XVIII.10** Evidence on application

**XVIII.10.c** Affidavit evidence

**XVIII.10.c.i** Based on information and belief

Evidence

**XIII** Opinion

**XIII.2** Experts

**XIII.2.c** Qualification of expert

**XIII.2.c.iv** Miscellaneous

Evidence

**XIII** Opinion

**XIII.2** Experts

**XIII.2.e** Expert reports

**XIII.2.e.i** Admissibility

**Headnote**

Evidence --- Opinion — Experts — Expert reports — Admissibility

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Expert's lack of independence and impartiality goes to admissibility of evidence in addition to being considered in relation to weight to be given to evidence if admitted — Duty owed by expert witness is that expert must be fair, objective and non-partisan — Absent challenge to expert's independence and impartiality, expert's attestation or testimony recognizing and accepting duty will generally be sufficient to establish that threshold is met — Burden is then on party opposing admission of evidence to show that there is realistic concern that expert's evidence should not be received because expert is unable and/or unwilling to comply with that duty — If opponent does so, burden to establish on balance of probabilities this aspect of admissibility threshold remains on party proposing to call evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application.

Evidence --- Opinion — Experts — Qualification of expert — Miscellaneous

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Concerns related to expert's duty to court and willingness and capacity to comply with it are best addressed initially in "qualified expert" element of framework from case law — Proposed expert witness who is unable or unwilling to fulfill this duty to court is not properly qualified to perform role of expert — Situating this concern in "properly qualified expert" ensures courts will focus expressly on important risks associated with biased experts — If expert evidence is found to meet basic threshold, judge must still take concerns about expert's independence and impartiality into account in weighing evidence at gatekeeping stage — Relevance, necessity, reliability and absence of bias can helpfully be seen as part of sliding scale where basic level must first be achieved in order to meet admissibility threshold and thereafter continue

to play role in weighing overall competing considerations in admitting evidence — Potential helpfulness of evidence must not be outweighed by risk of dangers materializing that are associated with expert evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application.

Civil practice and procedure --- Summary judgment — Evidence on application — Affidavit evidence — Based on information and belief

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Motions judge hearing summary judgment application under Nova Scotia rules must be satisfied that proposed expert evidence meets threshold requirements for admissibility at first step of analysis, but generally should not engage in second step cost-benefit analysis — That cost-benefit analysis, in anything other than most obvious cases of inadmissibility, inevitably involves assigning weight or potential weight to evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application — There was no finding by motions judge that affiant was in fact biased or not impartial or that she was acting as advocate — To the extent motion judge was concerned about "appearance" of impartiality, this factor played no part in test for admissibility — There was agreement with majority of Court of Appeal that motions judge committed palpable and overriding error in determining that affiant was in conflict of interest that prevented her from giving impartial and objective evidence.

**Preuve --- Opinion — Experts — Rapports d'expert — Recevabilité**

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — Manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du témoignage, s'il est admis — Obligation du témoin expert est d'être juste, objectif et impartial — En l'absence d'une contestation concernant l'indépendance et l'impartialité de l'expert, le critère est généralement satisfait dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte — Il incombe alors à la partie qui s'oppose à l'admission du témoignage de l'expert de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation — Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire.

**Preuve --- Opinion — Experts — Compétence de l'expert — Divers**

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — C'est sous le volet « qualification suffisante de l'expert » du cadre établi par la jurisprudence qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter — Témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle — En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris — Si le

témoignage de l'expert satisfait aux critères, le juge doit malgré tout tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien — Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité — Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire.

Procédure civile --- Jugement sommaire — Preuve en instance — Preuve par affidavit — Fondé sur des renseignements et sur une opinion

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — Juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices — Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur, ou, à tout le moins, d'une valeur possible, à la preuve — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire — Juge des requêtes n'a pas conclu que le témoin avait un parti pris, qu'il n'était pas impartial ou qu'il se faisait le défenseur des actionnaires — Même si, selon le juge des requêtes, il fallait une « apparence » d'impartialité, ce facteur ne constituait pas un critère d'admissibilité — On s'entendait avec les juges majoritaires de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en concluant que le témoin était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Shareholders brought a professional negligence action against the former auditors of their company. The shareholders started the action after retaining a different accounting firm to perform various accounting tasks and which they claimed revealed problems with the auditors' work. The auditors brought a motion for summary judgment to have the action dismissed. The shareholders retained a forensic accounting partner from the accounting firm to review materials and to prepare a report. Her affidavit set out her opinion that the auditors had not complied with their professional obligations. The auditors applied to strike out her affidavit on the grounds that she was not an impartial witness. The motions judge essentially agreed and struck out the affidavit. The majority of the Court of Appeal concluded that the motions judge erred in excluding the affidavit. The auditors appealed.

**Held:** The appeal was dismissed.

Per Cromwell J. (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring): Following the dominant view of Canadian cases, an expert's lack of independence and impartiality goes to the admissibility of evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. Such an approach is more in line with the basic structure of the law relating to expert evidence and with the importance jurisprudence has attached to the gatekeeping role of trial judges.

The duty owed by an expert witness is that the expert must be fair, objective and non-partisan. The appropriate threshold flows from this duty. Absent challenge to the expert's independence and impartiality, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that the threshold is met. The burden is then on the party opposing the admission of the evidence to show that there is realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide fair, objective and non-partisan evidence. Anything less should not lead to exclusion, but be taken into account in the

overall weighing of costs and benefits of receiving the evidence. The concept of apparent bias is not relevant to the question of whether an expert witness will be unable or unwilling to fulfill its primary duty to the court.

Concerns related to the expert's duty to the court and willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the framework from case law. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of expert. Situating this concern in the "properly qualified expert" ensures courts will focus expressly on the important risks associated with biased experts. If the expert evidence is found to meet the basic threshold, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. Relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play role in weighing the overall competing considerations in admitting the evidence. The potential helpfulness of the evidence must not be outweighed by the risk of the dangers materializing that are associated with expert evidence.

A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but generally should not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight or potential weight to the evidence.

The record amply sustained the result reached by the majority of the Court of Appeal that the affiant's evidence was admissible on the summary judgment application. There was no finding by the motions judge that the affiant was in fact biased or not impartial or that she was acting as an advocate. The motions judge recognized that the affiant was aware of the standards and requirements that experts be independent. The affiant testified that she owed an ultimate duty to the court in testifying as an expert witness. To the extent the motions judge was concerned about the "appearance" of impartiality, this factor played no part in the test for admissibility. The fact that one professional firm discovered what it thought was or may be professional negligence did not disqualify it from offering that opinion as an expert witness. There was no more than a speculative possibility of the accounting firm incurring liability if its opinion was not ultimately accepted by the court. An expert does not lack the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professions in reaching his or her own opinion. There was agreement with the majority of the Court of Appeal that the motions judge committed a palpable and overriding error in determining that the affiant was in a conflict of interest that prevented her from giving impartial and objective evidence.

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie. Les actionnaires ont intenté l'action après avoir engagé un autre cabinet comptable pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. Les actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle examine tous les documents pertinents et rédige un rapport. Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles. Les vérificateurs ont présenté une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial. Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié l'affidavit. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit et ont accueilli l'appel. Les vérificateurs ont formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., Abella, Rothstein, Moldaver, Wagner, Gascon, JJ., souscrivant à son opinion) : Conformément au courant prédominant dans la jurisprudence canadienne, le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale du droit en ce qui concerne les témoignages d'experts et l'importance que la jurisprudence accorde au rôle de gardien exercé par les juges de première instance.

L'obligation du témoin expert est d'être juste, objectif et impartial. Le critère d'admissibilité découle de cette obligation. En l'absence d'une contestation concernant l'indépendance et l'impartialité de l'expert, le critère est généralement satisfait dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Il incombe alors à la partie qui s'oppose à l'admission du témoignage de l'expert de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les

cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité devrait être déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par la jurisprudence qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris. Si le témoignage de l'expert satisfait aux critères, le juge doit malgré tout tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur, ou, à tout le moins, d'une valeur possible, à la preuve.

Le dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire. Le juge des requêtes n'a pas conclu que le témoin avait un parti pris, qu'il n'était pas impartial ou qu'il se faisait le défenseur des actionnaires. Le juge des requêtes a reconnu que le témoin connaissait les normes et exigences voulant que l'expert soit indépendant. Le témoin était conscient à titre de témoin expert de sa principale obligation envers le tribunal. Même si, selon le juge des requêtes, il fallait une « apparence » d'impartialité, ce facteur ne constituait pas un critère d'admissibilité. Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Il n'y avait rien de plus qu'une hypothétique possibilité que le cabinet soit tenu responsable si, en fin de compte, le tribunal n'avait pas retenu son opinion. Un expert ne satisfait pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. On s'entendait avec les juges majoritaires de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en concluant que le témoin était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

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## impartiality

Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance.

.....

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638- 39.

### Termes et locutions cités:

#### impartialité

Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale.

(....)

Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005) 42 *Alta. L. Rev.* 635, p. 638-639).

APPEAL by auditors from judgment reported at *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), 2013 NSCA 66, 2013 CarswellNS 360, 36 C.P.C. (7th) 22, 1046 A.P.R. 301, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, [2013] N.S.J. No. 259 (N.S. C.A.), allowing appeal, as to exclusion of certain affidavit evidence, from judgment striking out affidavit.

POURVOI formé par des vérificateurs à l'encontre d'un jugement publié à *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), 2013 NSCA 66, 2013 CarswellNS 360, 36 C.P.C. (7th) 22, 1046 A.P.R. 301, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, [2013] N.S.J. No. 259 (N.S. C.A.), ayant accueilli un appel concernant l'exclusion en preuve d'un affidavit interjeté à l'encontre d'un jugement ayant radié l'affidavit.

### Comment

*White Burgess Langille Inman v. Abbott and Haliburton Co.* comprehensively restates the law on admissibility of expert evidence in civil and criminal cases. A unanimous Supreme Court adopts the key feature of the judgment of Doherty J. in *R. v. Abbey*, 2009 ONCA 624, 68 C.R. (6th) 201 (Ont. C.A.) by holding that the admissibility analysis has two stages — a set of threshold preconditions to admissibility and a discretionary gatekeeper stage (see para. 22, adopting *Abbey*). The Court also resolves a longstanding question in the Canadian case law by holding that defects in an expert witness's independence and impartiality can go to admissibility and not only to weight (para. 45). In fact, on examination, the Court's analysis indicates that problems of independence and impartiality may properly be considered at three separate stages in the analysis of expert evidence. First, the question whether proposed expert witnesses are able and willing to comply with their duties to the court can be addressed at the threshold stage of the admissibility analysis under the "qualified expert" requirement (para. 53). Second, even when the expert is qualified, questions about independence and impartiality can be taken into account at the gatekeeper stage (para. 54). But this too is a question of admissibility to be considered by the trier of law. What may be obscured by the Court's emphasis on admissibility is the third stage when these concerns enter the analysis: independence and impartiality can also be considered by the trier of fact where the evidence is admitted (para. 45).

Given that *White Burgess Langille Inman* will become the starting point for argument on the admissibility of expert evidence, it is somewhat disappointing that the Court did not provide an easily accessible summary of the admissibility analysis. Instead, one must carefully read through the judgment to piece together the features of the admissibility framework. One might attempt to summarize that framework as follows:

Expert evidence is admissible when

- 1) it meets the threshold requirements of admissibility, which are that
  - a. the evidence must be logically relevant;
  - b. the evidence must be necessary to assist the trier of fact;
  - c. there must be no other exclusionary rule;
  - d. the expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the duty to the court to provide evidence that is
    - i. impartial,
    - ii. independent and
    - iii. unbiased; and
  - e. for opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose;

and

- 2) it passes scrutiny at the gatekeeper stage, and the trial judge determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as
  - a. relevance,
  - b. necessity,
  - c. reliability, and
  - d. absence of bias (see para. 54).

Certain features of this framework will require clarification and amplification in the future. For example, the Court's reference to reliability as a threshold requirement "in the case of an opinion based on novel or contested science or science used for a novel purpose" (para. 23) leaves open the status of the reliability tests for non-scientific evidence that were extensively discussed in *Abbey*. While some questions remain, the framework outlined in *White Burgess Langille Inman* renews and clarifies the structure of the admissibility analysis for expert evidence.

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***Cromwell J. (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring):***

## **I. Introduction and Issues**

1 Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

2 Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

3 Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

## **II. Overview of the Facts and Judicial History**

### **A. Facts and Proceedings**

4 The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

5 The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

6 The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

### **B. Judgments Below**

(1) *Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (N.S. S.C.) (Pickup J.)*

7 Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: at para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert ... does not meet the threshold requirements for admissibility": para. 101.

(2) *Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (N.S. C.A.) (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S., Dissenting)*

8 The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has a discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

9 MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

### **III. Analysis**

#### **A. Overview**

10 In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

#### **B. Expert Witness Independence and Impartiality**

11 There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358 at 373 (Eng. Rolls Ct.), at p. 374.

12 Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

13 To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

#### **C. The Legal Framework**

##### **(1) The Exclusionary Rule for Opinion Evidence**

14 To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.), at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

15 Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Professor Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.), at p. 42.

## (2) The Current Legal Framework for Expert Opinion Evidence

16 Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

17 We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. As Sopinka J. observed in *Mohan*:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. c. J. (J.-L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 46.)

18 The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 90, leave to appeal refused, [2010] 2 S.C.R. v (note) (S.C.C.). The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J. (J.-L.)*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D. (D.)*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D. (D.)*, at para. 55); the risk of admitting "junk science" (*J. (J.-L.)*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), at para. 76.

19 To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of

fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J. (J.-L.)*, at para. 28.

20 *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

21 So, for example, the necessity threshold criterion was emphasized in cases such as *D. (D.)*. The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J. (J.-L.)*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239 (S.C.C.). The question remains, however, as to where the cost-benefit analysis and concerns such as those about reliability fit into the overall analysis.

22 *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

23 At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J. (J.-L.)*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J. (J.-L.)*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D. (D.)*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290 (Ont. C.A.), at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396 (Ont. C.A.), at para. 72.

24 At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J. (J.-L.)*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

25 With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

#### **D. The Expert's Duty to the Court or Tribunal**

26 There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard with the collaboration of J. Béchard, *L'expert* (2011) ch. 9;

An Act to establish the new Code of Civil Procedure, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

27 One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera SA v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Eng. Comm. Ct.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ....
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise .... An expert witness in the High Court should never assume the role of an advocate.

[Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [*"Ikarian Reefer" (The), Re*] [1995] 1 Lloyd's Rep. 455 (Eng. C.A.), at p. 496.)

28 Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

29 There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules (Saskatchewan)*, r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of Civil Procedure*, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(c).

30 The formulation in the *Ontario Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan: r. 4.1.01(1)(a). The Rules are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure of Quebec* explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

31 Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in *Nova Scotia*, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

32 Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

#### **E. The Expert's Duties and Admissibility**

33 As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

34 In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality goes to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

##### *(1) Admissibility or Only Weight?*

###### **(a) The Canadian Law**

35 The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

36 Our Court has confirmed this position in a recent decision that was not available to the courts below:

It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with J. Béchard, *L'Expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.- M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "[Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts](#)" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).

*(Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, at para. 106)*

37 I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2000), 49 O.R. (3d) 187 (Ont. S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (Ont. S.C.J.) (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d)

394 (N.S. S.C.) (expert was also a party to the litigation); *Handley v. Punnett*, 2003 BCSC 294 (B.C. S.C.) (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Ont. S.C.J. [Commercial List]) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (Ont. Master) (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (B.C. S.C.) (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Carmen Alfano Family Trust v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62 (Ont. C.A.); *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617 (B.C. S.C.); *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19 (Ont. S.C.J.).

38 Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111 (B.C. S.C.); *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (Ont. S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

39 Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115 (Man. Q.B.), and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77 (N.L. C.A.). *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920 (B.C. S.C.). Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

40 I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

### **(b) Other Jurisdictions**

41 Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

42 For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Eng. & Wales H.C. [T. & C.C.]), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *Factortame Ltd. v. Secretary of State for the Environment, Transport & the Regions (Costs) (No.2)* (2002), [2002] EWCA Civ 932, [2003] Q.B. 381 (Eng. C.A.), at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Eng. Comm. Ct.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Eng. Ch. Div.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Eng. Ch. Div.), at paras. 312-17.

43 In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckleton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the state of Victoria put it: "... to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty Ltd. v. Fagenblat*, [2003] VSCA 33 (Australia Vic. Sup. Ct.), at para. 26 (AustLII); see also Freckleton and Selby, at pp. 186-88; *Collins Thomson Ltd. v. Clayton*, [2002] NSWSC 366 (New South Wales S.C.); *Kirch*

*Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485 (New South Wales S.C.); *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 200 (Australia Fed. Ct.)).

44 In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas Inc.* (1993), 980 F.2d 1014 (U.S. C.A. 5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University* (1988), 861 F.2d 1040 (U.S. C.A. 7th Cir. 1988); *Apple Inc. v. Motorola, Inc.* (2014), 757 F.3d 1286 (U.S. C.A. Fed. Cir.), at p. 1321. This also seems to be a fair characterization of the situation in the states: *Corpus Juris Secundum*, vol. 32 (2008), at p. 325 ("The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

### (c) Conclusion

45 Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J. (J.-L.)*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

#### (2) The Appropriate Threshold

46 I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept ... that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "*Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony*" (2009), 13 *Can. Crim. L. R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

47 Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "*Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts*" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

48 Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

49 This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not

automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

50 As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

51 Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

#### ***F. Situating the Analysis in the Mohan Framework***

##### ***(1) The Threshold Inquiry***

52 Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one way or another: the proper qualifications component (see, e.g., *Bank of Montreal; Dean Construction; Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166 (Ont. S.C.J.); *R. v. Demetrius* [2009 CarswellOnt 2548] (Ont. S.C.J.)], 2009 CanLII 22797; the necessity component (see, e.g., *Docherty; Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties; Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty; International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011 (B.C. S.C.); *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J. [Commercial List]); *Prairie Well Servicing Ltd. v. Tundra Oil & Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284 (Man. Q.B.). Some clarification of this point will therefore be useful.

53 In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), vol. 2, at s. 12:30 20.50; see also *Deemar v. College of Veterinarians (Ontario)*, 2008 ONCA 600, 92 O.R. (3d) 97 (Ont. C.A.), at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at § 469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at s. 12:30.20.50; Paciocco, "Jukebox", at p. 595.

##### ***(2) The Gatekeeping Exclusionary Discretion***

54 Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet

the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

#### **G. Expert Evidence and Summary Judgment**

55 I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348 (N.S. C.A.), at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385 (N.S. C.A.), at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

#### **H. Application**

56 I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

57 There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

58 The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

59 First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

60 The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

61 The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

62 There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

#### **IV. Disposition**

63 I would dismiss the appeal with costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

**ANTHONY WHITEHOUSE et al.**  
Plaintiffs

-and-

**BDO CANADA LLP**  
Defendant

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

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