

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

SEARS CANADA INC., SEARS HOLDING CORPORATION, ESL
INVESTMENTS INC., WILLIAM C. CROWLEY, WILLIAM R. HARKER,
DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R.
RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**BOOK OF AUTHORITIES OF THE PLAINTIFF
(Motion for Certification Returnable April 17, 2019)**

April 5, 2019

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INDEX

Tab

- 1 *Williams v. Canon Canada Inc.*, 2011 ONSC 6571
- 2 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57
- 3 *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291 (S.C.J.)
- 4 *Manufacturers Life Insurance Company v. AFG Industries Ltd.*, [2008] O.J. No. 149 (S.C.J.)
- 5 *Dunn v. Interglobe Financial Services Corp.*, [2004] O.J. No. 5261 (S.C.J.)
- 6 *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2006] O.J. No. 812 (S.C.J.)
- 7 *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (S.C.J.)
- 8 *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252
- 9 *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853
- 10 *AIC Limited v. Fischer*, 2013 SCC 69
- 11 *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46
- 12 *Pearson v. Inco Ltd., et al.*, 2006 CanLII 913
- 13 *1291079 Ontario Limited v. Sears Canada Inc.*, 2014 ONSC 5190
- 14 *McCracken v. Canadian National Railway*, 2012 ONCA 445
- 15 *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
JAMES WILLIAMS, KATHLEEN SCHATZ and RAFAEL LIPNER	)	<i>Henry Juroviesky and Kevin Caspersz, for the Plaintiffs</i>
)	
Plaintiffs/Moving Parties)	
)	
- and -)	
)	
CANON CANADA INC. and CANON INC.	)	<i>Joseph D’Angelo and Paul Martin, for the Defendants</i>
)	
Defendants/Respondents)	
)	
	)	HEARD: September 12, 13, 14, 2011

2011 ONSC 6571 (CanLII)

Contents

I.	Introduction.....	2
II.	Background Facts.....	3
	A. The E18 Error Message	3
	B. The Plaintiffs’ Evidence	4
	1. The Representative Plaintiffs.....	4
	2. The Plaintiffs’ Experts.....	5
	C. The Defendants’ Evidence.....	8
	1. The Defendants’ Fact Witnesses	8
	2. The Defendants’ Experts	10
III.	Preliminary Motions and Objections	14

A.	Motion to Amend Statement of Claim.....	15
B.	Motion to Remove Mr. Williams as a Representative Plaintiff.....	15
C.	Motion to Strike Plaintiffs’ Expert Evidence.....	16
1.	Applicable Legal Principles.....	16
2.	Application of the Principles in this Case	20
D.	Objection to Defendants’ Expert Evidence.....	31
IV.	The Test for Certification.....	33
A.	Introduction.....	33
Comparative Cases.....		37
B.	Section 5(1)(a): Cause of Action	46
1.	Breach of Contract.....	48
2.	Breach of <i>Consumer Protection Act, 2002</i>	50
3.	Breach of Section 52 of the <i>Competition Act</i>	56
4.	Unjust Enrichment.....	57
5.	Waiver of Tort	59
6.	Summary on cause of action.....	59
C.	Section 5(1)(b): Identifiable Class	59
D.	Section 5(1)(c): Common Issues.....	62
1.	General Principles regarding Common Issues.....	62
2.	Common Issues Proposed by the Plaintiffs	64
E.	Section 5(1)(d): Preferable Procedure	68
F.	Section 5(1)(e): Representative Plaintiffs.....	68
V.	Conclusion	70

G.R. STRATHY J.

I. Introduction

[1] The plaintiffs move to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “C.P.A.”) on behalf of a class of owners of cameras manufactured by the defendant Canon Inc. and distributed in Canada by the defendant Canon Canada Inc. (collectively, “Canon”).

[2] The plaintiffs' claim relates to 20 models in the "PowerShot" line of cameras sold by Canon between July 30, 2005 and the present ("the "Cameras").¹ The Cameras allegedly have a common defect, referred to as the "E18 Error," which allegedly causes the Cameras to shut down and to remain inoperable. The first version of the statement of claim pleaded that this defect was an error in the "algorithm" used by the Cameras' internal computer. That allegation has now been abandoned and it is alleged that the E18 Error is a "design deficiency" that "renders the Cameras prone to the unexpected manifestation of the E18 Error message."

[3] The plaintiffs plead that the E18 Error is caused by a defect in the design or manufacture of the Cameras that makes the Cameras unmerchantable and unfit for their intended use. They say that this is an ideal case for a class action, because it will bring access to justice to thousands of consumers who have a common complaint, will promote greater care and attention on the part of manufacturers, and will achieve the goal of judicial economy by aggregating numerous claims in one proceeding – claims that would not otherwise be realized in individual actions.

[4] For the reasons that follow, I have concluded that this action is not appropriate for certification, primarily because there is no factual basis for the assertion that the plaintiffs' cameras share a defect that is common to all the Cameras.

II. Background Facts

A. The E18 Error Message

[5] Like many digital cameras, PowerShot digital cameras have a liquid crystal display ("LCD") screen on the back of the camera, facing the user. When a user frames a picture, the LCD shows the image of the object on which the camera is focused. After the picture is taken, the image may be displayed on the LCD screen. In addition, the camera uses the LCD screen to display function settings and messages and to guide the user through various operational steps.

[6] The E18 Error message appears on a PowerShot digital camera's LCD screen when the camera senses a problem with the movement of its lens barrel. This could be caused by the "start" button being pushed when the camera is still in its case, or in a pocket, or by the user's hand obstructing the movement of the barrel, or by dirt, sand or other material on the exterior or interior of the lens barrel, impeding its movement. It could also be caused by physical damage to the camera, which could distort the alignment of the interconnecting tubes of the lens barrel, preventing a smooth opening.

[7] When the camera's lens barrel extends or retracts, the camera's computer monitors whether the movement is completed within a specified time. If the lens barrel does not complete the movement within that time, the computer assumes that there is a problem, displays an E18

¹ The Canon models are: A60; A70; A75; A80; A85; A95; 510; S30; S40; S100; S110; SD200; SD300; S400; SD450; S410; SD500; S2 IS; S500.

Error message on the LCD screen and shuts down the camera. The purpose of the shut-down is to avoid permanent damage to the lens mechanism due to stress on the lens barrel. The purpose of the E18 Error message is to alert the user that there is a problem and, hopefully, to send him or her to the owner's manual to find out the reason.

[8] This is an important point, because the display of the E18 Error message and the automatic shut-down is an intentionally designed safety feature of the Cameras. The display of the E18 Error on the LCD screen is not necessarily an indication that the camera is malfunctioning – it may well be functioning exactly as it is supposed to, in order to prevent the camera from sustaining further damage. While the display of this cryptic message, and the inability to use the camera, may be frustrating to the user, the problem may be resolved by re-starting the camera with the obstruction removed, by checking the user manual for other instructions, or by sending the camera for a repair under warranty (if the one-year warranty is still in effect) or taking it to a camera repair shop.

B. The Plaintiffs' Evidence

1. The Representative Plaintiffs

[9] This action was originally commenced with only one proposed representative plaintiff, Hillel Berkovits. By order dated October 6, 2010, Mr. Berkovits was permitted to withdraw and James Williams, Kathleen Schatz and Raphael Lipner were added as plaintiffs. Mr. Williams now wishes to withdraw for personal reasons, and, for reasons set forth below, an order will issue to that effect.

[10] The plaintiff Kathleen Schatz lives in British Columbia. In about May 2005, she bought a Canon "S500 Digital Elph" camera in Alberta for approximately \$440. The camera came with a one year warranty. She affirms that the camera worked until November 2006, when an E18 Error message was displayed after she turned on the camera. Her camera has not worked since that time. She says that she did not abuse the camera in any way. She says that she has been told that it would cost more to repair her camera than to replace it.

[11] The plaintiff Raphael Lipner lives in Ontario. He bought a Canon "PowerShot SX100" camera in Toronto in 2008 for about \$300. Shortly after the one-year warranty expired, he tried to turn the camera on and it displayed a message stating "Lens error, restart camera."² At the suggestion of Canon, he had the camera repaired for about \$100. The camera worked for a while, but about six months later, the same problem occurred. He had the camera repaired again, and it worked again for a while. Again the problem occurred. He had the camera repaired a third time. A short while later, the "Lens error, restart camera" message appeared and the camera would not work. He decided to buy a new camera. He swears that he did not misuse or abuse his camera in any way.

² In the Canon SX100 model, this is the equivalent to the "E18 Error" message.

[12] The defendants' evidence, which I will discuss shortly, is that the cameras of Mr. Lipner and Ms. Schatz had suffered abuse that likely caused the E18 Error message to be displayed.

2. The Plaintiffs' Experts

[13] I will briefly summarize the expert evidence tendered by the plaintiffs. For the reasons set out later, I have concluded that two of the witnesses put forward by the plaintiffs as experts, Mr. Atkins and Mr. Joffe, are not qualified to give expert evidence and their evidence will be struck. As their evidence is critical to the propositions that there is a basis in fact for the plaintiffs' claims and that these claims give rise to common issues capable of advancing this proceeding as a class action, the result is that the action cannot be certified.

Christopher Atkins

[14] Mr. Atkins was put forward by the plaintiffs as an expert in "consumer product failure." I will discuss his qualifications later in these reasons. He attended the inspection carried out on the plaintiffs' cameras by the defendants' expert, Mr. Hieber. Oddly enough, Mr. Atkins himself did not personally inspect the plaintiffs' cameras to determine why they may have displayed the E18 Error message. He did examine some 50 other "exemplar" Canon cameras and lens units that he had purchased on eBay, but he refused to bring them to his cross-examination in spite of defendants' counsel requesting that he do so. It was admitted that the majority of the "exemplar" cameras he examined (7 out of 11) are models that are not at issue in this action. It is also admitted that some of the cameras he inspected disclosed E18 Error messages, but he was unable to say which cameras demonstrated the error or why they did so. He did not investigate the cause of the E18 Error messages on those cameras.

[15] The substance of Mr. Atkins' opinion is contained in his "Executive Conclusions" at the outset of his report as follows:

It is our opinion that the "E-18" or "Lens Error Restart" message in the subject cameras was consistent with a design deficiency in the optical unit of the cameras, described later in this report.

It is also our opinion that the design deficiency in the optical unit is due to its intricate and highly complicated nature and the subsequent lack of the mechanism to possess prevention features to guard against the even minimal amount of dust and debris. Under typical usage and normal conditions, the subject cameras are vulnerable to fail and produce the "E-18" or "Lens Error Restart".

[16] Mr. Atkins testified on cross-examination that the occurrence of the E18 Error message was "consistent with" a design deficiency in the Cameras, but he acknowledged that it could be consistent with other things, such as impact damage or debris inside the camera. He also

admitted that the camera is programmed to display the E18 Error message and that it can be triggered for many reasons.

Josh Joffe

[17] Mr. Joffe is proffered as an expert in “web analytics” and “statistics.” He was retained by the plaintiffs’ counsel to determine whether the E18 Error is a statistically significant problem based on “its internet presence and the level of ‘web chatter’ on the topic.” He was also asked to review Canon’s expert reports and to determine the statistical value and accuracy of their opinions.

[18] Mr. Joffe produced a report entitled “Canon E18 Project - Efficacy of Claims/Preliminary Findings: A Technical Review Using Web Analytics and Statistics.” He states in the “Background” section of his report that:

The objective of this report is to provide an analysis of the prevalence of the E18 Error and related “Lens Error/Restart (Camera)” error using web analytics and statistical procedures, as well as critique the approach used in documents related to this case.

[19] Mr. Joffe never does define what “web analytics” is, although it appears to involve analysis of the occurrence of certain expressions on the internet. He says that “Given Google’s dominance, it is well accepted that the frequency of [the occurrence of] a search term is directly proportional to the popularity or use of that search term on the internet.” He describes different forms of searches, such as using quotation marks around a string of words, so that Google indexes only the exact wording, and also using related searches, such as “E18 error” in conjunction with “camera lens error.”

[20] Mr. Joffe carried out “Google” searches on the internet on the “E18 Error” or “Lens Error Restart” and similar terms. He typed in certain keywords, or combinations of words, and observed the number of hits to identify “complaints”. From these hits, and comparing them to complaints about other brands of cameras, he concluded that:

- (a) “[T]he E18 Error is either the largest or one of the largest most frequently occurring complaints about digital cameras on the internet.”
- (b) “[W]ith regards to lens errors, there is meaningfully more ‘chatter’ on the internet with respect to Canon than other digital camera brands.”
- (c) Canon’s expert witnesses had failed to provide an accurate or complete analysis of the frequency of the E18 Error in the population of Canon digital camera users.

- (d) There are significantly more internet complaints relating to the E18 Error than are reflected in Canon's service reports, suggesting that Canon has failed to adequately respond to customers' complaints.

Paul Mandel

[21] Mr. Mandel is a partner with the accounting firm of Collins Barrow Toronto LLP, specializing in business valuation and litigation support. He concludes, based on certain factual assumptions, that all class members have sustained economic damages due to the E18 Error and that these damages are capable of being calculated on an aggregate basis.

C. The Defendants' Evidence

[22] Canon Inc. is a Japanese company that designs and manufactures electronic products, including the PowerShot line of digital cameras. PowerShot digital cameras are assembled at factories owned by Canon Inc. subsidiaries.

[23] Canon Inc. does not market or sell PowerShot digital cameras directly to retailers or consumers. Rather, it distributes the cameras through sales subsidiaries located around the world. Canon Canada, Inc. ("Canon Canada") is the Canon Inc. sales subsidiary responsible for sales in Canada to third party retailers who, in turn, sell directly to consumers.

1. The Defendants' Fact Witnesses

Henrique Teixeira

[24] Mr. Teixeira is the Manager of Service Planning and Quality Assurance of Canon Canada. He has been with Canon Canada since 1996 with responsibilities for technical support, consumer service, and quality assurance. Among other things, he manages the technical support network for Canon Canada.

[25] Mr. Teixeira states that the plaintiffs' allegations that there is a defect in the Cameras at issue are "false." In particular, he states that "there is no malfunction in any algorithm used by Canon Inc. in the digital camera models at issue" in this litigation and notes that the plaintiff has not offered any evidence of such a malfunction or other defect.

[26] Mr. Teixeira explains that the E18 Error message identifies a problem with the movement of the camera's lens barrel. An internal computer in the camera is programmed to determine whether the lens barrel extends or retracts within a specified time. If it fails to do so, the computer displays the E18 Error code and shuts the camera down in order to avoid potential damage to the lens mechanism or stress to the lens barrel.

[27] The causes of the underlying problem – the inability of the lens barrel to move properly – are potentially numerous, including:

- the consumer inadvertently holding the lens barrel or obstructing its movement;
- the camera being powered up while still in its case;
- obstruction of the movement of the lens barrel by sand or liquids;
- impact damage;
- damage to the mechanical drive or gear teeth;
- flaws in workmanship or materials.

[28] Mr. Teixeira analyzed the sales and repair databases of Canon Canada for the period January 2000 to April 2009 for the camera models referred to in the statement of claim. He concluded that during this period a total of 977,085 Cameras were sold and, of these, some 88,615 (or 9.07%) were repaired for any reason. The number of Cameras of the models at issue that were repaired because they displayed the E18 Error code was 5,829 or 0.60% of the total sold. He concludes from this that the “vast majority of the cameras which were repaired were repaired for reasons that had nothing to do with the E18 Error code message.”

[29] Mr. Teixeira adds that some 5,380 Cameras of the models referred to (or 0.55% of the total sold) were repaired to address an issue involving the display of the E18 Error code caused by reasons other than customer misuse or abuse. He claims that these statistics are “completely inconsistent with the notion that there is a common defect in the PowerShot digital camera models at issue that causes the E18 Error code message to appear on the LCD screen and the Cameras to become inoperable.”

[30] It is Mr. Teixeira’s conclusion that Canon’s repair records do not establish the existence of any “common defect” in the Cameras at issue.

Hideo Nagumo

[31] Mr. Nagumo is the Deputy Senior General Manager of the Image Communication Products Quality Assurance Centre for Canon Inc. in Tokyo, Japan. He has had over 25 years of experience in quality assurance and technical support for video cameras and digital imaging products.

[32] Mr. Nagumo’s department monitors the quality of products, including the PowerShot product line, after they have been released onto the market. The department monitors, in Japan, the number of units sold, the number of units returned for repair, the types of repairs performed, and the number of repairs that are not caused by customer abuse or misuse. Where a repair trend

is detected, an investigation will be made to determine whether a particular model has a performance problem.

[33] Mr. Nagumo deposes that, contrary to the allegations made in the statement of claim, the camera models at issue in this litigation do not share a common defect caused by a malfunction in the algorithm used by the camera's internal process. He says that the purpose of the error code is to avoid permanent damage to the lens mechanism due to stress to the lens barrel. He notes that in some cases, the E18 Error message can be corrected by turning the camera off and on, which resets the camera's software. If the obstruction is removed – for example, by taking the camera out of its case or removing the operator's hand from the lens area – the lens should extend and function properly, thereby resolving the error message. If, however, the lens barrel has been damaged, in such a way as to affect the internal mechanism, the lens barrel may stop functioning – in that event, the camera will require professional inspection and repair. Determining whether the condition was created by customer abuse, or by other circumstances, will require an internal inspection.

[34] Mr. Nagumo denies that the Cameras have a common material defect. He notes, as did Mr. Teixeira, that less than 1% of all the cameras sold by Canon Canada in the period January 2000 to April 2009 were repaired as a result of the display of the E18 Error message.

2. The Defendants' Experts

[35] The plaintiffs have objected to the admissibility of the evidence of the defendants' expert witnesses on the ground that they have failed to file an acknowledgment of expert's duty in Form 53, as prescribed by Rule 53.03(2.1).7 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194. For reasons set out later, I find that it is not necessary to file a Form 53 where the expert's evidence is tendered for use on a motion.

Richard Hieber

[36] Mr. Hieber is a Technical Support Engineer employed at Canon U.S.A., Inc. He has approximately 15 years experience as a digital camera technician and has been with Canon since 2000. He now trains other Canon technicians. He examined the cameras of the three representative plaintiffs on December 7, 2010. He had previously conducted an examination of eight allegedly defective Canon PowerShot digital cameras in May 2006, in connection with class action litigation in the United States.

[37] Mr. Hieber's conclusions were, in brief summary, as follows:

- The lens barrel on Mr. Lipner's camera would not extend and a "lens error" message was displayed on the LCD screen – he attributed this to "customer abuse or misuse, most likely by impact to the lens unit area, which has caused the lens barrel to sit out of alignment."

- Ms. Schatz's camera had a similar problem, with the lens barrel failing to extend and an E18 Error message appearing. He observed a "dent" on the camera, which he attributed to a "strong impact." He also found some grains of sand inside the camera body and concluded that these could adversely affect lens movement, thereby causing the E18 Error message. It was his conclusion that "the alleged malfunction of Ms. Schatz's camera was caused by customer abuse or misuse, specifically impact damage to the front cover and/or the presence of sand inside the camera."
- Mr. Williams' camera did not display an "E-18" message, but it had an entirely unrelated problem, related to the shutter button, which in his opinion was due to "customer abuse."

[38] It was Mr. Hieber's conclusion that all three of the plaintiffs' cameras were capable of being repaired and restored to good working order.

[39] A controversy arose on the motion, initially in the context of the plaintiff's motion to amend the statement of claim, concerning the transcript of Mr. Hieber's cross-examination. Counsel for the plaintiffs, Mr. Juroviesky, submitted that the reason for the plaintiff moving to amend the statement of claim, at a late stage, to plead (in paragraphs 17-19), that the Cameras were not designed to withstand "typical" or "prototypical use," was that Mr. Hieber had admitted, on his cross-examination on April 18, 2011, that the Cameras were not designed to withstand the "sand tests" and the "drop tests" to which they were submitted during testing.

[40] Mr. Hieber swore in his affidavit that the Cameras were tested for their resistance to sand at the factory. He testified that he had never observed the testing of cameras and that he had no manuals, books, checklists or other technical literature from Canon concerning testing at the production stage. After testifying that sand within the optical unit could, depending on its location, cause a malfunction that would generate an E18 Error, and that the same could happen if sand got caught between the collapsing barrels on the exterior of the lens, he was asked how many grains of sand would be required as the "threshold amount" to trigger the malfunction, he replied, in response to Q. 484:

I wouldn't know.

[41] He was then asked whether certain tests were done at the production stage. He replied that a "drop test" was done. When asked whether a sharp impact was used to test the Cameras at that stage, he replied, "I know they do an impact test or drop test, but I do not know the actual test." He went on to state that he was not sure of the nature of the test.

[42] The contentious answer, as recorded in the transcript, was then given to the following question:

490. Q. So we've talked about the sand resistance test and the drop test at the production confirmation stage for Canon PowerShot cameras, would you agree that the Canon PowerShot cameras are then designed to resist the amount of sand and the type of drops indicated in these tests?

A. I wouldn't, no.

[43] The questioning then continued:

Q. Would you agree that a certain degree of sand and impacts due to drops are thereby typical of normal usage in the hands of a consumer?

A. Based on my experience, what I have seen, impact and sand damage are very common issues with consumer products.

[44] In the course of his submissions on the motion to amend the statement of claim, Mr. Juroviesky stated that the plaintiffs relied on Mr. Hieber's answer to question 490, as an admission that Canon's cameras were not designed to withstand the sand and dropping to which they were exposed during routine testing at the factory. There was an immediate objection by counsel for Canon, who stated that the transcript was clearly in error and that the answer was in fact, like the witness's earlier answer at Q. 484:

A. I wouldn't know.

[45] Mr. Juroviesky noted that the answer had never been corrected by the witness and that reference had been made to this evidence in the plaintiff's original factum and in his reply factum, so his position could not have been a surprise to defendants' counsel.

[46] Counsel for the defendants arranged to obtain the recording of the examination. A copy was provided to me. Each side claims that the recording supports its interpretation.

[47] I have listened to the recording. It is impossible to tell from the sound whether the word is "know" or "no", as they both sound the same. There was a slight pause between the word "wouldn't" and "no" or "know" and it appears that the reporter, who was dictating in parallel with the recording, gave the typist an instruction to insert a comma between the two words. Taken in context, however, particularly considering Mr. Hieber's answer to Q. 484 and his lack of personal knowledge of the testing procedures actually carried out at the factory, it is much more likely that his answer was "I wouldn't know." Since he had no personal involvement in either the design or testing of the cameras, he would clearly not know whether the cameras were designed to resist the amount of sand and drops to which they were subjected.

[48] Reading the questions that followed question 490, it does not appear to me that counsel for the plaintiffs regarded Mr. Hieber's answer as an admission that the cameras were not

designed to meet the testing to which they were subjected at the factory. I do not regard it as an admission to that effect.

R. David Etchells

[49] Mr. Etchells is the Publisher and Editor-in-Chief of The Imaging Resource, a website founded in 1998, that offers information concerning, and reviews of, the wide range of digital cameras available in the marketplace. Mr. Etchells has extensive experience in the digital photography field and has supervised or conducted in-depth testing and analysis of over 600 digital camera models. In broad summary, his opinion is:

- Canon digital cameras have enjoyed outstanding, and growing, sales success in the market place and since 2005 Canon has been the world leading digital camera manufacturer, based on sales – its cameras routinely dominated the most popular models on his website;
- Canon cameras are, in general, well-designed and well-constructed products that have a reputation in the industry for consistent quality and consumer satisfaction;
- Consumer publications such as *Consumer Reports* and *PC Magazine* have consistently rated Canon digital cameras, including PowerShot cameras, at or near the top of the industry in terms of quality, reliability and customer satisfaction;
- Canon cameras routinely win positions on his web site's assessment of the best cameras on the market;
- Canon's written one-year warranty is quite standard in the digital camera industry;
- The manner in which digital camera owners care for their cameras varies greatly;
- Consumer postings on the internet are heavily skewed to the negative and are not an accurate reflection of consumer experience with a particular brand or model of digital camera.

[50] Mr. Etchells was also retained by the defendants to review and comment on the report prepared by Mr. Joffe.

[51] Mr. Etchells challenges the integrity of the data relied upon by Mr. Joffe and questions his methodology. His conclusions can be summarized in the following comment:

The E18 Error is not, as Plaintiff's expert Mr. Joffe claims 'either the largest or one of the largest most frequently occurring complaints about digital camera on the internet.' Mr. Joffe's data showing this to be the case is based on false data, a lack of understanding of sampling error in statistical measurements, his discounting of valid data demonstrating the contrary, and careless, inattentive analysis of the data he does examine.

[52] He continues:

Overall, Mr. Joffe has completely failed to show any elevated incidence of E18-associated failure among cameras named in the litigation as compared to lens problems in other manufacturer's cameras. His 'statistical' analysis is based on data which is either demonstrably (and very obviously) false and artificial, or data selected with clear, inherent sampling errors that artificially bias results towards evidence of E18 prevalence.

David L. Trumper

[53] Mr. Trumper is a professor of Mechanical Engineering at Massachusetts Institute of Technology. His expertise is in the area of design, development, manufacture and testing of electromechanical systems and devices, including devices that are as sophisticated or more sophisticated than digital cameras. He was retained by the defendants to review an expert report, since withdrawn by the plaintiffs, of James Hood, who had expressed an opinion that the E18 Error was a significant defect in Canon cameras that affected a large portion of, if not all, product owners. Mr. Hood was apparently the president and editor of a consumer affairs website. As Mr. Hood's report is not part of the evidentiary record, this aspect of Mr. Trumper's evidence is irrelevant.

[54] In a second report, Mr. Trumper reviewed Mr. Joffe's report. He describes the report as meaningless, inaccurate and misleading, based on false assumptions and incorrect data. He says that Mr. Joffe has misused statistical models and has failed to apply logical reasoning. Among other criticisms, Mr. Trumper points out that the number of initial "hits" identified on a Google search is not reflective of the number of times the results actually appear on web pages and still less reflective of the underlying content of the particular pages. Moreover, the fact that there are a number of "hits" in response to the query "Canon Digital Camera Error" does not tell one anything about the underlying truth of the assertions made on the web pages.

III. Preliminary Motions and Objections

[55] In this section, I will address several preliminary procedural matters, as well as objections made by each party to the expert evidence tendered by the other party.

A. Motion to Amend Statement of Claim

[56] The plaintiffs brought a motion, at the opening of the hearing, for leave to deliver an “Amended Amended Amended Fresh as Amended Statement of Claim.” This proposed pleading, which is the sixth iteration of the statement of claim, was delivered on August 16, 2011, only a few weeks before the hearing and after all the certification records had been delivered and cross-examinations completed. The defendants have not delivered a statement of defence.

[57] The defendants opposed the motion. Their primary complaint was that the definition of the “Defect” had changed, to mean “a design deficiency that renders the Cameras prone to the unexpected manifestation of the E18 Error message (shown as the ‘Lens Error Restart’ in the case of SX 100 IS).” This is coupled with new allegations, at paragraphs 15-17 of the statement of claim, that the lens in particular and the Cameras in general cannot withstand “typical use” or “prototypical use.” There are also new allegations, at paragraphs 57-59 of the statement of claim, that the retailers who sell the cameras are agents of the defendants. The defendants objected that neither the pleadings at paras. 15 to 17, nor the pleadings at paras. 57 to 59, are supported by adequate particulars and that the latter pleadings are essentially pleadings of law that are unsupported by material facts, contrary to Rule 25.06(2).

[58] The defendants relied, in particular, on a consent order made October 6, 2010, which, among other things, permitted the plaintiffs to deliver an amended statement of claim. It was agreed, and included in the order, that the definition of “Defect” would be confined to the “unexpected display” of the “E18 Error” message and, in the case of Mr. Lipner’s SX100IS camera, the “Lens Error Restart” message.

[59] That order also provided, and the parties expressly agreed, that the plaintiffs reserved the right to seek future amendments of the statement of claim and the defendants reserved the rights to oppose same.

[60] The defendants objected that the plaintiffs’ complaints about the Cameras have been a moving target and the proposed amendments violated the consent order, particularly because they inject a new theory into the action – namely that the Cameras cannot withstand typical use.

[61] The obligation of the court under Rule 26.01 is to grant an amendment to pleadings, at any stage, on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment. At this stage of the proceedings, notwithstanding the several prior amendments, there is no reason not to permit an amendment. I asked defendants’ counsel whether they wished an adjournment and they replied, quite understandably, that as the matter has been delayed more than once, their clients wished to proceed with the motion. No other real prejudice had been identified. Accordingly, the amendments were permitted.

B. Motion to Remove Mr. Williams as a Representative Plaintiff

[62] The plaintiffs also brought a motion, returnable at the hearing, to remove Mr. Williams as one of the representative plaintiffs. He deposes that, since putting himself forward as a representative plaintiff, his circumstances have changed and he is unable to continue. On cross-examination, he made it clear that he did not want to make any claim at all against Canon. The motion was opposed by the defendants, who say that neither Mr. Hieber nor Mr. Atkins observed any E18 Error issue with Mr. Williams' camera and that Mr. Williams has acted as nothing more than a mere "placeholder" in this litigation. Those complaints, if made out, would be a good reason to remove Mr. Williams as a representative plaintiff, not a reason to keep him in.

[63] I conclude that there is no reason to refuse Mr. Williams' request to withdraw as a representative plaintiff, and he is permitted to do so, without prejudice to the rights of the defendants to claim costs against him with respect to the period of time he acted as representative plaintiff. The pleading will also be amended to delete any other references to Mr. Williams.

C. Motion to Strike Plaintiffs' Expert Evidence

[64] The defendants brought a motion to strike the evidence of Mr. Atkins and Mr. Joffe on the ground that they are not properly qualified experts and their evidence therefore fails to meet the test established by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36. That test requires that expert evidence satisfy the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert.

1. Applicable Legal Principles

[65] While the evidentiary burden on a certification motion is the low, "basis in fact" test, that burden must be discharged by admissible evidence. The evidence tendered on a certification motion must meet the usual criteria for admissibility: *Schick v. Boehringer Ingelheim (Canada) Ltd.*, [2011] O.J. No. 17, 2011 ONSC 63 at para. 13; *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, 2005 BCCA 540 at para. 31, leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 545.

[66] This applies to all forms of evidence, including expert evidence: *Schick v. Boehringer Ingelheim (Canada) Ltd.* at para. 14. In *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319, 158 A.C.W.S. (3d) 193 (S.C.J.), Cullity J. observed at para. 19:

I accept, also, [counsel's] submission that the fact that only a minimum evidential foundation need be provided for each of the statutory requirements for certification - other than that in section 5(1)(a) - does not mean that the standards for admissibility can properly be ignored, or are to be relaxed for this purpose. However, insistence that the general rules of admissibility are applicable to expert evidence filed on motions for certification does not entail that the nature and amount of investigation and

testing required to provide a basis for preliminary opinions for the purpose of such motions will necessarily be as extensive as would be required for an opinion to be given at trial.

[67] This means that expert evidence tendered on a certification motion must meet the test of admissibility but, once found admissible, the quality of evidence required to establish a “basis in fact” is not the same as would be required for proof “on a balance of probabilities” at a trial on the merits.

[68] While much of the recent discussion of expert evidence has taken place in the context of criminal cases, the principles apply equally to civil proceedings. The court has an important gate-keeping role with respect to the admissibility of evidence and it is not appropriate or fair to shirk that responsibility by saying “let it in, and the objections will go to weight rather than admissibility.” This approach was expressly rejected by Binnie J. in *R. v. J. (J.L.)*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 at p. 613.

[69] I will begin with first principles. Expert evidence is only admissible where the trier of fact would be unable to draw conclusions from proven facts, because the subject matter is not within the ordinary experience of a lay person and requires the opinion of someone with specialized knowledge. In *R. v. A.K.* (1999), 45 O.R. (3d) 641, [1999] O.J. No. 3280 (C.A.), the Court of Appeal described this aspect of the opinion rule as follows, at para. 71:

The opinion rule is a general rule of exclusion. Witnesses testify as to facts. As a general rule, they are not allowed to give any opinion about those facts. Opinion evidence is generally inadmissible. Opinion evidence is generally excluded because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form his or her opinions on the issues in the case. Hence, as will be discussed below, it is only when the trier of fact is unable to form his or her own conclusions without help that an exception to the opinion rule may be made and expert opinion evidence admitted. It is the expert's precise function to provide the trier of fact with a ready-made inference from the facts which the judge and jury, due to the nature of the facts, are unable to formulate themselves: *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 at 409.

[70] The Court of Appeal continued, summarizing the rule at para. 75, as follows:

In a nutshell, the opinion rule can be stated as follows: Opinion evidence is generally inadmissible unless it meets all four [of the *Mohan*] criteria set out above. A consideration of the first two criteria, relevance and necessity requires a balancing of the probative value of the proposed evidence against its potential

prejudicial effect. The Supreme Court in *Mohan* identifies a number of factors that should be considered in this balancing process. The proposed evidence will only be admissible if its probative value exceeds its prejudicial effect. The third criterion involves a consideration of other applicable rules of evidence. Even if the proposed evidence is sufficiently probative to warrant admission, it may be subject to some other exclusionary rule and further inquiry may be required. Finally, the last criterion requires that expert opinion evidence be adduced solely through a properly qualified expert.

[71] The starting point for considering the reception of expert evidence is to determine whether it is relevant. The next question is whether the subject is one in which the trier of fact needs the assistance of an expert. If so, and if there is no other applicable exclusionary rule, it must then be shown that the expert is duly qualified to give the evidence in question – as stated in *Mohan* at para. 27, “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.” In *R. v. K. (A)*, Charron J.A., as she then was, stated at para. 103:

This criterion is usually not difficult to apply. However, it must not be overlooked. Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject-matter that the average trier of fact does not already have. If the witness's "special" or "peculiar" knowledge on a subject-matter is minimal, he or she should not be qualified as an expert with respect to that subject.

[72] In *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378, [2006] O.J. No. 1146, Ducharme J. observed at paras. 20 and 21 that it must be established that the witness does have “special” or “peculiar” knowledge. That knowledge can, however, be acquired in a variety of ways:

How the witness acquired that “special” or “peculiar” knowledge is not the central issue at this point. Rather the issue is whether the witness does, in fact, have the “special” or “peculiar” knowledge. Thus one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter. [...]

When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness’s professional qualifications, actual experience, participation or membership in professional associations, the nature and extent of his or her publications, involvement in teaching, involvement in

courses or conferences in the field and efforts to keep current with the literature in the field and whether or not the witness has previously been qualified to testify as an expert in the area.

[73] Ducharme J. referred to the “old hunter” example given by Falconbridge C.J. in *Rice v. Sockett*, [1912] O.J. No. 49, 27 O.L.R. 410 (C.A.) at paras. 21-22:

Dr. John D. Lawson, in "*The Law of Expert and Opinion Evidence*", 2nd ed., p. 74, lays down as rule 22: "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible;" citing numerous authorities and illustrations.

"The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith:" *State v. Davis* (1899), 33 S.E. Repr. 449, 55 So. Car. 339, cited in *Words and Phrases Judicially Defined*, vol. 3, p. 2595.

[74] Particular caution needs to be exercised where the proposed expert seeks to advance a novel scientific theory or a novel technique. The risk is obvious – the very novelty of the theory or method makes it untested and potentially unreliable. In *Mohan*, Sopinka J. observed, at para. 28:

[...] 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.

[75] Binnie J. commented on this requirement in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52, at para. 33:

Novel Scientific Theory or Technique

Mohan kept the door open to novel science, rejecting the "general acceptance" test formulated in the United States in *Frye v. United*

States, 293 F. 1013 (D.C. Cir. 1923), and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While *Daubert* must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):

- (1) whether the theory or technique can be and has been tested...
- (2) whether the theory or technique has been subjected to peer review and publication ...
- (3) the known or potential rate of error or the existence of standards; and
- (4) whether the theory or technique has been generally accepted.

[76] The application of these factors will assist the court in the exercise of its "gatekeeper" role of determining whether the evidence is reliable and deserving of any weight.

2. Application of the Principles in this Case

[77] The defendants say that the evidence of Mr. Joffe and of Mr. Atkins fails to satisfy any of the *Mohan* criteria. They say that the most significant failing is that Mr. Atkins and Mr. Joffe are not properly qualified experts and their reports should be excluded for that reason alone. Second, they say that neither report is relevant to establishing that there is a defect in the PowerShot line of cameras that causes the E18 Error message in circumstances when it should not be displayed. They say that Mr. Joffe's report is based on inadmissible hearsay and is simply a survey of internet "chatter" that does not establish the existence of a defect and Mr. Atkins simply acknowledges that the display of the E18 Error message could be "consistent with a design deficiency." They also say that Mr. Atkins has prepared a previous report, which he has failed to produce and, at a minimum, the court should draw an adverse inference from his failure to do so.

Evidence of Mr. Joffe

[78] I have set out Mr. Joffe's general conclusions earlier in these reasons. He purports to be an expert in "web analytics and statistics." The plaintiffs say that they rely on his evidence primarily for the proposition that there is a basis in fact that the defect resulting in the E18 Error is a statistically significant problem based on its presence on the internet. They say that this establishes a basis in fact for the existence of a class of two or more persons who would be "interested" in the resolution of the common issues.

[79] As a starting point, there is no evidence at all to establish that “web analytics” is an accepted area of expertise, with recognized and proven standards, quality controls, methodologies and practices. There is no evidence to establish that any of the factors identified by Binnie J. in *R. v. J.-L.J.* have been satisfied, so as to give assurance to the Court that the technique employed by Mr. Joffe is sound and reliable. I have been unable to locate any case in Canada in which a witness has been qualified as an expert in web analytics. Nor has either party identified such a case.

[80] Moreover, there is no evidence to establish the underlying reliability of this technique. The defendants’ experts have pointed out that Google searches can be corrupted by malicious software (known as “malware”), which can seed the internet with false information. Mr. Joffe admitted on cross-examination that he made no attempt to verify any complaints on the internet about the E18 Error and he failed to explain how, if at all, his methodology screened out or differentiated scurrilous and malicious postings from genuine postings. He acknowledged that “you could spread false rumours on the internet” and “there is false information on the internet.” Mr. Joffe himself claimed to have been the victim of a “Google Bomb,” which spread malicious rumours about him on the internet. It has not been established that there are accepted methods to screen out such information or that Mr. Joffe followed any such procedures. There is no evidence of any standards, error rates or testing methods. There is no evidence that “web analytics” has been generally accepted as a research technique. There is no evidence that one can extrapolate factual conclusions from the number of occurrences of a particular search phrase on Google.

[81] It follows from this that, on the evidentiary record before me, I am not satisfied that the field of “web analytics” is one in which expert evidence would be admissible.

[82] In any case, I find that Mr. Joffe is not qualified as an expert in either statistics or web analytics and his evidence is inadmissible for that reason as well. I will examine his qualifications.

[83] Mr. Joffe is a consultant who provides consulting services on, among other things, “land use, water systems and resources.” He has a Master’s degree in Environmental Engineering and a Bachelor of Science in Civil Engineering. His company provides environmental consulting services, among other things. He is registered as a PEng in Pennsylvania and is a member of the American Society of Civil Engineers and the American Water Works Association.

[84] He claims in his report to have “published numerous papers and given presentations related to statistics for environmental engineering applications, including modeling, benefit costs analyst [sic] and risk assessment.” He also claims that with his company, from 1999 to the present, he has been “heavily involved with keyword analytics (including geocoding, semantics, statistics, etc) for search engine exposure for internet projects.”

[85] Mr. Joffe says in his CV that his work in the past 12 years has included “web analytics,” “search engine optimization,” “paid search submissions,” “campaign management and optimization,” “lead generation,” “demographic research” and “keyword analysis.” His CV

indicates that he has participated in some internet conferences and internet workshops, but the dates are not identified. He does not show any publications in the area of internet research and all of his publications, the most recent of which was in 1998, are in the area of water works and water quality. He shows no qualifications in statistics – no degrees, no courses, no papers, no professional affiliations, no teaching.

[86] In my view, Mr. Joffe lacked the necessary requirement of having acquired special or peculiar knowledge through study or experience in respect of the matters on which he undertook to testify. His alleged expertise was entirely self-bestowed. He has no degrees, certificates or professional qualifications in either statistics or web analytics. He has not published any papers or research on either subject. He belongs to no professional organization having to do with either subject. He has received no recognition by his peers in relation to either subject. He has never testified as an expert witness in relation to either statistics or web analytics.

[87] When it was pointed out to Mr. Joffe that his own website did not identify statistics as an area of his expertise, his response was:

A. I think it is... there is analytics in there, which implies statistics, so I don't really agree with the question. It is pretty implicit that I have strong analytical skills which one could very easily interpret as statistics. I am not a PhD statistician, as I have outlined in the report. Two of my academic advisors, who I maintain relationships with, have both published statistics ... applied statistics book for engineering.

Q. Well, good for them sir, but ...

A. I have done published research with them, sir, with my name on it.

Q. But you don't have, as you say, an advanced degree in statistics, do you.

A. No, but neither do they. My degrees are in engineering. You cannot, you know, get a degree in everything and live one life. It is hard. I have tried. It doesn't work.

...

Q. But you are aware, though, that there are people who consider themselves almost a professional calling in statistics?

A. Absolutely, but as I indicated to you, two of my advisors who are the top of their fields are not ... again, they don't have degrees

in statistics, they have degrees in engineering and sciences, yet they have published statistics... applied statistics textbooks.

Q. I heard you say that, sir. They don't work for Tranztek [Mr. Joffe's company], do they?

A. No, they don't. Tranztek is me.

Q. They didn't review your report, did they?

A. No, they did not. That doesn't mean it cannot be done though.

[88] Mr. Joffe's description of his expertise in "web analytics" was along similar lines. He described it as a "very very new field" and was not aware of any professional association in the area. He did not describe any professional standards or accreditations in the area. On cross-examination, the following exchange occurred:

Q. Well, you make some reference to this concept known as web analytics.

A. Yes.

Q. You don't have any diploma in web analytics, do you sir?

A. There hardly exists such a diploma.

Q. There does not exist such a diploma, does there?

A. There actually might be some colleges that actually do offer an SCO track, a web analytics track.

Q. Not one you took?

A. No, I only done my own. I am answering you very directly. Google ... as I have always been doing. Google, the company which rules the internet, as you know, does offer a certification process, just like Microsoft and Oracle have certification for their products. Google does offer some sort of certification for some of their products. I do ... I am, you know, more of an entrepreneur. I learn these things on my own. I did not receive such certification on web analytics, however, Google does ... grants for their products some type of certification.

Q. But you don't have that.

A. No, I do not. But I have worked with Google, I have corresponded with a company. I know people there, you know.

Q. I search Google, too.

A. No, no, much more than that.

Q. Is there ...

A. Can I ...

Q. Tell me other certifications you don't have.

A. Okay. I don't know what you are ... I am trying to understand what you are getting at. My brother worked ... I am not using ... I am not digressing here, I am just giving you an example to understand your question. My brother worked for Oracle. He performed well there. He is now a supplier of Oracle solutions to other big companies in Silicon Valley. He never got one of those licences, but if I understand what you are trying to get at, that doesn't mean that he is bad at what he did, it means that he is way above the layman level, in fact, and didn't even bother with it. So some people are experts. Let's make a distinction between a diploma and some of these layman's courses for software products such as Microsoft, Oracle, Google, etcetera. Some people are very, very good at this and they just never even bother because they are doing very advanced work, creating their own advanced customized tools for these companies, so I ... it doesn't mean that ... the decision to not get certified can mean that it is ... I am working at a different level where it is just not necessary. It doesn't mean that I don't work in the areas where the certification is given.

Q. Or it could mean that you didn't take the course and you are not qualified?

A. In theory it could mean that, but it doesn't necessarily mean that is the case.

[89] The last exchange between Mr. Joffe and counsel highlights the inadequacy of Mr. Joffe's qualifications. The fact that Mr. Joffe "works in the area" of statistics and web analytics and thinks he is good at it does not mean that he has the necessary expertise to testify before the court as an expert. That is why courts usually demand independent confirmation of the witness's qualifications. A "do-it-yourselfer" generally won't do. While it is true that there are some areas where on-the-job training or long experience, such as that of the "old hunter" may qualify as expertise, depending on the nature of the inquiry, statistics is not such an area. There

are really good statisticians and there are undoubtedly really bad ones. I have no way of knowing which category Mr. Joffe falls into.

[90] Reading Mr. Joffe's resumé and his cross-examination, one is left with the firm impression that, to use the expression employed by counsel for Canon, he is a Jack-of-all-trades, rather than an expert.

[91] The defendants raise the additional objection that Mr. Joffe's report contains inadmissible hearsay – that is, the web pages identified in the Google searches are nothing more than unconfirmed hearsay. Mr. Joffe admitted that he made no effort to obtain independent verification of the underlying truth of the web postings.

[92] The plaintiffs say that Mr. Joffe's report is not based on hearsay, because the purpose of the report is not to prove the definitive existence of a defect but rather to show that there is a "trend" or "chatter" or "propensity" on the internet relating to the Cameras at issue and the E18 Error. They say that if it is hearsay, it is admissible in any event because:

- (a) there is a lower evidentiary threshold on a certification motion;
- (b) the so-called "Rule in *Thorpe v. Honda*";
- (c) Rule 39.01(4);
- (d) the principled approach to exceptions to the hearsay rule.

[93] In support of the first proposition, the plaintiffs rely on the observations of Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418, 72 C.P.C. (6th) 158, leave to appeal to Div. Ct. ref'd, [2009] O.J. No. 3438, at para. 76, referring to *Stewart v. General Motors*:

The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.) [emphasis added].

[94] I do not regard this as lowering the threshold for the admissibility of the evidence. It simply means that, if the evidence is admissible, the weight of the evidence may be less than what would be required at trial.

[95] In support of the second proposition, the plaintiffs rely on the decision of the Saskatchewan Court of Queen's Bench in *Thorpe v. Honda Canada Inc.*, [2010] S.J. No. 77, 2010 SKQB 39, which in turn followed the decision of the Trial Division of the Federal Court in *ITV Technologies, Inc. v. WIC Television Ltd.*, [2003] F.C.J. No. 1335, 2003 FC 1056, aff'd. [2005] F.C.J. No. 438, 2005 FCA 96 (Fed. C.A.).

[96] In *Thorpe v. Honda*, the plaintiff had commenced a proposed class action against Honda, claiming a defect in her vehicle. As part of her affidavit in support of certification, she appended the results of searches she had conducted on the internet, including postings from discussion forums in which complaints similar to hers had been made. Another affidavit, filed by an employee of the plaintiff's lawyers, reported on responses the firm had received on its web site from persons complaining about issues similar to those raised by the plaintiff. Both affiants tendered the evidence based on their "information and belief," relying on a rule similar to Ontario Rule 39.01(4). Honda moved to strike those affidavits.

[97] In striking the affidavits, Popescul J. relied upon the decision of Tremblay-Lamer J. in *ITV Technologies* at paras. 16-18:

With regard to the reliability of the Internet, I accept that in general, official web sites, which are developed and maintained by the organization itself, will provide more reliable information than unofficial web sites, which contain information about the organization but which are maintained by private persons or businesses.

In my opinion, official web sites of well-known organisations can provide reliable information that would be admissible as evidence, the same way the Court can rely on Carswell or C.C.C. for the publication of Court decisions without asking for a certified copy of what is published by the editor. For example, it is evident that the official web site of the Supreme Court of Canada will provide an accurate version of the decisions of the Court.

As for unofficial web sites, I accept Mr. Carroll's opinion that the reliability of the information obtained from an unofficial web site will depend on various factors which include careful assessment of its sources, independent corroboration, consideration as to whether it might have been modified from what was originally available and assessment of the objectivity of the person placing the information on-line. When these factors cannot be ascertained,

little or no weight should be given to the information obtained from an unofficial web site.

[98] The Federal Court of Appeal dismissed an appeal, finding that it was unnecessary to consider the issue of the admissibility of evidence taken from the internet.

[99] Returning to *Thorpe v. Honda*, after considering the decision in *ITV Technologies*, Popescul J. continued, at paras. 21-27:

The internet is an abundant source of information. Some of the information available is impeccably accurate, while other information is pure garbage. It does not make sense, on the one hand, to conclude that any and all information pulled from the world-wide web is inherently unreliable and ought to be given zero weight; on the other hand, it makes equally little sense to open the door to admitting into court absolutely anything placed on the internet by anybody.

The approach taken by the Federal Court Trial Division has logical appeal. Even though the appellate court declined to endorse the analysis and conclusion, I agree with the essence of the ruling: internet information may be admissible in court proceedings depending upon a variety of circumstances relating to reliability which include, but are not limited to:

- whether the information comes from an official website from a well known organization;
- whether the information is capable of being verified;
- whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

Where the threshold of "admissibility" is met, it is still up to the triers of fact to weigh and assess the information to determine what significance, if any, such information would have on the issues to be decided.

If the internet-based evidence tendered does not contain sufficient badges of reliability, it ought be rejected as worthless and, hence, inadmissible.

In the case before me, Ms. Thorpe has pulled information from the internet complaints about Honda automobiles posted to various web pages by unknown and anonymous persons. As pointed out by

Honda Canada, who, when and under what circumstances, these postings have been made is not apparent. Although Ms. Thorpe swears that she believes the postings to be true in the generic opening paragraph of her affidavit, she provides no basis for such belief. How can she "know", for example, that "Kim R." is telling the truth about his/her 2006 Honda Civic? While it may be true that Ms. Thorpe has no reason to believe the information is not true, she likewise has disclosed nothing in her affidavits that would tend to suggest that such information is true, accurate, reliable and/or unaltered.

Likewise, the information retrieved from Ms. Thorpe's law firm's web page is similarly unreliable. Anonymous complaint submissions received in this fashion have little or no probative value.

Accordingly, I find that affidavit evidence, "on information and belief", including information taken from the internet, is potentially admissible in interlocutory applications, such as a class action certification application, and may be admitted "under special circumstances" where the "grounds for such information and belief" are adequately disclosed and the information is reliable. Here, the subjective basis for the reliability of the information has not been disclosed and, furthermore, there is no objective basis to believe that the various postings have any degree of reliability.

[100] I respectfully adopt these observations and this approach. The plaintiff says that the information in Mr. Joffe's searches is reliable because it is taken from Google, unquestionably the largest and most recognized internet search engine. The problem, however, is that the Google searches are simply agglomerations of hundreds or thousands or millions of individual postings, the authenticity and reliability of which is entirely unknown. There is no way of testing the underlying truth of the postings and it is clear from the evidence of Mr. Joffe that he made no attempt to do so. The defendants have adduced evidence to show that the reliability of some of the individual postings is open to serious question.

[101] Common sense tells us that simply because there are several million responses on Google to "Elvis is alive" or "I have been abducted by aliens" does not mean that these statements are true, either as individual observations or as collective proof of the facts. Nor do hundreds of thousands or even millions of responses to "E18 Lens Error" mean that hundreds of thousands or millions of people have experienced an E18 Error message. There is in this case no objective basis to determine that the results of the Google searches are reliable, and there is, in fact, evidence to the contrary.

[102] For these reasons, the decision in *Thorpe v. Honda* is of no assistance to the plaintiffs. Nor is Rule 39.01(4). That rule provides that an affidavit for use on a motion may contain statements of the deponent's information and belief "if the source of the information and the fact of the belief are specified in the affidavit." I agree with the conclusion of Popescul J. that in order for information from the internet to be admissible, there would have to be some objective basis for a conclusion that the information is reliable. Mr. Joffe having made no personal attempt to obtain confirmation of the reliability of the information, and there being no objective basis to conclude that the underlying information is reliable, it is inadmissible.

[103] Finally, the plaintiff relies on the "principled exception to the hearsay rule": *R. v. Khan*, [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81; *R. v. Smith*, [1992] 2 S.C.R. 915, [1992] S.C.J. No. 74 at paras. 30-38; *R. v. Khelawon*, [2006] 2 S.C.R. 787, [2006] S.C.J. No. 57 at para. 42. The evidence in this case does not have sufficient indicia of reliability to fall within that exception and, for that reason, it is inadmissible.

[104] Mr. Joffe is not a qualified expert and his evidence is inadmissible. His evidence is also inadmissible, in my opinion, because his conclusion that the "E18 Error" is a "statistically significant problem" is irrelevant because it has not been established that the display of the E-18 Error reflects a defect in the Cameras.

Evidence of Mr. Atkins

[105] Mr. Atkins purports to give an opinion on the design of digital cameras, the circumstances under which such cameras may produce an E18 Error or "Lens Error Restart" message, and the preventative features that should be installed in such cameras in order to prevent the entry of dust, sand, and debris that may cause such messages. I have summarized his evidence earlier in these reasons.

[106] Turning to Mr. Atkins' qualifications:

- he was 32 years old at the time he gave his opinion;
- he obtained a Bachelor of Applied Science degree in Mechanical Engineering in 2001 and obtained his PEng. designation in 2007;
- he had no particular experience or expertise in cameras and had never designed or repaired a camera;
- he is not a member of any relevant professional association other than the Association of Professional Engineers;
- he has not published, taught or taken courses on the subject of camera design, construction or repair;

- he has no relevant practical experience or training in the field of cameras in general or digital cameras in particular;
- he has never testified as an expert witness on any subject, let alone camera design, construction or repair.

[107] Prior to joining Walters Forensic Engineering (“Walters”) in 2007, Mr. Atkins was employed by Canadian Tire from 2001 to 2007 in the quality engineering area and was involved in developing specifications for and inspecting, testing and conducting design modifications of consumer products, such as bicycles, lawn mowers, weed trimmers and hand tools. His work with Walters, though it involves some consumer products, seems to have been focused on accident reconstruction, automotive systems and human factors.

[108] Mr. Atkins admitted that he did not have expertise in camera design to enable him to give an opinion about what specific design features would have to be incorporated in the Cameras to prevent the occurrence of the E18 Error message.

[109] The plaintiffs seek to qualify Mr. Atkins as a “consumer product failure expert.” His main qualification, prior to becoming a consultant, seems to be his work at Canadian Tire. To conclude that Mr. Atkins is a “product failure expert” and is therefore qualified to express opinions on the failure of a digital camera because he has experience in inspecting, testing and developing specifications for lawnmowers, bicycles and weed whackers is a leap of faith that is not supported by any evidence. I cannot conclude that his work experience with power tools, lawnmowers and the like qualifies him to give an opinion about the alleged failure of what he himself describes as an “intricate and highly complicated” optical unit of a camera, which has its own internal computer mechanism, or about the design features that should have been installed in the camera to prevent a failure, the cause of which he does not even identify. Never having examined a camera other than the Canon cameras he bought over the internet and having had no training or experience in camera inspection, repair and design, he can have no way of knowing what is, or is not, appropriate design.

[110] Like Mr. Joffe, Mr. Atkins’ expertise is entirely self-conferred. There is no independent evidence that he is qualified to give an opinion on digital camera design or failure. He has no experience whatsoever with camera products and has done nothing to acquire any expertise.

[111] In my view, Mr. Atkins is not qualified to give the opinion that he purports to give. His opinion is, therefore, inadmissible.

[112] During the course of the cross-examination of Mr. Atkins, it was disclosed that he had delivered a prior report, which has not been produced to the defendants and which plaintiffs’ counsel objects to producing. Mr. Atkins did not acknowledge the existence of this report when he was asked to list the contents of his file. In effect, the plaintiffs want to put before the court some, but not all, of the expert’s opinion. This is arguably an interference with the proper

function of an expert witness: see *Macdonald v. Sun Life Assurance Co. of Canada*, [2006] O.J. No. 4977 (S.C.J.). The failure to produce this report supports an inference that it would not assist the plaintiffs. As I have concluded that Mr. Atkins' evidence is inadmissible, I need say nothing further on this point.

[113] For these reasons, I find that the evidence of Mr. Joffe and Mr. Atkins is inadmissible and their affidavits will be struck.

D. Objection to Defendants' Expert Evidence

[114] Counsel for the plaintiffs raised an objection that the reports of the defendants' expert witnesses did not include an acknowledgment of the expert's duty (Form 53), as required by Rule 53.03(2.1).7. As the issue had not been directly addressed, either by way of motion or in the factums, I gave the plaintiffs' counsel an opportunity to make written submissions on the issue and defendants' counsel an opportunity to respond.

[115] The main threads of the plaintiffs' argument are as follows:

- Rule 53 must be read in the context of other rules, including the duty of an expert, set out in rule 4.1.01(1), to provide evidence that is "fair, objective and non-partisan";
- Rule 4.06(2) provides that an affidavit must be confined to "statements of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court ...";
- Rule 53.03(1) provides that a party who intends to call an expert witness [at trial] must follow the requirements of rule 53.03(2.1).7, including the delivery of Form 53;
- thus, for an expert to provide an affidavit in a motion, the affidavit must only contain evidence that the expert would be permitted to give in court, because an expert must execute Form 53 before being allowed to give evidence in court, an expert must execute Form 53 before giving evidence on a motion.

[116] I do not accept this argument. It overlooks the fact that Rule 53 is expressly concerned with evidence at trial. The rule states, in part:

- (1) A party who intends to call an expert witness at trial shall [serve a report signed by the expert not less than 90 days before the pre-trial conference ...];

(2) a party who intends to call an expert witness at trial to respond to the expert witness of another party, shall [serve a report signed by the expert not less than 60 days before the pre-trial conference ...];

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information.

...

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

[emphasis added].

[117] Rule 53.03(3) provides that an expert witness whose report has not been served under the rule may not testify, except with leave of the trial judge.

[118] Rule 4.06(2), which the plaintiffs rely on, simply limits affidavit evidence to evidence that the deponent could give if testifying as a witness in court, whether on a motion or at trial.

[119] As Cullity J. noted in *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 20, Rule 53.03 applies only to reports for the purpose of trial. While this observation was made prior to the amendment of the rule in 2010, requiring the execution of Form 53 acknowledging the expert's duty, the point is the same – Rule 52.03, by its express terms, deals only with expert reports prepared for the purpose of trial.

[120] While one could make the case that it would be good practice on a motion to include the matters set out in Rule 53.03(2.1) in the expert's report or that the *Rules* should be amended to require it, there is no express requirement in the current rules to do so. This may well be because there is an opportunity to cross-examine an expert prior to a motion and any issues as to the expert's qualifications, impartiality, instructions and opinions can be explored at that time.

[121] I therefore conclude that the defendants' experts were not required to deliver a Form 53. If I have reached the wrong conclusion, I would grant leave under Rule 53.03(3) as there has been no prejudice to the plaintiffs. They have cross-examined Mr. Hieber and they had an opportunity to cross-examine the other experts, had they wished to do so. In the further alternative, the plaintiffs acknowledge that the failure to deliver a Form 53 may go to the weight of the experts' opinions. There is no basis on which I could conclude that the defendants' experts failed to provide evidence that is fair, objective and non-partisan or that they have provided evidence that was outside their areas of expertise or that they otherwise breached their duty to the Court.

[122] I turn now to the test for certification.

IV. The Test for Certification

A. Introduction

[123] Section 5(1)(a) of the *C.P.A.* requires that the court shall certify an action 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 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.

[124] In *McKee's Carpet Zone v. Sears*, 2010 ONSC 4571, [2010] O.J. No. 3921, I adopted the following principles applicable to motions for certification, at para. 30:

- (a) The *C.P.A.* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) and by the Supreme Court of Canada are: judicial efficiency; improved access to the courts; and, behaviour modification, or the generation of "a sharper sense of obligation to the public by those whose actions affect large numbers of people": *Hollick v. Toronto (City)*, [2001] 3 S.C.R.

158, [2001] S.C.J. No. 67 at para. 15; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report* (Toronto: The Committee, 1990) at 16-18 and 20; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 27-29.

(b) The *C.P.A.* is entirely procedural. The certification stage is not meant to be a test of whether the plaintiff's claim will succeed. In the event that subsections (a) through (e) of s. 5(1) of the *C.P.A.* are satisfied, certification of the action by the court is mandatory: *C.P.A.* s. 5(1), *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 at para. 39 (Gen. Div.).

(c) The *C.P.A.* provides the courts with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and often-intertwined legal issues, some of which are common and some of which are not: *Hollick v. Toronto (City)*, above, at paras. 14 and 15; *Bendall v. McGhan Medical Corp.*, above, at para. 40.

(d) Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order, and it may be amended, varied or set aside at any time: *C.P.A.* ss. 5(5), 10(1) and 10(2); *Bendall v. McGhan Medical Corp.*, above, at para. 42; *Hollick v. Toronto (City)*, above, at para. 16; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report*, above, at 30-33.

(e) The court has no discretion to refuse to certify a proceeding as a class proceeding solely on the ground that one or more of the following are present: (i) the relief claimed would require individual damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; (iv) the number or identity of class members is not known; (v) the identified class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members: *C.P.A.* s. 6; *Anderson v. Wilson* (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 at para. 18 (Gen. Div.); varied (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671 (Div. Ct.); rev'd, certification order varied (1999), 44 O.R. (3d) 673,

[1999] O.J. No. 2494, (C.A.), leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. No. 476, 185 D.L.R. (4th) vii.

(f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical: *Hollick v. Toronto (City)*, above, at paras. 29 and 30; *Bendall v. McGhan Medical Corp.*, above, at para. 48; *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 at para. 48 (S.C.J.).

(g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order". It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick v. Toronto (City)*, above, at paras. 22 and 25.

(h) "*Some basis in fact*" is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial: *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 at para. 15 (S.C.J.).

[125] In many respects, consumer claims relating to defective or substandard products are ideal candidates for class action treatment, because proof of the product's defect need only be made once, and can be applied with confidence to the entire class of purchasers, thereby providing access to justice where it would be impractical to take individual proceedings: *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784, (S.C.J.) referring to *Chase v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292, affirmed 14 C.P.C. (4th) 197 (B.C.C.A.) and *Nantais v. Telectronics* (1995), 25 O.R. (3d) 331, [1995] O.J. No. 2592 (Gen. Div.); *Walls v. Bayer Inc.*, 2005 MBQB 3, [2005] M.J. No. 4 (Q.B.) at paras. 52-53, leave to appeal ref'd, [2005] M.J. No. 286 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 409; *Harrington v. Dow Corning Corp.*, [2000] 193 D.L.R. (4th) 67, [2000] B.C.J. No. 2237 (C.A.) at para. 67, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[126] A number of product liability cases have been found appropriate for certification: *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72, [2011] S.J. No. 107; *Ducharme v. Solarium de Paris Inc.*, 2010 ONSC 5667, [2010] O.J. No. 4436; *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, [2010] B.C.J. No. 838 (S.C.); *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339,

[2007] O.J. No. 784 (S.C.J.); *Sorotski v. CNH Global*, 2007 SKCA 104, [2007] S.J. No. 531 (C.A.), rev'g [2006] S.J. No. 258 (Q.B.), leave to appeal granted [2006] S.J. No. 417 (C.A.); *Olsen v. Behr Process Corp.*, 2003 BCSC 1252, [2003] B.C.J. No. 1887 (S.C.); *Reid v. Ford Motor Co.*, 2003 BCSC 1632, [2003] B.C.J. No. 2489 (S.C.); *Denis v. Bertrand & Frere Construction Co.*, [2000] O.J. No. 5783 (S.C.J.); *Chace v. Crane Canada Inc.*, [1997] B.C.J. No. 2862 (C.A.), aff'g [1996] B.C.J. No. 1606 (S.C.); *Campbell v. Flexwatt Corp.*, [1997] B.C.J. No. 2477 (C.A.), aff'g [1996] B.C.J. No. 1487 (S.C.), leave to appeal ref'd [1998] S.C.C.A. No. 13.

[127] On the other hand, as was observed by Newbury J.A., giving the judgment of the British Columbia Court of Appeal in *Ernewein v. General Motors of Canada Ltd.*, [2005] 260 D.L.R. (4th) 488 [2005] B.C.J. No. 2370 (C.A.), rev'g [2004] B.C.J. No. 2411 (S.C.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545, at para. 33, not all product cases are appropriate for certification:

I reach this conclusion notwithstanding the fact that product liability claims are often cited as an example of the type of action particularly suited to class action proceedings. Since earlier cases such as *Chace v. Crane Canada Inc.* (1997) 44 B.C.L.R. (3d) 264 (B.C.C.A.) and *Campbell v. Flexwatt Corp.* (1997) 44 B.C.L.R. (3d) 343 (B.C.C.A.), experience has shown that not all product liability cases lend themselves to certification. In some, the complexities inherent in problems of proof of the applicable duty of care over a long period of time, changing manufacturing techniques, or multi-party involvement in the product delivery chain, have made the formulation of a common question problematic: see *Bittner v. Louisiana-Pacific Corp.* (1997) 43 B.C.L.R. (3d) 324 (B.C.S.C.), *Caputo, supra*, and *Garipey v. Shell Oil Co.* (2002) 23 C.P.C. (5th) 360 (Ont. Sup. Ct. J.), aff'd [2004] O.J. No. 5309 (Ont. Sup. Ct. J. (Div. Ct.)). In each instance, the question must be determined "contextually" - i.e., not on the basis of a blanket assumption regarding product liability cases but in light of all the evidence concerning the specific case before the court. In the case at bar, the plaintiffs failed to establish an evidentiary basis; i.e., to adduce admissible evidence, for the proposition that the determination of the real common issues - whether the fuel system design(s) employed by the defendants breached the applicable standard(s) of care and created an unreasonable risk of harm to the plaintiffs - would advance the litigation in a meaningful way. I conclude that the certification order must therefore be set aside.

[128] For these and other reasons, a number of product cases have been found inappropriate for certification: *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (S.C.J) (settlement in which action dismissed and appeal abandoned without costs approved:

2010 ONSC 6776); *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, [2009] S.J. No. 179 (Sask. C.A.), rev'g [2007] S.J. No. 7 (Q.B.) and [2008] S.J. No. 101 (Q.B.) and [2008] S.J. No. 324 (Q.B.), leave to appeal to C.A. granted [2008] S.J. No. 378 (C.A.), leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 512; *Sparkes v. Imperial Tobacco Canada Ltd.*, 2008 NLTD 207, [2008] N.J. No. 379 (Nfld. T.D.), aff'd [2010] N.J. No. 108 (C.A.); *Chartrand v. General Motors Corp.*, 2008 BCSC 1781, [2008] B.C.J. No. 2520 (S.C.); *Poulin v. Ford Motor Co. of Canada* (2006), 35 C.P.C. (6th) 264, [2006] O.J. No. 4625 (S.C.J.) at para. 100, aff'd [2008] O.J. No. 4153 (Div. Ct.); *Benning v. Volkswagen Canada Inc.*, 2006 BCSC 1292, [2006] B.C.J. No. 1956 (S.C.).

Comparative Cases

[129] It will be of assistance to examine, for comparative purposes, some of the defective product cases that have been considered for certification. I will begin with several claims that have been certified for class treatment and will then examine several claims that have not been.

Certification Granted

[130] *Chase v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292, aff'd 14 C.P.C. (4th) 197, [1997] B.C.J. No. 2862 (B.C.C.A.) involved defective toilets that had cracked and caused water damage to the plaintiffs' homes. It was acknowledged by the defendant that toilet tanks manufactured at one of its plants had an unusually large failure rate - a rate of about 2% of the toilet tanks produced. The plaintiffs' expert expressed the opinion that the tanks had not been adequately fired at the kiln and that they absorbed excessive amounts of water, increasing the stress on the tanks and resulting in fractures. The defendant denied negligence, but it acknowledged that there had been an unusually high failure rate.

[131] The motion judge certified a cause of action in negligence and found that a common issue as to liability in negligence would advance the proceeding. It was found that issues of causation would be capable of routine and summary disposition, notwithstanding the defendant's argument that each tank would have to be examined in order to determine the cause of failure. The class action was certified.

[132] The British Columbia Court of Appeal affirmed the lower court's ruling. It described a defective product case as ideally suited to class action treatment – at para. 16:

This court recently observed that in a product liability case a determination that the product in question is defective or dangerous as alleged will advance the claims to an appreciable extent: *Tiemstra v. I.C.B.C.*, [1997] B.C.J. No. 1628, (7 July 1997), Vancouver Registry No. CA21870 (B.C.C.A.). I agree with the chambers judge that is the situation here. The respondents are alleging an inherent defect that results in tanks suddenly cracking. This seems exactly the type of question for which a class action is

ideally suited and remarkably similar to that concerning faulty heart pacemaker leads that was certified by the Ontario Court (General Division) in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995) 25 O.R. (3d) 331.

[133] It is noteworthy that in *Chase v. Crane Canada Inc.*, there was an admittedly high failure rate at the kiln in question, and, significantly, the plaintiff had produced an expert report that the failure was caused by a deficiency in the manufacturing process. This provided a sufficient evidentiary basis for the existence of a defect in the plaintiff's product and for the proposition that conclusions about the plaintiff's claim could be applied on a class-wide basis.

[134] In *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 (S.C.J.), Justice Brockenshire certified a class action involving allegedly defective laptop computers. The causes of action and common issues included negligence, negligent misrepresentation and breach of warranty.

[135] It was alleged that the computers would unexpectedly and spontaneously shut down or fail to operate at full capacity. The defendants argued, among other things, that the dissatisfaction experienced by two or three users did not establish that several thousand purchasers had the same problem. They also argued, as have the defendants in this case, that the plaintiffs did not have reliable evidence to establish a design or manufacturing defect on a class wide basis and that to establish that any particular computer was affected by the issue would require individual expert examination.

[136] Brockenshire J. found that the claim disclosed several causes of action and certified a class of purchasers of the computer model in question. As to the common issue of negligence, Brockenshire J. noted that the plaintiff's expert had expressed the opinion that the design of the notebook was defective, because the cooling system did not effectively dissipate the heat produced by the high-powered processor, resulting in the system overheating and slowing down or shutting down. The expert opined that this defect, by its very nature, would be common to all the notebooks and would be objectively measureable on a class-wide basis. Brockenshire J. concluded, at paras. 37 and 38, that a common issue of negligence would advance the proceeding:

What I have before me is some evidence, over and above the pleading itself, that the cooling system in this Notebook was deficient, that that resulted in the CPU overheating, and that resulted in the Notebook throttling or shutting down, and further, because this was a design error in the cooling system, it would be found in all of the Notebooks. From that information alone, if it withstands the test of the trial, it could be inferred that the defendants had been negligent in designing the cooling system, or perhaps negligent in manufacturing the cooling system, and being negligent in testing the Notebook to ensure that it would not only

work, but work as the "ultimate multimedia machine" it was held out to be.

As there is evidence, apparently, from the experts on both sides that these Notebooks might well have performed the usual day to day operations expected of ordinary run-of-the-mill laptops, to succeed, the class would have to be able to show that when the Notebooks were called upon to repeatedly perform complex and difficult operations, they would slow down or stop. The litigation would be materially advanced by proving this once, and a class proceeding would avoid each class member having to individually prove this. The concept of determining once if a product is defective, has been accepted in, among others, *Chase v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292, affirmed 14 C.P.C. (4th) 197 (B.C.C.A.) and *Nantais v. Telectronics* (1995), 25 O.R. (3d) 331 (Gen. Div.), with the appellate court commenting in *Crane* that "This seems exactly the type of question for which a class action is ideally suited ..."

[137] Brockenshire J. also certified common issues of negligent misrepresentation, breach of section 52 of the *Competition Act*, R.S.C., 1985, c. C-34, breach of warranty, damages and other subsidiary issues.

[138] Once again, there was admissible expert evidence that the deficiency in the plaintiff's computer resulted from a failure of the design and that the deficiency was common to all other computers of the same type.

[139] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418, 72 C.P.C. (6th) 158, 72 C.P.C. (6th) 158, leave to appeal to Div. Ct. ref'd, [2009] O.J. No. 3438, a decision of Justice Lax, is a particularly interesting case, also involving computers – five different models of the "Inspiron" notebook computer sold by Dell over approximately a two-year period. It was alleged that the computers were prone to unexpected shut-downs, were unable to "boot up" and that the battery was unable to hold a charge. The circumstances were different from both *Bondy* and this case, because Dell sold directly to the public, both online and over the telephone.

[140] The evidence relied on by the plaintiff on certification included affidavits from each of the three representative plaintiffs as well as from a lawyer in the plaintiffs' law firm, who filed a database kept by the law firm concerning the experience of over 400 putative class members with the notebook computers at issue. In addition, the plaintiff relied on expert evidence of an engineer and consultant who had examined the computers of six would-be class members.

[141] Justice Lax found that the negligence claim was adequately pleaded, but she noted that, as the claim was for purely economic loss, the only available category would be the claim for "negligent supply of shoddy goods or structures," referred to in *Canadian National Railway v.*

Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, [1995] S.C.J. No. 40. She found that, on the current state of the law, it was an open question as to whether there could be recovery in relation to non-dangerous defects: *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*, [1995] 1 S.C.R. 85, [1995] S.C.J. No. 2. She therefore certified a cause of action in negligence as well as breach of contract at common law and under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, and waiver of tort and unjust enrichment. She found that a claim under s. 36(1) and section 52(1) of the *Competition Act* had not been properly pleaded but gave leave to amend.

[142] With respect to the class, Justice Lax noted at para. 70 that:

In products liability cases, the scope of the proposed class should not normally be in dispute as the relationship between the class and the common issues is clear from the facts: *Hollick* at para. 20. I believe it is clear in this case.

[143] She dismissed the defendant's objection that the class was over-inclusive, because it would include persons whose computers never failed and who would have no claim against Dell. In support of this holding, Justice Lax noted the observation of Cullity J. in *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996, (2008), 295 D.L.R. (4th) 32 (S.C.J.) at para. 78, that the fact that some class members may not have suffered damages is not a bar to the claim.

[144] For the purpose of this action, Justice's Lax's observations and analysis of the common issue of negligence is of particular interest. The proposed common issue was whether the defendant owed the plaintiff and the class a duty of care to ensure that the computers were merchantable, free from defects and fit for their ordinary use. The plaintiffs' expert, having inspected a sampling of computers of class members, testified that the shutdowns and other problems were manufacturing defects that were common to the Inspiron computer models at issue. His evidence was summarized by Lax J. at para. 74:

He concluded that the computers' problems of unexpected shutdowns, inability to boot up and inability of the battery to hold a charge are a result of two common manufacturing defects: (a) inferior soldering quality; and (b) poor design of the case that permits excessive flexing and leads to premature breaking of the solder joints. He produced photographs of the disassembled computers that appear to show inadequacies in the soldering techniques and explained how this would cause the operational problems described by class members. There is uncontradicted evidence that laptop computers are more vulnerable to impact issues due to the stress of mobile use and the flexion of the keyboard from pressing on the unit. Mr. Fowler's evidence is that Dell did not manufacture a system robust enough to withstand the stress of the computer's intended and normal mobile use.

[145] In that case, as here, the defendants challenged the qualifications of the plaintiffs' experts. As I have pointed out, Lax J. noted, at para. 76, the Court's "gatekeeper" role with respect to expert evidence on certification motions, but said that if the opinion passes the threshold for admissibility, a lower level of scrutiny is permitted for the purpose of establishing a "basis in fact."

[146] Justice Lax found that, although there were some issues about the witness's misstatement of his qualifications, the expert witness had sufficient "special knowledge or experience" to give an opinion on solder integrity as a result of "many years of engineering experience that involves design, manufacturing and maintenance of electronic components for process machinery and electronic devices and failure analysis of major systems and printed circuits, including component, wiring and solder failures": *Griffin v. Dell Canada Inc.* para. 81. The expert testified that the computers had a common manufacturing defect and that, as all the computers were manufactured in accordance with a standard manufacturing process, it was reasonable to extrapolate his findings to all the other Inspiron computer models at issue.

[147] Even without the expert's evidence, Justice Lax concluded that the plaintiffs would have met their "minimum evidentiary burden" by virtue of the extensive database of consumer complaints kept by plaintiff's counsel (the admissibility of which defendants did not contest). She found that the vast majority of complaints were consistent with the problems described by the representative plaintiffs and with the observations of the expert when he operated the computers in his laboratory. She found that the persistence and remarkable similarity of the complaints in relation to each of the five models across a large group of users amounted to "some evidence" that there was reason to believe that there was a common defect affecting the normal operation of the computers.

[148] Lax J. therefore certified common issues of whether Dell owed a duty of care, whether it breached the duty and whether the computers were merchantable, free of defects and fit for their purpose. She also certified issues relating to disgorgement, punitive damages and pre-judgment interest. She did not certify common issues based on breach of warranty or s. 52 of the *Competition Act*.

Certification Not Granted

[149] In *Chartrand v. General Motors Corp.*, 2008 BCSC 1781, [2008] B.C.J. No. 2520 (S.C.), the plaintiff sought to represent a class composed of owners of various models of automatic transmission pickups and utility vehicles manufactured by General Motors between 1999 and 2002. It was alleged that a spring clip on the parking brake was defective, rendering the brake less effective and potentially dangerous. From 2003 forward, GM had modified the design of the parking brake on both the manual transmission and the automatic transmission vehicles to include a new spring clip. Service bulletins sent out by GM in 2002 to 2005 made the newly-designed spring clip available for both manual and automatic vehicles.

[150] In 2005, GM recalled the manual transmission vehicles produced from 1999 to 2002 in order to replace the original spring clips with different clips. The automatic transmission vehicles, like the plaintiff's, were not recalled.

[151] The potentially faulty spring clips had been investigated by an agency of the Department of Transportation in the United States, which found that the issue of "rollaway" (which presumably refers to a vehicle moving in spite of the application of the parking brake), was confined to the manual transmission vehicles. The "rollaway rate" in the GM automatic transmission vehicles was found to be comparable to the rates experienced by other vehicles. Accordingly, no recall was ordered for the automatic transmission models.

[152] The evidence also established that no concerns had been expressed by Transport Canada. There had been only three complaints to Transport Canada regarding the parking brakes of GM trucks, none of which related to vehicles in the proposed class. There was evidence that the braking system met the applicable safety standards in both the United States and Canada. The evidence of a GM witness was that there was no safety concern with respect to the automatic transmission vehicles.

[153] A motion to certify the action as a class proceeding was dismissed. It was conceded that the pleading disclosed a cause of action based on negligent manufacture of a defective product that poses a real and substantial danger: *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193. That was the same case Lax J. had relied on in *Griffin v. Dell*, concluding that it was an open question as to whether the case extended to non-dangerous products.

[154] The real impediment to certification in *Chartrand v. General Motors*, however, was the absence of any "air of reality" to the assertion of a relationship between the proposed class and the common issues. Martinson J. found that not only was there no evidence that there was an identifiable class of two or more people with complaints about the vehicles,

There is no air of reality to the assertion that there is a relationship between the proposed class, being the owners of the automatics in question, and the proposed common issues that arise in Ms. Chartrand's negligence and unjust enrichment claims. [at para. 68]

[155] I take this to mean that there was no basis in fact for the proposition that the plaintiff's vehicle and the vehicles of all other class members shared a common defect and that the defendant's liability for that defect could be determined on a class-wide basis. That is precisely the situation before me.

[156] *Poulin v. Ford Motor Co. of Canada* (2006), 35 C.P.C. (6th) 264, [2006] O.J. No. 4625 (S.C.J.) at para. 100, aff'd [2008] O.J. No. 4153 (Div. Ct.) was also a defective vehicle case. The plaintiff alleged that the door latch mechanisms in certain Ford vehicles were defective and failed to meet the minimum regulatory standards in Canada and the United States.

[157] The defendant adduced evidence that although they had some common components, the design and manufacture of the door latch mechanisms in the vehicles at issue were different and would require individual investigation of the alleged defects. As a result, findings in relation to a particular vehicle could not be extrapolated to other vehicles.

[158] In refusing to certify a common issue about whether the door latch mechanism was “defective and unreasonably unsafe,” MacKenzie J. observed at para. 67:

The plaintiff has failed to establish on the evidentiary record that the different door latch mechanisms on the Affected Vehicles are of no consequence. Both the plaintiff and the defendants have put forward evidence in respect of their positions. In the circumstances, the issue framed above cannot be described or characterized as a common issue within the meaning of the case law. Accordingly, a resolution of this issue relating to the plaintiff's vehicle does not resolve the question of whether other Affected Vehicles having a different door latch mechanism have a defective or unsafe door latch mechanism.

[159] Thus, the absence of an evidentiary basis to show commonality between the door latch mechanism on the plaintiff's vehicle and the mechanisms of the vehicles of all other class members made the question unsuitable as a common issue.

[160] In *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, [2005] B.C.J. No. 2370 (C.A.), rev'g [2004] B.C.J. No. 2411 (S.C.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545, the British Columbia Court of Appeal reversed the decision of the B.C. Supreme Court to certify a proposed class action on behalf of owners of trucks manufactured by General Motors. The Court of Appeal found that there was no evidentiary basis for the proposed common issues. The plaintiffs sought to recover damages based on the alleged diminution in value of their vehicles as a result of the allegedly dangerous location of their fuel tanks.

[161] The plaintiff, a GM truck owner, had commenced the action after hearing of a similar proceeding in the United States. In support of the certification motion, plaintiff's counsel had filed, attached to one of the lawyer's affidavits, a report of the United States National Highway Traffic Safety Administration, which essentially stated that the fuel tanks on certain GM trucks were in a dangerous location. Attached to the same affidavit was a settlement agreement relating to a class action suit in Louisiana. The certification motion judge held that the report was not evidence. There was no evidence that there had been any recall in either Canada or the United States.

[162] For its part, GM introduced evidence that the trucks at issue, which were from four different series, had a number of different fuel systems designs, which had been changed at various times during the eighteen year class period.

[163] The certification motion judge, although finding that the Safety Administration report was “not evidence,” concluded that at the certification stage, it could be presumed to be true. The Court of Appeal found that he fell in error in doing so and made the following observation at para. 31:

Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants: see the discussion at paras. 31-52 of *Epstein v. First Marathon Inc.* (2000) 41 C.P.C. (4th) 159 (Ont. Sup. Ct. J.).

[164] The Court of Appeal found that without this report, there was no evidentiary basis for the proposition that the location of the fuel tank of the plaintiff’s vehicle raised a question common to all the class members, the resolution of which would significantly advance the litigation. It continued, at para. 32:

Rather, the only evidence is that of the defendants' expert, Mr. Sinke, to the effect that because the C/K pick-ups between 1973 and 1991 incorporated "a number of unique fuel system designs", one cannot "generalize on how such vehicles will perform in particular crashes beyond stating that all the designs are reasonably safe and meet all applicable federal safety standards." The ability to generalize, or extrapolate, from one plaintiff's vehicle to another, is crucial to the existence of a common issue. As Huddart J.A. stated for the majority in *Harrington v. Dow Corning Corp.*, supra:

More important to a determination of common issues is the requirement that they be "common" but not necessarily "identical." In the context of the Act, "common" means that the resolution of the point in question must be applicable to all who are to be bound by it. I agree with the appellants that to be applicable to all parties, the answer to the question must, at least, be capable of extrapolation to each member of the class or subclass on whose behalf the trial of the common issue is certified for trial by a class proceeding. As the appellants note, this requirement will, of necessity, require that the answer be capable of

extrapolation to all defendants who will be bound by it.
[para. 24; emphasis added.]

Having provided no "evidentiary basis", the plaintiffs did not meet this requirement in this case.

[165] In setting aside the certification order, the Court of Appeal continued further, at para. 33:

... In the case at bar, the plaintiffs failed to establish an evidentiary basis; i.e., to adduce admissible evidence, for the proposition that the determination of the real common issues - whether the fuel system design(s) employed by the defendants breached the applicable standard(s) of care and created an unreasonable risk of harm to the plaintiffs - would advance the litigation in a meaningful way. I conclude that the certification order must therefore be set aside.

[166] Put another way, the plaintiff had failed to establish a basis in fact for the proposition that the answer to the common issue could be applied to the claims of all members of the class.

[167] In *Benning v. Volkswagen Canada Inc.*, 2006 BCSC 1292, [2006] B.C.J. No. 1956 (S.C.), the plaintiff asserted that there was a defect in the locking system of the Volkswagen Jetta and other Volkswagen and Audi vehicles using the same system. He sought certification of a class action on behalf of owners or lessees of such vehicles.

[168] The plaintiff had experienced two break-ins to his Volkswagen vehicle. In both cases, there was damage to the door lock mechanism. An expert metallurgical engineer, with specific expertise in the field of failure analysis and fracture mechanics, expressed the opinion that there was a design flaw in the lock assembly which made it particularly vulnerable to a break-in. Another expert witness for the plaintiff, a mechanical engineer specializing in mechanical and material failures, carried out testing of the door lock mechanism, including destructive testing. He concluded that the design of the lock mechanism made it easy to dislodge and easily opened. He examined, and opined upon, door locks of vehicles of other manufacturers, and concluded that their design prevented them from being opened by a thief armed only with a hammer and a screwdriver.

[169] Gropper J. of the British Columbia Supreme Court declined to certify the action as a class proceeding. She found that it would be impossible to extrapolate the results of the analysis of the fitness of the lock on the plaintiff's vehicle to other vehicles in the class because the nature of the attack would vary from vehicle to vehicle.

[170] Interestingly enough, in a subsequent case, also involving allegedly defective vehicle locks, Dardi J., also of the British Columbia Supreme Court, certified the proceeding: *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, [2010] B.C.J. No. 838 (S.C.). In that case, however, the

manufacturer had addressed the problem by introducing a reinforcement to the lock and further changes in the design and manufacture of the door lock mechanism. As well, it had sent a letter to owners of the affected vehicles advising them of the availability of the reinforcement for the door lock mechanism and offering them \$100 towards the purchase of a shock sensor alarm. The court held that it could be inferred from these facts that there was a commonality in the alleged defect.

Conclusions on Comparative Cases

[171] This brief review demonstrates the need for the plaintiff to demonstrate on certification some factual basis for the proposition that the product owned by the plaintiff shares a common defect with the products owned by all members of the class. The plaintiff need not establish that the defendant is liable for the defect, but it must be shown that the defendant's liability to the class can be extrapolated from a finding in relation to the representative plaintiff.

[172] Thus, in *Chase v. Crane Canada*, there was evidence of an unusually high failure rate amongst toilet tanks manufactured at a particular plant and expert evidence linking the failure to the process employed at that plant. In *Bondy v. Toshiba* and *Griffin v. Dell*, there was evidence that the plaintiffs' computers were shutting down or otherwise failing to perform in normal operating conditions and there was expert evidence linking those failures to deficiencies in design that were shared with other computers in the class. In both cases, there was a factual foundation for the proposition that findings concerning the plaintiffs' computers could be extrapolated to all the computers at issue. In *Koubi v. Mazda Canada*, the actions taken by the manufacturer, which applied to the entire class, helped to establish that there was a defect and that it was common to all the vehicles at issue.

[173] On the other hand, in the cases that were not certified, the evidentiary record did not establish a basis in fact for the common issues. In *Chartrand v. General Motors*, the defect in the plaintiff's vehicle had not been established and there had been no recall of automatic transmission vehicles, which met all relevant standards. There was no evidence that the alleged defect could be determined on a class-wide basis. Similar conclusions were reached in *Poulin v. Ford Motor Co. of Canada* and *Ernewein v. General Motors of Canada Ltd.*

[174] The evidence to establish that the product is defective and that liability can be determined on a class-wide basis, may vary from case to case. In some cases, evidence that the defendant or regulatory authority has made a product recall may be sufficient. In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

[175] I now turn to the test for certification under s. 5(1) of the *C.P.A.*

B. Section 5(1)(a): Cause of Action

[176] Section 5(1)(a) of the *C.P.A.* requires that the pleadings disclose a cause of action. The plaintiffs have set out a number of principles applicable to this requirement, all of which I accept:

- the certification stage is not meant to be a test of the merits of the action;
- the question is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action;
- the proper approach to the section 5(1)(a) requirement is to apply the “plain and obvious” test that is applied on a motion to strike a statement of claim under Rule 21, for failing to disclose a cause of action;
- no evidence is admissible for the purpose 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 pleadings will only be struck if it is *plain and obvious* and beyond doubt that the plaintiff cannot succeed and the action is certain to fail;
- the novelty of the cause of action will not militate against sustaining the plaintiff’s claim;
- matters of law which are not fully settled by the jurisprudence must be permitted to proceed;
- the pleadings must be read generously to allow for drafting inadequacies or frailties and the plaintiff’s lack of access to many key documents and discovery information;
- there is a very low threshold to prove the existence of a cause of action.

[177] The plaintiffs plead:

- (a) breach of contract;

- (b) breach of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;
- (c) breach of section 52 of the *Competition Act*, R.S.C. 1985, c. C-34;
- (d) unjust enrichment; and
- (e) waiver of tort.

[178] The plaintiffs have two fundamental pleading problems. The first is that they purchased their cameras from retailers, not from Canon. This immediately distinguishes this case from *Griffin v. Dell*, where Dell sold directly to the public. The plaintiffs have therefore struggled to find some way of establishing contractual privity with the defendants. They have done this by pleading that the warranty that came with their Cameras puts them in a relationship of privity with Canon. They have also pleaded that the retailers who sold to them were Canon's agents. I will discuss these pleadings below.

[179] The plaintiffs' second problem is that there is no pleading in negligence. I was advised that this was a deliberate decision on the part of plaintiffs' counsel, I assume due to concerns about the recoverability of pure economic loss in the case of allegedly "shoddy" but non-dangerous goods – see *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590, 5 CCLT (3d) 61 (S.C.J.). On the other hand, in *Griffin v. Dell*, above, Lax J. found that the availability of that cause of action was an "open question". Similarly, on a pleadings motion prior to certification in *Bondy v. Toshiba of Canada Ltd.*, [2006] O.J. No. 1655, 35 C.P.C. (6th) 293, Brockenshire J. found that it was not "plain and obvious" that a claim of negligence in design and manufacture was bound to fail, particularly when coupled with a claim for negligent misrepresentation and allegations of a direct relationship between the consumer and the manufacturer.

[180] These problems have forced the plaintiffs to engage in creative and imaginative pleading. I approach the cause of action issue, however, bearing in mind that the principles set out earlier in this section, particularly the direction that the pleadings should be read generously and that the novelty of the cause of action is not a bar to the action proceeding.

1. Breach of Contract

[181] The plaintiff pleads that the standard one-year warranty (referred to in the statement of claim as the "Warranty-Contract") included with the Cameras is a contract between Canon and each class member.

[182] In assessing whether the pleading discloses a cause of action for breach of contract, I am entitled to consider contractual documents (in this case, the warranty) that are referred to in the pleading and that form an integral part of the plaintiff's claim: see *Re*Collections Inc. v. Toronto-Dominion Bank*, 2010 ONSC 6560, [2010] O.J. No. 5686 at para. 107 and cases referred to therein.

[183] The warranty states:

Your PowerShot Digital Camera when delivered to you in new condition in its original container, is warranted against defects in materials or workmanship as follows: for a period of one (1) year from the date of original purchase, defective parts or a defective PowerShot Digital Camera returned to Canon U.S.A. or Canon Canada, or their authorized PowerShot Digital Camera service providers, as applicable, and proven to be defective upon inspection, will be repaired with new or comparable rebuilt parts or exchanged for a refurbished PowerShot Digital Camera, as determined by Canon U.S.A or Canon Canada, or the authorized PowerShot Digital Camera service provider, in their sole discretion.

[184] The warranty provides that the agreement is between the original purchaser and Canon Canada Inc. It continues:

No implied warranty, including any implied warranty of merchantability or fitness for a particular purpose, applies to the PowerShot Camera after the applicable period of the express limited warranty stated above, and no other express warranty or guaranty, except as mentioned above, given by any person or entity with respect to the PowerShot Digital camera shall bind Canon U.S.A or Canon Canada. (some states and provinces do not allow limitations on how long an implied warranty lasts, so, the above limitation may not apply to you).

[185] The plaintiffs plead that the defendants owe the plaintiffs a duty of good faith in the performance of the “Warranty-Contracts” and that they breached the duty of good faith:

[...] by failing to act honestly and reasonably in the exercise of their Warranty-Contracts with the Plaintiffs because the Defendants knew or had reason to know of the Defect, that the Cameras were and are susceptible to the Defect, and the Defendants did not disclose same to the Plaintiffs.

[186] The plaintiffs also plead that because they and other class members did not have a chance to see the warranty prior to the purchase of their cameras, since they did not receive it until they opened the box, the defendants cannot rely on the warranty. As a result, they say that the “unfair terms” of the warranty must be struck, including (a) the waiver of the implied warranties of merchantability and fitness for purpose; (b) the loss of protection under the warranty in the event of misuse; and (c) the one-year limitation of the warranty. This causes me to query how the plaintiffs can rely on the warranty if it has been struck, but it is not necessary to resolve that question.

[187] The pleading with respect to breach of contract is devoid of content. There is no pleading of any contract between Canon and the plaintiffs, other than the warranty, but the warranty is not a contract of sale, it is a contract to repair or replace defective cameras, under certain defined conditions, within one year. The plaintiffs have not pleaded facts that could be a breach of warranty and there is no allegation that the warranty itself has been breached.

[188] It seems to me that the claim based on the warranty must be struck, based on simple contract law. The claim in this action is not based on the warranty – it is based on an alleged defect in the camera itself.

2. Breach of *Consumer Protection Act, 2002*

[189] The plaintiffs claim that Canon breached the *Consumer Protection Act, 2002*, and that they are entitled to damages or, alternatively, a refund of the purchase price paid for their Cameras, under s. 98(3) and s. 100 of the *Consumer Protection Act, 2002*. I will begin by summarizing the pleading and will then analyze it in more detail in order to determine whether a cause of action has been pleaded.

[190] One of the difficulties the plaintiffs have, in pleading the *Consumer Protection Act, 2002*, is a previous decision of mine (in which the same counsel acted for the plaintiff) to the effect that the *Consumer Protection Act, 2002*, does not apply to claims by a consumer against a manufacturer: see *Singer v. Schering-Plough Canada Inc.* (2010), 87 C.P.C. (6th) 276, [2010] O.J. No. 113 (S.C.J.).

The Pleading

[191] The plaintiffs plead that the “Warranty-Contract” given by Canon Canada Inc. is both a “consumer transaction” and a “consumer agreement” within the meaning of the *Consumer Protection Act, 2002*, and that both defendants are “suppliers” for the purpose of the definition of “consumer agreement” in s. 1 of that statute, “by virtue of the fact that Defendants engage in the sale of goods, namely Cameras and the provision of services under a warranty.” They refer in particular to s. 3 of the *Consumer Protection Act, 2002*, which provides:

... [i]n determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

[192] The plaintiffs say that although a “consumer agreement” requires payment, the definition of “payment” under s. 1 is “consideration of any kind” and they plead that “payment” in this case includes the purchase price paid by the plaintiffs to Canon’s authorized retailers and any remuneration paid by the retailers to Canon. They plead that the purchase of the Cameras by class members is “consideration.”

[193] In the alternative, the plaintiffs plead that in substance, the relationship between the defendants and the class members is one of supplier-consumer and therefore the defendants, “through the intervening Authorized Retailers, which are acting as agents for Canon” are deemed to be supplying the Cameras to class members.

[194] The plaintiffs also plead that the defendants have breached the *Consumer Protection Act, 2002*, by engaging in unfair practices by making false and misleading representations or failing to disclose material facts. The alleged false and misleading representations were:

- (a) Non-disclosure of the defect to consumers;
- (b) Canon’s slogan “you always get your shot” is a misrepresentation as to the quality of the Cameras, “warranting a level of reliability which cannot be attained due to the built-in Defect”; and
- (c) Canon’s provision of a standard one-year limited warranty “implies that no inherent Defects were presently known by Canon.”

[195] The plaintiffs say that these were unfair practices and in breach of section 17(1) of the *Consumer Protection Act, 2002*, and were false, misleading and deceptive under s. 14(1) and (2). They say that, as a result of these breaches, they are entitled to a refund under s. 98(3) of the *Consumer Protection Act, 2002*. They plead that the retailers who sold the Cameras were agents of Canon or, alternatively, that the consideration paid by the retainers to Canon was “payment” for the purpose of section 98(3) of the *Consumer Protection Act, 2002*.

[196] They rely on s. 18 of the *Consumer Protection Act, 2002*, which provides that an agreement entered into after a person has engaged in an unfair practice may be rescinded by the consumer and ask that the Court grant an order dispensing with the requirement of notice, under s. 18(15).

[197] The plaintiffs also rely on s. 9(2) of the *Consumer Protection Act, 2002*, which extends the implied conditions and warranties under the *Sale of Goods Act* to goods supplied under a consumer agreement. They plead that Canon breached the implied warranties of merchantability and fitness for purpose and plead that the disclaimer of any such warranties in the “Warranty-Contract” is void under s. 9(3) of the *Consumer Protection Act, 2002*.

[198] They plead that this warranty is a contract between the defendants and each purchaser and that the contract contains both express and implied terms. They plead that the warranties of merchantability and fitness for purpose are implied by law and cannot be waived. They argue that “the law in respect of privity is still developing, it is, thus, not plain and obvious that a consumer cannot maintain a suit directly against a manufacturer under the implied warranties of merchantability and fitness.”

[199] The plaintiffs also plead that the duty of good faith and fair dealing are implied terms of the warranty and that, due to the breach of that duty, the exclusionary terms of the warranty should be struck out.

Analysis

[200] The terms of the Canon warranty (the “Warranty-Contract”) are set out above. It is a warranty against defects in materials and workmanship for a period of one year.

[201] The first question is whether the warranty is a “consumer transaction” and a “consumer agreement” within the meaning of the *Consumer Protection Act, 2002*, and whether the defendants are “suppliers” for the purpose of the definition of “Consumer agreement” in s. 1 of that statute, “by virtue of the fact that Defendants engage in the sale of goods, namely Cameras and the provision of services under a warranty.”

[202] The following statutory definitions are pertinent (s. 1):

“consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

“consumer agreement” means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

“goods” means any type of property;

“payment” means consideration of any kind, including an initiation fee;

“services” means anything other than goods, including any service, right, entitlement or benefit;

“supplier” means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themselves out to be a supplier or an agent of the supplier.

[203] It is certainly arguable, and not plainly and obviously wrong, that by providing the warranty to purchasers of the Cameras, Canon was engaged in a “consumer transaction,” since it was dealing with a consumer.

[204] It is also arguable, and not plainly wrong, that by providing the warranty, Canon was supplying services, namely repair and replacement of defective cameras, and that the consideration for such services was the consumer’s purchase of the camera and that the warranty was a “consumer agreement.”

[205] It is also arguable, and not plainly wrong, that Canon is a supplier of services, to the extent it supplies warranty services.

[206] However, the fact that Canon is a supplier of services under its warranty does not make it a supplier of goods, within the meaning of the *Consumer Protection Act, 2002*, in its dealings with consumers such as the plaintiff and the Class. The plaintiffs plead that they purchased their cameras from retailers and not from Canon. There is no “consumer agreement” with Canon for the purchase and sale of the plaintiffs’ cameras. This has a direct impact on the remedies available to the plaintiffs under the *Consumer Protection Act, 2002*. If there is no agreement with Canon for the purchase of the cameras, there is no agreement to rescind and the alternative remedies under the statute are not available either.

[207] The next question is whether the plaintiffs have properly pleaded a breach of the *Consumer Protection Act, 2002*.

[208] Section 17(1) of the statute provides that “[N]o person shall engage in an unfair practice.” Section 14(1) provides that it is an unfair practice to make a “false, misleading or deceptive representation.” Section 14(2) identifies certain representations that are false and misleading, “[W]ithout limiting the generality of what constitutes a false, misleading or deceptive representation ...” The plaintiffs rely on the following sub-paragraphs of s. 14(2):

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.

...

2. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not ...

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.

[209] As noted earlier, the plaintiffs plead that Canon has made false and misleading representations by virtue of: (a) failing to disclose the defect; (b) its slogan “you always get your shot”; and (c) the one-year warranty implies that no inherent defects are known to Canon.

[210] Reading the statute purposefully and with a view to the protection of the public, it is concerned with unfair practices in relation to the goods or services supplied under the “consumer agreement.” Vis-à-vis the plaintiffs, Canon is not a supplier of goods under its warranty, it is a supplier of services. The prohibition against unfair practices is in relation to the goods or services provided by the supplier. It is not a general prohibition in relation to goods that are supplied to an intermediary, namely the retailer.

[211] Even if I found that the unfair practice could apply to representations relating to the Cameras or that the retailers were, as pleaded, agents of Canon, I would conclude that: (a) there is no positive and general obligation in the statute to disclose defects in the goods; (b) the “slogan”, even if it was properly pleaded, which it has not been, is not a representation, it is an advertising pitch; (c) one cannot reasonably read the warranty as implying the absence of inherent defects – it simply says that if there are defects, Canon will repair them; (d) there is no express representation pleaded that fails to state a material fact. I agree with the submission of the defendants that s. 14(2).14 requires that there be a pleading of an express representation and no such representation has been pleaded.

[212] The final question is whether the pleading discloses a cause of action based on the *Sale of Goods Act* implied conditions and warranties that are incorporated into consumer agreements pursuant to section 9 of the *Consumer Protection Act, 2002*.

[213] Section 9 provides:

(1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.

(2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.

(3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.

(4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing an intent that the

deemed or implied warranty or condition does not apply.
[emphasis added]

[214] In this case, I would be prepared to find, for the purpose of testing the pleadings, that the warranty was a “consumer agreement” for the supply of warranty services. Where the warranty services resulted in the supply of a replacement camera, it might also be possible to say that it was an agreement for the supply of goods – namely, that replacement camera. But the Cameras of the plaintiffs and the Class members were not supplied under the consumer agreement and the warranty is not an agreement for the sale or supply of goods.

[215] Canon concedes that the deemed warranty under s. 9(1) of the *Consumer Protection Act, 2002* applies to services rendered pursuant to its warranty, but the claim in this action does not relate to those services, it relates to the goods. I would be prepared to find, were it relevant, that Canon’s attempt to exclude the implied warranties is void by virtue of section 9(3) of the *Consumer Protection Act, 2002*, but – as I have said – the warranty given by Canon is not in relation to the sale of goods.

[216] For these reasons, I would not find that the plaintiffs have pleaded a cause of action for breach of s. 9 of the *Consumer Protection Act, 2002*, or indeed any cause of action under that statute.

The Pleading of Agency

[217] In the context of the pleading of the *Consumer Protection Act, 2002*, the plaintiffs plead that the substance of the relationship between Class members and Canon is that of supplier and consumer and Canon is therefore “deemed to be supplying the Cameras to the Class Members, through the intervening Authorized Retailers, which are acting as agents for Canon” (para. 47). Similar pleadings are made in paras. 57 and 58 of the statement of claim, in which the plaintiffs claim that the purchase price paid to retailers was received as agents and the Class members are entitled to a refund under s. 98(3) of the *Consumer Protection Act, 2002*.

[218] The defendants submit that these pleadings of agency are pleadings of law, which offend rule 25.06(2), because no material facts are pleaded. Rule 25.06(2) provides:

A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

[219] I agree with this submission: see *Gardner v. The Queen* (1984), 7 D.L.R. (4th) 464, [1984] O.J. No. 3162 (Ont. H.C.), referring to *Paradis v. Vaillancourt*, [1943] O.W.N. 359; *Forensic Support Services Inc. v. Out of the Cold Resource Centre Inc.*, [2005] O.J. No. 2758 (S.C.J.); *Carten v. Canada*, 2009 FC 1224, [2009] F.C.J. No. 1511 at paras. 38-40; *Tompkins v. Alberta Wheat Pool*, [1997] A.J. No. 300. I recognize that in *CIBC v. Vierra*, 2011 ONSC 775, [2011] O.J. No. 530, Bielby J. found that such a pleading was not a pleading of law, but there is no indication that these authorities were brought to his attention.

[220] There being no material facts to support the pleading, it should be struck. In other circumstances, I would give the plaintiffs leave to amend to plead particulars and the defendants an opportunity to make submissions on the amended pleading. In view of the conclusions I have reached, it is not necessary to do so.

3. Breach of Section 52 of the *Competition Act*

[221] The plaintiffs plead that Canon has made false or misleading representations to the public concerning the Cameras and has therefore committed an offence under s. 52 of the *Competition Act*. These misrepresentations were, the plaintiffs plead:

- (a) Canon's failure to disclose the "Defect" to consumers;
- (b) Canon's slogan "you always get your shot" is a misrepresentation in its advertisements as to the quality of the Cameras, warranting a level of reliability which cannot be attained due to the built-in Defect; and
- (c) Canon provided a standard one-year limited warranty, which implies that no inherent Defects were presently known by Canon.

[222] The plaintiffs say that these were false and misleading representations contrary to section 52 of the *Competition Act* and that it is not necessary to establish that any consumer actually relied on these representations.

[223] Section 52(1) provides:

(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.

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

- (a) any person was deceived or misled;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

[224] Section 52 is contained in Part VI of the *Competition Act*, entitled “Offences in Relation to Competition.” It is a regulatory offence and not, in and of itself, a cause of action.

[225] Section 36 of the *Competition Act* contained in Part V, entitled “Special Remedies,” provides a civil cause of action for a person who has suffered loss or damage as a result of conduct contrary to Part VI, such as a breach of s. 52.

[226] The plaintiffs do not plead a cause of action under section 36, presumably due to issues associated with proof of common representations on a class-wide basis. Instead, they assert that the violation of section 52, when taken together with the so-called doctrine of waiver of tort, gives rise to a cause of action. In the words of the plaintiffs’ factum:

... the violation of Section 52 of the *Competition Act* may be utilized in the context of Waiver of Tort, and, when taken together (a statutory violation with Waiver of Tort) constitutes a cause of action. That is to say, a monetary remedy is available under Waiver of Tort by virtue of the pleaded violation of Section 52 of the *Competition Act*.

Referring to: *Serhan Estate v. Johnson & Johnson* (2004), 72 OR (3d) 296, [2004] O.J. No. 2904 (S.C.), at paras. 35-38; and 2038724 *Ontario Ltd. v. Quizno’s Canada Restaurant Corporation* (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.) at paras. 46-48.

[227] Section 52 requires that there be a “representation.” The failure to disclose the alleged defect cannot be a “representation.” Nor would it be a “representation” if one could infer from the warranty that Canon knew of no inherent defects in the Cameras – an inference that cannot reasonably be drawn in any event. Finally, what the plaintiffs claim is a “slogan” – “You always get your shot” – which is not pleaded with any particularity, is nothing more than puffery and not an actionable representation: see *Telus Communications Company v. Bell Mobility Inc.*, 2007 BCSC 518 at para. 19 (“on the most powerful network in Western Canada”); *Stone v. Galaxy Motor Inc.*, [1991] B.C.J. No. 334 (S.C.) (“best car on the lot”). I am simply unable to find that any of the pleaded misrepresentations is capable of sustaining a cause of action.

4. Unjust Enrichment

[228] The plaintiff pleads that Canon has been unjustly enriched by its failure to disclose the “Defect,” because, had the defect been disclosed, Canon would have sold fewer cameras or the cameras would have been sold for less. They plead that consumers have suffered a deprivation, in the form of damages arising out of the defect or because the cameras were purchased at a price that exceeded their true value. They plead that there is no juristic reason for the enrichment and that it would be inequitable for Canon to retain the revenues that it received from its wrongful conduct.

[229] The plaintiffs refer to the well-known test for unjust enrichment set out in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21 at para. 30: There must be (a) an enrichment of the defendant; (b) a corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment.

[230] In *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 2218, 174 O.A.C. 44 (C.A.), the plaintiff brought a proposed class action against a drug manufacturer for health problems suffered as a result of an allegedly defective drug. As part of her claim, she sought reimbursement of the price she had paid for the drug when she bought it from the retailer. The Court of Appeal held that her claim for unjust enrichment had been properly struck, because the purchase price for the drug had been paid to the retailer and not to the manufacturer. Any “enrichment” of the manufacturer was therefore indirect. The Court of Appeal stated, at para. 20:

Third, the appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery. In *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, [1992] 3 S.C.R. 762, McLachlin J. said this at para. 58:

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. [Citations omitted.] 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. *The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant [emphasis added in original quotation].*

[231] This decision is directly applicable to the case before me. To the extent that Canon may have been “enriched” by the purchase of cameras by the plaintiffs, the enrichment was indirect.

[232] Moreover, the existence of a valid contract between the plaintiffs and the retailers, and between the retailers and Canon, is a valid juristic reason for any enrichment: *Bank of Montreal v. ACS Precision Components Partnership*, 2011 ONSC 700, [2011] O.J. No. 857 at para. 43;

Maynes v. Allen-Vanguard Technologies Inc., 2011 ONCA 125, [2011] O.J. No. 644 at paras. 49-52.

[233] I therefore conclude that the pleading does not disclose a cause of action for unjust enrichment.

5. Waiver of Tort

[234] The plaintiffs assert the right, at the common issues trial, to waive entitlement to tort damages and to have damages assessed based on a disgorgement remedy:

As a result of the Defendants' conduct and breach of the aforementioned statutory provisions, the Plaintiffs reserve to themselves the right to elect at the trial of the common issues to waive all relevant pleaded torts, and to have damages assessed in an amount equal to the gross revenues earned by the Defendants, or the net income received by the Defendants from the sale of the Cameras.

[235] The claim appears to be expressed, therefore, on the basis that waiver of tort is a remedy, as opposed to a cause of action. If that is the claim, it is not necessary for me to determine whether the plaintiff has pleaded a tenable cause of action and the issue of entitlement to a disgorgement remedy, if one exists, could simply be left to the common issues judge.

[236] I propose to leave the issue on that basis. In light of my conclusions on the other causes of action, the claim in waiver of tort, if asserted as a cause of action, would fail for lack of an predicate wrongdoing: see *Aronowicz v. Emtwo Properties Inc.* (2010), 98 O.R. (3d) 641, 2010 ONCA 96 at para. 82; *Harris v. Glaxosmithkline Inc.* (2010), 272 O.A.C. 214, 2010 ONCA 872 at paras. 58-59.

6. Summary on cause of action

[237] In summary, the plaintiffs have not pleaded a cause of action in either contract or under the *Consumer Protection Act, 2002*, because they do not – and cannot – plead that they purchased their cameras from Canon. The warranty they received from Canon is not a contract for the sale of their cameras and they do not assert a claim under the warranty. They do not assert a cause of action under s. 36 of the *Competition Act* and they have no cause of action for unjust enrichment because they are unable to assert either a direct enrichment of Canon or the absence of a juristic reason for the enrichment. The claim in waiver of tort fails for lack of a predicate wrongdoing.

C. Section 5(1)(b): Identifiable Class

[238] In an action involving an allegedly defective product, the class will generally consist of those who purchased the product: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 20. As Lax J. noted in *Griffin v. Dell*, above, at para. 70, the class definition in a product liability case will not usually be a matter of controversy, because the relationship between the class and the common issues will be clear from the facts.

[239] The plaintiffs propose the following class definition:

All persons in Canada who, either: (i) purchased one (1) or more of the Cameras, for their own use and/or received the Camera(s) as a gift from someone who purchased the Camera(s), during the Class Period [July 30, 2005 to the date of certification], or, (ii) purchased one (1) or more of the Cameras, for their own use and/or received the Camera(s) as a gift from someone who purchased the Camera(s) and had their Cameras manifest the Error during the Class Period.

[240] I asked plaintiffs' counsel whether the group of Class members within part (ii) of the above definition was not a subset of the class members included within part (i). He explained that the intention was to include people who acquired their cameras before the Class Period in group (ii) if their cameras manifested the E18 Error during the Class Period. I suggested that this could create difficulties of identification, since an assessment would have to be made, in the case of each group (ii) class member, whether his or her camera "manifested" the E18 Error during the Class Period. After reflecting on this issue, plaintiffs' counsel acknowledged that the definition should be amended to delete group (ii).

[241] The class definition is important because it identifies persons who have a potential claim for relief against the defendants. It defines the parameters of the lawsuit by identifying those persons who are bound by the result and it describes who is entitled to notice of certification: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (Ont. Gen. Div.), per Winkler J. at para. 10.

[242] In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, McLachlin C.J. discussed the "identifiable class" requirement, at paras. 38 and 40, as follows:

... 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 ...

...[W]ith 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.

[243] The class definition must also be connected to the common issues raised by the cause of action. As McLachlin C.J. said in *Western Canadian Shopping Centres Inc. v. Dutton* at para. 39, “an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim.”

[244] The plaintiffs submit that the revised definition meets the requirements of a proper class definition because it uses objective criteria, has a rational relationship to the common issues and does not depend on the outcome of the litigation. They submit that the definition is not unduly broad.

[245] The “Cameras” are defined as any one of the twenty Canon models set out earlier, all of which fall within the “PowerShot” family, but they do not include all PowerShot models. Thus, the qualification for membership in the Class is ownership of one of twenty camera models. The problem with the class definition in this case is that there is no evidence to show any commonality between the complaints of the individual plaintiffs Lipner and Schatz, who owned two of the PowerShot models at issue, and the owners of the other eighteen camera models. There is no evidence as to why these twenty models, out of all the other PowerShot models (which were said to be 136) were chosen for inclusion in the class definition and the others were excluded. Why are the other seven PowerShot models inspected by Mr. Atkins not included in the class? Why are the other 116 models not included in the class? What is the feature of these twenty models that the Cameras have that gives commonality to their claims and that the other models do not have?

[246] The evidence of Mr. Joffe does not help us with this issue, because his internet searches did not discriminate between different models of the Canon camera. Nor does the evidence of Mr. Atkins help for the reasons identified above – in fact, it was his opinion that “all Canon PowerShot optical units likely share a reasonably common design and functionality.” If that is the case, why are all PowerShot models not included within the Class definition?

[247] Balanced against this, the evidence of Canon is that only a very small number of the Cameras at issue have needed repairs as a result of the E18 Error message being displayed and

the evidence of Mr. Hieber is to the effect that the cameras of the two representative plaintiffs displayed the message because of conditions that were intended to trigger the error message.

[248] I have concluded that the plaintiffs are unable to articulate a coherent and evidence-based explanation for the class definition and I would not approve it.

D. Section 5(1)(c): Common Issues

1. General Principles regarding Common Issues

[249] Section 5(1)(c) of the *C.P.A.* requires that “the claims or defences of the class members raise common issues.” These are defined 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.”

[250] It has been said that the common issue requirement is a critical inquiry, which lies at the heart of a class proceeding: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 at para. 62 (C.A.).

[251] The principles applicable to the common issues analysis have been set out in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (S.C.J.) at para. 140 and in *McCracken v. Canadian National Railway*, above, at paras. 312-320. The common issues requirement is a “low bar”: see *Cloud v. Canada (Attorney General)*, above, at para. 52.

[252] The plaintiff must, however, adduce evidence to show that there is “some basis in fact” for the existence of common issues: *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. CIBC*, [2009] O.J. No. 2531, 71 C.P.C. (6th) 97, at para. 21 (S.C.J.); *Hollick* at paras. 16-26; *Lambert v. Guidant Corporation* (2009), 72 C.P.C. (6th) 120, [2009] O.J. No. 1910 (S.C.J.) at paras. 56-74; *Cloud v. Canada (Attorney General)*, above, at paras. 49 to 52; *Grant v. Canada (Attorney General)* (2009), 81 C.P.C. (6th) 68, [2009] O.J. No. 5232 (S.C.J.) at para. 21; *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (S.C.J.) at paras. 13-14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 4129 (Div. Ct.); *Ring v. Canada (Attorney General)*, 2010 NLCA 20, [2010] N.J. No. 107 (Nfld. C.A.) at paras. 12-14.

[253] The requirement of “some basis in fact” has been expressed in different ways. In *Grant v. Canada (Attorney General)*, Cullity J. stated at para. 21:

At least for the purposes of the inquiry into commonality, it appears that the evidence must show merely that there is some basis in reality for the assertion that the Class members have claims raising issues in common with the claims of the plaintiff.

[254] In *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, 71 C.P.C. (6th) 97, (S.C.J.) Lax J stated at para. 52:

The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in fact to show that issues are common: *Hollick* at para. 25. An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[255] In his recent decision in *McCracken v. Canadian National Railway*, Justice Perell made a thorough examination of the “some basis in fact” test and the evidentiary burden for certification, noting the overwhelming authority for the propositions that (a) the plaintiff’s evidentiary burden on a certification motion is low; and (b) the plaintiff is only required to adduce evidence to show some “basis in fact” to meet the requirements of ss. 5(1)(b) to (e) of the test for certification as a class action. He also noted, at para. 285:

It is also established that a certification motion is not the time to resolve conflicts in the evidence: *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at para. 50 or to resolve the conflicting opinions of experts: 2038724 *Ontario Ltd v. Quizno’s Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.) at paras 101-102, *aff’d*. [2010] O.J. No. 2683 (C.A.).

[256] Perell J. went on to describe the basis in fact test as a “necessary but not sufficient condition for certification.” He noted at para. 301:

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.

[257] In the context of the common issues analysis in this case, there must be some basis in fact for the plaintiffs’ claims and some basis in fact to enable the court to determine whether the common issue requirement has been satisfied: *Taub v. Manufacturers Life Insurance Co.* (1998),

40 O.R. (3d) 379, [1998] O.J. No. 2694 (Gen. Div.); *Grant v. Canada (Attorney General)* at para. 21. I must determine whether there is a “basis in reality” for the assertion that Class members have claims raising issues in common with the plaintiffs.

[258] Recognizing this obligation, plaintiffs’ counsel submitted that he would establish a basis in fact for the existence of a design defect in the Cameras and a basis in fact that this issue can be determined on a common basis.

2. Common Issues Proposed by the Plaintiffs

[259] The plaintiffs propose the following common issues:

(a) Did the Canon cameras (“Cameras”), listed in the Claim (Schedule A of the Notice of Motion), contain a defect in design that renders the Cameras prone to manifesting the E18 Error? If so, were Defendants aware of this defect? If not, should Canon have been aware of such a defect?

(b) Does the warranty in respect of the Cameras constitute a contract as between the Defendants and the Class Members?

(i) Do the Defendants have duty of good faith and fair dealing in the performance of their Warranty Contract?

(ii) Does the doctrine of fundamental breach apply?

(iii) Are the Defendants barred from relying on the Warranty Contract’s exculpatory clauses as the Class Members could not review same prior to the purchase of the Cameras in sealed boxes?

(iv) If yes to i, ii, or iii, should the court strike the following terms of the Warranty Contract: A) one year time limitation, B) the exculpatory clause (as referred to in the Claim), and C) the waiver of the implied warranties?

(c) Were the Defendants’ representations, listed in paragraph 54 of the Claim (Schedule A of the Notice of Motion), false, misleading, deceiving or did they tend to deceive?

(d) If yes to question c, did the Defendants make materially false and misleading representations to the public in violation of Section 52 of the Competition Act, in respect of the Cameras?

(e) Are the sales of the Defendants' Cameras to Class Members "consumer transactions" and/or "consumer agreements" as defined by Section 1 of the Consumer Protection Act?

(f) If yes to question c or question e, did the Defendants engage in unfair practices or acts in the solicitation, offer, marketing and sale of the Cameras contrary to Part III of the Consumer Protection Act, 2002?

(g) Is the Defendants' warranty a (i) "consumer transaction" or (ii) a "consumer agreement", as defined by Section 1 of the Consumer Protection Act?

(h) Does Section 9(2) of the Consumer Protection Act apply?

(i) If yes to question h (i) Did the Defendants breach the implied warranty of merchantability by supplying the Cameras? (ii) Did the Defendants breach the implied warranty of fitness for a particular purpose by supplying the Cameras?

(j) If the Defendants breached Parts I, II, and/or III of the Consumer Protection Act, are the Class Members entitled to (i) damages, (ii) rescission, (iii) disgorgement of profits, under Sections 18, 94, 98 and/or 100 of the Consumer Protection Act?

(k) Should the court exercise its discretion to waive the notice provisions of Sections 18(3) and 92 of the Consumer Protection Act as permitted by Sections 18(15) and 101 of the Consumer Protection Act?

(l) Were the Defendants unjustly enriched from the sale of the Cameras?

(m) Are the Class Members entitled to elect Waiver of Tort to compel the Defendants to disgorge their revenues or net income in connection with the sale of the Cameras?

(n) Is this an appropriate case to admit statistics under Section 23 of the Class Proceedings Act to determine the amount of the Defendants' liability?

(o) Pursuant to Section 24 of the Class Proceedings Act, should the court determine part or all of the Defendants' liability to the Class Members?

(p) Should the Defendants pay punitive damages to the Class Members?

[260] Counsel for Canon submits that the first issue is the core common issue. The plaintiff's counsel acknowledged that this issue is "Do the Cameras break by virtue of a design defect" and that most of the remaining common issues are legal questions. For reference, I repeat the first common issue:

Did the Canon cameras ("Cameras"), listed in the Claim ... contain a defect in design that renders the Cameras prone to manifesting the E18 Error? If so, were Defendants aware of this defect? If not, should Canon have been aware of such a defect?

[261] I agree that the fundamental question regarding the common issues is whether the plaintiffs have established a basis in fact for the existence of a design defect, common to all the Cameras, that causes the E18 Error message to appear and renders the Cameras inoperable. If there is a basis in fact for the first common issue, then some of the other issues will be appropriate for certification. If there is no basis in fact for this issue, then the resolution of the remaining issues would be of purely academic interest and would not move the action forward.

[262] The obstacle to certification of the proceeding is the absence of admissible evidence to show that the plaintiffs' claims give rise common issues of fact. As I have noted, there is no evidence to show that the E18 Error message displayed by the plaintiffs' cameras is caused by a defect. Nor is there evidence to show that the answer to this question can be extrapolated from the plaintiffs' cameras to the Cameras of the class in such a way as to advance the resolution of every class member's claim.

[263] To begin with, there is no admissible evidence that the display of the E18 Error message in the plaintiffs' cameras is anything other than an indication that the cameras were doing exactly what they were programmed to do – shut down and warn the user that the lens cannot extend in safety. This may be frustrating to the user, who will not necessarily know why the camera has stopped working and is refusing to start up again, but according to the evidence of Mr. Hieber, it is a built-in safety feature, designed to prevent further damage. This is not a case, like *Griffin v. Dell* or *Bondy v. Toshiba*, where the product unexpectedly shut down for no reason. In this case, the product was designed to shut down in certain conditions and there is no admissible evidence that the plaintiffs' cameras shut down for any reason attributable to defective design. The evidence of Mr. Hieber, who was the only qualified expert to actually inspect the plaintiffs' cameras, is that they probably experienced the E-18 Error message due to conditions unique to each camera that triggered the message because the barrel of the lens was being prevented from extending in the normal manner and within the pre-programmed time.

[264] Moreover, there is no evidence that liability for the defect, if there is one, in the twenty Canon PowerShot models referred to in the statement of claim, can be determined on a common basis. The evidence of Mr. Hieber is that while there is a similarity in the basic design of the

PowerShot cameras and the cameras have some common features, there are differences in their design and construction. There is no evidence to show that the similarities are such that the causes of the E18 Error can be determined on a common basis.

[265] Mr. Atkins, based on an inspection of the 11 “exemplar” cameras (7 of which were in the PowerShot product line but not amongst the Cameras included in the class proceeding), purported to say that “Based on the variety of cameras that we inspected, it is our opinion that all Canon PowerShot optical units likely share a reasonably common design and functionality.” This comes from a witness who had no prior experience in camera inspection, no experience in camera design and who had not even examined the optical units of the plaintiffs’ cameras.³ On cross-examination, Mr. Atkins admitted that this conclusion was an assumption on his part and that the only way he could know it would be by examining every single model. He also acknowledged that while the display of the E18 Error could be “consistent” with a design deficiency, it could also be consistent with other causes, such as impact damage or debris within the camera.

[266] In re-examination of Mr. Atkins, plaintiffs’ counsel asked him, on the assumption that he examined eleven cameras out of a PowerShot line of 136 cameras, whether he had on a statistical basis, a particular level of confidence in his conclusion that the eleven cameras were representative of the PowerShot line and that the optical units of the cameras were “reasonably identical in design ...” The witness replied that he had a “very high level of confidence” in his conclusion.

[267] There are two problems with this conclusion. The first is that, not being an expert in the field and never having seen the optical units in the plaintiffs’ cameras, the witness was in no position to judge whether the design of one optical unit was the same as any other units, let alone whether they were similar to the design of the optical units in the plaintiffs’ cameras. Second, statistics and probabilities have nothing to do with the determination of whether the design of one camera is the same as the design of another. The witness properly admitted on cross-examination that the only way to be sure was to examine the cameras themselves.

[268] I might note in passing that it is clear that there are many cameras in the PowerShot line that are not included in this proceeding. The number of such cameras has not been clearly identified, although Mr. Atkins himself examined seven cameras that are not at issue in this proceeding and reference was made in the cross-examinations and in the factum of the plaintiffs to 136 models. No explanation has been given as to how the twenty cameras at issue were identified, out of all the PowerShot cameras produced by Canon, for the purpose of inclusion in this proceeding. If Mr. Atkins’ conclusions are valid, no explanation has been given as to how the twenty cameras at issue in this proceeding have been selected.

[269] I note as well that this is not a case, such as *Griffin v. Dell*, in which the court has received evidence to establish that many other consumers (in that case over 400) have

³ Mr. Atkins attended to observe the inspection of the plaintiffs’ cameras by Mr. Hieber, but he did not inspect them himself, and Mr. Hieber did not disassemble the cameras to observe the optical units.

experienced the very problem of which the representative plaintiffs complain. The evidence of Mr. Joffe, which I find is inadmissible in any case, does not differentiate between “correct” E18 Error messages and “false” E18 Error messages – that is, between messages correctly identifying an obstruction of the movement of the lens and messages falsely shutting down the camera for other reasons, one of which is allegedly inadequate design. Nor does Mr. Joffe’s report differentiate between the Cameras that are included in the class and all the other cameras in the PowerShot line that are outside the class. The data is entirely useless for the purpose of establishing a common issue relating to design.

[270] In closing on this point, I should note that the plaintiffs submitted in their factum that they were unable, at this stage of the litigation, to make “a definitive determination of the existence of the Defect,” because they “were prohibited from requesting the schematics and related technical drawings and specifications of the Defendants’ Cameras” by an order of the court dated October 6, 2010. What the plaintiffs neglected to mention is that the order in question was made on consent, and dealt with a number of issues including the addition of three new plaintiffs and the removal of Mr. Berkovits, the delivery of a fresh as amended statement of claim, the inspection of the plaintiffs’ cameras and other issues. The issue of whether the plaintiffs were entitled to the production of the defendants’ technical drawings and other information was never argued, presumably because the plaintiffs concluded that they were content to proceed without them.

[271] As I find the plaintiffs’ first common issue is incapable of certification, the resolution of the remaining issues, which hinge on it, would do nothing to advance the claims of the class. Moreover, I have found that the plaintiffs have not pleaded any of the causes of action on which these common issues are based. I therefore do not propose to comment on them.

E. Section 5(1)(d): Preferable Procedure

[272] Section 5(1)(d) of the *C.P.A.* requires that a class proceeding must be “the preferable procedure for the resolution of the common issues.” In view of my findings that the fundamental common issue is inappropriate for certification, it is obvious that this action does not meet that aspect of the test.

F. Section 5(1)(e): Representative Plaintiffs

[273] Section 5(1)(e) of the *C.P.A.* requires that there be 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.

[274] Representation has been problematic in this case. The original representative plaintiff, Mr. Berkovitz, withdrew in October, 2010. It was his evidence that he no longer had the camera as his children had been playing with it and apparently damaged it. As a result, it was impossible longer had to determine the cause of the E18 Error message. Mr. Williams has, as I have noted, also removed himself as a representative plaintiff. The evidence does not establish that his camera is affected by an E18 Error message.

[275] That leaves Mr. Lipner and Ms. Schatz. For the purpose of this discussion, I will assume that there is a debate about whether their cameras displayed the E18 Error due to customer abuse or misuse, as Mr. Hieber opined, or for some other reason.

[276] The defendants make a vigorous attack on the adequacy of these plaintiffs. They contend that:

(a) the representative plaintiff must demonstrate that he or she has a general understanding of the class action procedure and the nature of the lawsuit, in order that he can properly instruct counsel;

(b) the evidence must demonstrate that the plaintiff will be able to discharge these responsibilities and capably and vigorously prosecute the action to advance the interests of the class: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.) at para. 41; *Poulin v. Ford Motor Company of Canada Ltd.*, [2008] O.J. No. 4153 (Div. Ct.) at para. 62;

(c) the representative plaintiff is not a mere placeholder, but rather must serve as a genuine client actively engaged in instructing counsel and directing the action on behalf of other persons with a direct interest in the common issues: *Chartrand v. General Motors Corporation*, 2008 BCSC 1781 at para. 99; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (S.C.J.) at para. 219.

[277] Canon says that neither Lipner nor Schatz displayed the degree of familiarity or interest with the litigation that would be displayed by a real litigant who was engaged in his or her own proceedings. Lipner displayed a lack of appreciation of the statement of claim and of the models at issue in the proceeding. Questions to both Lipner and Schatz concerning their understanding of the role and responsibility of a representative plaintiff were refused.

[278] I make no finding that Mr. Lipner and Ms. Schatz were recruited. They clearly had sufficient concern about an issue affecting their cameras that they were prepared to undertake the role of representative plaintiff. If the issue of representation was the only matter standing in the way of certification, I would be prepared to make a more thorough examination of this issue and of the proposed representatives and the litigation plan. In the circumstances, it is unnecessary to do so.

V. Conclusion

[279] As is so often the case in Canadian class actions, this action appears to have followed on the heels of a class action in the United States: *In Re Canon Cameras Litigation*, 237 F.R.D. 357, 2006 U.S. Dist. LEXIS 62176 (S.D.N.Y. 2006). There were a number of cameras within the scope of the action and a number of complaints were made, including but by no means limited to complaints relating to the “E-18 Defect subclass,” which referred to three of the cameras included in this action. While the test for certification of a class proceeding under Rule 23 of the *Federal Rules of Civil Procedure* differs from the requirements of the *Class Proceedings Act*,⁴ it is interesting to note that the United States District Court denied the motion for certification, finding that questions of law or fact common to the members of the class did not predominate over questions affecting only individual members. The Court also found that a class action was not superior to other available methods for the fair and efficient adjudication of the controversy.

[280] The court described the history of the action as “a lawsuit in search of a basis.” It observed that the plaintiffs had “not shown that more than a tiny fraction of the cameras in issue malfunctioned *for any reason*.” It found that proof that the camera had malfunctioned would be a prerequisite to any of the plaintiffs’ claims but that the class consisted overwhelmingly of owners of cameras that had not malfunctioned at all. Further, the court said that it was undisputed that where cameras did malfunction, many were due to causes such as consumer misuse, which would not result in liability under any theory, and the determination of a malfunction would require highly individualized fact-finding. The court continued:

To be sure, this problem, in the abstract, may be present in many product design cases in which a class is nonetheless certified. But here, where the portion of the proposed class that even suffered malfunctions appears to be tiny, plaintiffs’ proposal to certify the class of all camera owners, then determine which few suffered malfunctions, and then determine which few of those few even arguably can attribute the malfunctions to the design defect here alleged, would render the class action device nothing more than a façade for conducting a small number of highly individualized cases.

[281] As I noted earlier, when this action was originally commenced, in 2007, the statement of claim pleaded that the E18 Error was caused by a defect in the “algorithm” used by the Cameras’ internal processor. While this theory has since been scrapped, the plaintiffs have failed to replace it with any alternative theory that is grounded in the evidence. There is no evidence at all that the plaintiffs’ cameras have a “defect.” Nor is there any evidence to establish a factual

⁴ Under Rule 23(a), the threshold prerequisites to certification of a class action are numerosity, commonality, typicality and adequacy of representation. If these requirements are met, the plaintiff s are required to establish that they meet one of the three alternative conditions in Rule 23(b) which, in this case, was the condition that that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy

basis for the proposition that all Cameras in the proposed class share the same defect or that the defendants' liability for that defect can be established on a common basis.

[282] In the course of submissions, I asked plaintiffs' counsel why no effort had been made to present foundational evidence on these issues through an expert in camera design and construction. Mr. Juroviesky replied, very candidly, that he had looked for a digital camera expert but had been unable to find anyone, other than Mr. Atkins, whose shortcomings I have described. The fact that the plaintiffs are unable to meet the low "basis in fact" test in relation to subsections (b), (c) and (d) of section 5(1) of the *C.P.A.* through qualified expert evidence confirms my view that this is an appropriate case to exercise the Court's "gatekeeper" role by refusing certification.

[283] For these reasons, the motion for certification is dismissed. Costs, if not resolved, may be addressed by written submissions.

G.R. Strathy J.

Released: November 8, 2011

CITATION: *Williams v. Canon Canada Inc.*, 2011 ONSC 6571
COURT FILE NO.: 07-CV-335257CP
DATE: 20111108

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

**JAMES WILLIAMS, KATHLEEN SCHATZ
and RAFAEL LIPNER**

Plaintiffs/Moving Parties

- and -

CANON CANADA INC. and CANON INC.

Defendants/Respondents

REASONS ON MOTION FOR CERTIFICATION

G.R. Strathy J.

Released: November 8, 2011

**Pro-Sys Consultants Ltd. and
Neil Godfrey** *Appellants*

v.

**Microsoft Corporation and Microsoft Canada
Co./Microsoft Canada CIE** *Respondents*

and

Attorney General of Canada *Intervener*

**INDEXED AS: PRO-SYS CONSULTANTS LTD. v.
MICROSOFT CORPORATION**

2013 SCC 57

File No.: 34282.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella,
Rothstein, Cromwell, Moldaver, Karakatsanis and
Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Civil procedure — Class actions — Certification — Indirect purchasers — Plaintiffs suing defendants for unlawful conduct in overcharging for its PC operating systems and PC applications software — Plaintiffs seeking certification of action as class proceeding under provincial class action legislation — Whether indirect purchaser actions are available as a matter of law in Canada — Whether certification requirements are met — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

P brought a class action against M, alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. P sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“CPA”). The proposed class is made up of ultimate consumers, known as “indirect purchasers”, who acquired M’s products from re-sellers.

**Pro-Sys Consultants Ltd. et
Neil Godfrey** *Appelants*

c.

**Microsoft Corporation et Microsoft Canada
Co./Microsoft Canada CIE** *Intimées*

et

Procureur général du Canada *Intervenant*

**RÉPERTORIÉ : PRO-SYS CONSULTANTS LTD. c.
MICROSOFT CORPORATION**

2013 CSC 57

N° du greffe : 34282.

2012 : 17 octobre; 2013 : 31 octobre.

Présents : La juge en chef McLachlin et les juges
LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis et Wagner.

**EN APPEL DE LA COUR D’APPEL DE LA
COLOMBIE-BRITANNIQUE**

Procédure civile — Recours collectifs — Certification — Acheteurs indirects — Action intentée contre les défenderesses au motif qu’elles auraient agi illégalement en majorant le prix de leurs systèmes d’exploitation et de leurs logiciels d’application pour ordinateur personnel — Demande de certification d’une action à titre de recours collectif en application des dispositions provinciales sur les recours collectifs — L’acheteur indirect dispose-t-il d’un recours en droit canadien? — Respect des conditions de certification — Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1).

P a intenté contre M un recours collectif dans lequel elle allègue que, à compter de 1988, M a agi illégalement en majorant le prix de ses systèmes d’exploitation et de ses logiciels d’application pour ordinateur personnel compatibles avec le processeur Intel. P a demandé la certification de son action à titre de recours collectif en application de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (« CPA »). Le groupe proposé se compose des consommateurs finaux, appelés « acheteurs indirects », qui ont acheté des produits de M à des revendeurs.

The British Columbia Supreme Court found that the certification requirements set out in s. 4(1) of the *CPA* were met and certified the action. The majority of the Court of Appeal allowed M's appeal, set aside the certification order and dismissed the action, determining that indirect purchaser actions were not available as a matter of law in Canada and therefore that the class members had no cause of action under s. 4(1)(a) of the *CPA*.

Held: The appeal should be allowed.

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 the indirect purchasers as a result of the overcharge being "passed on" to them through the chain of distribution. The argument that indirect purchasers should have no cause of action because passing on has been rejected as a defence in Canada should fail.

The passing-on defence, which was typically advanced by an overcharger at the top of a distribution chain, 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. This defence has been rejected by this Court in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, and that rejection is not limited to the context of the imposition of *ultra vires* taxes; the passing-on defence is rejected throughout the whole of restitutionary law.

However, the rejection of the passing-on defence does not lead to a corresponding rejection of the offensive use of passing on. Therefore, indirect purchasers should not be foreclosed from claiming losses passed on to them. The risk of double or multiple recovery where actions by direct and indirect purchasers are pending at the same time or where parallel suits are pending in other jurisdictions can be managed by the court. Furthermore, indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages. In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss, and whether they have met their burden of

La Cour suprême de la Colombie-Britannique a conclu que les conditions de certification prévues au par. 4(1) de la *CPA* étaient réunies et elle a certifié l'action. Les juges majoritaires de la Cour d'appel ont accueilli l'appel de M, annulé l'ordonnance de certification et rejeté l'action après avoir statué que l'acheteur indirect n'a pas de recours en droit canadien et que les membres du groupe n'avaient donc pas de cause d'action comme l'exige l'al. 4(1)(a) de la *CPA*.

Arrêt : Le pourvoi est accueilli.

L'acheteur indirect a une cause d'action contre l'auteur de la majoration qui se situe au sommet de la chaîne de distribution et qui l'aurait indirectement lésé du fait que la majoration lui a été « transférée » en aval dans la chaîne de distribution. On ne peut retenir l'argument selon lequel l'acheteur indirect ne doit se voir reconnaître aucune cause d'action en raison du rejet du transfert de la perte comme moyen de défense au Canada.

Le moyen de défense fondé sur le transfert de la perte, généralement invoqué par l'auteur de la majoration situé au sommet de la chaîne de distribution, voulait que si l'acheteur direct absorbait la majoration puis la transférait à ses propres clients, l'auteur de la majoration ne réalisait pas le bénéfice au détriment de l'acheteur direct, celui-ci ne subissant aucune perte. Ce « transfert » de la majoration était donc invoqué en défense à l'action intentée par l'acheteur direct contre l'auteur de la majoration. La Cour a rejeté ce moyen de défense dans *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, et ce rejet ne vaut pas que pour l'imposition d'une taxe *ultra vires*; le moyen de défense fondé sur le transfert de la perte est toujours exclu aux fins du droit de la restitution.

Cependant, le rejet du transfert de la perte comme moyen de défense n'entraîne pas son exclusion comme cause d'action. En conséquence, l'acheteur indirect ne doit pas se voir empêcher de recouvrer le montant de la perte qui lui a été transférée. Le tribunal peut gérer le risque de recouvrement double ou multiple lorsque l'action de l'acheteur direct et celle de l'acheteur indirect sont en instance simultanément ou lorsque des poursuites sont intentées parallèlement dans d'autres ressorts. Par ailleurs, il n'y a pas lieu de faire totalement obstacle à l'action de l'acheteur indirect pour la seule raison qu'il sera ardu d'établir le préjudice subi. L'acheteur indirect qui intente une action contracte volontairement l'obligation d'établir qu'il a subi une perte, et la question

proof is a factual question to be decided on a case-by-case basis. In addition, allowing the offensive use of passing on will not frustrate the deterrence objectives of Canadian competition laws. Indirect purchaser actions may, in some circumstances, be the only means by which overcharges are claimed and deterrence is promoted. Finally, 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 reserving these actions for direct purchasers who may have in fact passed on the overcharge.

The first requirement for certification at s. 4(1) of the *CPA* requires that the pleadings disclose a cause of action. 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. In the case at bar, the pleadings disclose causes of action that should not be struck out at this stage of the proceedings.

First, it cannot be said that the pleadings do not disclose a cause of action under s. 36 of the *Competition Act*. The contention that the s. 36 cause of action is not properly pleaded because it was not included in the statement of claim and that any attempt to add it now would be barred by the two-year limitation period contained in s. 36(4) of the Act is purely technical and should be rejected. The argument that the Competition Tribunal should have jurisdiction over the enforcement of the competition law should also be rejected, since s. 36 expressly confers jurisdiction on the court to entertain the claims of any person who suffered loss by virtue of a breach of Part VI of the Act.

Next, it is not plain and obvious that the claim in tort for predominant purpose conspiracy cannot succeed. The contention that the tort of predominant purpose conspiracy is not made out because the statement of claim fails to identify one true predominant purpose and instead lists overlapping purposes should fail at this stage of the proceedings. Similarly, the argument that the predominant purpose conspiracy claim should be struck as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should fail because it is not plain and obvious that the law considers parent and wholly-owned subsidiary corporations to always act in combination.

Similarly, at this point, it is not plain and obvious that there is no cause of action in tort for unlawful means conspiracy or intentional interference with economic

de savoir s'il s'est acquitté ou non de son fardeau de preuve tient aux faits de l'espèce. En outre, permettre d'alléguer en demande le transfert de la perte ne nuira pas aux objectifs de dissuasion des dispositions canadiennes sur la concurrence. Dans certaines circonstances, l'action de l'acheteur indirect peut offrir le seul moyen de recouvrer la majoration et d'assurer la dissuasion. Enfin, permettre à l'acheteur indirect d'intenter une action en justice s'accorde 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, peut ainsi être indemnisée.

La première condition de certification prévue au par. 4(1) de la *CPA* veut que les actes de procédure révèlent une cause d'action. Le demandeur ne satisfait pas à la condition lorsque, à supposer que les faits invoqués soient vrais, la demande ne pourrait manifestement pas être accueillie. En l'espèce, les actes de procédure révèlent des causes d'action qu'on ne saurait radier à ce stade de l'instance.

Premièrement, on ne peut affirmer que les actes de procédure ne révèlent pas une cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence*. La prétention que la cause d'action fondée sur l'art. 36 est irrégulièrement plaidée parce qu'elle ne figure pas dans la déclaration et que le délai de prescription de deux ans imparti au par. 36(4) de la Loi fait obstacle à l'ajout de cette cause d'action est purement technique et doit être rejetée. Celle voulant que c'est au Tribunal de la concurrence qu'il appartient de faire respecter le droit de la concurrence doit également être rejetée puisque l'art. 36 confère expressément compétence à une cour de justice pour statuer sur toute réclamation d'une personne à qui une violation de la partie VI a infligé une perte.

Ensuite, on ne saurait dire qu'il ne peut manifestement pas être fait droit à l'allégation relative au délit civil de complot visant principalement à causer un préjudice. La thèse voulant que l'allégation ne soit pas étayée parce que la déclaration ne révèle pas un véritable objet principal, mais en énumère en fait plusieurs qui se chevauchent, doit être rejetée à ce stade de l'instance. Il convient également de rejeter la demande de radiation de l'allégation de complot entre une société mère et une filiale visant principalement à causer un préjudice car il n'est pas manifeste que, sur le plan juridique, une société mère et une filiale à 100 p. 100 agissent toujours de concert.

Aussi, l'inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle

interests. 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 *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. Depending on the decision of this Court in *Bram*, it will be open to M to raise the matter at trial should it consider it advisable to do so.

With respect to the restitutionary claim in unjust enrichment, it is not plain and obvious that it cannot succeed. With respect to the argument that any enrichment received by M 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, it is not 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. The question of whether the contracts between M and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers, which could constitute a juristic reason for the enrichment, are illegal and void should not be resolved at this stage of the proceedings and must be left to the trial judge.

The pleadings based on constructive trust must be struck. 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. In the present case, there is no referential property. P makes a purely monetary claim. As the 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 this claim cannot succeed.

Finally, it is not plain and obvious that a cause of action in waiver of tort would not succeed. There is contradictory law as to the question of whether the underlying tort needs to be established in order to sustain an action in waiver of tort. 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.

aux intérêts financiers n'est pas manifeste à ce stade. Ces causes d'action alléguées doivent être examinées sommairement car, dans le dossier *Bram Enterprises Ltd. c. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 R.N.-B. (2^e) 215, autorisation d'appel accordée, [2012] 3 R.C.S. v., actuellement en délibéré, notre Cour ne s'est pas encore prononcée sur l'approche qui s'impose à l'égard de l'exigence, commune aux deux délits civils, du recours à des moyens illégaux. Selon l'issue du pourvoi dans *Bram*, M pourra demander à la juridiction de première instance de statuer sur ce point si elle le juge opportun.

S'agissant de la demande de restitution fondée sur l'enrichissement sans cause, il n'est pas manifeste qu'il ne peut y être fait droit. En ce qui concerne la thèse voulant que l'enrichissement de M provienne des acheteurs directs, et non des membres du groupe, et que son absence de lien direct avec ces derniers scelle le sort de l'allégation d'enrichissement sans cause, il n'est pas manifeste que l'enrichissement sans cause ne sera établi que si le lien entre la demanderesse et la défenderesse est direct. Il n'y a pas lieu, à ce stade de l'instance, de statuer sur la question de savoir si les contrats entre M et les acheteurs directs et entre les acheteurs directs et les acheteurs indirects, lesquels pourraient constituer la cause juridique de l'enrichissement, sont illégaux et nuls; il appartient au juge du procès de le faire.

Les allégations relatives à l'existence d'une fiducie par interprétation doivent être radiées. Pour faire la preuve d'une fiducie par interprétation, le demandeur doit pouvoir établir un lien ou un rapport de causalité entre sa contribution et l'acquisition d'un bien. Nul bien n'est en cause en l'espèce. P réclame seulement une réparation pécuniaire. Étant donné qu'elle n'indique pas en quoi une réparation pécuniaire serait inappropriée ou insuffisante, et qu'elle n'établit pas de lien avec un bien en particulier, l'allégation ne satisfait pas aux conditions d'imposition d'une fiducie par interprétation. Au vu des actes de procédure, il est manifeste qu'on ne saurait faire droit à cette allégation.

Enfin, il n'est pas manifeste que le demandeur qui fonde son action sur la renonciation au recours délictuel sera débouté. Le droit est contradictoire quant à savoir si le délit civil sous-jacent doit être prouvé ou non pour les besoins d'une action fondée sur la renonciation au recours délictuel. Il ne convient pas de statuer plus avant, dans le cadre du pourvoi, sur le droit applicable en matière de renonciation au recours délictuel, ni sur le contexte particulier dans lequel on peut invoquer celle-ci.

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 decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158: the class representative must show some basis in fact for each of the certification requirements set out in the provincial class action legislation, other than the requirement that the pleadings disclose a cause of action. The certification stage is not meant to be a test of the merits of the action, rather, this stage is concerned with form and with whether the action can properly proceed as a class action. The 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. Although evidence has a role to play in the certification process, the standard of proof does not require evidence on a balance of probabilities. 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. 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 not having been met.

In the case at bar, the applications judge's finding that the claims raised common issues is entitled to deference. 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. With respect to the common issues that ask whether loss to the class members can be established on a class-wide basis, they require the use of expert evidence in order for commonality to be established. The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement — it 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. The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question, and there must be some evidence of the availability of the data to which the methodology

Le point de départ pour déterminer la norme de preuve applicable aux autres conditions de certification réside dans l'arrêt *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158 : le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions que prévoit les dispositions provinciales sur les recours collectifs, sauf celle voulant que les actes de procédure révèlent une cause d'action. L'examen au fond est écarté à l'étape de la certification, laquelle intéresse plutôt la forme et le caractère approprié de la poursuite par voie de recours collectif. Suivant la norme de preuve applicable, la question n'est pas celle de savoir si la demande a un certain fondement factuel, mais bien si un certain fondement factuel établit chacune des conditions de certification. Bien que la preuve importe aux fins de la certification, la norme de preuve n'exige pas une preuve selon la prépondérance des probabilités. La procédure de certification ne comporte pas d'examen au fond de la demande et elle ne vise pas à déterminer le bien-fondé des allégations; elle intéresse plutôt la forme que revêt l'action pour déterminer s'il convient de procéder par recours collectif. L'issue d'une affaire dépend des faits qui lui sont propres. Suffisamment de faits doivent permettre de convaincre le tribunal que les conditions de certification sont réunies de telle sorte que l'instance puisse suivre son cours sous forme de recours collectif sans s'écrouler à l'étape de l'examen au fond à cause du non-respect des conditions applicables.

En l'espèce, la conclusion du juge selon laquelle les demandes soulèvent des questions communes commande la déférence. Établir la communauté des questions n'exige pas la preuve que les actes allégués ont effectivement eu lieu; à ce stade, il faut plutôt établir que les questions soulevées sont communes à tous les membres du groupe. Démontrer le caractère commun des questions — la perte subie par les membres peut-elle être circonscrite à l'échelle du groupe? — commande le recours à une preuve d'expert. La méthode d'expert doit être suffisamment valable ou acceptable pour établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune; elle doit offrir une possibilité réaliste d'établir la perte à l'échelle du groupe, de sorte que, si la majoration est établie à l'issue de l'examen des questions communes au procès, un moyen permette de démontrer qu'elle est commune aux membres du groupe. Il ne peut s'agir d'une méthode purement théorique ou hypothétique; elle doit reposer sur les faits de l'affaire, et l'existence des données auxquelles la méthode est censée s'appliquer

is to be applied. Resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification.

The applications judge's decision to certify as common issues whether damages can be determined on an aggregate basis and if so, in what amount, should not be disturbed. The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue should only be 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. 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.

The applications judge's finding that the class action is the preferable procedure should not be interfered with. In the present case, there are common issues related to the existence of the causes of action and there are also common issues related to loss to the class members. 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 M'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 in this case, a resolution of the common issues would significantly advance the action.

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Referred to: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55, aff'd 2013 SCC 58, [2013] 3 S.C.R. 545; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161;

doit être étayée par quelque preuve. Trancher entre des preuves d'expert contradictoires relève du juge du procès et ne doit pas intervenir à l'étape de la certification.

La décision de certifier à titre de questions communes l'opportunité d'établir les dommages-intérêts de manière globale et, dans l'affirmative, la détermination du montant de ces dommages-intérêts, ne doit pas être réformée. La question de savoir si l'octroi de dommages-intérêts globaux constitue une réparation appropriée peut être certifiée comme question commune. Cependant, cette question commune ne sera tranchée qu'au procès, une fois la responsabilité établie. La décision relative à l'applicabilité des dispositions de la *CPA* sur les dommages-intérêts globaux doit appartenir en fin de compte au juge du procès appelé à statuer sur les questions communes. L'omission de proposer ou de certifier à titre de question commune l'opportunité d'accorder des dommages-intérêts globaux ou une autre réparation n'empêche pas le juge du procès de se fonder sur les dispositions s'il l'estime indiqué.

La conclusion du juge saisi des demandes selon laquelle le recours collectif constitue la meilleure procédure ne doit pas être modifiée. Dans la présente affaire, non seulement l'existence de causes d'action, mais aussi la perte subie par les membres du groupe, constituent des questions communes. On peut dire que la perte constitue une question commune car il a été déterminé qu'une méthode proposée par un expert permettrait assez certainement d'établir la perte à l'échelle du groupe. Le règlement des questions communes devrait permettre de statuer sur la responsabilité de M et sur le transfert de la majoration aux acheteurs indirects. Puisqu'il est essentiel de statuer sur ces points afin que les membres du groupe puissent recouvrer le montant de la perte, le règlement des questions communes ferait progresser substantiellement l'instance.

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J. J. Camp, Q.C., Reidar Mogerman, Melina Buckley and Michael Sobkin, for the appellants.

Neil Finkelstein, James Sullivan, Catherine Beagan Flood and Brandon Kain, for the respondents.

John S. Tyhurst, for the intervener.

The judgment of the Court was delivered by

ROTHSTEIN J. —

TABLE OF CONTENTS

	Paragraphe
I. Introduction	1
II. Background.....	3
III. The Proceedings Below	6

Thimmesch, Adam. « Beyond Treble Damages : *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.* » (2005), 90 *Iowa L. Rev.* 1649.

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J. J. Camp, c.r., Reidar Mogerman, Melina Buckley et Michael Sobkin, pour les appelants.

Neil Finkelstein, James Sullivan, Catherine Beagan Flood et Brandon Kain, pour les intimées.

John S. Tyhurst, pour l’intervenant.

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

TABLE DES MATIÈRES

	Paragraphe
I. Introduction	1
II. Contexte.....	3
III. Décisions des tribunaux inférieurs	6

A. Certification Proceedings in the British Columbia Supreme Court.....	6	A. Procédure de certification devant la Cour suprême de la Colombie-Britannique.....	6
B. Appeal of the Certification to the British Columbia Court of Appeal.....	10	B. Appel de la certification devant la Cour d'appel de la Colombie-Britannique	10
IV. Analysis	14	IV. Analyse	14
A. Indirect Purchaser Actions (the “Passing-On” Issue)	15	A. Action de l’acheteur indirect (la question du « transfert de la perte »)	15
(1) Rejection of Passing On as a Defence.....	18	(1) Rejet du transfert de la perte comme moyen de défense	18
(2) Significance of the Passing-On Defence in This Appeal	30	(2) Importance en l’espèce du moyen de défense fondé sur le transfert de la perte	30
(3) Analysis of the “Necessary Corollary” Argument.....	34	(3) L’argument du « corollaire nécessaire »	34
(a) Double or Multiple Recovery	35	a) Recouvrement double ou multiple.....	35
(b) Remoteness and Complexity	42	b) Caractère indirect et complexité	42
(c) Deterrence.....	46	c) Effet dissuasif	46
(d) Restitutionary Principles.....	50	d) Principes de la restitution	50
(e) Departure From the Rule in <i>Illinois Brick</i> in the United States.....	51	e) Dérogation à la règle établie aux États-Unis dans l’arrêt <i>Illinois Brick</i>	51
(f) Doctrinal Commentary	52	f) Doctrine	52
(4) Conclusion on the Offensive Use of Passing On.....	60	(4) Conclusion sur l’allégation en demande du transfert de la perte	60
B. Certification of the Class Action.....	61	B. Certification du recours collectif	61
(1) The Requirements for Certification Under the British Columbia <i>Class Proceedings Act</i>	62	(1) Les conditions de certification selon la <i>Class Proceedings Act</i> de la Colombie-Britannique	62
(2) Do the Pleadings Disclose a Cause of Action?	63	(2) Les actes de procédure révèlent-ils une cause d’action?	63

<ul style="list-style-type: none"> (a) Section 36 of the <i>Competition Act</i> 65 (b) Tort..... 72 <ul style="list-style-type: none"> (i) Predominant Purpose Conspiracy 74 (ii) Unlawful Means Conspiracy and Intentional Interference With Economic Interests..... 80 (c) Restitution..... 84 <ul style="list-style-type: none"> (i) Unjust Enrichment 85 (ii) Constructive Trust..... 90 (iii) Waiver of Tort 93 (3) The Remaining Certification Requirements..... 98 <ul style="list-style-type: none"> (a) Standard of Proof..... 99 (b) Do the Claims of the Class Members Raise Common Issues?..... 106 <ul style="list-style-type: none"> (i) Expert Evidence in Indirect Purchaser Class Actions..... 114 (ii) Aggregate Assessment of Damages 127 (c) Is a Class Action the Preferable Procedure? 136 (4) Conclusion on the Certification of the Action..... 142 	<ul style="list-style-type: none"> a) Article 36 de la <i>Loi sur la concurrence</i> 65 b) Responsabilité délictuelle 72 <ul style="list-style-type: none"> (i) Complot visant principalement à causer un préjudice 74 (ii) Complot prévoyant le recours à des moyens illégaux et atteinte intentionnelle aux intérêts financiers 80 c) Restitution..... 84 <ul style="list-style-type: none"> (i) Enrichissement sans cause 85 (ii) Fiducie par interprétation..... 90 (iii) Renonciation au recours délictuel..... 93 (3) Les autres conditions présidant à la certification 98 <ul style="list-style-type: none"> a) Norme de preuve 99 b) Les demandes des membres du groupe soulèvent-elles des questions communes? 106 <ul style="list-style-type: none"> (i) Preuve d'expert dans le cadre d'actions d'acheteurs indirects 114 (ii) Détermination globale du montant des dommages-intérêts 127 c) Le recours collectif constitue-t-il la meilleure procédure pour régler les questions communes? 136 (4) Conclusion sur la certification du recours collectif 142
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V. Conclusion..... 143

APPENDIX: Common Issues Certified by Myers J.

I. 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.

II. 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.

V. Conclusion..... 143

ANNEXE : Questions communes certifiées par le juge Myers

I. Introduction

[1] Ce n’est pas tâche facile que de statuer sur la responsabilité et de répartir les dommages-intérêts lorsque le fautif et les parties lésées se trouvent aux extrémités d’une chaîne de distribution longue et complexe constituée de nombreuses personnes, qu’il s’agisse d’acheteurs, de revendeurs ou d’intermédiaires. Là réside la difficulté que présente l’action intentée par l’acheteur indirect, lequel se situe en aval dans la chaîne de distribution, en vue de recouvrer la majoration illégale qui lui aurait été transférée d’un maillon à l’autre de la chaîne.

[2] La complexité de l’action de l’acheteur indirect s’accroît lorsqu’il y a regroupement au sein d’un recours collectif. Les tribunaux doivent alors non seulement se colleter avec les problèmes liés à une telle action, mais aussi déterminer si les conditions de certification d’un recours collectif sont réunies. Telles sont les questions sur lesquelles la Cour doit se prononcer dans le présent pourvoi.

II. Contexte

[3] Les demandeurs constitués représentants en l’espèce, Pro-Sys Consultants Ltd. et Neil Godfrey (collectivement, « Pro-Sys »), ont intenté un recours collectif contre Microsoft Corporation et Microsoft Canada Co./Microsoft Canada CIE (collectivement, « Microsoft »). Ils allèguent qu’à compter de 1988, Microsoft a agi illégalement en majorant le prix de ses systèmes d’exploitation et de ses logiciels d’application pour ordinateur personnel compatibles avec le processeur Intel. Selon Pro-Sys, le comportement illégal de Microsoft a eu pour conséquence directe que tous les membres du groupe et elle ont payé et paient toujours, pour les systèmes d’exploitation et les logiciels d’application de Microsoft, un prix supérieur à celui qu’ils auraient payé n’eût été ce comportement.

[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 (CanLII), at para. 16)

III. The Proceedings Below

A. *Certification Proceedings in the British Columbia Supreme Court*

[6] Pro-Sys filed its original statement of claim in the British Columbia Supreme Court (“B.C.S.C.”) 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

[4] Pro-Sys a demandé la certification de l’action à titre de recours collectif en application de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (« CPA »).

[5] Le groupe proposé se compose des consommateurs finaux qui ont acheté des produits Microsoft à des revendeurs qui les avaient eux-mêmes achetés soit directement à Microsoft, soit à d’autres revendeurs situés en amont dans la chaîne de distribution. On les qualifie d’« acheteurs indirects ». Le groupe proposé est défini comme suit dans la déclaration :

[TRADUCTION] . . . toutes les personnes résidant en Colombie-Britannique qui, depuis le 1^{er} janvier 1994, ont acquis indirectement une licence pour un système d’exploitation ou un logiciel d’application de Microsoft à leur usage personnel, et non aux fins de revente ou de location.

(2010 BCSC 285 (CanLII), par. 16)

III. Décisions des tribunaux inférieurs

A. *Procédure de certification devant la Cour suprême de la Colombie-Britannique*

[6] Pro-Sys a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique (« C.S.C.-B. ») en décembre 2004. Puis, avec l’approbation du juge Tysoe, elle y a apporté de nombreuses modifications pour arriver finalement à la troisième déclaration modifiée. Une quatrième déclaration modifiée n’a pas été officiellement déposée au dossier.

[7] En 2006, Microsoft a demandé la radiation de la demande et le rejet de l’action. À titre subsidiaire, elle a demandé la radiation de certaines parties seulement de la demande. Les parties conviennent que le sort réservé à la demande de radiation sera déterminant sur le respect de la condition de certification, prévue à l’al. 4(1)(a) de la *CPA*, voulant que les actes de procédure révèlent une cause d’action.

[8] Le juge Tysoe conclut, pour les besoins de l’art. 36 de la *Loi sur la concurrence*, L.R.C. 1985,

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). 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), 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 (“B.C.C.A.”), 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 (CanLII)). The common issues certified by Myers J. are listed in the appendix to these reasons.

B. *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 186, 304 B.C.A.C. 90*

[10] Microsoft appealed from the decisions of Tysoe and Myers JJ. The majority of the B.C.C.A., *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

ch. C-34, 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 (2006 BCSC 1047, 57 B.C.L.R. (4th) 323). Il ordonne que les éléments des actes de procédure qui concernent l’enrichissement sans cause et la fiducie par interprétation soient radiés au motif que, dans leur libellé actuel et sauf modification par Pro-Sys, ils n’appuient pas les allégations. Sur demande de modification des actes de procédure, le juge Tysoe autorise ensuite leur modification (2006 BCSC 1738, 59 B.C.L.R. (4th) 111) afin qu’ils appuient les allégations d’un enrichissement sans cause et d’une fiducie par interprétation.

[9] Après avoir statué sur les demandes de radiation et de modification, le juge Tysoe a été nommé à la Cour d’appel de la Colombie-Britannique (« C.A.C.-B. »), et le juge Myers s’est vu confier la gestion de l’instance. Le juge Myers a examiné les autres conditions de certification prévues au par. 4(1) de la *CPA*, à savoir (i) l’existence d’un groupe identifiable de personnes (al. 4(1)(b)), (ii) le fait que les demandes des membres du groupe soulèvent une question commune (al. 4(1)(c)), (iii) le fait que le recours collectif constitue la meilleure procédure pour régler la question (al. 4(1)(d)) et (iv) l’aptitude de Pro-Sys et de Neil Godfrey à bien représenter le groupe (al. 4(1)(e)). Il a certifié le recours et conclu que ces quatre autres conditions étaient réunies (2010 BCSC 285 (CanLII)). Les questions communes certifiées par le juge Myers sont énumérées en annexe.

B. *Appel de la certification devant la Cour d’appel de la Colombie-Britannique, 2011 BCCA 186, 304 B.C.A.C. 90*

[10] Microsoft a porté en appel les décisions des juges Tysoe et Myers. Les juges majoritaires de la Cour d’appel, par la voix du juge Lowry (avec l’accord du juge Frankel), accueillent l’appel, annulent l’ordonnance de certification et rejettent l’action au motif qu’il est manifeste que les membres du groupe n’ont pas de cause d’action comme l’exige l’al. 4(1)(a) de la *CPA*. Ils arrivent à cette conclusion après avoir établi qu’un acheteur indirect

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 B.C.C.A., 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). 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 B.C.C.A. 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, *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, which this Court has addressed in separate reasons, *per* LeBel and Wagner JJ. Reasons in *Sun-Rype* can be found at 2013 SCC 58, [2013] 3 S.C.R. 545.

IV. Analysis

[14] The issues are addressed in the following order:

- (1) Did the majority of the B.C.C.A. err in finding that indirect purchaser actions were not available as a matter of law in Canada?

ne peut légalement intenter une action au Canada. Ils n'examinent donc pas les autres conditions de certification.

[11] Dissident, le juge Donald aurait rejeté l'appel et certifié l'action car, selon lui, l'acheteur indirect peut poursuivre au Canada et l'action est suffisamment étayée.

[12] La Cour d'appel a entendu l'appel de pair avec un autre dont l'objet est assez semblable, soit *Sun-Rype Products Ltd. c. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55. Les demandeurs étaient représentés par les mêmes avocats, et les deux appels ont été entendus par la même formation de juges. Dans *Sun-Rype*, comme en l'espèce, la question déterminante était celle de savoir si, au Canada, un acheteur indirect peut intenter un recours. Dans des motifs rendus en même temps que dans la présente affaire, les juges majoritaires de la Cour d'appel réservent le même sort à l'appel, annulent la certification et rejettent le recours collectif des acheteurs indirects au motif que le droit canadien n'autorise pas le recours de l'acheteur indirect. Dissident, le juge Donald conclut que l'acheteur indirect possède un recours.

[13] L'autorisation de pourvoi devant notre Cour a été accordée dans les deux affaires. Il y a eu audition commune des deux appels, ainsi que de *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600, une autre affaire de recours collectif intenté au Québec par des acheteurs indirects dans laquelle les juges LeBel et Wagner se prononcent dans des motifs distincts. Les motifs de l'arrêt *Sun-Rype* sont publiés sous la référence 2013 CSC 58, [2013] 3 R.C.S. 545.

IV. Analyse

[14] La Cour examine les questions en litige dans l'ordre suivant :

- (1) Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont-ils tort de conclure qu'un acheteur indirect ne peut légalement intenter une action au 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?

A. *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

- (2) Le juge Tysoe a-t-il raison de conclure que les actes de procédure révèlent une cause d’action comme l’exige l’al. 4(1)(a) de la *CPA*?
- (3) La conclusion du juge Myers sur les autres conditions de certification prévues au par. 4(1) de la *CPA* est-elle fondée?

A. *Action de l’acheteur indirect (la question du « transfert de la perte »)*

[15] Les parties au pourvoi soulèvent de nombreuses questions, dont celle qui revient le plus souvent dans les mémoires et les plaidoiries, à savoir si l’acheteur indirect peut tenter une action pour recouvrer la perte qui lui a été transférée. D’aucuns estiment qu’il s’agit de savoir s’il a ou non qualité pour agir. Je pense qu’il convient davantage d’y voir une question préliminaire à trancher avant l’examen des causes d’action précises alléguées dans la demande de certification du recours collectif.

[16] Comme je l’indique précédemment, l’acheteur indirect est un consommateur qui n’a pas acheté le produit directement à l’auteur de la majoration, mais à un acheteur direct ou à un autre intermédiaire dans la chaîne de distribution. Dès lors, a-t-il une cause d’action contre l’auteur de la majoration qui se situe au sommet de la chaîne de distribution et qui l’aurait indirectement lésé du fait que la majoration lui a été « transférée » à l’autre extrémité de la chaîne de distribution?

[17] Microsoft fait valoir que l’acheteur indirect ne doit pas se voir reconnaître une telle cause d’action, car selon elle, l’autoriser à ester contre l’auteur allégué de la majoration pour recouvrer la perte qui lui a été « transférée » est incompatible avec la jurisprudence de notre Cour, qui écarte le moyen de défense fondé sur pareil transfert. Microsoft affirme que le rejet du transfert de la perte comme *moyen de défense* implique nécessairement son exclusion comme cause d’action aux fins de recouvrer la perte qui découle d’une

of the passing-on defence and then deal with its impact on indirect purchaser actions.

(1) 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 (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

majoration refilée à l’acheteur indirect. Je ferai d’abord état du moyen de défense fondé sur le transfert de la perte, puis j’examinerai son incidence sur l’action de l’acheteur indirect.

(1) Rejet du transfert de la perte comme moyen de défense

[18] Le transfert de la perte a généralement été invoqué en défense par l’auteur de la majoration situé au sommet de la chaîne de distribution. L’argument voulait que si l’acheteur direct absorbait la majoration puis la transférait à ses propres clients, l’auteur de la majoration ne réalisait pas le bénéfice au détriment de l’acheteur direct, car celui-ci ne subissait aucune perte. Ce « transfert » de la majoration était donc invoqué en défense à l’action intentée par l’acheteur direct contre l’auteur de la majoration.

[19] Les tribunaux tant canadiens qu’américains ont rejeté le moyen de défense fondé sur le transfert de la perte. La question a d’abord été examinée en 1968 par la Cour suprême des États-Unis dans *Hanover Shoe, Inc. c. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Dans cette affaire, Hanover avait poursuivi United en dommages-intérêts sous le régime des dispositions américaines antitrust au motif que cette dernière offrait seulement la location, et non la vente, de ses équipements de fabrication de chaussures, ce qui coûtait plus cher. United avait fait valoir que Hanover avait transféré le surcoût à ses propres clients et n’avait donc pas subi de préjudice. La Cour suprême des États-Unis (le juge White, sous réserve de la dissidence du juge Stewart) a rejeté le moyen de défense fondé sur le transfert de la perte. Elle a invoqué la difficulté de déterminer la nature et la portée du transfert du surcoût :

[TRADUCTION] Même si l’on pouvait montrer que l’acheteur a augmenté son prix à cause du surcoût, et en proportion du surcoût, et que sa marge bénéficiaire et son chiffre de ventes total n’ont pas baissé après cela, il resterait une difficulté quasi insurmontable, c’est-à-dire de démontrer que, n’eût été le surcoût, le demandeur en cause n’aurait pas pu augmenter

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 (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, 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

ou n’aurait pas augmenté ses prix, ou qu’il n’aurait pas pu maintenir le prix plus élevé si le surcoût n’avait pas été imposé. Comme la preuve de l’applicabilité du moyen de défense fondé sur le transfert de la perte exigerait une démonstration convaincante à l’égard de chacune de ces données pratiquement impossible à établir, la tâche se révélerait normalement insurmontable. [p. 493]

[20] La cour ajoute que reconnaître une cause d’action au seul acheteur indirect, qui [TRADUCTION] « n’a qu’un intérêt minime dans la poursuite judiciaire et que peu d’intérêt à intenter un recours collectif » revient à permettre à « celui qui enfreint les dispositions antitrust interdisant la fixation des prix ou la monopolisation de conserver le fruit de ses actes illégaux » (*Hanover Shoe*, p. 494). Elle rejette donc le moyen de défense fondé sur le transfert de la perte. Depuis *Hanover Shoe*, le défendeur qui impose un surcoût illégal ou effectue une majoration illégale ne peut invoquer le transfert de la perte en défense pour échapper à sa responsabilité envers son acheteur direct.

[21] Au Canada, le moyen de défense fondé sur le transfert de la perte a été rejeté dans *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, une affaire de recouvrement de taxes payées en application de dispositions *ultra vires*. Le litige découlait d’une action intentée par Kingstreet Investments, qui exploitait entre autres des boîtes de nuit, pour recouvrer le montant de redevances d’exploitation perçues illégalement par la province du Nouveau-Brunswick sur les boissons alcooliques. Au nom des juges unanimes de la Cour, le juge Bastarache conclut que l’autorité publique qui perçoit illégalement une taxe ne peut limiter sa responsabilité à cet égard en établissant simplement que le contribuable a refilé la taxe à ses clients en totalité ou en partie.

[22] Le juge Bastarache estime que ce moyen de défense est incompatible avec le fondement premier du droit de la restitution. Les principes fondamentaux applicables en la matière « pourvoient à la restitution au demandeur de [TRADUCTION] « ce qui lui a été pris ou a été reçu de lui sans justification » [. . .] La possibilité que le demandeur obtienne un profit fortuit n’a pas d’importance du

loss” (*Kingstreet*, at para. 47, quoting *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 (H.C.A.), 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 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 (“*Canfor*”), 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

point de vue du droit de la restitution, précisément parce que celui-ci ne repose pas sur le concept de l’indemnisation d’une perte » (*Kingstreet*, par. 47, citant *Commissioner of State Revenue (Victoria) c. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 (H.C.A.), p. 71). Par conséquent, « [d]u point de vue des rapports entre le contribuable et l’État, la question de savoir si le contribuable a été en mesure de récupérer sa perte auprès d’une autre source n’est tout simplement pas pertinente » (*Kingstreet*, par. 45, citant P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (feuilles mobiles 2005), p. 11-45).

[23] Le juge Bastarache conclut en outre que le moyen de défense fondé sur le transfert de la perte n’est pas « judicieux sur le plan économique » (*Kingstreet*, par. 48). Il admet ainsi que déterminer l’identité de celui à qui incombe en dernier ressort la charge de la taxe « s’avère extrêmement difficile, et il ne convient pas de refuser une réparation en se basant sur ce motif » (par. 44). Revenant sur les réserves exprimées dans *Hanover Shoe*, il évoque à l’appui de sa conclusion la difficulté de déterminer les effets que l’élasticité du marché aura sur les prix demandés par les acheteurs directs. Il conclut qu’en raison de cette difficulté, il est impossible de dire quelle partie de la perte, s’il en est, a été effectivement transférée (*Kingstreet*, par. 48).

[24] Selon Pro-Sys, l’arrêt *Kingstreet* ne milite en faveur du rejet du moyen de défense que dans le contexte du prélèvement d’une taxe *ultra vires*. J’estime toutefois qu’il y a lieu trois raisons de conclure que le juge Bastarache n’écarte pas le transfert de la perte comme moyen de défense que dans ce seul cas.

[25] Premièrement, la jurisprudence de notre Cour appuie le rejet général du moyen de défense fondé sur le transfert de la perte. Dans *Colombie-Britannique c. Canadian Forest Products Ltd.*, 2004 CSC 38, [2004] 2 R.C.S. 74 (« *Canfor* »), la Couronne invoquait la « diminution de la valeur du bois » qu’elle avait vendu par suite d’un incendie de forêt imputable en grande partie à *Canfor*. Même si, en fin de compte, la Cour conclut que la Couronne n’a pas subi de préjudice puisqu’elle a pu

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 (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.

recouvrer ses pertes grâce au régime réglementaire applicable, le juge Binnie fait remarquer (de manière incidente) qu’« [i]l n’est généralement pas loisible à l’auteur d’une faute de contester l’existence d’une perte au motif qu’elle a été “transférée” par le demandeur », car pareille prétention obligerait le tribunal à entreprendre « la tâche interminable et futile de suivre chaque opération jusqu’à son aboutissement ultime » (par. 111, citant *Southern Pacific Co. c. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), p. 534). De même, le juge LeBel, dissident, mais non sur ce point, opine qu’« au regard des faits de l’espèce et en général, il ne faut pas laisser ce moyen de défense s’enraciner dans la jurisprudence canadienne » (par. 197). Selon lui, admettre ce moyen de défense obligerait le demandeur à prouver non seulement qu’il a subi une perte, mais aussi qu’il n’a pas réalisé d’autres opérations commerciales qui l’ont indemnisé de la perte, ce qui serait ardu (par. 203).

[26] Dans *Kingstreet*, le juge Bastarache souscrit aux motifs pour lesquels, dans *Canfor*, le juge LeBel rejette le moyen de défense fondé sur le transfert de la perte en droit de la responsabilité délictuelle et opine que ce rejet vaut tout autant, sinon plus, en droit de la restitution (par. 49).

[27] Deuxièmement, dans *Kingstreet*, le juge Bastarache conclut qu’écarter le moyen de défense fondé sur le transfert de la perte est compatible avec les principes fondamentaux du droit de la restitution. Plus précisément, c’est observer la règle qui interdit l’enrichissement sans cause ou la maxime *nullus commodum capere potest de injuria sua propria* (selon laquelle le fautif ne saurait tirer avantage de son acte illégal). Empêcher le défendeur d’invoquer le transfert de la perte en défense contribue à faire en sorte que le fautif ne puisse conserver le gain mal acquis seulement parce qu’il est difficile de circonscrire le préjudice avec précision. De même, en matière de restitution, il importe de s’assurer que le fautif qui majore le prix exigé de l’acheteur ne le fasse pas impunément parce que la difficulté de retracer le parcours de la majoration d’un maillon à l’autre de la chaîne de distribution ne permet pas d’établir sa responsabilité.

[28] Finally, there is support in the academic commentary for the broader rejection of the passing-on defence. Madaugh 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” ((loose-leaf 2013), at p. 11-46).

[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.

(2) 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 (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,

[28] Enfin, l’exclusion générale du moyen de défense fondé sur le transfert de la perte trouve appui chez les auteurs de doctrine. Ainsi, selon Madaugh et McCamus, l’arrêt *Kingstreet* constitue une [TRADUCTION] « exclusion globale à la fois péremptoire et manifeste » du moyen de défense fondé sur le transfert de la perte au Canada; « [p]our tirer cette conclusion, la Cour adhère au large consensus international sur l’inapplicabilité de ce moyen de défense » ((feuilles mobiles 2013), p. 11-46).

[29] C’est pourquoi je conclus que le rejet de ce moyen de défense dans *Kingstreet* ne vaut pas que pour l’imposition d’une taxe *ultra vires*. Nul motif rationnel ne permet d’écarter le moyen de défense dans un contexte, mais pas dans un autre; il est toujours exclu aux fins du droit de la restitution.

(2) Importance en l’espèce du moyen de défense fondé sur le transfert de la perte

[30] Comme je l’indique précédemment, le transfert de la perte comme cause d’action fonderait le recours de l’acheteur indirect. Pour Microsoft, le rejet par notre Cour du transfert de la perte comme moyen de défense a nécessairement pour corollaire son rejet comme cause d’action. Or, si l’auteur de la majoration ne peut invoquer le transfert de la perte en défense, l’acheteur indirect ne devrait pas non plus pouvoir l’invoquer en demande.

[31] Microsoft cite l’arrêt *Illinois Brick Co. c. Illinois*, 431 U.S. 720 (1977), rendu par la Cour suprême des États-Unis en 1977. Illinois Brick fabriquait des blocs de béton qu’elle vendait à des entrepreneurs en maçonnerie qui, à leur tour, fournissaient leurs services à des entrepreneurs généraux. Ces derniers utilisaient les blocs de béton pour construire des bâtiments qu’ils vendaient notamment à l’État de l’Illinois, lequel était donc un acheteur indirect des produits d’Illinois Brick (p. 726). À titre d’acheteur indirect, l’État a poursuivi Illinois Brick pour participation à un complot visant à fixer le prix des blocs de béton,

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 B.C.C.A. accepted this argument in dismissing the Pro-Sys claim.

(3) 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.

(a) *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

contrairement aux dispositions américaines anti-trust (p. 727).

[32] La Cour suprême des États-Unis l’a débouté. À son avis, puisque le transfert de la perte ne pouvait être invoqué en défense suivant l’arrêt *Hanover Shoe*, l’acheteur indirect ne pouvait non plus ester en alléguant que la majoration de prix lui avait été transférée. Selon la cour, [TRADUCTION] « quelle que soit la règle applicable au transfert de la perte pour les besoins d’une action antitrust en dommages-intérêts, elle doit s’appliquer tant au demandeur qu’au défendeur » (*Illinois Brick*, p. 728).

[33] Selon Microsoft, étant donné que, dans *Illinois Brick*, l’impossibilité d’invoquer en demande le transfert de la perte est considérée comme le corollaire nécessaire du rejet, dans *Hanover Shoe*, du transfert de la perte comme moyen de défense, le rejet du moyen de défense fondé sur le transfert de la perte dans *Kingstreet* doit emporter la même exclusion en demande au Canada. Les juges de première instance en l’espèce ayant été saisis des demandes avant l’arrêt *Kingstreet*, la question du transfert de la perte n’a pas été soulevée devant eux. Toutefois, les juges majoritaires de la C.A.C.-B. font droit à la prétention et rejettent l’action de Pro-Sys.

(3) L’argument du « corollaire nécessaire »

[34] Comme je l’explique plus loin, malgré le rejet du transfert de la perte comme moyen de défense, les arguments invoqués par Microsoft pour justifier également son exclusion comme cause d’action ne sont pas convaincants. À défaut d’une justification suffisante, la symétrie ne peut étayer à elle seule la thèse du « corollaire nécessaire ». À mon avis, la thèse avancée par Microsoft n’offre pas une telle justification.

a) *Recouvrement double ou multiple*

[35] Microsoft soutient que l’allégation en demande du transfert de la perte par un acheteur indirect lui fait courir le risque d’être tenue responsable vis-à-vis de tous les acquéreurs dans

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

la chaîne de distribution. Elle ajoute que l'impossibilité d'invoquer en défense le transfert de la perte permettra à l'acheteur direct d'obtenir le recouvrement intégral de la somme payée en trop. Si l'acheteur indirect intente lui aussi une action, tant l'acheteur direct que l'acheteur indirect pourront tenter de recouvrer la même somme. Microsoft fait valoir que ce risque de recouvrement double, voire multiple, justifie que l'on exclut l'allégation en demande du transfert de la perte.

[36] Dans *Illinois Brick*, la Cour suprême des États-Unis estime que le recouvrement multiple constitue un [TRADUCTION] « risque sérieux » et elle se dit « non disposée à y donner ouverture » (p. 730-731, le juge White) :

[TRADUCTION] L'application asymétrique de l'arrêt *Hanover Shoe* augmente considérablement le risque de décisions contradictoires et, par conséquent, de responsabilité multiple imputée sans fondement au défendeur en ce qu'elle présume qu'un des demandeurs (l'acheteur direct) a droit au recouvrement intégral et qu'elle refuse au défendeur le droit d'invoquer cette présomption contre l'autre demandeur . . . [Italiques omis; p. 730.]

[37] On ne saurait écarter cette préoccupation à la légère, mais j'estime que des arguments à l'effet contraire doivent être considérés. Dans les faits, les tribunaux peuvent gérer le risque de recouvrement double ou multiple. Dans *Illinois Brick*, le juge Brennan, dissident, indique que ce risque n'existe que lorsque d'autres poursuites sont intentées après l'indemnisation ou que les actions d'acheteurs directs et indirects sont simultanément en instance. Selon lui, le risque demeure faible dans les deux cas (p. 762-764).

[38] Dans le premier cas, le juge Brennan affirme que la complexité et la durée des poursuites antitrust, auxquelles s'ajoute le court délai de prescription de quatre ans, [TRADUCTION] « peuvent empêcher les demandeurs éventuels d'attendre le prononcé d'un premier jugement pour faire valoir leurs droits » (*Illinois Brick*, p. 764). Le même raisonnement vaut au Canada pour les actions intentées sous le régime de la *Loi sur la concurrence*, qui sont tout aussi complexes et

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, 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 B.C.C.A., 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

auxquelles s'applique un délai de prescription de seulement deux ans lorsqu'une personne réclame une somme égale au montant des dommages qu'elle a subis (voir la *Loi sur la concurrence*, al. 36(4)a)).

[39] Dans le second cas — le risque de double indemnisation lorsque l'action de l'acheteur direct et celle de l'acheteur indirect sont en instance simultanément —, le défendeur peut présenter une preuve de ce risque au juge du procès et lui demander de modifier en conséquence tout octroi de dommages-intérêts. Dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, au nom des juges majoritaires, le juge Dickson (plus tard Juge en chef) dit ce qui suit lorsqu'il se penche sur le risque que le demandeur invoque des régimes législatifs distincts pour être indemnisé deux fois :

Les cours sont à même d'empêcher le double recouvrement dans le cas théorique et peu probable où des demandeurs cherchent à se faire indemniser en vertu des deux ensembles de dispositions. [. . .] [À] l'étape finale dans laquelle elle conclut à la responsabilité et en fixe le montant, la cour peut empêcher le double recouvrement si, en fait, un défendeur a déjà versé une indemnité et produit une reddition de compte. Aucune cour ne permettra le double recouvrement. [p. 191]

Si le défendeur est en mesure de le convaincre que le risque ne peut être géré par le tribunal, le juge conserve le pouvoir discrétionnaire de rejeter la demande.

[40] De même, si le défendeur établit que des poursuites sont intentées parallèlement dans d'autres ressorts et qu'elles peuvent entraîner une indemnisation supplémentaire, le juge peut rejeter la demande ou modifier l'octroi de dommages-intérêts en fonction des réparations sollicitées ou accordées dans les autres ressorts afin d'empêcher le cumul des indemnités.

[41] Au vu de ces mécanismes dont disposent les tribunaux, je conviens avec le juge Donald, de la C.A.C.-B., dissident dans *Sun-Rype*, que [TRADUCTION] « la règle théorique selon laquelle il ne peut y avoir double recouvrement ne devrait pas s'appliquer pour faire obstacle à une action dans une affaire réelle où il est possible d'empêcher

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.

(b) *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. 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).

le double recouvrement » (par. 30). À ce stade de l'instance, Microsoft n'a produit aucun élément de preuve selon lequel les tribunaux de la Colombie-Britannique ne peuvent empêcher le recouvrement double ou multiple. Je suis donc d'avis de ne pas écarter l'action de l'acheteur indirect en raison du risque de recouvrement multiple.

b) *Caractère indirect et complexité*

[42] Microsoft soutient deuxièmement que le caractère indirect de la majoration et la difficulté d'établir la perte subie constituent [TRADUCTION] « des obstacles "importants" et "fondamentaux" à la preuve du transfert de la perte » (m.i., par. 20). Ces obstacles seraient sources de confusion et d'incertitude et grèveraient les capacités institutionnelles des tribunaux appelés à retracer le parcours de chacune des majorations jusqu'à son aboutissement final.

[43] Microsoft invoque le raisonnement de la Cour d'appel de l'Ontario dans *Chadha c. Bayer Inc.* (2003), 63 O.R. (3d) 22, où cette dernière refuse de certifier l'action d'un acheteur indirect en raison [TRADUCTION] « des nombreux problèmes de preuve qui attendent les appelants [. . .], y compris le nombre des maillons de la chaîne de distribution et la "multitude de variables" qui jouent dans la détermination du prix d'achat final » (par. 45 (adhérant aux conclusions de la Cour divisionnaire)). Selon Microsoft, si quelque partie de la majoration était absorbée par l'un de ses maillons, [TRADUCTION] « la chaîne serait rompue » et il serait d'autant plus ardu de retracer le parcours de la majoration d'un maillon à l'autre (m.i., par. 22, citant *Chadha*, par. 45). Il appert des motifs formulés sur ce point dans *Illinois Brick*, et sur lesquels Microsoft insiste beaucoup, que [TRADUCTION] « l'analyse des décisions en matière de prix et de production comporte une grande part d'incertitude et de difficulté lorsqu'elle intervient "dans le monde économique réel plutôt que dans le cadre d'un modèle économique fictif" » (p. 731-732). Le tribunal déplore « les coûts supportés par le système judiciaire et les mécanismes d'application des dispositions antitrust lorsqu'il s'agit de reconstituer ces décisions en salle d'audience » (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.

(c) *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

[44] L'action intentée par un acheteur indirect, surtout sur le fondement des dispositions anti-trust, comporte souvent une preuve volumineuse, la formulation de théories économiques complexes et l'existence de nombreuses parties le long de la chaîne de distribution, de sorte qu'il est d'autant plus ardu de retracer le parcours de la majoration d'un maillon à l'autre jusqu'à son aboutissement final. Toutefois, selon le juge Brennan, dissident dans *Illinois Brick*, il s'agit de caractéristiques communes à la plupart des affaires antitrust et elles ne devraient donc pas empêcher l'acheteur indirect de prouver ses allégations :

[TRADUCTION] Certes, dans bien des cas, le demandeur ne sera pas en mesure de prouver le transfert de la majoration. Dans d'autres, la partie transférée ne pourra être déterminée qu'approximativement. Mais là encore, ce problème distingue à peine l'espèce d'une autre affaire antitrust. Dans ce domaine, toute instance exige une estimation raisonnée, mais « bien que les dommages [dans les affaires de cette nature] ne puissent être déterminés au moyen de simples spéculations ou conjectures, il suffira d'inférer de manière juste et raisonnable l'étendue des dommages, même si le résultat ne sera qu'approximatif. » [. . .] L'imprécision de la répartition des dommages-intérêts entre l'acheteur direct et l'acheteur indirect n'est donc pas une considération suffisante pour priver l'acheteur indirect de la possibilité d'établir le préjudice subi. [Texte entre crochets dans l'original; p. 759-760.]

[45] L'acheteur indirect qui intente une action contracte volontairement l'obligation d'établir qu'il a subi une perte, ce qui peut fort bien nécessiter le témoignage d'experts et une preuve complexe de nature économique. À mon avis, la question de savoir si ces éléments lui permettront de s'acquitter de cette obligation tient aux faits de l'espèce. Il n'y a pas lieu de faire totalement obstacle à l'action de l'acheteur indirect pour la seule raison qu'il sera ardu d'établir le préjudice subi.

c) *Effet dissuasif*

[46] Selon un troisième argument que ne soulève pas Microsoft, mais qui est examiné dans *Illinois Brick* et qui vaut particulièrement dans le cas d'actes anticoncurrentiels, permettre d'invoquer

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.

en demande le transfert de la perte ferait obstacle à l’application des dispositions sur la concurrence et nuirait ainsi à la dissuasion. Bien que cette application incombe généralement à l’État, une personne privée peut, suivant l’art. 36, faire respecter la loi et demander le recouvrement d’une somme par suite de la violation de la partie VI de la *Loi sur la concurrence*.

[47] Dans *Illinois Brick*, les juges majoritaires concluent de l’arrêt *Hanover Shoe* que [TRADUCTION] « les lois antitrust seront mieux appliquées si on assure le recouvrement intégral de la majoration par l’acheteur direct au lieu de permettre à chacune des personnes touchées par la majoration de recouvrer uniquement la partie qu’elle peut prouver avoir absorbée » (p. 735). Ils partagent ce point de vue et estiment que l’acheteur direct est le mieux placé pour ester en justice, car [TRADUCTION] « la preuve volumineuse et les théories compliquées » associées à l’instance engagée impose un trop lourd fardeau à l’acheteur indirect, de sorte qu’il est peu probable qu’il ait gain de cause, ce qui va à l’encontre des fins dissuasives des dispositions antitrust (p. 741).

[48] À mon avis, permettre d’alléguer en demande le transfert de la perte ne devrait pas nuire aux objectifs de dissuasion des dispositions canadiennes sur la concurrence. Je conviens avec le juge Brennan, dissident dans *Illinois Brick*, que contrairement au fait d’invoquer le transfert de la perte en défense, le fait d’alléguer le transfert de la perte en demande risque peu de faire en sorte que l’auteur de la majoration échappe à sa responsabilité et que la dissuasion soit compromise; [TRADUCTION] « [L]es mêmes principes qui consistent à assurer l’efficacité constante de l’action [antitrust] et à empêcher le fautif de conserver le gain mal acquis militent plutôt en faveur de la possibilité que l’acheteur indirect prouve que la majoration lui a été refilee » (p. 753). L’exclusion du transfert de la perte comme moyen de défense, afin de ne pas nuire à l’application de la loi, ne justifie pas de refuser son allégation en demande dans une action par ailleurs bien-fondée intentée contre l’auteur de la majoration.

[49] Further, despite evidence advanced by the respondents in the *Sun-Rype* 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.

(d) *Restitutionary Principles*

[50] Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing (see Maddaugh and McCamus (2013), 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.

(e) *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*

[49] En outre, malgré la preuve des intimées dans *Sun-Rype* voulant que l'acheteur direct soit souvent le plus susceptible de poursuivre l'auteur de la majoration, il peut arriver qu'un acheteur direct hésite à intenter une action contre le fautif par crainte de mettre en péril de bonnes relations d'affaires. On soutient en l'espèce que les acheteurs directs sont parties aux arrangements de majoration de Microsoft, de sorte qu'il est peu probable qu'ils intentent quelque recours. Dans ces circonstances, les actions d'acheteurs indirects peuvent offrir le seul moyen de recouvrer la majoration et d'assurer la dissuasion. Exclure ces actions en pareil cas augmenterait le risque que la majoration demeure entre les mains du fautif. Pour ces motifs, je suis d'avis qu'écarter tout recours de l'acheteur indirect de sorte que seul l'acheteur direct puisse se pourvoir en justice n'accroîtrait pas nécessairement l'effet dissuasif.

d) *Principes de la restitution*

[50] De nature réparatrice, le droit de la restitution a pour objet le recouvrement du gain mal acquis (voir Maddaugh et McCamus (2013), p. 3-1 à 3-3). J'estime que permettre à l'acheteur indirect d'intenter une action en justice s'accorde 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, peut ainsi être indemnisée.

e) *Dérogation à la règle établie aux États-Unis dans l'arrêt Illinois Brick*

[51] Bien que l'arrêt *Illinois Brick* établisse toujours le droit applicable au palier fédéral, de nombreux États l'ont écarté par voie législative ou judiciaire. En 2007, la commission de modernisation des lois antitrust a déposé au Congrès un rapport selon lequel [TRADUCTION] « plus de trente-cinq États permettaient à l'acheteur indirect, comme à l'acheteur direct, d'intenter une action en dommages-intérêts en application de la

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 (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*.

(f) *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

loi de l’État » (*Antitrust Modernization Commission : Report and Recommendations* (2007) (en ligne), p. 269). Elle recommandait l’« abrogation » de la règle issue de l’arrêt *Illinois Brick* par une loi fédérale (p. 270). Dans *California v. ARC America Corp.*, 490 U.S. 93 (1989), la Cour suprême des États-Unis a été appelée à se prononcer sur la validité des « lois abrogatoires ». Elle a conclu que l’arrêt *Illinois Brick* ne faisait pas obstacle à l’adoption de dispositions antitrust par un État, même si ces dispositions avaient pour effet d’écarter la règle issue de cet arrêt. Voilà des éléments qui sont de nature à remettre en cause la thèse du « corollaire nécessaire » retenue dans *Illinois Brick*.

f) *Doctrine*

[52] Les débats des auteurs sur le recours de l’acheteur indirect demeurent axés sur les échanges qui ont tout juste suivi la publication de l’arrêt *Illinois Brick*. Peu après celle-ci, les Américains William M. Landes et Richard A. Posner (maintenant juge de la Cour d’appel des États-Unis pour le septième circuit) ont défendu dans un article la règle qui refusait le droit d’action à l’acheteur indirect (voir « 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, p. 634-635). Selon eux, réserver à l’acheteur direct le droit d’intenter une action contre l’auteur de la majoration était l’option la plus susceptible de promouvoir les dispositions antitrust. Ils ajoutent que permettre à l’acheteur indirect d’intenter une action n’aura pas d’effet ou en aura peu sur la réalisation des objectifs d’indemnisation et de dissuasion, car l’acheteur direct sera plus susceptible de constater la majoration et, ensuite, de disposer des données et des ressources nécessaires pour avoir gain de cause dans une action antitrust. Ils voient dans l’acheteur direct un « agent efficace d’application » des dispositions antitrust et font valoir que permettre à l’acheteur indirect de se pourvoir en justice rendra la répartition des dommages-intérêts si coûteuse que les intéressés hésiteront à poursuivre et que le partage du droit d’action entre de multiples parties réduira l’importance des

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 Landes and Posner'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] Landes and Posner 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 Landes and Posner 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

demandes et affaiblira l'effet dissuasif (p. 608-609). Quant à l'indemnisation, ils soutiennent que, même s'il n'a pas de droit d'action indépendant, l'acheteur indirect sera néanmoins « indemnisé » grâce à la faculté de l'acheteur direct d'intenter une action, car ce dernier répercutera sur le prix demandé à l'acheteur indirect les retombées éventuelles d'une action antitrust contre l'auteur de la majoration (p. 605).

[53] Peu après la publication de l'article de Landes et Posner, deux autres spécialistes du droit antitrust, Robert G. Harris et Lawrence A. Sullivan, ont exprimé l'opinion contraire (voir « Passing On the Monopoly Overcharge : A Comprehensive Policy Analysis » (1979), 128 *U. Pa. L. Rev.* 269, p. 351-352). Selon Harris et Sullivan, l'acheteur direct hésitera à compromettre ses bonnes relations avec son fournisseur et sera donc plus enclin à refile la note à ses clients à lui. Il ne serait donc pas un « agent efficace d'application » des dispositions antitrust; pour les besoins de l'effet dissuasif, mieux vaudrait reconnaître la qualité pour agir à l'acheteur indirect.

[54] L'année suivante, Landes et Posner répliquaient directement à la thèse de Harris et Sullivan (voir « The Economics of Passing On : A Reply to Harris and Sullivan » (1980), 128 *U. Pa. L. Rev.* 1274). En réponse à la thèse de leurs détracteurs, à savoir qu'un acheteur direct hésitera à intenter une action en justice afin de ne pas compromettre de bonnes relations commerciales, ils affirment que [TRADUCTION] « l'omission de l'acheteur direct d'intenter une action en justice sera récompensée. Le fournisseur doit verser quelque chose pour s'attacher l'acheteur direct et il s'agit en quelque sorte d'une indemnisation antitrust » (p. 1278). En d'autres termes, l'acheteur direct obtient pour sa participation au complot une gratification financière qui peut être transmise à l'acheteur indirect.

[55] Depuis ce débat entre Landes et Posner, d'une part, et Harris et Sullivan, d'autre part, la question du droit d'action de l'acheteur indirect et, en particulier, la règle issue de l'arrêt *Illinois Brick*, continuent d'alimenter la discussion. Plus

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 Landes and Posner, 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

récemment, de nombreux auteurs ont cependant préconisé la neutralisation de l’arrêt afin de favoriser la réalisation des objectifs des dispositions antitrust.

[56] Certains, dont Gregory J. Werden et Marius Schwartz, se sont joints à Harris et Sullivan pour critiquer Landes et Posner. Ils qualifient d’[TRADUCTION] « assez invraisemblable » l’idée que l’acheteur indirect puisse bénéficier des retombées pour l’acheteur direct d’un recouvrement anticipé (« *Illinois Brick* and the Deterrence of Antitrust Violations — An Economic Analysis » (1984), 35 *Hastings L.J.* 629, p. 638-639).

[57] La thèse voulant qu’un acheteur direct hésite à poursuivre un fournisseur important par crainte de mettre en péril ses rapports avec lui a aussi ses tenants parmi les auteurs de doctrine (voir p. ex. K. J. O’Connor, « Is the *Illinois Brick* Wall Crumbling? » (2001), 15:3 *Antitrust* 34, p. 38 (selon lequel l’acheteur indirect est peut-être plus susceptible d’intenter une poursuite que l’acheteur direct parce qu’il ne risque pas la rupture de ses [TRADUCTION] « liens d’affaires directs avec le présumé contrevenant »); A. Thimmesch, « Beyond Treble Damages : *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.* » (2005), 90 *Iowa L. Rev.* 1649, p. 1668 et note en bas de page 127 (selon lequel, dans bien des cas, l’acheteur direct est en situation de dépendance vis-à-vis du fournisseur et hésitera donc à le poursuivre)). Tout récemment, en 2012, on a avancé la même idée : [TRADUCTION] « Cela est particulièrement vrai lorsque l’acheteur direct peut transférer au consommateur toute somme payée en trop par suite d’une entorse à la concurrence. [. . .] [L]a règle par laquelle la Cour suprême [des États-Unis] refuse catégoriquement à “l’acheteur indirect le droit de poursuivre l’auteur” de la majoration a une portée excessive » (J. M. Glover, « The Structural Role of Private Enforcement Mechanisms in Public Law » (2012), 53 *Wm. & Mary L. Rev.* 1137, p. 1187).

[58] En ce qui concerne l’objectif d’indemnisation, plusieurs auteurs font observer que la règle issue de l’arrêt *Illinois Brick* va en fait à l’encontre de sa réalisation; l’un d’eux dit de cette décision

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.

(4) 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 restitutionary principles, those same principles are promoted by allowing passing on to be used offensively.

qu’elle est celle qui [TRADUCTION] « s’écarte le plus de l’objectif d’indemnisation » (C. C. Van Cott, « Standing at the Fringe : Antitrust Damages and the Fringe Producer » (1983), 35 *Stan. L. Rev.* 763, p. 775). Dans le même ordre d’idées, selon Andrew I. Gavil, spécialiste en matière antitrust, [TRADUCTION] « indemniser toutes les victimes du comportement illégal pour les préjudices causés par le contrevenant constitue un objectif secondaire, mais aussi essentiel, d’un régime de réparation complet, un objectif que l’arrêt *Illinois Brick* méconnaît dans bien des situations courantes » (« Thinking Outside the *Illinois Brick* Box : A Proposal for Reform » (2009), 76 *Antitrust L.J.* 167, p. 170).

[59] Comme il appert de cet aperçu, malgré son appui initial par des auteurs de renom du domaine antitrust, la règle dégagée dans l’arrêt *Illinois Brick* ne remporte plus la faveur des juristes versés en la matière.

(4) Conclusion sur l’allégation en demande du transfert de la perte

[60] Malgré l’impossibilité d’invoquer le transfert de la perte en défense à une action en restitution, l’acheteur indirect ne doit pas pour autant se voir empêcher de recouvrer la perte qui lui a été transférée. En bref, voici les éléments à retenir :

- (1) Le risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituent 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.
- (2) Le recours de l’acheteur indirect ne portera vraisemblablement pas atteinte à l’effet dissuasif que sont censées avoir les dispositions canadiennes sur la concurrence.
- (3) Même si invoquer le transfert de la perte en défense à une action va à l’encontre des principes fondamentaux de la restitution, permettre son allégation en demande est dans le droit fil de ces mêmes principes.

- (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.

B. *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 B.C.C.A. 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.

- (1) 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

- (4) Bien que, aux États-Unis, la règle issue de l'arrêt *Illinois Brick* demeure valable au palier fédéral, son « abrogation » dans de nombreux États et le rapport recommandant au Congrès de l'infirmier remettent en question sa raison d'être.
- (5) Malgré un certain appui initial, la doctrine récente penche en faveur de la suppression de la règle.

Pour ces motifs, je ne conviens pas avec Microsoft que le rejet par notre Cour dans des affaires antérieures et en l'espèce du moyen de défense fondé sur le transfert de la perte fait obstacle au recours de l'acheteur indirect.

B. *Certification du recours collectif*

[61] Après avoir tranché la question préliminaire et conclu que l'acheteur indirect peut invoquer le transfert de la perte en demande, j'examine maintenant s'il y a lieu ou non de certifier l'action intentée en l'espèce à titre de recours collectif. Étant donné que les juges majoritaires de la C.A.C.-B. statuent que l'acheteur indirect ne peut pas légalement intenter d'action au Canada, ils ne se penchent pas sur les conditions de certification examinées par le juge Tysoe (cause d'action exigée à l'al. 4(1)(a) de la *CPA*) et par le juge Myers (les autres conditions prévues aux al. 4(1)(b) à (e) de la *CPA*). Il nous faut donc contrôler l'analyse des deux juges saisis des demandes en ce qui concerne la certification. Microsoft ne conteste leurs conclusions qu'à l'égard de trois des conditions : (1) les actes de procédure révèlent une cause d'action, (2) les demandes soulèvent une question commune et (3) le recours collectif constitue la meilleure procédure pour régler cette question.

- (1) Les conditions de certification selon la *Class Proceedings Act* de la Colombie-Britannique

[62] Le paragraphe 4(1) de la *CPA* dispose :

[TRADUCTION]

- 4 (1) Le tribunal saisi d'une demande visée à l'article 2 ou 3 certifie une instance à titre de recours

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.

(2) Do the Pleadings Disclose a Cause of Action?

[63] The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 (“*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. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 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. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[64] Pro-Sys has alleged causes of action (1) under s. 36 of the *Competition Act*, (2) in tort

collectif lorsque les conditions suivantes sont réunies :

- (a) les actes de procédure révèlent une cause d’action;
- (b) il existe un groupe identifiable de deux personnes ou plus;
- (c) les demandes des membres du groupe soulèvent une question commune, que celle-ci l’emporte ou non sur les questions qui touchent uniquement les membres individuels;
- (d) le recours collectif serait la meilleure procédure pour régler la question commune de manière juste et efficace;
- (e) un demandeur-représentant :
 - (i) défendrait de manière juste et appropriée les intérêts du groupe,
 - (ii) a présenté, pour le recours collectif, un plan qui établit une méthode praticable de faire progresser l’instance au nom du groupe et d’aviser les membres du groupe de l’existence du recours collectif,
 - (iii) n’a pas de conflit d’intérêts avec d’autres membres du groupe en ce qui concerne les questions communes.

(2) Les actes de procédure révèlent-ils une cause d’action?

[63] La première condition de certification veut que les actes de procédure révèlent une cause d’action. Dans *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261 (« *Alberta Elders* »), notre Cour explique que le respect de cette condition est apprécié au regard de la norme de preuve applicable à la requête en radiation selon l’arrêt *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980. Le demandeur ne satisfait donc pas à la condition lorsque, à supposer que les faits invoqués soient vrais, la demande ne pourrait manifestement pas être accueillie (*Alberta Elders*, par. 20; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25).

[64] Pro-Sys prétend avoir des causes d’action (1) suivant l’art. 36 de la *Loi sur la concurrence*,

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.

(a) *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

(2) en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers et (3) en restitution pour enrichissement sans cause, existence d’une fiducie par interprétation et renonciation au recours délictuel. Pour les motifs qui suivent, je conviens avec le juge Tysoe que les actes de procédure révèlent des causes d’action qu’on ne saurait radier à ce stade de l’instance.

a) *Article 36 de la Loi sur la concurrence*

[65] Selon l’art. 36 de la *Loi sur la concurrence*, toute personne qui a subi une perte ou des dommages par suite d’un comportement contraire à la partie VI de la Loi peut réclamer et recouvrer une somme égale au montant de la perte ou des dommages subis. Voici le libellé de l’art. 36 :

36. (1) Toute personne qui a subi une perte ou des dommages par suite :

a) . . . d’un comportement allant à l’encontre d’une disposition de la partie VI;

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n’a pas obtempéré à l’ordonnance une somme égale au montant de la perte ou des dommages qu’elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n’excède pas le coût total, pour elle, de toute enquête relativement à l’affaire et des procédures engagées en vertu du présent article.

[66] La partie VI de la *Loi sur la concurrence* est intitulée « Infractions relatives à la concurrence ». Les infractions qu’elle crée et dont la perpétration est alléguée en l’espèce sont (1) le complot, au par. 45(1), et (2) les indications fausses ou trompeuses, au par. 52(1). Voici quel était le libellé de ces dispositions lors de l’audience présidée par le juge Tysoe :

45. (1) [Complot] Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l’une de ces peines, quiconque complot, se coalise ou conclut un accord ou arrangement avec une autre personne :

(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 B.C.C.A., 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.

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture du produit, ou dans le prix d'assurances sur les personnes ou les biens;

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

52. (1) [Indications fausses ou trompeuses] Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

[67] Microsoft conteste l'existence d'une cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence* et fait essentiellement valoir que le transfert de la perte ne peut être allégué en demande. Vu ma conclusion que l'acheteur indirect peut ester en justice, cette prétention n'importe plus aux fins du pourvoi.

[68] Toutefois, Microsoft soutient par ailleurs que la cause d'action fondée sur l'art. 36 est irrégulièrement plaidée devant notre Cour car elle ne figure pas dans la déclaration de Pro-Sys. Selon elle, le délai de prescription de deux ans imparti au par. 36(4) de la Loi fait obstacle à l'ajout de cette cause d'action. Or, le juge Donald de la C.A.C.-B., dissident, conclut qu'il s'agit d'une prétention d'ordre purement technique et qu'elle ne permet pas de rejeter la demande. Je suis d'accord. Selon la troisième déclaration modifiée, le comportement illégal se poursuivait, ce qui doit être tenu pour avéré aux fins du pourvoi. On ne saurait donc dire que l'action n'a pas été déposée dans le délai prescrit.

[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” (B.C.C.A., 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*.

(b) *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

[69] Par ailleurs, selon le libellé même de la troisième déclaration modifiée, [TRADUCTION] « [l]es demandeurs invoquent [. . .] la partie VI de la *Loi sur la concurrence* » (par. 109, d.a., vol. II, p. 48) et réclament des dommages-intérêts en conséquence. Bien que le document ne renvoie pas expressément à l’art. 36, le recouvrement pour violation de la partie VI de la *Loi sur la concurrence* ne peut être demandé par une personne privée que sur le fondement de cette disposition. Je conviens avec le juge Donald que [TRADUCTION] « les parties ont considéré l’art. 36 lors de l’audition de la demande de certification, de sorte que nulle allégation de surprise ou de préjudice ne saurait être retenue » (C.A.C.-B., par. 59). C’est pourquoi je ne fais pas droit à la prétention de Microsoft selon laquelle le délai de prescription imparti par la *Loi sur la concurrence* fait obstacle à la demande.

[70] Microsoft invoque d’autres motifs succincts à l’encontre de la reconnaissance d’une cause d’action fondée sur l’art. 36. Devant le juge Tysoe, elle a fait valoir qu’il devait incomber au Tribunal de la concurrence de faire respecter le droit de la concurrence. Je conviens que certaines dispositions de la *Loi sur la concurrence* confèrent compétence au Tribunal de la concurrence plutôt qu’à une cour de justice. Or, ce n’est pas le cas de l’art. 36, qui prévoit expressément que toute personne à qui une violation de la partie VI inflige une perte peut se pourvoir en recouvrement devant une cour de justice.

[71] Pour tous ces motifs, il n’est pas manifeste qu’une demande fondée sur l’art. 36 de la *Loi sur la concurrence* ne serait pas accueillie. Pour l’application de l’al. 4(1)(a) de la CPA, on ne saurait affirmer que les actes de procédure ne révèlent pas une cause d’action fondée sur l’art. 36 de la *Loi sur la concurrence*.

b) *Responsabilité délictuelle*

[72] Pro-Sys soutient que Microsoft s’est associée à diverses personnes pour commettre les délits civils financiers que sont le complot (tant celui qui vise principalement à causer un préjudice que celui qui prévoit l’emploi de moyens illégaux) et l’atteinte

conspiracy arises when two or more parties agree “to do an unlawful act, or to do a lawful act by unlawful means” (*Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, 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, 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.

(i) 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, 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

illégal aux intérêts financiers. Il y a complot lorsqu’au moins deux personnes conviennent [TRADUCTION] « d’accomplir un acte illégal ou un acte légal par des moyens illégaux » (*Mulcahy c. The Queen* (1868), L.R. 3 H.L. 306, p. 317). Même si l’existence du délit civil de complot remonte [TRADUCTION] « au Moyen Âge, [il] ne s’agit pas aujourd’hui d’un délit civil bien établi quant à son utilité actuelle ou à la portée de la réparation qu’il permet » (*Golden Capital Securities Ltd. c. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54, par. 42).

[73] Il demeure que, au Canada, deux types de complot donnent ouverture à une action en droit de la responsabilité délictuelle : celui qui vise principalement à causer un préjudice et celui qui prévoit l’emploi de moyens illégaux. J’examine d’abord la thèse avancée relativement au complot qui vise principalement à causer un préjudice. Je me penche ensuite sur le complot qui prévoit le recours à des moyens illégaux et sur l’atteinte illégale aux intérêts financiers, que j’examine de pair puisque les motifs de contestation de ces causes d’action touchent à l’exigence, commune aux deux délits civils, du recours à des « moyens illégaux ».

(i) Complot visant principalement à causer un préjudice

[74] L’existence du complot visant principalement à causer un préjudice est établie lorsque le comportement du défendeur vise principalement à causer un préjudice au demandeur par des moyens légaux ou illégaux, et que le demandeur subit effectivement un préjudice à cause de ce comportement. Lorsque des moyens légaux sont employés à la même fin, les actes deviennent illégaux (*Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452, p. 471-472).

[75] Mentionnons que, dans *Ciments LaFarge*, le juge Estey opine que le complot visant principalement à causer un préjudice constitue un « anachronisme commercial » et qu’il y aurait lieu d’en limiter l’application :

Le délit civil de complot en vue de nuire, même s’il n’est pas étendu de manière à comprendre un complot

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” (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

en vue d’accomplir des actes illégaux lorsqu’il y a une intention implicite de causer un préjudice, a été la cible de nombreuses critiques partout dans le monde de la *common law*. Comme l’indique si bien lord Diplock dans l’arrêt *Lonrho*, précité, aux pp. 188 et 189, il s’agit réellement d’un anachronisme commercial. En fait, il est possible que dans le contexte commercial actuel cette action ait perdu en grande partie son utilité et qu’elle survive comme une anomalie dans notre droit. Quoi qu’il en soit, il est maintenant trop tard pour déraciner de la *common law* le délit civil de complot en vue de nuire. Sans aucun doute, les cours tenteront dans l’avenir, pour les mêmes motifs que certains invoquent actuellement à l’appui de sa suppression, de limiter l’application de ce délit civil. [p. 473]

Néanmoins, la question de savoir si ce délit civil devrait voir sa portée limitée de sorte que les faits de la présente espèce n’y soient pas assimilés ne doit pas être tranchée dans le cadre d’une demande de radiation.

[76] Au paragraphe 91 de sa troisième déclaration modifiée, sous une rubrique portant à la fois sur le complot qui vise principalement à causer un préjudice et celui qui prévoit l’emploi de moyens illégaux, Pro-Sys affirme que [TRADUCTION] « [I]es défenderesses entendaient comploter », puis elle énumère les trois « objectifs principaux » de celles-ci : (1) causer un préjudice aux demandeurs en exigeant qu’ils achètent les produits de Microsoft plutôt que ceux de concurrents, (2) causer un préjudice aux demandeurs en exigeant d’eux un prix majoré de façon artificielle et (3) accroître illégalement leurs profits (d.a., vol. II, p. 43).

[77] Microsoft soutient que le délit civil de complot visant principalement à causer un préjudice n’est pas étayé, car la déclaration de Pro-Sys ne révèle pas un véritable objet principal, mais en énumère plutôt [TRADUCTION] « plusieurs qui se chevauchent » (m.i., par. 93). À son avis, lorsque Pro-Sys allègue que Microsoft était « motivée uniquement par des considérations d’ordre financier » (par. 94), elle admet en fait que l’objet principal du comportement reproché ne pouvait être de lui causer un préjudice comme l’exige la loi.

[78] Il y a désaccord entre les parties sur la portée des allégations de Pro-Sys. Microsoft affirme

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 (C.A.), leave to appeal refused, [2006] 1 S.C.R. xii, 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.

qu’elles n’établissent pas que le véritable objet principal du complot était de causer un préjudice aux demandeurs. Pro-Sys fait valoir que, suivant ses allégations, les actes de Microsoft visaient principalement à causer un préjudice aux membres du groupe et qu’ils ont notamment eu pour effet d’accroître ses profits. Même si les actes de procédure auraient pu être rédigés de manière plus précise et directe, j’hésite à statuer définitivement, sur demande de radiation, que l’allégation d’un complot visant principalement à causer un préjudice est si lacunaire qu’aucune cause d’action n’est révélée. Pour l’heure, je ne peux écarter l’explication de Pro-Sys selon laquelle l’intention première de Microsoft était de causer un préjudice aux demandeurs et l’accroissement illégal de ses profits a résulté de cette intention. C’est pourquoi je ne saurais dire qu’il ne peut manifestement pas être fait droit à l’allégation de Pro-Sys selon laquelle il y a eu complot visant principalement à causer un préjudice.

[79] Microsoft ajoute que l’allégation doit être radiée dans la mesure où elle vise des sociétés liées, car [TRADUCTION] « [s]ociétés mères et filiales à 100 p. 100 agissent toujours de concert » (m.i., par. 95). Pro-Sys rétorque que [TRADUCTION] « [l]a prétention est infondée en droit » (mémoire en réponse des appelants, par. 55). Les deux invoquent entre autres le par. 19 de l’arrêt *Smith c. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (C.A.), autorisation d’appel refusée, [2006] 1 R.C.S. xii, où la Cour d’appel dit [TRADUCTION] « qu’il peut y avoir complot entre une société mère et une filiale ». À mon sens, cet énoncé paraît permettre que le complot visant principalement à causer un préjudice puisse constituer une cause d’action même lorsque le complot serait le fait de sociétés liées. Là encore, il ne convient pas de statuer définitivement sur ce point au stade de la demande de radiation. Dans les circonstances, je ne peux conclure que l’allégation de complot entre une société mère et sa filiale visant principalement à causer un préjudice doit manifestement être radiée à ce stade de l’instance.

(ii) 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, at para. 98; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1). 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 *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. 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

(ii) Complot prévoyant le recours à des moyens illégaux et atteinte intentionnelle aux intérêts financiers

[80] Pour le deuxième type de complot — celui « qui prévoit le recours à des moyens illégaux » —, point n’est besoin d’objet principal; il faut seulement que le comportement illégal soit dirigé contre le demandeur, que le défendeur doive savoir que le demandeur en subira vraisemblablement un préjudice et que le demandeur subisse effectivement un préjudice (*Ciments LaFarge*, p. 471-472).

[81] La raison d’être du délit civil d’atteinte intentionnelle aux intérêts financiers est l’indemnisation des victimes de pratiques commerciales délibérément préjudiciables (*Correia c. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, par. 98; *OBG Ltd. c. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1). Les trois éléments essentiels de ce délit civil sont (1) l’intention du défendeur de porter atteinte aux intérêts financiers du demandeur, (2) le recours à des moyens illégaux et (3) le préjudice consécutif subi par le demandeur (voir P. H. Osborne, *The Law of Torts* (4^e éd. 2011), p. 336).

[82] Microsoft fait valoir que les allégations de complot prévoyant le recours à des moyens illégaux et d’atteinte intentionnelle aux intérêts financiers doivent être radiées vu l’impossibilité d’établir l’élément qui leur est commun, soit le recours à des « moyens illégaux ».

[83] Ces causes d’action alléguées doivent être examinées sommairement car, dans le dossier *Bram Enterprises Ltd. c. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 R.N.-B. (2^e) 215, autorisation d’appel accordée, [2012] 3 R.C.S. v. actuellement en délibéré, notre Cour ne s’est pas encore prononcée sur l’approche qui s’impose à l’égard de cet élément commun aux deux délits civils. Il suffit de constater que, pour l’heure, l’inexistence d’une cause d’action fondée sur le complot prévoyant le recours à des moyens illégaux ou sur l’atteinte intentionnelle aux intérêts financiers n’est pas

be open to Microsoft to raise the matter in the B.C.S.C. should it consider it advisable to do so.

(c) *Restitution*

[84] Pro-Sys makes restitutionary claims alleging causes of action in unjust enrichment, constructive trust and waiver of tort.

(i) 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, at para. 30; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455; *Pettkus v. Becker*, [1980] 2 S.C.R. 834). 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. 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

manifeste. Je suis donc d’avis de ne pas radier les allégations. Selon l’issue du pourvoi dans *Bram*, Microsoft pourra demander à la Cour suprême de la Colombie-Britannique de statuer sur ce point si elle le juge opportun.

c) *Restitution*

[84] Pro-Sys demande restitution sur le fondement de l’enrichissement sans cause, de la fiducie par interprétation et de la renonciation au recours délictuel.

(i) Enrichissement sans cause

[85] Les éléments qui doivent être réunis pour qu’il y ait enrichissement sans cause sont bien connus : (1) l’enrichissement du défendeur, (2) l’appauvrissement corrélatif du demandeur et (3) l’absence d’une cause juridique de cet enrichissement (p. ex., un contrat) (voir *Alberta Elders*, par. 82; *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 30; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 455; *Pettkus c. Becker*, [1980] 2 R.C.S. 834). Selon Pro-Sys, Microsoft s’est injustement enrichie par la majoration du prix exigé de ses acheteurs directs, lesquels ont transféré cette majoration aux membres du groupe situés en aval dans la chaîne de distribution.

[86] Microsoft prétend que l’enrichissement, s’il en est, provient des acheteurs directs, et non des membres du groupe, et que son absence de lien direct avec ces derniers scelle le sort de l’allégation d’enrichissement sans cause. Elle ajoute que les contrats qu’elle a conclus avec les acheteurs directs et ceux intervenus entre les acheteurs directs et les acheteurs indirects (dont l’existence n’est pas contestée) constituent la cause juridique de l’enrichissement.

[87] À l’appui de sa première prétention, Microsoft invoque l’arrêt *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, où la juge McLachlin (maintenant Juge en chef) conclut à la p. 797 que « [l]es affaires dans lesquelles l’enrichissement sans cause a été établi concernent

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.

(ii) Constructive Trust

[90] As a remedy for the alleged unjust enrichment, Pro-Sys submits that an amount equal to the

généralement des avantages conférés directement et expressément au défendeur ». Pour fonder l’allégation d’enrichissement sans cause, l’avantage conféré ne doit pas revêtir qu’un « caractère purement incident. Un avantage secondaire et accessoire ne suffit pas. En effet, permettre qu’il y ait recouvrement à l’égard d’avantages accessoires et incidents reviendrait à admettre la possibilité d’un double recouvrement par le demandeur — d’abord, de la personne qui bénéficie immédiatement du paiement ou de l’avantage [. . .] et ensuite, de la personne qui en a tiré un avantage incident » (*Peel*, p. 797). Les mots employés dans cet arrêt paraissent écarter en eux-mêmes la possibilité d’un lien indirect entre le demandeur et le défendeur, mais la question n’est pas résolue pour autant. Premièrement, il n’est pas évident que l’avantage obtenu par Microsoft revêt un caractère « purement incident » ou qu’il est « accessoire ». Deuxièmement, Pro-Sys invoque l’arrêt *Alberta Elders*, selon lequel il peut y avoir enrichissement sans cause lorsque l’avantage conféré est indirect et qu’il a été transféré par un tiers. À ce stade, je ne peux conclure qu’il est manifeste que l’enrichissement sans cause ne sera établi que si le lien entre le demandeur et le défendeur est direct.

[88] En ce qui concerne la prétendue cause juridique de l’enrichissement de Microsoft, Pro-Sys fait valoir que les contrats en cause sont [TRADUCTION] « illégaux et nuls » en ce qu’ils portent atteinte à la liberté du commerce en common law, ils enfreignent les dispositions américaines antitrust, ils vont à l’encontre des politiques d’entreprise de Microsoft et ils contreviennent à la partie VI de la *Loi sur la concurrence*. Elle soutient qu’il ne s’agit donc pas d’une cause juridique de l’enrichissement. Il n’y a pas lieu, à ce stade de l’instance, de statuer sur la légalité et la validité des contrats. Il appartiendra au juge du procès de le faire.

[89] Je ne saurais donc conclure qu’il ne peut manifestement pas être fait droit à l’allégation d’enrichissement sans cause.

(ii) Fiducie par interprétation

[90] Pro-Sys soutient qu’en guise de réparation de l’enrichissement sans cause allégué, Microsoft

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, 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.

devrait détenir en fiducie pour le compte des membres du groupe une somme égale au montant de la majoration du prix de ses systèmes d’exploitation et de ses logiciels d’application vendus en Colombie-Britannique. En d’autres termes, elle demande que Microsoft soit constituée fiduciaire par interprétation à son bénéficiaire.

[91] L’arrêt *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269, est décisif en matière de fiducies par interprétation. Le juge Cromwell y explique que pour faire la preuve d’une fiducie par interprétation, le demandeur doit pouvoir établir un lien ou un rapport de causalité entre sa contribution et l’acquisition du bien en cause :

... la fiducie [par interprétation] est un outil général, souple et juste qui permet de déterminer le droit de propriété véritable (*Pettkus*, p. 843-844 et 847-848). Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l’acquisition, la conservation, l’entretien ou l’amélioration du bien en cause, une part proportionnelle à l’enrichissement sans cause peut faire l’objet d’une fiducie [par interprétation] en sa faveur (*Pettkus*, p. 852-853; *Sorochan*, p. 50). [par. 50]

[92] Nul bien n’est en cause en l’espèce; Pro-Sys réclame seulement une réparation pécuniaire. La fiducie par interprétation sert à « déterminer le droit de propriété véritable » lorsqu’« une réparation pécuniaire est inappropriée ou insuffisante » (*Kerr*, para. 50). Étant donné que Pro-Sys n’indique pas en quoi une réparation pécuniaire serait inappropriée ou insuffisante, et qu’elle n’établit pas de lien avec un bien en particulier, l’allégation ne satisfait pas aux conditions d’imposition d’une fiducie par interprétation. Au vu des actes de procédure, il est manifeste qu’on ne saurait faire droit à l’allégation de Pro-Sys selon laquelle Microsoft devrait conserver en fiducie pour le compte des membres du groupe une somme égale au montant de la majoration du prix de ses systèmes d’exploitation et de ses logiciels d’application vendus en Colombie-Britannique. Les éléments des actes de procédure qui concernent l’existence d’une fiducie par interprétation doivent être radiés.

(iii) 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 (2013), 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.*, [1941] A.C. 1 (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 (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (S.C.J. (Div. Ct.)), Epstein J. (as she then was) performed an extensive review

(iii) Renonciation au recours délictuel

[93] Subsidiairement à une cause d’action en responsabilité délictuelle, Pro-Sys invoque la renonciation au recours délictuel et demande à recouvrer une somme égale à l’enrichissement sans cause obtenu par Microsoft. Il y a renonciation au recours délictuel lorsque le demandeur renonce à son droit d’intenter une action en responsabilité délictuelle et choisit plutôt de se pourvoir en restitution et [TRADUCTION] « de recouvrer ainsi le bénéfice que le défendeur a tiré de la conduite délictueuse » (Maddaugh et McCamus (2013), p. 24-1). Les causes d’action en responsabilité délictuelle et en restitution ne s’excluent pas mutuellement, mais offrent plutôt des mesures de réparation qui peuvent être réclamées simultanément (*United Australia, Ltd. c. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), p. 18). La renonciation au recours délictuel a pour prémisses que, [TRADUCTION] « dans certains cas de délit civil, le demandeur peut avoir avantage à recouvrer l’enrichissement sans cause obtenu par le défendeur plutôt qu’à obtenir des dommages-intérêts dans le cadre d’une action en responsabilité délictuelle » (Maddaugh et McCamus, p. 24-1 et 24-2). D’aucuns considèrent que l’action fondée sur la renonciation au recours délictuel confère un avantage au demandeur en ce qu’elle peut le dispenser de prouver la perte au regard des règles de la responsabilité délictuelle ou même de quelque manière (Maddaugh et McCamus, p. 24-4).

[94] Microsoft fait valoir deux motifs de radier cette allégation. Premièrement, Pro-Sys invoque la renonciation au recours délictuel dans une optique de réparation, et non à titre de cause d’action, de sorte que la preuve de la perte est essentielle. Deuxièmement, si la renonciation au recours délictuel est effectivement invoquée comme cause d’action, il faut donc établir le délit civil sous-jacent, y compris la perte. À mon avis, aucun des deux motifs avancés ne permet de conclure que la demande fondée sur la renonciation au recours délictuel ne peut manifestement pas être accueillie.

[95] Dans *Serhan (Trustee of) c. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (C.S.J. (C. div.)), la juge Epstein (maintenant juge de la Cour d’appel

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 (2005), at p. 24-20; 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 (1879); *Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.*, 268 F. 575 (S.D.N.Y. 1920); *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374 (P.C.); *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, [1983] A.C. 366 (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; *Zidarcic 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 (CanLII)). 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).

de l'Ontario) examine minutieusement la notion de renonciation au recours délictuel. Elle constate que de nombreux auteurs reconnaissent sa validité comme cause d'action pour la restitution par le défendeur de l'enrichissement sans cause obtenu par des moyens répréhensibles, et non seulement pour la réparation de cet enrichissement sans cause. Ces auteurs diffèrent cependant d'avis quant à savoir si le délit civil sous-jacent doit être prouvé ou non pour les besoins de l'action fondée sur la renonciation au recours délictuel.

[96] Les tribunaux américains et britanniques, ainsi que les auteurs de doctrine en la matière, écartent pour la plupart l'obligation du demandeur d'établir le délit civil sous-jacent pour qu'il puisse avoir gain de cause sur le fondement de la renonciation au recours délictuel (voir *Serhan*, par. 51-68, citant Maddaugh et McCamus (2005), p. 24-20; 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 », dans W. R. Cornish et autres, dir., *Restitution : Past, Present and Future : Essays in Honour of Gareth Jones* (1998), 133; *National Trust Co. c. Gleason*, 77 N.Y. 400 (1879); *Federal Sugar Refining Co. c. United States Sugar Equalization Board, Inc.*, 268 F. 575 (S.D.N.Y. 1920); *Mahesan c. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374 (P.C.); *Universe Tankships Inc. of Monrovia c. International Transport Workers Federation*, [1983] A.C. 366 (H.L.)). Selon un autre courant jurisprudentiel, il ne peut y avoir de cause d'action fondée sur la renonciation au recours délictuel que s'il est établi que le défendeur a commis le délit civil y donnant ouverture (voir *United Australia*, p. 18; *Zidarcic c. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (C.S.J. Ont.), par. 14; *Reid c. Ford Motor Co.*, 2006 BCSC 712 (CanLII)). Dans au moins une de ces affaires (*Reid*), le tribunal laisse entendre que la réticence à écarter l'obligation de prouver la perte comme élément de la cause d'action explique en partie qu'il faille prouver le délit civil sous-jacent (par. 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.

(3) 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.

(a) *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

[97] La juge Epstein conclut au final que, vu l’état contradictoire du droit, [TRADUCTION] « [o]n ne saurait affirmer, de toute évidence, que le demandeur qui fonde son action sur la renonciation au recours délictuel sera assurément débouté »; elle ajoute que le débat « sur les conséquences de la reconnaissance de la renonciation au recours délictuel comme cause d’action indépendante dans des circonstances comme celles de l’espèce fait intervenir des principes sur lesquels il ne convient pas de prononcer à l’étape de l’examen des allégations » (*Serhan*, par. 68). Je suis d’accord. À mon avis, il ne convient pas de statuer plus avant, dans le cadre du pourvoi, sur le droit applicable en matière de renonciation au recours délictuel, ni sur le contexte particulier dans lequel on peut invoquer celle-ci. Je ne peux affirmer que le demandeur qui fonde son action sur la renonciation au recours délictuel sera manifestement débouté.

(3) Les autres conditions présidant à la certification

[98] Les causes d’action que confère l’art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution (sauf sur le fondement de la fiducie par interprétation) remplissent la première condition de certification voulant que les actes de procédure révèlent une cause d’action. Je me penche maintenant sur la prétention de Microsoft selon laquelle les demandes des membres du groupe doivent néanmoins être rejetées parce qu’elles ne satisfont pas à deux des autres conditions, à savoir qu’une question commune soit soulevée et que le recours collectif constitue la meilleure procédure pour régler cette question.

a) *Norme de preuve*

[99] Le point de départ pour déterminer la norme de preuve applicable aux autres conditions de certification réside dans l’arrêt de principe *Hollick* où la juge en chef McLachlin énonce succinctement cette norme : « . . . le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions énumérées [dans] la Loi, autre que l’exigence que les actes de procédure révèlent une cause d’action » (par. 25 (je souligne)). La Juge

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 (“*Infineon*”), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (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

en chef signale que « [l]a Loi écarte carrément un examen au fond à l’étape de la certification » (par. 16). Cette étape intéresse plutôt la forme et le caractère approprié de la poursuite par voie de recours collectif (voir *Hollick*, par. 16; *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (« *Infineon* »), par. 65; *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), par. 50).

[100] Suivant la norme de preuve issue de l’arrêt *Hollick*, la question n’est pas celle de savoir si la demande a un certain fondement factuel, mais plutôt si un certain fondement factuel établit chacune des conditions de certification. La juge en chef McLachlin signale cependant que la preuve importe aux fins de la certification. Elle fait remarquer que « le rapport [. . .] du comité consultatif du procureur général [sur la réforme du recours collectif] envisageait manifestement que le représentant du groupe serait tenu d’étayer sa demande de certification » (par. 25).

[101] Bien qu’elle souscrive à la norme fondée sur l’existence d’« un certain fondement factuel », Microsoft fait valoir que [TRADUCTION] « pour respecter la norme de preuve, les demandeurs doivent établir *selon la prépondérance des probabilités* que le recours collectif proposé soulève une question commune et qu’il constitue la meilleure procédure pour régler cette question » (m.i., par. 41 (en italique dans l’original)). Elle invoque à l’appui les propos du juge Cullity, de la Cour supérieure de justice de l’Ontario, selon lesquels, [TRADUCTION] « [d]ans la mesure où l’exigence d’un certain fondement factuel est liée au fait que la demande de certification revêt un caractère procédural et que son examen ne doit pas porter sur le fond des allégations, rien ne paraît justifier l’application d’une norme moins stricte aux conditions essentielles qui président à la certification et qui échapperont à la compétence du tribunal lors du procès » (« Certification in Class Proceedings — The Curious Requirement of “Some Basis in Fact” » (2011), 51 *Rev. can. dr. comm.* 407, p. 422). En d’autres termes, le juge Cullity indique qu’en

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 (3rd Cir. 2008), at p. 307, and R.F., at 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 (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).

raison de leur nature procédurale, les conditions de certification ne feront pas l’objet d’un nouvel examen lors du procès. Il n’y a donc aucune raison de statuer sur le respect de ces conditions selon une norme moins stricte que celle de la « prépondérance des probabilités » généralement appliquée en matière civile. Microsoft ajoute que notre Cour devrait, à l’instar des tribunaux américains, tirer des conclusions de fait à l’étape de la certification selon la prépondérance de la preuve et exiger du juge saisi de la demande de certification qu’il évalue la preuve de façon à régler les différends d’ordre factuel ou juridique à cette étape, même lorsque ces différends touchent le fond du litige (voir m.i., par. 42, citant *In re : Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008), p. 307, et m.i., par. 43).

[102] Je ne saurais souscrire aux observations de Microsoft sur ce point. Si la juge en chef McLachlin avait voulu que le respect des conditions de certification soit assujéti à la norme de la « prépondérance des probabilités », elle l’aurait précisé. Or, la règle établie est claire. Les tribunaux n’ont jamais considéré que l’arrêt *Hollick* exigeait une preuve selon la prépondérance des probabilités. En outre, en s’appuyant sur le droit américain, Microsoft adopte une approche nouvelle et rompt avec la norme de l’arrêt *Hollick*. La norme fondée sur l’existence d’« un certain fondement factuel » n’exige pas que le tribunal se prononce sur les éléments de fait et les éléments de preuve contradictoires à l’étape de la certification. Elle tient plutôt compte du fait que, à cette étape, [TRADUCTION] « le tribunal n’est pas en mesure de statuer sur les éléments contradictoires de la preuve non plus que de déterminer sa valeur probante à l’issue d’une analyse nuancée » (*Cloud*, par. 50; *Irving Paper Ltd. c. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (C.S.J.), par. 119, citant *Hague c. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (C.S.J. Ont.)). La procédure de certification ne comporte pas d’examen au fond de la demande et elle ne vise pas à déterminer le bien-fondé des allégations; [TRADUCTION] « elle intéresse plutôt la forme que revêt l’action pour déterminer s’il convient de procéder par recours collectif » (*Infineon*, par. 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)).

(b) *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*

[103] De toute manière, plus d’une décennie s’est écoulée depuis *Hollick* et il convient de confirmer l’importance que revêt la procédure de certification comme mécanisme de filtrage efficace. La norme de preuve appliquée au stade de la certification n’emporte pas de [TRADUCTION] « conclusion sur le bien-fondé de l’instance » (*CPA*, par. 5(7)); elle ne donne pas lieu non plus à un examen du caractère suffisant de la preuve qui soit superficiel au point d’être strictement symbolique.

[104] Quoi qu’il en soit, j’estime en toute déférence qu’il serait peu utile de tenter de définir « un certain fondement factuel » dans l’abstrait. L’issue d’une affaire dépend des faits qui lui sont propres. Suffisamment de faits doivent permettre de convaincre le juge saisi des demandes que les conditions de certification sont réunies de telle sorte que l’instance puisse suivre son cours sous forme de recours collectif sans s’écrouler à l’étape de l’examen au fond à cause du non-respect des conditions prévues au par. 4(1) de la *CPA*.

[105] Enfin, je fais observer que les tribunaux canadiens ont refusé d’adopter l’approche américaine et de se livrer à une analyse rigoureuse sur le fond à l’étape de la certification. En conséquence, la certification du recours collectif ne garantit aucunement que les demandeurs auront gain de cause lors de l’examen des questions communes au procès. J’estime qu’il importe de souligner que l’approche canadienne à l’étape de la certification ne permet pas d’apprécier toutes les difficultés et tous les défis que le demandeur devra surmonter pour prouver ses allégations au procès. Une fois le recours certifié, de nouvelles données peuvent apparaître et remettre en question le respect des conditions du par. 4(1). C’est la raison pour laquelle la *CPA* consacre le pouvoir du tribunal de révoquer la certification du recours collectif à tout moment où il est établi que les conditions de certification ne sont plus réunies (par. 10(1)).

(b) *Les demandes des membres du groupe soulèvent-elles des questions communes?*

[106] L’exigence d’une question commune a été qualifiée de [TRADUCTION] « [f]ondamentale au recours collectif » (M. A. Eizenga et autres, *Class*

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, this Court addressed the commonality question, stating that “[t]he 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 not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial common ingredient to justify

Actions Law and Practice (feuilles mobiles), p. 3-34.6). Elle repose sur l’idée que « les personnes qui soulèvent une question de droit “commune” doivent pouvoir obtenir le règlement de cette question commune dans le cadre d’une seule instance plutôt que d’instances multiples et répétitives confinant à l’inefficacité » (*ibid.*).

[107] L’alinéa 4(1)(c) de la *CPA* dispose que le tribunal certifie qu’il s’agit d’un recours collectif lorsque, notamment, [TRADUCTION] « les demandes des membres du groupe soulèvent une question commune, que celle-ci l’emporte ou non sur les questions qui touchent uniquement les membres individuels ». Selon l’article 1 de la *CPA*, « question commune » s’entend, selon le cas, « (a) d’une question de fait commune, mais pas nécessairement identique ou (b) d’une question de droit commune, mais pas nécessairement identique, qui découle de faits qui sont communs, mais pas nécessairement identiques ».

[108] Dans l’arrêt *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, notre Cour aborde la notion de communauté et conclut que « [l]a question sous-jacente est de savoir si le fait d’autoriser le recours collectif permettra d’éviter la répétition dans l’appréciation des faits ou l’analyse juridique » (par. 39). J’énumère les autres paramètres établis par la juge en chef McLachlin et qui figurent aux par. 39-40 de l’arrêt :

- (1) Il faut aborder le sujet de la communauté en fonction de l’objet.
- (2) Une question n’est « commune » que lorsque son règlement est nécessaire au règlement des demandes de chacun des membres du groupe.
- (3) Il n’est pas essentiel que les membres du groupe soient tous dans la même situation par rapport à la partie adverse.
- (4) Il n’est pas nécessaire que les questions communes l’emportent sur les questions non communes. Les demandes des membres du groupe doivent toutefois partager

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.

un élément commun important afin de justifier le recours collectif. Le tribunal évalue l'importance des questions communes par rapport aux questions individuelles.

- (5) Le succès d'un membre du groupe emporte nécessairement celui de tous. Tous les membres du groupe doivent profiter du dénouement favorable de l'action, mais pas nécessairement dans la même proportion.

[109] Microsoft fait valoir que les différences entre les membres du groupe proposé sont trop importantes et ne permettent pas de satisfaire à l'exigence d'une question commune. Selon elle, les demandeurs allèguent avoir subi un préjudice à l'occasion de comportements fautifs distincts, que ces actes ont eu lieu sur une période de 24 ans, qu'ils ont visé 19 produits différents, que diverses personnes ont pris part au complot et que d'innombrables licences sont en cause. Elle ajoute que le transfert de la majoration aux membres du groupe en aval dans la chaîne de distribution rend impossible la preuve de la perte de chacun des membres du groupe aux fins d'établir l'existence d'une question commune.

[110] La multitude de variables que font intervenir les actions d'acheteurs indirects pourrait fort bien présenter un défi de taille à l'étape de l'examen au fond. Toutefois, plusieurs questions communes paraissent discernables. Établir la communauté des questions n'exige pas la preuve que les actes allégués ont effectivement eu lieu. À ce stade, il faut plutôt établir que les questions soulevées sont communes à tous les membres du groupe.

[111] Le juge Myers conclut que les demandes soulèvent des questions communes. Je conviens que leur règlement est en effet nécessaire à celui de la réclamation de chacun des membres du groupe. Il permettrait de faire progresser l'examen des allégations du groupe dans son ensemble et d'éviter la répétition dans l'analyse du droit et des faits. Une cour d'appel doit faire preuve de déférence à l'égard de ces conclusions.

[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.

(i) 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).

[112] À mon sens, les différences invoquées par Microsoft ne permettent pas d’écarter la conclusion qu’il y a questions communes. L’arrêt *Dutton* confirme que même des différences assez importantes entre les membres du groupe n’empêchent pas de conclure à l’existence de questions communes. En tout état de cause, comme le fait remarquer la juge en chef McLachlin, « [s]i des différences importantes surviennent, le tribunal réglera la question le moment venu » (*Dutton*, par. 54).

[113] Outre celles liées à l’existence et à la portée des causes d’action invoquées, les autres questions communes certifiées par le juge Myers portent sur la perte qu’auraient subie les membres du groupe et sur la possibilité d’établir les dommages-intérêts de manière globale. Démontrer le caractère commun des questions liées à la perte — la perte subie par les membres peut-elle être circonscrite à l’échelle du groupe? — commande le recours à une preuve d’expert. La norme de preuve applicable à cette preuve est contestée, et je l’examine ci-après. On soulève par ailleurs la question de savoir si les dispositions sur l’octroi de dommages-intérêts globaux peuvent servir à fonder la responsabilité. J’examine ce point ensuite.

(i) Preuve d’expert dans le cadre d’actions d’acheteurs indirects

[114] L’une des difficultés que pose le recours d’acheteurs indirects a trait à l’appréciation du caractère commun des questions liées au préjudice ou à la perte. Pour que ces questions puissent satisfaire à la norme d’« un certain fondement factuel », il doit être assez certain qu’elles peuvent faire l’objet d’un règlement commun. Dans le cadre d’actions intentées par des acheteurs indirects, les demandeurs tentent généralement de satisfaire à cette exigence en offrant une preuve d’expert qui revêt la forme de modèles et de méthodes économiques.

[115] La méthode proposée par l’expert vise à établir que la majoration a été transférée aux acheteurs indirects, ce qui rend la question commune au groupe dans son ensemble (voir *Chadha*,

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.

[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 B.C.C.A. in *In-fineon* 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

par. 31). À l’étape de la certification, la méthode n’a pas à déterminer le montant des dommages-intérêts, mais doit plutôt — et c’est là l’élément crucial — être susceptible de prouver « les conséquences communes », comme le conclut un tribunal américain dans une affaire antitrust, *In Re : Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). Les demandeurs doivent démontrer qu’une [TRADUCTION] « preuve permettra d’établir, lors du procès, les conséquences antitrust qui sont communes à tous les membres du groupe » (*ibid.*, p. 155). À l’étape de la certification, point n’est besoin que la méthode établisse la perte réellement subie par le groupe dans la mesure où le demandeur démontre qu’une méthode permet de le faire. Dans le cadre d’actions d’acheteurs indirects, la méthode doit donc pouvoir établir que la majoration a été transférée à l’acheteur indirect situé en aval dans la chaîne de distribution.

[116] La question la plus vivement débattue au chapitre de l’utilisation de la preuve d’expert est celle de savoir à quel point la preuve doit être concluante à l’étape de la certification pour convaincre le tribunal qu’une méthode permet d’établir les conséquences communes à l’échelle du groupe. Dans l’affaire *Infineon*, la C.A.C.-B. a invité la demanderesse à ne présenter [TRADUCTION] « qu’une méthode valable ou acceptable » pour ensuite conclure qu’« [i]l est bien établi que l’analyse de régression statistique offre en principe une estimation raisonnable du bénéfice ou du préjudice global et de l’étendue du transfert de la perte lorsqu’il y a eu fixation des prix » (par. 68). C’est le critère appliqué par le juge Myers en l’espèce, de sorte qu’il conclut que les méthodes employées par les parties demanderesses permettaient de satisfaire à l’exigence d’une question commune.

[117] Microsoft soutient que le critère de la « méthode valable ou acceptable » adopté par le juge Myers est trop laxiste et ouvre la voie à des demandes étayées par une preuve insuffisante. Elle fait valoir que le par. 5(4) de la *CPA* oblige les parties à déposer des affidavits qui énoncent tous les faits importants qu’elles entendent invoquer et que le juge Myers avait donc l’obligation de mettre

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 (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., precertification 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). Microsoft can hardly argue for rigorous and robust

en balance les éléments de preuve des deux parties en cas de conflit. Elle allègue que, au mépris de cette exigence, le juge Myers ne soupèse pas la preuve d'expert de Pro-Sys au regard de la sienne, mais conclut simplement que la preuve d'expert de Pro-Sys n'est [TRADUCTION] « pas inacceptable » et que l'appréciation des éléments de preuve contradictoires « ne peut et ne doit pas intervenir à l'étape de la certification » (m.i., par. 43, citant le par. 144 des motifs du juge Myers). Or, selon Microsoft, cette approche est erronée et incompatible avec la norme applicable à cette étape. Invoquant encore une fois la jurisprudence américaine, elle exhorte notre Cour à apprécier les témoignages d'expert contradictoires à l'étape de la certification, et ce, de manière [TRADUCTION] « stricte » et « rigoureuse » (m.i., par. 45-48, citant *Hydrogen Peroxide*, p. 323, et *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), p. 2551).

[118] À mon avis, la méthode d'expert doit être suffisamment valable ou acceptable pour établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune. Elle doit donc offrir une possibilité réaliste d'établir la perte à l'échelle du groupe, de sorte que, si la majoration est établie à l'issue de l'examen des questions communes au procès, un moyen permette de démontrer qu'elle est commune aux membres du groupe (c.-à-d. que le transfert a eu lieu). Or, il ne peut s'agir d'une méthode purement théorique ou hypothétique; elle doit reposer sur les faits de l'affaire. L'existence des données auxquelles la méthode est censée s'appliquer doit être étayée par quelque preuve.

[119] Il ne convient pas, à l'étape de la certification, de soumettre la méthode à la norme stricte ou rigoureuse que préconise Microsoft, notamment d'exiger du demandeur qu'il prouve le préjudice effectivement subi. Au Canada, contrairement à ce qui a cours aux États-Unis, il n'y a pas d'emblée un droit à la communication de documents avant la certification. Même si le juge saisi des demandes a le pouvoir discrétionnaire de l'ordonner, Microsoft s'y est opposée et le juge Myers a refusé de l'ordonner en l'espèce (2007 BCSC 1663, 76 B.C.L.R. (4th) 171). Microsoft peut difficilement plaider en

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.

faveur d'un examen strict ou rigoureux, alors qu'elle s'est opposée à la communication de documents avant la certification et que le juge saisi des demandes a retenu son opposition.

[120] En l'espèce, la preuve d'expert de Pro-Sys est constituée de méthodes proposées par deux économistes, les professeurs James Brander et Janet Netz. Dans son affidavit, le professeur Brander déclare enseigner le commerce international pour la zone Asie-Pacifique à la Sauder School of Business de l'Université de la Colombie-Britannique et exercer la fonction de conseiller principal au sein du Delta Economics Group. Selon son affidavit, la professeure Netz est économiste et associée fondatrice d'ApplEcon LLC, un cabinet de services-conseils en économie établi à Ann Arbor, au Michigan, professeure agrégée permanente d'économie à l'Université Purdue, ainsi que professeure agrégée invitée à l'Université du Michigan. Elle a été témoin expert dans plusieurs instances semblables engagées contre Microsoft aux États-Unis. Son témoignage s'appuie en grande partie sur les éléments de preuve qu'elle a présentés à titre d'experte dans ces instances.

[121] La professeure Netz estime que les méthodes employées aux États-Unis peuvent également l'être en l'espèce. Selon elle, ces méthodes permettent d'établir la majoration que Microsoft a imposée initialement à ses acheteurs directs, ainsi que son transfert aux acheteurs indirects. Elle fait état de trois méthodes pour évaluer le préjudice subi et établir le montant des dommages-intérêts. Les deux premières méthodes, à savoir celle fondée sur le taux de rentabilité (« *rate of return method* ») et celle fondée sur la marge bénéficiaire (« *profit margin method* »), permettent de déterminer la majoration intervenue au sommet de la chaîne de distribution — soit la majoration directe par Microsoft lors de la vente à ses propres clients. Ces méthodes ne permettent pas à elles seules d'établir le transfert de la majoration, mais elles visent à déterminer la somme totale touchée par Microsoft par suite de la majoration. En ce qui concerne la troisième méthode, celle fondée sur l'augmentation du prix (« *price premium method* »), l'analyse commence à l'autre extrémité de la chaîne de distribution, là où se situe le consommateur final.

[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). [Emphasis in original; 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).

[122] La professeure Netz décrit comme suit la méthode fondée sur l'augmentation du prix :

[TRADUCTION] Cette méthode sert à calculer l'augmentation du prix au *détail* des produits de Microsoft par rapport à ceux de concurrents pour les produits en cause et pour un ensemble de produits de référence lorsqu'il n'y a pas eu d'allégations de comportement anticoncurrentiel. La majoration correspond au pourcentage de diminution du prix au *détail* des produits en question qui permettrait à Microsoft de toucher la même augmentation du prix au *détail* que pour les produits de référence (à savoir des produits offerts sur des marchés non touchés par le comportement illégal de Microsoft). [En italique dans l'original; 2010 BCSC 285, par. 26.]

[123] Une fois déterminée la majoration du prix au détail, on établit le montant des dommages-intérêts en multipliant par le pourcentage de majoration le total des dépenses faites par les membres du groupe pour les produits en question.

[124] Selon la professeure Netz, l'analyse de régression peut servir à déterminer l'étendue du transfert afin d'établir la perte subie par l'acheteur indirect. Faisant fond sur l'application concluante de ces méthodes aux États-Unis, elle précise que, [TRADUCTION] « [s]ur le plan théorique, rien ne s'oppose à ce que les méthodes s'appliquent à la vente des logiciels de Microsoft au Canada » (affidavit de la professeure Netz, par. 49 (d.a., vol. II, p. 177)). Il appert implicitement de son témoignage que les données nécessaires à l'application des méthodes existent au Canada.

[125] Aux paragraphes 131-164 de ses motifs, le juge Myers se penche sur les critiques formulées par Microsoft à l'égard du témoignage de la professeure Netz. Microsoft reproche au témoin de ne pas tenir compte du contexte canadien, de n'offrir aucune preuve à l'appui de ses conclusions, de ne pas bien choisir les produits de référence et de proposer des méthodes inapplicables. Le juge Myers conclut que la professeure Netz fait néanmoins état d'une méthode acceptable pour établir la perte infligée à l'échelle du groupe. Il n'examine donc pas les méthodes proposées par le professeur Brander (par. 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.

(ii) 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

[126] Il se peut effectivement que, au procès, le témoignage d'expert présenté par Microsoft se révèle plus convaincant et plus digne de foi que ceux de la professeure Netz et du professeur Brander. Or, trancher entre des preuves d'expert contradictoires relève du juge du procès et ne doit pas intervenir à l'étape de la certification (voir *Infineon*, par. 68; *Irving*, par. 143). Le juge du procès disposera d'un dossier complet qui lui permettra de se prononcer sur le caractère approprié de tout octroi de dommages-intérêts fondé sur la méthode proposée. Aux fins de la certification, et compte tenu de la déférence à laquelle a droit le juge saisi des demandes sur ce point, je suis d'avis de ne pas modifier les conclusions du juge Myers sur le caractère commun des questions touchant à la perte subie.

(ii) Détermination globale du montant des dommages-intérêts

[127] La question qui se pose en l'espèce est celle de savoir s'il y a lieu de certifier comme questions communes celles se rapportant à l'opportunité de dommages-intérêts globaux. Les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux prévoient l'établissement de la réparation pécuniaire à l'échelle du groupe. Voici le libellé des par. 29(1) et (2) de la *CPA* :

[TRADUCTION]

29 (1) Le tribunal peut fixer par ordonnance le montant global des dommages-intérêts quant à la totalité ou à une partie de la responsabilité pécuniaire d'un défendeur envers les membres du groupe, et rendre jugement en conséquence, si :

- (a) une réparation pécuniaire est demandée au nom de tous les membres du groupe ou de certains d'entre eux;
- (b) il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire afin de fixer le montant de la responsabilité pécuniaire du défendeur;
- (c) la totalité ou une partie de la responsabilité du défendeur envers tous les membres du

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

groupe ou certains d'entre eux peut raisonnablement être établie sans que des membres n'aient à en faire la preuve individuellement.

- (2) Avant de rendre l'ordonnance visée au paragraphe (1), le tribunal permet au défendeur de présenter des observations sur toute question qui touche l'ordonnance proposée, y compris sur ce qui suit :
- (a) le bien-fondé de l'ordonnance rendue en application de ce paragraphe ou le montant des dommages-intérêts qui y sont accordés;
 - (b) la nécessité d'une preuve individuelle du droit à la réparation pécuniaire étant donné la nature individuelle de celle-ci.

[128] Dans la présente affaire, les questions communes qui ont été certifiées sont les suivantes : peut-on établir les dommages-intérêts de manière globale et, dans l'affirmative, à combien se montent-ils? Pour les motifs qui suivent, la décision du juge saisi des demandes de certifier ces questions ne doit pas être réformée. Toutefois, même si les questions que certifie le juge Myers relativement aux dommages-intérêts globaux n'ont trait qu'à la détermination de leur montant, et non à la preuve de la perte, ses motifs créent une certaine incertitude quant à savoir si les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux peuvent être invoquées pour prouver la perte lorsque la preuve de celle-ci est un élément essentiel de l'établissement de la responsabilité. Cette question a été tranchée différemment par les tribunaux de l'Ontario et de la Colombie-Britannique, deux provinces dont les dispositions pertinentes s'apparentent suffisamment entre elles pour qu'on puisse les comparer.

[129] Dans la présente affaire, le juge Myers conclut que ces dispositions peuvent être invoquées pour établir ce qui me paraît être la preuve de la perte qui permet d'établir la responsabilité. Il dit que [TRADUCTION] « les dispositions de la *Class Proceedings Act* sur l'octroi de dommages-intérêts globaux permettent de prouver le préjudice infligé globalement au groupe en entier » (par. 126) et aussi qu'« il faut considérer que, pour la Cour d'appel, la certification d'une demande d'indemnisation n'exige pas la démonstration qu'une méthode

aggregate damages sections can be used to establish liability” (B.C.S.C., 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, 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, 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.

permet d’établir le préjudice infligé à tous les membres du groupe et, en outre, les dispositions sur l’octroi de dommages-intérêts globaux peuvent être invoquées pour établir la responsabilité » (C.S.C.-B., par. 125).

[130] Pour arriver à la conclusion que les dispositions de la *CPA* sur l’octroi de dommages-intérêts globaux peuvent être invoquées pour prouver la perte infligée au groupe dans son ensemble, le juge Myers s’appuie sur la jurisprudence de la Cour d’appel de la Colombie-Britannique. Son raisonnement figure dans *Infineon* :

[TRADUCTION] Dans *Knight*, la Cour confirme la certification de la réparation pécuniaire globale fondée sur la *CPA* comme question commune dans une instance en restitution des profits tirés du comportement fautif sans détermination préalable de la responsabilité du défendeur — en fait, l’évaluation globale établirait à la fois le fait que le défendeur a tiré profit de son comportement fautif et l’étendue de ce profit. [par. 39]

(Voir également *Steele c. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389, par. 50-52.)

[131] Soit dit en tout respect, je n’adhère pas à ce raisonnement. Les dispositions de la *CPA* sur l’octroi de dommages-intérêts globaux ont trait à la réparation, sont de nature procédurale et ne peuvent permettre d’établir la responsabilité (*2038724 Ontario Ltd. c. Quizno’s Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, par. 55). Le libellé de l’al. 29(1)(b) veut qu’il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire pour qu’une réparation pécuniaire globale puisse être accordée. À mon sens, il faut une conclusion préalable de responsabilité avant d’appliquer les dispositions de la *CPA* sur l’octroi de dommages-intérêts globaux, ce qui comprend, lorsque l’exige une cause d’action comme celles prévues à l’art. 36 de la *Loi sur la concurrence*, une conclusion sur la preuve de la perte. Je ne vois pas comment une disposition visant à accorder des dommages-intérêts de manière globale pourrait être le fondement d’une conclusion sur quelque volet de la responsabilité.

[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 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).

[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, p. 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

[132] Je souscris à la conclusion de la juge Feldman dans *Chadha*, à savoir que les dispositions sur l’octroi de dommages-intérêts globaux [TRADUCTION] « s’appliquent seulement une fois la responsabilité établie et offrent une méthode d’évaluation globale des dommages-intérêts, mais ne permettent pas d’établir le préjudice » (par. 49). Je conviens également avec le juge Masuhara de la Cour suprême de la Colombie-Britannique qu’[TRADUCTION] « établir la responsabilité exige de prouver que le transfert de la perte a atteint les membres du groupe. Il faut statuer sur ce point avant d’appliquer les dispositions sur l’évaluation globale des dommages-intérêts, lesquelles n’offrent qu’un moyen d’attribuer l’indemnité » (voir *Infineon*, 2008 BCSC 575 (CanLII), par. 176). Aussi, je partage l’avis de la Cour d’appel de l’Ontario dans *Quizno's* selon lequel [TRADUCTION] « [L]es juges majoritaires reconnaissent clairement que l’art. 24 [de la *Loi de 1992 sur les recours collectifs* de l’Ontario, L.O. 1992, ch. 6] est de nature procédurale et ne peut servir d’assise à l’établissement de la responsabilité » (par. 55).

[133] Ce raisonnement traduit l’intention du procureur général de la Colombie-Britannique. Lorsque ce dernier a présenté la *CPA* à l’Assemblée législative de la province, il a précisé que la loi visait à permettre aux personnes ayant des réclamations apparentées de réunir leurs demandes individuelles et de poursuivre collectivement : [TRADUCTION] « En somme, le but est seulement de trouver un moyen de reconnaître aussi à un regroupement de personnes le droit d’ester en justice que l’on reconnaît à une personne individuelle » (l’hon. C. Gabelmann, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, n° 20, 4^e sess., 35^e lég., 6 juin 1995, p. 15078). La *CPA* ne visait pas à permettre à un groupe de personnes de prouver ce que nulle personne individuelle ne pouvait prouver. L’un de ses principaux objectifs était plutôt de faire en sorte que les personnes qui ont des réclamations individuelles prouvables puissent se regrouper et voir ainsi leurs démarches judiciaires facilitées.

[134] La question de savoir si l’octroi de dommages-intérêts globaux constitue une réparation appropriée peut être certifiée comme question commune. Cependant, cette question commune ne

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.

(c) *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;

sera tranchée qu'au procès, une fois la responsabilité établie. La décision relative à l'applicabilité des dispositions de la *CPA* sur les dommages-intérêts globaux doit appartenir en fin de compte au juge du procès appelé à statuer sur les questions communes. En outre, l'omission de proposer ou de certifier à titre de question commune l'opportunité d'accorder des dommages-intérêts globaux ou une autre réparation n'empêche pas le juge de se fonder sur les dispositions s'il l'estime indiqué.

[135] Toutefois, rappelons que même si les dispositions sur les dommages-intérêts globaux ne sauraient servir à prouver la perte, la décision du juge Myers de certifier que leur application soulève une question commune demeure valable. Même s'il conclut à tort qu'elles peuvent être invoquées pour établir la responsabilité, il ajoute que point n'est besoin de les invoquer en l'espèce (voir par. 119-120 et 127). Les questions qui s'y rapportent et qu'il certifie consistent seulement à savoir si le montant des dommages-intérêts peut être arrêté globalement et, dans l'affirmative, quel est ce montant. Puisque le juge Myers ne s'appuie pas véritablement sur sa conclusion que les dispositions peuvent être invoquées pour prouver la responsabilité, sa décision de certifier des questions communes touchant à l'octroi de dommages-intérêts globaux n'a pas à être modifiée.

c) *Le recours collectif constitue-t-il la meilleure procédure pour régler les questions communes?*

[136] Le paragraphe 4(2) de la *CPA* prévoit que le recours collectif doit constituer la meilleure procédure pour régler une question commune :

[TRADUCTION]

- (2) Pour déterminer si le recours collectif serait la meilleure procédure pour régler la question commune de manière juste et efficace, le tribunal tient compte des facteurs applicables et se demande notamment ce qui suit :
- (a) la question de fait ou de droit qui est commune aux membres du groupe l'emporte-t-elle sur celle qui touche uniquement les membres individuels;

- | | |
|--|---|
| <p>(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;</p> <p>(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;</p> <p>(d) whether other means of resolving the claims are less practical or less efficient;</p> <p>(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.</p> | <p>(b) un nombre important de membres du groupe ont-ils véritablement intérêt à poursuivre des instances séparées;</p> <p>(c) le recours collectif comprend-il des demandes qui ont été ou qui font l'objet d'autres instances;</p> <p>(d) les autres modes de règlement sont-ils moins pratiques ou efficaces;</p> <p>(e) la gestion du recours collectif crée-t-elle de plus grandes difficultés que l'adoption d'un autre moyen?</p> |
|--|---|

[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).

[137] Dans l'arrêt *Hollick*, notre Cour confirme que le fait de constituer ou non la meilleure procédure pour régler les questions communes est fonction des trois principaux avantages du recours collectif : « . . . l'économie des ressources judiciaires, l'accès à la justice et la modification des comportements » (par. 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.

[138] Selon Microsoft, l'absence de caractéristiques communes aux membres du groupe et le grand nombre de questions individuelles font que le recours collectif n'est pas un moyen [TRADUCTION] « juste, efficace et pratique de faire progresser l'instance » comme l'exige l'arrêt *Hollick* (m.i., par. 84, citant *Hollick*, par. 28). Elle ajoute que la certification de l'action ne saurait remplir la fonction du recours collectif qui consiste à faciliter l'accès à la justice, car l'action se fragmenterait inévitablement en de nombreux procès individuels, ce qui causerait des retards au détriment des membres du groupe. Microsoft soutient en outre que les actions d'acheteurs indirects donnent généralement lieu à des versements selon le principe de l'aussiprès (en anglais, « *cy près doctrine* ») — lorsqu'il est irréaliste de distribuer la somme accordée aux demandeurs individuels —, ce qui n'est pas non plus de nature à favoriser l'accès à la justice. En ce qui concerne l'objectif de modifier les comportements, Microsoft soutient qu'il relève plutôt du commissaire de la concurrence et que les instances susceptibles d'être engagées par cet organisme offrent le meilleur moyen de statuer sur les actes fautifs allégués en l'espèce.

[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” (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.

[139] Je ne puis faire droit à ces prétentions. Dans *Hollick*, la juge en chef McLachlin estime que le demandeur ne satisfait pas aux conditions de certification en ce que le recours collectif ne constitue pas la meilleure procédure. Selon elle, la question de savoir si la défenderesse a émis illégalement du méthane et d’autres polluants est commune à tous les membres du groupe. Sur la question de savoir si la perte peut être établie à l’échelle du groupe, elle conclut cependant que, en raison de différences trop nombreuses entre les membres du groupe, il n’y a pas lieu de voir dans la perte une question commune. En d’autres termes, bien qu’elle conclue que l’existence d’une cause d’action soulève une question commune, la Juge en chef estime que les questions liées à la perte ne sont pas communes à tous les membres du groupe. Elle refuse de certifier le recours collectif au motif que, « [u]ne fois la question commune considérée dans le contexte global de la demande, il devient difficile d’affirmer que le règlement de la question commune fera progresser substantiellement l’instance » (par. 32).

[140] Dans la présente affaire, non seulement l’existence de causes d’action, mais aussi la perte subie par les membres du groupe, constituent des questions communes. Contrairement à l’affaire *Hollick*, on peut dire en l’espèce que la perte constitue une question commune car il a été déterminé qu’une méthode proposée par un expert permettrait assez certainement d’établir la perte à l’échelle du groupe. Le règlement des questions communes devrait permettre de statuer sur la responsabilité de Microsoft et sur le transfert de la majoration aux acheteurs indirects. Puisqu’il est essentiel de statuer sur ces points afin que les membres du groupe puissent recouvrer le montant de la perte, on peut soutenir en l’espèce que le règlement des questions communes fera progresser substantiellement l’instance. Bien qu’il soit possible que des questions individuelles soient soulevées à l’audition des questions communes, le juge Myers indique implicitement dans ses motifs que, à l’étape de la certification, les questions communes l’emportent sur les questions qui ne touchent que des membres individuels. Je suis d’accord. Dans les circonstances, je suis d’avis de ne pas modifier sa conclusion portant que le recours collectif constituerait la meilleure procédure pour régler les questions communes.

[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.

(4) 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.

V. Conclusion

[143] For the above reasons, I would allow the appeal with costs throughout.

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?

[141] De plus, il est trop tôt pour présumer que la réparation accordée en l'espèce donnera lieu à des versements selon le principe de l'aussi-près ou que, le cas échéant, l'objectif de favoriser l'accès à la justice sera compromis. En outre, bien que, sous le régime de la *Loi sur la concurrence*, la dissuasion et la modification des comportements relèvent en premier lieu du commissaire de la concurrence, le Bureau de la concurrence a indiqué qu'il ne poursuivrait pas Microsoft dans le présent dossier. Par conséquent, si le recours collectif n'est par certifié, les objectifs de dissuasion et de modification des comportements ne feront l'objet d'aucune mesure. Non seulement le recours collectif constitue la meilleure procédure pour atteindre ces objectifs, mais il est le seul.

(4) Conclusion sur la certification du recours collectif

[142] Je suis d'avis de rétablir les ordonnances des juges saisis des demandes qui font droit à la demande de certification de l'action à titre de recours collectif, sous réserve de la radiation des allégations fondées sur la fiduciaire par interprétation.

V. Conclusion

[143] Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi avec dépens devant tous les cours.

ANNEXE : Questions communes certifiées
par le juge Myers

[TRADUCTION]

Violation de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34

- a) Les défenderesses ou l'une d'elles se sont-elles livrées à un comportement allant à l'encontre des art. 45 ou 52 de la *Loi sur la concurrence*?
- b) Les membres du groupe ont-ils droit, suivant l'art. 36 de la *Loi sur la concurrence*, au recouvrement des pertes ou des dommages subis et, dans l'affirmative, à raison de quel montant?

<p>(c) Can the amount of damages be determined on an aggregate basis and if so, in what amount?</p>	<p>c) Le montant des dommages-intérêts peut-il être établi de manière globale et, dans l'affirmative, quel est-il?</p>
<p>Conspiracy</p> <p>(d) Did the Defendants, or either [of] them, conspire to harm the Class Members?</p> <p>(e) Did the Defendants, or either of them, act in furtherance of the conspiracy?</p> <p>(f) Was the predominant purpose of the conspiracy to harm the Class Members?</p> <p>(g) Did the conspiracy involve unlawful acts?</p> <p>(h) Did the Defendants, or either of them, know that the conspiracy would likely cause injury to the Class Members?</p> <p>(i) Did the Class Members suffer economic loss?</p> <p>(j) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?</p> <p>(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?</p>	<p>Complot</p> <p>d) Les défenderesses ou l'une d'elles ont-elles participé à un complot visant à causer un préjudice aux membres du groupe?</p> <p>e) Les défenderesses ou l'une d'elles ont-elles agi en vue de la réalisation du complot?</p> <p>f) Le complot visait-il principalement à causer un préjudice aux membres du groupe?</p> <p>g) Les auteurs du complot ont-ils eu recours à des actes illégaux?</p> <p>h) Les défenderesses ou l'une d'elles savaient-elles que le complot causerait vraisemblablement un préjudice aux membres du groupe?</p> <p>i) Les membres du groupe ont-ils subi une perte financière?</p> <p>j) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses ou l'une d'elles aux membres du groupe?</p> <p>k) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?</p>
<p>Tortious Interference with Economic Interests</p> <p>(l) Did the Defendants, or either of them, intend to injure the Class Members?</p> <p>(m) Did the Defendants, or either of them, interfere with the economic interests of the Class Members by unlawful or illegal means?</p> <p>(n) Did the Class Members suffer economic loss as a result of the Defendants' interference?</p> <p>(o) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?</p> <p>(p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?</p>	<p>Atteinte délictuelle aux intérêts financiers</p> <p>l) Les défenderesses ou l'une d'elles ont-elles eu l'intention de nuire aux membres du groupe?</p> <p>m) Les défenderesses ou l'une d'elles ont-elles porté atteinte aux intérêts financiers des membres du groupe par des moyens illégaux?</p> <p>n) Les membres du groupe ont-ils subi une perte financière par suite de cette atteinte?</p> <p>o) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses ou l'une d'elles aux membres du groupe?</p> <p>p) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?</p>
<p>Unjust Enrichment, Waiver of Tort and Constructive Trust</p> <p>(q) Have the Defendants, or either of them, been unjustly enriched by the receipt of an Overcharge? "Overcharge" means the difference</p>	<p>Enrichissement sans cause, renonciation au recours délictuel et fiducie par interprétation</p> <p>q) Les défenderesses ou l'une d'elles se sont-elles enrichies sans cause par suite d'une majoration? « Majoration » s'entend de la différence entre</p>

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?

les prix que les défenderesses ont effectivement exigés pour les systèmes d'exploitation et les logiciels d'application Microsoft sur le marché canadien des ordinateurs personnels et les prix qu'elles auraient pu exiger n'eût été leur comportement fautif.

- r) Les membres du groupe se sont-ils appauvris d'un montant égal à celui de la majoration?
- s) Une cause juridique justifie-t-elle les défenderesses ou l'une d'elles de conserver le fruit de la majoration?
- t) Quelle somme les défenderesses ou l'une d'elles doivent-elles restituer aux membres du groupe, le cas échéant, sur le fondement de l'enrichissement sans cause?
- u) Les défenderesses ou l'une d'elles doivent-elles être constituées fiduciaires par interprétation au bénéfice des membres du groupe quant au montant de la majoration?
- v) À combien se monte la majoration, s'il en est, que les défenderesses ou l'une d'elles détiennent en fiducie pour les membres du groupe?
- w) Quelle somme, s'il en est, les défenderesses doivent-elles restituer aux membres du groupe sur le fondement de la renonciation au recours délictuel?
- x) Les défenderesses ou l'une d'elles sont-elles tenues de comptabiliser à l'intention des membres du groupe les profits illégitimes réalisés, le cas échéant, lorsqu'elles leur ont vendu des systèmes d'exploitation et des logiciels d'application Microsoft, sur le fondement de la renonciation au recours délictuel?
- y) Le montant de la restitution peut-il être établi globalement et, dans l'affirmative, quel est-il?

Dommages-intérêts punitifs

- z) Les défenderesses ou l'une d'elles sont-elles tenues de verser des dommages-intérêts punitifs ou exemplaires eu égard à la nature de leur comportement et, dans l'affirmative, quel est ce montant et qui sont les bénéficiaires?

Intérêt

- aa) Quelle obligation, s'il en est, les défenderesses ou l'une d'elles ont-elles de verser l'intérêt dont le paiement est ordonné par la cour?

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]

Appeal allowed with costs throughout.

Solicitors for the appellants: Camp Fiorante Matthews Mogerma, Vancouver; Michael Sobkin, Ottawa.

Solicitors for the respondents: McCarthy Tétrault, Toronto; Blake, Cassels & Graydon, Vancouver and Toronto.

Solicitor for the intervener: Attorney General of Canada, Ottawa.

Distribution des dommages-intérêts ou des fonds détenus en fiducie

- bb) Quel est le bon mode de distribution aux membres du groupe des dommages-intérêts ou des fonds détenus en fiducie et de l'intérêt, et qui doit assumer le coût de cette distribution? [d.a., vol. I, p. 167-169]

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs des appelants : Camp Fiorante Matthews Mogerma, Vancouver; Michael Sobkin, Ottawa.

Procureurs des intimées : McCarthy Tétrault, Toronto; Blake, Cassels & Graydon, Vancouver et Toronto.

Procureur de l'intervenant : Procureur général du Canada, Ottawa.

Ontario Superior Court of Justice
Levy-Russell Ltd. v. Shieldings Inc.
Date: 2004-10-22

Docket: 97-BK-000004

Chris G. Paire, John K. Phillips for Plaintiffs

Pete F.C. Howard, Christopher J. Cosgriffe, Timothy M. Banks for Defendants, The Bank of Nova Scotia, Coopers & Lybrand Limited, Stanley Dennis Norman Belcher

Cumming J.:

Background

[1] The plaintiffs, Levy-Russell Limited ("LRL") and Levy Industries Limited ("LIL") (collectively referred to as "Levy") commenced action no. 29272/88 June 10, 1988 in this Court against, *inter alia*, Shieldings Incorporated ("Shieldings"). Shieldings had purchased the assets of a corporation, Tecmotiv Inc. ("Tecomotiv"), owned by Levy.

[2] That action (which can be called the "Tecomotiv action"), alleging a civil conspiracy, resulted in a 71 day trial which concluded April 29, 1993. Reasons for Decision of Mr. Justice G. Dennis Lane, comprising 405 pages, were released April 5, 1994. See *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161 (Ont. Gen. Div.). Judgment in the amount of \$5,261,000.00 plus costs was given in favour of Levy against the defendants Tecmotiv Inc., Kenneth Foreht, Ronald Bradshaw, Morton Krestell, Terrence Godsall ("Godsall") and Shieldings. The formal judgment was signed May 30, 1994 and entered June 21, 1994.

[3] The appeal period for Levy's judgment expired. The judgment remains unpaid in its entirety and, with interest, now amounts to more than \$12,400,000.00. Therefore, Levy has been a judgment creditor of Shieldings since 1994.

[4] Levy can be referred to as having had the status of a 'contingent judgment creditor' of Shieldings from the inception of the litigation it commenced in 1988 against Shieldings until Levy obtained judgment in 1994. Levy then became an actual judgment creditor of Shieldings.

[5] Mr. Justice Lane held that three of Levy's own directors, Messrs. Foreht, Bradshaw and Krestall, conspired with Mr. Godsall, an officer of Shieldings, to breach their fiduciary duties to Levy and to arrange matters so that, in concert with Shieldings, the Levy business could be purchased from the receiver of Levy at less than fair value.

(Parenthetically, it is noted that evidence in the case at hand indicates Shieldings ultimately lost an estimated \$10.95 million on the Tecmotiv acquisition.)

[6] Levy's business has been inactive since at least 1992. There is common ground that Levy has no assets of any value other than the alleged claim brought in the action at hand.

Introduction to the Action at hand

[7] Levy's 58 page claim in the action at hand, Amended Fresh As Amended Statement of Claim, Court file no. 97-BK-000004 ref. B299/94 includes as defendants, Shieldings, The Bank of Nova Scotia ("BNS" or "the Bank"), Coopers & Lybrand Limited ("Coopers") and Stanley Dennis Norman Belcher ("Belcher"), a director of Shieldings and a Vice President of BNS. The action is now pursued against only the above-named four of the original 17 defendants. Extensive allegations are made.

[8] Shieldings made no appearance in this action and was noted in default. There is common ground between the parties that if Levy is successful against BNS and/or Mr. Belcher that judgment is also to be entered against Shieldings. The Receiver of Shieldings, Coopers, has been added as a party because of consequential relief that would follow if Levy is successful against the other parties.

[9] The action at hand is an oppression action brought under ss. 245 and 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"). In brief, Levy brings this action as a complainant alleging that the business and affairs of Shieldings were carried on in a manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of Levy. The claim alleges that the evidence supports the inference that BNS had *de facto* control of Shieldings such that the Bank caused Shieldings to embark upon a course of action whereby BNS gained a preferential and unfair position over Levy as an unsecured creditor.

[10] BNS has worn two hats in its relationship with Shieldings: BNS has been a major (but not controlling) shareholder and BNS has been the major lender to Shieldings.

The Issues

[11] This case raises a contest between the asserted rights of a *contingent* unsecured judgment creditor (Levy) vis-à-vis Shieldings and the rights of another, pre-existing creditor of Shieldings, being BNS. Levy seeks to utilize the oppression remedy against the pre-

existing creditor Bank because Levy, the *contingent* judgment creditor, successfully obtained a final judgment but has been unable to realize upon that judgment. There are only two major creditors of Shieldings, being BNS and Levy.

[12] Levy claims that BNS and Shieldings purportedly converted unsecured debt to secured debt to the advantage of BNS and to the corresponding disadvantage of Levy. Levy says that at worst it ranks *pari passu* with BNS as unsecured creditors. Indeed, Levy submits that given the Bank's oppression the BNS claim against Shieldings should be subordinated to the unsecured claim of Levy. The main allegation of the claim is that about September 13, 1993 BNS achieved its asserted favourable position through a \$35.5 million bridge loan which was repaid within four days. At that time, BNS required Shieldings to provide security in respect of other, existing unsecured loans.

History of Shieldings

[13] In 1986 Mr. Beverly G. "Bud" Willis, then a Vice President of investment dealer Richardson Greenshields, left that company, together with Mr. Godsall, to acquire and operate Shieldings, as a venture capital corporation.

[14] By about mid-1986 Shieldings had raised some \$15 million in equity capital from six institutional investors, including \$5 million from BNS.

[15] Shieldings would proceed over time to provide venture capital by way of debt and equity financing to some 30 start-up companies in various geographic and industrial segments. Shieldings invested in companies considered by management to represent under-valued situations in view of their asset base or earnings potential. Shieldings sought to provide long-term planning, financial and management assistance to the companies so as to add value to the businesses.

[16] BNS was the banker for Shieldings, being a substantial lender. At the same time, BNS was also a substantial equity investor. BNS has been both a creditor and shareholder of Shieldings at all relevant times.

[17] BNS (with 9.1% of the voting shares and 31.7% of the equity), along with six institutional investors, being Dofasco Employees Savings Fund, Canada Life Assurance Co., CP Pension Plan, Ontario Hydro Pension Plan, Claridge (Pentrust Holdings) and Ontario Hydro Pension Fund (together with individuals comprising management) were the shareholders of Shieldings upon its organization in 1986. A seventh institutional investor, Dofasco Profit Sharing Fund, would later become a shareholder. By September, 1993

BNS had invested some \$22.1 million, or 38.1% of the total of \$58.8 million comprising the then five classes of shares.

[18] Management at the inception of Shieldings included Mr. Bud Willis as the 'driving force,' who was President, and Mr. Godsall as Vice-president.

[19] There were initially six, and later seven, directors of Shieldings. Each of the institutional investors (except for Dofasco), together with management, nominated a director. Mr. Belcher, Senior Vice President of BNS, was appointed as the single BNS nominee to the Shieldings' board of directors. Although a quorum required the Bank's nominee and management's nominee to be present, the Bank had only one vote.

[20] A resolution of five members of the Board (less any members declaring a conflict of intent) was required for certain actions, including the encumbering of an asset by Shieldings, except in respect of providing funds for its acquisition.

[21] After the death of Mr. Willis in 1991, Messrs. Gil Bennett, David R. G. Tanner and Michael Trites became part of the management of Shieldings. Mr. Bennett became Chairman and Chief Executive Officer and Mr. Godsall became President.

Shieldings' Venture Capital Investments

[22] Three major venture capital investments of Shieldings included an interest in each of Comcor Waste Systems Ltd. ("Comcor"), Versatile Pacific Shipyards Inc. ("Versatile") and Brenda Bay Timber Company Limited ("Brenda Bay").

Comcor Waste Systems Ltd. ("Comcor")

[23] Comcor, through a subsidiary, Comcor Waste Systems Ltd., purchased a substantial interest in a corporation, Reclamation Systems Inc., which owned a one-third interest in a quarry acquired in March, 1987, in Acton, Ontario. Comcor sought to convert this quarry into a landfill site. The objective was to provide a very significant destination for treated garbage from the Toronto area.

[24] The Comcor venture required a licence from government regulatory authorities after an extensive environmental review process. The operating capital required by Shieldings for this intended development was obtained in March, 1990, through some \$19.5 million in Comcor convertible debentures acquired by the institutional investors of Shieldings, including BNS who advanced \$7,200,000.00. Shieldings provided an unsecured guarantee to the debenture holders in respect of Comcor's indebtedness to them.

[25] Thus, BNS came to have four separate interests in respect of Shieldings; it was a secured creditor of Shieldings as a direct lender; it was an unsecured creditor as a direct lender to Shieldings; it was an unsecured creditor of Shieldings as a lender to Comcor because of the unsecured guarantee provided in respect of the Comcor debentures; and it was an equity investor as a minority shareholder of Shieldings.

[26] On June 23, 1994 a private members' bill moved by the member for the electoral riding where the Comcor quarry was located was enacted in the Legislature, becoming the *Environmental Protection Amendment Act (Niagara Escarpment)*, 1994, S.O. 1994, c. 5 ("*Comcor Act*"). This legislation was specifically targeted at the Comcor project. It effectively prevented the quarry being converted to a garbage disposal landfill site as intended. The Comcor project was then at an end. The Comcor investment was rendered valueless to Shieldings.

[27] The business plan of Shieldings Incorporated was not achieved. With the passage of the *Comcor Act*, there was no prospect of a return to shareholders. The liabilities of Shieldings exceeded management's estimation of the value of its assets.

[28] Shieldings' management may have been naïve in assessing the risk of political intervention in respect of the Comcor venture. However, Shieldings' management understood that the Government of then Premier Bob Rae would allow the environmental review process to proceed to completion and the merits of the project determined by the pertinent regulatory agencies. Shieldings was unsuccessful in litigation against the provincial Government. See *Reclamation Systems Inc. v. Ontario* (1996), 27 O.R. (3d) 419 (Ont. Gen. Div.). If the project had received the regulatory approvals and proceeded forward to fruition, Shieldings would have had a major financial success.

[29] There is no credible basis to suggest that Shieldings was approaching insolvency until the point in time of the passage of the legislation relating to Comcor. See generally *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (Ont. S.C.J. [Commercial List]), at 667. As a memo dated February 1, 1993 of Mr. Belcher to a Bank officer stated, Shieldings' shareholders (including the Bank) were prepared to continue funding Shielding's operating expenses, including the interest on its secured debt, being confident at the time of Shieldings' ability to realize a significant profit upon its Comcor investment.

[30] As stated above, the Levy judgment in the Tecmotiv action against Shieldings was delivered by Lane J. April 5, 1994. Shieldings attempted to negotiate a settlement of the judgment but was unsuccessful. Given the collapse of the Comcor venture in late June,

1994, Shieldings became insolvent. BNS appointed Coopers as Receiver of Shieldings September 13, 1994. The assets of Shieldings were subsequently realized, the asset dispositions being approved by several Court Orders. Levy challenged some of the asset sales as being improvident, without success.

[31] The loss of BNS as a *lender* to Shieldings is at a minimum \$22.5 million and may ultimately be as much as \$48 million (depending upon the ultimate realization of distress preferred shares the Bank received in respect of a disposition of the so-called "North Vancouver Lands" of Shieldings, discussed below). BNS has also lost its entire equity contribution of more than \$26 million.

[32] At the time of Shielding's insolvency, being June 23, 1994, with the demise of the Comcor project, Levy was a *contingent* unsecured creditor of Shieldings (given that the judgment in the Tecmotiv action was entered only June 21, 1994 and the right to appeal to appeal the decision of Lane J. was then alive) and later became an unsecured judgment creditor.

Versatile Pacific Shipyards Inc. ("Versatile")

[33] Until 1989, Shieldings had entered into a number of relatively small investments with no investment in excess of about \$7 million. Management of Shieldings then identified what it considered to be a major opportunity, the acquisition of Versatile Pacific Shipyards in British Columbia. This transaction in June, 1989 resulted in a subsidiary of Shieldings, 379186 B.C. Limited ("#379"), purchasing the shares of Versatile Pacific Shipyards Inc. ("Versatile") (later known as "Yarrows Limited"), which engaged in shipyard operations on Vancouver Island at Esquimalt with ship-building and ship-repairing, and purchasing through a second subsidiary, 366466 B.C. Ltd. ("#366"), a property consisting of 18.6 acres, referred to as the "North Vancouver lands."

[34] To fund Shieldings' acquisition of Versatile, BNS had made a loan of some \$32 million. This intended short-term loan was to be repaid within four months, that is, by October 29, 1989. Management had advised the board of Shieldings at the time of the acquisition that there was a commitment by a third party to purchase the Esquimalt property for \$9 million and by a second third party to purchase 75% of the North Vancouver lands for some \$24 million.

[35] The Versatile transaction included a loan to #366 to enable it to purchase the North Vancouver lands as part of the overall acquisition of Versatile. The #366 loan was secured

by the land owned by #366, by a demand debenture of #366 and unlimited guarantees provided by #379, and by Shieldings itself. The unlimited guarantee of Shieldings in respect of its subsidiaries indebtedness, (supported by the hypothecation of various shares and notes of investee companies), initially unsecured in 1989, later became secured by a continuing \$85 million demand debenture dated September 10, 1993 in connection with the Brenda Bay transaction, discussed below. There was no cross-collateralization of security until the 1993 demand debenture.

[36] As part of the consideration for the loan from BNS, Shieldings also provided an undertaking, *inter alia*, that it would not dispose of any assets in excess of \$250,000.00 unless the entire proceeds of any such sale were paid to BNS to reduce its loan in support of the Versatile acquisition.

[37] Shieldings' management was never successful in realizing a sale in respect of either the North Vancouver lands or the Esquimalt property. No sale of these assets was realized before the Receivership of Shieldings created in September, 1994.

[38] The objective of Shieldings' management to sell and realize a profit on the Versatile acquisition failed. The shipbuilding corporation ultimately filed under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 in March, 1991 and emerged in a new company known as Yarrows Limited ("Yarrows"). The Versatile acquisition loan of \$32 million from BNS resulted in substantial ongoing interest obligations and carrying costs for Shieldings.

[39] The Versatile investment in June, 1989, was the last major new acquisition by Shieldings. Thereafter, management focused upon seeking to realize upon the existing assets in its portfolio. However, asset sales were difficult given the economic recession of the early 1990s. As Shieldings needed more money, a \$22 million equity infusion was made in December, 1990 with BNS contributing \$8.5 million of this amount. With the death of Mr. Willis, the driving force of Shieldings, in December, 1991, the problems of Shieldings were compounded.

[40] Mr. Gil Bennett became CEO and Mr. Michael Trites became Vice-President Finance. A 30 month business plan was presented to the board of directors at its meeting February 27, 1992. In the meanwhile, further funds were required to protect and maintain Shieldings' operations. By the end of 1993 a further \$14.3 million in equity was contributed by the shareholders.

Brenda Bay Timber Company Limited ("Brenda Bay")

[41] Brenda Bay was owned 50% by a subsidiary of Shieldings, being Shieldings Forest Products Inc. ("SFPI"), and 50% by a subsidiary (Eacom Timber Sales Ltd.) of Doman Industries Inc. ("Doman"), subject to a unanimous shareholders agreement dated May 12, 1988, with a buy-sell 'shotgun' provision. The main asset of Brenda Bay was a 13,000 hectares tree farm with a secondary asset being development lands, called the "Lake Cowichan lands."

[42] In 1993 Shieldings wanted to sell off the tree farm of Brenda Bay. Shieldings' management hoped that the net proceeds from a sale of the tree farm would be more than \$15 million and would be utilized to pay off the then existing revolving credit line ("RTC") extended by BNS and leave a residual of some \$2.5 million as operating capital. The Lake Cowichan lands would remain as an asset, directly or indirectly owned by Shieldings.

[43] Shieldings' board of directors met August 3, 1993. Shieldings' management hoped that its partner, Doman, in Brenda Bay would elect to buy if Shieldings triggered the buy-sell shotgun through an offer to sell to Doman.

[44] The board determined at its meeting August 3, 1993 to trigger the buy-sell clause with a strike price of \$56 million for Brenda Bay. While the expectation had been that Doman would elect to purchase Shieldings' interest, Shieldings had a 'backstop agreement' whereby John Hancock Mutual Life Insurance Co. ("John Hancock") would purchase the entirety of the tree farm of Brenda Bay from Shieldings in the event that Shieldings was required to purchase the interest of Doman.

[45] Mr. Tanner had prepared a memo which mentioned that bridge financing might be required in the event that Doman elected to sell its interest in Brenda Bay rather than purchase Shieldings' interest. Bridge financing would be necessary for a four day period between a purchase by Shieldings of Doman's 50% interest and the closing of the follow-on purchase by John Hancock (through the back-stop agreement) from Shieldings of what would then be its 100% interest in the tree farm of Brenda Bay.

[46] Shieldings exercised its rights under the buy-sell provision by putting Doman to its election. Shieldings hoped and anticipated Doman would elect to buy Shieldings' 50% interest in Brenda Bay held through SFPI. However, Doman elected to sell its 50% interest in Brenda Bay. Accordingly, utilization of the bridge financing by BNS was necessary.

The Bridge Financing Extended by BNS

[47] In January, 1991, Shieldings' debt to BNS in respect of an unsecured operating line of credit ("UOC") was about \$16 million. Unsecured debt of BNS would, of course, rank *pari passu* with other unsecured creditors in the event of the bankruptcy of Shieldings.

[48] In December, 1990 the Shieldings' shareholders had subscribed for their *pro rata* shares of a \$22 million rights offering. The proceeds were used to pay down the UOC's outstanding balance of some \$16 million. The UOC was reduced to zero at that time. As well, some of the proceeds, together with the sale proceeds of Air Nova, another Shieldings' investment, were used to pay interest arrears and some principal on the Versatile loan.

[49] Shieldings executed on March 13, 1991, a "Secured Revolving Term Credit Agreement" ("RTC") dated January 31, 1991. The plaintiffs submit the RTC agreement was not properly authorized by Shieldings, the purported security was ineffective, and that unsecured advances were made on the RTC to September 1993 and the time of the Brenda Bay transaction.

[50] The evidence does not support the plaintiffs' position in respect of the RTC. The RTC and security agreement were signed by Messrs. Willis and Godsall on behalf of Shieldings. The directors of Shieldings were well aware of the RTC and the advances made to Shieldings thereunder.

[51] A request by a customer-borrower for any credit facility from the BNS, depending upon the borrower, the amount and the terms, could proceed through as many as four levels of scrutiny by the Bank after a recommendation by the branch dealing with the customer. The approval process could extend through Corporate Banking East to Corporate Credit East, to the Senior Credit Committee and perhaps to the Loan Policy Committee. Mr. Belcher was a member of the Loan Policy Committee from 1991 through September, 1994.

[52] Messrs. Tanner and Trites had first met with the BNS branch handling the Shieldings' account on July 29, 2003 to consider the bridge financing which might be necessary in respect of the intended and anticipated disposition of Brenda Bay should Doman elect to sell upon the buy-sell provision being triggered.

[53] BNS was informed August 11, 1993 of this request for approval of bridge financing in the event it should become necessary. Messrs. Tanner and Trites understood from the branch contacts that the Bank was favourable and inferred that the only security

contemplated was in respect of the asset (the tree farm) being sold with the security expiring upon repayment to the Bank of the bridge loan. BNS ultimately provided the bridge financing, but subject to certain significant conditions, discussed below.

[54] At that time the Shieldings' revolving line of credit, or RTC, with BNS was at its limit with \$15,700,000.00 owing and payment past due. Messrs. Tanner and Trites requested that the expiry of this credit facility be extended by BNS to September 30, 1993.

[55] On August 11, 1993, Corporate Banking East advised Corporate Credit East that the bridge loan was approved should it become necessary, provided the sale proceeds from the John Hancock transaction, after repayment of the bridge loan, would be used to effect a "permanent reduction in Facility #1" [i.e. the revolving line of credit or RTC, with the amount then outstanding of about \$15,700,000.00]. Corporate Credit East determined that this credit line would be reduced to only \$3 million in on-going availability to Shieldings.

[56] If there were still net proceeds from the Brenda Bay sale after this reduction to Facility #1 then such balance would be used to pay down Facility #3, being the \$32 million loan in respect of the 1989 Versatile transaction. As of August 6, 1993 there was still some \$29,941,000.00 outstanding in respect of this borrowing. (Facility #2 was a non-revolving loan of some \$1,950.00 involving an investee company of Shieldings, Yukon Pacific Forest Productions Limited. This loan remained unsecured at the Shieldings level). Mr. Bennett later outlined these conditions in a September 15, 1993 memo to Shieldings' directors.

[57] However, it is to be noted that the net proceeds available to Shieldings in the event that Doman elected to sell (as Doman did) would be only about \$15.1 million (as the Royal Bank was a secured creditor as a direct lender to Brenda Bay for a substantial amount in respect of the Brenda Bay tree farm).

[58] Shieldings learned August 27, 1993 that Doman had elected to be a seller of its Brenda Bay interest. The closing for the transaction was projected for September 10, 1993. BNS was advised August 30, 1993 of the necessity of finalizing the bridge loan. To that point, there was no term sheet or draft documentation exchanged between Shieldings and BNS in respect of the bridge loan.

[59] Messrs. Trites and Tanner met with BNS branch officials September 7, 1993. The closing in respect of the Brenda Bay transaction was three days off. Shieldings provided a new cash flow forecast and, for the first time, proposed that not all of the proceeds be paid

to reduce bank debt. Specifically, the Bank was asked to not apply proceeds to reduce the 1989 Versatile loan.

[60] Put simply, BNS chose not to agree to this request. BNS was entirely free to make this decision and it was understandable, given the history of events to date and the repeated failed promises of Shieldings' management. The existing RTC facility was at its limit and past due. The continuing undertaking by Shieldings at the time of the Versatile acquisition in June, 1989 was that the proceeds of any asset sales in excess of \$250,000.00 would be used to reduce the \$32 million loan in support of the Versatile acquisition. As well, the contemplated structuring of the Brenda Bay transaction suggested that for tax reasons there might be a shift of assets with a wind-up of the Shieldings' subsidiary, SFPI, with its indirectly held Lake Cowichan lands moving up to Shieldings. Thus, there was an additional reason for the Bank to want to track the assets and obtain real security in respect of those assets from Shieldings itself to avoid any possible prejudice.

[61] A letter agreement was signed September 9, 1993 between the Bank and Mr. Godsall on behalf of Shieldings as to the terms of the bridge loan. The directors of Shieldings have never disputed this letter agreement. Mr. Bennett approved and signed the minutes of the August 3, 1993 board authorization in respect of the Brenda Bay transaction which included the recognition of the need for bridge financing, after reading the memo of Mr. Trites of September 9, 1993 as to the final position of BNS in respect of the terms of the requested bridge loan.

[62] The evidence establishes that Messrs. Trites and Tanner had the authority to cause Shieldings to enter into the September 9, 1993 letter agreement and to grant three \$85 million demand debentures in favour of BNS as security. One was in respect of Brenda Bay's assets, a second was in respect of SFPI's assets, and a third provided for "first ranking fixed (non-specific) and floating charges over all of the present and future undertaking, property and assets" of the borrower, Shieldings. (At this point, the total existing outstanding debt of Shieldings to BNS was about \$50 million and the bridge loan would add a further approximate \$35 million.)

[63] The evidence establishes the board of directors authorized the arrangements contemplated by the September 9, letter agreement. Legal counsel to Shieldings provided an opinion that Shieldings had the ability to proceed and that the September 9, 1993 letter agreement and the \$85 million demand debentures were valid and binding.

[64] Mr. Bennett reported to the directors in writing September 15, 1993 following upon the completion of the Brenda Bay transaction and did not raise any concern in respect of the bridge loan and attendant conditions and security given by Shieldings.

[65] Mr. Bennett, an experienced corporate lawyer, was not called as a witness by the plaintiffs. Nor was Mr. Godsall. Nor were any of the directors.

[66] The September 9, 1993 letter agreement references two separate loan facilities and the security required. One was the bridge facility of about \$35,500,000.00. The other is the second amended RTC facility which was to expire very shortly. BNS agreed to provide \$3 million through a new RTC facility.

[67] The Bank imposed conditions that all of the proceeds from the sale of the Brenda Bay tree farm to John Hancock would be applied to repay the \$35,500,000.00 bridge loan, pay down the outstanding balance on the RTC (the authorized amount of the RTC being permanently reduced to \$3,000,000.00) and third, to reduce the balance owing on the then outstanding \$29,941,000.00 loan extended to #366 in connection with the Versatile transaction and guaranteed by Shieldings.

[68] BNS advanced some \$35.5 million to Shieldings September 10, 1993 to enable the purchase of Doman's 50% interest in the tree farm to be completed. The RTC was continued to September 30, 1993 with a limit of \$3 million. The \$85 million demand debentures *inter alia*, were given to BNS, by Shieldings and its subsidiaries, as security.

[69] On September 14, 1993 the tree farm was sold to John Hancock. The amount paid by John Hancock to Shieldings for the tree farm, US\$40,500,000.00, was paid to BNS by the direction of Shieldings. This money was sufficient to repay BNS the \$35.5 million bridge loan, to pay down the RTC from \$15.7 million and to pay down the outstanding Versatile loan by \$2,619,901.17.

[70] The \$85 million demand debentures given by Shieldings as security continued to apply to those residual lands beneficially owned by Shieldings as a result of the purchase from Doman, being in the main the Lake Cowichan lands which were estimated to have a value of some \$5 million (and as well to some "environmental carve out" from the tree farm property which was not purchased by John Hancock).

[71] Levy seeks to delete or set aside the security that the Bank required as a condition of advancing funds to Shieldings. Levy claims to either rank ahead of BNS's claim or, at

least, *pari passu*. Also, Levy attacks the payment of interest on the amended RTC for the funds advanced.

The Oppression Remedy

[72] Trade creditors and contingent judgment creditors are not complainants of right under s. 245 of the *OBCA*. A court has the discretion to provide standing as a complainant: s. 245 (c). The defendants did not oppose Levy's assertion that it had standing as a complainant; however, the defendants vigorously oppose the plaintiffs' submission that there was oppression.

[73] Assuming the plaintiffs are proper complainants, the oppression remedy is available to protect the plaintiffs' "reasonable expectations": *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 191.

[74] In considering the oppression section of the *OBCA*, and other comparable statutes, the issue as to whether there has been oppression is fact specific: see *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (Ont. C.A.), at 137, leave to appeal refused, (1983), 2 O.A.C. 158 (note) (S.C.C.); *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2004), 41 B.L.R. (3d) 74, 2004 CarswellOnt 208 (Ont. S.C.J. [Commercial List]) at para. 215; and *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1998), 110 O.A.C. 160 (Ont. Div. Ct.), at 163.

[75] Recognizing that some parameters are necessary, courts have developed general principles in approaching claims for an oppression remedy.

[76] The starting point is for the complainant to establish the complainant's reasonable expectations in the relationship between the complainant, the corporation and the other stakeholders. See *Buttarazzi Estate v. Bertolo* (2004), 40 B.L.R. (3d) 287, 2004 CarswellOnt 17 (Ont. S.C.J.) at para. 12; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at 177, leave to appeal refused (2002), 163 O.A.C. 397 (note) (S.C.C.); *Renegade Capital Corp. v. Schmalz* (2003), 36 B.L.R. (3d) 294 (Ont. S.C.J. [Commercial List]), at 300.

[77] Although a finding of bad faith or want of probity is not required for a finding of oppression, its presence may indicate oppression. See *Ford Motor Co. of Canada*, *supra* at para. 224.

[78] The Court will be reluctant to interfere with business decisions that have been made in good faith and on reasonable grounds. The affairs of a corporation are to be managed under the direction of its board of directors. Directors and officers must be given considerable latitude in exercising their business judgment in the handling of a corporation's affairs.

[79] The courts recognize and respect the autonomy of the corporation and the expertise of its management. Directors and officers must act in the best interests of the corporation. Absent bad faith, or some other improper motive, business judgment exercised in the perceived best interests of the corporation that, with the benefit of hindsight, has proven to be mistaken, misguided or imperfect, will not give rise to liability through the oppression remedy. See *Ford Motor Co. of Canada*, *supra* at para. 215; *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Gen. Div. [Commercial List]), at 777 cited with approval in *Renegade Capital Corp*, *supra* at 301.

Was There Oppression by BNS?

[80] The objectively determined reasonable expectations of a person in the position of the complainant are to be considered in addressing the issue as to whether there has been oppression. Insofar as a contingent creditor in the position of Levy is concerned, the exercise is to identify what those reasonable expectations were, or could be as a matter of law, and whether Shieldings complied with them.

[81] Shieldings funded its operations by a combination of debt and equity. The loans made by BNS were made at arms length on market terms to Shieldings while it was solvent. The security given to BNS was granted when Shieldings was solvent. The evidentiary record establishes that Shieldings used the proceeds from these loans for its own business purposes, including the preserving of its investments.

[82] In my view, the security interests given in respect of such loans are valid and enforceable. My reasons follow.

[83] Accusations have been made as to Mr. Belcher's conduct as a director of Shieldings, claiming that he somehow dominated its other directors. The complaint is that, in effect, BNS controlled *de facto* Shieldings. There is no evidence to support such accusations. Indeed, the record establishes the contrary.

[84] I find Mr. Belcher to be credible and accept his evidence. In my view, he acted honestly and properly as a director of Shieldings at all times and with a view to acting in the best interests of that corporation.

[85] Mr. Belcher had prepared for his testimony through a review of the extensive documents available. He had the most detailed involvement of any of the witnesses. He readily acknowledged his participation in various events and acknowledged events in which he was not involved. He had sworn a lengthy affidavit in 1995 after reviewing the files and undergone some 11 days of discovery over 1997 to 2001. His evidence was informed and straightforward.

[86] This is not a case of asset stripping through non-market value transactions. Mr. Willis had an extraordinary relationship with the senior management of BNS such that Shieldings was afforded favourable treatment from the Bank.

[87] Mr. Tanner was the person who arranged the John Hancock back-up for the Brenda Bay transaction. Mr. Tanner and Mr. Trites dealt with the Bank in arranging the bridge financing. Neither Mr. Tanner nor Mr. Trites had any contact with Mr. Belcher in the August-September 15, 2003 time period when the negotiations with the Bank took place.

[88] There is no impediment in law or principle to a shareholder advancing loans to the corporation in which the shares are held and receiving security therefore. It is not uncommon that this is done. Public policy in a free market economy supports this flexibility in the movement and formation of capital.

[89] The evidentiary record does not raise any issue in respect of Shieldings having failed to comply with its corporate constitutional documents in terms of the loans and security given. Nor is there any evidence that the price of any loan varied from what the market would require.

[90] The UOC was outstanding from about June 1987 to February 1991 when it was repaid. The plaintiffs do not assert that it was improper for Shieldings to enter into the loan nor do they complain as to its terms. Rather, the plaintiffs say that it was oppressive to pay interest after July 1988 and to repay the loan notwithstanding Shieldings would be in breach of contract if Shieldings did not pay.

[91] Levy does not criticize the June 1989 loan to purchase Versatile or the terms of that loan. Levy attacks the repayment of principal of \$2.6 million made in September, 1993 (from the proceeds of the Brenda Bay sale). Levy also claims to rank ahead of BNS, or at

worst *pari passu* for any payment that may ultimately be realized through the receivership with respect to the sale of the Versatile assets.

[92] The RTC, with security, was agreed to in February 1991 and repaid in full in September 1993. It was replaced at that time by an amended RTC in the amount of \$3 million which was fully drawn by fresh advances as at the date of the receivership. The RTC has now been repaid in full by the proceeds of asset dispositions.

[93] Levy argues that BNS should rank behind Levy's claim, or at best *pari passu*, in respect of the RTC and amended RTC. Levy asserts it was oppressive to enter into, grant security for, pay interest and to repay the RTC and amended RTC.

[94] In my view, the approach to dealing with all of the plaintiffs' claims is as follows.

Is a given loan valid and enforceable?

[95] First, is a given loan and any security granted valid and enforceable as between BNS and Shieldings?

[96] The power to borrow is *intra vires* a modern corporation: *OBCA* s. 19. A lender is entitled to rely upon the indoor management rule when dealing with a corporation seeking to borrow funds: *OBCA* s.19. That is, the lender is entitled to assume that the affairs of the corporation have been conducted in accordance with its internal constitution. In any event, the record establishes that Shieldings complied with its internal constitution in respect of its borrowings from BNS.

[97] The ability of a corporation to raise funds through secured debt is a collateral aspect of the power to borrow. The right of a debtor to grant security is inherent to the debtor's right to carry on business and to deal with its property in the ordinary course of that business. See Kevin Patrick McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1999) at para. 6.18.

[98] Provided that the security given is not a fraudulent preference and complies with the registration requirements of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 or other applicable registration statutes, the registered security given gains priority over all unsecured creditors and all subsequent secured creditors.

[99] The fact of fresh credit being extended to a debtor in return for security will generally mean that the transaction cannot be considered to be a fraudulent preference. See *Aboud, Re* (1940), 22 C.B.R. 121 (Ont. S.C.), at 127.

[100] A solvent corporation is free to carry on its affairs as it sees fit, subject to its contractual obligations with respect to those debts. A debtor can choose to pay one creditor over another unless it is insolvent or has in its contemplation an event of bankruptcy. See *Hudson v. Benallack* (1975), [1976] 2 S.C.R. 168 (S.C.C.), at 175-76.

[101] The power to borrow and to provide guarantees and undertakings clearly implies the power to make payments in accordance with the terms on which a loan has been provided.

[102] Moreover, equitable doctrine provides that if a corporation borrows money and uses the borrowing to pay its debts or uses the monies otherwise in the normal course of its business, the loan is repayable, and applicable security is enforceable, even though the lender may know of the want of power of the corporation to borrow. See *Guaranteed Hardware Co., Re*, [1972] 3 O.R. 138 (Ont. S.C.), at 141; *Bank of Montreal v. Petrobuild Ltd.* (1981), 94 A.P.R. 375 (N.B. Q.B.), at 381-82.

[103] A corporation can cure a defect in authority in entering any contract by ratifying the contract, assuming that the contract is otherwise *intra vires* the corporation. A court will determine whether substantive ratification has occurred by the circumstances. If a corporation learns of an unauthorized contract but does not give back any benefits received pursuant to that contract the corporation will be taken to have ratified the contract. See *Great Northern Grain Terminals Ltd. v. Axley Agricultural Installations Ltd.* (1990), 76 Alta. L.R. (2d) 156 (Alta. C.A.), at 159. As stated above, in my view the evidentiary record establishes that Shieldings complied with its internal constitution in respect of its borrowings from BNS. However, if there was any defect in authority in any instance of borrowing the evidentiary record establishes that there was substantive ratification by Shieldings in respect of its obligations under such contract(s) to borrow monies from BNS.

[104] As has been stated above, the evidentiary record establishes that the corporation was solvent until June 23, 1994 with the passage of the *Comcor Act*.

[105] On December 13, 1990 the Loan Policy Committee of BNS had approved the new RTC facility with security by a first charge on all of Shieldings' assets. The evidence establishes that Mr. Willis bargained aggressively in respect of the rate of interest to be charged, meeting with very senior bank officers. The rate was reduced from the initial proposal of prime plus two percent to prime plus one-half percent.

[106] Messrs. Willis and Godsall had executed the RTC Agreement by March 13, 1991. The evidence establishes the likelihood that this was done with prior board approval. Mr. Godsall on September 23, 1991 confirmed the approval by a certified resolution of the board of directors. It was known at the February 15, 1991 board meeting that Shieldings needed to borrow the money to be made available by the RTC. At that point, as stated above, BNS was asking for interest at the rate of prime plus two percent. The Shieldings board of directors often held meetings by telephone. The evidence indicates approval of the RTC was given after Mr. Willis successfully negotiated the reduced rate of interest. Counsel to Shieldings had provided an opinion that Shieldings was authorized to enter into the RTC agreement.

[107] If Messrs. Willis and Godsall had not been authorized to execute the RTC, then Mr. Godsall could have so testified. He reportedly had agreed to cooperate with the plaintiffs in exchange for being released from the judgment against him in the Tecmotiv action. The plaintiffs did not call him as a witness. Indeed, the plaintiffs did not call any of the directors to testify.

[108] In my view, and I so find, the RTC was validly entered into and the advances made thereunder were validly secured.

[109] In the fall of 1992 Shieldings was in breach of the covenants of the RTC Agreement. Shieldings sought an extension of the term of the RTC from December 31, 1992 to February 28, 1993. Shieldings also sought an increase in the RTC limit from \$8.5 million to \$15.7 million.

[110] An RTC Extension Agreement was executed by Mr. Tanner on behalf of Shieldings September 22, 1992, incorporating by reference the terms of the RTC.

[111] The plaintiffs do not dispute that all amounts drawn on the RTC were used by Shieldings for corporate purposes, including for costs associated with Brenda Bay and with the Comcor project.

[112] The financial statements of Shieldings for each fiscal year of the RTC existence were approved by Shieldings' board of directors. The statements disclose the existence of the RTC, the security given, and the fact of Shieldings being generally in default of its covenants.

[113] There is no evidence that either Mr. Belcher or BNS had any belief that the RTC loan was not properly authorized. Indeed, all of the evidence suggests that everyone

involved with Shieldings believed that the RTC was valid and that the security given in connection therewith was enforceable.

[114] Levy submits that the payment of the net proceeds from the sale of Brenda Bay to BNS to pay down the RTC and the Versatile loan was a "preference."

[115] There is no support in the evidence for this contention. All the evidence is to the contrary.

[116] BNS had good, enforceable security in respect of the RTC loan which Shieldings' management agreed would be repaid from the proceeds of the Brenda Bay sale. BNS had security over the Brenda Bay assets. Since June 1989 Shieldings had contractually promised BNS that any proceeds of sale of assets in excess of \$250,000.00 would be used to reduce the Versatile loan. The memoranda internal to Shieldings relating to Brenda Bay from 1989 to the sale in September, 1993 indicate that Shieldings intended to use the net proceeds to reduce bank debt. For example, the 30 month plan presented to Shieldings' directors in February, 1992 indicated that Shieldings expected to sell its interest in Brenda Bay by August, 1992 with the anticipated net proceeds to be used to reduce bank debt. For example, a cash flow forecast prepared for the board of directors by Mr. Bennett in March, 1993 indicated that the entire net proceeds from the sale of Brenda Bay would be used to reduce bank debt.

[117] A rights offering had been agreed upon by the board in March, 1993. \$7.2 million was raised in April 1993 by a share issuance for the purpose of reducing bank debt. BNS subscribed for its *pro rata* share, thus in effect converting \$2,890,000.00 of its secured debt to equity (and thereby subordinating its position to this extent to any unsecured creditors of Shieldings) some six months before the closing of the Brenda Bay transaction. This fact alone belies any assertion that the Bank's economic interest was being preferred.

[118] The First RTC Extension Agreement had expired February 28, 1993. By a Second RTC Extension Agreement dated June 4, 1993, executed by Messrs. Tanner and Trites, BNS agreed to extend the RTC to June 30, 1993. Again, Shieldings agreed on June 9, 1993, through Messrs. Trites and Tanner, that the net proceeds from the Brenda Bay sale would be used to retire the RTC and reduce bank debt. Mr. Trites wrote to BNS June 21, 1993 requesting a further extension of the RTC term to September 30, 1993, which was authorized June 29, 1993, it being again indicated that all proceeds of realization would be used to reduce bank debt.

[119] At the August 3, 1993 board meeting to consider triggering the shotgun provision in respect of Brenda Bay, it was known that the proceeds of the contemplated Brenda Bay transaction would go to reduce bank debt, that the RTC was to expire September 30, 1993, that the Bank had made no promise for future bank lines of credit and that BNS preferred Shieldings to finance itself forward by equity. Finally, it was known that the Bank would expect additional security in respect of any future funding.

[120] The plaintiffs submit that the proceeds of the Brenda Bay transaction should not have been applied in respect of the loan to #366 to fund the Versatile transaction. The plaintiffs say that in August, 2003, the Bank knew that the Tecmotiv trial had concluded and there was already a pending decision then under reserve for more than three months.

[121] However, in granting the bridge loan, BNS had made it a condition that the entirety of the Brenda Bay proceeds was to go to retire bank debt. The Versatile loan had been intended as only a four month loan back in June, 1989. The loan was secured in part against the North Vancouver lands owned by #366. As well, Shieldings had given an undertaking at the time that any disposition of assets in excess of \$250,000.00 would be applied to reduce debt to BNS.

[122] All Bank debt had to be retired, of course, before there could be any return on the shareholders' investments in Shieldings. It was a business decision by Shieldings' management to take the bridge financing on the terms offered. None of Shieldings' directors, each of whom was sophisticated and represented major shareholders, objected to the Brenda Bay bridge loan arrangements involving BNS and the granting of the \$85 million demand debentures as security.

[123] When the Comcor debentures, (held by the institutional investors of Shieldings) secured only by a pledge of Comcor shares by Shieldings, ultimately turned out to be worthless in June, 1994 those debentures were left as unsecured obligations of Shieldings through the Shieldings' guarantee. If the plaintiffs' arguments as to the invalidity of the \$85 million debentures had any force then it would mean that the Comcor debentures should properly rank *pari passu* with the RTC and Versatile loans at the Shieldings level. Yet no director or institutional shareholder of Shieldings has challenged or called into question the Bank's position on its \$85 million demand debentures as security. This suggests that all the directors knew that the Shielding's board accepted and approved the use of the Brenda Bay proceeds and the grant of security on the terms seen, that is, with the \$85 million demand debentures.

[124] The resolution of the board of directors certified by Mr. Tanner as corporate secretary September 10, 1993 authorizing completion of the Brenda Bay transaction included, *inter alia*, the undertaking "to give such security as the Bank may require".

[125] Shieldings was not insolvent in September, 1993. It was not until April, 1994 that the Levy judgment in the Tecmotiv action was given that there was a significant creditor apart from BNS. It was not until the Comcor project collapsed in late June, 1994 that Shieldings was rendered insolvent.

[126] When Shieldings was made a defendant in the Tecmotiv lawsuit the corporation was faced with two considerations in respect of its financial statements, given that the lawsuit represented a possible contingent liability. See *Canadian Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981), at s. 3290.

[127] First, a decision as to whether disclosure is required had to be made. Second, if there is to be disclosure, a decision was required as to whether the corporation should take an accrual or reserve with respect to the contingent liability.

[128] Disclosure is meant to alert all users of the financial statements to the potential liability of the corporation but does not necessarily result in an adjustment to the balance sheet or income statement.

[129] In my view, Shieldings treated the Tecmotiv lawsuit, commenced in July, 1988, appropriately. It disclosed its existence in notes on the financial statements commencing with the February 29, 1988 financial statements. Management made an assessment at that time and in each fiscal year thereafter that the lawsuit had no merit and was without significant risk to Shieldings. This assessment was made each year after the auditor received a written opinion from Shieldings' legal counsel. The auditor followed applicable Generally Accepted Accounting Principles ("GAAP") and Generally Accepted Auditing Standards ("GAAS").

[130] Management reasonably anticipated that Shieldings would be successful in its defence of the Tecmotiv action. The objective proof of the state of mind of the board of directors is seen in the contribution by all the institutional investors of substantial equity *after* the commencement of the Tecmotiv action which claimed some \$25 million plus punitive damages against Shieldings.

[131] A corporation is obliged to assess a claim made against it using reasonable judgment and to act accordingly with respect to the financial and operational implications.

[132] Where, as in the case of Shieldings, a corporation believes with the assistance of its legal counsel that it has substantive defences to the lawsuit such that it is unlikely the contingent liability will become an actual liability, the proper treatment is disclosure in the notes to the financial statements but to not include the contingent liability as a reserve or as an accrued liability.

[133] This approach of GAAP and GAAS provides a fair picture of the business to persons dealing with it. To require that an unlikely contingent liability be treated in the financial statements as an actual liability could have serious practical ramifications. It could unfairly and severely hinder the business in its business operations, in the raising of money, and in its dealings with creditors.

[134] It follows then that there is no reason to be critical of a corporation when the reasonable judgments made turn out in hindsight to be incorrect. It would be unfair to retroactively adjust the priority of the claims of third parties who advanced funds or changed their positions on the basis of those judgments as reflected in the financial statements.

[135] Actions on debts are not generally the subject of oppression applications. See *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]), at 92. Rather, the common law governing creditor-debtor relationships, together with statutory law such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, and the *Personal Property Security Act* will apply.

[136] There is no real factual evidence in the case at hand as to the plaintiffs' reasonable expectations in respect of its interests being protected by Shieldings. The reasonable expectations for someone in the position of the plaintiffs measured by an objective standard would be twofold: first, that Shieldings would conduct itself in accordance with GAAP and GAAS with respect to the assessment and treatment of the contingent judgment claim on Shieldings' financial statements; and second, that the management of Shieldings would not engage in 'asset stripping' or a reduction in the capitalization of the corporation to the disadvantage of creditors.

[137] The term 'asset stripping' covers transactions (in the face of a contingent claim against the corporation) for which the corporation does not receive fair value and which are commonly structured with non-arms length parties to the directors/shareholders. The stripping of the assets results in the corporation being unable to pay its debts. See for example *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp.* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.), at 196-97, aff'd (2003), 40 B.L.R. (3d) 88 (Ont. C.A.).

[138] It is not oppression for the shareholders to put in new equity or where a lender, like BNS, has made new funds available on the basis of a grant of security through commercially reasonable loans granted on market terms.

[139] The plaintiffs do not attack *shareholder transactions* in the case at hand. BNS has not received any monies as a shareholder. Rather, it has lost its entire equity investment, being some \$26 million. Nor has any other shareholder received any return of equity.

[140] The plaintiffs allege that Mr. Belcher abused his position as the nominee director of Shieldings on behalf of the so-called dominant shareholder, BNS, to its advantage. The plaintiffs seek to have the BNS loans subordinated to their unsecured claim against Shieldings or, at least, to gain a *pari passu* position with the Bank.

[141] The other five corporate shareholders are independent, major corporations with sophisticated financial and legal advisors. It is extremely unlikely that the nominee directors of any of them would be puppets of BNS. There is no evidence to suggest they were. None of these other shareholders or their nominee directors for Shieldings testified. There is no evidence that any have ever raised accusations against BNS or Mr. Belcher.

[142] Mr. Belcher was only one of six (later seven) directors. He did not have the numerical ability to impose his will. BNS did not have a majority voting interest in Shieldings and could not override the other shareholders. The evidence establishes that the Bank did not always prevail in its preferred position with respect to management and shareholder decisions. It is apparent that there was very little conflict at the board level of Shieldings. Votes were generally unanimous.

[143] Neither Messrs. Trites nor Tanner gave any evidence to assist the plaintiffs in their contention as to Mr. Belcher abusing his position. Mr. Tanner had no reason to be surprised that the Bank required Shieldings to provide the \$85 million demand debentures in respect of the Brenda Bay bridge loan. Mr. Tanner knew that there was verbal approval only of the bridge loan by the line officers of the Bank at the branch level. Shieldings was

requesting the bridge loan from the Bank on very short notice. The loan terms and security documentation remained to be determined with finality by the Bank's internal hierarchical credit approval process.

[144] The management of Shieldings did not question or complain about the Bank's requirement for additional security through the \$85 million demand debentures. As well, given all the circumstances, Messrs. Tanner and Trites were unrealistic in their expressed desire that the Bank would not require a pay down of the RTC and other debts with the Brenda Bay proceeds. The plaintiffs did not call as witnesses any directors nor did they call either of Messrs. Bennett and Godsall, the two main officers of Shieldings.

[145] The plaintiffs claim that Mr. Belcher was in breach of his duties as a director of Shieldings. They allege he acted with other senior bank officials in imposing the debentures as security in the Brenda Bay transaction such as to constitute "a preference of the BNS as creditor."

[146] The Bank had two interests in Shieldings: as a shareholder and a distinct, separate interest as a lender. There is no inherent conflict between Mr. Belcher's duty as a director of Shieldings and the Bank's interest as a *shareholder*.

[147] There was a potential for conflict between the Bank's interest as *lender* and hence, Mr. Belcher's duties as an employee of the Bank and Mr. Belcher's duties as a director of Shieldings. This was recognized from the beginning of Shieldings' dealings with the Bank. This potential for conflict was dealt with by disclosure and by Mr. Belcher not making decisions with respect to lending by BNS to Shieldings. Rather, the evidentiary record shows he assisted Shieldings in his role as a director on occasion by ensuring the Bank's lending side understood the nature and importance of requests of Shieldings for credit.

[148] It is to be noted incidentally that Mr. Belcher was generally of the view that Shieldings should be funded by equity infusions by the shareholders rather than by borrowings from BNS. That is, he personally was not in favour of new borrowing by Shieldings after 1989.

[149] In particular, Mr. Belcher was not involved in the two transactions that are the primary subject of the plaintiffs' allegations, being the negotiations in 1990 and 1991 leading to the RTC and the September 9, 1993 letter agreement relating to the Brenda Bay transaction. Mr. Belcher was not present at the Loan Policy Committee meetings with

respect to either the 1991 RTC loan or the 1993 Brenda Bay transaction. Mr. Belcher also testified he had no involvement in the UOC negotiations in 1987.

[150] Mr. Belcher did not manage the Bank's loan portfolio. He stated that he had no communication with Messrs. Tanner or Trites in the time period in August-September, 1993, relating to proceeding with the Brenda Bay transaction. Messrs. Trites and Tanner did not testify as to any contact with Mr. Belcher over the relevant time frame. Mr. Belcher says he was not aware as to how the Bank intended to take security in respect of the bridge financing. There is no documentary or viva voce evidence to suggest that the lending side of the Bank had any contact with Mr. Belcher as to the terms and conditions of the Brenda Bay loan. The internal Bank documents, read fairly, tend to confirm that Mr. Belcher had nothing to do with the Bank's terms and conditions with respect to the Brenda Bay bridge financing.

[151] There is no evidence that Shieldings had alternative sources of credit available at better rates or on more favourable terms than those extended by BNS, or that Shieldings would not have had to provide like security to another lender. In my view, and I so find, considered by an objective standard, the conduct of the Bank as lender at all times, and specifically, in August-September, 1993, was commercially reasonable and fair to Shieldings. Indeed, Shieldings itself, arms-length to the Bank, has never complained about the Bank's conduct.

[152] The evidence establishes that Mr. Belcher at all times understood full well his duties as a director of Shieldings. I find that at all times he acted reasonably, conscientiously and properly as a director of Shieldings. He never purported to act as Shieldings itself. Shieldings acted through its management. Mr. Belcher had no personal interest in conflict with the interests of Shieldings nor did he have any actual conflict of interest as a nominee director of BNS. I find Mr. Belcher acted honestly and in good faith with a view to the best interests of Shieldings. He exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. He met his common law and ss. 132 and 134 *OBCA* obligations and duties as a director.

[153] In my view, and I so find, the plaintiffs' allegations are not substantiated. Indeed, the evidence is all to the contrary. Mr. Belcher and BNS acted properly and reasonably throughout in their dealings with Shieldings.

[154] The crux of the plaintiffs' alleged oppression is that the challenged loans, security and repayments constituted a preference in favour of the Bank. The plaintiffs claim in their

submissions, if not in their pleading, that the Bank caused Shieldings to prefer the existing debts of the Bank as creditor, by securing them against the contingent unsecured judgment of the plaintiffs.

[155] However, "until a debtor is insolvent or has an act of bankruptcy in contemplation" the debtor is "free to deal with his property as he wills and he may prefer one creditor over another": *Hudson v. Benallack, supra* at 175 per Dickson J. See also *Van der Liek, Re* (1970), 14 C.B.R. (N.S.) 229 (Ont. S.C.), at 232.

[156] Put otherwise, the plaintiffs must establish first, that Shieldings was insolvent at the date of the impugned transaction and second, that at that date the transaction constituted a preference, that is, all creditors were not treated equally. The plaintiffs' claim fails on several bases.

[157] First, there was no evidence led to establish that Shieldings was insolvent in August-September, 1993 or at any time prior to passage of the legislation June 23, 1994, that effectively ended the Comcor project. Indeed, the evidence indicates, applying the accepted tests for insolvency, that Shieldings was solvent until late June, 1994.

[158] Second, the evidence indicates the Bank was the only significant creditor of Shieldings until the failure of the Comcor project. The only other persons visibly claiming to be creditors are the plaintiffs. But the plaintiffs were contingent creditors with an unliquidated claim for damages until April 1994 when they successfully gained a judgment in the Tecmotiv action and the right of appeal was later exhausted.

[159] The common law definition of "debt" is a specified sum of money owing by one person to another which includes not only the obligation of the debtor to pay but also the right of the creditor to receive and to enforce payment by legal process. See *Central Capital Corp., Re* (1995), 29 C.B.R. (3d) 33 (Ont. Gen. Div. [Commercial List]), at 44, aff'd (1996), 27 O.R. (3d) 494 (Ont. C.A.), at 531; *207053 Alberta Ltd., Re* (1998), 7 C.B.R. (4th) 32 (Alta. Q.B.), at 35.

[160] However, a contingent creditor might arguably claim oppression because of a preference in a situation when there is not yet insolvency and where the creditor's claim at the time of the impugned transaction is for an unliquidated sum. See *Downtown Eatery, supra*; *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.* (2001), 20 B.L.R. (3d) 156 (Ont. S.C.J.), at 163-64.

[161] Such a situation is most readily seen where two elements are present: first, when it seems probable that the contingent creditor is going to successfully gain a judgment such that the contingent liability is recognized by GAAP and GAAS as requiring an accrual or reserve relating to the contingency; and second, it is established that the impugned action of the debtor in dealing with another creditor is *intended* to confer a preference and defeat the contingent judgment creditor in the later event of an insolvency. One would expect to see indicia of collusion in such a situation such as a non arms-length relationship involving the impugned transaction.

[162] That is not the situation here. The evidence establishes the Bank and Shieldings were acting at arms-length at all times. The evidence establishes the Bank was not seeking a preferred position vis-à-vis the plaintiffs, nor was Shieldings seeking to give the Bank a preferred position. The insolvency and bankruptcy of Shieldings were not in the contemplation of either the Bank or Shieldings until the Comcor project collapsed in June, 1994. The financial statements provided full disclosure of the Tecmotiv action. Accounting principles and auditing standards did not require a reserve to be taken, given that it was reasonable to regard the contingent liability as improbable because of Shieldings' asserted defence.

[163] The oppressive conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. See *Downtown Eatery, supra*. However, it must be established that a complainant has a reasonable expectation that a corporation's affairs will be conducted with a view to protecting his interests.

[164] Until the judgment of Lane J. in the Tecmotiv action, the status of Levy was merely that of a contingent claimant, or potential judgment creditor, asserting an unliquidated demand against Shieldings, a potential judgment debtor who might have exigible assets.

[165] Levy had a reasonable expectation that the affairs of Levy's potential debtor, Shieldings, would be conducted honestly and in good faith, based on the reasonable business judgment of its directing mind, and in a manner that did not *unfairly* prejudice or affect Levy's interests. Levy did not have a reasonable expectation that Shieldings would be managed and operated in such a way as to ensure Levy was paid the debt of Shieldings if and when there was a judgment favourable to Levy following upon the trial in the Tecmotiv action. See the judgment of Blair J.A. in *Stabile v. Milani Estate*, [2004] O.J. No. 2804 (Ont. C.A.) at para. 46.

[166] Not all conduct that has a harmful effect to a complainant gives rise to recovery under the oppression remedy of s. 248 (2) of the *OBCA*. Not only must the reasonable expectations of the complainant Levy be defeated by the impugned conduct, but the conduct involved must be such as to effect a result that is "oppressive," or that "unfairly prejudices" the complainant, or that "unfairly disregards the interests of the complainant." See *Stabile v. Milani Estate*, *supra* at paras. 35 and 47 per Blair J.A.

[167] The evidentiary record establishes that the affairs of Shieldings relevant to the issues in the case at hand (and in particular, the affairs of Shieldings in its dealings with the Bank) were conducted honestly and in good faith, based on the reasonable business judgment of Shieldings' directing mind, and in a manner that did not unfairly prejudice or unfairly affect Levy's interests.

[168] As I also find, the Bank acted honestly and in good faith, and with reasonable business judgment, as a creditor/lender to Shieldings. As well, I find that Mr. Belcher acted honestly and in good faith and in the best interests of Shieldings at all times in his capacity as a director of Shieldings.

[169] The Bank was an arms-length creditor of Shieldings. The Bank did not control Shieldings. The Bank was independent of Shieldings. The Bank determined the terms of its loans to Shieldings and the security required. Levy did not have any reasonable expectation that the Bank would, or should, compromise its loan terms in September, 1993 on the basis that a contingent judgment creditor might obtain judgment and thereby become a competing creditor of Shieldings. When new funds are advanced by a creditor the creditor can demand new and greater security. The new security can reach back and add security to funds that were loaned at an earlier time.

[170] Levy arguably has a reasonable expectation that Shielding's affairs will be conducted by the management of Shieldings with a view to fairness in protecting the interests of Shieldings' creditors, including the interest of a contingent judgment creditor. But Shieldings' borrowings from BNS, and in particular, the bridge loan in September, 1993, were clearly seen by Shieldings' management and based upon the directors' judgment to be in the best interests of Shieldings and hence, in the best interests of any unsecured *contingent* judgment creditor of Shieldings.

[171] Shieldings (and its shareholders) needed, and wished, to sell its assets. The Brenda Bay transaction was a favourable sale at a fair price. Shieldings could only

complete the sale with the bridge loan in place. The Bank had the right and power to state the terms on which it would make the bridge loan.

[172] The Bank did not control Shieldings or act unfairly in its arms-length relationship to Shieldings. Shieldings was free to accept or reject the terms offered. Shieldings accepted the terms of the bridge loan.

[173] There is no evidence to suggest Shieldings would have received more favourable terms from another lender. The evidence suggests the contrary. In any event, if Shieldings could have somehow obtained better terms from another lender so as to not disadvantage a contingent creditor, any oppressive conduct was simply the conduct of Shieldings and not BNS. (Levy has, of course, an existing judgment against Shieldings in its Tecmotiv action. It would be of no practical purpose to seek a new judgment against Shieldings for oppressive conduct in failing to satisfy that existing judgment.)

[174] There is no basis for the plaintiffs to assert a successful claim of equitable subordination, a doctrine seen in American case law. The Bank did not engage in inequitable conduct. The actions of the Bank did not confer any unfair advantage on the Bank. See *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, 7 B.L.R. (2d) 113 (S.C.C.), at 151-52 per Iacobucci J.

[175] The directors and officers Bennett and Godsall undoubtedly had knowledge of the relevant facts and material evidence to offer. As already stated, the plaintiffs reportedly had the cooperation of Messrs. Bennett and Godsall in advising the plaintiffs as to their knowledge of the relevant facts. Levy entered into a settlement with Mr. Godsall and some of the Shieldings directors in respect of the action at hand. This oppression action, which at its inception included them as defendants, was dismissed with the individual defendants agreeing to make themselves available for interviews with Levy's counsel, attend examinations under oath and as witnesses at trial if requested, and produce for review all relevant, non-privileged documents within their power, possession or control.

[176] It seems certain that if there was any such evidence which would have supported the position the plaintiffs advance that one or more of the directors and officers would have been called as witnesses by the plaintiffs. No explanation is offered by the plaintiffs for not calling any of these potential witnesses. The only reasonable inference is the adverse inference that the evidence of these material witnesses would be contrary to the plaintiffs' case. See generally John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 297, s. 6.321. Plaintiffs' counsel

impress as very conscientious in having exhausted every conceivable evidentiary path. I have no doubt they have thoroughly reviewed all possibly relevant documents. I have no doubt they have interviewed every potential witness.

Disposition

[177] For the reasons given, the action is dismissed. I may be spoken to as to costs.

[178] The Court recognizes and appreciates the co-operative approach of all counsel in presenting the voluminous documentary evidence through a well-organized, electronic medium via computer screens. This approach saved considerable time and money for all concerned. All issues in this complex action were thoroughly and exhaustively canvassed by counsel for all parties.

Action dismissed.

DATE: 20080117
DOCKET: 07-CV-328433PD1

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Manufacturers Life Insurance Company (Plaintiff) v. AFG Industries Ltd., AFG Industries, Inc., Asahi Glass Co Ltd, Trow Consulting Engineers AFG Canada, and Envirocure Environmental Consultants Inc., operating as Envirocure Inc. (Defendants)

BEFORE: Pattillo J.

COUNSEL: *Marc McAree and Nureen Shariff*
For the Defendant AGF Industries Inc., Moving Party

Maxwell M. Steidman, Q.C. and Harry Poch
For the Plaintiff, Responding Party

HEARD: December 4, 2007

ENDORSEMENT

[1] This is a motion by the defendant AFG Industries, Inc. ("AFG US") for an order pursuant to rule 21.01(1) striking out those portions of the statement of claim pleaded against it or in the alternative dismissing the action against it in its entirety. At issue is the breadth of the oppression remedy under s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended ("*CBCA*").

Background

[2] The plaintiff's action seeks recovery of environmental remediation costs alleged to have been incurred as a result of the defendant AFG Industries Ltd.'s ("AFG Canada") use of the

plaintiff's property in Vaughn, Ontario during the period of AFG Canada's or its predecessors in title tenancies from June 1969 to December 31, 2005.

[3] The plaintiff's action was commenced by statement of claim issued February 27, 2007. The claim against AFG US was based on the oppression remedy provided in s. 248 of the Ontario Business Corporations Act, R.S.O. 1990, c.B.16, as amended ("OBCA"). It alleged that AFG US, a Delaware corporation and an affiliate of AFG Canada, controlled and directed AFG Canada to take certain actions in relation to its dealings with the plaintiff in respect of its claim for remediation expenses which were prejudicial to the rights of the plaintiff and particularly that it caused AFG Canada to divest itself of all of its assets.

[4] AFG Canada and AFG US filed a joint defence and cross-claim dated May 8, 2007 which contained a general denial to the plaintiff's oppression claims against AFG US. Paragraphs 5 and 6 stated that AFG Canada was incorporated under the laws of Canada and that AFG US was AFG Canada's parent.

[5] The plaintiff filed a brief reply to the defence and cross claim dated May 14, 2007.

[6] AFG US's motion to strike the claim against it was originally commenced on July 12, 2007. Following service of the motion record, the plaintiff served a draft amended statement of claim which amended the claim against AFG US to plead the oppression remedy contained in s. 241 of the *CBCA*. As a result, AFG US delivered a revised motion record containing a revised notice of motion dated September 12, 2007.

[7] Following service of the revised motion record, the plaintiff purported to again further amend the statement of claim, this time providing further particulars with respect to its allegations of oppression against AFG US. Needless to say, AFG US and AFG Canada have not consented to the proposed amendments and a motion by the plaintiff to amend the statement of claim in accordance with amendments set forth in the second amended pleading is pending before the Master.

[8] Notwithstanding that the plaintiff has not formally amended its statement of claim, it was agreed by the parties that I should deal with AFG US's motion having regard to the claim as pleaded against it in the second amended statement of claim (the "Statement of Claim").

[9] The claim against AFG US is contained in paragraphs 2, 6, 55, 56, 57, 58 and 59 of the Statement of Claim. The plaintiff claims, among other things, declarations that it is a complainant under s. 238 of the *CBCA* and has been oppressed by AFG US under s. 241 of the *CBCA* and compensation or in the alternative damages for oppression (paragraph 2). Paragraph 6 asserts that AFG US is a Delaware corporation with its executive offices in the State of Georgia and is an affiliate of AFG Canada as defined in the *CBCA*.

[10] The substance of the plaintiff's claim against AFG US is set forth in paragraphs 55 to 59 of the Statement of Claim. The plaintiff asserts that because of the amount it has expended and will expend on the remediation of its property, it is a creditor of AFG Canada, a *CBCA* company. Further, AFG US, as AFG Canada's parent, is an affiliate of AFG Canada as defined in s. 2(1) and (2) of the *CBCA*. It further pleads that AFG US has and continues to control and direct AFG Canada in respect of the plaintiff's claim in various ways, including AFG Canada

divesting itself of its assets, all of which have interfered with the plaintiff's rights as a creditor of AFG Canada. The plaintiff further submits that it "may" be found to be a "complainant" pursuant to s. 238(d) of the *CBCA* because AFG US's actions have been unfairly prejudicial to the plaintiff or have unfairly disregarded its interests as a creditor of AFG Canada.

[11] In a motion to strike a pleading pursuant to rule 21.01(1)(b) on the basis that it discloses no reasonable cause of action, the test is whether it is "plain and obvious" that the plaintiff's claim cannot succeed: *Hunt v. Kerry Canada Inc.*, [1990] 2 SCR 959 (S.C.C.).

[12] AFG US submits that the plaintiff's claim as pleaded against it cannot succeed for two reasons: first, the statutory cause of action created by s. 241 of the *CBCA* does not apply to AFG US because it is a foreign corporation, not a *CBCA* corporation; and second, the plaintiff lacks standing to bring an oppression claim because it is not a creditor of AFG Canada within the meaning of s. 241 of the *CBCA*.

Can an oppression claim pursuant to s. 241 of the CBCA be brought against AFG US, a Delaware Corporation?

[13] AFG US submits, having regard to the wording of s. 3 (1) of the *CBCA*, the *CBCA* only applies to every corporation incorporated and every body corporate continued as a corporation under the *CBCA*. As AFG US is a Delaware corporation, it cannot be governed by the provisions of the *CBCA*. Matters with respect to its internal corporate management and corporate status of a foreign corporation cannot be determined by Ontario courts. They must be determined by the court of the corporation's domicile, which in this case is Delaware.

[14] Section 241(2) of the *CBCA* provides as follows:

241(2)

If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

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

[15] There is no question that AFG Canada, being a *CBCA* corporation, is a “corporation” within s. 241(2). Further, AFG US as the parent corporation of AFG Canada is encompassed by the words “any of its affiliates” in the section (see the definition of affiliate: s. 2(2) *CBCA*). The issue on this motion becomes, therefore, whether a *CBCA* oppression claim can be asserted against a foreign affiliate of a *CBCA* corporation?

[16] AFG US submits there is support in the case law for its submission that a *CBCA* oppression claim does not lie against a corporation which is incorporated and governed by a different jurisdiction. In *PMSM Investments v. Bureau* (1995), 25 O.R. (3d) 586 (Gen. Div.), Farley J., on a rule 21.01 motion, dealt with the issue of whether the oppression remedy pursuant to s. 248(2) of the *OBCA* could be invoked against an insurance company governed by the *Federal Insurance Companies Act*. The plaintiffs, who were shareholders and directors of the insurance company, asserted an oppression claim objecting to certain aspects of the internal management of the insurance company. As the *CBCA* does not apply to federally incorporated

insurance companies and the *Insurance Companies Act* contains no oppression remedy, the plaintiffs brought their claim under the *OBCA*.

[17] After setting forth the wording of the oppression remedy in s. 248(2) of the *OBCA* (which is virtually similar but not identical to s. 241 (2) of the *CBCA*), Farley J. stated at page 591:

It would seem to me that the meaning of this section is clear in that while the activities of affiliates (O.B.C.A. or non-O.B.C.A. companies) of the corporation (an O.B.C.A. company) may be taken into account to see if there has been inappropriate behaviour, it must be such behaviour as affects (is oppressive or unfairly prejudicial to or that unfairly disregards) "the interests of any security holder, creditor, director or officer of the corporation [O.B.C.A. company]". That is, what is affected inappropriately must be the interests of those persons qua their interests specifically in the O.B.C.A. company in question. This may take into account the indirect interest which may be derived through that O.B.C.A. company which that O.B.C.A. company may have in an affiliate.

[18] It is clear from the above comments that Farley J. was of the opinion that a claim pursuant to s. 248(2) of the *OBCA* did not lie against an affiliate corporation (whether an *OBCA* corporation or otherwise) in circumstances where the interests of any security holder, creditor, director or officer of an *OBCA* corporation were not affected.

[19] As noted, section 241(2) of the *CBCA* is not identical to s. 248(2) of the *OBCA*. Section 241(2) of the *CBCA* does not contain the words "of the corporation" after the words "any security holder, creditor, director or officer of the corporation" in s. 241(2). It was the words "of the corporation" in s. 248(2) of the *OBCA* which formed the basis behind Farley J.'s reasoning quoted in the above paragraph. Does the absence of such words in s. 241(2) of the *CBCA* effect that reasoning?

[20] In *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [2001] O.J. No. 4882 (Ont. S.C.J.), Killeen J. dealt with a motion by the defendants for an order staying the plaintiff's action on the basis that Ontario had no jurisdiction to hear the action or, in the alternative, was not the most convenient forum. The plaintiff's action was an oppression claim pursuant to s. 241(2) of the *CBCA* relating to the affairs of CanWest Broadcasting Ltd. ("Broadcasting") a Manitoba company. The plaintiffs, who were minority shareholders of Broadcasting, alleged that the corporate defendants, all of whom were *CBCA* affiliate companies, had, as shareholders of Broadcasting, injured or damaged the plaintiff's interests as shareholders in Broadcasting.

[21] Killeen J. allowed the defendants motion and stayed the action both on the basis that the Ontario courts lacked jurisdiction and Ontario was not the convenient forum. As part of his decision, Killeen J. held that the oppression remedy under s. 241 of the *CBCA* was not available to the plaintiffs. The learned judge reviewed the wording of s. 241(2) of the *CBCA*. In the learned judge's view, the absence of the words "of the corporation" in s. 241(2) was of no consequence in considering the issue of jurisdiction. In respect of whether an action for oppression could be maintained against a non-*CBCA* affiliate, the learned judge stated at para. 124:

As I read s. 241 contextually, the phrase "any of its affiliates" in the opening language of s. 241(2) must reflect Parliament's recognition that the conduct of a *CBCA* affiliate may be oppressive to the shareholders of the *CBCA* corporation or, contrariwise, the conduct of the *CBCA* corporation may be oppressive to the shareholders of the affiliate. But, in either of these scenarios, the complainant asserting the claim must be a shareholder of a *CBCA* corporation or the activities complained of must be in respect of the business and affairs of a *CBCA* corporation.

[22] The plaintiffs appealed the decision to the Court of Appeal (reported: (2003) 63 O.R. (3rd) 341). Although the court held that Killeen J. erred in concluding that Ontario had no jurisdiction to hear the action, it found that the learned judge was correct in concluding that Ontario was not the most convenient forum and accordingly dismissed the appeal. In considering the issue of jurisdiction, Rosenberg J.A., on behalf of the court was critical of the motions judge's consideration of the availability of the oppression remedy under s. 241 of the *CBCA* on the basis that the issue was not before him on the motion. Mr. Justice Rosenberg stated at paragraphs 56 and 57 of his reasons:

[56] The appellants submit that they are entitled to a remedy under the *CBCA* on the following theory. Section 241(2) provides that on an application by a "complainant", if the court is satisfied that "in respect of a corporation or any of its affiliates" that (for example) any act or omission of the corporation or any of its affiliates effects a result that is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder or director, the court may make an order to rectify the matters complained of. "Corporation" is defined in s. 2(1) of the Act to mean a body corporate incorporated or continued under the *CBCA* and would thus include CanWest Global and Global Television. "Affiliate" is defined to mean an affiliated body corporate, and "body corporate" is defined to include a company or other body corporate "wherever or however incorporated" and thus need not be a *CBCA* corporation. Under s. 2(2)(a), one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person. "Complainant" is defined in s. 238 to mean "a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates" or "a director or an officer or a former director or officer of a corporation or any of its affiliates".

[57] Thus, prior to the amalgamation, the appellants qualified as complainants, being registered holders or beneficial owners of the securities of Broadcasting and directors of Broadcasting, an affiliate of CanWest Global. They say that a court could find that in respect of Broadcasting (an affiliate of Global Television) the acts of CanWest Global and its affiliates such as Global Television, CanVideo and the other defendants effected a result that was oppressive or unfairly prejudicial to the interests "of any security holder" or "director". A frailty

in the argument is that the appellants must argue that "any" security holder or director includes a security holder or director of an affiliate that is not a CBCA corporation, in this case, Broadcasting. Case law under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ["OBCA"] tends to be against this proposition but, as the appellants point out, the OBCA is worded differently. See *PMSM Investments AFG Canada v. Bureau* (1995), 25 O.R. (3d) 586, 24 B.L.R. (2d) 295 (Gen. Div.). In any event, as I have said, it is my view that the court should not decide the merits of the claim for the purposes of determining jurisdiction or convenient forum. I will therefore apply the convenient forum test, taking the appellants' claim at face value.

[23] The Court of Appeal's decision in *Canwest, supra*, leaves open the issue of whether a security holder, creditor, director or officer of a non-CBCA affiliate can bring an oppression action against that affiliate under s.241(2) of the *CBCA*.

[24] Regardless, the facts in respect of the oppression claims being asserted in each of the *PMSM Investments* and *Canwest* cases, *supra*, were different than the facts of the claim being asserted in the present case. Here, the Statement of Claim asserts that the plaintiff is a creditor of AFG Canada, a *CBCA* corporation. The plaintiff complains about the conduct of an affiliate of the *CBCA* corporation (AFG US) which conduct (among other things, causing AFG Canada to divest itself of its assets) has affected the plaintiff in its capacity as a creditor of AFG Canada. Put another way, it is the plaintiff's interests in a *CBCA* company which are alleged to have been affected by the conduct of the affiliate. In such circumstances, I am of the view that, having regard to the wording of s. 241(2) of the *CBCA*, such a claim can and does lie against a non-*CBCA* affiliate, even if the affiliate is a foreign corporation.

[25] Contrary to AFG US's submission, the essence of the plaintiff's claim goes not to issues involving the internal corporate management or corporate status of a foreign corporation. Rather the claim deals with AFG US's conduct in respect of the affairs of AFG Canada. Such a

claim is clearly, in my view, subject to the jurisdiction of this court notwithstanding that AFG US is a foreign corporation. In any event, there is no issue of jurisdiction of the court in this case because AFG US has attorned to the jurisdiction of the court by filing its defence to the claim.

Does the Plaintiff Lack Standing to Bring an Oppression Claim?

[26] AFG US submits that the plaintiff's claim against it fails because the facts as pleaded in the Statement of Claim establish only that the plaintiff is a "contingent" creditor of AFG Canada and not a creditor. As it will only become a "creditor" upon the successful completion of its claim and obtaining judgment, the plaintiff cannot be a "complainant" within s. 238 of the *CBCA* which is a pre-condition to an oppression claim.

[27] Section 238 of the *CBCA* provides, in part, as follows:

238. In this part,

"complainant" means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

[28] While a "creditor" is not listed as a complainant in s. 238 (a), (b) or (c), being someone whose interests can be considered under s. 241(2), the courts have held that a creditor

can be a “proper person” pursuant to s. 238(d) above (see: *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 (S.C.C.) at para. 48 to 51).

[29] AFG US submits that a claim for unliquidated damages does not give the plaintiff the status of “creditor” within the meaning of s. 241(2) of the *CBCA* (see: *Royal Trust v. Hordo* (1993), 10 B.L.R. (2d) 86 (Gen. Div.); and *Devry v. Atwood’s Furniture Showrooms Ltd.*, [2000] O.J. No. 4283 (S.C.J.)).

[30] Notwithstanding the above cases, there are cases which allow contingent creditors to proceed with their claims and grant the plaintiff standing as a “complainant” at the conclusion of the trial (see: *Tavares v. Deskin Inc.*, [1993] O.J. No. 195 (Gen. Div.); *Gignac, Sutts and Woodall Construction v. Harris*, [1997] O.J. No. 3084 (Gen. Div.) Paras. 65 to 76; *Apotex Inc. v. Laboratories Fournier S.A.*, [2006] CanLII 38354 (Ont. S.C.J.) at para. 38).

[31] The question of whether the court will exercise its discretion to grant standing to a creditor in accordance with s. 238 (d) of the *CBCA* involves a consideration by the court of the conduct involved in light of the reasonable expectations of the creditor. In both the *Tavares* and *Gignac, Sutts* cases, *supra*, the oppressive conduct complained of by each of the plaintiffs was asset stripping in the face of their claim. The plaintiff’s claim in this case involves, in part, similar allegations.

[32] Accordingly, I cannot say that it is “plain and obvious” at this stage of the action that the plaintiff will not be held to be a complainant pursuant to s. 238 of the *CBCA*.

[33] AFG US’s motion is therefore dismissed.

[34] The plaintiff has been successful on the motion and is therefore entitled to its costs on a partial indemnity basis. At the conclusion of the argument both parties provided me with costs outlines which were quite far apart in amount. The plaintiff's costs outline, on a partial indemnity basis, claims \$20,856.80 inclusive of disbursements and GST.

[35] I am mindful of the fact that in assessing costs, I must have regard to the principles set out in rule 57.01 and what is fair and reasonable, having regard to what was involved. As a result, and having regard to the fact that what was involved was a pleadings motion which required the plaintiff to recast its pleading twice resulting in two false starts for the motion, I think the appropriate award of costs payable to the plaintiff by AFG US is \$9,500.00, inclusive of disbursements and GST.

Pattillo J.

Released: January 17, 2008

[Dunn v. Interglobe Financial Services Corp., \[2007\] O.J. No. 5261](#)

Ontario Judgments

Ontario Superior Court of Justice

T.L.J. Patterson J.

Heard: May 25, 2007.

Judgment: July 4, 2007.

Court File No. 06-CV-007622CM

[2007] O.J. No. 5261

Between Michael Robert Dunn and M.R. Dunn Holdings Limited, Plaintiffs, and Interglobe Financial Services Corp., Kurt Dunn, Kenneth J. Fitzpatrick, Kevin Parent, John Joseph Peloso and Michael P. Robinson, Defendants

(22 paras.)

Counsel

James K. Ball, for the Plaintiffs.

Deborah Berlach, for the Defendants Kurt Dunn, Kenneth J. Fitzpatrick, Kevin Parent, John Joseph Peloso and Michael P. Robinson.

T.L.J. PATTERSON J.

1 This motion is being brought under Rule 21 on behalf of the defendants Kenneth J. Fitzpatrick ("Fitzpatrick"), Kevin Parent ("Parent"), John Joseph Peloso ("Peloso") and Michael P. Robinson ("Robinson") for disclosing no reasonable cause of action and further on behalf of the defendant Kurt Dunn ("Dunn") for an order striking paragraphs 68-74 of the Statement of Claim for disclosing no reasonable cause of action.

2 The plaintiffs have claimed against the defendants on various grounds but relevant to the motion before me is whether the alleged conduct by the defendants is oppressive and unfairly prejudicial to and unfairly disregards the interests of the plaintiffs.

3 The defendants Fitzpatrick, Parent, Peloso, Robinson and Dunn are each officers and

directors of the defendant corporation Interglobe Financial Services Corp. ("Interglobe") with Mr. Kurt Dunn being also employed by Interglobe as an investment advisor.

4 The Statement of Claim alleges that Kurt Dunn provided bad financial advice to the plaintiff Michael Dunn with the allegation that the defendants Fitzpatrick, Parent, Peloso, Robinson and Dunn were on notice of facts that through the financial press and otherwise in early 2005 that Portus Alternative Asset Management Inc. ("Portus") and its senior management were the subject of investigations alleging the swindling of investors of approximately 800 million dollars. It is alleged that the individual defendants caused Interglobe to pay extraordinary management bonuses and compensation and caused Interglobe to pay dividends to them and others with whom they did not deal at arms length which payments left Interglobe under capitalized to adequately meet the loss full claims of investors after allowing for exposure to a large contingent liability because of the Portus losses. It is alleged that by those payments and reduction in indebtedness the defendants caused a result that was oppressive and unfairly prejudicial to the interest of the investors including the plaintiffs herein for the purpose of s. 248 of the *Business Corporations Act* each of whom the plaintiff alleges is a proper complainant within the meaning of that term as defined by paragraph 245(c) of that Act.

5 It is argued that the question for the trial court is whether the actions of the defendants in making payments to third parties to defeat, delay or hinder the recovery of an unliquidated corporate liability constitutes creditor oppression under s. 248 of the *Business Corporations Act (Ontario)*.

6 Under s. 245(c) of the Act complainant means any other person who in the discretion of the court is a proper party to make an application under this part.

7 Section 248 of the Act provides:

248(1) A complainant ... may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), 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; or

(c) the powers of the directors of the corporation ... have been ... exercised in a manner,

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

8 Under s. 38(3) of the Act (which relates to circumstances when a dividend cannot be declared) provides as follows:

- (3) The directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that,
- (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or
 - (b) the realizable value of the corporation's assets would thereby be less than the aggregate of,
 - (i) its liabilities, and
 - (ii) its stated capital of all classes.

The Statement of Claim on the facts as pleaded allege that dividend stripping in contravention of s. 38(3) is made out and that the actions by the defendants in paying extraordinary management bonuses in compensation in a fashion that benefited themselves in relationship to its liabilities was a motivating factor in such payments.

9 The defendants have argued that the plaintiffs are creditors and not complainants under s. 248(2).

10 In support of that proposition Swinton J. in *Devry v. Atwood's Furniture Showrooms Ltd.* [\[2000\] O.J. No. 4283](#) stated that even if the dividends were improperly paid here the payments were made at a time when the applicant was not a creditor at Atwood's. At most she was a contingent creditor as judgment in her action was not given until after the final dividend payment of March 31, 1994.

11 Farley J. in *Royal Trust Corp. of Canada v. Hordo* [\[1993\] O.J. No. 1560](#) (Gen. Div.) said at para. 13:

... it is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained.

12 The plaintiff takes the position that it does not have a contingent interest in an uncertain claim. It alleges the defendants are liable to the plaintiff on the facts deemed proved. On the facts as pleaded the defendant corporation's assets were depleted in an attempt to avoid payment of liability to the plaintiff and others and the ability of the corporation to satisfy that liability was deliberately and wrongfully impaired. A decision of Epstein J. in a s. 248 oppressive proceeding *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* [\(1997\), 147 D.L.R. \(4th\) 300](#) required individual directors to make good a person aggrieved who was owed a yet to be due promissory note where it was established that the corporation had been looted and dividend-stripped to frustrate the soon to be paid promissory note.

13 The case of *G.T. Campbell & Associates Ltd. et al. v. Hugh Carson Co. Ltd. et al.* [\(1979\), 24 O.R. \(2d\) 758](#) the Ontario Court of Appeal per Holden J.A. in commenting on the word creditor

within the context of s. 252 and 253 of the *Business Corporations Act* stated:

... "creditor" in s. 253 cannot be restricted to its ordinary common law meaning of a person to whom a debt is owing but must be given an extended meaning of a person with a claim coming within s. 252. This was the interpretation given to "creditor" by Steel, J., and by a majority of the Divisional Court, and I agree with it.

14 Section 253(1) as now s. 243(1) of the *Business Corporations Act* and the word creditor has been dropped and the words "to any person claiming under s. 242" has been substituted.

15 The plaintiff argued that legislative expression has now confirmed the correctness of the majority in the *G.T. Campbell & Associates Ltd. et al.*, *supra* decision that creditor was intending to extend to any person with an unliquidated claim provable against the corporation.

16 The plaintiff argues that in view of the *G.T. Campbell & Associates Ltd. et al.* decision that comments made by Justice Spence in the *Awad v. Dover Investments Ltd.*, [\[2004\] O.J. No. 3847](#) is questionable because of the reasons given by the majority in the *G.T. Campbell & Associates Ltd. et al.* case which addressed the purposes and objects of the Act. Justice Cumming in *Levy-Russell Ltd. v. Shieldings Inc.*, [\[2004\] O.J. No. 4291](#) at para. 92 recognized that persons to whom a corporation may be contingently liable or persons with an unliquidated claim provable against a corporation may be afforded standing as a proper person under s. 245 to bring in s. 248 oppressive remedy proceedings.

17 In the *Downtown Eatery 1993 Ltd. v. Ontario* [\(2001\), 14 B.L.R. \(3d\) 41](#) (O.C.A.) an aggrieved person who alleged wrongful dismissal from an employer corporation brought a s. 248 oppressive application against two of the directors Grad and Grosman. The Ontario Court of Appeal stated at para. 62, page 58:

It was the reasonable expectation of Alouche that Grad and Grosman, in terminating the operation of ... [the employer corporation] ... and leaving it without assets to respond to the possible judgment should have retained a reserve to met the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely-held company, is clear. By diverting the accumulated profits of ... [the employer corporation] ... to other companies that they owned, they were able to insulate these funds from being available to satisfy Alouche's judgment.

For the foregoing reasons, it is our opinion that Alouche has demonstrated his entitlement to the oppression remedy against Grad and Grosman.

18 Under Rule 21 a party may move before a judge to strike out a pleading on a ground that it discloses no reasonable cause of action and a judge may make an order accordingly with the standard being that assuming the facts as pleaded can be proven that it is plain and obvious that the claim cannot succeed. The defendant argued that the individual defendants are unnecessary parties and the action should be dismissed as against them.

19 I agree with the argument made by the plaintiff and the motion by the defendants fails. The pleadings as currently constituted in my opinion should be dealt with by the trial judge. I am satisfied that there is an arguable point that the plaintiffs are a proper party to bring a creditor oppressive remedy application under s. 248.

20 Similarly I believe that paragraphs 68-74 of the Statement of Claim should not be struck as there is disclosed a reasonable cause of action.

21 The defendants' motion therefore is dismissed.

22 I may be spoken to as the matter of costs if the parties fail to agree.

T.L.J. PATTERSON J.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
J.S.M. CORPORATION (ONTARIO) LTD.) *Frank J.C. Newbould, Q.C.* and *Aaron A.*
) *Blumenfeld*, for the Plaintiffs
)
Plaintiff)
)
- and -)
)
)
THE BRICK FURNITURE WAREHOUSE) *H. James Marin* and *Wendy R. Cole*, for
LTD., THE BRICK FURNITURE) the Defendants
WAREHOUSE (WINDSOR) LTD., THE)
BRICK WAREHOUSE CORPORATION,)
LANDEX INVESTMENTS LTD., THE)
BRICK WAREHOUSE LP, WAYNE)
TISCHER, PAUL RICHARDS AND)
WILLIAM COMRIE)
)
Defendants)
)
) **HEARD:** July 21, October 17, 20, 24, 27
) and 28, 2005

CUMMING J.

The action and the parties

[1] The plaintiff, J.S.M. Corporation (Ontario) Ltd. (“JSM”) brings this action against the defendants alleging damages arising from the breach of a commercial lease.

[2] JSM purchased a retail shopping center known as “Gateway Plaza” in Windsor, Ontario, in early 1986. JSM, an Ontario corporation, is a closely held private family corporation. Two sons-in-law of the late J.S. Mooallim, Mr. Robert Nathaniel and Mr. Joe Gourgy, act as the

vice-presidents and the principal management of the corporation. Messrs. Nathaniel and Gourgy reside in Montreal.

[3] JSM claims damages against the defendants for alleged breach of contract; for the alleged torts of inducing breach of contract, intentional interference with contractual relations and economic interests, and misrepresentation; seeks a declaration of oppressive conduct; and seeks ancillary relief, if necessary, by way of leave to commence a derivative action.

[4] The defendant corporations are related and affiliated corporations with an underlying common ownership. All are part of a single business enterprise (“the Brick enterprise”) that sells furniture, appliances and electronics to the public across Canada. The Brick enterprise was launched in 1971 when the defendant William Comrie opened a single Edmonton store that he operated with his brother. The Brick enterprise has been very successful over its 34 years. It currently encompasses approximately 6000 employees and 170 stores. The Brick enterprise became an income trust, known as the Brick Group Income Fund, through the offering of \$272 million Class A units to the public in July 2004. The trust holds all of the limited partnership units of the defendant, The Brick Warehouse LP, as well as its general partner and subsidiaries (the “Brick LP”).

[5] The individual defendant, Wayne Tischer, was a director of the defendants The Brick Furniture Warehouse Ltd. and the Brick Furniture Warehouse (Windsor) Ltd. until May 31, 2000; a director of the defendant The Brick Warehouse Corporation until July 12, 1989; and from January 19, 1989 to May 31, 2000 Secretary-Treasurer, Senior Vice-President and Controller of that corporation. Mr. Tischer states that, due to illness, he did not participate in any business decisions made by that corporation after January 1999.

[6] The individual defendant, Paul Richards, of Edmonton, is a director of the defendants The Brick Furniture Warehouse Ltd. and The Brick Furniture Warehouse (Windsor) Ltd. and was a director of The Brick Warehouse Corporation until July 10, 1998. Since February 4, 1999, he has held the position of Executive Vice President, Operations, of that corporation. He is currently Chief Operating Officer for Brick LP.

[7] The defendant William Comrie was formerly chairman of the board of The Brick Furniture Warehouse Ltd. and The Brick Furniture Warehouse (Windsor) Ltd. and was a director of The Brick Warehouse Corporation as of July 12, 1989. On March 1, 2004, he resigned as Chief Executive Officer of that corporation, as well as from his several directorships within the Brick enterprise. Mr. Comrie was the principal owner of the Brick Enterprise until the creation of the income trust. He retains a substantial equity interest in the Brick LP but is no longer an officer or director within the Brick enterprise.

The evidence

[8] On June 16, 1986, the defendant The Brick Furniture Warehouse Ltd. (“Brick Ltd.”), an Alberta corporation, made an offer to lease 29,000 square feet of store space in JSM’s Gateway

plaza. The lease was for a period of 10 years with two five year renewal options by the lessee at a stepped-up rent.

[9] An amended offer was accepted by JSM June 27, 1986. The formal lease was dated August 1, 1986 with the commencement date to be October 1, 1986 and the termination date to be September 30, 1996.

[10] Brick Ltd., agreed in the lease “to establish and operate a business” for the retail sale of furniture, appliances and video and audio equipment. The parties agreed by clause 7.03.2 as follows:

7.03.2 The Tenant will not, and will not permit a subtenant to assign this Lease in whole or in part or sublet all or part of the Leased Premises, and will not permit the occupation or use of all or part thereof by others without the prior written consent of the Landlord in each case, which consent will not be unreasonably withheld except that it may be withheld in any event if the permitted use of the Leased Premises stipulated in Article 7.23 would [sic] be changed. It will not be unreasonable for the Landlord to consider the following factors before giving or withholding its consent: any covenants made by the Landlord with another tenant of the Shopping Centre, the financial background and status, business history, capability in the Tenant’s line of business. The consent by the Landlord to an assignment or subletting will not constitute a waiver of its consent to a subsequent assignment or subletting. This prohibition against assignment or subletting includes a prohibition against an assignment or subletting by operation of law. If this Lease is assigned, or if all or part of the Leased Premises is sublet or occupied by anybody other than the Tenant, in any case without the consent of the Landlord when required, the Landlord may collect rent from the assignee, subtenant or occupant and apply the net amount collected to the Rent herein reserved. Despite an assignment the Tenant will remain fully liable under this Lease. The tenant may sublet the premises to its parent, subsidiary or affiliated company with notice but without consent subject to sublessee compliance with 7.23. The Tenant may mortgage or encumber its leasehold interest in the leased premises.

[11] The tenant agreed by this clause that it would not, and would not permit a subtenant to, assign the lease, or sublet, without the written consent of the landlord (whose consent could not be unreasonably withheld); provided, however, that the *tenant* could sublet to its parent, subsidiary or an affiliated company with notice but without consent. The tenant would remain liable under the lease despite any assignment.

[12] The lease also contained a series of clauses relating to the mandatory use of the space. These clauses include 4, 5.01, 7.23, 7.24 and 7.25 relating to the non-payment of rent for three months, vacating the premises for more than 15 days and not staying open for business during the requisite business hours.

[13] By an agreement dated April 1, 1987, Brick Ltd. assigned its interest as tenant under the lease to The Brick Furniture Warehouse (Windsor) Ltd. (“Brick Windsor”), another Alberta corporation. The assignee agreed to perform the covenants on the part of the assignor tenant. The assignor tenant, Brick Ltd., agreed to remain bound by the terms of the lease.

[14] By an agreement of the same date, April 1, 1987, Brick Windsor entered into a sublease of the premises with The Brick Warehouse Limited, (“Brick Warehouse”), an Alberta corporation, (which later changed its name to The First Founder Holding Corporation).

[15] The subtenant Brick Warehouse agreed to pay to the sublandlord, Brick Windsor, the requisite rent and such other amounts as required under the lease.

[16] By an assignment dated June 1, 1987, Brick Warehouse then assigned its interest in this sublease to The Brick Warehouse Corporation (“Brick Corp”), incorporated under the *Canada Business Corporations Act*, R.S.C.1985, c. C-44. (“CBCA”).

[17] Brick Warehouse and Brick Corp were the operating corporations at the heart of the Brick enterprise and, as such, had substantial assets. In contrast, Brick Furniture and Brick Windsor were simply shell corporations whose only assets were the lease in the Gateway Plaza site and whatever intangible benefit might result from that leasehold interest.

[18] The Alberta in-house counsel for the Brick enterprise, Mr. John Butler, had written to the Brick enterprise’s Toronto counsel January 28, 1987 advising that the sublease was to include a clause whereby Brick Warehouse could terminate its obligations after one year on 30 days’ notice. In fact, this intended clause was inexplicably not included in the sublease. The intent of the Brick enterprise was to have the two shell corporations, Brick Ltd. and Brick Windsor, obligated under the lease, but to provide Brick Warehouse (and the later assignee, Brick Corp) with an escape clause through an early termination provision.

[19] By a Consent and Acknowledgment dated June 1, 1987, the landlord, JSM; the subtenant Brick Warehouse; and the assignee of the subtenant, Brick Corp, acknowledged *inter alia* that the sublease was in good standing and that the business conducted on the premises was being sold to the assignee, Brick Corp, by Brick Warehouse. Brick Corp agreed under clauses 5 and 6 to comply with all terms of the sublease, to pay all sums due under the sublease and that JSM as landlord retained all of its rights under the lease and sublease.

[20] Enclosed with a letter dated June 23, 1987, Toronto counsel for the Brick sent JSM the assignment from Brick Ltd. to Brick Windsor dated April 1, 1987, the original sublease agreement between Brick Windsor and Brick Warehouse dated April 1, 1987, the assignment of

the sublease from Brick Warehouse to Brick Corp dated June 1, 1987 and the Consent and Acknowledgement signed by JSM and dated June 1, 1987.

[21] Mr. Butler wrote to the Edmonton law firm representing the Brick on November 4, 1987, saying that they had been talking for the last several months about rectifying the problem arising from the failure to have an early termination clause in the sublease. He confirmed that the law firm was working with Toronto counsel for the Brick enterprise to amend the sublease so as to provide for a 30 day termination clause. Mr. Butler also confirmed that he had been advised by the Edmonton law firm that such an amendment would not require any notice to JSM.

[22] It is to be noted that such advice would not accord with the requirements of clause 7.03.2 of the lease. Indeed, a note to file prepared by Toronto counsel for the Brick corporations on February 1, 1988 indicates that Mr. Butler agreed in a telephone conversation that notice should be sent. By a memo to file dated February 15, 1988, Mr. Butler recorded that he concurred with Toronto counsel “that it would be best to send a copy of the restated Sublease to the landlord” given that JSM had been given a copy of the original sublease by Toronto counsel June 23, 1987.

[23] A second sublease agreement, which for ease of reference can be called the “amended sublease”, was entered into between Brick Windsor and Brick Warehouse around March 1988 (although left with the nominal date of April 1, 1987).

[24] One preamble clause to the amended sublease provided: “whereas certain terms ... were omitted by inadvertence from the initial Sublease...” One new term in the amended sublease provided:

10. The Sublandlord acknowledges and agrees that, notwithstanding anything to the contrary hereinbefore in this Sublease expressed or implied, the Subtenant, at any time subsequent to the 1st day of January, 1987, shall have the sole right, for any reason whatsoever, on ninety days prior written notice to the Sublandlord, to terminate the remaining term (whether the original term or any renewal term) of this Sublease, in which event this Sublease, at the expiration of such ninety-day notice period, shall, for all purposes, be at an end and of no force and effect whatsoever and the Subtenant shall forthwith vacate the Premises and neither the Sublandlord nor the Subtenant shall have any liability, the one to the other.

[25] This term, which for ease of reference will be called the “90 days notice of termination clause”, is central to the issues raised in the action at hand.

[26] Brick Warehouse and Brick Corp amalgamated as of March 1, 1988 and continued as Brick Warehouse Corp. (“Brick Corp #2”), incorporated under the *CBCA*. (Brick Corp #2 later

changed its name to “The Second Founder Holding Group” as of March 3, 1989, which in turn amalgamated with and changed its name to Landex Investments Ltd., an Alberta corporation, as of March 12, 1996.)

[27] Toronto counsel for the Brick enterprise had written to Mr. Nathaniel February 2, 1988 seeking a non-disturbance agreement in favour of Brick Corp and advising him that it would be necessary to insert recitals in a non-disturbance agreement with respect to the sublease. Toronto counsel for the Brick enterprise did not advise Mr. Nathaniel of its intent to sign an amended sublease although counsel sent five copies of that amended sublease to the Alberta counsel for the Brick enterprise that very same day. The purported amended sublease was never sent to JSM.

[28] By an assignment dated February 17, 1989 (effective March 1, 1989) Brick Corp #2 assigned its interest in the sublease to 154129 Canada Ltd., a corporation incorporated under the *CBCA*, which later changed its name to The Brick Warehouse Corporation (“Brick Corp #3”). (Brick Corp #3 and Landex Investments Ltd. amalgamated August 27, 2004 and continued under the name of Landex Investments Limited (“Landex”), which is now continued as a Nova Scotia corporation.) As vendor to the income trust fund, Landex holds a substantial number of the issued fund units.

[29] Toronto counsel for the Brick enterprise wrote to JSM February 21, 1989 with a copy of the February 17, 1989 assignment and a Consent and Acknowledgement for JSM to sign. (This consent was not signed by JSM). Toronto counsel stated that an aborted ‘going public’ intent by the Brick enterprise in the fall of 1987 was the reason behind its convoluted history of corporate maneuvers. The Brick enterprises explained that it was its intention at the time to have Brick Corp #2 sell its furniture retail division to Brick Corp #3, which was a wholly-owned subsidiary of Brick Corp #2, that would carry on the business operations of Brick Corp #2 related to the retail sale of furniture. The assurance was given that the obligations of Brick Corp (now called herein Brick Corp #2) to JSM under the sublease would remain. No reference was made to the existence of the purported amended sublease. JSM had no knowledge of the amended sublease. It would have been reasonable for JSM to have understood the assurance of the Brick enterprise’s Toronto counsel as meaning that Brick Corp would maintain its obligations under the original sublease.

[30] The same day, Toronto counsel for the Brick enterprise wrote to the Brick enterprise’s Alberta counsel advising that it did not have a copy of the amended sublease in its files and requesting that it be sent a copy. By letter dated February 23, 1989, Alberta counsel for the Brick enterprise sent five copies of the amended sublease, dated April 1, 1987, to Brick Corp’s Edmonton offices for signature by Brick Corp. These five copies were then returned February 27, 1989 to the said Alberta counsel by the Brick enterprise’s in-house counsel, Mr. John Butler, to obtain the signatures of Brick Windsor and Brick Ltd. These copies contained the notation of Mr. Butler stating that he had a copy of the sublease executed “in late March of 1988” with the handwritten change relating to the 90 day notice of termination clause. Mr. Butler requested that JSM be given “the appropriate notice of the amended Sublease”.

[31] Alberta counsel for the Brick enterprise then wrote to Toronto counsel for the Brick enterprise February 28, 1989 requesting that notice be given to JSM of the amended sublease once they could provide Toronto counsel with an "originally executed copy of the matter of an amended sub-lease." This request was repeated when the executed amended sublease was sent to Toronto counsel by overnight courier. The request was not acted upon by Toronto counsel for the Brick corporations.

[32] Toronto counsel for the Brick enterprise had written to Toronto counsel for JSM, at JSM's request, on February 23, 1989, enclosing a copy of the February 21, 1989 letter to JSM and other documents. However, the letter made no reference to the matter of an amended sublease. Toronto counsel for the Brick enterprise also wrote directly to Mr. Joe Gourgy of JSM February 28, 1989 saying that no consent is necessary to the Consent and Acknowledgement sent with the February 21, 1989 letter from the said Toronto counsel in respect of the intended assignment of sublease from Brick Corp to 154129 Canada Ltd. i.e. Brick Corp #3. Mr. Gourgy telephoned Toronto counsel for the Brick enterprise to advise that consent was in fact required and that a covenant directly from the subtenant to JSM was required. Toronto counsel for JSM delivered a letter March 1, 1989 confirming that JSM's consent was required by virtue of clause 7.03.2 of the lease. (JSM never signed this Consent and Acknowledgment in respect of the purported assignment to Brick Corp #3).

[33] By letter dated June 13, 1989 to Mr. Craig Styles, Vice President of Real Estate at Brick Corp #3, Toronto counsel for the Brick enterprise stated that the Brick was required to give notice to JSM of the amended sublease and that "We are awaiting your instructions in connection with giving notice...." Also produced in this action was a letter dated June 12, 1989 from the Brick's Toronto law firm giving notice of the amended sublease dated April 1, 1987 (but executed in March 1988) and attaching a copy of the amended sublease. There is a handwritten notation on the letter "Not Sent".

[34] In summary, the evidentiary record establishes that at all times relevant to the issues in this action, JSM understood that the original sublease was in place. While counsel for the Brick made several internal statements that they would forward a copy of the amended sublease to JSM, JSM was not in fact advised during this period that there was an amended sublease. JSM had no knowledge of the purported amended sublease.

[35] The defendants submit that the evidence suggests that, prior to 1992, it was not common for landlords of commercial leases to require the operating corporation to sign a lease. This generalized opinion may or may not be accurate; no real evidence is before me about the commercial leasing market in Windsor in 1987, nor in respect of the specific market in terms of the Gateway Plaza at that time. In any event, the relevant question is what contractual terms the parties actually bargained for when they entered into the lease dated April 1987.

[36] Clause 7.03.2 of the lease stipulated that the *consent* of JSM was required in respect of the sublease by the assignee sublandlord, Brick Windsor, to its subtenant, Brick Warehouse.

Indeed, JSM's consent was obtained to this sublease through the Consent and Acknowledgement dated June 1, 1987, which JSM signed.

[37] In my view, and I so find, adding the 90 day notice of termination provision (clause 10 of the amended sublease) by the March 1998 amendment required the consent of JSM. The purported amendment represented a fundamental change to the original sublease. In essence, Brick Windsor and Brick Warehouse were purportedly agreeing to a new sublease. Thus, the amended sublease to which JSM had not consented (and indeed, of which JSM had no knowledge) was of no force and effect insofar as JSM was concerned. The original sublease remained in full force and effect. As well, the consented-to assignment dated April 1, 1987, from Brick Warehouse to Brick Corp in respect of this original sublease, remained in full force and effect. Any obligations of Brick Corp under the Consent and Acknowledgment dated June 1, 1987 remained in full force and effect.

[38] On January 17, 1996, Brick Corp #3 exercised its option under clause 8 of the sublease to renew the sublease for a period of five years as permitted under clause 11.03 of the head lease. Brick Windsor gave the requisite notice to JSM. The term of the lease would now expire September 29, 2001.

[39] The defendants submit that because only the amended sublease has a clause 8, and not the original sublease, that somehow JSM is charged with knowledge of the amended sublease. I do not agree. First, the reference to clause 8 of the amended sublease is only made in the letter from Brick Corp #3 to its sublandlord, Brick Windsor. Mr. Styles' letter of January 18, 1998, that was written on behalf of Brick Windsor and sent to JSM, makes no reference to clause 8 and no reference to any amended sublease. Second, even if the option to renew letter dated January 17, 1996 that Brick Corp sent to Brick Windsor was passed on to JSM with Brick Windsor's letter of January 18, 1996 in which it exercised its option to renew, JSM cannot be charged with knowledge of an amended sublease through this obscure reference to "paragraph 8 of the sublease." JSM knew that clause 11.03 of the head lease (and the offer to lease of June 16, 1986) contained an option to renew. It follows that, as JSM had no knowledge of any amended sublease, it would reasonably assume that Brick Windsor (and Brick Warehouse and Brick Corp) had a right of renewal option in the original sublease (as it did in clause 2 thereof) that mirrored the right of renewal in the head lease given to Brick Ltd.

[40] Mr. Nathaniel states that he did not learn of the purported amended sublease and its 90 day notice of termination clause until the defendants filed their statement of defence in the action at hand. He says that had he known of the purported amended sublease, he would not have signed the Consent to the assignment of the sublease from Brick Windsor to Brick Corp made June 1, 1987 nor would he have caused JSM to deal with the corporate defendants in the way JSM did, including giving rent reductions of some 30% for 11 months in 1992 and over 20% throughout 1993 because of the economic recession. I accept Mr. Nathaniel's evidence. I find him to be a straightforward and credible witness.

[41] Mr. Tischer states in his affidavit evidence that in late November 1999, Brick Corp #3 made a business decision to end its sublease so that it could relocate its retail business to a new location in Windsor. This location had some 47,000 square feet. By a notice dated November 25, 1999, Brick Corp #3, as subtenant, gave notice to Brick Windsor, as sublandlord, that it was terminating the sublease as of February 29, 2000.

[42] By letter dated February 8, 2000 Brick Windsor then gave notice as sublandlord to JSM that Brick Corp #3, as subtenant, had ended its sublease and would be vacating the premises at the end of February 2000. It further advised JSM that, as a consequence, it would be difficult for Brick Windsor to continue paying rent. On February 28, 2000, Brick Windsor agreed with Brick Corp to allow Brick Corp #3 to overhold to March 31, 2000. The rent remitted by Brick Corp #3 March 1, 2000 was the last rent paid to JSM.

[43] Mr. Nathaniel states that he was shocked to see the reference to Brick Corp #3 ending the sublease as he was only aware of the original sublease, which provided the same period of lease as the head lease. With the renewal, this was to last until September 30, 2001. (There is not, of course, any 90 days notice of termination clause in the original sublease.)

[44] By letter of May 19, 2000, counsel for JSM advised Brick Windsor that it was in default of its obligations as tenant under the lease, including clauses 4, 5.01, 7.23, 7.24 and 7.25 relating to the non-payment of rent for three months, vacating the premises for more than 15 days and not staying open for business during the requisite business hours. Given these continuing breaches, JSM terminated the lease June 27, 2000.

Disposition

Contract

[45] The Consent and Acknowledgement of June 1, 1987, constituted an agreement between JSM and Brick Warehouse, Brick Warehouse and Brick Corp.

[46] JSM as landlord, Brick Windsor as assignee tenant and sublandlord, and Brick Warehouse as subtenant, agreed in clause 1 to the assignment of Brick Warehouse's interest to Brick Corp. Brick Windsor covenanted with Brick Corp under clause 2 that the (original) sublease is valid and constitutes the entire agreement between Brick Windsor and Brick Warehouse.

[47] (Note that Brick Windsor as assignee is obligated under clause 3 of the assignment from Brick Ltd. dated April 1, 1987 (along with Brick Ltd. as tenant under the head lease), to pay the rent due under the head lease to JSM.)

[48] In clause 5 of the Consent and Acknowledgement dated June 1, 1987, Brick Corp also promised to pay Brick Windsor the rent due under the (original) sublease between Brick Windsor, as sublandlord, and Brick Warehouse, as subtenant.

Brick Windsor, as assignee, is in turn obligated to pay JSM under clause 3 of the assignment dated April 1, 1987.

[49] JSM consented in clause 3 of the Consent and Acknowledgement dated June 1, 1987, to the sale of the business from Brick Warehouse to Brick Corp on the strength of the above promises.

[50] Under the requirements of the original lease, Brick Windsor required the consent of JSM to assign its interest to Brick Corp. The Consent and Acknowledgement dated June 1, 1987 contained this consent. JSM's consent was not a mere rubber stamp approval. Under the lease, it had the ability to withhold such consent for many reasons including for the "financial background and status, business history, [and] capability in the Tenant's line of business". In exchange for the consideration provided by this consent, covenants were entered into by the parties. The Consent and Acknowledgement dated June 1, 1987 therefore constituted a contract.

[51] A contract cannot be amended and changed unilaterally by one side thereto without the consent of the other party. JSM did not agree to the purported amended sublease being substituted for the original sublease referred to in that contract. Indeed, JSM did not even know about the amended sublease. Therefore, the amended sublease has no force and effect as against JSM. Those obligations and representations made directly to JSM that are contained in the original sublease remain in force for the purpose of determining the rights and obligations set out in the Consent and Acknowledgement dated June 1, 1987.

[52] I find, as conceded, that Brick Lt. and Brick Windsor are in breach of their contract with JSM.

[53] The defendants submit that there is no privity of contract between JSM and Brick Corp. The defendants submit that the only parties with direct contractual obligations to JSM are Brick Ltd. (through the head lease) and Brick Windsor (through the assignment agreement dated April 1, 1987).

[54] Clause 5 in the Consent and Acknowledgement dated June 1, 1987, imposes an obligation upon Brick Corp to *Brick Windsor*, and not directly to JSM, to meet the subtenant Brick Warehouse's obligations to pay rent to Brick Windsor under the sublease. However, implicit in JSM agreeing to the Consent and Acknowledgement, as would be known and understood by the Brick parties, is the promise that Brick Corp will meet the rent obligation under the sublease. Moreover, clause 2 of the assignment of the sublease dated June 1, 1987, from Brick Warehouse to Brick Corp, obligates Brick Corp to perform Brick Warehouse's obligation to pay the rent required under the sublease between Brick Windsor and Brick Warehouse. Again, this obligation upon Brick Corp is in favour of Brick *Windsor*.

[55] Privity of contract is necessary to create contractual obligations: See *Granborough Developments Ltd. v. TCCB, Ltd.*, [2003] O.J. No. 4266 (S.C.J.) at paras. 35 to 41. In *Kingwood Estates Inc. v. Hildebrand*, [1996] M.J. No. 80, Justice Twaddle of the Manitoba Court of Appeal held that there was no privity of contract as between an assignee and landlord when no direct

covenants run between the two. The endorsement of the landlord's consent on the assignment after the document had been executed did not create privity of contract. His Honour further noted that he doubted it would have even if the endorsement had preceded the execution (para. 26).

[56] In this case, it is clear that the consent and Acknowledgment is more than a mere endorsement. There was privity of contract between JSM, Brick Windsor and Brick Corp through the Consent and Acknowledgement dated June 1, 1987; however, apart from clause 6, there were no covenants between JSM and Brick Corp. There was no privity between JSM and Brick Corp in respect of the first five covenants. I agree that there is no covenant from Brick Corp to pay rent directly to JSM. However, there were representations and undertakings by Brick Corp in clause 5 of the Consent and Acknowledgement (that the rent under the sublease will be paid). These representations remain relevant to the issues at hand, notwithstanding that the *contractual* obligation in clause 5 was simply from Brick Corp to Brick Windsor.

Reasonable expectations

[57] How then are the representations relevant? Brick Corp made these promises and commitments for the purpose of inducing JSM to consent to the assignment in the Consent and Acknowledgement dated June 1, 1987. Brick Corp could not remove or diminish its obligations to pay rent through the purported amended sublease.

[58] JSM relied upon these undertakings of Brick Corp to Brick Windsor in agreeing and contracting in the Consent and Acknowledgement. It is implicit to the promises of Brick Windsor and Brick Corp that they will not renege upon their promises to honour the obligations assumed under the sublease. They created reasonable expectations on the part of JSM through their promises and representations, as known to them in making those promises and representations, and in receiving the consideration JSM provided by agreeing to the Consent and Acknowledgement. That reliance is reinforced by the assurance given to JSM by the Toronto counsel for the Brick enterprise in the said counsel's letter of February 21, 1989.

[59] It is to be remembered that Brick Windsor and Brick Corp, and the other Brick corporations, are related and affiliated corporations with a common underlying ownership. The same signing officers (the defendants Tischer and Edwards) signed the documents on behalf of Brick Windsor, Brick Warehouse and Brick Corp. The directing mind of all three corporate defendants was principally the defendant Comrie. The evidence establishes that the various contracts, assignments of interests, the purported amendment seen in the amended sublease and the restructurings seen in the case at hand all came about at the direction of the overall, common directing mind of the Brick enterprise.

[60] Brick Windsor and Brick Warehouse cannot prejudice JSM by agreeing to the terms of the amended sublease which, in effect, upon activation of the 90 notice of termination clause, purport to wipe out the pre-existing representations of the assignee, Brick Corp, to JSM. Those representations underlie the consideration given by JSM in agreeing June 1, 1987, through the Consent and Acknowledgment, to the assignment to Brick Corp. The continuance of those

representations underlies the promises made by Brick Windsor and Brick Corp to JSM in the Consent and Acknowledgement dated June 1, 1987.

[61] The defendants do not dispute the liability of Brick Ltd. and Brick Windsor to JSM under the lease. The defendant Mr. Comrie articulates the position that the Brick enterprise would generally negotiate with a landlord on the basis of having a shell corporation as the tenant. If the tenancy proved to be a profitable business at the location in question, then it was a win-win situation for both the landlord and the Brick enterprise. If the business proved unprofitable at the location in question, then both the landlord and the Brick enterprise would lose inasmuch as the landlord would lose future rent from the Brick shell corporation and the Brick enterprise would be left with a failed business with possible wasted start-up and location improvement costs. In effect, in such a situation of employing a shell corporation as the tenant, the Brick enterprise and the landlord are sharing the risk of the business location being profitable. This approach makes good business sense and is consistent with freedom to contract in commercial relationships. There is not anything unlawful with this arrangement in a commercial leasing context. Indeed, it is not an uncommon phenomenon.

[62] It is up to a landlord, if there are concerns about the value of a prospective tenant's covenant, to do its due diligence before entering into a lease. The evidence is that JSM did not do such due diligence and was content with the covenants of Brick Ltd. and Brick Windsor. None of the Brick enterprises disclosed to JSM that these two corporations did not have any real assets; but JSM did not make inquiries into the strength of those corporations. So long as there were no misrepresentations made by the Brick enterprise regarding the financial status of its corporations, JSM could have no complaint in respect of its decision to accept a tenant, and assignee, which in fact were simply shell corporations.

[63] However, if one company is going to retain the power to leave on 90 days notice in order to reduce its business loss, it can only reserve this right if this is part of the bargain struck by the two parties. In the case at hand, JSM bargained through the Consent and Acknowledgment dated June 1, 1987 for the assignee (Brick Windsor), the subtenant of the assignee (Brick Warehouse), and the assignee of that subtenant (Brick Corp) to assume the rent obligations which were set out in their leases and which reflected the original sublease, for a term (with the renewal) to September 29, 2001. JSM never agreed to (nor had notice of) the purported 90 day notice of termination clause in the amended sublease. Perhaps JSM would have agreed to the term in the first instance if given the choice of a lease with the early termination clause or no lease at all. But that is a moot point. The lease contract was for a fixed term, with the renewal, to September 29, 2001. The original sublease, with the renewal, was for the same term.

[64] Brick Warehouse and Brick Corp (later amalgamated) were substantial entities at the center of the Brick enterprise. Therefore, it is surprising that Brick Warehouse (and Brick Corp) would assume obligations under the sublease given by Brick Windsor to Brick Warehouse without an early termination clause. In fact, JSM was put in a better position through the Consent and Acknowledgment as, prior thereto, JSM could only look to the two shell corporations, Brick

Ltd. and Brick Windsor, in the event of a default in the payment of rent. However, the issue in this case is not how the two parties should have best bargained for their rights, but on the deal that was actually made. The fact is that the original sublease dated April 1, 1987 did not contain an early termination clause.

[65] The defendants submit that there were no obligations created in favour of JSM from Brick Corp through the (original) sublease from Brick Windsor to Brick Warehouse, the immediate assignment thereof by Brick Warehouse to Brick Corp and the consequential Consent and Acknowledgement between JSM, Brick Windsor and Brick Corp. I disagree. For the reasons stated above I find that while there were no contractual obligations created, nor subsequently breached when Brick Corp left upon the 90 days termination clause, in doing so, Brick Corp did breach the reasonable expectations of JSM.

The oppression remedy and leave for a derivative action

[66] The central issue is whether there is an oppression remedy available to JSM under s. 241(2) of the *CBCA* as against Brick Corp, and under s. 234(2) of Alberta's *Business Corporations Act*, R.S.A. 2000, c. B-9 ("ABCAs") as against the other Brick corporations.

[67] Whether or not oppression has occurred is fact specific. However, our courts have provided some guidance as to the nature of the inquiry to be made. First, it is necessary for the complainant to establish the complainant's reasonable expectations in the relationship between the complainant, corporation and other stakeholders. As I identified in *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291, at para. 80, once it has been determined what the reasonable expectations of a contingent creditor are, or could be as a matter of law, it is then necessary to determine if the defendant complied with them. The inquiry, therefore, is not focused on the intent of the potential oppressor. While a finding of bad faith or want of probity may indicate oppression, it is reasonable expectations, and not an intent to harm, that is at the heart of the inquiry: *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2004), 40 B.L.R. (3d) 297 (S.C.J.), varied (2006), 144 A.C.W.S. (3d) 859 (Ont. C.A.) and *Downtown Eatery*, *supra*.

[68] As I have stated, the purported amended sublease is ineffectual as against JSM, given that JSM did not consent to the amended sublease (in effect a purported new sublease) as required by clause 7.03.2 of the head lease. The purported amended sublease is ineffective and does not relieve Brick Corp of its undertakings and representations given in the Consent and Acknowledgement dated June 1, 1987.

[69] There is nothing inherently wrong with an early termination clause. What was oppressive and unlawful in this case was for the Brick enterprise (Brick Windsor, Brick Warehouse and Brick Corp) to first create reasonable expectations and reliance on the part of the landlord, JSM, that Brick Corp would meet the rental obligations at the Gateway Plaza through the sublease, and then, through invidious corporate and contractual maneuverings amongst related and affiliated corporations, seek to defeat those reasonable expectations.

[70] Brick Corp should properly be a third party to this court action, at the initiative of Brick Windsor, charged with indemnifying Brick Windsor for any liability on its sublease to JSM. The fact it is not speaks to the intention of the common operating mind of the Brick enterprise to defeat the reasonable expectations of JSM. If it were necessary, I would give leave for a derivative action on behalf of Brick Windsor to bring an action against its assignee debtor, Brick Corp,

[71] It is oppressive to its creditor landlord, JSM, for Brick Windsor to seek to allow its subtenant, Brick Warehouse, to escape its obligations to pay rent to Brick Windsor. Further, it is oppressive for it to relieve Brick Warehouse's assignee, Brick Corp, from its similar obligation to pay rent to Brick Windsor. It is oppressive given that Brick Corp had expressly undertaken to Brick Windsor to pay the rent under the sublease and held out to JSM that it would meet that obligation as an inducement for JSM to agree to the Consent and Acknowledgement dated June 1, 1987.

[72] The only reasonable inference that can be drawn from the evidentiary record is that the Brick enterprise was attempting (through the ineffectual amended sublease) to provide an escape hatch for the enterprise, from the rental obligation, in the event that it was expedient to relocate the Brick enterprise's business from the Gateway Plaza or in the event of losses at the business site. It was the intent of the Brick enterprise, and of Brick Corp in particular, that in a relocation situation, JSM be left seeking rent from the shell corporations, Brick Ltd. and Brick Windsor.

[73] The Brick enterprise cannot create reasonable expectations through the Brick enterprise's (in particular, Brick Corp's) own words and actions (as seen in the commitments made between the related and affiliated corporations in the Consent and Acknowledgement dated June 1, 1987) as a representation and inducement to JSM to agree to the assignment to Brick Corp, and then go back on those representations.

[74] While the evidence before me clearly expresses that JSM's reasonable expectations were violated, and JSM was therefore "oppressed", I cannot engage in this inquiry without first determining whether or not JSM has standing to seek the oppression remedy.

[75] Brick Corp was incorporated under the *CBCA*. Brick Windsor was incorporated under the *ABCA*. In my view, and I so find, JSM is entitled to be a "complainant" under the *ABCA* in respect of Brick Windsor: s. 239 (b) (iii) (B), (iv) *ABCA*. JSM is a "creditor" as an unpaid landlord of Brick Windsor and I exercise my discretion to find that JSM is properly a person to make an application under ss. 242 (1) (the oppression remedy provision) of that statute. This finding is in of itself of little consequence because Brick Windsor has admitted liability to JSM.

[76] However, s. 240(1) of the *ABCA* also provides that a "complainant" may apply for leave to commence a derivative action. I am satisfied that reasonable notice has been given to the directors of Brick Windsor (and, indeed, to the Brick enterprise), through the pleadings, of the complainant's intention to apply to the Court for such leave. It is apparent that the directors of Brick Windsor do not intend to pursue Brick Corp under the original sublease (and in respect of

Brick Corp's further contractual obligation to Brick Windsor, under the Consent and Acknowledgement dated June 1, 1987, to pay the rent due under the sublease). JSM is acting in good faith and it is in the interests of Brick Windsor that an action be brought against Brick Corp to recover rent under the sublease by which to meet Brick Windsor's rent obligation to JSM. If requested, an order will go authorizing JSM to control the conduct of the action against Brick Corp and for directions for the conduct of such an action.

[77] In my view, JSM is also entitled to be a "complainant" under s. 238 of the *CBCA* as a person who, in the discretion of the Court, is a proper person to make an oppression application under s. 241(1) in respect of Brick Corp.

[78] In reaching these conclusions, I have considered the argument of the defendants that a failure to pay rent is not in of itself an act of oppression. I have also considered their position that if there is an act of oppression on the facts before me, then it occurred at the point in time at which the parties signed the Consent and Acknowledgement dated June 1, 1987 and that the reasonable expectations were created. The defence argues that if JSM was oppressed at the time the Consent and Acknowledgment was signed, then it would lack status as a creditor to bring this remedy.

[79] In a case decided under the Alberta legislation, *First Edmonton Place v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, Justice McDonald of the Alberta Court of Queen's Bench specifically considered the issue of whether a lessor had standing as a complainant to bring a derivative action. McDonald held that the term "complainant" does not include a lessor to whom rent is not owing at the time of the acts complained of.

[80] In *Royal Trust Corp. of Canada v. Hordo*, [1993] O.J. No. 1560 (S.C.J.) at paras. 11 to 13, Farley J. held that the person who qualifies as a "complainant" must be in that capacity at the time of the acts complained of as constituting an oppression. In *Awad v. Dover Investments Ltd.*, [2004] O.J. No. 3847, Justice Spence canvassed the law and concluded that the plaintiff in that case could only be regarded as a complainant if, at the time he initiated the complaint, he was a judgment creditor or could otherwise show the amount owing in a determinable way (ie he had money owing to him pursuant to an agreement that had not been paid). Justice Spence was concerned that someone not gain standing to seek the oppression remedy if he would only become a creditor if the claim was successful, as this would introduce circularity to the definition of creditor. Qualifying as a complainant is a separate and distinct matter from having sustainable grounds of oppression.

[81] I disagree with the defendants' characterization in the case at hand as to when the oppression occurred and how this impacts upon JSM's standing as a creditor under the *CBCA* and *ABCA*. JSM does not become a creditor until the actual breach of the lease and the sublease. There is no unpaid rent and monies owing to JSM prior to that time. In the case at hand, the undertakings of Brick Windsor and Brick Corp in the Consent and Acknowledgement dated June 1, 1987, made as an inducement to JSM so that JSM would consent to the assignment, preceded the breaches of the lease and sublease as of April 1, 2000 when there was a refusal to pay further

rent. However, the act of oppression is the combination of the representations and undertakings made June 1, 1987 coupled with the breaches of the lease and sublease in contradiction of those representations and undertakings.

[82] The underlying issue in these situations is whether an individual can reasonably expect his interests to be considered by the defendants. In the situation at hand, whenever JSM technically reached the point of being a creditor, the defendants certainly knew at all times that JSM stood in a creditor role and would be injured by their actions. They knew this long before the point that they actually oppressed JSM. There were contractual duties and representations flowing to JSM whether or not there was an oppressive act. It would be a stretch to argue that extending the term “creditor” to JSM would require the corporation to have to consider the reasonable expectations of an unascertained or contingent group of people.

[83] In addition to my comments above, I note, the recent comments made by the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustees of) v. Wise*, [2004] 3 S.C.R. 461. The Supreme Court rejected extending the fiduciary duty owed by directors under s. 122(1)(a) of the *CBCA* to creditors given the “availability of such a broad oppression remedy” (para. 51). This recent case suggests that judges should have a broad discretion in determining when creditors should be compensated through an oppression remedy.

[84] When a person (like JSM) has a contract (the lease) such that upon a breach there will be an active creditor-debtor relationship with monies owing, the act of oppression crystallizes at the point of the breach of the contract. While the creditor’s reasonable expectations are engaged prior to the breach, there are no damages and, thus, no oppression, prior to the point of the breach.

[85] While actions on debts are not generally the subject of oppression applications (*Levy-Russell, supra*, at para. 135 and *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 at p. 92 (Ont. Gen. Div.)), the circumstances in this case warrant the use of an oppression remedy.

Damages

[86] A landlord has a duty to mitigate in the event of a breach of a lease by a tenant. The defendant bears the burden of proof of establishing that there has been a failure to mitigate: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 440 at pp. 331-2; *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440 at pp. 458-9. I accept the evidence of Mr. Nathaniel that JSM made best and reasonable efforts to find another tenant for the subject premises upon the default under the lease and sublease. Indeed, as Mr. Styles testified, the corporate defendants also made unsuccessful efforts to try to find a new tenant for the premises to be vacated by Brick Corp at the Gateway plaza. JSM was unsuccessful in finding a new tenant and ultimately decided to sell the premises. Indeed, the purchaser of the Gateway Plaza, First Pro Shopping Centres, still has not been able to find a new tenant in the five years it has taken this action to reach trial.

[87] JSM entered a conditional agreement of purchase and sale dated December 10, 1999 with the purchaser 1376273 Ontario Inc. (a nominee for First Pro Shopping Centres) for the

price of \$9,500,000.00. Ultimately, the sale was completed in June 2000 at a reduced price of \$9,025,000.00.

[88] The defendants submit that, at the least, the sale of the premises as of June 2000 means that the defendants cannot be held liable for more than the unpaid rent to June 30, 2000. I disagree. Mr. Nathaniel testified that he would not have sold the property if he had not lost the Brick store, one of his two anchor tenants (the other being Wal Mart). I accept his evidence. When a tenant defaults, a landlord in the position of JSM has to take the course of action that best protects its self-interest. In the circumstances, a sale was reasonably seen as minimizing the losses of JSM. Such a sale was in part an attempt to mitigate loss, although it could not compensate for the rent that JSM lost by the Brick leaving.

[89] As well, the evidence of the purchaser was that the reduction in the purchase price by \$475,000.00 was in substantial part due to the fact that it was known the Brick had vacated the premises. It is common sense that if the Brick store had remained at the site and the purchaser had therefore expected that the remaining term of the lease would be honoured, that the purchaser would factor that expectation of future rent into the sale price.

[90] JSM has suffered damages as a result of the breach of contract by Brick Ltd. and Brick Windsor and because of the oppressive conduct of Brick Corp. Brick Ltd. and Brick Windsor breached their contract when they failed to pay rent owing under the lease between April 1, 2000 and September 30, 2001. Brick Corp was oppressive towards JSM through its failure to pay the rent on the sublease in contravention of the reasonable expectations of JSM created by Brick Corp through the Consent and Acknowledgement dated June 1, 1987.

[91] For the reasons provided, judgment is given in favour of the plaintiff against the defendants Brick Ltd., Brick Windsor and Brick Corp on a joint and several basis for the loss of rents. In my view, and I so find, JSM is entitled to this amount as damages. By agreement of counsel, the defendants Second Founder Holding Corporation and Landex Investment Ltd., as successor entities to Brick Corp, are obligated to meet any liability of Brick Corp through this judgment. Therefore, all corporate defendants are jointly and severally liable for the damages of JSM. By a further agreement of counsel, The Brick Warehouse LP assumed any liability in this matter found in respect of the defendant Brick Corp. and The Brick Warehouse LP was added as a defendant by amendment. As such, The Brick Warehouse LP is jointly and severally liable with all corporate defendants for the damages of JSM.

The tort of inducing breach of contract

[92] The plaintiff also submits that the individual defendants induced the corporate defendants to breach several contracts and are therefore liable in tort to JSM.

[93] There are five essential elements of inducing breach of contract: *Unisys Canada Inc. v. York Three Associates Inc.*, [1999] O.J. No. 4859 (S.C.J.), varied with respect to damages at [2001], O.J. No. 3777 (C.A.) at paras. 44 and 45 and *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, [1999] O.J. No. 3243 (C.A.) at paras. 12 to 14.

[94] First, there must be an enforceable contract. For our purposes there is the Assignment of April 1, 1987 whereby in clause 3 Brick Windsor as assignee covenants with the landlord, JSM (and with the assignor, Brick Ltd.), to pay the rent under the head lease to JSM.

[95] Second, the defendant must have knowledge that JSM has made a contract. The evidence establishes that all three individual defendants had knowledge of all of the contracts relating to the lease and, specifically, had knowledge of the Assignment to Brick Windsor April 1, 1987.

[96] Third, there must be an intentional act on the part of the defendants that causes a breach of that contract. The evidence establishes that the individual defendants intended to put Brick Windsor in such a position that it would be unable to pay rent and thus would be in breach of its obligations in the said Assignment to pay the rent due under the head lease. The individual defendants made the decision to (attempt to) amend the sublease (without the consent of the landlord) so as to leave Brick Windsor as a shell corporation that would be unable to pay the rent if the Brick enterprise decided to leave the Gateway Plaza site. The individual defendants intentionally put Brick Windsor in the position of being in breach under the Assignment by having Brick Windsor not pay the rent due under the head lease.

[97] Fourth, there must be wrongful interference with the plaintiff's contract. The individual defendants caused Brick Corp to default on its obligation to pay the rent under the original sublease to Brick Windsor; and thereby caused Brick Windsor to default on its obligation to pay rent to JSM.

[98] The problematical issue is whether the individual defendants, being corporate officers and directors of Brick Windsor and Brick Corp, may be liable for torts that they committed in the course of their employment. The acts complained of were performed in the course of the corporate duties of the three individual defendants. There are no allegations of fraud, dishonesty or want of authority on their part. Their actions were not themselves tortious (such as negligently causing personal injury or property damage). Nor did their actions exhibit a separate identity or interest apart from that of the Brick enterprise: *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.) per Finlayson J.A. at p. 491.

[99] The defendants rely upon the so-called rule in *Said v. Butt*, [1920] 3 K.B. 497; approved of in *Kepic v. Tecumseh Road Builders, Division of Countryside Farms Ltd.* (1987), 18 C.C.E.L. (Ont. C.A.) 218 at p. 222. Generally, corporate officers and directors are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the corporation. However, this potential liability is subject to the *Said v. Butt* exception: *ADGA Systems International Ltd. v. Valcom Ltd. et al.* (1999), 43 O.R. (3d) 101 per Carthy J.A. at p. 107. According to the *Said v. Butt* exception, a claim for inducement of breach of contract cannot proceed against a corporate officer or director where a claim for breach of contract lies against the officer/director's corporation. See generally *1175777 Ontario Ltd. v. Magna International Inc.* (2001), 200 D.L.R. (4th) 521.

[100] The acts of oppression and breaches of contract were the acts of the corporate defendants, as discussed above. The individual defendants simply acted in their capacity as corporate officers and as part of the directing mind of the defendant corporations. Considering all of these circumstances, in my view, the so-called *Said v. Butt* exception applies.

The tort of intentional interference with economic relations

[101] The plaintiff alleges that the individual defendants are liable for the tort of intentional interference with economic relations. There are three elements that JSM must prove to establish this tort: that the defendants intended to injure JSM; that the defendants interfered with JSM's business by unlawful means and; that as a result of the unlawful interference, JSM suffered economic loss: *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.) at para. 44.

[102] In my view, the first element of this tort is met. The defendants' maneuvers were targeted against JSM, even though the ultimate purpose was simply to advance the interests of the Brick enterprise. While the defendants have argued that their intention was merely to move to a new location, they in fact made two distinct decisions. The first decision was to move. The second decision was to break the lease and therefore to cease paying rent to JSM. The individual defendants intended to injure JSM when they made this latter decision. They wanted to retain the rental fees in order to advance the interests of the Brick enterprise and, indirectly, their own individual self-interest.

[103] However, the second element of this tort is not proven. For the purposes of considering the applicability of this tort, I have given the term unlawful means the broad definition of being an act without lawful justification by the defendant: *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 1 All E.R. 522 (C.A.) at p. 530 per Lord Denning. The individual defendants caused Brick Windsor and Brick Corp to be in breach of their contractual relations. As I have detailed above, the Brick enterprise never gave notice, or sought the consent of JSM, to the amended sublease. It does not matter whether this was deliberate or due to negligence. In either case, the amended sublease was of no effect. The original sublease remained in force. When Brick Corp failed to pay rent to Brick Windsor, it was in breach of that contract and could in the broadest sense be said to have acted "unlawfully". However, the individual defendants did not themselves employ unlawful means. They simply acted as directors or officers. In these capacities, they had lawful justification to act in the interests of Brick Corp and, in fact, it was their obligation to do so. It was the corporations who were in breach of contract.

[104] For the reasons given, there is no liability on the part of the individual defendants. This action is dismissed as against the individual defendants.

Interest

[105] Clause 9.04 of the lease provides for simple interest on arrears at two per cent per annum over the prime rate charged by the Canadian Imperial Bank of Commerce. JSM seeks interest at this rate and on a compounded basis.

[106] This action is founded both in contract and on representations and undertakings contained in that contract. It is therefore appropriate that the corporate defendants adhere to the terms of the lease and pay simple interest on arrears at the set rate. An award of compound pre and post-judgment interest is generally limited to breach of contract cases in which the parties agreed, had knowledge, or should have had knowledge, that the money which is the subject of the dispute would bear compound interest as damages: *The Bank of America Canada v. Mutual Trust Co.* [2002], S.C.R. 601 at para. 55. As the parties made a bargain as to the appropriate interest rate, the court will not intervene to provide JSM with compound interest and therefore provide a better deal than that for which it bargained. Accordingly, interest is awarded at the contractual rate on the rent arrears as they accrue, to the date of judgment.

[107] Following its oral submissions, JSM submitted a written calculation as to its loss of rents and simple interest to October 31, 2005. This calculation is not contested by the defendants. Accordingly, judgment is given in favour of JSM in the total amount of \$796,228.65 for the loss of rent and for interest to October 31, 2005. JSM is additionally entitled to interest on the unpaid rent at the contractual rate to the date of judgment. The post-judgment rate of interest as provided for in the *Courts of Justice Act*, R.S.O. 1990, c. C-43, accrues thereafter until payment.

Costs

[108] I may be spoken to as to costs.

CUMMING J.

Released: March 2, 2006

COURT FILE NO.: 04-CL-5647
DATE: 20060303

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

J.S.M. CORPORATION (ONTARIO) LTD.

Plaintiff

- and -

THE BRICK FURNITURE WAREHOUSE LTD.,
THE BRICK FURNITURE WAREHOUSE
(WINDSOR) LTD., THE BRICK WAREHOUSE
CORPORATION, LANDEX INVESTMENTS
LTD., WAYNE TISCHER, PAUL RICHARDS
AND WILLIAM COMRIE

Defendants

REASONS FOR DECISION

CUMMING J.

Released: March 2, 2006

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
DIANE GRANT	)	<i>Won J. Kim, James C. Orr and Victoria</i>
	)	<i>Paris</i> , for the Plaintiff/Responding Party
)	
Plaintiff)	
)	
- and -)	
)	
THE ATTORNEY GENERAL OF CANADA	)	<i>Christine Mohr and Glynis Evans</i> , for the
	)	Defendant/Moving Party
)	
Defendant)	
)	
- and -)	
)	
LONG LAKE NO. 58 FIRST NATION	)	<i>Derek T. Ground</i> , for the Third Party
)	
)	
Third Party)	
)	
-and-)	
)	
BARINO CONSTRUCTION LIMITED)	
)	
Fourth Party)	
	)	HEARD: June 9, 10, 11, 12 and August
	)	26, 2009

2009 CanLII 68179 (ON SC)

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.

[1] The statement of claim in this action commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) was issued on February 2, 2004. It has been amended on a number of occasions and the pleading is now contained in a Second Fresh as Amended Statement of Claim which I will refer to simply as the “statement of claim”.

BACKGROUND

[2] The plaintiff is a status Indian and a member of the Long Lake No. 58 First Nation (the “First Nation”). She resides on the First Nation's reserve lands (the “Reserve”) at Long Lake to the west of the town of Longlac in Northern Ontario. She seeks declarations and damages against the Crown - as represented by the Attorney General of Canada - on behalf of a class (the “Class”) consisting of members of the First Nation who resided on the Reserve at any time from and after January, 2001, and their family members. (The department of the federal government that had primary responsibility for the administration of statutes relating to Indians changed its name during the period to which the claims relate. I will refer to it simply as the “Crown”.)

[3] The allegations of fact at the centre of the plaintiff's claims relate to the consequences of the relocation of the residential community from one part of the Reserve to another. The relocation to the north side of the Reserve is alleged to have occurred as a result of a decision of the Crown that was implemented by the construction of housing in the new location over a period commencing in the late 1960s and ending in the early 1980s.

[4] It is alleged that a serious problem with mould developed in the new housing. The plaintiff claims that this resulted from a failure of the Crown to properly assess the suitability of the location for residential housing – the plaintiff described it as “swampy” - and the Crown's selection of building materials, techniques and designs that, among other things, permitted moisture to penetrate the houses. It is alleged that, as a consequence of these decisions, the plaintiff and other members of the First Nation were exposed to unsafe levels of toxic mould, and associated toxins, and developed a variety of symptoms and illnesses that included skin rashes, respiratory infections, eye irritation, nose bleeds, headaches, fatigue and nausea. The Crown's failure to construct housing that will remain free of toxic mould is said to be continuing.

[5] The fact that there was toxic mould in levels unsafe for humans is alleged to have been determined in or about the year 2000. It is pleaded that, in July 2001, after the Chief of the First Nation declared a state of emergency on the Reserve, several homes were evacuated, approximately 45 houses were demolished and temporary accommodation off the Reserve was found for most of the residents in trailers, local hotels and motels in and around Long Lake. It is claimed that the Crown's efforts to remedy the problem of toxic mould were - and are continuing to be - inadequate in a number of respects.

[6] The original causes of action pleaded were negligence, breaches of fiduciary duties, and breaches of section 7 and 15 (1) of the *Canadian Charter of Rights and Freedoms*. Damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1998, c. F.3 are claimed in respect of a subclass of family members with derivative claims. There is also a claim for punitive damages.

[7] In 2005 the Crown moved to strike numerous paragraphs of the statement of claim, as it then existed, on the grounds that they disclosed no reasonable cause of action; were frivolous, vexatious or an abuse of process; or related to funding or policy decisions of the Crown that are not justiciable. Counsel for the Crown submitted that, whether or not it would have been possible to plead material facts that would adequately support a cause of action in negligence, this had not been done. They submitted, further, that the statement of claim was replete with allegations that extend far beyond a claim that the Crown breached a duty of care owed to the Class members and that these were either legally untenable, or not justiciable. The Crown's motion was coupled with a request for particulars to be ordered but this was not pursued at the hearing.

[8] For reasons released on September 12, 2005, and reported at (2005), 77 O.R. (3d) 481 (S.C.J.), I made orders striking numerous paragraphs of the statement of claim including those for breaches of section 7 and section 15 of the Charter. I declined to strike the claims for negligence and breach of fiduciary duty on the ground that it was not plain and obvious to me that these claims would fail if, at a trial, the plaintiff could prove the factual allegations she had pleaded. Despite the substantial pruning that occurred as the result of the motion, the pleading is, I regret, still over-endowed with assertions that appear to imply, or assume, that all of the statutory powers and responsibilities of the Crown in Indian affairs create, or are, enforceable private law duties, and that any breach of such duties will be negligence *per se*. Among the claims of enforceable private law duties that I believe are untenable are an obligation to develop and maintain reasonable policies to prevent mould infestation, a duty to make improvements, and a general responsibility to provide adequate housing and services on the Reserve.

[9] An appeal by the Crown from the refusal to strike all of the plaintiff's claims was ultimately abandoned and the demand for particulars was not renewed.

[10] After a lengthy delay while the plaintiff's pleading was finalized to comply with my decision on the Crown's motion – and while the motion record for certification was prepared - the hearing of the motion to certify the proceeding under the *CPA* was set down for June 9 of this year. In the meantime, the Crown had filed a statement of defence and made third party claims against the First Nation for contribution and indemnity in respect of the plaintiff's claims. The First Nation has subsequently delivered a fourth party claim against one of the contractors allegedly employed in the construction of the housing and has sought leave to add other fourth party defendants in the future.

[11] In the meantime, also, the Court of Appeal had handed down several important decisions dealing with the requirement of proximity between the Crown and private individuals for the purpose of finding a private law duty of care.

[12] In a number of these cases the Court of Appeal reversed, or commented unfavourably on, decisions of this court and the Divisional Court in which proximity had been found. These included my decisions in the SARS cases such as *Williams v. Canada*, [2005] O.J. No. 3508 (S.C.J.), rev'd 2009 ONCA 378 (C.A.) and *Abarquez v. Ontario*, [2005] O.J. No. 3504 (S.C.J.), rev'd [2009] O.J. No. 1814 (C.A.) and the decision in *Taylor v. Canada*, [2007] O.J. No. 3312

(S.C.J.) which was criticized in *Drady v. Canada*, [2008] O.J. No. 3772 (C.A.). In each of these cases the Court of Appeal had held that it was plain and obvious from the pleading that there were no private law duties of care owed by the Crown to the particular plaintiffs and, in consequence, that no causes of action in negligence had been disclosed. More recently, in *Heaslip v. Mansfield Ski Club Inc.*, [2009] O.J. No. 3185 (C.A.), the Court of Appeal reversed a decision in which claims for negligence had been disallowed on the ground that there was an absence of a relationship of proximity sufficient to give rise to a duty of care. What is notable in all of these and similar decisions is that the courts at each level had purported to apply the principles in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as followed and explained by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and other cases.

[13] As I had rejected the Crown's motion under rule 21.01 (b) and found that it was not plain and obvious that there was no proximity between the plaintiff and the Crown in this case - and as it might be thought that there were points of similarity between my reasons and, in particular, those criticized in *Drady* - I enquired of counsel for the Attorney General whether they wished to make any submissions on the possibility of reopening the question in the context of section 5 (1) (a) of the *CPA*.

[14] Although the tests under Rule 21.01 (1) (b), and section 5 (1) (a) have been held to be essentially the same and, in consequence the issue under the section would *prima facie* appear to be *res judicata* as between these parties, some limits on the application of the principle to the requirements for certification may be indicated by the provisions of section 10 (1) of the *CPA* that permit a proceeding to be decertified

... where it appears to the court that the conditions in subsections 5 (1) and (2) are not satisfied

[15] As the provision obviously contemplates a reversal of a decision made earlier at the certification stage, it would seem, therefore, that a finding under section 5 (1) (a) that a cause of action had been disclosed in a statement of claim might be overturned on a motion under section 10 (1) if intervening decisions of appellate courts indicated that it was legally unsound. If that is correct, it would arguably be a technicality to make an application of the estoppel depend upon whether a finding that was subsequently challenged under section 10 (1) of the *CPA* was made under Rule 21 or under section 5 (1) (a).

[16] Counsel accepted my invitation to make submissions on the application of *res judicata* and the relevance for that purpose of the intervening decisions of the Court of Appeal together with the question - if there was no estoppel - whether, in view of those decisions, my earlier finding on the existence of a duty of care should now, in effect, be reversed, or ignored, for the purpose of the requirement in section 5 (1) (a).

[17] Written submissions from counsel were received and oral submissions were heard subsequently.

[18] Perhaps not altogether surprisingly, counsel made conflicting submissions on *res judicata* - with plaintiff's counsel supporting the existence of an estoppel and counsel for the Attorney General supporting both the authority to reopen the question relating to the existence of a duty of care and the appropriateness of so doing. Counsel also differed on the question whether the decisions of the Court of Appeal and the reasoning of the learned judges are inconsistent with the finding I had made on the existence of the Crown's duty of care for the purpose of the claims in negligence.

[19] Having reviewed the recent decisions of the Court of Appeal and considered counsel's submissions on the duty of care, I adhere to the conclusion reached on the earlier motion under rule 21.01 (1) (b), and I do not find it necessary to consider the question of *res judicata*. However, as in most contested certification cases - and in particular those involving claims against the Federal or Provincial Crown for negligence - there must be a strong possibility of an appeal from any decision on this motion. In consequence, I will - in the context of the requirement in section 5 (1) (a) of the *CPA* - provide my reasons for confirming my opinion that it is not plain and obvious that the Crown owed no duty of care to the plaintiff and the other members of the putative class.

EVIDENCE

[20] At the certification stage, evidence will usually be important to explain the background to the litigation. Otherwise, the role and weight of the evidence required is quite limited as is indicated in the following passage from the recent decision of the British Columbia Court of Appeal in *Pro-Sys Consultants Ltd v. Infineon Technologies AG*, 2009 BCCA. 503 (November 12, 2009), at para 65:

The certification hearing does not involve an assessment of the merits of the claims; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one - it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24 - 25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 50...

[O]n 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.

[21] I note that the “some basis in fact” requirement is not the same as the requirement - for the purpose of motions for summary judgment - that the evidence establishes a genuine issue for trial. If that were the test, certification motions would indeed involve some assessment of the merits of the plaintiff’s claims and they would be considerably more protracted. At least for the purposes of the inquiry into commonality, it appears that the evidence must show merely that there is some basis in reality for the assertion that the Class members have claims raising issues in common with the claims of the plaintiff.

[22] As I will indicate, the implications of the requirement of a minimum evidentiary basis for the existence of common issues are of particular importance in this motion. There is a sufficient disconnect between the assertions of fact pleaded and the evidence filed to suggest that the availability of evidence may not have been a primary consideration when the statement of claim was drafted. It is almost as if the correct roles of the pleading and the affidavit evidence have been reversed with the evidence filed on behalf of the plaintiff relating mainly to her personal claims, and the pleading intended to substantiate those of the other Class members. As I will indicate, I do not believe this is decisive of the outcome of the motion, but it adds appreciably to the difficulty of the analysis.

(a) Ms Grant’s evidence

[23] In support of certification, the plaintiff swore an affidavit in which she deposed to the presence of mould in the house she previously occupied on the Reserve, the health consequences she allegedly suffered, her evacuation in 2001, and the subsequent demolition of the house and the destruction of her furniture and other personal property.

[24] Although the affidavit, for the most part, deals with her personal experiences and her understanding of the procedure of the CPA, Ms Grant referred to a Report of the Auditor General to the House of Commons in 2003, in which mould contamination in Indian housing on reserves was described as “a serious and growing health and safety problem”. This, the Report stated, was accepted by Central Mortgage and Housing Corporation (“CMHC”) and Health Canada and it was agreed that they and the Crown should develop a comprehensive strategy and action plan to address the problem. The conclusions in the Auditor General’s Report with respect to the serious health risks of mould infestation do not fit happily with the evidence in affidavits delivered on behalf of the Crown in this motion, and on which counsel for the Attorney General relied.

[25] Ms Grant also referred to a report prepared by a private engineering firm - Cook Engineering (“Cook”) - who had been retained by the First Nation in 2001 to conduct an investigation into the extent of mould in the buildings on the Reserve. A house by house inspection of 95 units was carried out and elevated concentrations of mould were identified in several of them. Lower concentrations were found in most of the others. The sources of the contamination were said to include ongoing water infiltration, site moisture conditions, as well as other factors such as poor air circulation and humidity.

[26] Cook recommended that immediate action should be taken to eliminate the potential exposure of the occupants. In particular, it was stated that the underlying cause of the water accumulation must be rectified.

[27] The qualifications of Cook to give expert opinions were not challenged at the hearing.

(b) Evidence of Dr Ronald E. Gots

[28] The Cook reports were considered by Dr. Gots in an affidavit delivered on behalf of the Crown. Dr Gots is a physician and toxicologist who, for over 30 years, has specialized in determining the causal effects of various types of environmental exposure - including exposure to mould - on illnesses and injuries suffered by individuals. In his affidavit, he addressed the nature, types and ubiquity of mould, their dependency on water for their growth and different methods of measuring exposure to them. He had not visited the Reserve, but, on the basis of the investigations conducted by Cook and Mr William G. Boles (below), he concluded that there is no scientifically justified basis for finding that the members had been subjected to uniform exposure to mould, or that they suffered common physical disorders with a common uniform cause.

[29] Dr Gots generally discounted the likely detrimental effects of indoor mould on the health of occupants, and he doubted the likelihood that the mould detected by the investigators would have had any such effects on the First Nation members in this case. In this context, he referred to a health assessment study prepared for the First Nation in March, 2002 after remediation measures had been taken. In the report, one of the consultants concluded that, in general, the First Nation members were at that date strong and relatively healthy. In Dr Gots' opinion, the results of questionnaires completed by First Nation members for the purpose of the assessment confirmed his view of the unlikelihood that detrimental health consequences would have been caused by exposure to the types and levels of mould on the Reserve.

(c) Evidence of William G. Boles

[30] Mr Boles has had extensive experience as an indoor air quality investigator and trainer. He has been engaged by CHMC and Health Canada to investigate and advise on indoor air quality conditions – including the presence of mould – in many reserves and other housing across Canada, and to make recommendations for remediation to a minimum level of health and safety.

[31] After the declaration of emergency had been made, Mr Boles was retained by CHMC to investigate the prevalence and cause of the mould in housing on the Reserve and to prepare a report for the Crown. In his affidavit he refers to the various species of mould and how they develop in moist conditions. He inspected 21 of the 91 (or 95?) housing units and concluded that the causes of mould in the sample arose from a combination of inadequate maintenance and ventilation, plumbing leaks and poor original construction. He disagreed with Cook that poor drainage resulting from the low-lying location of the housing was a contributing factor. He found large areas of mould in approximately 43 per cent of the houses in the sample but was of the

opinion that it would be more cost-effective to replace only three or four of them than to make repairs. He found that both the amounts and locations of the mould and the causes of it varied significantly from house to house and that the First Nation members were not well-informed on mould-related issues.

(d) Evidence of David C. Scott

[32] The other principal affidavit delivered on behalf of the Crown was that of Mr David C. Scott who was employed by the Crown from 1978 to 2007 and was the Senior Funding Services Officer at the time of the declaration of emergency and the evacuation. In that capacity, he had personal knowledge of the events that occurred in 2001 on the Reserve.

[33] Mr Scott described various funding, housing and health policies of the Crown and Health Canada at different times and the financial assistance given to the First Nation to remediate the housing in 2001 and thereafter. He put considerable emphasis on the extent to which decisions were made by the First Nation rather than by the Crown but, apart from providing useful information about the historical context of the claims, his evidence is mainly directed at their merits.

(e) Evidence of Dr Hari M. Vijay

[34] In addition to the affidavit of Ms Grant, her counsel filed a transcript of an examination of an employee of Health Canada, Dr Hari M. Vijay. Dr Vijay is a research scientist whose more recent work has been directed at the effects of mould on children's health. She had been examined pursuant to rule 39.03 prior to the hearing.

[35] Dr Vijay had originally been contacted by a member of the First Nation Council who referred to the prevalence of mould and the chronic illnesses of many occupants of houses on the Reserve. Dr Vijay visited the Reserve for several days in April, May and June, 2002 for the purpose of a proposed study of the prevalence of mould on the Reserve and its effects on the health of First Nation members. For this purpose she inspected five houses and found them to be “very mouldy” and, in her opinion, undoubtedly unfit for human habitation. Although her project was initially approved by her supervisors in Health Canada, permission to proceed with it was subsequently rescinded.

[36] Prior to the examination, I had dismissed a motion by the Attorney General to strike the summons to witness that had been served on Dr Vijay. Counsel had objected that it had not been demonstrated that Dr Vijay was in a position to offer evidence relevant to the certification issues and, in particular, that she was not qualified to provide expert opinions for that purpose.

[37] In written reasons reported at [2008] O.J. No. 4470, I held that plaintiff's counsel would be permitted to examine Dr Vijay with respect to her observations when present on the Reserve and, to the extent of her expertise, with respect to the opinions she had formed on those occasions. I did not accept the submissions of counsel for the Attorney General that, despite Health Canada's public recognition of her qualifications and of the research she had been conducting into the

allergenic effects of mould on the health of children, she had no expertise sufficient to justify the admission of her opinions on any issues relating to certification. The Attorney General's motion was dismissed without prejudice to the rights of counsel to object to questions that addressed matters beyond the scope of Dr Vijay's expertise, or irrelevant to issues relating to certification.

[38] It was not objected that, in the circumstances, Dr Vijay should not be permitted to give expert evidence in an examination under rule 39.03 without complying with the provisions of rule 53.03 that require experts' reports prior to trial. In *Niagara-on-the-Lake Association of Ratepayers v. Niagara-on-the-Lake (Town)* (2003), 63 O.R. (3d) 568 (S.C.J.), Quinn J. held that the absence of any requirement of expert reports in rule 39.03 does not allow a party to use the rule as an economical alternative to hiring an expert, or to obtain evidence on the record without prior notice to opposing parties. The learned judge suggested that it might be only when the expert had refused to provide a report that it should be dispensed with for the purpose of the rule. In his opinion, the propriety of using the rule for experts must depend on a case-by-case analysis.

[39] Dr Vijay was an employee of the Crown and she could not be compelled to provide a report. Given that her employer was aware of her observations and opinions, and refused to agree to her examination, this is not, in my opinion, a case where the requirement of a report should be read into rule 39.03.

[40] In the course of her examination, Dr Vijay expressed opinions with respect to the possible health consequences of mould that provided a strong contrast with the much more sceptical views of Dr Gots. She referred to the allergenic effects of certain types of mould, a strong association between mould in homes and respiratory symptoms, and the carcinogenic effects of other mould species. At the examination, counsel for the Attorney General objected that it had not been established that Dr Vijay had the expertise necessary to qualify her to provide opinions on the last of these alleged consequences.

[41] While there may, I believe, be some difficulty in delineating precisely the limits of Dr Vijay's expertise, I am satisfied that she should be allowed to express opinions on the dangerous effects of mould on human beings. The fact that her research is conducted by examining the effects on animals, and not on individuals, is not sufficient to disqualify her from providing such opinions. As she stated during the examination, one would hardly expect her research to be conducted by exposing humans to mould for the purpose of determining whether it would cause cancer. The purpose of the research is to investigate the deleterious effects on people - and not on animals - and although she is not a physician and would not be qualified to diagnose, or to treat different types of illnesses, the research is necessarily predicated on a body of established medical knowledge relating to such ailments. Where necessary, this is provided by medical consultants.

[42] The ability to draw reliable inferences from Dr Vijay's research may, of course, be challenged at trial but, on the basis of the record on this motion and the earlier motion to strike the summons, I am not prepared to find that her opinions on the dangers to health of various kinds of mould, and on the condition of the houses she inspected, are inadmissible. Their relevance for the purpose of certification is, however, quite limited. To the extent that they bear on the merits of the

claims advanced on behalf of the class, such an inquiry is irrelevant at the certification stage other than for determining whether the minimum evidential standard of "some basis in fact" is satisfied with respect to the reasonable foresight of harm and the existence of at least "colourable" claims of other Class members that raise common issues. The opinions relating to the dangers of mould to human health could also have some possible relevance to the complexity of any determination of the individual issues which might, in turn, impact on the preferable procedure.

[43] The same comments apply to the opinions of Dr Gots on the dangers to the health of the First Nation members. His other evidence, like that of Mr Boles and Mr Scott, does provide useful background information but, again, in my opinion, it has limited relevance. To the extent that it, and that of Mr Boles, was relied on by Crown counsel to demonstrate that the claims of the Class members did not raise common issues, I did not find it helpful. Although Dr Gots referred to an absence of "commonality" in a number of places in his affidavit, he was, in these references, addressing issues of specific causation that the plaintiff has conceded to be individual issues. His opinions with respect to the variations in the levels of mould and the houses, and the various causes for them, do not, in my opinion, bear on the commonality of the principal common issue that has been proposed - namely whether the Crown breached a duty of care with respect to the choice of the new location, the selection of building materials and contractors, and the design and construction of the housing.

REQUIREMENTS FOR CERTIFICATION

[44] For the purpose of certification, the plaintiff must satisfy the court that each of the five requirements in section 5 (1) of the *CPA* is satisfied.

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

[45] The first requirement is that the statement of claim must disclose a cause of action. It has been held in numerous cases that the test for this purpose is essentially the same as that applicable for the purposes of a motion to strike under rule 21.01 (1) (b): see, for example, *Cloud v. Canada*, [2004] O.J. No. 4924 (C.A.) at para 41. In this jurisdiction, no significance has been attributed to the fact that, under section 5 (1) (a), the moving party must satisfy the court that a cause of action has been disclosed in the pleading while, under the rule, the moving party must demonstrate that no reasonable cause of action has been pleaded. For both purposes, the focus of the inquiry is on whether the material facts that, if proven, would constitute a cause of action have been pleaded.

[46] The requirement in section 5 (1) (a) will be satisfied unless the court concludes that it is plain and obvious that this is not the case. It follows that, for this purpose, it must be presumed that the plaintiff's allegations of fact will be proven unless they are manifestly incapable of proof. It has also been held consistently that, for the purpose of applying the test, the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies, and that the novelty of a cause of action is not, in itself, a factor that would justify a decision that it has not been disclosed in the pleading. In addition, it has been held that such a decision should not be

made if it would require a resolution of difficult legal questions in an area where the law is unsettled.

[47] On the motion under rule 21.01 (1) (b), I was not persuaded that it was plain and obvious that causes of action for negligence and breach of fiduciary duty had not been pleaded. As I did not invite further submissions on the claim for breach of fiduciary duty, only that for negligence will be reconsidered. For this purpose, the principal allegations in the statement of claim that are relevant to a cause of action in negligence can be summarized as follows:

1. The Crown, through the Minister of Indian Affairs and Northern Development was responsible for administering Indian Reserve lands - including the Reserve in this case - and for administering and managing the construction, installation, inspection, maintenance and repair of improvements to the Reserve.
2. In or about the late 1960s, the Crown decided to relocate the First Nation's residences to a different part of the Reserve.
3. The Crown selected a new location and induced the members to move to it with assurances of improved conditions, new housing, less crowding and better access to services that the Crown was prepared to provide at the original location.
4. The Crown failed to properly survey and assess the suitability of the new location for human habitation. The new location's local geography, marked by poor drainage and constant dampness, provided an ideal setting for the amplification of the mould problem that occurred.
5. The quality of the replacement housing was poor and wholly inadequate for the Class members' needs. The poor quality of the construction of the replacement housing exacerbated the mould problem. The Crown employed building materials, techniques and designs that amplified the mould problem by allowing, among other things, moisture to penetrate the dwellings.
6. By the early 1980s, all of the dwellings of the First Nation members had been relocated to the current location and the remains of the previous settlement were demolished.
7. From and after the date of the relocation, Class members were exposed to toxic mould and their associated toxins in levels which exceed safe levels for human exposure.

8. After the relocation, many Class members developed a variety of illnesses and symptoms including, but not limited to, skin rashes, respiratory infections, eye irritation, nose bleeds, headaches, fatigue and nausea.
9. From and after July 2001, the Crown was warned repeatedly by the Class members and their representatives and the Crown's own servants and agents that in order to remedy the mould problem on the Reserve, more was required than to merely remove the mould from houses. Despite these warnings, the Crown repeatedly and consistently failed to adequately remediate the mould contamination and failed to warn the Class members of its failure to do so.

[48] The above factual allegations were particularized in the parts of the pleading dealing with the plaintiff's personal circumstances and the effect of the Crown's alleged conduct.

[49] The pleading identifies the provisions of various statutes as the sources of the alleged responsibilities of the Crown with respect to the relocation of the First Nation. The most general provision is section 18 of the *Indian Act*, R.S.C. 1985, c. I-5 which reads as follows:

18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian Affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for these purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

[50] In addition, the statement of claim refers to the Minister's authority to authorize surveys, lots and subdivisions of reserve lands, a requirement of ministerial approval for First Nation members to have possession or to occupy land in reserves, the power to make regulations for various purposes, including the prevention, mitigation and control of diseases on reserves, the destruction, alteration or renovation of premises to prevent the overcrowding of dwellings, and to provide for sanitary conditions in private premises.

[51] In my reasons for the decision on the preliminary motion to strike, I referred to the necessity for the plaintiff to have pleaded facts that, if proven, would establish the existence of a

duty of care owed by the Crown to prevent harm to members of the First Nation when relocating housing on the Reserve. I stated that, under the test in *Anns*, such a duty would exist if:

- (a) it was reasonably foreseeable that harm would result from the manner in which the relocation was implemented;
- (b) a sufficient relationship of proximity existed between the Crown and the members of the First Nation; and
- (c) there are no overriding considerations of policy that should be held to negative the existence of a duty of care.

[52] Reasonable foresight of harm having been pleaded, I found that the first of the three requirements raised a question of fact to be decided at a trial.

[53] The first and second parts of the test are often referred to together as the first stage in the *Anns* inquiry with the third part as the second stage. I used this terminology.

[54] I referred to the submission of the Crown that no facts had been pleaded to satisfy the requirement of proximity and the extent to which such a finding is dependent on the terms of statutes governing the powers and responsibilities of the Crown. At paragraphs 25 - 27, I concluded:

A finding that, in deciding whether to effect the relocation and to construct new dwellings, the Crown was exercising a permissive statutory authority and discretion, would not, in my opinion, exclude a finding in negligence with respect to the manner in which the decision was implemented. It was directed at a discrete group of individuals for whom the Crown has fiduciary as well as statutory responsibilities and, if the plaintiff's allegations with respect to the selection of a new site and of the designs and building materials are proven, I do not believe a finding of proximity would necessarily be excluded. Moreover, the manner in which the decisions of the Crown were implemented should, in my judgment, clearly be considered to be operational in nature for the purpose of the inquiry at the second stage of the *Anns* test.

I do not accept the submission of counsel for the Crown that a finding of a duty of care owed to the members of a First Nation in respect of the Crown's impugned conduct in this case will necessarily give rise to the spectre of indeterminate liability. In my opinion there is nothing indeterminate about the possibility of liability if the same acts were repeated on other reserves and, likewise, found to constitute breaches of a duty of care owed to the residents.

For these reasons, I do not believe I would be justified in concluding that it is plain and obvious that the claim for negligence could not be proven at trial.

[55] With one qualification, I have found nothing in the more recent decisions of the Court of Appeal that might persuade me now to reach a different conclusion. The qualification relates to the criticisms of the reasoning in *Taylor* that were made by the Court of Appeal in *Drady*. To the extent that these were based on a belief - see *Drady* para 25 - that it was held in *Taylor* that a relationship of proximity arose simply from the allegation that the Crown agency's conduct increased the risk to the health of the recipients of the medical devices in question, they were based on a misunderstanding of the reasoning in *Taylor*, and for any lack of clarity I am, of course, responsible.

[56] The point made in *Taylor* was not that risk, or an increased risk, is enough to give rise to a relationship of proximity. Risk is relevant to the first part of the tripartite test in *Anns* that I have set out above - and only then if it is reasonably foreseeable. It does not follow, I believe - and believed in *Taylor* - that the same conduct that creates, or increases a risk, cannot also establish a sufficiently direct relationship between the parties to give rise to proximity.

[57] More fundamentally, for the purpose of an enquiry into proximity, the creation of a risk of harm must be relevant to, though it may not determine,

... whether the actions of the alleged wrongdoer had 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: *Hill v. Hamilton-Wentworth Regional Police Services Board*, at para 29 *per* McLachlin C.J.C.

[58] Similarly, it was, and is, my opinion that a relationship of proximity may - although it will not necessarily - arise from a public authority's disregard of a policy decision or from the manner in which a policy decision is implemented.

[59] This possibility was recognized in the later case of *Heaslip* in which the Court of Appeal reversed a decision at first instance that a statement of claim failed to allege facts that would give rise to a duty of care owed by the Crown. The claims of negligence were made by the estate of Patrick Heaslip, and others, as a result of his death following a tobogganing accident in which he suffered serious injuries. He was taken to a local hospital where the attending physician requested an air ambulance operated by a provincial Crown agency to take Heaslip to St Michael's Hospital in Toronto. On being advised that such an ambulance would not be available for another two hours, the physician cancelled the request and Patrick Heaslip was placed in a land ambulance to take him to Toronto. He died in the course of the journey.

[60] The statement of claim alleged that an air ambulance had been available and had been carrying a patient whose life was not in danger. It was alleged, among other things, that the failure of the Crown Agency to reassign the ambulance to provide transport for Patrick Heaslip was a breach of the agency's manual of operational policy and procedures which provided that, a person with life-threatening injuries should be given priority over even existing assignments for persons whose injuries were not life-threatening.

[61] On a motion under rule 21.01 (1) (b), the judge at first instance considered the application of the *Anns* test as explained in *Cooper* and held that the facts as pleaded did not fall within an established category of a duty of care. He then proceeded to consider whether the requirement of proximity at the first stage of the *Anns* test was satisfied and concluded that, as the Crown's duties were owed to the public at large, and not to individuals, there was no proximity.

[62] The learned judge at first instance held also that the second stage of the *Anns* test would, in any event, negate a duty of care because there were residual policy considerations relating to the prospect of indeterminate liability, and that the claims were made in respect of policy, rather than operational, decisions.

[63] In delivering the judgment of the Court of Appeal reversing the decision of the motion judge, Sharpe J.A. found that the case fell within

... the established category of a public authority's negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so will cause physical harm to the plaintiff: see, e.g., *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (para 21)

[64] The learned judge also found that, independently of the established category, it was arguable, following *Cooper*, that there was a sufficiently "close and direct" relationship between Patrick Heaslip and the Provincial Crown to make it

... fair to require Ontario to be mindful of the legitimate interests of Patrick Heaslip. (para 23)

[65] In this context, he cited the passage from *Hill* that I have quoted in part above:

The most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words "close and direct". This factor 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 had 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. (para 25)

[66] With respect to the second stage of the *Anns* inquiry, Sharpe J.A. held that it was an error to characterize the claim as

... implicating a policy decision as opposed to an operational decision. The facts pleaded bring this case within the category of operational negligence identified in *Just*, in which the Supreme Court held that where the government has made a policy decision to provide a service, a negligent failure to implement that policy at the operational level may be actionable when an individual member of the public suffers loss. (para 35)

[67] I am not aware of any authority, principle or policy that would immunize the Crown from the private law consequences of its operational conduct on reserve lands.

[68] The statements in *Drady* that it was an error in *Taylor*, as in *Swanson Estate v Canada* (1991), 80 D.L.R. (4th) 741 (F.C.A.), to speak of "operational" activities or conduct in connection with the proximity question must, I believe, be read in the light of the possibility that in the course of such activities a sufficiently close or direct effect on a plaintiff may occur so as to give rise to a relationship of proximity. This was what occurred in *Heaslip*, as well as in *Swanson*. As the same panel that decided *Drady* stated, when addressing the requirement of proximity in *Attis v. Canada (Minister of Health)*, [2008] O.J. No. 3766 (C.A.), in a passage accepted by Sharpe J.A. in *Heaslip*:

Once the government has direct communication or interaction with the individual in the *operation* or implementation of a policy, a duty of care may arise particularly where the safety of the individual is *at risk*. (italics added) (para 66)

[69] For the above reasons, I do not consider that the criticisms of *Taylor* in *Drady*, and the other recent decisions of the Court of Appeal, would require me to resile from the decision on the preliminary motion to strike in this case, if I am free to do so. The decision to move the First Nation's housing from its original location may well have been a policy decision that under the second stage of the *Anns* inquiry could not be challenged - and, indeed, has not been challenged by the plaintiff - as a breach of a private law duty of care. It is the manner in which it was implemented in the light of the pre-existing special relationship between the parties that is alleged to have given rise to proximity and a duty of care and, in my judgment, it is not plain and obvious on the basis of the facts pleaded that the duty could not be found to have existed. The requirement in *Hill* is in my opinion satisfied.

[70] Whether or not the decision in *Taylor* fell within the statement of the Chief Justice in *Hill* as followed in *Heaslip*, or within the established category accepted by Sharpe J.A. in *Heaslip* and exemplified by *Just v. British Columbia*, [1989] 2 S.C.R. 1228 must be left to the court at trial or to a motion to decertify pursuant to section 10 (1) of the *CPA*.

[71] In view of the emphasis placed on representations and expectations in *Drady* - although absent in *Heaslip* - I note that, in addition to the assurances of improved housing conditions and services given in order to persuade the Class members to relocate, the expectations of the plaintiff and the Class members that the Crown would act in their best interests with respect to the choice of the relocation, and the manner in which it was to be implemented, have been specifically pleaded.

[72] I am indebted to counsel for their learned submissions on the significance of the recent decisions of the Court of Appeal. I do not find it necessary, or appropriate, to comment on the question whether the reasoning in the decisions is reconcilable in all respects or, if it is not, to consider the explanations suggested by counsel. Far less, of course, am I entitled to adopt the

view of the High Court of Australia in *Sullivan v. Moody*, [2001] HCA 59 and subsequent decisions, that an inquiry into proximity is unhelpful and should be discarded as providing

... little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty of care has been established.

...[To ask whether proximity exists] might be a convenient shorthand method of formulating the ultimate question in the case, but it provides no assistance in determining how to answer the question. (para 48)

[73] The fact remains that – quite apart from the problem of distinguishing operational activities from policy decisions - the general principles governing proximity in the passages I have quoted from *Hill*, *Heaslip* and *Attis* are not readily and unequivocally determinative of the correct decision on particular facts such as, for example, those in *Taylor*. They must be supplemented, or qualified, by additional considerations and principles or policies peculiar to different situations as disparate as the maintenance of highways, the provision of various social programmes, the regulation of drugs, medical devices and other activities, the administration of justice and the apprehension of criminals, the response to public health and other emergencies, the exercise of powers relating to Indians on reserves, and innumerable others.

[74] No matter how often selected passages such as those I have quoted are cited, or recited, it is not surprising that opinions will differ on questions whether a relationship is sufficiently “close and direct” – and, if it is, what makes it so - and whether, in different situations, it is “fair” to attribute a duty of care to the Crown. However, it is, perhaps, surprising that even lawyers can disagree so much about what is “plain and obvious” in each of the situations I have mentioned and others. From the vantage point of a motions judge, it very often appears that the test in *Hunt v. Carey Canada Ltd.*, [1990] 2 S.C.R. 959 has a special meaning and application for the purposes of pleading claims against the Crown for negligence.

[75] Finally, I note that this is not a case like *A.L. v. Ontario (Minister of Health)* (2006), 83 O.R. (3d) 512 (C.A.) in which the Crown’s allocation of its financial resources was directly in issue. The claims are directed at the operational decisions and conduct of the Crown that were allegedly detrimental to the health and welfare of the class. The Crown’s allocation of funds for this purpose has not been challenged and is relevant only to the extent that the need for it may have enabled the Crown to exercise control over the location and construction of housing on the reserve.

[76] For the above reasons, I confirm my earlier decision that a cause of action in negligence has been adequately pleaded. In addition, pursuant to that decision, a cause of action for breach of fiduciary duty has been disclosed. I found, also, that the question whether the type and degree of control exercised by the Crown over the Reserve and its members was sufficient to make it an “occupier” for purpose of the very broad definition in section 1 of the *Occupiers’ Liability Act* R.S.O. 1990, c. O-2 involved questions of fact that should be left to be dealt with on the basis of the evidence at trial. As no appeal from these findings was made, and there have been no

intervening decisions that would, in my opinion, justify a decision to reopen them, I did not undertake to reconsider them. It follows that these causes of action as well as that in negligence have, in my opinion, been disclosed within the meaning of section 5 (1) (a) of the *CPA*.

2. Section 5 (1) (b): the Class

[77] At the commencement of the hearing, plaintiff's counsel filed a revised Class definition which reads as follows:

SubClass I: Those members of the First Nation who resided on the Reserve at any time from and after January, 2001, and who were evacuated from their home due to the presence of Toxic Mould;

SubClass II: Those members of the First Nation who resided on the Reserve at any time from and after January 2001, but were not evacuated from their home due to the presence of Toxic Mould;

SubClass III: ("FLA Claimants") Those members of the First Nation, including minors, who suffered the loss of guidance, care and companionship of any of their family members who were members of SubClass I or SubClass II or who incurred out of pocket expenses for the benefit of or to visit any of the said family members or who provided nursing, housekeeping or other services for any of the said family members as a result of their injuries arising from exposure to Toxic Mould on the Reserve at any time from and after January 2001.

[78] As the references to the evacuation add nothing of significance, the first two subclasses can be replaced by a single class that omits all words after the date of January 2001. I note that the references to "Toxic Mould" in the class description – as well as in the statement of claim – are not restricted to those types of mould that were identified by Dr Gots and Dr Vijay as toxic, as distinct from, for example, allergenic.

[79] In its original form, and as restated, the Class may include persons whose houses, health and property were not affected by mould but that does not make the Class objectionably over-inclusive as any attempt to exclude such persons would result in what has been considered to be a merits-based description.

[80] The definition of FLA claimants will be amended to refer to the single primary Class and the concluding reference to resulting injuries should be deleted. The latter would, it seems, create an impermissibly merits-based criterion. Unless there is intended to be an overlap between membership of the subclasses, the word "other" should be inserted before "members" in the first line of the description of the FLA Claimants.

[81] As the common issues concern the existence of duties of care owed by the Crown to First Nation members resident on the Reserve, there is the required rational connection between such issues and persons resident on the Reserves. The restriction of the primary Class to persons

resident on the Reserve "from and after January, 2001" was explained by the pleading that it was not until 2000 that the Class members became aware of the presence of mould in levels unsafe for human habitation. It was in July 2001, by the declaration of an emergency, that the Crown was informed that the First Nation considered the existing situation to have become intolerable.

[82] As the conduct of the Crown that is alleged to have breached a duty of care commenced more than thirty years prior to the beginning of the class period, the definition can be criticized as under inclusive. Persons who suffered harm from mould in the new housing prior to January 1, 2001 would be excluded from the Class if they died or ceased to reside on the Reserve before that date. To that extent it might be said that the class description lacks a rational connection to the claims and the common issues relating to the existence and breach of the Crown's duties of care.

[83] On balance, I see no reason why the plaintiff should be precluded from restricting the claims to those who were alive and resident on the Reserve shortly before the time that the degree of mould contamination had, in the opinion of the Chief of the First Nation, progressed to a level that required emergency measures. Persons who ceased to reside on the Reserve before that time would not be bound by the outcome of a trial of common issues and would be free to pursue in other proceedings any claims they wish to assert. The inclusion of persons who became resident after January 1, 2001 is satisfactory as there is an evidential foundation for the continued existence of mould in some of the housing after 2001. The Class should, however, be closed as of the commencement of the proceeding.

[84] I do not accept the submission of counsel for the Attorney General that the conditions of membership in the First Nation and residence on the Reserve are inherently uncertain. Membership would be determined under the provisions of the *Indian Act*, or the membership code of the First Nation if there is one. The criteria are objective and evidentiary difficulties that might exist in some cases are not determinative. Similarly, courts have managed to deal with the concept of residence for purposes of income tax legislation for more than 90 years and its inclusion in the Class definition does not, in my opinion, taint it with uncertainty.

[85] Although slightly different estimates were provided, it appears that there may have been approximately 450 Class members resident on the Reserve in 2001, and that approximately 350 of them were evacuated.

Section 5 (1) (c): the common issues

[86] The plaintiffs have proposed the following common issues:

Negligence

1. Did the Crown owe a duty of care to the Class members in relation to the site selection, relocation, construction, installation, inspection, maintenance, repair and/or improvement of the Reserve and the housing and services on the Reserve? If so, did the Crown breach that duty?

2. Did the Crown owe a duty to warn the Class members of the existence of toxic mould on the Reserve, and the risks of exposure to toxic mould? If so, did the Crown breach that duty?
3. Did the Crown owe a duty of care to Class members with respect to the implementation and enforcement of policies, statutes and building codes relating to the avoidance, detection and remediation of mould and fungal problems on the Reserve and any associated health emergencies? If so, did the Crown breach that duty?
4. Did the Crown owe a duty of care in relation to the implementation, operation and execution of the Evacuation, including the duty to ensure that Class members were not denied the care, guidance and companionship of family members and community members? If so, did the Crown breach that duty?
5. What was the nature and role of the Long Lake #58 First Nation culture and community for the Class members? Did the Crown owe a duty of care to take all reasonable steps to ensure that that culture and/or community was maintained?

Breach of fiduciary duty:

6. Did the Crown owe a fiduciary duty to the Class members in relation to the administration of the Reserve, including selection of the Reserve's location, construction and installation, inspection, maintenance, repair and/or improvement of the Reserve and the housing and services on the Reserve, and the manner in which the Class members were relocated? If so, did the Crown breach that duty?
7. Did the Crown owe a fiduciary duty to act in the best interests of the Class members upon the discovery of toxic mould on the Reserve, including a duty to take reasonable steps to ensure that the Class members were not living in conditions that were unsafe and/or dangerous to their health? If so, did the Crown breach that duty?
8. What was the nature and role of the Long Lake # 58 First Nation culture and community for the Class members? Did the Crown owe a fiduciary duty to take all reasonable steps to ensure that that culture and/or community was maintained

The Occupier's Liability Act:

9. Did the Crown breach the Occupiers' Liability Act by failing to ensure that the Class members entering on the Reserve and housing premises, and the property brought on the premises by the Class members were reasonably safe while on the premises?

Damages:

10. If it is established that the Crown breached any of its duties referred to above, are the Class members entitled to a damage award?
11. If so, are the Class members entitled to an aggregate assessment of damages for part or all of the damages they suffered? If so, which part of the damages? How will the award be distributed among Class members?
12. Are the Class members entitled to punitive and exemplary damages? If so in what amount? How will the award be distributed among Class members?
13. Should the Crown be ordered to pay pre-judgment interest? If so, at what annual rate? Should the payment be simple or compound interest? How is the pre-judgment interest to be calculated?

Administration:

14. Should the Crown pay the cost of administering and distributing any recovery? If so, in what amount?

[87] Counsel for the Attorney-General were critical of the scope of these proposed common issues, and the manner in which they were formulated. I am satisfied that to a considerable extent the criticisms were justified.

[88] The most serious defect is that the ambit of some of the proposed common issues extends far beyond anything which has even the acceptable minimum evidentiary support and also beyond the causes of action I have found to be adequately pleaded. In proposed common issue #1, for example, the reference to a duty of care relating to the improvement of the Reserve and the housing and services, appears to contemplate a general private law responsibility of the Crown to provide adequate housing conditions and services on the Reserve rather than the much more narrow private law duty that I have found to have been supported by the facts pleaded: a duty to exercise care to avoid harm to Class members when effecting the relocation and the design and construction of the replacement housing.

[89] In order to reflect the cause of action that has been pleaded, proposed common issue #1 might be reformulated as follows:

1. Was the presence of mould in houses on the reserve caused, or materially contributed to, by decisions of the Crown relating to:
 - (a) the site selection for the replacement housing; or
 - (b) the design and construction of the housing?

2. If so, did such decisions constitute a breach of a duty of care owed to Class members by the Crown?

[90] If the issue is restated in the above manner, it would still be necessary to ask whether there is evidence that satisfied the necessary minimum standard of "some basis in fact" for the existence of the duty. The standard is not exacting but it must be observed. Without it, plaintiffs' counsel could - for the purposes of certification - plead with impunity facts sufficient to constitute causes of action that they had no reason to believe could be substantiated by evidence at trial.

[91] It is not disputed that there was mould on the Reserve and, despite the evidence of Dr Gots and Mr Boles, there is a sufficient evidential basis in my opinion to raise an issue relating to the dangers of indoor mould to the health of the First Nation members. Similarly, I believe there is a necessary basis in fact for attribution of knowledge to the Crown that swampy conditions and inadequate drainage could encourage the growth of mould in the housing.

[92] What is missing is affidavit evidence that would, or might, attribute the existence of mould to decisions of the Crown. Ms Grant's "understanding" that the relocation of housing was made at the direction of the Crown is merely a statement of her belief without reasons or any reference to its source. There is a complete absence of evidence of the assurances of better housing conditions that are, in the pleading, alleged to have induced the First Nation members to move from the old location. There is similarly no evidence to support the plea that the Crown conducted inadequate, or any, surveys, or that it employed inadequate, or any, building materials, techniques and designs. There is no evidence to support the claim that the Crown was aware of the mould prior to the declaration of an emergency, or that it had been repeatedly warned of the requirements for effective remediation and failed to respond adequately. If, as I have found, the existence of the Crown's private law duty of care depends on a relationship of proximity that arose out of the manner in which the Crown implemented a policy decision to relocate the First Nation, the evidence in the affidavits falls short of providing any basis in fact for an inference that the Crown did anything for that purpose or, indeed, that its officials made any such decisions.

[93] The gaps in the evidence are to an extent remedied by admissions made by the Crown in its statement of defence. It is asserted that the previous location of the housing was inadequate to meet the needs of the First Nation members for a variety of reasons, including overcrowding and consequential sanitation and fire hazards. It is claimed that the new site on the north part of the Reserve was the obvious and only feasible alternative. The Crown, it is stated, encouraged the relocation, provided funding for it, and advised with respect to building design and standards. It is denied however that the Crown unilaterally selected the new site or induced members to move to it. It is pleaded that all relevant decisions of the Crown were made in response to the First Nation's requests for assistance.

[94] It follows, in my opinion, that the degree of control exercised by the Crown and the extent to which its decisions were determinative are central to the viability of the first of the proposed common issues, as restated. Is there evidence that suggests that the plea that the Crown

"encouraged" the relocation, and "advised" on its implementation might be considered to be an euphemistic mischaracterization of the determinative role of the Crown?

[95] In cross-examination on her affidavit, Ms Grant poured considerable scorn on the assertion that the First Nation, and not the Crown, was permitted to make decisions involving the First Nation's financial expenditures. The Crown, she stated, exercised total control that extended to determining where members of the First Nation could live on the Reserve.

The government has total control. They tell us, "This is what you do. This is the amount of money you have to do this. This is not your land. You can't move here, you can't live there, you can't" - it is total control. So what - what we went through this past - it was unbelievable. ...

This is a farce. It is not the Band, it's not the Chief, it's you guys. We say we want this and they say, 'No you can't have this one, it is too expensive.' You have to go - we have to pick who [the Crown] wants. ...

I am just telling you what happens. We don't have a say. We never do. We try. We do our best, but we're stuck.

They treat us like little children you know. (Questions 384-413, in part)

[96] The purpose of a certification motion is to determine whether a plaintiff's claims are suitable for resolution under the procedure of the *CPA*. It has been held repeatedly that the motion is not to be treated as a test of the merits of the claims advanced on behalf of the class, and that the statute is to be given a liberal application. In their pleadings the parties have joined issue on the critical question relating to the extent that the Crown's advice and encouragement was a materially contributing factor in the decisions with respect to the site selection for the relocation and the construction of housing there. If Ms Grant's evidence of the complete and pervasive control exercised by the Crown is accepted, it might well be found that what the Attorney General described as "advice" and "encouragement" had in reality the effect of mandatory directions. In these circumstances, there is, in my opinion, sufficient to satisfy the minimum evidential burden to link the presence of mould arising from the site location and faulty construction to conduct of the Crown.

[97] The possibility that it might be found at trial that only some of the houses occupied by Class members were infested with mould, or that only some of the Class members suffered adverse health consequences, or property - or other - losses, does not detract from the commonality of the first of the common issues, as restated. As has been mentioned in other cases, this court's insistence that class definitions must not be merits-based often makes it virtually inevitable that some class members may not be able to prove that they suffered harm or losses as a consequence of a defendant's breach of duty: *Frohlinger v. Nortel Networks Corporation* (2006), 40 C.P.C. (6th) 62 (Ont. S.C.J.) at para 23; *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. 129 (Ont. S.C.J.) at para 52. In any event, absent an aggregate assessment based on

actuarial evidence and sampling, the question whether Class members suffered damages will be an individual issue.

[98] Together with the finding that links the presence of mould to the conduct of the Crown, the evidence of the existence of mould in a number of the houses, the evidence that, in some cases, it could be attributed to faulty construction, and the evidence that some members of the Class suffered harm or incurred losses is sufficient to satisfy the evidential burden on the question whether the class members had “colourable claims” to which the first of the proposed common issues relates: *Hollick*, at paras 19-26; *cf.*, *Taub v. Manufacturers Life Insurance Co*, [1998] O.J. No. 2694 (G.D.) at page 3. It is also clear that these claims are not legally distinguishable from those of the plaintiff.

[99] Counsel for the Attorney General referred to an opinion I expressed in *Dumoulin v. Ontario*, [2006] O.J. No. 1233 (S.C.J.) at para 16 that different evidential standards may apply to the existence of the claims of class members, than to the commonality of issues. Whether or not the suggestion that a higher standard of proof applies to questions of commonality was consistent with the analysis in *Hollick*, it was confined to the situation where the latter depends on disputed questions of fact. This is not the case here where the commonality of the claims of the Class members depends on essentially the same issues of fact as those of Ms Grant.

[100] Proposed common issue #2 is acceptable only if, at trial, an affirmative answer is provided to common issue #1. There would otherwise be no independent evidential foundation for the existence of such a duty.

[101] The third of the issues, is in my opinion, unsatisfactory. The plaintiff has not identified the policies, or any specific provisions of statutes and building codes that are referred to in the issue, and, without such knowledge, it is impossible to determine whether even the minimum required basis in fact for the alleged breaches of duty exists.

[102] Proposed common issue #4 fails for an absence of any evidence that would connect the Crown to the implementation, operation and execution of the evacuation. The question whether the evacuation was a reasonably foreseeable consequence of the Crown’s alleged breaches of a duty of care could at trial be raised in connection with an assessment of damages.

[103] Similarly, there is no evidence to suggest that the first part of common issue #5 is in issue between the parties. Nor is there any evidence that bears on the question it raises. The second part of the issue that relates to a duty of care is said to arise from one of the particulars of negligence in paragraph 68 of the statement of claim that alleges a failure to

... adequately compensate the Class members for their past and future injuries, and exposure to injuries, and loss of use and enjoyment of their homes and damage to their community as a nation.

[104] As one of the particulars of negligence, this paragraph in the pleading is premised on an assumption that it was a breach of a duty of care to fail to pay compensation for loss of use and

enjoyment and damage to the community. This appears to be tantamount to an allegation that it is negligence not to pay damages for negligence. As such, the proposition adds nothing of legal relevance to the pleading, and it does not raise proposed common issue #5 which is, in any event, significantly wider. To the extent that it contemplates the existence of a freestanding duty to maintain the culture and community of the First Nation, this reaches far beyond the duty of care that I have found to be supported in the plaintiff's pleading.

[105] Proposed common issue #6 is subject to the criticism that I have made of common issue #1 as it was proposed. It ignores the fact that my finding was limited to the Crown's alleged decisions with respect to the site selection and the design and construction of replacement housing. I would replace common issues # 6 and 7 with the following:

Did decisions and conduct of the Crown with respect to the site selection, and the design and construction of replacement housing, breach a fiduciary duty of the Crown to act in the best interests of the Class members?

[106] Common issue #8 is, for the reasons given in connection with common issue #5, not responsive to anything in the pleading and is not acceptable.

[107] Proposed common issue #9 is dependent on my finding that evidence at a trial may bear on the question whether the Crown exercised such control over the conditions of premises on the Reserve, and on persons allowed to enter the premises, as to be an "occupier" for the purpose of the *Occupiers' Liability Act*. In my judgment, Ms Grant's evidence in cross-examination provides a sufficient evidential basis for common issue #9 and it is acceptable.

[108] With the exception of proposed common issue #12 relating to punitive damages, the remaining issues are, for the most part, satisfactory. However, common issue #10 requires attention as, unless an aggregate assessment of damages is ordered, the question whether Class members are entitled to damages would raise individual issues.

[109] The claim for punitive damages is supported in the pleading only by a general allegation that the Crown conducted its affairs in a high-handed and arrogant manner with a wanton and callous disregard for its obligations owed to Class members. I was not asked to strike this paragraph on the earlier motion and, whether or not it is sufficient as a matter of pleading, it is not in my opinion, supported by evidence that provides the necessary minimum basis of fact to be acceptable as a common issue. The statements of Ms Grant in cross-examination do not in my opinion go so far as to suggest that the claim that the Crown acted wantonly and callously in its relationship with the First Nation.

[110] The question whether an aggregate assessment of damages could and should be made is for the judge at trial although the court hearing a motion to certify the proceeding commonly includes it as a common issue where it believes that there is a reasonable likelihood that the three conditions in section 24 (1) of the *CPA* will be satisfied at trial: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para 44.

[111] In *Markson* the Court of Appeal accepted the earlier finding in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A) at para 49 that section 24 (1)

... 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".

[112] The subsequent substitution in *Markson* and *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No . 4406 (C.A.) of "potential liability" for the purpose of the requirement that liability be first established has in later cases been held not to permit an aggregate assessment where proof of damage is an essential requirement for the existence of liability: *2038724 Ontario Ltd v. Quiznos Canada Restaurants Corp.* (2008), 89 O.R. (3d) 252 (S.C.J.), at paras 120 - 123; *Steele v. Toyota Canada Inc.*, [2008] (B.C.J. No. 1496 (S.C.) at para 122.

[113] *Markson* and *Cassano* involved claims for restitution and breach of contract - claims for which the Court of Appeal was satisfied that liability - or "potential liability" - did not require the fact of damage to be established. The claim for breach of fiduciary duty - but not the claim for negligence - in this case may, I believe, be placed in the same category; *cf.*, *Pro-Sys* at paras 36-40. Accordingly, I will accept common issue #12 for the purposes only of the claim for breach of fiduciary duty.

[114] The question whether a resolution of the common issues would substantially and sufficiently advance the proceeding will be considered as part of the enquiry into the preferable procedure under the next heading.

4. Section 5 (1) (d): the preferable procedure

[115] Section 5 (1) (d) requires a finding that a class proceeding will be the preferable procedure for resolving the common issues. This inquiry is to be conducted in the light of the three goals of class actions: access to justice; judicial economy; and behavioural modification: *Hollick; Cloud; Markson*. For this purpose, the court must consider whether a class proceeding would be a fair, efficient and manageable method of advancing the claims made on behalf of the class, and whether such a proceeding would be preferable to other reasonably available means of resolving them - including, but not limited to, individual proceedings. These inquiries require the court to look at the common issues in their context in the litigation as a whole and not in isolation: *Hollick*, paras 27 - 31.

[116] In order to determine whether the requirements are satisfied it is relevant to consider the extent to which the determination of the common issues would advance the proceeding. While there is no requirement that the common issues must predominate over the individual issues that would remain to be decided if the common issues are resolved in favour of the class, the number and nature of the individual issues may have a bearing on the question of preferability and, in particular, on the manageability and efficiency of a Class proceeding. None of the objectives of the CPA is likely to be achieved if the practical reality will be that the trial of common issues is a relatively insignificant step in the resolution of the claims asserted on behalf of the class.

[117] Although - subject to the possibility of an aggregate assessment of damages on the basis of the "potential liability" of the Crown for breach of fiduciary duty - the trial of common issues will not dispose of the questions of causation and damages that will have to be determined individually, I am in agreement with counsel for the plaintiff that the trial would resolve the central and most difficult issues that will determine liability. If contested, causation in relation to personal injuries may require what have been called mini-trials conducted according to the directions of the trial judge. This is what the plaintiff has proposed in her litigation plan. Plaintiff's counsel have estimated that substantial claims of this kind are not likely to be numerous and this is supported strongly by the evidence of the Crown's witness, Dr Gots. Claims for loss of use and enjoyment and for losses to property are less likely to give rise to serious problems of causation if, at the trial, it is found that the consequences of the evacuation, the demolition of housing, and the destruction of mould-infested personal property can be attributed to breaches of a duty of care owed by the Crown to the Class members. In my judgment, these considerations indicate strongly that judicial economy is likely to be achieved by permitting the action to continue under the *CPA*.

[118] On the question of access to justice, the largely undisputed evidence of Ms Grant is that most of the Class members do not have the financial and emotional resources to initiate proceedings against the Crown. As individuals, they have limited access to legal advice and counsel, and this factor, together with the cost and inconvenience of individual litigation, entails that a class proceeding is, in her opinion, the only available method of resolving these claims efficiently.

[119] The need for modification of the Crown's conduct was also strongly asserted by Ms Grant. It is central to her claims that the Crown exercised total control of housing on the Reserve and breached its private law duties to the persons on the Reserve in the manner in which it was exercised. This is denied by the Crown who seeks to have responsibility for the relocation, and any failure to deal adequately with the infestation of toxic mould, cast exclusively on the First Nation and its Council. The line between public and private law duties of the Crown will be very much in issue and, if the common issues are resolved in favour of the class, they should have a major impact on the Crown's future discharge of its responsibilities with respect to conditions on the Reserve.

[120] Although counsel for the Attorney General gave several reasons why a class proceeding should not be considered to be the preferable procedure, I did not find them persuasive. To the extent that they relied on evidence that the Crown had taken reasonable steps to alleviate and remediate the problem of toxic mould and had always responded diligently, and reasonably, to the needs of the First Nation in connection with it, counsel's submissions beg questions that would be involved in the determination of the common issues.

[121] Counsel appeared to suggest that the action was not a *bona fide* attempt by the plaintiff to obtain compensation for injuries and losses suffered as a result of the Crown's breaches of private law duties of care. They described the "true issues" in the action as relating to the adequacy of the Reserve lands - issues that they submitted were not amenable to a determination

under the *CPA* because of the possibility that some Class members would opt out. I see no reasonable basis for accepting this attempted re-characterization of the claims that have been pleaded.

[122] Evidence that is relevant only to the determination of individual issues is not required for the purpose of certification except to provide the necessary basis of fact for the existence of claims of the Class members, or in relation to the preferable procedure. As far as the question of preferability is concerned, the main thrust of counsel for the Attorney General's emphasis on the lack of evidence of injuries and losses of Class members was that, as stated in paragraph 166 of their factum:

It is highly questionable whether there are Class members who have claims commensurate with the risks and expense of a class action.

[123] However, as the Court of Appeal insisted in *Markson*, the test is not whether no litigation would be preferable to a class proceeding. It is whether a class proceeding would be preferable to other methods of resolving the claims asserted on behalf of the Class. This is not a case like *Dumoulin* in which it was concluded that the cost of a class proceeding

might well involve expense and delays that would be entirely disproportionate to that required for more-narrowly focused individual actions. (para 23).

[124] In an appendix to their factum, counsel for the Attorney General identified what they described as a plethora of individual issues that would be involved in determining liability to any particular Class member. Many of these are questions of fact of no complexity. Others relating, for example, to the date that particular houses were built, the type of building structure and the contractor hired to do the work would lend themselves to evidence given by representatives of the First Nation and the Crown on one occasion rather than on a case by case determination. Similarly, the assumption that the identification of the houses infected by mould, the types of mould, its severity and the likely risks to the health of the occupants would have to be dealt with separately for each claimant - rather than in a joint reference after joint discoveries - does not in my opinion give sufficient weight to the scope of the trial judge's authority to give directions for the manner of resolving individual issues. To a large extent, these questions have been addressed in the very detailed reports of Cook and Boles.

[125] I do not wish to underplay the possible existence and difficulty of questions of causation that may arise in connection with claims for personal injuries, and on which expert medical and scientific evidence may be required. As I have indicated, however, I do not believe the necessity to deal with these issues will overwhelm the advantages and benefit to be obtained from a resolution of the common issues in a single trial.

[126] Finally, counsel for the Attorney General sought to rely on the complexity introduced into the proceeding by their client's decision to make third party claims against the First Nation and the First Nation's counterclaim against the Crown. These claims, they submit, will have to be dealt with as part of the common issues trial. If that is correct, the reason will be that the claims

raise issues that are likely to arise in any event as part of the trial - namely, whether the plaintiff's allegation that the Crown had effective control of, and responsibility for, the relocation, choice of a new site, and the construction and remediation of the replacement housing, is to be accepted. The additional complexity arising from the third party claims and the counterclaim has, I believe, been vastly overstated.

[127] If the First Nation's intended fourth party claims against certain contractors and sub-contractors would introduce undue complexity and expense into the proceeding, they may, as in other cases, be stayed until its completion, or severed.

[128] Despite references by counsel for the Attorney General to representative actions, individual actions and proceedings in small claims court, the overall thrust of their submission was not that individual proceedings, or other methods of dispute resolution, would be preferable to a class proceeding, but rather that the claims should not be pursued at all. As I have indicated, this does not reflect the correct approach for the purpose of certification. In any event, the procedure and powers of the court under the *CPA* are, in my opinion, far better suited to the management and resolution of the claims in this case than an action under the ordinary procedure by a representative appointed under Rule 10. Similarly, on the basis of Ms Grant's evidence of the financial and emotional resources of the Class members, access to justice is more likely to be achieved under the *CPA* than by individual actions in this court or the Small Claims Court. If, contrary to the evidence, there is a realistic possibility of a significant number of individual actions, judicial economy would not be served by deciding the common issues in a multiplicity of actions.

[129] I accept the submission of plaintiff's counsel that a class proceeding will be the preferable procedure and that the requirement under section 5 (1) (d) is satisfied.

5. Section 5 (1) (e): the representative plaintiff and the litigation plan

[130] Ms Grant is a status Indian pursuant to the provisions of the *Indian Act*. She is 61 years of age and is employed as a social worker with the First Nation's Social Services Department. She was a First Nation councillor from 2000 to 2008. From 1988 until they were evacuated, she and her family lived in a house at 204 Otter Street on the north side of the Reserve.

[131] In her affidavit, Ms Grant describes the presence of mould in 204 Otter Street and her unsuccessful attempts to eradicate it. She and her family were evacuated in July 2001 and were provided with temporary accommodation at various places off the Reserve. In 2002 she was informed by the First Nation Council that the mould in her home was too extensive to be repaired and that the house would be demolished. This was done in the same year and later she was assigned a newly constructed home on the Reserve. Ms Grant claims that she has experienced a number of health problems that she attributes to the presence of mould in 204 Otter Street and that her furniture and other personal property was destroyed by the First Nation as a result of the infestation.

[132] In the affidavit, Ms Grant sets out in some detail her understanding of the claims in the action and the procedure under the *CPA*. She states that she understands the responsibilities of a representative plaintiff and intends to perform them if her appointment is approved by the court. She asserts that she has no conflicts of interest with other members of the Class.

[133] Counsel for the Attorney General challenged Miss Grant's ability to act as a representative plaintiff. They referred to the difficulties her counsel have experienced in maintaining contact with her and the resulting missed deadlines and delays that have occurred in progressing to this stage of the proceeding.

[134] The delays that have ensued are regrettable but I have in the past accepted the explanations of Ms Grant's counsel about the difficulties of communication arising from the isolation of the Reserve and the First Nation members, and I have declined to strike the pleading when asked to do this by counsel for the Attorney General. By the same token, I am not prepared at this stage to reject Ms Grant as an appropriate representative plaintiff. Nor am I prepared to make an adverse finding of credibility on the basis of an apparent inconsistency between a statement in her affidavit that, while a First Nation councillor, she did not participate in decisions regarding the mould issue and her signature to a First Nation Council resolution requesting the Crown to release funds to enable the First Nation to pay for work done to remedy the problem.

[135] Ms Grant was not asked to explain the alleged contradiction and I do not know whether it is more apparent than real, or whether there was some misunderstanding at the time she swore her affidavit, or on the later occasion. Without more, however, I do not feel that I should find her to be disqualified as a proposed representative on the ground of a general lack of credibility as suggested by counsel for the Attorney General.

[136] Counsel also submitted that, in view of her former status as a First Nation councillor, and the fact that one of her sons was the First Nation's housing manager at the date of the evacuation, Ms Grant should be disqualified on the ground of a conflict of interest. At this stage it is not apparent to me that any conflict exists, or is likely to arise as the First Nation's interest, and that of the First Nation Council and the housing manager are coincident with those of Ms Grant and the other Class members. If, at some future stage of the litigation, it appears likely that a conflict may arise, a motion to remove her as a representative plaintiff and either to substitute another Class member in her place if a replacement is available, or to decertify the proceeding, may become appropriate.

[137] The litigation plan filed is, I believe, satisfactory. Although it is not a lengthy document, it is responsive to the issues considered above in the context of the preferable procedure. I do not consider that it was necessary prior to certification to include the amount of detail that was referred to by counsel for the Attorney General - relating, for example, to the names of experts whose opinions will be relied on at the trial of common issues.

[138] I will, however, add this caveat with respect to the future conduct of the proceeding. Plaintiff's counsel must understand that the litigation is to be kept moving and that the indulgence

shown by the court - as well as by opposing counsel - with respect to the serious delays in the past may not be allowed in the future.

CONCLUSION

[139] For the above reasons, this proceeding will be certified for the purposes of the *CPA*. The form of the order, the revised common issues and the notice to be given to Class members can be settled at a case conference.

[140] If the parties are not able to agree on costs, counsel for the plaintiff may make submissions within 21 days of the release of this decision. Counsel for the Attorney General will then have a further 14 days in which to reply.

CULLITY J.

Released: December 4, 2009

COURT FILE NO.: 04-CV-263007 CP
DATE: 20091204

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DIANE GRANT

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

LONG LAKE NO. 58 FIRST NATION

Third Party

- and -

BARINO CONSTRUCTION LIMITED

Fourth Party

REASONS FOR DECISION

Cullity J.

Released: December 4, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

FAIRVIEW DONUT INC. AND BRULE FOODS LTD.	)	<i>Jerome R. Morse, Lori Stoltz, John J. Adair and Khalid Janmohamed, for the Plaintiffs</i>
)	
Plaintiffs/Moving Parties on Certification)	
Motion/ Respondents on Summary Judgment)	
Motion)	
)	
)	
- and -)	
)	
)	
THE TDL GROUP CORP. AND TIM HORTONS INC.	)	<i>Peter Howard, Danielle Royal and Bevan Brooksbank, for the Defendants</i>
)	
Defendants/Respondents on Certification)	
Motion/Moving Parties on Summary)	
Judgment Motion)	
)	

Proceeding under the Class Proceedings Act, 1992

HEARD: August 15-18, 29-31, September 1-2, October 5-6, 2011 and by written submissions

TABLE OF CONTENTS

I. OVERVIEW	3
A. The “Always Fresh” Conversion.....	4
B. The “Lunch Menu”	4
C. Causes of Action	5
D. Tim Hortons’ Response to the Plaintiffs’ Complaints	5

II.	THE FACTS	6
A.	Tim Hortons' History	6
B.	The Tim Hortons Business Model	7
C.	The Plaintiffs and Mr. Garland	9
D.	The Always Fresh Conversion	11
E.	Alleged Misrepresentation of Cost of Donuts under Always Fresh.....	18
F.	The Lunch Menu.....	25
G.	The Plaintiffs' Expert Evidence	30
1.	Evidence of Douglas Fisher – Defendants' Motion to Strike.....	30
2.	Evidence of Howard Rosen	35
3.	Evidence of Andy Baziliauskas	36
H.	Tim Hortons' Expert Evidence	37
1.	Evidence of Roger Ware.....	37
2.	Evidence of KPMG	38
III.	THE FRANCHISE AGREEMENT	39
IV.	CERTIFICATION	49
A.	Introduction	49
B.	The Test for Certification.....	49
(a)	Cause of Action	50
(b)	Identifiable Class	51
(c)	Common Issues	54
(d)	Preferable Procedure.....	81
(e)	Representative Plaintiffs.....	83
C.	Conclusion on Certification	84
V.	SUMMARY JUDGMENT	85
A.	The Test for Summary Judgment.....	86
B.	The Breach of Contract Claim	92
1.	Introduction and Overview.....	92
2.	Principles of Interpretation.....	95
3.	Express Terms	96
4.	Implied Terms.....	102
C.	Breach of Duty of Good Faith and Fair Dealing.....	112

1.	<i>Arthur Wishart Act</i>	113
2.	Plaintiffs’ Allegations: Breach of Duty of Good Faith and Fair Dealing.....	120
D.	Unjust Enrichment.....	124
1.	Requirements of Unjust Enrichment	125
2.	Unjust Enrichment – Is a Trial Required?	128
3.	Always Fresh – Unjust Enrichment.....	128
4.	Lunch Menu – Unjust Enrichment	130
E.	<i>Competition Act</i>	131
1.	The Maidstone Bakeries Joint Venture and Pricing of the Par baked Donut	131
2.	Distribution and Supply Agreements	133
3.	The Pleadings	134
4.	The Plaintiffs’ Claims under the <i>Competition Act</i>	135
5.	Price Maintenance: Section 61	137
6.	Conspiracy – Old Section 45	145
7.	Conspiracy – New Section 45	147
8.	The Limitations Defence	149
F.	The Liability of THI.....	153
G.	Conclusions on Summary Judgment	156
VI.	CONCLUSIONS.....	158
	Schedule “A”: Common Issues.....	159

G.R. STRATHY J.

[1] The plaintiffs move to certify this proceeding as a class action on behalf of franchisees of the Tim Hortons restaurant chain, pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “C.P.A.”). The defendants oppose that motion and bring a motion for summary judgment dismissing the plaintiffs’ claims.

I. OVERVIEW

[2] The plaintiffs are Tim Hortons franchisees.¹ They complain that they are required to buy some of the ingredients that they use in their products at unreasonably high prices, thereby eroding their profits. Their complaints target two aspects of their operations: the cost of donuts and the cost of ingredients for soups and sandwiches, referred to as the “Lunch Menu”. I will begin with a short summary of their complaints and of Tim Hortons’ response.

[3] For the reasons that follow, I have concluded that the defendants’ motion should be granted and that the plaintiffs’ individual claims should be dismissed. I will nevertheless set out my conclusion on the certification motion, in the event there is an appeal from this decision or in the event the plaintiffs seek leave to substitute another representative plaintiff.

A. The “Always Fresh” Conversion

[4] The first claim, the cost of donuts, stems from the “Always Fresh” Conversion. Until 2002, most baked goods sold in Tim Hortons stores were baked on the premises “from scratch”, by skilled bakers, using donut mixes and other ingredients supplied by Tim Hortons. Between 2002 and 2004, Tim Hortons replaced scratch baking of donuts, timbits, cookies and muffins with a system called “Always Fresh”, in which the dough was partially baked and flash frozen (referred to as “par baking”) at a centralized facility and delivered frozen to the franchisees’ stores, where the baking would be completed, when needed, in specially-designed ovens. The par baked donuts that franchisees were required to buy were supplied by a joint venture, in which Tim Hortons had an interest.

[5] The plaintiffs plead that, contrary to representations made to franchisees before the Always Fresh Conversion, the cost to produce donuts and other baked goods has increased, cutting into their profits.

[6] They claim that Tim Hortons makes enormous profits on the sale of the par baked donuts, at the franchisees’ expense, and that it ignored their requests for sale price hikes to offset the increased costs. They say that Tim Hortons breached express terms of their franchise agreements by implementing the Always Fresh Conversion, which was not for their financial benefit, and that it breached an implied term of those agreements that ingredients would be sold to franchisees at lower prices than they could obtain in the marketplace.

B. The “Lunch Menu”

[7] The plaintiffs’ second complaint relates to the “Lunch Menu”. The Lunch Menu includes soups, sandwiches and similar items, which are sold in most stores twenty-four hours a day. The

¹ The contractual agreement, discussed below, refers to Tim Hortons as the “Licensor” and to the plaintiffs as “Licensees”. Although the agreement grants the plaintiffs a license to operate a Tim Hortons shop and to use Tim Hortons’ trademarks, it is in substance a franchise agreement. This point is not in dispute. I will refer to Tim Hortons as the “franchisor” and to the plaintiffs and other proposed Class members as the “franchisees”. The document also refers to the Tim Horton Shop and the Tim Horton System. For the sake of convenience, I have simply referred to the defendants, and to the system, as “Tim Hortons”.

plaintiffs say that Tim Hortons requires franchisees to sell Lunch Menu items at either break-even prices or at a loss. They say that while they are selling these items at a loss, Tim Hortons is making a profit through rent, royalties and advertising payments, all of which are calculated based on franchisees' sales. They say that this was also a breach of an implied term of their contracts that ingredients would be sold to them at lower prices than they could obtain in the marketplace.

C. Causes of Action

[8] The plaintiffs say that Tim Hortons' conduct relating to the Always Fresh Conversion and the Lunch Menu breached their contracts, breached the franchisor's common law obligation of good faith and breached the statutory duty of good faith and fair dealing under the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (the "*Arthur Wishart Act*") and similar legislation in other provinces.² They also say that Tim Hortons has committed the offences of price maintenance and conspiracy under the *Competition Act*, R.S.C. 1985, c. C-34, giving rise to civil causes of action under s. 36 of that statute. Finally, the plaintiffs say that Tim Hortons' conduct has resulted in unjust enrichment and that they are entitled to equitable and restitutionary remedies. The plaintiffs have abandoned a claim for damages for alleged negligent misrepresentation by Tim Hortons concerning the price at which the par baked donuts would be sold to franchisees. The misrepresentation allegations nevertheless remain relevant to the other causes of action.

D. Tim Hortons' Response to the Plaintiffs' Complaints

[9] Tim Hortons' answer to these claims is that it has a contractual right to determine the price at which franchisees purchase ingredients, that it exercised its contractual rights reasonably and in good faith and that, overall, the plaintiffs and all franchisees enjoy an exceptional rate of return on their investments.

[10] Tim Hortons denies that the Always Fresh donut is significantly more expensive than the one produced by scratch baking. It says that franchisees benefitted from the Always Fresh Conversion, because it eliminated many of the difficulties associated with scratch baking, resulted in a better product, increased efficiency in the stores and made each franchisee's life much easier. While there was an initial increase in the cost of raw materials, that cost has been offset over time by increased retail prices for donuts and by other savings. Tim Hortons says that in the long run, had scratch baking continued, the cost of a scratch baked donut today would have substantially exceeded the cost of a par baked donut.

[11] Tim Hortons says that a Lunch Menu has been a part of its system since 1986, when soups, sandwiches and chili were first introduced. It says that offering such products permits its

² Section 3 of the *Franchises Act* of Prince Edward Island, R.S.P.E.I. 1988, c. F-14.1; s. 3 of the *Franchises Act* of New Brunswick, S.N.B. 2007, c. F-23.5; and s. 7 of the *Franchises Act* of Alberta, R.S.A. 2000, c. F-23. The language of the other provincial legislation is similar to that of the *Arthur Wishart Act*.

franchisees to attract customers around the clock and makes them competitive with other fast food outlets. It denies that Lunch Menu items are sold at a loss.

[12] Tim Hortons says that the Always Fresh Conversion and the Lunch Menu are permitted by the franchise agreements and that franchisees have no right to acquire any particular product or product line at a particular price. They say that the plaintiffs' claims are so plainly unmeritorious and have no chance of success that they should be dismissed at this stage, on summary judgment.

[13] Against this background, I will turn to a more detailed examination of the facts, beginning with an overview of the Tim Hortons franchise system. I will then describe the circumstances of the plaintiffs. Finally, I will discuss the matters at issue in this action in more detail and will then address the certification and summary judgment motions.

II. THE FACTS

A. Tim Hortons' History

[14] The Tim Hortons franchise operation is perceived by many to be a Canadian success story. The first Tim Hortons store was opened in May, 1964 by Tim Horton, a famous NHL defenseman. In 1967, Horton entered into partnership with Ron Joyce, a former Hamilton police officer and the operator of three Tim Hortons shops. They opened thirty-seven restaurants over the next seven years. At that time, their operation was more or less coffee and donuts. As we shall see, Tim Hortons franchisees now offer their customers an extensive and constantly changing array of foods and beverages.

[15] Joyce continued to expand the chain after Horton's death in 1974, buying out his widow and becoming the sole owner of the business in 1975. In the early 1990s, Tim Hortons and Wendy's International Inc. became partners in real estate development and constructed combination restaurant sites containing Wendy's and Tim Hortons restaurants under the same roof. In 1995, Wendy's acquired Joyce's interest in Tim Hortons and the company was merged with Wendy's. By that time, there were over 1,000 stores in the Canada-wide chain. By 2008, Tim Hortons was the fourth largest publicly traded quick-service restaurant ("QSR") chain in North America. By the end of 2009, there were approximately 3,000 stores in Canada, owned by just under 1,000 franchisees. Some franchisees owned only one store and others owned multiple stores.

[16] In 2006, Tim Hortons sold 18% of its outstanding common stock in an initial public offering on both the New York and Toronto Stock Exchanges. Later that year, Wendy's distributed its remaining 82% interest to its stockholders of record. Since then, Tim Hortons Inc. ("THI") has operated as a stand-alone public company.

[17] THI is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, and carries on business in Canada through its subsidiary, the defendant, TDL Group

Corp. (“TDL”). Except where it is necessary to distinguish between the two corporations, I will refer THI and TDL collectively as “Tim Hortons”.

[18] I will discuss the Tim Hortons system in more detail below, but it is quite apparent that the face of the franchise has evolved over the years. It quickly moved from just coffee and donuts to a menu that included soups, chili and sandwiches. The menu has continued to develop over time, driven by changing customer demands and hot competition in the QSR business. Tim Hortons stores now offer such exotic choices as hot and iced cappuccinos, specialty teas, breakfast sandwiches, fajita wraps, yoghurts and gourmet cookies.

[19] Part of the challenge of running a national QSR franchise operation such as Tim Hortons is keeping ahead of powerful and aggressive competition, including coffee operations, such as Starbucks, Second Cup and Dunkin’ Donuts, and restaurant chains, such as McDonalds and Subway. Tim Hortons has a large marketing department, which is constantly evaluating its own menu offerings and monitoring what the competition is doing, in order to stay competitive in the face of changing customer demands and stiff competition for customer loyalty.

[20] There is one aspect of the Tim Hortons franchise that the plaintiffs don’t complain about – coffee.

[21] Coffee is what Tim Hortons has been about since the very first day. It remains so today. Tim Hortons owns the coffee brand. It owns the trademark. The franchisee acquires the right to use the trademark. To sell the brand. Tim Hortons calls its coffee “legendary” and describes it on its website at “[T]he chain’s biggest calling card.”

[22] A large cup of coffee sells, at least in Toronto, for \$1.57. It is, not surprisingly, extremely profitable. The ingredient cost is very low. The cost of the labour involved in making the pot and pouring a cup is also very low. The evidence establishes that the sale of coffee is an enormous source of revenue for every Tim Hortons franchisee.

B. The Tim Hortons Business Model

[23] Tim Hortons’ basic business model is simple. It identifies suitable restaurant locations, develops restaurants on the sites, and leases the restaurants to approved franchisees, with which it signs revenue-generating franchise agreements. The model has been enormously successful.

[24] Later in these reasons, I will discuss some of the benefits of owning a franchise. Two of the most important of these are the opportunities to sell a nationally-recognized brand and to use a proven and profitable business system. There is a waiting list of over 3,000 candidates hoping to acquire the right to use the Tim Hortons system and to sell its brand.

[25] The majority of Tim Hortons stores are run by franchisees and by operators of corporate-owned stores. Franchisees pay a non-refundable licence fee for the privilege of acquiring the franchise. The initial fee can be several hundred thousand dollars.

[26] In addition to the franchise fee, franchisees pay the following:

- (a) rent, based on 10% of monthly sales, to cover rental of the land, generally owned by Tim Hortons, on which the stores are located;
- (b) a royalty, usually based on 3% of sales, as compensation for Tim Hortons' ongoing support, know-how, and efforts to maintain and increase the brand; and
- (c) an advertising levy of 3.5% of monthly sales (the amount actually stated in the contract is 4%, but Tim Hortons had reduced this amount on a voluntary and temporary basis).

[27] Tim Hortons also makes money through the distribution and sale of food ingredients, paper, dry goods and other commodities to its franchisees. It owns a coffee roasting plant and an interest in a bakery, to which reference will be made below.

[28] In consideration for the payments described above, franchisees are licensed to use the "Tim Hortons System". I will describe that system in more detail when I discuss the contractual provisions at issue, but in essence – like most franchise operations – the franchisee is required to abide by a set of rules and procedures, to purchase all supplies and ingredients from Tim Hortons or from its designated suppliers, and to offer for sale only products that have been approved by Tim Hortons. As one might expect, the franchise agreement provides that the franchisee must adhere to rigorous standards designed to protect and enhance the Tim Hortons brand.

[29] The franchise agreements are typically for ten year terms. A franchisee has no right to territorial exclusivity. Most franchisees are required to keep their stores open 24 hours a day.

[30] There is a formal system in place for consultation with franchisees, consisting of an Advisory Board composed of seventeen franchisees, elected by franchisees across Canada and the United States. There are representatives on the Advisory Board from every region in Canada. Advisory Board members are expected to liaise with and report to franchisees in their own region. The board meets three times a year for a day and a half or two days. Senior management of Tim Hortons is typically present at these meetings and minutes are kept and made available to all franchisees. At the meetings, Tim Hortons provides information to Advisory Board members concerning the state of the business and new products or initiatives. The franchisee members raise issues of concern to franchisees. The discussions are frequently detailed.

[31] In addition to the Advisory Board meetings, Tim Hortons meets annually with all franchisees at spring and fall regional meetings and occasionally at a larger national convention. These meetings are used to discuss topics of particular importance, including subjects such as new products or initiatives, new methods or techniques, and questions and complaints from franchisees.

[32] Franchisees have a say in the pricing of products. The proposed price of new product offerings is discussed at the Advisory Board before the product comes on the market. The franchise agreements provide that Tim Hortons may set a maximum retail price for any product, but franchisees are free to sell at a lower price, if they wish. Before there can be an increase in the price of a product, the franchisees in each region must vote on whether to approve the proposed increase, which only becomes effective if approved by majority vote.

C. The Plaintiffs and Mr. Garland

[33] The Plaintiff Brule Foods Ltd. (“Brule”) is an Ontario company. Archibald Jollymore is the principal of Brule. He is a cousin of Ron Joyce, the former owner of Tim Hortons. He began his association with Tim Hortons in 1977 as a member of the senior management team. When he left management in 1994, to start up his own franchises, he held the position of Executive Vice President.

[34] Brule is a Tim Hortons franchisee operating two stores in Burlington, Ontario. One of those stores, store #750, is a franchised location, which has been operated by Mr. Jollymore continuously since 1994. The franchise agreement was renewed in 2004 for a term ending in January 2014. The renewal was documented in 2006, some considerable time after the store had converted to the “Always Fresh” baking method in October, 2002. At the time of the renewal, Mr. Jollymore and Brule executed general releases in favour of Tim Hortons of all claims under the franchise agreement. Mr. Jollymore also acknowledged receipt of a disclosure statement, provided by Tim Hortons under the *Arthur Wishart Act*. The disclosure statement contained the regulatory mandated statement that “[t]he cost of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the goods and services available in the marketplace.” The disclosure statement also confirmed that the franchisee was required to purchase supplies from Tim Hortons or from its designated suppliers and that Tim Hortons was entitled to receive rebates and other benefits from the designated suppliers.

[35] The other store operated by Brule, store #2267, is a corporate-owned store, operated under what is referred to as an “80/20 operating agreement”, signed in 2002, under which the franchisee pays a flat royalty of 20% of sales plus an advertising charge and receives 80% of the revenue. Prior to entering into this agreement, Brule received the Ontario disclosure statement, confirming that the price at which products were supplied by the franchisor was not necessarily the lowest price available. It also confirmed that the franchisee was not guaranteed any particular return on its investment.

[36] Brule had operated a third store, store #737, under a franchise agreement that it signed in 1994. That agreement was renewed by Mr. Jollymore in 2004 for an additional ten year term. In 2007, Mr. Jollymore sold the balance of the term of the agreement to Tim Hortons for \$65,000. At that time, he and Brule executed a general release in favour of Tim Hortons and its affiliates of all claims in connection with the franchise agreement.

[37] The Plaintiff Fairview Donut Inc. (“Fairview”) is an Ontario company owned by Mr. Jollymore’s wife, Anne Jollymore. Fairview has been a Tim Hortons franchisee since 1988, when Mrs. Jollymore and her former husband acquired a franchise for store #368. Mr. and Mrs. Jollymore married in 1994. The franchise licence for store #368 was renewed for a further 10 year term in 1998. Mrs. Jollymore later acquired store #593, which was also located in Burlington, pursuant to a franchise agreement signed in 1992. The licence agreement for that store was terminated in April 2001 and at the same time Fairview signed a new agreement for a new store #593, which was established at a new location on Brant Street in Burlington. In 2008, Tim Hortons decided not to renew Fairview’s franchise agreement for store #368. Fairview continues to operate store #593.

[38] It is fair to say that, by virtue of their experience as franchisees, Mr. and Mrs. Jollymore are sophisticated and knowledgeable business people who are very familiar with the QSR business in general and with the operation of the Tim Hortons System in particular. This is especially true for Mr. Jollymore, who had experience in the corporate office of Tim Hortons at a very senior level.

[39] It is also fair to say that Mr. and Mrs. Jollymore have earned very significant income from their stores. In the case of Fairview’s store #593, over the three years 2008 to 2010, sales averaged almost \$2 million per year. Average income was almost \$325,000 per year. In the case of store #368, which Fairview also operated, its sales in the last three years of its operation, 2005 to 2007, were in excess of \$1 million per year, with net income around \$100,000 per year.

[40] In the case of store #750, operated by Brule, the sales averaged close to \$2.3 million per year for the years 2008 to 2010. Net income averaged around \$235,000 for the same period. Mr. Jollymore’s figures for store # 2267 for the last three years of its operation, 2006 to 2008, were averaging sales of \$1.6 million and net income of about \$100,000 per year.

[41] The financial information produced by both parties indicates that the plaintiffs have received a reasonable return on their investments over the years. In spite of their complaints about the Always Fresh Conversion and the Lunch Menu, the plaintiffs have continued to operate their stores and have renewed their franchise agreements or have signed new agreements. Their real complaint is not that they don’t make a reasonable profit as Tim Hortons franchisees – but rather that they don’t make more profit. –

[42] A third important individual in this saga, and a witness on behalf of the plaintiffs, is Cyril Garland. Mr. Garland was a former member of Tim Hortons senior management. He held the position of Vice-President, Finance when he left the company in 1998 to become a franchisee. Mr. Garland is the principal of 1301541 Ontario Inc., which, until November 2010, was a Tim Hortons franchisee operating store #385, and of a Tim Hortons kiosk in an Esso station, store #1957. Mr. Garland’s company also operated store #1536 from 1998 to January 2009. Mr. Garland is also the principal of 1549402 Ontario Inc., which was the franchisee of store #2402 until November 2002.

[43] Mr. Garland had commenced a separate lawsuit alleging some of the same claims as the Plaintiffs in this action with respect to the Always Fresh Conversion. As part of a settlement of that proceeding, Tim Hortons purchased Mr. Garland's stores and he released all claims against it, except his potential claim as a class member in this action.

[44] I will now expand on the source of the plaintiffs' complaints, the Always Fresh Conversion and the Lunch Menu.

D. The Always Fresh Conversion

[45] The evidence establishes that by the 1990s Tim Hortons' business model, which required the franchisee to bake most products, including donuts, timbits and muffins in their own stores "from scratch", had become a source of aggravation to franchisees. As one franchisee described it, "donuts under scratch baking were 10% of sales but 90% of the problems."

[46] Bagels, which had been introduced in approximately 1996, had always been supplied in a par baked form and were prepared in the store as needed in a convection oven.

[47] By the late 1990s, only donuts, timbits, cookies, muffins, croissants and cakes were being baked from scratch in the stores. These products made up between approximately 10% and 15% of franchisees' sales.

[48] Tim Hortons has adduced affidavit evidence from eleven franchisees, who have been referred to as the "Affiant Franchisees". Some of these were members of the "Concerned Franchisees Group", which had sought and was denied status as an intervenor at an early stage of this proceeding: see *Fairview Donut Inc. v. TDL Group Corp.*, [2008] O.J. No. 4720 (S.C.J.). That group was made up of 436 franchisees, operating over 1300 stores, who opposed the commencement of this proposed class action. The group represented franchisees from every region of the country and included owners who operated only one store and others who operated multiple stores.

[49] The problems identified by Tim Hortons concerning scratch baking, and confirmed by the evidence of the Affiant Franchisees, included:

- the need to employ expensive skilled bakers;
- logistical problems with and costs of hiring, training and retaining skilled bakers;
- inconsistency in product quality;
- wastage of product caused by the need to bake relatively large quantities in advance, twice a day (unable to accurately anticipate demand, the bakers sometimes prepared too many donuts, resulting

in wastage or “throws,” and sometimes baked too little, resulting in disappointed customers and lost sales);

- maintenance and cleaning costs; and
- disruption and inconvenience for the franchisee when the baker was sick, late, unavailable or quit.

[50] I will describe the transition to Always Fresh baking shortly, but I will note here that the evidence of the Affiant Franchisees was uniformly positive about its benefits. They gave evidence that the Always Fresh method permitted them to bake as required throughout the day, allowing them to respond more effectively to customer demand and reducing the amount of “throws”. They acknowledged that there had been an increase in food cost for the Always Fresh par baked products, but said that this was offset by lower labour costs, reduced wastage, improved product quality and a much easier baking method. It was their overwhelming evidence that the Always Fresh Conversion was beneficial to the franchisees and had been an improvement in the Tim Hortons system.

[51] A number of the Affiant Franchisees spoke of the stress and aggravation associated with reliance on experienced bakers, including bakers calling in sick or not showing up for work, requiring the franchisee himself or herself to get up in the middle of the night to bake. The evidence of Mr. Oliver is typical:

Knowing what I know today, including the costs of producing donuts, I still would have voted in favour of the Always Fresh Conversion. Always Fresh has substantially increased my quality of life as a franchisee and has reduced the level of stress associated with operating my stores. It has eliminated my reliance on bakers. I am able to train employees on the Always Fresh process in two to three days and baking expertise is no longer required in order to produce donuts. I am able to produce donuts in a matter of five minutes and therefore the donuts in my stores are consistently fresher than under the scratch baking system. As I can bake donuts on demand, I am able to control my donut inventory and reduce waste. I can ensure that my displays are consistently stocked with fresh product. I am able to bake donuts in all my stores, regardless of store size, and am no longer required to transport donuts from one store to another. Given that the donuts are of a uniform size, the lack of product uniformity across Tim Hortons store [sic] has been eliminated.

In order to appreciate the benefit of the change it is also important to note that donuts represent a relatively small percentage of our

revenue, but with scratch baking it used up considerable energy and management resources.

[52] Other franchisees shared Mr. Oliver's observations and observed that while donuts were a relatively small part of overall store sales, issues related to donut preparation took an inordinate part of their time.

[53] Several Affiant Franchises indicated that they had been informed by Tim Hortons, prior to the Always Fresh Conversion, that their product costs would increase but that, over time, their labour costs would reduce and would offset the increase in costs and said that this had, in fact, been their experience. For example, Susan Marshall deposed in her affidavit:

Prior to the Always Fresh Conversion in 2002, TDL engaged in a transparent consultation process with Tim Hortons franchisees. Many meetings were held in which franchisees were encouraged to ask questions about the new system. While I do not recall any specific representations by TDL, I recall that TDL was clear that the conversion would be costly, the product would cost more and there would be changes to how owners did business. It was emphasized by TDL, however, and widely understood by franchisees that any increase in product cost would be compensated by savings in labour costs and other efficiencies. TDL's explanation of the Always Fresh Conversion was measured and cautious. It was also stressed to franchisees, that positive results from the Always Fresh conversion would be impacted by the level of effort franchisees put into the new system to ensure its success at their stores.

There was a decrease in profitability of my stores immediately following the conversion due in part to baking too much product, resulting in a higher amount of "throws"; as well as labour shortages in Alberta causing increased labour costs...

However, profitability at the Edmonton stores returned to, and exceeded, pre-Always Fresh levels. My stores are now on average 3% more profitable than they were prior to Always Fresh.

[54] Of particular interest is the evidence of one franchisee, Mr. Gilson, who was examined by the plaintiffs under Rule 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194. Mr. Gilson had been a Tim Hortons franchisee in Ottawa since 1991. He operated a number of stores. He was a member of the Advisory Board, representing Eastern Ontario, between 1996 and the fall of 2001. I will examine other aspects of Mr. Gilson's evidence in due course, but for the moment, it is interesting to note his enthusiastic support for the Always Fresh Conversion.

[55] On cross-examination by Tim Hortons' counsel, Mr. Gilson admitted that the conversion "absolutely" simplified operations for the franchisee, that the product was easier to work with and that the consistency was not dependent on the baker. He agreed that under scratch baking there had been problems with waste, because it was difficult to estimate the amount of product that would be required on a given day, which he described as "hit and miss".

[56] Mr. Gilson was clear that the Always Fresh Conversion was a huge benefit for his operation and said that it would be a decidedly retrograde step to revert to the scratch baking system. The following exchange is particularly interesting:

Q. So you would agree with me that many of the complications and difficulties that were associated with scratch baking ---

A. I agree wholeheartedly. I would never want to go back to scratch baking. That's not something I would ever try to say that I would – I was in favour of it coming and I'm still in favour of it today.

Q. And overall it was a good thing for the business?

A. Overall, in my world, it was the best thing that happened to the business.

Q. I think you will also agree with me that store sales have increased since the conversion?

A. They have.

Q. In your particular stores, sales have increased since the "Always Fresh" conversion?

A. They have. Sales have increased. Some of it is due to pricing. A lot of it I think is just due to normal growth, and we can handle that growth now. In the days prior to, you couldn't always – it wasn't that you couldn't handle it, but you couldn't handle it as well, because you don't have the recovery time. This system helped us. It really has. I'm not against this system in the least. It's a great system.

[57] Although the plaintiffs downplay the problems associated with scratch baking, there is substantial evidence from Tim Hortons, including the evidence of the eleven Affiant Franchisees and Mr. Gilson, that these problems were widespread and significant.

[58] At some point in the 1990s, Tim Hortons began to explore alternatives to scratch baking. After investigating several technologies, it began to focus on the par baking method. Mr. David

Clanachan, a Vice President of Tim Hortons, led a team tasked with investigating par baking, which visited a number of manufacturing facilities in Europe, England and Ireland.

[59] After conducting this due diligence and examining the application of the par baking technology in Europe, Mr. Clanachan decided that the optimal business strategy would be to joint venture with an Irish company, IAWS Group plc (“IAWS”), for the construction of a donut manufacturing and par baking facility in Canada. This facility was ultimately located in Brantford, Ontario and is referred to as “Maidstone Bakeries”. It was an indirect subsidiary of CillRyan’s Bakery Group (“CillRyan”), which was owned by the joint venture partners until Tim Hortons sold its interest in the joint venture to Arytza AG in 2010.

[60] Before committing to this project, Tim Hortons demonstrated the par baking method to franchisees at a convention held in Ottawa in July, 2000. A display was set up where par baked donuts were actually baked on site and could be sampled by franchisees. The response was enthusiastic. Neither Mr. nor Mrs. Jollymore nor Mr. Garland attended this convention.

[61] In August 2000, the Wendy’s board authorized senior management of Tim Hortons to proceed with the negotiation of a joint venture with IAWS for the construction of the par baking facility at an estimated capital cost of US\$94 million. There were legitimate business and strategic reasons for this project, including those already mentioned. As well, Tim Hortons’ potential for growth in the United States market was constrained by the need to bake in-store and the overall growth of the business in North America was being impaired by difficulties in finding and retaining trained bakers. The Always Fresh baking method was perceived by Tim Hortons management as an opportunity to re-vitalize and expand the donut business. It would produce donuts of consistent size and quality. The competition was selling hot donuts and the fast in-store baking process would allow fresh batches of donuts to be made as needed.

[62] The evidence of Mr. Clanachan makes it clear that in deciding to move to a central donut production facility, Tim Hortons was looking to the long-term success of its brand. As he put it, “[T]he view of TDL management was that if TDL did not adopt this technology in some fashion, we were going to be a dinosaur and the scratch-baking part of the business was not likely to survive.”

[63] A joint venture agreement was ultimately signed by Tim Hortons and its affiliated companies with IAWS and others. It was publicly announced in March of 2001. As I will discuss below, the price at which the par baked donuts would be sold to franchisees was a matter of vital concern to both joint venture partners as it would affect the financial viability of the project and would determine whether their capital investment could be justified by the return on investment. The evidence, which I will discuss below, establishes that Tim Hortons wanted to ensure that the price of the par baked donut was reasonable from the franchisees’ perspective and that it was approximately the same price as the combined food and labour cost of the scratch baked donut.

[64] At regional meetings with franchisees in the spring of 2001, Tim Hortons discussed plans for the conversion of all stores to the Always Fresh methodology beginning in 2002. This would

require franchisees to replace their scratch baking equipment with new freezers and specialized ovens purchased from Tim Hortons.

[65] Tim Hortons expected and explained to its franchisees that the costs of raw materials – donuts, timbits, muffins and cookies – would increase, but that their labour costs would be reduced over time. Exactly what franchisees were told is a matter of some controversy, as will be discussed below.

[66] There is no question, however, that from the spring of 2001 until the roll-out of par baking was completed in 2004, there was extensive communication between Tim Hortons and its franchisees concerning the Always Fresh system, what it would cost and how it would work. It was anticipated that it would cost each franchisee between \$30,000-35,000 to convert a store for par baking. There was extensive discussion of the subject at Advisory Board meetings and there was considerable investment by Tim Hortons in training and in the production of a conversion kit and a training manual to equip its franchisees for Always Fresh production.

[67] The plaintiffs say that the Always Fresh Conversion increased their food cost for donuts from around 7 cents under scratch baking to 18 to 20 cents under Always Fresh and that their margins eroded as a result. Tim Hortons disputes this.

[68] The plaintiffs claim that the Maidstone Bakeries joint venture marks up the price of the frozen donut from its actual production cost of 12 cents to 16 cents. They call this the “CillRyan markup.” They say that this markup is not commercially reasonable and that Tim Hortons has used the franchisees’ “captive” position to extract a “monopoly premium”. In their factum, they use the following language to describe it:

It is a monopoly premium unnecessary to provide the [Joint Venture] partners with a reasonable rate of return on their capital invested in the initiative, without value to the franchisees, and extracted from the franchisees solely by virtue of the Defendants’ decision to exploit for their own profit the captive supply provisions in the Licence Agreement contrary to the usual commercial purposes for which franchisees accept them.

....

In the circumstances at issue in this case, the effect of the captive supply provisions in the Licence Agreements binding on all franchisees was to insulate the Defendants (and their JV partner) from the usual competitive forces in the marketplace. In this vacuum, the Defendants had free rein to exploit those provisions to extract from the franchisees a monopoly premium over the commercially reasonable cost to manufacture par-baked donuts and Timbits.

But for the captive supply provisions of the Licence Agreement, franchisees unhappy with the high food cost of the Maidstone AF donuts and Timbits could have looked elsewhere in the market to source those products, individually or in groups. Given the existence of those provisions, however, the only limit on the cost of the Maidstone donuts and Timbits was the Defendants' own view of the highest price their market – i.e., the franchisees – could be compelled to “sustain”. The Plaintiffs submit that the Defendants conduct amounts to a perversion of the purpose for which franchisees accepted the captive supply provisions and (as will be argued below) a breach of the *Competition Act*.

[69] Stripping away the rhetoric, the plaintiffs are saying that but for their franchise agreements, which require that they buy ingredients from suppliers designated by Tim Hortons and at prices set by Tim Hortons, they could have sourced lower prices for their inputs in the market.

[70] It is worth noting that, had par baking not been introduced, the price of producing a scratch baked donut today would have been as high as 30 cents, due to increased labour and ingredients costs in the intervening years. In contrast, the price of a par baked donut to the franchisee has kept relatively constant since the Always Fresh Conversion at about 18 to 20 cents. It is also worth noting that there have been retail price increases in donuts since the conversion, from 70 cents per donut to the current price of 90 cents per donut, although these numbers do not reflect the fact that donuts are frequently sold in boxes of six or twelve, which the plaintiffs say brings the average selling price of a donut down to between 56 and 57 cents.

Distribution Systems

[71] I will discuss Tim Hortons' product distribution system in somewhat more detail when I discuss the plaintiffs' claims under the *Competition Act*. In overview, however, TDL has entered into distribution agreements for the delivery of supplies, including frozen donuts, to the franchisees. The typical arrangement is based on cost plus a mark-up. The product is sold to the distributor, which is entitled to charge a mark-up to the franchisees. Tim Hortons negotiates the maximum mark-up that can be charged by the distributor. Distributors are, however, entitled to charge a lower mark-up and there are no provisions in their agreements that prevent them from doing so.

[72] In addition to using third party distributors, Tim Hortons also distributes some products, such as dry goods, directly to its franchisees. In 2006, Tim Hortons built a distribution facility in Guelph, which it uses to distribute refrigerated and frozen products to franchisees in most of Ontario. It charges a distribution mark-up on those products that is the same as the mark-up charged by the third party distributors.

E. Alleged Misrepresentation of Cost of Donuts under Always Fresh

[73] The Statement of Claim originally included a claim for negligent misrepresentation. That claim was withdrawn shortly before the hearing. Allegations of misrepresentation remain as part of the claims for breach of contract and breach of the duty of good faith and fair dealing.

[74] The plaintiffs assert that Tim Hortons misled the franchisees about the benefits of the Always Fresh Conversion. They say that Tim Hortons misrepresented the cost at which the frozen donuts and other baked goods would be supplied to their stores and misrepresented the benefits that would be obtained from Always Fresh. They argue that the franchisees were required to spend tens of thousands of dollars to replace their scratch baking equipment with the new freezers and ovens needed for the Always Fresh baking method, but that they did so relying on these representations. They say that only after the conversion did franchisees discover the truth and experience significantly eroded margins on baked goods. They say that Tim Hortons got the franchisees to buy into the Always Fresh baking method by misrepresenting the costs.

[75] The Statement of Claim pleads that, prior to the Always Fresh Conversion, the following representations were made to the plaintiffs and other class members:

- par baking would cause quality to improve, thereby increasing sales;
- the cost to franchisees of producing a donut using the par baking system would increase modestly from 8 or 9 cents to 12 cents per donut;
- the increased cost of production under the par baking system would be offset by reductions in labour costs and wastage; and
- the franchisees' lives would be less stressful.

[76] The plaintiffs allege that these representations were made by Paul House, then President and CEO of Tim Hortons, and by Mr. Clanachan, at a regional meeting held in Toronto at the Harbour Castle Hotel on November 27 and 28, 2001. At this meeting, franchisees were given a demonstration of the new oven and sampled the new Always Fresh donut produced by the par baking method. The plaintiffs allege that, contrary to these representations, there was an increase in the production cost of donuts (up to 20 cents) and other baked goods. They allege that Tim Hortons knew the effect that the Always Fresh Conversion would have on franchisees' revenues and failed to disclose it to them.

[77] The pleading alleges that, in engaging in this conduct, Tim Hortons breached the common law and statutory duty "that franchisors are to act fairly, in good faith and in a commercially reasonable manner towards franchisees."

[78] The plaintiffs' proposed common issues ask whether Tim Hortons breached the franchise agreement or breached the duty under the *Arthur Wishart Act* or other provincial statutes "to act fairly, in good faith and in a commercially reasonable manner":

- in representing to the franchisees through Advisory Board members that they could deliver the frozen Always Fresh donut to the franchisees' stores for 11 to 12 cents; or
- in representing that the increased food cost of the Always Fresh products would be offset by savings in labour, waste and other operational expenses.

[79] The plaintiffs claim that Tim Hortons knew from at least September of 2000, or possibly earlier, that the price of the Always Fresh donut leaving Maidstone Bakeries would be 16 cents and that there would be a further mark-up for distribution, but that they got the franchisees to "buy into" the concept by misrepresenting the price and misrepresenting the benefits of the conversion.

[80] I will begin by examining the evidence with respect to the alleged representation.

Mr. Jollymore

[81] Mr. Jollymore deposed that in conversations with "various members" of the Advisory Board prior to November 2001, he was told that members of the Board had expressed an interest to Mr. House that TDL should investigate the possibility of implementing a par baking system if the unit cost of the donut increased to 11 or 12 cents. He said that he therefore assumed that the increase would be only 4 or 5 cents more than the existing cost. He says that in the spring of 2002, at regional meetings, franchisees were told that the cost of the frozen, unfinished donut would be approximately 19 cents. He says that Mr. Clanachan explained that this was consistent with the pre-Always Fresh food cost of 7 cents and a labour cost of 13 cents.

[82] I pause here to note three things. First, Mr. Jollymore's evidence is not consistent with the pleading that the alleged misrepresentation was made at a regional meeting in Toronto in late November 2001. Second, the representation was not based on anything that Tim Hortons executives had said to the Advisory Board, but rather on something the Advisory Board had allegedly communicated to Tim Hortons management, which was of course not obliged to follow the wishes of the Advisory Board. Third, whatever the "representation" may have been, the true facts – that is, the real price of the Always Fresh donut – were made known to franchisees in the spring of 2002.

[83] Mr. Jollymore stated that he had been informed by Mr. Gilson, who, as mentioned earlier, was a former member of the Advisory Board, that at the Eastern Ontario regional meeting in the spring of 2002, Mr. Gilson questioned Mr. House about why the cost of the Always Fresh frozen donut was going to be 19 cents, when he had informed the Advisory Board that the cost would be between 11 and 12 cents. Mr. House apparently responded that he had no recollection of ever

stating that the cost of the par baked donut would be 12 cents. Mr. Jollymore says that Advisory Board members Gilson and Joe Zoccolli told him that they had been surprised and angry about the announced food costs, because Mr. House had told the Advisory Board “at the time TDL was considering implementing a par bake system that the food cost of a donut would be \$0.11 or \$0.12.”

[84] Mr. Jollymore swore that Tim Hortons executives also represented that, as a result of the Always Fresh Conversion, quality would improve, operating costs would decrease, wastage or “throws” would be reduced and the new system would be “cost neutral”.

[85] As I will mention in connection with the summary judgment motion, it is significant that in spite of his complaint about the “misrepresentation” of the cost of the Always Fresh donut, Mr. Jollymore signed an operating agreement for Brule’s store #2267 in June 2002, after he was aware of the actual cost of the Always Fresh donut. By that time, he had also received Tim Hortons’ statutory disclosure package and certified that he was not relying on any representations made by any employee of Tim Hortons concerning the costs of operating a Tim Hortons restaurant or the potential earnings of the restaurant.

Mr. Garland

[86] In an affidavit sworn May 22, 2009 and included in the plaintiffs’ initial motion record for certification, Mr. Garland swore that he attended the Ontario regional meeting of franchisees in late November 2001 at the Westin Harbour Castle Hotel when the Always Fresh system was presented to franchisees. He swore that at this meeting Tim Hortons did not advise franchisees of the costs of the Always Fresh product. Again, Mr. Garland’s evidence is inconsistent with the alleged misrepresentation being made at this meeting. Mr. Garland deposed that franchisees were told that the product would be fresher, more consistently sized and that there would be cost reductions due to the elimination of the highly-paid bakers. He says that franchisees were told that donut sales would increase because the product would be baked throughout the day and would therefore be fresher.

[87] Mr. Garland stated that, after he learned of the Always Fresh Conversion at that meeting, “I persistently questioned TDL executives, including David Clanachan (Executive Vice President) and Tom McNeally (Vice President, Finance), about the cost of the frozen product, but they would not give me an answer.” Again, this is inconsistent with the plaintiffs’ assertion that Tim Hortons was actively misrepresenting the cost as 12 cents.

[88] Mr. Garland says that he ultimately found out that Tim Hortons estimated the cost of an Always Fresh donut to be about 20 cents in a conversation in a bar with Mr. McNeally in the fall of 2001. He said that Mr. McNeally had suggested that this cost was the same as the pre-Always Fresh donut, based on raw material costs of 7 cents and additional store production costs of 13 cents. Mr. Garland’s opinion is that this analysis was not correct, because it ignored the additional labour costs that would be incurred by franchisees in processing the par baked donuts and getting them onto their store shelves.

[89] Mr. Garland testified on cross examination that he first heard the 20 cent cost number from Mr. House at the spring meeting of franchisees in 2002.

[90] Mr. Garland also stated that he had been told by Mr. Zoccolli “that TDL had stated a per donut cost of \$0.12 when the possibility of a par baked system was first presented to the Advisory Board. The Advisory Board had agreed that TDL should investigate the possibility of implementing a par baked system if the per donut cost would be \$0.12.”

[91] Like Mr. Jollymore’s evidence, Mr. Garland’s evidence is not consistent with Tim Hortons having made a broad-based representation to franchisees concerning the cost of the Always Fresh donut. Nor is it consistent with the plaintiff’s claim that Tim Hortons was attempting to pull the wool over the franchisees’ eyes by getting them to buy in to the Always Fresh concept in the fall of 2001 based on a 12 cents donut, only to reveal the truth the following spring. In fact, the upshot of Mr. Garland’s evidence is that 20 cents was the only number he ever heard from Tim Hortons management prior to the Always Fresh Conversion.

Mrs. Jollymore

[92] Mrs. Jollymore swore that she signed a new agreement for her store #593 (which was executed in July, 2001) and proceeded with the Always Fresh Conversion of store #368 in reliance upon Tim Hortons’ representation that:

... the cost of the Always Fresh donut would be in the range of \$0.11 or \$0.12, information that was known to me at the time based upon Arch’s discussions with members of the Advisory Board. To the best of my knowledge, this information had circulated widely to all of the franchisees in my area at that time. By the time the actual price of the unfinished Always Fresh donut was disclosed to franchisees in the Spring of 2002 (at close to \$0.20), my store #593 had already been built and opened without the fryers and other equipment required for Full-Baking. I proceeded at that time in reliance upon TDL’s representation that the high cost of the frozen Always Fresh donut would be offset by cost reductions in labour, waste and other operating expenses.

[93] With knowledge of the actual cost of the Always Fresh donut, Mrs. Jollymore converted her stores #593 and #368 to the Always Fresh method in October 2002.

Mr. Gilson

[94] Mr. Gilson was, as I have mentioned, a former member of the Advisory Board. He described his recollection of the discussion of the Always Fresh pricing at the Advisory Board meetings – he could not recall the exact dates - in the following terms:

They felt that – from what I understand, and I believe I heard it on more than one occasion, is that they felt they could bring the product to the store for somewhere between 11 to 12 cents.

[95] Mr. Gilson said that this information was conveyed by Mr. House. It was not memorialized or reduced to writing or recorded in any of the minutes of the Advisory Board. In cross-examination, Mr. Gilson acknowledged that the statement was not made in the context of a formal presentation. “It was a discussion around the table”. Later in his examination, in response to a question asked by plaintiffs’ counsel, Mr. Gilson described the 11 to 12 cents number as the cost to manufacture the product at Maidstone Bakeries. This is not the same as the cost to the franchisee.

[96] Mr. Gilson stated that he shared this information with other franchisees in the area and that, although it was more than their current cost, they felt that the convenience of the new system, coupled with the labour savings, would offset the additional 3 to 4 cents in costs. He says at the time, franchisees were scratch baking donuts at around 8 to 9 cents each.

[97] Mr. Gilson says that he did not learn of the price of the “Always Fresh” product until “[P]retty much when it arrived at my store”, which would have been in late December 2002. The price was close to 18 cents. He said that his reaction at the time was “we had hoped that we would be able to offset [the higher price].” The evidence in fact indicates that Mr. Gilson was present at a meeting of the Advisory Board in September 2002 at which time the 18 cent cost was discussed.

[98] It was Mr. Gilson’s evidence that at the regional meeting in Kingston, he asked Mr. House, who was on the stage with Mr. Walton, Mr. Clanachan and Mr. Moir, why the price of donuts had come out at 18 cents when the Advisory Board had been told that it would be 11 or 12 cents. He said that Mr. House replied that he did not recall ever having talked about the 11 to 12 cent donut. Mr. Gilson did not feel he could take the matter further with Tim Hortons management. He said that following this incident, a member of TDL management, Mr. Javor, met with him and was critical of him asking the President of the company a question that put him on the spot.

[99] As I have mentioned earlier, Mr. Gilson testified on cross examination, in glowing terms, concerning the benefit of the Always Fresh Conversion, saying that it was the best thing to have happened to his business. He admitted that although his food cost had increased, there had been price increases in the stores to offset this. He also acknowledged that Tim Hortons had done a good job with the Always Fresh product.

[100] It is of some interest to know that Mr. Gilson renewed the franchise agreements for two of his stores after he became aware of the actual price of the Always Fresh donut, presumably in recognition of the fact that he would be able to make a fair and commercial rate of return on his business. His daughter also acquired a franchise with full knowledge of the real price.

[101] One of the interesting observations made by Mr. Gilson on his examination was with respect to coffee. He acknowledged that coffee was the most profitable item in the store: “We’re fairly blatant that coffee is our big money. That’s what brings most of the money in the store, we need that.” He acknowledged that coffee is the easiest product to handle, the lowest in food cost and that the margins on coffee are “significantly higher” than the margins on other products.

Mr. Loiello

[102] Mr. Loiello was a franchisee in Quebec who ultimately filed for bankruptcy. He was examined by the plaintiffs pursuant to Rule 39.03. It was his evidence that at a regional meeting in Montreal in 2001, Mr. House gave a slide presentation that showed the price of an Always Fresh donut at 12 cents. He claims that Mr. Clanachan, Mr. Moier and Mr. Walton were also present at the regional meeting, but he was unable to say whether they were all in the room at the same time. It was his evidence that he did not find out the actual price of the Always Fresh donut until he received his first delivery of the new donuts.

Mr. House

[103] Mr. House denied making any statement at the November 2001 Toronto regional meeting concerning the anticipated cost of the Always Fresh donut and says that he would not have made the statement because, as of that date, Tim Hortons was in the process of determining its estimated costs. He would not have been prepared to put forward an estimate unless the back-up work had been done. The evidence of Mr. Clanachan is to the same effect. He confirmed that there is no reference to any such statement in the slide presentation that was used to explain the “Always Fresh” system to franchisees across the country.

Mr. Walton

[104] Mr. Walton testified that he never heard Mr. House tell the Advisory Board that the Always Fresh donut would cost 11 to 12 cents.

The Affiant Franchisees

[105] Mr. Archibald was one of the “Affiant Franchisees”. He swore, in response to the plaintiffs’ allegations of misrepresentation, that Tim Hortons informed franchisees “at the outset” that food costs would increase as a result of the conversion. He said that he anticipated this increase and that it has been offset by lower labour costs and reduced wastage.

[106] The evidence of Danny Murphy was similar. Mr. Murphy swore that Tim Hortons explained that food costs would increase, but also stressed savings in labour costs. He says that his stores in Prince Edward Island experienced a “slight decline” in profitability after the conversion but there was a return to the previous profit margins within 6 to 8 months. He expressed the opinion that the implementation of Always Fresh baking was beneficial to franchisees and said that he would not want to return to the old method of scratch baking.

[107] Neither Mr. Archibald nor Mr. Murphy was cross-examined.

[108] The evidence of franchisee Susan Marshall, quoted earlier, was that, Tim Hortons was transparent about the increased product costs in the consultation process leading up to the Always Fresh Conversion, but said that they would be offset by lowered labour costs.

[109] Like Mr. Murphy, Ms. Marshall observed a decrease in profitability in her stores in Edmonton immediately following the conversion. Profitability ultimately returned, however, and her stores were on average, 3% more profitable than they were prior to Always Fresh. She observed:

As a Tim Hortons franchisee, I personally welcomed the Always Fresh Conversion. In light of my problems under scratch-baking, I knew that the old system was no longer sustainable in the Edmonton stores. I saw the conversion as an opportunity to increase the profitability of my stores.

[110] On cross-examination, Ms. Marshall was not challenged on her evidence concerning the “representations” that Tim Hortons made concerning the effect of the Always Fresh Conversion. Nor was it suggested to her that there was any representation as to a “12 cent donut”.

[111] Mr. Cardella was a member of the Advisory Board at the time when Tim Hortons is alleged to have made the representation concerning the “12 cent donut”. On cross-examination, it was pointed out that he was at a meeting of the Advisory Board in February 2000 at which Always Fresh was discussed. The minutes recorded a discussion to the effect that one benefit of the program would be reduced labour, but that the primary objective would be to produce a better product, namely a warmer and fresher donut that would increase sales. He acknowledged that, in his view, that was part and parcel of the objective of controlling costs by reducing labour, making less donuts more frequently and increasing sales.

[112] Significantly, the alleged representation of the “12 cent donut” was not put to Mr. Cardella by counsel for the plaintiffs. Nor was it put to Mr. Angelini, another Affiant Franchisee and a member of the Advisory Board at the material time. Mr. Shaw, the third Affiant Franchisee who was a member of the Advisory Board at the material time, was not even cross-examined.

Peter Madden

[113] Mr. Madden swore two affidavits, which were part of the evidence adduced by Tim Hortons on the summary judgment motion. He was an employee of IAWS and of its subsidiary Cuisine de France and was actively involved in the negotiation of the joint venture between IAWS and Tim Hortons. It was his evidence that in negotiations with Tim Hortons, including with Mr. House, Mr. McNeely and Mr. Clanachan, the Tim Hortons personnel were insistent that “one of the things that was critical to the success of the project was that the joint venture had to be in the best interest of the franchisees and that the pricing mechanisms agreed by the joint

venture had to be consistent with this objective.” It was his evidence that the price of 16 cents for every kind of par baked donut was agreed to after three months of analysis and intense negotiation. He also deposed that the price was acceptable to Tim Hortons because it was roughly equal to the true cost of on-site scratch baking, while at the same time provided the joint venture with an acceptable return on capital. It was Mr. Madden’s evidence that his goal in negotiations was to achieve the highest possible product price in order to maximize his company’s return on the venture and that the negotiated price was lower than what he had expected it to be. I will set out Mr. Madden’s evidence on this point, in full, later in these reasons.

[114] Mr. Madden’s evidence substantially confirms the evidence of Mr. Clanachan concerning Tim Hortons’ desire to achieve a single price for all varieties of donuts that was roughly comparable to the combined labour and food costs of the scratch-baked donut.

[115] Mr. Madden was not cross-examined on his affidavit, although the plaintiffs had initially requested an opportunity to do so. They withdrew their request after Mr. Madden produced his notes of the negotiations.

Conclusion Regarding Misrepresentation

[116] As mentioned above, this action originally included a claim for negligent misrepresentation of the cost of the Always Fresh donut. This claim was only abandoned by the plaintiffs two weeks before the certification and summary judgment motions. It generated an inordinate amount of affidavit evidence and cross-examinations. It is not surprising that the claim was abandoned, given the disparate nature of the evidence concerning the alleged misrepresentation and the case law concerning the difficulties in certifying a misrepresentation claim: see *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057 (S.C.J.) at paras. 135-136, varied, [2011] ONSC 3782; [2011] O.J. No. 3240 (Div. Ct.).

[117] Although the claim for misrepresentation has fallen by the wayside as a cause of action, it remains relevant to the plaintiffs’ allegation that Tim Hortons breached its contractual duties under the franchise agreement to maintain an advisory relationship with franchisees and to develop new products compatible with the Tim Horton System. It also remains relevant to the plaintiffs’ claim for breach of the duty of good faith and fair dealing.

[118] Taken at its highest, however, the plaintiffs’ evidence does not support any common class-wide representation having been made to franchisees concerning the cost of the Always Fresh donut, other than a representation, which Tim Hortons admits, that food costs would initially increase, but that labour costs and waste would come down.

F. The Lunch Menu

[119] The plaintiffs initially pleaded that Tim Hortons breached their contracts by requiring them to sell Lunch Menu items. That allegation has now been abandoned and it is acknowledged that the franchise agreement permits Tim Hortons to require franchisees to sell the Lunch Menu.

The plaintiffs continue to allege that Tim Hortons breached their contracts concerning the Lunch Menu and breached the duty of good faith and fair dealing, by requiring them to buy Lunch Menu ingredients at prices that were higher than the market price.

[120] The plaintiffs argue that they are at Tim Hortons' mercy when it comes to the Lunch Menu, because Tim Hortons controls the products they must sell, the suppliers and distributors they must use, the ingredients they must buy and the prices they must charge. They say that they lose money on Lunch Menu items due to high ingredient costs, the high labour cost and the low retail pricing of Lunch Menu items. Lunch Menu items are frequently sold as part of a "combo" with other items, such as a drink, donut or cookie, further discounting the retail price.

[121] The plaintiffs say that their franchise agreements have been breached, because they are not able to earn a profit from selling Lunch Menu items. They say that the changes in the Lunch Menu are not a "benefit" or improvement and that Tim Hortons has breached the franchise agreement by failing to use reasonable efforts to develop new products and by failing to engage in meaningful consultation with franchisees.

[122] The sale of Lunch Menu items appears to make up 15% or less of the sales of most franchisees. Mr. Jollymore says that Lunch Menu items represent approximately 7% of the total sales of his stores. He says that the margin on these items results in losses and that Tim Hortons has failed to adjust either the input costs or the selling prices of these items to prevent the erosion of the franchisees' margins. Mr. Garland claims that the sale of Lunch Menu items had been fairly constant at 6% of sales in his store, but the food costs for Lunch menu items increased from about 44% of sales in 2003 to 54% in 2008, with the result that he sold Lunch Menu items at a loss. He claims that he discussed his complaints about the price of Lunch Menu items with Tim Hortons executives but they refused to accept his accounting methodology and failed to address the problem.

[123] The evidence of the plaintiffs' expert, Mr. Fisher, is that the food costs for Lunch Menu items in 2008 ranged from about 51% to about 54% of sales and that, when combined with paper costs and operating costs, these items yielded a negative contribution to operating costs. That is, Mr. Fisher opined that franchisees lose money on the sale of Lunch Menu items. Mr. Garland's view is the same. He noted that, at the same time, Tim Hortons makes a profit on franchisees' sale of the Lunch Menu, because it is paid a royalty on sales regardless of whether the particular item is sold at a profit by the franchisee.

[124] Mr. Fisher's evidence is also that the sale of Lunch Menu items does not cause a significant increase in the sale of higher margin items, such as coffee.

[125] Mr. Fisher advances the theory of what he calls "category cost analysis", which he says requires an examination of each menu category – of which "Lunch" would be one – and says that a rational approach to pricing is to ensure that each menu "category" makes a profit.

[126] As I mentioned earlier, soup, sandwiches and chili have been part of the Tim Hortons business model since the mid-1980s. Tim Hortons' evidence is that most stores are required to be

24-hour-a-day operations and the sale of such items takes place at all hours of the day and night and not simply at the traditional “lunch hour”. Its view is that the Lunch Menu brings customers into the franchisees’ shops at times other than traditional “coffee time” in the morning and that having the Lunch Menu helps to cross-sell other profitable items such as coffee and other drinks. Moreover, the Lunch Menu is a way to sell “combos”. Thus, the loss of the sale of the sandwich at a low price would be off-set by the sale of the other profitable items.

[127] The sales statistics support the conclusion that the Lunch Menu probably attracts customers to stores at times other than the traditional lunch hours. The evidence of Mr. O’Rourke, Tim Hortons’ Director, Financial Analysis, Franchise Operations, was that an average of only 18% of franchisees’ sales of all items were between 11 a.m. and 2 p.m. Approximately 40% to 44% of sales occur in the morning hours between 5:30 a.m. and 11 a.m. This leaves about 38% to 42% of sales in the afternoon, evening and night time period. It is probable that, during these off-lunch periods, the Lunch Menu attracts some people who would not otherwise come to the store.

[128] Tim Hortons’ evidence is that the Lunch Menu also helps to build customer loyalty. It helps the franchisee to compete with the aggressive marketing of other QSR chains, such as McDonalds, Subway and Mr. Submarine, that are vying for the loyalties of the lunchtime crowd and even catering to the needs of the caffeine addicts. Without low-priced, healthy and attractive lunch offerings, Tim Hortons risks losing some of its customer base to the competition.

[129] The minutes of meetings of the Advisory Board show that extensive and granular discussion takes place at these meetings concerning the Lunch Menu in general and the introduction and pricing of particular Lunch Menu items. It is clear from these minutes that Tim Hortons and the Advisory Board members are alive to the competitive threats in this market and the opportunities for Tim Hortons and its franchisees. It is also clear that the introduction of new menu items takes place only after careful consideration of the justification for a particular item, the cost of the ingredients and the price at which it is to be sold. Considerable research and investigation is carried out by Tim Hortons with respect to demands for particular Lunch Menu items, costing of such items, pricing of such items and marketing. A great deal of thought goes into removal of some products and replacement with others.

[130] The evidence of some of the Affiant Franchisees supports the value of the Lunch Menu as a way of cross-selling other products, bringing customers into the store throughout the day and remaining competitive.

[131] The evidence of Brian Archibald is reasonably representative:

My stores have offered lunch items such as sandwiches, soups and chili since 1988. Lunch menu items have increased as a percentage of my overall sales and have made my stores competitive in the local lunch market in Terrace (and Prince Rupert when I operated that franchise). The lunch program is an

important part of my business accounting for a range of 12-14% of sales in my stores over the course of the last few years.

I would strongly oppose any reduction or termination of the lunch menu. The higher associated food costs for lunch menu items are more than offset by the price of lunch items and overall increased sales. In particular, I believe that by offering a quality and competitive lunch menu in my stores, I am able to increase sales of other items such as coffee and baked goods by offering these items together with the lunch menu products. The expanded lunch menu attracts customers throughout the day as opposed to in the past, when sales were concentrated only in the peak early morning period.

[132] Some of the Affiant Franchisees acknowledged that the profit margins on Lunch Menu items were lower than other items, such as coffee, due to higher product and labour costs, but said that they were still able to make a profit on these items. They said that Lunch Menu revenues were an important part of their business. The evidence of franchisee Dale Reinke spoke to the value of the Lunch Menu in bringing customers into the store during off-peak hours:

The main advantage of the lunch menu is its essential role in maintaining day-time, and in particular mid-day, customer flow. The increased lunch-hour customer volume has augmented our traditional early morning peak period, and the lunch items have proven popular with customers who work night shifts as well.

[133] Graham Oliver made similar observations:

When I first became a Tim Hortons franchisee twelve years ago, the lunch menu at my store consisted of sandwiches, soups and chili. Since that time, the lunch menu has been consistently expanded to include a variety of sandwiches, soups, bagels and combos while still keeping chili. The profit margins on lunch menu items are inevitably lower than on other items, such as coffee, due to higher product and labour costs. However, franchisees are still able to make profits on lunch as luncheon items are sold at higher prices.

The expansion of the lunch menu has ensured that Tim Hortons remained competitive. Unlike some of our competitors who have limited their menu to coffee and donuts, Tim Hortons has become regarded as a food option for every meal of the day. Prior to the expansion of the lunch menu (beginning in the late 1980's), traffic at stores was very slow after 11 a.m. The business was essentially a

morning coffee and snack operation. However, after 11 a.m., the stores were still incurring overhead costs while not making any significant sales. Today, the lunch time slot is one of the busiest times of the day in my stores. The expanded lunch menu has helped to create a consistent flow of traffic throughout the day.

In addition to the profits that franchisees receive from sale of lunch menu items, franchisees are also profiting from the increased goodwill that is generated from satisfied customers at lunch and from other items, such as coffee, that are purchased during those lunch hours.

I verily believe that all franchisees would agree that we are still making profits on lunch, and that the expanded lunch menu has allowed us to become the competitive business that we are today.

[134] There has been a debate between the parties concerning the pricing of Lunch Menu items. The plaintiffs maintain that due to high ingredient costs, they are required to sell Lunch Menu items at a loss. The plaintiffs' expert, Mr. Fisher, disputes the contention that the sale of Lunch Menu items promotes the sale of other, more profitable, foods and beverages.

[135] Tim Hortons says that the plaintiffs' accounting methodology is flawed and that, in any event, the plaintiffs do not properly account for complementarity of demand – a customer who buys a sandwich with a small margin or even a negative margin may also purchase a coffee or soft drink with a high margin, with the result that the sandwich makes a positive contribution to profits. It also says that the accounting approach followed by Mr. Garland is flawed, because he allocates all the discount of “combo” prices to the food items and fails to apply it to the drink items as well. Tim Hortons says that this approach tends to make the food items appear unprofitable whereas, when allocated across all the items in the “combo”, the franchisee makes a profit. Even the plaintiffs' own expert, Mr. Rosen, acknowledges that the incremental sales of donuts, beverages and other items that are included in lunch “combos” should be considered in determining whether the Lunch menu is profitable.

[136] It is not necessary for me to resolve the debate about whether the Lunch Menu is profitable for the plaintiffs or for every franchisee. For the reasons set out below, it is my conclusion that Tim Hortons has the contractual right to require all franchisees to sell the Lunch Menu, just as it has the right to require franchisees to sell every other menu item. Franchisees are not entitled to pick and choose between menu offerings and to sell only the most profitable ones.

[137] It is also my conclusion that no franchisee has a contractual right to sell every one of the numerous items on its menu at a profit. If it loses money on the Lunch Menu, it makes it up on the sale of other items, such as breakfast sandwiches or the “Bagel BELT.” It also makes it up on the sale of coffee, tea and other beverages.

[138] I also conclude that the Lunch Menu has been developed by Tim Hortons for perfectly rational business reasons, having regard to its own interests and the interests of its franchisees, with due consideration of the opinions of franchisees through the Advisory Board in the selection and pricing of Lunch Menu items. While Mr. Garland, Mr. Jollymore and Mr. Fisher may disagree with Tim Hortons' Lunch Menu model, and with the pricing of specific items, those matters are within the reasonable business discretion of the franchisor. It is quite apparent from the evidence of the Affiant Franchisees that many of them agree with Tim Hortons' rationale and are reasonably content with their rate of return. Although Mr. Garland did not share this view, Tim Hortons gave reasonable consideration to his opinions, but in the end simply did not agree with him.

[139] I will now summarize the key conclusions of the expert witnesses called by both sides. I will begin with the plaintiffs' expert evidence, starting with Mr. Fisher.

G. The Plaintiffs' Expert Evidence

1. Evidence of Douglas Fisher – Defendants' Motion to Strike

[140] The plaintiffs seek to introduce expert evidence from Mr. Douglas Fisher, the principal of a food service and franchise management consulting firm. Mr. Fisher's initial expert affidavit was 187 pages long and ran to 618 paragraphs. The defendants move to strike the affidavit on the ground that Mr. Fisher has exceeded the bounds of proper expert evidence because he has:

- engaged in the interpretation of the franchise agreement;
- expressed opinions for which there is no factual foundation;
- purported to make findings of fact on contested matters;
- engaged in impermissible advocacy; and
- expressed opinions on matters for which he has no expertise.

[141] The key conclusions expressed by Mr. Fisher, for the purposes of the motions before me, are:

- (a) the cost of an unfinished donut to the plaintiffs and the class members tripled as a result of the Always Fresh Conversion, from about 6 cents per donut to nearly 18 cents per donut and this increased cost was not offset by reductions in labour, waste and other operating expenses and failed to reflect the economies of scale that should have been created by Maidstone Bakeries;
- (b) contrary to reasonable commercial practices, Tim Hortons entered into the joint venture agreement to build the Maidstone Bakeries without a clear analysis of the

impact of the cost of donuts on franchisees or was indifferent as to what the cost was going to be;

- (c) Tim Hortons' communications with franchisees in connection with the Always Fresh Conversion were inconsistent with reasonable commercial practices and the financial numbers used to project the savings to franchisees were wrong;
- (d) the plaintiffs' food costs for Lunch Menu items were in the range of 51.5% to 54.6% in 2008, and when combined with paper and other operating costs associated with preparing and selling the Lunch Menu, resulted in a negative contribution to the plaintiffs' operating profits, while at the same time benefitting Tim Hortons through royalty payments on sales and mark-ups on ingredient sales;
- (e) as a result of his examination of the stores operated by Mr. Garland and the plaintiffs, Mr. Fisher concluded that the Lunch Menu does not significantly increase the sales of higher profit items and does not offset the losses that are incurred by franchisees as a result of selling the Lunch Menu;
- (f) it is commercially unreasonable for Tim Hortons to require that franchisees sell the entire category of Lunch Menu items at an operating loss; and
- (g) the Always Fresh Conversion and the low price of the Lunch Menu eliminated profits to the plaintiffs and to class members and caused economic harm to them.

[142] Mr. Fisher also calculated that, examining the sale of baked goods as a category, the plaintiffs experienced a negative contribution to operating profit of - 4% (negative four percent) in 2005 and, in the same time period, the Affiant Franchisees whose records he examined came close to breaking even on the sale of baked goods at -0.08% (negative zero point zero eight percent). He calculated that the situation had improved somewhat by 2008, in that the plaintiffs were basically breaking even on the sale of baked goods (zero contribution to operating profit) and the Affiant Franchisees made a nominal profit of 1.1%.

[143] He also concluded that the lunch prices charged by Tim Hortons are significantly lower than those charged by its competition for similar products. It was his opinion that Tim Hortons offered an excellent quality sandwich at a very low price and that the price/value relationship of the Tim Hortons sandwich was better than its major competitors. It was his opinion that if franchisees were able to charge higher prices for Lunch Menu items, they would make a better profit. He concluded as well that the sale of Lunch Menu items did not promote sales of other, more profitable, menu items.

[144] One of the most significant conclusions that Mr. Fisher makes in his report, in my view, is in response to a sworn statement by Mr. O'Rourke of Tim Hortons that Tim Hortons believes that its franchisees receive "a return on investment for our store owners that is unmatched in the

quick service restaurant industry.” Mr. Fisher did not contest this statement. On the contrary, he acknowledged that Tim Hortons franchisees receive a reasonable margin, on average. He stated:

... [Tim Hortons] provides a reasonable margin to its franchisees on average, but that is not a reason to have the franchisees work a Lunch Menu without any benefit for themselves or to serve donuts, where both significantly profit [Tim Hortons], while providing the franchisee with significantly less profit than was once available to the franchisees in the case of donuts and no profit in the case of lunch.

[145] This acknowledgment is significant. Mr. Fisher acknowledged that Tim Hortons franchisees receive, on average, a reasonable level of profit and a reasonable return on investment. His argument – and I use that term intentionally – is that Tim Hortons should have shared more of the profits with its franchisees.

[146] At the same time as making this acknowledgment, however, Mr. Fisher could not resist assuming the role of advocate, something that occurs throughout his affidavit. This is perhaps not surprising, as the evidence shows that soon after this action was commenced, Mr. Fisher contacted Tim Hortons, unsolicited, and attempted to obtain a retainer, suggesting that he could assist in “stifling this matter early on”. I agree with the submission of Tim Hortons that this sort of conduct by a putative expert should lead the court to approach his opinion with some degree of skepticism.

[147] One of the key areas where Mr. Fisher, and Mr. Garland differ from Tim Hortons is with respect to what Mr. Fisher calls “product and product category analysis”. Tim Hortons takes the view that the franchisee’s profit margin should be analyzed based on its overall food costs from all products. As expressed by Mr. O’Rourke, Tim Hortons Director, Financial Analysis, Franchise Operations, the rationale is simple: you cannot tell whether a customer who bought a donut and a coffee would have bought the donut if coffee was not available and vice versa. What matters to Tim Hortons, and what Mr. O’Rourke says really matters to franchisees, is the profit on the sale of both items. In Mr. O’Rourke’s words:

What Tim Hortons looks at is the margin based on the overall food cost from all products. This is for a simple reason. It is impossible to know whether you would have sold the coffee or donut that you did at Lunch if you didn’t also sell the soup or chili that the customer came to the store to buy. A reasonable conclusion is that if you did not offer the soup and sandwich, the customer likely would not have come to the store but would have gone somewhere else and so you would not have sold the coffee, tea, other beverage or accompanying donut. There are any number of variations of this theme as, for example, in the morning would you have sold the

coffee if you didn't have the donut or vice versa and also the same question arises as to the breakfast sandwich.

[148] Mr. Fisher does not agree with Tim Hortons' accounting methodology or its conclusions. It is his evidence that all restaurants should be concerned about the contribution margin of each item served and that all major restaurants track their sales and profit margins by item (such as a donut, a bagel, a coffee or a sandwich), by category (such as lunch or breakfast) and by the overall menu. He says that:

Smart restaurant operators try to sell those items that have the highest contribution to overall profit and reduce the amount of items that have a lower contribution to sales. This is managed through suggestive selling techniques, menu placement techniques and advertising. Certainly few, if any, restaurants promote items that provide a minimal contribution or have a negative impact on operating profit.

[149] Mr. Fisher says that Tim Hortons should be doing his form of menu analysis, which would show that franchisees rely heavily on coffee and other drinks as their most significant source of profit. If it took his approach, it would presumably increase the retail price of Lunch Menu items to allow the franchisee to make more money, discontinue the sale of unprofitable menu items, and either reduce the price at which franchisees buy the par baked donuts or increase the sale price of donuts or discontinue the sale of donuts.

[150] The defendants say that Mr. Fisher's affidavit should be struck. In *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049 (S.C.J.), I dealt with a similar motion and set out the principles applicable to expert evidence generally and on a certification motion in particular, at paras. 65 – 76. I adopt those observations for the purposes of this proceeding.

[151] The objections made by the defendants are as follows:

- (a) large portions of Mr. Fisher's affidavit are unnecessary, because they fall within the experience of the trier of fact and do not require evidence of an expert;
- (b) the evidence of Mr. Fisher includes advocacy dressed up as opinion;
- (c) the evidence contains legal conclusions, including conclusions as to the interpretation of the franchise agreements that are at issue in this proceeding;
- (d) the witness has engaged in fact-finding – rather than proceeding from assumptions, as an expert should, Mr. Fisher has

set out on a broad-ranging fact-finding expedition and purports to come to expert opinions based on his personal observations of the facts;

(e) he has expressed opinions that are not based on underlying proven facts; and

(f) he gives opinions based on financial and accounting issues that are not within his expertise.

[152] There is considerable merit to the defendants' objections to Mr. Fisher's evidence. Without in any way being exhaustive, the following are some examples:

- he conducted his own investigation into customer complaint “web chat pages” on the internet to refute the suggestion of Tim Hortons that the Always Fresh baking method resulted in improved product quality;
- he frequently stated his own factual observations based on his personal inspections or experiences of Tim Horton's stores;
- he made observations to the effect that Tim Hortons' conduct was not consistent with “reasonable commercial standards” without stating what those standards are, whose standards they are, whether they are observed by others and, if so, how they are observed, and why they are reasonable – it became apparent that Mr. Fisher's use of the term “reasonable commercial standards” simply meant his opinion about what reasonable commercial standards are, or should be;
- he engaged in frequent advocacy, critiquing the evidence of Tim Hortons and its experts;
- he resisted no opportunity to challenge an assertion made by Tim Hortons – for example, in responding to Tim Hortons' evidence about the difficulties in retaining skilled bakers, he stated: “I do not believe that one would need a ‘trained baker’ to work at a Tim Hortons but rather someone willing to ‘bake’ who would be called a ‘baker’ and would be responsible for the baking process” – he follows this statement with a recitation of information provided to him by his wife concerning bakers' wages; and

- he frequently expressed opinions without giving any foundation for his opinion.

[153] Mr. Fisher's opinion is prolix in the extreme, largely because he does not confine himself to expressions of opinion based on assumed facts or facts clearly established by other evidence. Instead, he undertakes his own fact-finding mission, relying on facts that have not been proven. His affidavit also includes improper legal analysis and contract interpretation and improper advocacy.

[154] In the final analysis, I find Mr. Fisher's evidence of little value on the motions before me. Whatever Mr. Fisher's opinion may be about how the Tim Horton System should be run, it is Tim Horton's right to determine how that system will be run. Tim Hortons must conduct itself in accordance with its contractual undertakings under the franchise agreement and with its other legal obligations, including its duty of good faith and fair dealing in the performance of the agreement; Mr. Fisher's opinion about how Tim Hortons should manage its menu, price its products, conduct its accounting, and split its profits with franchisees is interesting but irrelevant.

[155] I will discuss below the duty of a franchisor to act in good faith and in accordance with reasonable commercial standards in the performance of the franchise agreement. I do not accept Mr. Fisher's evidence, however, that it is "commercially unreasonable" for Tim Hortons to consider the franchisees' overall profit picture, as opposed to his approach using "category cost analysis". The latter approach may be appropriate for a single restaurant or even for a chain, but that does not mean that it is unreasonable for a franchisor to focus on the big picture. If the franchisor reasonably believes that an economically-priced lunch selection is a good way of attracting customers in off-peak hours, helps to cross-sell other profitable products, and builds customer loyalty, then, subject to the terms of its contracts with its franchisees, it is entitled to price the ingredients as it sees fit, having regard to the franchisees' operations as a whole, and the return on investment they receive.

[156] In summary, although I do not propose to strike Mr. Fisher's affidavit, I give his evidence little weight.

2. Evidence of Howard Rosen

[157] The plaintiffs have adduced expert evidence of Mr. Howard Rosen, C.A., of FTI Consulting Canada ULC, a chartered business valuator. In summary, it was Mr. Rosen's opinion, based on a preliminary assessment of the available evidence, that the plaintiffs had suffered an economic loss as a result of the Always Fresh Conversion, that the losses were capable of being analyzed as a common issue, and that the gains realized by Tim Hortons as a result could be calculated on an aggregate basis. With respect to the *Competition Act* claims, Mr. Rosen opined that the plaintiffs had suffered an economic loss due to the mark-ups they paid on Always Fresh products, that damages were capable of being calculated on an aggregate basis and that the gains of Tim Hortons could be analyzed as a common issue and calculated on an aggregate basis.

[158] With respect to the Always Fresh Conversion, it was Mr. Rosen's opinion that the cost of a finished donut to a franchisee prior to the conversion was in the range of from four and a half cents to eight and a half cents each. By his calculation, after the conversion there was an increase between 140% and 330% to just over nineteen cents. He concluded that the financial information provided by Tim Hortons did not establish that these increased costs had been offset by savings in labour and other costs.

[159] Mr. Rosen also concluded that class members had suffered an economic loss as a result of the mark-up of the price of donuts and timbits from Maidstone Bakeries. He concluded that the total costs of producing a donut at the Maidstone facility was approximately 10 cents on average. Maidstone then charged CillRyan a price of between 11 cents and 12 cents during the period 2003 to 2009, which Mr. Rosen accepts as a reasonable arm's length price. After paying Maidstone for the donut, CillRyan then invoiced the distributor at a different price, to which the distributor added its own mark-up to the franchisee.

[160] Mr. Rosen concluded that CillRyan charged distributors 15.8 cents per donut in 2003 and this was increased to 16.3 cents in 2003 and 2009. The price initially paid by franchisees to the distributors from 2003 to March 2007 was 17.9 cents per donut. From March 2007 onward, it was 18.3 cents.

[161] It was Mr. Rosen's opinion that the mark-up by CillRyan of the donut and timbit price did not reflect any significant value added to the product, was in excess of fair value, and was therefore excessive and a detriment to franchisees, causing them economic loss. He concluded that Tim Hortons made an extraordinary return on its investment in CillRyan and it made a further return, in some cases, in its capacity as a distributor of par baked products in Ontario.

[162] It was also Mr. Rosen's preliminary opinion that there was evidence to establish that the Lunch Menu resulted in negative earnings for that category, even when the sale of incidental beverages was taken into account, and that the loss from the Lunch Menu could be determined on a common and aggregate basis.

3. Evidence of Andy Baziliauskas

[163] Mr. Baziliauskas is a consulting economist, employed by Charles River Associates, specializing in competition issues. He expressed the opinion that there was a workable methodology for determining, on a class-wide basis, whether class members suffered economic loss as a result of Tim Hortons' alleged breaches of the *Competition Act*. Essentially, it was his opinion that a "but for" price could be determined for donuts and timbits – namely, the price that franchisees would have paid "but for" the alleged price maintenance and price fixing by Tim Hortons. This price could then be compared to the actual price paid by franchisees.

[164] Mr. Baziliauskas was asked to assume that Maidstone sold the products to CillRyan at an average price of 12 cents and that CillRyan then sold the products to distributors (including Tim Hortons, after 2006, for distribution in Ontario) at a price of about 16 cents each, which he

refers to at the “CillRyan Mark-up” or the “TDL Rebate”. He also assumed that donuts were sold by the distributors to franchisees at a price of between 17.9 cents and 18.3 cents from 2002 to the present. He further assumed that Tim Hortons controls or influences the supply and distribution chain and the prices at which the products are sold by:

- its control over the specifications of the products and their prices;
- its ability to require the franchisees to purchase the products from designated suppliers and distributors;
- its control of the price, including the price at which Maidstone sells the products to CillRyan, the price at which CillRyan sells to distributors, the rebates its receives from suppliers and distributors, and the prices charged by distributors to franchisees; and
- the practical inability of franchisees to negotiate discounts in prices paid for the products and their inability to purchase the products from other sources.

[165] Mr. Baziliauskas opined that the actual prices paid by franchisees, the “but-for” prices and the resulting overcharges could be determined on a class-wide basis. The “but-for” price would be determined by deducting from the actual price the amount of the CillRyan mark-up that was found to be unreasonable and the amount of any rebates to TDL that were found to be unreasonable.

H. Tim Hortons’ Expert Evidence

1. Evidence of Roger Ware

[166] The defendants have tendered affidavit evidence from an expert economist, Professor Roger Ware of Queen’s University. Professor Ware gives evidence concerning the economic principles of franchising, noting that as the creator of the “brand”, the franchisor obtains returns on its innovation that are not necessarily shared with the franchisees. It was his opinion that Tim Hortons, as a prudent franchisor, would make production and pricing decisions to enhance the long-term value of its brand and that the success of individual franchisees would be integral to the long-term success of the brand. Accordingly, he describes the relationship between the franchisor and franchisee as symbiotic, in that the success of one depends on the success of the other.

[167] In general, he viewed the Always Fresh baking method and the Lunch Menu as appropriate business innovations in the development of the Tim Horton system and as positive

developments for franchisees. It was his opinion that as the “innovator” of the Always Fresh baking method, Tim Hortons was entitled to receive a return from the innovation.

[168] Professor Ware opined that the alleged “harm” to franchisees as a result of these innovations could not be calculated on a common basis because financial performance could only be determined on an individual basis.

[169] Professor Ware also expressed opinions concerning the *Competition Act* claims. With respect to the price maintenance claim, he thought that the setting of wholesale prices for the products supplied by Maidstone is simply part and parcel of normal business behaviour of every supplier in a vertical chain and is not an anticompetitive act. The determination of Maidstone’s price is not an attempt to influence the “price at which any other person ... supplies or offers to supply the product”.

[170] Professor Ware’s opinion, as well, is that Tim Hortons’ contractual arrangements with its distributors, such as Gordon Food Service (“GFS”), and the royalties it receives from distributors, are not price maintenance. Tim Hortons’ agreements with its distributors put a ceiling on the mark-up that the distributors can charge to franchisees.

[171] In a reply affidavit, Professor Ware disputes the evidence of the plaintiffs’ expert, Mr. Fisher, to the effect that the Always Fresh Conversion has eroded franchisees’ profits. He also challenges the evidence of both FTI and Dr. Baziliauskas, noting that their calculations of the “but-for” prices charged for the Always Fresh donuts and timbits do not properly account for the fact that Tim Hortons is entitled to make a return on its innovation.

2. Evidence of KPMG

[172] The defendants engaged KPMG Forensic Inc. (“KPMG”) to review and critique the report of Mr. Fisher. In summary, KPMG points out that Fisher has no professional accounting expertise. It says that his calculation of donut costs, both before and after the Always Fresh Conversion, and his calculations of the costs of Lunch Menu items are “fundamentally flawed”. It also challenged Mr. Fisher’s conclusion that the results of his analysis could be extrapolated to all class members.

[173] In addition, KPMG commented on the FTI report tendered by the plaintiffs, specifically on FTI’s conclusion that the price charged to franchisees for the donuts between 2003 and 2009 was excessive. KPMG was of the opinion that FTI’s analysis failed to account for the significant risks undertaken by CillRyan, the functions it performed and its ownership of and access to intangible assets, including know-how and the right to produce the par baked goods, including the recipes for the products.

[174] In particular, KPMG disagreed with FTI’s conclusion that the “mark-up” charged by CillRyan to distributors was excessive. It noted that CillRyan was entitled to compensation for functions that it performed and risks it assumed. The functions it performed included: taking

orders, forecasting, pricing, accounts receivable, marketing, purchasing and distribution, research and development, information technology, financing, and the development, acquisition and protection of intellectual property. Although some of these functions may have been outsourced to Tim Hortons, the latter was paid for the services and the responsibility for them remained with CillRyan.

[175] The risks assumed by CillRyan included the market risk associated with the forecasting and pricing of the products produced at Maidstone, including risks related to changes in consumer tastes and demands. This is not an insignificant risk in view of trends towards healthy eating. As well, there are foreign exchange risks, credit risks and product liability risks.

[176] In summary, KPMG concludes that considering the functions performed by CillRyan and the risks it assumed, it was entitled to make a profit on the price that was charged to distributors.

[177] In a further report, dated June 10, 2011, KPMG commented on FTI's report dated May 4, 2011. It expressed the opinion that the economic effect of the Always Fresh Conversion and the Lunch Menu on franchisees would be extremely difficult, if not impossible, to determine on a common basis due to the wide variety of factors affecting the financial performance of individual stores.

III. THE FRANCHISE AGREEMENT

[178] As described in Frank Zaid, *Franchise Law* (Toronto: Irwin Law Inc., 2005) at p. 15, a franchise agreement has certain core features:

Franchising is fundamentally a form of business investment and ownership governing the distribution and sale of goods or services. In a franchise, the franchisor typically develops a business system, in association with a trade-mark, and licenses the use of that system to a franchisee, for a period of time. The franchisee is required to conform to the standards of the system and to pay consideration to the franchisor, usually as a combination of an initial fee and ongoing payments in the nature of royalties based on gross sales of the products and services associated with the franchise system.

[179] The acquisition of a franchise can provide an independent business person with a number of benefits. These include:

- (a) a
access to a well-recognized brand that immediately brings customers into the store due to goodwill associated with the brand;

- (b) comprehensive business system with a proven track record; a
- (c) sophisticated and extensive business controls and accounting systems; s
- (d) high quality, consistent and dependable product; a
- (e) the ability to provide customers with affordable prices in a highly competitive industry; t
- (f) extensive market research, which enables franchisees to remain competitive in a constantly changing market; e
- (g) promotional marketing, which promotes new products; and n
- (h) access to ongoing support and assistance from the franchisor. a

[180] There are, of course, disadvantages to a franchise operation. The initial purchase of a franchise can be expensive and there are ongoing royalty expenses paid to the franchisor that would not be incurred by an independent business person.

[181] One of the greatest disadvantages of operating a franchise is loss of control. The franchisee loses the freedom of choice that is the hallmark of the independent business person. This loss of control is a necessary aspect of a franchised operation. Products, prices, menu offerings, store set-up, hours and methods of operation are strictly controlled to create the uniformity that is so vital to the success of the franchise as a whole.

[182] This loss of control can impact the costs of the operation. The franchisor generally tells the franchisee what products it must buy, from whom it must buy them, and at what price. This affects the franchisee's cost of sales, a key component of the franchisee's profitability. The fact that the franchisee might be able to buy exactly the same product from another source at a cheaper price is irrelevant. The law recognizes that the franchisor is not required to sell products to its franchisees at the lowest price available in the market. In Ontario, Regulation 581/00 under the *Arthur Wishart Act* provides that the franchisor must disclose to a prospective franchisee that "[T]he cost of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the goods and services available in the marketplace."

[183] Most Tim Hortons stores are operated by franchisees as “owners” of their own stores or by “operators” of corporately-owned stores. As mentioned earlier, the store “owners” pay an initial non-refundable franchise fee, rent, which is typically 10% of monthly sales, a service fee of 3% of sales, an advertising and marketing fee (4% stated, but in fact 3.5%). Those who “operate” corporate stores are also required to sign a franchise agreement, but instead of a franchisee fee they pay a royalty of 20% to Tim Hortons, as well as the advertising fee.

[184] Under the typical franchise agreement, Tim Hortons grants the franchisee a licence to operate a Tim Horton Shop for a term of ten years and to use the Tim Horton trademarks and the Tim Horton System. The franchisee agrees to devote 100% of its efforts to the business. It acknowledges the importance of uniform standards of quality and service and the need to operate in accordance with the system to increase the demand for Tim Hortons’ products and to protect and enhance the reputation and goodwill of Tim Hortons. Tim Hortons undertakes to maintain a continuing consultative relationship with the franchisee, to develop and improve its system over time and to ensure the integrity of the system as a whole.

[185] The recitals to the franchise agreement describe and define the “Tim Horton System”, confirm Tim Hortons’ development and ownership of that system, and acknowledge the franchisee’s agreement to operate in accordance with that system:

WHEREAS the Licensor, as the result of the expenditure of time, effort and money, has acquired experience and skill in the development, opening and operating of shops involving the production, merchandising and sale of donuts, muffins, tarts, cakes, pies, cookies, coffee and other related products utilizing a specially designed building with specified equipment, equipment layouts, interior and exterior accessories, identification schemes, products, management programs, standards, specifications and procedures and propriety trademarks and tradenames, all of which may be improved, further developed or otherwise modified from time to time and all of which are referred to in this Agreement as the "TIM HORTON SYSTEM".

AND WHEREAS the Licensor owns all rights to, interest in and goodwill of, and uses, promotes and licenses the trademarks and/or tradenames "TIM HORTONS" and "TIMBITS" and such other trademarks and tradenames as are now designated as a part of (and which may hereafter be designated in the Confidential Operating Manual or otherwise in writing as part of) the "TIM HORTON SYSTEM" (hereinafter called the "Licensor's Trademarks"), all of which the Licensor has adopted and used to identify Tim Horton Shop services operated pursuant to the "TIM HORTON SYSTEM" and of the food, beverage and other products sold or used therein, and which the Licensor continues to develop and use and control

the usage of, for the benefit and use of itself and its licensees in order to identify for the public by the association of the Licensor's Trademarks the source of goods and services marketed thereunder and to represent to the public the high and uniform standards of quality, cleanliness, appearance and service available at a Tim Horton Shop;

...

AND WHEREAS the Licensee understands and acknowledges the importance of Licensor's high and uniform standards of quality, cleanliness, appearance and service, the value of the "TIM HORTON SYSTEM" and the necessity of opening and operating the Licensee's Tim Horton Shop in conformity with the "TIM HORTON SYSTEM" and in accordance with the Licensor's standards and specifications, which form part of such System;

[186] I turn now to Article 3 of the franchise agreement, which is one of the provisions relied upon by the plaintiffs. It speaks, among other things, to the franchisor's advisory relationship with the franchisee, the provision of information concerning Tim Hortons' procedures, techniques and products, and the need to develop and improve these over time. It is quite obvious that in buying a franchise, one of the most important things that the franchisee acquires is the right to use the franchisor's carefully developed systems and products, the result of the franchisor's know-how, which have been successfully used by other franchisees over the years.

[187] Article 3 speaks to these issues under the heading "Initial and Continuing Services Furnished by the Licensor":

During the term of this license, the Licensor shall provide the following services to the Licensee:

...

(f) to maintain a continuing advisory relationship with the Licensee, including consultation in the areas of marketing, merchandising and general business operations;

(g) to provide a Confidential Operating Manual which contains the standards, specifications, procedures and techniques of the "TIM HORTON SYSTEM" and to revise, from time to time, the content of the manuals to incorporate new developments regarding standards, specifications, procedures and techniques;

(h) to use its best efforts to maintain high and uniform standards of quality, cleanliness and appearance at all Tim Horton Shops, thus protecting and enhancing the reputation of the Licensor and the demand for the products of the "TIM HORTON SYSTEM" and, to that end, shall conduct periodic inspections of the Tim Horton Shop licensed herein and periodic evaluations of the products sold and used therein

...

(i) to use reasonable efforts to develop new products compatible with the "TIM HORTON SYSTEM"; to review and approve any and all proposed advertising and promotional materials prepared by the Licensee for use in local advertising ...

[188] These are important provisions for both franchisor and franchisee. The franchisee is assured that it will receive advice and support from the franchisor, that it will receive an operating manual that will be modified from time to time, and that the franchisor will maintain high standards for the benefit of all franchisees and will develop new products compatible with the system. By doing so, the franchisor strengthens not only the individual franchisee, but the operation of the franchise system as a whole.

[189] Article 5, entitled "Duties of the Licensee", confirms the duty of the franchisee to comply with the Tim Horton System. It also acknowledges the need for uniformity in quality, appearance and techniques. This is important, of course, to the franchisor, but it is also important to every other franchisee who participates in the system. It provides in part:

The Licensee understands and acknowledges that every detail of the "TIM HORTON SYSTEM" is important to the Licensor, to the Licensee, and to other licensees in order to develop and maintain high and uniform standards of quality, cleanliness, appearance, service, facilities, and techniques to increase the demand for Tim Horton products and to protect and enhance the reputation and goodwill of the Licensor. The Licensee accordingly covenants as follows:

[190] Section 5.04, entitled "Supply of Product by Licensor", is of particular importance, in the submission of Tim Hortons. It obliges the franchisee to purchase all supplies from either the franchisor or from manufacturers designated by the franchisor. The evidence establishes that this is the case with all ingredients purchased by Tim Hortons franchisees, other than milk. The section acknowledges that Tim Hortons may make a profit or receive a commission or rebate as a result of such purchases and the franchisee expressly renounces any entitlement to it. It provides:

The Licensee shall purchase its supplies as follows:

a. the Licensee agrees that all containers, cartons, bags, napkins, spoons and other utensils shall be purchased from the Licensor or manufacturers as designated by the Licensor from time to time and shall comply with the specifications provided by the Licensor from time to time. The Licensee further agrees that any and all of the ingredients and commodities which may form any part of the products or the whole product of any food or beverage made, sold or consumed on the Premises and, without limiting the generality of the foregoing, including donut flours, toppings, fillings, frostings, flavourings, coffee, tea, chocolate, dairy products, vegetable oil, soft drinks and vending machines, shall be purchased from the Licensor or manufacturers as designated by the Licensor from time to time. Payment for all of the aforementioned ingredients, commodities and supplies shall be made on delivery or within fifteen (15) days of delivery as specified by the Licensor from time to time in the Licensor's sole and absolute discretion during the currency of this Agreement. It is hereby acknowledged by the Licensee that in purchasing such products or supplies from the Licensor or manufacturers designated by it, the Licensor will make a profit or receive a commission or rebate on the price of goods sold to the Licensee and the Licensee agrees that such profits, commissions or rebates shall be the sole and absolute property of the Licensor and the-Licensee shall have no claim to them in law or in equity ... [emphasis added]

[191] Section 5.06 returns to the obligation of the franchisee to conduct its operations and its store in conformity with standards established by Tim Hortons. This includes the obligation to use all ingredients, supplies and methods of production specified by the franchisor and to offer for sale all products prescribed by the franchisor. In other words, the franchisee has no right to pick and chose which of the franchisor's products it will offer in its shop. Were this not so, the franchisee might simply chose to offer the most profitable products, such as coffee, and refuse to offer less profitable products, such as, to pick an example that may not be apt, a ham and cheese sandwich. A Tim Hortons customer in Bracebridge who loves a ham and cheese sandwich for lunch is entitled to expect, when she goes to Toronto, that she will find her favourite ham and cheese sandwich on the menu and that it will taste just the same as it does in the store at home.

[192] Section 5.06 provides:

Section 5.06 - Operation of Tim Horton Shop

The Licensee shall operate the Tim Horton Shop in conformity with such uniform methods, standards and specifications as the Licensor may from time to time prescribe in the Confidential Operating Manual or otherwise in writing to insure that the highest

degree of quality and service is uniformly maintained, to refrain from any deviation therefrom and from otherwise operating in any manner which reflects adversely on the Licensor's name and goodwill or on the Licensor's Trademarks associated with the "TIM HORTON SYSTEM" and in connection therewith:

- (a) to use all materials, ingredients, supplies, paper goods, uniforms, fixtures, furnishings, signs, equipment, methods of exterior and interior design and construction and methods of product preparation prescribed by or which conform with the Licensor's standards and specifications;
- (b) to refrain from using or selling any products, materials, ingredients, supplies, paper goods, uniforms, fixtures, furnishings, signs, equipment and methods of product preparation which do not meet the Licensor's standards and specifications;
- (c) to offer for sale only such products as shall be expressly approved for sale in writing by the Licensor and to offer for sale all products that have been designated as approved by the Licensor;
- (d) to maintain at all times a sufficient supply of approved products for sale to the public.

[193] Article 6.00 deals with the "Licensor's Trademarks" and contains extensive provisions with respect to the use of the "Tim Horton" trademarks by the franchisee. This is not surprising, given the iconic nature of the "Tim Horton" name and coffee brand in Canada and the goodwill attached to them. Section 6.06, entitled "Tim Horton System", returns to the importance of the system not only to the franchisor but to the franchisee and to other members of the franchise chain. It provides:

The Licensee acknowledges that every detail of the "TIM HORTON SYSTEM" is important to itself, the Licensor and other licensees in order to develop and maintain high and uniform standards of quality and service, and hence to protect the reputation of Tim Horton Shops. Accordingly, the Licensee covenants: ...

[194] There follow various undertakings with respect to the use by the franchisee of the "Tim Hortons" name and trademarks.

[195] Article 7 deals with the Confidential Operating Manual. Section 7.00 provides:

In General:

In order to protect the reputation and goodwill of the "TIM HORTON SYSTEM" and to maintain uniform standards of

operation under the Licensor's Trade Marks, the Licensee shall conduct the Tim Horton Shop business in accordance with the Licensor's Confidential Operating Manual which consists of a set of manuals and guides, as they may exist from time to time (herein collectively called the "Confidential Operating Manual"), and the Licensor hereby lends to the Licensee such Confidential Operating Manual for the term of the license, receipt of one (1) set of which is hereby acknowledged by the Licensee.

...

[196] Section 7.03 in particular is relied upon by the plaintiffs. It is entitled "Changes in Confidential Operating Manual":

7.03(a) In order that the Licensee may benefit from new knowledge gained by the Licensor as to improved methods, procedures and techniques in the preparation, merchandising and sale of donuts and other food items, and in the operation of the Tim Hortons Shop, the Licensor may from time to time revise the contents of the Confidential Operating Manual and such other manuals and materials, if any, as it may develop and the Licensee covenants to forthwith comply with all changes to the contents of the Confidential Operating Manual and such other manuals and materials, if any, as the Licensor may develop, made by the Licensor from time to time during the term of this License Agreement provided that such changes shall not unreasonably alter the Licensee's rights or obligations under this Agreement.
[underlined wording does not appear in all agreements]

[197] I will return to this provision shortly. It contemplates that the franchisor will revise its system, as embodied in the Confidential Operating Manual, from time to time, to give effect to new knowledge and improvements in the business. Some, but not all of the franchise agreements in use at the material time, contained the underlined words at the end of the section, "provided that such changes shall not unreasonably alter the Licensee's rights or obligations under this Agreement." It appears that these words were added to licence agreements executed on or after October 1995.

[198] The plaintiffs rely in particular on the words: "In order that the Licensee benefit from new knowledge gained by the Licensor as to improved methods, procedures and techniques ...". They submit that any new methods, procedures or techniques introduced by the franchisor, and any changes to the Confidential Operating Manual, must be improvements that have a benefit to the franchisee. At certain points in the argument, the plaintiffs contended that "benefit" means a financial benefit. I will return to this submission.

[199] The franchise agreement contains, as might be expected, many provisions that are standard in a commercial agreement, including an “Entire Agreement” clause, section 16.02:

This Agreement, the documents referred to herein, and the exhibits attached hereto, if any, constitute the entire, full and complete agreement between the Licensor and Licensee concerning the subject matter hereof, and supersede all prior agreements written or oral. The Licensee acknowledges and agrees that it has not been induced to enter into this Agreement in reliance upon, nor as a result of, any statements, representations, warranties, promises or inducements whatsoever, whether written or oral and whether directly related to the contents hereof or collateral thereto, given or made by the Licensor, its officers, directors, agents, employees and contractors. No amendment, change or variance from this Agreement shall be binding on either party unless mutually agreed to by the parties and executed in writing.

[200] Under the heading “Licensee’s Acknowledgments”, section 16.13 provides that the franchisee acknowledges, among other things, that there are business risks associated with the venture and that no warranties have been given concerning the profits or success of the franchisee’s operation:

(a) The Licensee acknowledges that it has read this Agreement and that it understands and accepts the terms, conditions and covenants contained in this Agreement as being reasonably necessary to maintain the Licensor’s high standards of quality and service and the uniformity of those standards at all Tim Horton Shops and thereby to protect and preserve the goodwill of the Licensor’s Trademarks.

(b) The Licensee acknowledges that it has conducted an independent investigation of the business venture contemplated by this Agreement and recognizes that it involves business risks and that the success or failure of the venture is largely dependent upon the individual business abilities and efforts of the Licensee and general economic conditions which are beyond the control of the parties to this Agreement.

(c) The Licensee acknowledges that it has read and received a copy of this Agreement and has consulted with its legal and economic advisers prior to the execution of this Agreement.

(d) The Licensor expressly disclaims the making of, and the Licensee acknowledges that it has not received or relied upon, any

warranty or guaranty, express or implied, as to the potential revenues, profits or success of the business venture contemplated by this Agreement. The Licensee acknowledges that it has no knowledge of any representations about the license by the Licensor or its officers, directors, shareholders, employees or agents that are contrary to the terms herein and further represents to the Licensor as an inducement to its entry into this Agreement, that the Licensee has made no misrepresentations in obtaining this license.

[201] The franchise agreements included a provision that permitted Tim Hortons to suggest the prices at which products would be sold by franchisees, but franchisees were permitted to sell at lower prices, provided they did not sell at prices in excess of the maximum price suggested. This was in order to comply with provisions of the *Competition Act*, discussed below, directed at resale price maintenance. The relevant provision of the franchise agreement was as follows:

The Licensor may from time to time suggest prices for the products sold from or at the Tim Hortons Shop. Except as hereinafter provided, the Licensee shall have the sole right to determine the prices of any and all products sold from or at the Tim Hortons Shop and the Licensee shall not suffer in the Licensee's business relations with the Licensor or any other person controlled by the Licensor if the price suggestions are not followed. However, notwithstanding the foregoing, the Licensee shall not at any time offer any products for sale at prices in excess of the prices suggested by the Licensor for such products at such time.

[202] The Franchise Disclosure document provided by Tim Hortons to prospective franchisees, including to the plaintiffs, prior to the renewal of their agreements, provided:

The Licensee shall have the sole right to determine the prices of any and all products sold, subject however, to the fact that the Licensee shall not at any time offer any products for sale at prices in excess of the prices suggested by the Licensor for such products from time to time. Provided the price set by the Licensee does not exceed the suggested price, the Licensee may determine the price of any and all products sold from the Tim Hortons Store and the Licensee shall not suffer in its business relations with the Licensor or any person controlled by the Licensor for so doing.

[203] The foregoing evidence, and summary of the key contractual terms, provides some background for the plaintiffs' motion for certification and the defendants' motion for summary judgment. I will discuss additional evidence, as required, in the context of those motions.

IV. CERTIFICATION

A. Introduction

[204] The primary goal of the *C.P.A.* is to facilitate access to justice by making litigation practical for those who would find it difficult to litigate on their own. By permitting the aggregation of claims, a class action promotes judicial economy by avoiding duplication of fact-finding and legal analysis. It can also promote behaviour modification by holding wrongdoers accountable for their conduct, when they might not otherwise be brought to task. It is well-established that the *C.P.A.* should be given a generous interpretation in order to promote its objects: see *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, S.C.J. No. 67 at paras. 14-16; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 at paras. 36-38. As Chief Justice McLachlin said in *Hollick* at para. 16, the question at the certification stage is not whether or not the claim is likely to succeed, but whether the action can be appropriately prosecuted as a class action.

[205] The intersection of the *C.P.A.* and the *Arthur Wishart Act* has provided a fertile ground for the growth of franchise class actions. As I noted in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889 at paras. 46-59, there have been a number of class actions in Ontario in the past fifteen years involving claims by franchisees against franchisors. The existence of a group of franchisees, operating under a standard contract, can give rise to common issues of fact or law that are capable of resolution on a class-wide basis. The *C.P.A.* has proven to be an effective procedural tool to address concerns that individual franchisees are powerless, vulnerable and lack an effective voice.

[206] In this case, leaving aside the issue of the representative plaintiff, which I shall address shortly, the defendants did not really dispute that if the action survives summary judgment, it would be possible to identify a class and common issues that would make the action appropriate for certification. The defendants say that if the action does proceed as a class action, they might well assert common issues of their own.

[207] I turn to the test for certification and its application.

B. The Test for Certification

[208] Section 5 of the *C.P.A.* provides:

(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.

[209] The elements of this test 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 (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.). The causes of action, when applied to the circumstances of the representative plaintiff and the class, must give rise to common issues of fact or law that are capable of fair and manageable resolution on a class-wide basis. In the franchise context, as in most cases, the devil will be in the details, which include a precise definition of the class and carefully crafted common issues. Those areas, which in turn impact the preferable procedure requirement, have proven particularly troublesome in this case.

(a) Cause of Action

[210] The test under s. 5(1)(a) of the *C.P.A.* is the same as that applied on a motion to strike a pleading under rule 21.01(1)(b) of the *Rules*, 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?": see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at para. 33. The principles applicable to this test have been summarized in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* at para. 61.

[211] The defendants acknowledge that any causes of action that survive summary judgment will be appropriate for certification. I find that the plaintiffs have properly pleaded causes of action for breach of contract, breach of the duty of good faith and fair dealing at common law and under the *Arthur Wishart Act*, breach of the *Competition Act*, unjust enrichment and waiver of tort. Similar causes of action have been approved in other franchise cases: see for example

Landsbridge Auto Corp. v. Midas Canada Inc. (2009), 73 C.P.C. (6th) 10, [2009] O.J. No. 1279 (S.C.J.) (breach of contract, breach of common law and statutory duties of good faith); *Trillium Motor World Ltd. v. General Motors of Canada Ltd* (claims under *Arthur Wishart Act*); 2038724 *Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, aff'g (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.), rev'g (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (S.C.J.) ("*Quizno's*"), (breach of contract, conspiracy, breach of *Competition Act*); 1250264 *Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3371, [2011] O.J. No. 1373 (breach of contract, breach of duty of fair dealing under *Arthur Wishart Act*, unjust enrichment).

[212] I will discuss the causes of action in somewhat more detail when I discuss the summary judgment motion. Suffice to say for the moment, applying the "plain and obvious" test, the causes of action pleaded by the plaintiffs meet the requirements of s. 5(1)(a) of the *C.P.A.*

(b) Identifiable Class

[213] The class definition in this action has been a moving target. It continued to evolve during the hearing.

[214] The Statement of Claim alleges that there are currently 500 to 800 potential class members operating approximately 2400 Tim Hortons stores across Canada. The evidence of Mr. Clanchan of Tim Hortons is that, as of the end of 2008, there were nearly 3,000 Tim Hortons stores in Canada, owned by 950 franchisees.

[215] The plaintiffs propose two classes, broken down between those interested in the Always Fresh issues and those interested in the Lunch Menu issues. Obviously many class members will be interested in both issues.

[216] Class A will include franchisees who are concerned with the Always Fresh issue. Class A will be divided into two groups: Class A-1 is composed of those who converted from scratch baking to the Always Fresh method (the "Conversion Class"); Class A-2 will be composed of those who became franchisees after their stores were converted and who purchased Always Fresh baked goods. The proposed Class A definitions are as follows:

Class A-1 Members – The conversion class:

"Class A-1 Members", being all persons, including corporations, carrying on business or who carried on business in Canada as a Tim Hortons store under one or more License Agreement(s) or Operating Agreement(s) with the Defendant, the TDL Group Corp. or any of its predecessors ("TDL"), and who converted one or more stores from the full production model for donuts, Timbits, muffins and cookies to the Always Fresh frozen production model for donuts, Timbits, muffins and cookies including those persons,

including corporations whose License Agreement(s) or Operating Agreement(s) with TDL has since ended.

Class A-2 Members – Post-conversion franchisees purchasing AF Baked Goods:

“Class A-2 Members”, being all persons, including corporations, carrying on business or who carried on business in Canada as a Tim Hortons store under one or more License Agreement(s) or Operating Agreement(s) with the Defendant, the TDL Group Corp. or any of its predecessors (“TDL”), and who sold Always Fresh frozen donuts, Timbits, muffins and/or cookies at any time after January 1, 2002 including those persons, including corporations, whose License Agreement(s) or Operating Agreement(s) with TDL has since ended.

[217] Class B includes all franchisees selling the Lunch Menu. It is defined as follows:

Class B Members – The Lunch Menu

“Class B Members”, being all persons, including corporations, carrying on business in Canada as a Tim Hortons store under one or more License Agreements or Operating Agreements with the Defendant, the TDL Group Corp. or any of its predecessors (“TDL”), who have sold one or more Lunch/Soups and Sandwiches items since January 1, 2002, including those persons whose License Agreement(s) or Operating Agreement(s) with TDL has since ended.

[218] Some of the proposed common issues relate only to members of one class or sub-class and some relate to all members of both classes.

[219] There is no particular dispute about the principles applicable to the class definition requirement in s. 5(1)(b) of the *C.P.A.* As the plaintiffs point out, the purpose of the class definition, is to: (a) identify the persons who have a potential claim for relief against the defendants; (ii) define the parameters of the action so as to identify those persons who will be bound by the settlement or judgment if they do not opt out; and (iii) describe who is entitled to receive notice and relief under the *C.P.A.*: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 at para. 10 (Gen. Div.); *Tiboni v. Merck Frosst Canada Ltd.* (2008), 60 C.P.C. (6th) 65, [2008] O.J. No. 2996 at para. 76 (S.C.J.).

[220] The case law has established the following requirements of a class capable of certification:

- (a) membership in the class should be determinable by objective criteria without reference to the merits of the action;
- (b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;
- (c) the class must be bounded and not of unlimited membership;
- (d) there is a further obligation, although not onerous, to show that the class is 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;
- (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and
- (f) a proper class definition does not need to include only those persons whose claims will be successful.

[221] The defendants have identified some difficulties associated with these definitions. I will begin with the Class A franchisees.

[222] First, the defendants say that the Class A-1 group should be confined to those who were franchisees before March 6, 2001, the date when the Maidstone joint venture was announced. Persons who became franchisees after that date would have known that the conversion would be taking place and they would have entered into the franchise relationship knowing that Always Fresh was coming. They should simply be in Class A-2. I disagree. If a particular franchisee's knowledge of Always Fresh becomes relevant, it could be addressed as an individual issue.

[223] Second, the defendants say that the date of January 1, 2002, chosen as the commencement date for the A-2 Class, is arbitrary. According to the evidence, they say, the first conversions to "Always Fresh" franchises occurred in September 2002, so that should be the start date. I acknowledge that the date is arbitrary, but in the absence of clear evidence about when the first store converted, it is not unreasonable to pick a definitive, if arbitrary, start date.

[224] I would add a third concern. If Class A-2 is intended to include only those franchisees who acquired franchises that were Always Fresh from the outset (described as "post conversion franchisees"), the definition is too broad, because it would appear to cover members of Class A-1 as well. This concern can be addressed by describing Class A-2 as "all persons, other than members of Class A-1".

[225] Turning to Class B, the defendants have identified two problems with the Class B definition. First, the description of this group as franchisees “who have sold one or more Lunch/Soups and Sandwiches items” does not coincide with the common issues which refer to the “Lunch Menu”. During the course of the hearing, questions were also raised about the term “Lunch Menu”, which is not defined in any way and was not a term of art in the Tim Horton System. I agree that there should be symmetry between terms used in the class definition and the common issues, but this is simply a definitional issue. The “Lunch Menu” could be defined, for example, as “Soups, sandwiches, chili, stews and similar menu items”. Alternatively, a comprehensive list of Lunch Menu items could be prepared. The class could be defined as those “who have sold one or more Lunch Menu items since January 1, 2002”.

[226] Second, the defendants say that the commencement date of this class is entirely arbitrary and will give rise to limitation period issues. It is suggested that the date should be June 12, 2002, which would be 6 years prior to the commencement of the action. I agree with the plaintiffs’ response that the possibility that the claims of some class members may be time-barred does not make the class definition inappropriate. The class need not include only persons whose claims will ultimately be successful. The limitation period can be raised as an individual issue, if necessary.

[227] I would be reluctant to approve amendments to the proposed class definitions without further input from counsel. Had I not concluded that the plaintiffs’ claims should be dismissed on the summary judgment motion, I would have invited counsel to discuss at a case conference whether agreement could be reached on a class definition. Failing a consensus on a suitable class definition, I would invite further submissions, either in writing or on motion.

(c) Common Issues

[228] Section 5(1)(c) of the *C.P.A.* requires that the claims of class members give rise to common issues. These are “common but not necessarily identical issues of fact” or “common but not necessarily identical issues of law that arise from common but not necessarily identical facts” (s. 1).

[229] The parties do not take issue with the following principles concerning the common issues, taken from *Trillium Motor World Ltd. v. General Motors of Canada, Ltd.*, at paras. 97-98:

- (a) the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;
- (b) 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;
- (c) there must be a basis in the evidence before the court to establish the existence of common issues;

(d) there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;

(e) the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;

(f) 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 for (or against) the class;

(g) 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;

(h) a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

(i) where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;

(j) common issues should not be framed in overly broad terms; and

(k) the core of a class proceeding is the element of commonality - there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this [references omitted].

[230] I will add another requirement:

(l) the common issues should be clear, neutrally-worded and fair to both parties.

[231] We do not assist the common issues judge by producing common issues that are vague or ambiguous, that contain implicit factual or legal assumptions or that are biased in favour of one party or another.

[232] The common issues requirement has been described as a “low bar”: see *Cloud v. Canada (Attorney General)*, at para. 52. The plaintiffs need only establish that there is “some basis in fact” for the existence of common issues.

[233] Like the class definition, the common issues in this case have undergone wholesale revision. The common issues were originally set out in the notice of motion for certification in May of 2009 and were relatively straightforward. Somewhat revised common issues were delivered with the plaintiffs' factum in early August of 2011. There were some changes from the earlier version, but they were not complicated and the defendants were prepared to proceed with the certification motion in spite of the changes.

[234] On August 16, 2011, the second day of the hearing, the plaintiffs presented a revised set of common issues that were very different from the previous version. Those issues were revised yet again and a further set was delivered on August 17, 2011. In connection with the revision of the common issues, the class definition was changed, as discussed above. The defendants' counsel argued that the revision of the common issues had significantly altered the landscape of the action and requested an adjournment to address the new common issues. I granted that request. The balance of the certification motion, and the defendants' summary judgment motion, proceeded as scheduled.

[235] The plaintiffs delivered further revised common issues on August 24, 2011. The hearing was later reconvened to address these revised common issues.

[236] The common issues are attached as Schedule A to these reasons.

[237] Looking at the plaintiffs' claims from the perspective of 10,000 feet away, there are two obvious factual commonalities. First, there is a standard form of franchisee agreement which, with some variations, is applicable to all franchisees. Second, there is conduct of Tim Hortons that is common to all franchisees. Indeed, the essence of the franchise system is that the franchisor treats every franchisee in exactly the same way and every franchisee is expected to behave in exactly the same way. This common factual foundation gives rise to at least two broad categories of common issues: namely, common issues of the interpretation of the contract and common issues with respect to the legal duties of the franchisor to its franchisees under the contract, the common law and the *Arthur Wishart Act*.

[238] The plaintiffs have produced a rather lengthy and complicated set of common issues. During the course of submissions, I suggested that many of the common issues could be reduced to the following two questions, which I have edited slightly from those discussed at the hearing:

- A. Having regard to the contractual rights and responsibilities of both parties, was it an express or implied term of the franchise agreements or a requirement of the duty of good faith at common law or under the *Arthur Wishart Act* that Tim Hortons would supply ingredients to its franchisees at lower prices that they could obtain for the same ingredients in the marketplace?
- B. If so, did Tim Hortons breach that term or requirement?
- C. If so, how?

[239] These questions are at the core of the contractual and good faith issues concerning both the Always Fresh Conversion and the Lunch Menu. They are, on the one hand, issues of contract interpretation based on a contract that is common to the class and that has a common factual matrix. While there are undoubtedly some variations in the forms of contracts and in the factual matrix from franchisee to franchisee, the answer to the contractual interpretation question would take the parties a long way down the road to the disposition of the issue. These questions also raise issues concerning the statutory and common law duty of good faith. These are issues that can be answered in common based on the nature of the relationship between the parties and the statutory framework that applies to that relationship.

[240] If these common issues are answered in favour of the defendants, it will likely be the end of the inquiry, except for the *Competition Act* issues. If they are answered in favour of the plaintiffs, it is quite possible that some of the other common issues would fall by the wayside as unnecessary.

[241] Common issues similar to these were approved in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, above, and *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571, [2010] O.J. No. 3921.

[242] In general terms, therefore, I find that this action meets the requirements of s. 5(1)(c) of the *C.P.A.* and that common issues similar to the ones I have set out would satisfy the principles set out in (a) to (l), above.

[243] Had I not dismissed the plaintiffs' claims in summary judgment, I would have asked the parties to attempt to draft a set of agreed common issues. I will, however, review the common issues proposed by the plaintiffs.

Always Fresh Conversion

[244] The first series of questions deals with the alleged breach of express contractual terms in connection with the Always Fresh Conversion as it affected the Class A-1 members, the "Conversion Class".

Breach of Express Contractual Terms

1. *Did one or both Defendants breach s.7.03(a) of the License Agreement and/or Operating Agreement (collectively, the "Agreement") entered into by each Class A-1 Member by:*
 - a. *requiring the franchisees to undertake the Always Fresh ("AF") conversion;*
 - b. *following the AF conversion, requiring the franchisees to purchase the AF frozen donuts, timbits, muffins and cookies (the "AF Baked Goods") at commercially unreasonable prices;*

- c. *following the AF conversion, requiring the franchisees to purchase the AF Baked Goods at prices that were not offset by savings in labour, waste or operational savings.*

[245] As I have noted earlier, the plaintiffs interpret s. 7.03(a) of the franchise agreement to mean that any new methods, procedures or techniques introduced by the franchisor, and any changes to the Confidential Operating Manual incorporating those methods, procedures and techniques, must be improvements that are a benefit to the franchisee.

[246] The common issue as previously framed asked, in a rather convoluted way, whether the Always Fresh Conversion was a “benefit”. The defendants argued that whether the change to Always Fresh was a benefit was a question that could only be answered on an individual basis, looking to the circumstances of each particular franchisee. The plaintiffs met this attack by amending the common issue and they now say that this common issue is limited to financial benefits capable of objective determination and that there is no need for individual inquiry into whether the Always Fresh Conversion was a benefit to individual class members.

[247] The problem with the question as now phrased is that, instead of being explicit, the question now contains an imbedded implicit assumption that “benefit” in s. 7.03(a) of the franchise agreement means a financial benefit. It ignores the obvious fact that most changes made by Tim Hortons to the Confidential Operating Manual are likely to have both financial and non-financial consequences and a change could be a benefit without having a specific positive financial impact.

[248] As a general comment, common issues 1(b) and 1(c) suffer from the same shortcomings as many of the other common issues. They are not neutral. They are rolled-up issues that have unfair assumptions and vague terms bundled into them. They assume, as part of the questions, that franchisees were required to purchase Always Fresh ingredients at commercially unreasonable prices that were not offset by labour savings or other savings. Issue 1(b) uses the expression “commercially unreasonable price” without defining that term in any objective way.

[249] I will turn to the individual questions.

Issue 1(a): The Always Fresh Conversion

[250] Question 1(a) is unnecessary in light of the plaintiffs’ concession that Tim Hortons was entitled to implement the Always Fresh Conversion – to convert the stores from scratch baking to par baking. The plaintiffs’ complaint is with respect to the financial consequences of Always Fresh.

Issue 1(b): Selling Always Fresh Baked Goods at “Commercially Unreasonable” Prices

[251] The defendants say that this common issue, and the same common issue relating to the Lunch Menu, contain an imbedded and unfair assumption that Always Fresh products and the

ingredients for the Lunch Menu were sold at “commercially unreasonable prices”. They complain that the plaintiffs do not propose any common issue that addresses this question head-on – that is, that asks whether, as a factual matter, the prices of Always Fresh products and Lunch Menu ingredients were commercially reasonable.

[252] This contention points to the underlying flaw in these common issues. By assuming “commercially unreasonable prices” without defining this term, the common issues gloss over the problem that commercial reasonableness may mean different things for different franchisees in different circumstances.

[253] The defendants say that this inquiry would be inappropriate for certification. They say that it would entail the examination of the price of every product in Tim Hortons, in every different price zone across Canada, presumably in comparison with the market prices of other products, at various times, to determine whether the price at which each particular ingredient was sold, in every particular region, was commercially reasonable at every particular time.

[254] The defendants rely, in particular, on *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.* (2000), 138 O.A.C. 180 [2000] O.J. No. 3649 (Div. Ct.), rev’g (1999), 93 O.R.C. 66, [1999] O.J. No. 2973 (S.C.J.), in which the plaintiff claimed that the franchisor had breached its contractual obligation to supply products at a price that would be at a level “generally charged or realized by other competitive suppliers in the general market area.” The allegation was, as here, that the franchisor was overcharging its franchisees. In that case, there were only 56 stores in the franchise network.

[255] In setting aside the decision of the motion judge certifying the action, the Divisional Court found that there was no factual basis for the existence of a common issue regarding overcharging. In addition, it found that the proceeding would be unmanageable due to the need to examine and compare prices throughout the franchise network – at para. 28:

In order for each person to become a member of the class, he or she must succeed in showing not just what the charge was for a given commodity or a list of commodities supplied to them by Bulk Barn at specified times, but that it was available locally from other suppliers in their area at a lower price. In our view an action of this sort would be completely unmanageable.

[256] On the other hand, in *Quizno’s*, the Divisional Court was not concerned about the fact that the amount of loss or damage sustained by class members might vary from region to region or from time to time because of the “systemic” nature of the conduct potentially giving rise to liability. The system included a common contract, a common pricing system and a common distribution system. It included the addition of mark-ups and sourcing fees by the franchisor on every single product, with an additional mark-up being added by the distributor. In *Quizno’s*, the complaint was not just in relation to some products acquired by franchisees; it related to all the

products they sold. Moreover, the plaintiff alleged that some forty percent of Quizno's franchisees were operating at a loss.

[257] The majority of the Divisional Court held in *Quizno's* that the breach of contract claim gave rise to common issues. The issue of the commercial reasonableness of the defendants' mark-ups and sourcing fees could be addressed in common by examining the franchisor's conduct, the services it provided and industry standards.

[258] The majority also held that the question of whether the franchisor had breached an express term of the contract by charging commercially unreasonable prices could be addressed as a common issue, in spite of the fact that proof of damages could not necessarily be made on a class-wide basis.

[259] In my view, a common issue could be structured in this case to ask whether Tim Hortons breached the franchise agreement by requiring the plaintiffs to purchase Always Fresh baked goods at the price stipulated by Tim Hortons from time to time.

Issue 1(c): Prices Not Offset by Savings

[260] Question 1(c) asks whether Tim Hortons breached the franchise agreement by requiring the franchisees to purchase the Always Fresh Baked Goods at prices that were not offset by savings in labour, waste or operational savings. That question cannot be answered without determining whether a franchisee in fact experienced labour savings, reduced waste, operational savings or other benefits that offset the increased cost. Not only does the evidence of the Affiant Franchisees and Mr. Gilson clearly establish that Always Fresh had beneficial effects in these areas, but the evidence also establishes that the obvious fact that the profitability of a franchise depends on a variety of circumstances, including the efficiency of the operator, the involvement of the owner, the sales mix, the location of the store and the presence of competition. For this reason, question 1(c) is not an appropriate common issue. Nor is question 2(e).

[261] It is possible that a common issue could be worded to ask whether section 7.03(a) of the franchise agreement permits the franchisor to make changes to the Confidential Operating Manual to incorporate improved methods, procedures and techniques in the preparation, merchandising and sale of donuts and other food items that are not for the financial benefit of franchisees. If the answer is "no", the answer would not advance the inquiry, because it would still be necessary to examine the circumstances of each franchisee to determine whether the consequence of the change was beneficial.

2. *Did one or both Defendants breach s.3.00(f) or (i) of the Agreement by:*

- a. *representing to franchisees, through the Advisory Board members and directly, that they could deliver the frozen AF donut to the franchisees' stores for 11 to 12 cents;*

- b. *signing the JV agreement with IAWS Group plc (“IAWS”) on March 6, 2001 without reasonable analysis of the impact of the increased costs at the franchisee level;*
- c. *requiring the franchisees to undertake the AF conversion;*
- d. *following the AF conversion, requiring the franchisees to purchase the AF Baked Goods at commercially unreasonable prices;*
- e. *following the AF conversion, requiring the franchisees to purchase the AF Baked Goods at prices that were not offset by savings in labour, waste or operational savings;*
- f. *representing that the increased food cost of the AF Baked Goods would be offset by savings in labour, waste and other operational expenses;*
- g. *failing to take reasonable steps to consider and redress the commercially unreasonable prices of AF Baked Goods;*

Issues 2(a) and 2(f); Representations

[262] While the plaintiffs have withdrawn their cause of action based on misrepresentation, they re-introduce this issue in connection with the breach of contract and good faith claims.

[263] Common issues 2(a) and 2(f) ask whether Tim Hortons breached sections 3.00(f) and (i) of the franchise agreement by representing to franchisees that they could deliver the Always Fresh donut to the franchisees’ stores for 11 to 12 cents and by representing that the increased food cost of the Always Fresh Baked Goods would be offset by labour and other savings. The complaint really relates to the alleged breach of section 3.00(f), which requires the franchisor to maintain a “continuing advisory relationship with the franchisee.”

[264] The issue of misrepresentation comes up again in Common Issue 4, which asks whether these alleged representations were a breach of the duty of good faith and fair dealing.

[265] In my view, there is no basis in fact for common issue 2(a), but there is a basis for common issue 2(f). I will explain.

[266] There is no evidence that there was any common representation made to the class concerning an 11 or 12 cents Always Fresh donut. At its highest, there is some evidence of Mr. Gilson that he was told something by Mr. House at an Advisory Board meeting. The nature of this communication is not very clear, and it is denied by Mr. House and not recorded in the minutes of the Advisory Board. There is no evidence that any direct misrepresentation was made by Tim Hortons to either plaintiff. There is certainly no evidence of any written representation to any members of the class. Further, there is no evidence that any common representation was made to franchisees or that conclusions with respect to representations to the plaintiffs could be

extrapolated to all members of the class. Question 2(a) is not, therefore, an appropriate common issue

[267] Proposed common issue 2(f) stands on a slightly different footing, because there is evidence, including an acknowledgment by Tim Hortons, that franchisees were told that there would be increased food costs under Always Fresh, but that the savings would offset this cost. I would therefore approve common issue 2(f).

Issue 2(b): Signing Joint Venture Agreement

[268] The defendants object that this alleged breach of contract is not pleaded. I agree. In any case, the resolution of this issue is really irrelevant to the plaintiffs' claims unless they can establish that the price arising from the joint venture agreement was a breach of contract.

Issue 2(c): Requiring the franchisees to undertake the AF conversion

[269] For the same reasons set out under Question 1(a), there is no point to this question. The plaintiffs admit that Tim Hortons was contractually entitled to undertake the conversion.

Issue 2(d): Commercially Unreasonable Prices

[270] As I have observed in relation to issue 1(b), the question of whether a price is commercially reasonable is not capable of a common answer.

Issue 2(e): Prices not Offset by Savings

[271] Question 2(e) is not an appropriate common issue for reasons already discussed under Issue 1(c).

Issue 2(f): Representing Increased Food Cost would be Offset by Savings

[272] For the reasons set out above, a common issue based on representations would not be an appropriate common issue.

Issue 2(g): Failing to take Reasonable steps to Redress Commercially Unreasonable Prices

[273] This issue, as framed, contains an unfair embedded assumption that the prices were commercially unreasonable. It also contains an assumption that Tim Hortons had an obligation to redress prices that were commercially unreasonable. It might be appropriately phrased by asking whether Tim Hortons had a duty to consult with franchisees in connection with the Always Fresh Conversion, whether that duty included a duty to consult with them in connection with the price of the product and, if so, whether that duty was breached.

Breach of Implied Term

[274] The next common issue asks whether it was an implied term of the franchise agreement that ingredients would be supplied to franchisees at commercially reasonable prices and, if so, whether this term was breached.

3. *With respect to the Class A-1 Members:*

- a. *did the Agreement contain an implied term that the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers and distributors designated by the Defendants would be sold to the franchisees at commercially reasonable prices?*
- b. *if so, did one or both Defendants breach that implied term by requiring the franchisees to purchase the AF Baked Goods at commercially unreasonable prices?*

[275] The defendants object to these questions for several reasons. First, they say that the questions are not neutrally worded because they assume the existence of “commercially unreasonable prices”. This concern could be addressed by a simple change in the wording of question 3.b. to ask: “If so, did one or both Defendants require the franchisees to purchase the Always Fresh Baked Goods at commercially unreasonable prices?”

[276] Second, the defendants contend that this common issue is not consistent with the implied term that is pleaded in the Statement of Claim. I agree that there is some disconnect between the common issue and the pleading. The common issue refers to “commercially reasonable prices”. The pleading refers to “lower prices than the franchisees could obtain for the same products in the marketplace”. The plaintiffs plead in paragraph 15 of the Statement of Claim that one of the key ingredients of the Tim Hortons distribution system was that:

... the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers, suppliers and/or distributors designated by the Defendants were to be sold to the franchisees at lower prices than the franchisees could obtain for the same products in the marketplace in accordance with reasonable commercial standards due to the Defendants’ volume buying power.

[277] Paragraph 34 of the pleading contains the allegation with respect to an implied term:

In forcing the Plaintiffs and Class A-1 Members to convert to the Always Fresh system and in requiring the Class A-1 and Class A-2 Members to purchase the AF Baked Goods thereafter at inflated and/or commercially unreasonable prices, the Defendants breached the license agreements, including the implied term in accordance with reasonable commercial standards that the ingredients and commodities the Plaintiffs and Class A-1 and Class A-2 Members

were required to purchase from the TDL Distribution System would be sold to franchisees at lower prices than they could obtain for the same products in the marketplace, and therefore are liable for damages.

[278] The words “in accordance with reasonable commercial standards” have been inserted into the pleading, in the course of a previous amendment. It is not clear to me what they are intended to modify. It strikes me that the plaintiffs are attempting to bootstrap section 3(3) of the *Arthur Wishart Act*, discussed below, into the common issue. That provision imposes a duty of good faith and fair dealing on parties to a franchise agreement, including a “duty to act in good faith and in accordance with reasonable commercial standards” in the performance or enforcement of the franchise agreement.

[279] The third, and more substantive objection, made by the defendants to this common issue, which applies equally to the other common issues dealing with implied terms (Questions 5 and 11), is that the implication of a term requires a close examination, not only of the terms of the contract, but also of the circumstances in which it was made and of the underlying factual matrix. As a general proposition, terms implied based on the presumed intention of the parties have not been regarded as appropriate for certification, because they can only be implied where there is no evidence of a contrary intention, the ascertainment of which must be done on an individual basis.

[280] I will discuss the law of implied terms at some length when I come to the defendants’ motion for summary judgment. In *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491, McLachlan J., as she then was, concurring in the result, described implied terms as falling within one of three categories – terms implied as a matter of custom or usage, terms implied in law, and terms implied in fact: see also G.H. Treitel, *The Law of Contract*, 7th ed. (London: Sweet & Maxwell, 1987), at pp. 158-165. McLachlan J. noted that terms implied as a matter of fact are based on the presumed intention of the parties.

[281] *Nadolny v. Peel (Region)* (2009), 78 C.P.C. (6th) 4006, [2009] O.J. No. 4006 (S.C.J.) is an example of a case, in which a term based on the presumed intention of the parties was not found appropriate for certification. The plaintiff, a retired employee of the defendant Region, claimed that her former employer had breached an implied term of its contract with retirees by increasing the premium that they were required to pay for post-retirement health benefits. In finding that this claim was inappropriate for certification, Quigley J. observed at paras. 70-71, that the factual circumstances pertaining to each class member would have to be examined to determine whether it would be appropriate to imply a term:

In order to determine the content of the contract that was allegedly breached, all of the sources of information related to the terms of the contract will have to be considered, including written and oral communications, particularly where the alleged breach is of an implied, as opposed to an express term of the contract as it is in

this case. However, the jurisprudence shows that these types of cases are not amenable to certification. The Courts have repeatedly found, as Greer J. of our Divisional Court did in *Arabi v. The Toronto Dominion Bank* (2007), 233 O.A.C. 275 (Ont. Div. Ct.) at paras. 85-86, and at para. 91 in reliance on the Court of Appeal's decision in *G. Ford Home Ltd. v. Draft Masonry* (1983), 43 O.R. (2d) 401, that it is inappropriate to certify an action based on the existence of an implied term because "... the circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result it is clear that every case must be determined on its own particular facts."

In cases like this one, where the proposed common issues are dependant upon findings of fact that would have to be made with respect to each member of the class, success for one does not necessarily mean success for all absent the making of unfounded common assumptions. In these circumstances, the issues are not common. As in *MacLeod v. Viacom Entertainment Canada Inc. et al.* (2003), 28 C.P.C. (5th) 160 (Ont. S.C.J.) at para. 24, the Statement of Claim here does not identify express terms of the retirement benefits contracts that were allegedly breached. In addition, it would be inappropriate to determine "common" issues involving the breach of an implied term based solely on evidence of general practices adopted by the Region without regard to the knowledge and understanding of the individual retirees relative to their contractual relationship with it: *MacLeod*, at para. 24.

[282] There may be cases, however, in which the existence of an implied term does not depend on the individual knowledge, understanding or circumstances of the class member. An example is *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 (S.C.J.). That case involved the outbreak of Legionnaire's Disease at a home for the elderly operated by the City of Toronto. It was determined that the source of the outbreak was in an air conditioning cooling tower. It was alleged, among other things, that the City had breached a contractual and statutory duty to provide a safe facility for the residents. There was a standard form contract signed by residents, including a Bill of Rights that provided that every resident had the right to live in a safe and clean environment. The plaintiff contended that this gave rise to an implied contractual term to provide clean, uncontaminated air. Lax J. found, at para. 52, that the existence of a common issue concerning such an implied term was appropriate, because it could be determined without reference to the circumstances of each class member.

[283] The plaintiffs suggest that although the "early class action cases" (including *Arabi v. The Toronto Dominion Bank* (2007), 233 O.A.C. 275 (Div. Ct.) and *MacLeod v. Viacom Entertainment Canada Inc. et al.* (2003), 28 C.P.C. (5th) 160 (Ont. S.C.J.)) did not certify

common issues dealing with implied terms, the courts have taken a “more nuanced approach” in recent cases. They say that where an implied term is based on custom or usage, or where it arises as a legal incident of a particular class of contract, there is no need to examine the individual circumstances of the contracting party and it is appropriate to certify a common issue.

[284] The plaintiffs refer, in particular, to *Matoni v. C.B.S. Interactive Multimedia Inc.* (2008), 163 A.C.W.S. (3d) 701, [2008] O.J. No. 197 (S.C.J.), in which Hoy J., as she then was, certified a common issue asking whether the contract contained a term implied by custom or usage or as a legal incident of the particular class of contract. The plaintiff brought a proposed class action against a career college, claiming that it was an implied term of the contract that students who graduated from the dental hygiene program would be entitled to write the provincial accreditation exam. Justice Hoy held that it would not be appropriate to certify a common issue relating to an implied term based the “presumed intention” of the parties. She held, however, that it would be appropriate to pose a common issue concerning the existence of implied terms based on custom or usage, or terms that are incidents of particular classes of contracts, because the existence of such implied terms does not depend on the parties’ intentions. She stated, at paras. 113-116:

As noted above, the plaintiffs argue that class members' contracts with CBC included, in addition to the written registration agreement, certain implied terms. The heart of the plaintiffs' claim for breach of contract is the alleged breach of implied terms. They argue that the determination of the implied terms is a common issue.

Terms may be implied (1) based on usage or custom, (2) as the legal incidents of a particular class or kind of contract, or (3) based on the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the "officious bystander" test as a term which the parties would say that they had obviously assumed. When determining "presumed intention", the court must focus on the actual intentions of the parties, and not the intentions of reasonable parties. *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

Generally, it seems a term might be implied on either of the first two bases on a class-wide basis, depending on the nature of the term. The third basis, namely presumed intention, which focuses on the actual intentions of the parties, does not, however, appear in any event susceptible to determination on a class-wide basis.

My impression is that the plaintiffs' claim for breach of implied term is essentially founded on the second basis, and that they seek,

primarily, to argue that the implication of the term is required by the nature of the contract.

[285] A similar approach was taken by Veale J. in *Anderson v. Bell Mobility Inc.*, 2010 NWTSC 65, [2010] N.W.T.J. No. 60, certifying a common issue asking whether there was an “implied term, based on custom or usage or as the legal incident of a particular class or kind of contract” to provide a the services of a live operator in the case of “911” calls made through Bell Mobility. Veale J. declined to certify a common issue based on the presumed intention of the parties because, on the authority of *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, it would require evidence not just from the plaintiffs but from every individual class member.

[286] The plaintiffs also refer to *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, [2010] O.J. No. 716, in which I certified a common issue relating to an implied term, relying in part of the decision of Lax J. in *Glover v. Toronto (City)*, above. In *Fulawka*, it was alleged that the contracts of employment of members of the class included an implied term that they would be paid for overtime that they were “permitted or required” to work. The existence of the implied term was not based on circumstances unique to the class member but rather on the existence of a common overtime policy, a common contract and common statutory and legal duties that were owed to the class members.

[287] The plaintiffs attempt to squeeze the facts of this case into one or other theory of implied terms. On the one hand, they say that there is evidence, to which I will refer in the summary judgment motion, that it was the practice of Tim Hortons to source the best available price when purchasing ingredients and that such conduct is typically how franchisors operate. They say that this evidence, which focuses on the conduct of the defendant, could establish an implied term based on custom or as the legal incident to the particular contract. Alternatively, they say that this may be a case, like *Glover* and *Fulawka*, where the presumed intention or “business efficacy” test can be satisfied without reference to the evidence or circumstances of every contracting party.

[288] There is no basis in fact for the existence of a custom in the franchise business or the QSR business that franchisors invariably supply goods to franchisees at commercially reasonable prices or at prices lower than those available in the marketplace. Nor is such a term a legal incident of franchise agreements. At best, the evidence establishes that franchisors, including Tim Hortons, are generally able to acquire products at competitive prices due to their purchasing power, but there is no evidence at all that franchisors invariably pass on the benefit of such prices to their franchisees in the case of every product they sell to franchisees. Nor is there any evidence that franchisors customarily sell inputs to their franchisees at prices lower than the market price. Indeed, the regulation under the *Arthur Wishart Act* requires the franchisor to disclose that this will not be the case. For that reason, a common issue asking whether a term could be implied based on custom would not be appropriate.

[289] Nor would it be appropriate to ask whether a term could be implied based on “business efficacy” or the “officious bystander test”. Even if such a term might be implied based only on the terms of the contract, it would still be necessary to determine, as a factual matter, whether the presumed intention was consistent with the parties’ actual intention. This would require an examination of the entire factual matrix applicable to each franchisee.

[290] Put another way, the “officious bystander” might ask, “Surely it was your intention that the franchisee would be entitled to acquire inputs at commercially reasonable prices?” The parties might respond, “No, as a matter of fact we did not say that in the contract because we did not intend that result. If you look at our contract, the other documents we signed and exchanged over the years, as well as our entire course of dealing, you will see that we did not have that intent.”

[291] For these reasons, I would not certify the proposed common issue asking whether Tim Hortons breached an implied term of the franchise agreement.

Breach of Statutory and Common Law Duty of Good Faith and Fair Dealing

[292] Common issue 4 asks whether the conduct referred to in Question 2 constituted a breach of the common law and statutory duties of good faith and fair dealing:

4. *As a result of any of the conduct described in 2.a. to g. above, did one or both Defendants breach their duties to the Class A-1 Members:*
 - a. *under the Arthur Wishart Act (Franchise Disclosure), 2000 or similar statute, to act fairly, in good faith and in a commercially reasonable manner; or*
 - b. *under the common law, to act fairly, in good faith and in a commercially reasonable manner?*

[293] As a starting point, I note that these issues distort, slightly, the duty of a franchisor under the *Arthur Wishart Act*. The duty imposed under section 3(1) is one of “fair dealing” in the “performance and enforcement” of the franchise agreement and includes “the duty to act in good faith and in accordance with reasonable commercial standards” in that regard. The statute does not require that every interaction between the franchisor and the franchisee be subjected, in isolation, to a standard of “commercial reasonableness”. Still less does it require that the price of every commodity sold by a franchisor to the franchisee must be commercially reasonable. What the statute requires is that the franchisor must act in good faith and in accordance with reasonable commercial standards in the performance of the contract.

[294] The issue cannot possibly be addressed by looking at only one product supplied by the franchisor (the par baked donut) or even one category of products (the Lunch Menu) without considering the performance of the entire contract, including, for example, the profits made by the franchisee on other products, including products bearing the franchisor’s trade marks, sold

under the franchise agreement. I will discuss the issue in more detail when I come to the summary judgment motion.

[295] My comments with respect to Common Issues 2(a) to (g) apply equally to this common issue. There is no question that issues relating to the breach of the duty of good faith, whether statutory or at common law, could be appropriate common issues. As I have noted earlier, there have been a number of cases in this court in which those causes of action have been certified and appropriate common issues have been approved.

Post Conversion Franchisees – Breach of Implied Term

[296] The next group of issues, Common Issues 5 and 6, deals with the Class A-2 members, the so-called “Post-conversion Franchisees”, and asks similar questions with respect to breach of the alleged implied term (Question 5) and breach of the duty of good faith and fair dealing (Question 6).

5. *With respect to the Agreement entered into by each Class A-2 Member:*

- a. *did the Agreement contain an implied term that the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers and distributors designated by the Defendants would be sold to the franchisees at commercially reasonable prices?*
- b. *if so, did one or both Defendants breach that implied term by requiring the franchisees to purchase the AF Baked Goods at commercially unreasonable prices;*

[297] My comments with respect to Common Issue 3 apply equally to common issue 5.

Post Conversion Franchisees – Breach of Duty of Good Faith and Fair Dealing

6. *As a result of the conduct described in 5.b. above, did one or both Defendants:*

- a. *breach their statutory duties to the Class A-2 Members to act fairly, in good faith and in a commercially reasonable manner; or*
- b. *breach their common law duties to the Class A-2 Members to act fairly, in good faith and in a commercially reasonable manner?*

[298] My comments with respect to Common issue 4 apply to this Common Issue.

Class A-1 and A-2 – Breach of Competition Act

[299] The *Competition Act* common issues apply to both Class A-1 and Class A-2 members:

7. *In requiring the franchisees to purchase the AF Baked Goods, did one or both Defendants breach the Competition Act in one or more of the following ways:*
- a. *by agreement or other like means with other parties to the chain of supply of AF frozen donuts and timbits, influencing upward or discouraging the reduction of prices for those products charged by those other parties in the supply chain, in contravention of s.61(1) until March 11, 2009;*
 - b. *by agreement with other parties to the AF frozen donut and Timbit supply chain, enhancing unreasonably the price charged for those products by those other parties, in contravention of s.45(1)(b) until March 11, 2010; or*
 - c. *by agreeing with IAWS to fix, maintain, increase or control the price for the supply of AF frozen donuts and timbits, in contravention of s.45(1)(a) from and after March 12, 2010; and*
 - d. *if so, are the Class A-1 and/or Class A-2 Members entitled to recover from one or both Defendants the full costs of their investigations and the full costs of this proceeding on a complete indemnity basis under s.36(1) of the Competition Act?*

[300] I accept that the plaintiffs have pleaded tenable causes of action under the *Competition Act* and that they have established a basis in fact for the existence of the above common issues. I agree that, as in *Quizno's*, the proposed *Competition Act* common issues would be appropriate. They focus primarily on the conduct of the defendants, which is common to the class. There is a common contract, a common product and distribution structure, and common behaviour in relation to the establishment of prices. While there is evidence of Dr. Baziliauskas that suggests that a reasonable methodology could be developed for the calculation of damages, it is not necessary to resolve that question for the purposes of this motion. The resolution of the other elements of the *Competition Act* claim would, as in *Quizno's*, advance the claim of every class member.

[301] Had I not concluded that the plaintiffs' claims under the *Competition Act* have no prospect of success, I would have approved these common issues.

Class A-1 and A-2 – Waiver of Tort

[302] Question 8 deals with Waiver of Tort:

8. *By virtue of waiver of tort, are the Defendants liable on a restitutionary basis:*
- a. *to account to the Class A-1 Members for any part of the Defendants' financial benefit from the AF conversion as a result of the conduct described in issues 1 to 4 and 7 above?*

- i. *If so, in what amount and for whose benefit is such accounting to be made?*
 - ii. *Or, in the alternative, such that a constructive trust is to be imposed on all or any part of the Defendants' financial benefit from the AF conversion for the benefit of the Class A-1 Members? If so, in what amount and by whom are such profits held?*
- b. *to account to the Class A-1 and Class A-2 Members for any part of the Defendants' financial benefit from the sale of some or all the AF Baked Goods as a result of the conduct described in issues 2.d., 4 (referable to 2.d.) and 5 to 7 above?*
 - i. *If so, in what amount and for whose benefit is such accounting to be made?*
 - ii. *Or, in the alternative, such that a constructive trust is to be imposed on all or any part of the Defendants' financial benefit from the sale of some or all the AF Baked Goods for the benefit of the Class A-1 and Class A-2 Members? If so, in what amount and by whom are such profits held?*

[303] The plaintiffs plead that in the alternative to their claim for damages, they and class members are entitled to “waive the tort” claims for breach of contract, breach of the duty of good faith and breach of the *Competition Act* and to claim payment of the revenues or profits realized by Tim Hortons as a result of the Always Fresh Conversion. Alternatively, they claim a constructive trust on such revenues. As similar claim is made with respect to the Lunch Menu, limited to the breach of contract and good faith claims.

[304] In *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942, [2011] O.J. No. 1381, I pointed out at para. 67 that class actions certified in Ontario have included claims based on waiver of tort, beginning with the seminal decision of Cullity J. in *Serhan v. Johnson and Johnson* (2004), 72 O.R. (3d) 296, [2004] O.J. No. 2904 (S.C.J.) aff'd (2006), 85 O.R. (3d) 665, [2006] O.J. No. 2421, leave to appeal to the Court of Appeal refused on October 16, 2006 and leave to appeal to the Supreme Court of Canada refused on April 12, 2007, [2006] S.C.C.A. No. 494. These have included: *Heward v. Eli Lilly & Co.*, above; *Peter v Medtronic Inc.* (2007), 50 C.P.C. (6th) 133, [2007] O.J. No. 4828 (S.C.J.) leave to appeal to Div. Ct. refused (2008), 55 C.P.C. (6th) 242, [2008] O.J. No. 1916 (Div. Ct.); *Tiboni v Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32, [2008] O.J. No. 2996 (S.C.J.), *Mignacc v. Merck Frosst Canada Ltd.*, [2009] O.J. No. 5233 (S.C.J.), leave to appeal to Div. Ct. refused (2008), 304 D.L.R. (4th) 220, [2008] O.J. No. 4731.

[305] As Lax J. observed in *Anderson v. St. Jude Medical Inc.*, 2010 ONSC 77, [2010] O.J. No. 8, at para. 27, it is “well established that commonality exists in questions relating to waiver

of tort and that it is preferable that waiver of tort questions proceed as common issues to be determined on a full factual record.”

[306] On the other hand, Perell J. cautioned in *Carom v. Bre-X Minerals Ltd.*, 2010 ONSC 6311, [2010] O.J. No. 5289 at para. 32, “[I]t does not follow, however, that waiver of tort or constructive trusts or restitutionary claims are the O-positive or common donor issue for class proceedings. Each case turns on its own facts, and each case must be assessed based on its own circumstances and exigencies.”

[307] The defendants submit that a waiver of tort common issue could be appropriate, provided that it focused on the question of whether wrongful conduct could be determined on a class-wide basis. They suggest that the plaintiffs have not proposed common issues that would determine the wrongful conduct of the defendants on a class-wide basis. I do not accept this submission. The common issues proposed under the heading waiver of tort specifically ask whether, as a result of specified conduct of the defendants set out in the other common issues, the defendants are liable to account to the class members. To the extent that I have approved earlier common issues, the conduct in question is common to all class members and, if found to be wrongful, could support a claim for waiver of tort. Accordingly, I will approve the common issue.

[308] I do not propose to determine, at this time, whether the quantum of the waiver of tort claim should be bifurcated. If the parties were unable to agree on this issue, I would invite further submissions.

Class A-1 and A-2 – Unjust Enrichment

[309] Question 9 deals with Unjust Enrichment:

9. *Have the Defendants been unjustly enriched to the detriment of the Class A-1 or Class A-2 Members as a result of any of the conduct referred to in issues 1 to 7 above?*

[310] I have discussed the requirements of a claim for unjust enrichment in my reasons on the summary judgment motion. The plaintiffs must establish an enrichment of the defendants, a corresponding deprivation of the plaintiffs, and the absence of any juristic reason for the enrichment: *Garland v. Consumers’ Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21.

[311] The difficulty with an unjust enrichment common issue in this case is twofold. First, “deprivation” of class members may not be readily quantifiable in economic terms, because any financial costs may be offset by less tangible benefits, such as the convenience and other advantages of Always Fresh baking. Similarly, a franchisee who experiences lower margins on the sale of Lunch Menu items may gain both financial and intangible benefits, through incidental sales of more profitable items, increased traffic in the store at slower periods, and customer loyalty and goodwill. These observations are supported by the evidence of the Affiant Franchisees.

[312] Second, in the case of the Always Fresh claim, there is no direct nexus between the alleged deprivation of franchisees and the enrichment of Tim Hortons. In *Landsbridge v. Midas Canada Inc.* (2009), 73 C.P.C. (6th) 10, [2009] O.J. No. 1279 (S.C.J.), Cullity J. found that such a deficiency was fatal to the unjust enrichment claim of the franchisees, at paras. 66 – 67:

The claim in respect of the increased revenue the defendants have received from alleged unlawful and unjustified receipts of rebates and allowances from product suppliers stands on a different footing. Counsel for the defendants were, I believe, correct in their submission that the alleged deprivation consisting of higher prices that the Franchisees have been forced to pay under the new distribution system, and a loss of benefits under the Midas system, do not constitute a corresponding deprivation. Assuming as I must, that the new system produces advantages for Midas and disadvantages to the Franchisees, and that in implementing it, Midas breached its contractual obligations to the Franchisees, it does not follow that there is the necessary correspondence between the advantages and disadvantages to justify the grant of a restitutionary remedy that would attach a constructive trust to the amounts received by Midas. In this connection, counsel referred to, and relied on, *Boulangier v. Johnson & Johnson*, [2003] O.J. No. 2218 (C.A.), at para. 20, where Goudge J.A. referred to, and applied, a passage in the reasons of McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 in which it had been argued that the remedy could extend to benefits that the plaintiffs indirectly conferred on the defendants. The learned judge stated, at para. 58:

This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant.

Similarly, there is, in my judgment, an insufficiently direct and clear correlation between the numerous disadvantages allegedly suffered by the Franchisees, and the benefits obtained by Midas, under the Uni-Select agreement.

[313] For these reasons, I do not propose to certify the common issue pertaining to unjust enrichment.

The Lunch Menu

[314] The questions relating to the Lunch Menu apply to Class B members. The basic framework of the common issues is similar to the issues dealing with the Always Fresh Conversion – it asks whether there was a breach of express contractual terms, implied terms, and the duty of good faith and fair dealing. There are also common issues with respect to waiver of tort and unjust enrichment.

Lunch Menu – Breach of Express Term

[315] The first question deals with the alleged breach of certain express terms of the franchise agreement:

10. Did one or both Defendants breach one or more of s.7.03(a), s.3.00(f) and s.3.00(i) by:

- a. requiring franchisees to purchase the ingredients and commodities for the Lunch Menu at commercially unreasonably high prices from the Defendants and/or manufacturers and distributors designated by the Defendants and/or setting the maximum prices for Lunch Menu items at commercially unreasonably low prices, such that the Lunch Menu as a category generates revenue for the Defendants while franchisees lose money because the costs associated with selling the Lunch Menu exceed the revenue generated by those sales;*
- b. failing to perform any form of product category or menu analysis on the Lunch Menu, contrary to reasonable commercial practices.*

[316] The plaintiffs have abandoned their complaint that the “imposition” of the Lunch Menu was a breach of s. 7.03 of the franchise agreement, recognizing that the Lunch Menu has been a part of the Tim Hortons System for many years.

[317] The proposed common issue violates proposition (l) for common issues, above, because it is not clear, fair to both parties, and neutrally-worded. Leaving aside the problems associated with the definition of what goes into the “Lunch Menu” and the embedded assumptions about the terms “commercially unreasonable prices” and “reasonable commercial practices”, all of which may be capable of resolution, this common issue bundles together a number of questions and assumptions, including the assumption that franchisees “lose money” because the costs of selling the Lunch Menu exceed the revenues.

[318] This common issue also violates the basic rule, expressed as proposition (h) above, that “[A] common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant”: *Williams v. The Mutual Life Assurance Company of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 at para. 39 (S.C.J.), aff’d (2001), 17 C.P.C. (5th) 103, [2001] O.J. No. 4952 (Div. Ct.), aff’d (2003), 226 D.L.R. (4th) 112 and 131, [2003] O.J. No. 1160 and 1161 (C.A.).

[319] Answering the question, as currently phrased, would require an examination of whether a particular class member “lost money” from the sale of the Lunch Menu. In turn, this would

likely require an analysis not only of Lunch Menu items per se, but the sale of “combo” items (in which, for example, a Lunch Menu item was sold at a discounted price along with a coffee and a cookie, muffin or donut) and the sale of other items (such as a soft drink, tea or coffee) that were sold to a customer who came in for lunch. For that reason, the question as phrased is unsuitable for certification. Had I not dismissed the action on summary judgment, it might be appropriate to consider, as the defendant in fact suggests, whether the parties could agree on an acceptable joint list of common issues. In the circumstances, I do not propose to attempt to redraft this issue.

[320] Common issue 10(b) contains the same unacceptable assumption about reasonable commercial practice.

Lunch Menu – Breach of Implied Term

[321] Question 11 is identical to Question 3, above. It asks whether it was an implied term that ingredients would be sold at commercially reasonable prices and, if so, whether Tim Hortons breached that term.

11. With respect to the Class B Members:

- a. did the Agreement contain an implied term that the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers and distributors designated by the Defendants would be sold to the franchisees at commercially reasonable prices?*
- b. if so, did one or both Defendants breach that implied term by requiring the franchisees to purchase the ingredients and commodities for the Lunch Menu at commercially unreasonable prices?*

[322] This issue is similar to Common Issue 3, which deals with implied terms in the context of Always Fresh. In my discussion of that issue, I have set out the case law addressing the circumstances in which it is appropriate to consider the implication of a term on a common basis. I have concluded that there may be cases falling under the “business efficacy” or “officious bystander” test, where a term could be implied based solely on the nature of the contract and the contractual terms. In such cases, it would not be necessary to examine the factual matrix or the individual circumstances of the contracting parties – simply by examining the contract, one could say “of course” that term would have been contemplated by the parties as a necessary part of their bargain. A franchise agreement, which is a standard form contract designed to treat an entire class of franchisees in a uniform manner, regardless of their individual circumstances, could be exactly such a contract. A term would be implied regardless of the circumstances of a particular franchisee, to give the contract business efficacy.

[323] In my view, the proposed common issue states an acceptable common issue.

Lunch Menu – Breach of Duty of Good Faith and Fair Dealing

[324] Question 12 asks whether there was a breach of the duty of good faith and fair dealing under the *Arthur Wishart Act* or at common law in connection with the Lunch Menu:

- 12. As a result of any of the conduct described in 10 above [requiring franchisees to purchase Lunch Menu ingredients at commercially unreasonable high prices, setting maximum Lunch Menu prices at commercially unreasonable low prices, such that franchisees lose money because the costs of selling the Lunch Menu exceed the revenues], did one or both Defendants breach their duties to the Class B Members:*

- a. *under the Arthur Wishart Act (Franchise Disclosure), 2000 or similar statute, to act fairly, in good faith and in a commercially reasonable manner; or*
- b. *under the common law, to act fairly, in good faith and in a commercially reasonable manner?*

[325] The words I have placed in square brackets, taken substantially from question 10, are objectionable for the reason previously identified. They contain embedded assumptions about the commercial unreasonableness of the prices paid by franchisees and about the consequence of those prices – that the franchisees “lose money”.

[326] The question also contains an assumption that in considering whether the franchisees “lose money” from the sale of the Lunch Menu, one can simply isolate revenue from Lunch Menu items, ignoring the sale of more profitable items to customers buying the Lunch Menu. The Lunch Menu is available throughout the day and night. It seems quite obvious that a customer who comes into the store to buy a sandwich is likely to buy a drink, a dessert, a cookie or other menu item that would not otherwise have been sold without the attraction of the Lunch Menu. It is also quite obvious that the sale of Lunch Menu items helps to build customer loyalty. A customer who comes to the store for a reasonably-priced sandwich and has a good experience is more likely to return for breakfast and for coffee breaks.

[327] In my view, a common issue could be framed, as I suggested earlier, to simply ask whether, having regard to the rights and obligations of both parties under the franchise agreement, it was a requirement of the duty of good faith at common law or under the *Arthur Wishart Act*, that Tim Hortons would supply Lunch Menu ingredients to its franchisees at lower prices than they could obtain for the same ingredients in the marketplace and, if so, whether Tim Hortons breached that duty.

[328] Expressed in this manner, the question focuses not on the Lunch Menu in isolation, but rather on the price of Lunch Menu items in relation to the overall benefits and burdens of the franchise agreement.

Lunch Menu – Waiver of Tort and Unjust Enrichment

[329] Questions 13 and 14 address waiver of tort and unjust enrichment:

13 By virtue of waiver of tort, are the Defendants liable on a restitutionary basis as a result of any of the conduct referred to in issues 10 to 12 above:

- a. *to account to the Class B Members for any part of the Defendants’ financial benefit from the Lunch Menu? If so, in what amount and for whose benefit is such accounting to be made? Or, in the alternative,*

- b. *such that a constructive trust is to be imposed on all or any part of the Defendants' financial benefit from the Lunch Menu for the benefit of the Class B Members? If so, in what amount and by whom are such profits held?*

14. *Have the Defendants been unjustly enriched to the detriment of the Class B Members as a result of any of the conduct referred to in issues 10 to 12 above?*

[330] My comments about unjust enrichment in relation to Always Fresh apply equally to this common issue.

All Class Members

[331] The remaining common issues apply to all class members.

Liability of THI

[332] The first issue deals with the liability of THI to class members:

15 *If one or more of the common issues 1 to 7 or 10 to 12 are answered in the affirmative, is the Defendant Tim Hortons Inc. liable to the Class Members:*

- a. *as a direct participant in the wrongful conduct;*
- b. *on the basis of agency by estoppel and/or*
- c. *on the basis that it is the alter ego of the Defendant The TDL Group Corp. or one or more of its corporate predecessors?*

[333] The plaintiffs plead that THI is liable for the acts of Tim Hortons because:

- (a) TDL was created by THI to shield it from liability;
- (b) TDL's profits were treated as the profits of THI;
- (c) directors, senior management and other personnel conducting business for TDL were appointed by THI;
- (d) THI was the directing mind of TDL, controlled the activities of TDL and made the decisions concerning the matters in issue; and
- (e) revenues and profits received by TDL were earned by the skill and direction of THI.

[334] The plaintiffs say that THI could be liable for wrongs committed by TDL in at least three ways: (a) as TDL's agent; (b) as its *alter ego*; (c) on the basis of holding itself out as

carrying on the business of Tim Hortons. None of these has been specifically pleaded, although the pleading that THI was the “directing mind” of TDL could be regarded as an *alter ego* claim.

[335] With respect to the *alter ego* claim, the plaintiffs rely upon *Buanderie central de Montréal Inc. v. Montréal (City)*, [1994] 3 S.C.R. 29, [1994] S.C.J. No. 80, at para. 34:

... a corporation may be regarded as the alter ego of another corporation when there is such a close relationship between them that what apparently concerns one actually pertains to the activities of the other. Undoubtedly a large number of factors can be identified to determine the existence of such a relationship: in my opinion, however, the one that is most explicit and most likely to cover all aspects of the concept is control.

[336] With respect to the holding out claim, the plaintiff invoke the principle of agency by estoppel expressed in Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at pp. 111-112, as follows:

Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person in suffering some kind of detriment. Applied to agency this means that a person who by words or conduct has allowed another to appear to the outside world to be his agent, with the result that third parties deal with him as his agent, cannot afterwards repudiate this apparent agency if to do so would cause injury to third parties; he is treated as being in the same position as if he had in fact authorized the agent to act in the way he has done.

Even in the absence of prior agreement as to authority or subsequent ratification of unauthorized acts, a person can become a principal by placing another in a situation in which...according to the ordinary usage of mankind that other is understood to represent an act for the person who placed him so. Everything depends upon the way the principal makes the situation appear to the outside world, in the light of what is usual and reasonable to infer, and upon the reliance which is placed by third parties upon the apparent authority of the person with whom they are dealing. The 'principal' is said to 'hold out' as his agent the person represented as having authority to act on his behalf. The 'agent' is said to have 'ostensible' or 'apparent' authority. [Emphasis added]

[337] The plaintiffs say that THI and TDL have held themselves out to the world as one corporation.

[338] The defendants say that agency by estoppel has not been pleaded and that in any event reliance would be a necessary ingredient of an estoppel claim and would have to be determined on an individual basis. The plaintiffs contend that there are statements in Tim Hortons' annual reports that group the various corporate entities as one business and that Tim Hortons' statement of defence acknowledges that THI carries on the franchising business through TDL. They say that the need to prove reliance is no barrier to the existence of a common issue where there are, in substance, a limited number of representations with a common import made to all class members: see *McKenna v. Gammon Gold Inc.*, (S.C.J.), above, at paras. 136-137.

[339] A determination that the common issues are appropriate is not in any way an assessment of their merits. It is simply a determination that there are common issues of fact and law that meet the criteria set out earlier.

[340] Bearing in mind the low bar applicable to the common issues and the "some basis in fact" requirement, I am satisfied that the proposed common issues, which focus on the conduct of THI and TDL, are appropriate for certification.

Calculation and Allocation of Damages

[341] The plaintiffs propose:

16. If one or more of the common issues 1 to 7 or 10 to 12 are answered in the affirmative, how are damages to be computed as payable between the Defendants and allocated for distribution to the Class Members?

[342] This is a question that can be left to the common issues judge and does not require definition at this time.

Prejudgment and Post-Judgment Interest

[343] The plaintiffs propose:

17. Should one or both Defendants pay prejudgment and post-judgment interest, at what annual rate, and should the interest be compound interest?

[344] It is not clear to me, at least at this stage, that the issue of pre-judgment and post-judgment interest can be determined on a common basis.

Costs of Administration and Distribution of Judgment

[345] The plaintiffs propose:

18. *Should one or both Defendants pay the cost 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 cost, why, in what amount and to what extent?*

[346] This is a matter within the jurisdiction of the common issues judge and does not require that a common issue be stated.

(d) Preferable Procedure

[347] 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 inquiry asks whether a class proceeding would be a fair, efficient and workable procedure for the resolution of the issues, keeping in mind not only the common issues, but also the individual issues that will remain after the resolution of the common issues.

[348] It has frequently been observed that the fact that individual issues will remain after the resolution of the common issues – even substantial individual issues – is not a bar to certification: see *Cloud v. Canada (Attorney General)*, at para. 53. This is expressly contemplated by s. 6 of the *C.P.A.*

[349] In addressing the preferable procedure requirement, judges in this province frequently begin with the observations of Rosenberg J.A. in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at paras. 69-70, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346:

- (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.

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.

[350] My experience with the preferable procedure inquiry has generally been that plaintiffs' counsel are in a state of denial about the existence of any individual issues that might undermine certification of the class action and defendants' counsel can find whole chorus lines of individual issues dancing on the heads of pins.

[351] That said, a number of franchise disputes have been found suitable for certification: see, for example, *Quizno's; 1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.), aff'd. (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.); *578115 Ontario Inc. (cob McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571, [2010] O.J. No. 3921; *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776, [1998] O.J. No. 5461 (Gen. Div.), rev'd. [2001] O.J. No. 5368 (Div. Ct.); *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada* (2000), 48 O.R. (3d) 753, [2000] O.J. No. 1815 (Div. Ct.), rev'g [2000] O.J. No. 533 (S.C.J.); *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, above. I reviewed many of these, and others, in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889. The existence of a clearly identifiable class, a common standard form contract and a common business system, coupled with conduct of the franchisor that treats every franchisee in the same way, frequently makes it possible to identify common issues of fact and law that are suitable for class-wide resolution.

[352] This is not to say that a class action will be the preferable procedure for the resolution of every franchise case.

[353] In considering whether a class action would be the preferable procedure in this case, I must ask, among other things, having regard to the importance of the common issues in relation to the overall claim, (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims of the class; (b) whether it would be preferable to other methods, such as individual actions, joinder or a test case; and (c) whether, in the context of this particular proceeding, it would promote the goals of the *C.P.A.*, namely access to justice, judicial economy, and behaviour modification.

[354] As I have noted, many of the contractual common issues and even the *Arthur Wishart Act* issues can be condensed to two questions, namely whether, in all the circumstances, Tim Hortons had a contractual or statutory duty to supply ingredients to franchisees at prices that were lower than the market price and, if so, whether Tim Hortons breached that duty. Those questions, which are at the core of the plaintiffs' claims, can largely be answered without the need to examine the conduct of individual class members and will focus on the defendants' conduct. The same is true of the *Competition Act* common issues.

[355] The defendants acknowledge that there may be some contractual issues for which a class action would be the preferable procedure. They say, supported by their expert evidence that the plaintiffs' complaints concerning the "economic harm" caused to franchisees by the Always Fresh Conversion and the Lunch Menu would require individual inquiry into each franchisee's circumstances.

[356] I do not agree. Most of the proposed common issues will focus on the conduct of the defendants. If the defendants have over-charged the class members for ingredients, every member of the class is at risk. The determination of the defendants' liability will substantially advance the litigation and will promote judicial economy. Access to justice will be promoted because individual franchisees would be reluctant to sue the franchisor on whom they are so dependent. Any individual issues that remain, assuming the common issues are decided in the plaintiffs' favour, can be dealt with efficiently and fairly under the direction of the common issues judge.

(e) Representative Plaintiffs

[357] Section (5)(1)(e), as noted above, requires that there be a suitable representative plaintiff who will fairly represent the class, who is free of conflicts with other members of the class and who has developed a workable litigation plan to move the action forward. The courts have repeatedly stressed the concern that the plaintiff be an engaged and active representative of the class and not a mere pawn or puppet of counsel.

[358] There is no question that the plaintiffs are substantial, motivated and competent representatives of the class. The defendants' sole objection to the suitability of the plaintiffs is their refusal to answer, on the grounds of relevancy, questions on cross-examination about whether they have any arrangements with any third party for the funding of the litigation. On Mr. Jollymore's cross-examination, he was asked questions about whether he had any funding arrangement with his cousin, Ron Joyce.

[359] In response, the plaintiffs say that they were prepared to answer questions about whether or not they had control of the litigation, but they were not prepared to answer questions about funding arrangements, which they say are privileged.

[360] The plaintiffs rely on *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43, which deals with the confidentiality of solicitor and client communications and *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89, [1998] F.C.J. No. 794 (F.C.A.), which dealt with the question of whether a lawyer's billing records are protected by solicitor-client privilege. The issue in this case is not about communications between the plaintiffs and their counsel – it is about who is paying for the lawsuit and whether a third party is providing an indemnity for fees. The answer to that question does not require the disclosure of solicitor-client communications.

[361] In my view, a Court being asked to certify a class proceeding and to appoint a representative of the class is entitled to know whether some other party is funding the litigation

and, if so, who is doing so and on what terms. The answers go to the independence and motivations of the representative plaintiff as well as the ability of the representative plaintiff to see the action through to completion. It will be relevant for the Court to know whether the third party has an interest in the litigation that is or could be divergent from the interests of the representative plaintiff or the class. In the context of third party funding arrangements, the Court has been particularly concerned to know the details of the arrangements with the third party to ensure that the representative plaintiff, and not the third party, is actually calling the shots: *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (S.C.J.); *Metzler Investment GMBH v. Gildan Activewear Inc.* (2009), 81 C.P.C. (6th) 384, [2009] O.J. No. 3315 (S.C.J.).

[362] Answering the question “who has control of the litigation” or “who is instructing counsel” may not elicit a full answer to the real question, which is whether some behind-the-scenes party is financing or promoting the litigation, and if so, whether there are any strings attached.

[363] If it was established that the third party was not a member of the class and was supporting the litigation financially for collateral reasons, that alone might be reason to question the independence and suitability of the representative plaintiff.

[364] For that reason, assuming all other issues were resolved in the plaintiffs’ favour, I would order that the questions asked by defendants’ counsel and any proper and necessary follow-up questions be answered, before I would approve certification of this action.

C. Conclusion on Certification

[365] For these reasons, had I not concluded that the plaintiffs’ individual claims should be dismissed on summary judgment, I would have found that:

- (a) the plaintiffs’ claim discloses causes of action, as set out above;
- (b) there is an identifiable class, with the description of that class to be resolved by further submissions;
- (c) the claims of class members raise common issues, with the wording of those issues to be discussed by counsel and submitted to the court for further consideration;
- (d) a class proceeding is the preferable procedure for the resolution of the common issues; and
- (e) the determination of whether the plaintiffs meet the requirements of s. 5(1)(e) of the *C.P.A.* should be adjourned pending further submissions after the plaintiffs answer the questions refused on their cross-examination.

V. SUMMARY JUDGMENT

[366] Tim Hortons moves for summary judgment dismissing the plaintiffs' claims. To reiterate, these claims are for (a) breach of contract; (b) breach of the duty of good faith and fair dealing at common law and under the *Arthur Wishart Act*; (c) unjust enrichment, including disgorgement and waiver of tort remedies; and (d) statutory causes of action under s. 36 of the *Competition Act*, claiming breach of the price maintenance and conspiracy provisions.

[367] While it has not generally been the practice to permit summary judgment motions to be brought by defendants before or at the time of the certification motion, this case was an exception.

[368] Prior to my appointment as case management judge in this matter, the parties had agreed that the defendants would be permitted to bring a motion for summary judgment at the same time as the plaintiffs' motion for certification. This agreement was approved by Lax J., the case management judge at the time, and a schedule was established leading up to the two motions, which were to be heard commencing late November, 2010. In May 2010, the plaintiffs moved to change the schedule and to defer the summary judgment motion until after certification. I held that, given the agreement between the parties, and the substantial efforts undertaken by the defendants in reliance on that agreement, efficiency would be achieved by hearing the motions together, as previously scheduled: *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 2845, [2010] O.J. No. 2094.

[369] This procedure was driven by the unique circumstances of this case, particularly the agreement between the parties as approved by the previous case management judge. I acknowledge that this course of action has resulted in a very substantial record. It has also led to a situation, in the result, in which there is a potentially certifiable class action with no representative plaintiffs and where questions may well arise about whether my conclusions on the summary judgment motion are binding in relation to putative representative plaintiffs who may come forward in the future. These concerns were identified by Nordheimer J. in *Moyes v. Fortune Financial Corp.* (2001), 13 C.P.C. (5th) 147, [2001] O.J. No. 4455 at paras. 9 and 10.

[370] When these issues were raised at the hearing of these motions, defendants' counsel suggested that if I decided the summary judgment motion in favour of his clients, I should simply decline to decide the certification motion. For the reasons set out earlier, I have decided to express my conclusions on both motions.

[371] I will begin by considering the test applicable to motions for summary judgment under Rule 20 of the *Rules of Civil Procedure*, as recently stated by the Court of Appeal. I will then consider the issues, the evidence and the submissions of the parties with respect to each cause of action. In the course of so doing, and applying the test stated by the Court of Appeal, I will consider whether a trial is required in order to achieve a full appreciation of the evidence and issues in order to make dispositive findings of fact on the motion and whether the interest of justice requires a trial in this case.

A. The Test for Summary Judgment

[372] On December 5, 2011, the Court of Appeal released its decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (“*Combined Air*”). It is a unanimous decision of a five member panel of the Court, stating a test for determining when summary judgment should be granted and describing the types of cases that are suitable for summary judgment. The Court of Appeal disposed of five jointly-heard appeals of summary judgment decisions through the application of the new principles.

[373] The Court of Appeal chose not to comment on the conflicting jurisprudence concerning summary judgment and described its decision, as a “new departure and a fresh approach to the interpretation and application of the amended Rule 20” (para. 35).

[374] In articulating the new test, which it labeled the “full appreciation test”, the Court of Appeal emphasized the importance of both procedural fairness and substantive fairness in arriving at a fair and just disposition of the parties’ dispute. It also emphasized the need for a full appreciation of the evidence and the issues in the proceeding which, in some cases, can only be acquired through the trial process. It said that a motion judge must ask, before embarking on the summary judgment analysis and using the enhanced powers afforded under Rule 20.04(2.1), whether that full appreciation required to make dispositive factual or legal findings can be achieved by way of summary judgment or whether it must be acquired at trial. 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 conducted on a case-by-case basis.

[375] The Court of Appeal identified three types of cases, not necessarily exclusive, that are amenable to summary judgment.

[376] The first case is one where the parties agree, and the court is satisfied, that it is appropriate to determine the action by way of a summary judgment motion. This is not such a case.

[377] The second case is where, using the tools provided by the new Rule 20, the claim or defence is shown to be without merit and has no chance of success.

[378] The third case is one that can be disposed of on the merits because the trial process is not required in the “interest of justice”. This requirement guides the determination of whether the motion judge should exercise the powers under Rule 20.04(2.1) to weigh evidence, evaluate credibility and draw reasonable inferences from the evidence.

[379] The Court of Appeal emphasized, at paras. 46-51, the importance of the trial process, or the “trial narrative”, in informing a judge’s appreciation of the evidence and the issues as they unfold during the trial. It noted, at para. 47, the perspective and intimate knowledge of the facts and issues acquired by the trial judge by participating in the trial, hour after hour, day after day, witness after witness, exhibit after exhibit. This dynamic, and frequently interactive, process not

only ensures that the trial judge fully apprehends the evidence and appreciates how the pieces of the evidentiary puzzle fit together – or do not fit together – it also provides an assurance to the parties and the public that nothing has been overlooked. The Court of Appeal noted that the “trial narrative”, as it develops in the course of a live trial, will often be very different from the sterile document-based and transcript-based record that is before a judge on a motion for summary judgment.

[380] The Court stated that, before a judge should use the enhanced powers under Rule 20.04(2.1), to weed out a claim as having no chance of success or to resolve all or part of an action, he or she should 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?”

[381] The Court of Appeal described, at paras. 51 and 52, the circumstances in which, applying that test, summary judgment might or might not be appropriate. It cautioned against 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 amenable 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.

[382] 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).

[383] 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.

[384] The last paragraph of this quotation contemplates that a single proceeding may involve different causes of action, some of which simply have no chance of success and do not require the weighing of evidence, the evaluation of credibility and the drawing of inferences for their resolution.

[385] 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. I do not propose to review each of the five cases, because some address aspects of the test that are not particularly germane to the case before me. However, there are two cases that provide additional useful guidance concerning the approach to be taken in this case.

[386] One of the cases involved appeals to the Court of Appeal in two related actions, reported at first instance as *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, 2010 ONSC 5490, [2010] O.J. No. 4661, (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 lawyers and one of the partners in the law firm for fraud, conspiracy, negligence and breach of contract. The motion judge had 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.

[387] 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.

[388] The Court of Appeal concluded that cases such as *Bruno Appliance* require a trial and should not be decided on summary judgment. It noted its earlier observations, at paras. 50 and 51 of its reasons, that cases should not be decided summarily "where the full appreciation of the evidence and issues that is required to make dispositive findings can only be achieved by way of a trial" and 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.

[389] 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 hallmarks 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.

[390] 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 generated enormous costs. 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 the lawyer.

[391] In spite of the Court of Appeal’s conclusion that the case was not appropriate for summary judgment, and as a unique exception to the principles it had stated, it decided that it would be appropriate to determine 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.

[392] The second case determined by the Court of Appeal, to which I will refer, was 394 *Lakeshore Oakville Holdings Inc. v. Misek* (C53035), on appeal from [2010] O.J. No. 4659, 2010 ONSC 6007 (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.

[393] 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.

[394] This case bears some of the hallmarks identified by the Court of Appeal in *Combined Air* of one in which a full appreciation of the evidence and issues can only be achieved at trial. The record before me is massive and fills 15 banker’s boxes. It includes:

- multiple motion records in both the certification and summary judgment motions, including multi-volume records and supplementary records – there are at least 40 volumes;
- affidavit evidence of some 26 witnesses, including reports of six experts;
- Rule 30.03 evidence of two witnesses;
- transcripts of cross-examinations of 18 witnesses;
- various compendia of evidence filed by the parties for the purpose of the hearing; and
- multiple factums and books of authorities.

[395] The hearing itself lasted eleven days in total. Having examined the mountain of evidence and material in the confines of my chambers, the words of the Court of Appeal concerning the importance of the trial narrative in informing the judge’s full appreciation of the evidence, begin to resonate. The Court of Appeal noted this at para. 47 of its reasons:

... the trial judge is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses. As expressed by the majority in *Housen*, at para. 25, the trial judge is in a “privileged position”. The trial judge’s role as a participant in the unfolding of the evidence at trial provides a greater assurance of fairness in the process for resolving the dispute. The nature of the process is such that it is unlikely that the judge will overlook evidence as it is adduced into the record in his or her presence.

[396] These observations having been made, a massive evidentiary record does not preclude the moving party on summary judgment from making a focused attack on key elements of the claim or defence of the other party to show that it simply cannot succeed. As the Court of Appeal noted, there may be claims that do not require extensive resort to evidence or fact-finding in order to make dispositive findings of fact or law. It may be appropriate, in such cases, to “weed out” claims that have no chance of success.

[397] In *Combined Air*, the Court of Appeal at para. 42 referred to the decision of the Supreme Court in *Canada (A.G.) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 10:

The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no

chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[398] In that case, a proposed representative action, the Supreme Court of Canada restored the decision of the motions judge, who had dismissed most of the plaintiffs' claims based on their lack of standing and limitations period issues. The Supreme Court of Canada acknowledged that there was one remaining claim – a claim for an accounting – that might properly continue, should an appropriate plaintiff be found, because it was not barred by the limitation period.

[399] This is the approach the defendants take here. They focus on specific aspects of each cause of action advanced by the plaintiffs. They say that those aspects are deficient, and so, the cause of action is not made out. Tim Hortons says that, by and large, the issues are matters of contract interpretation and statutory interpretation and that it is not necessary to engage in extensive fact-finding for the purpose of making dispositive findings on those issues.

[400] I now turn to an examination of each cause of action advanced by the plaintiffs and will examine the evidence, submissions and authorities applicable to each. I will consider whether they have no chance of success or can be fairly and justly resolved by exercising the powers in Rule 20.04(2.1). In so doing, to the extent the resolution of the issues requires the weighing of evidence, evaluation of credibility, or drawing reasonable inferences from the facts, I am required to apply the full appreciation test.

B. The Breach of Contract Claim

1. Introduction and Overview

[401] The plaintiffs' breach of contract claim can be summarized as follows: Tim Hortons breached the express or implied terms of the franchise agreement, by requiring franchisees to purchase Always Fresh ingredients and Lunch Menu ingredients, either at prices that were greater than the market price or at commercially unreasonable prices.

[402] To elaborate, the plaintiffs say that Tim Hortons:

- (a) breached sections 7.03(a), 3.00(f) and 3.00(i) of the franchise agreement by requiring franchisees to undertake the Always Fresh Conversion;

(b) breached an express or implied term of the franchise agreement by failing to supply Always Fresh baked goods at either (i) lower prices than market price; or (ii) at commercially reasonable prices;

(c) breached the franchise agreement by requiring franchisees to purchase Always Fresh baked goods, after the conversion, at prices that were not offset by savings in labour, waste or operating expenses;

(d) breached section 7.03(a) by requiring franchisees to purchase ingredients for Lunch Menu items at prices that were unreasonably high or by setting the maximum price for such items at prices that were commercially unreasonable;

(e) breached s. 3.00(f), by failing to “maintain a continuing advisory relationship with the Licensee, including consultation in the areas of marketing, merchandising and general business operations”; and

(f) breached s. 3.00 (i), which requires the franchisor to “develop new products compatible with the Tim Hortons System.”

[403] For the purposes of context, I will repeat s. 7.03(a), which is entitled “Changes in Confidential Operating Manual”:

In order that the Licensee may benefit from new knowledge gained by the Licensor as to improved methods, procedures and techniques in the preparation, merchandising and sale of donuts and other food items, and in the operation of the Tim Hortons Shop, the Licensor may from time to time revise the contents of the Confidential Operating Manual and such other manuals and materials, if any, as it may develop and the Licensee covenants to forthwith comply with all changes to the contents of the Confidential Operating Manual and such other manuals and materials, if any, as the Licensor may develop, made by the Licensor from time to time during the term of this License Agreement provided that such changes shall not unreasonably alter the Licensee's rights or obligations under this Agreement.

[404] The plaintiffs acknowledge that Tim Hortons was entitled to introduce changes to the Confidential Operating Manual to require franchisees to change the method of production from the scratch baking method to the Always Fresh method. They submit, however, that s. 7.03(a) of the franchise agreement requires that any change in methods, procedures and techniques in the

production of baked goods must be both a “benefit” and an “improvement” and that “benefit” means a financial benefit to the franchisee. They say that:

(a) this section trumps the recital in the franchise agreement, which speaks of the products, procedures and equipment of the franchisor being “improved, further developed or otherwise modified from time to time”;

(b) the *contra proferentem* rule applies to the interpretation of s. 7.03(a), which must be construed in the manner most favourable to franchisees;

(c) s. 15 of the franchise agreement expressly provides that franchisees are independent contractors, which means that they are “entitled to conduct their operations as efficiently as possible to maximize their return on investment”; and

(d) good commercial sense dictates that franchisees should not be subjected to any change the franchisor chooses to make, regardless of its effect on them.

[405] The plaintiffs also rely on the concluding language of s. 7.03(a) in some versions of the franchise agreement, which qualifies the franchisor’s ability to make changes: “... provided that such changes shall not unreasonably alter the Licensee’s rights or obligations under this Agreement.”

[406] The plaintiffs submit that “benefit” or “improvement” must have a financial component and not only have the defendants failed to show that the Always Fresh Conversion was a financial benefit to franchisees, there is evidence of financial harm to franchisees.

[407] The plaintiffs say that Tim Hortons also breached an implied term of the franchise agreements that the ingredients and commodities they were required to purchase would be sold to franchisees at lower prices than they could obtain for the same products in the marketplace. They dispute that section 5.04 (above, acknowledging that the franchisor is entitled to make a profit or obtain a rebate on the sale of goods to franchisees) or sections 16.02 (the “entire agreement” term) and 16.13 (the disclaimer of any implied warranty or representation) have any application.

[408] The plaintiffs say that this implied term is necessary, reasonable and consistent with custom and usage. It is necessary, they say, because they are captive purchasers of the franchisor and depend upon lower ingredient prices in order to make a profit. It is reasonable, they say, because their expert, Mr. Fisher, opines that prices obtained by a franchisor are “generally lower” than the prices that any individual franchisee could obtain on its own. It is consistent with custom and usage, they say, because Tim Hortons has admitted that it has historically used its buying power to negotiate the most competitive prices from suppliers.

[409] Turning to the Lunch Menu, the plaintiffs acknowledge that the Lunch Menu has been part of the Tim Hortons System for some time and that Tim Hortons is entitled to make changes in the Lunch Menu. They say, however, that Tim Hortons has breached s. 7.03(a) and ss. 3.00(f) and (i) of the franchise agreement, because, through its control of the Lunch Menu, Tim Hortons is causing franchisees economic loss by increasing its profits at their expense.

[410] Tim Hortons' submission on the breach of contract issue can be summed up as follows:

(a) the Always Fresh Conversion was permitted by the franchise agreement, which allowed Tim Hortons to make changes to the Tim Horton System and to the Confidential Operating Manual;

(b) there is no requirement that such changes are limited to ones that are financially beneficial to franchisees;

(c) even if the Always Fresh Conversion and the Lunch Menu resulted in lower profits to franchisees (which the defendants do not admit), the franchise agreement does not guarantee the plaintiffs a right to make a profit or a particular rate of return; and

(d) there is no basis for the implication of a term that prices of any particular ingredients would be either lower than could be obtained in the market or commercially reasonable.

[411] The defendants submit that the issue is essentially one of contract interpretation and, even assuming the truth of the plaintiffs' version of the key facts necessary to resolve the issue, there is no genuine issue requiring a trial.

[412] Before examining the contract provisions and the evidence and arguments submitted by the parties, I will set out some general principles of contractual interpretation.

2. Principles of Interpretation

[413] Both parties accept the principles of contract interpretation expressed in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, [2007] O.J. No. 1083 (C.A.), in which the Court of Appeal, at para. 24, confirmed that a commercial contract is to be interpreted:

(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based

upon the "cardinal presumption" that they have intended what they have said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and

(d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

[414] While the contract in that case was not a franchise agreement, these principles are generally applicable to such agreements: see *Landsbridge Auto Corp. v. Midas Canada Inc.* ("*Landsbridge*"), above.

[415] That being said, I note and accept the observations made by Cullity J. at para. 14 of *Landsbridge*, that franchise agreements are contracts of adhesion, invariably drafted by the franchisor. Where there is ambiguity, they should be interpreted *contra proferentem*. Exclusionary clauses should be subjected to particular scrutiny: see *Shelanu Inc. v. Print Three Franchising Corporation* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919 (C.A.) at para. 58.

[416] I also accept the principle that the starting point in the interpretation of any contract is to determine the intention of the parties, with reference to the words they have chosen. Those words should be given their plain meaning and should be considered in the context of the contract as a whole and in a manner that accords with sound commercial principles and good business sense: see *Drosophilinks Consulting Inc. v. Canadian National Railway Co.*, [2010] O.J. No. 2654 (S.C.J.) at para. 15. As part of the interpretive process, the court should have regard to the commercial context in which the agreement was made and the circumstances that existed at the time: *Dumbrell v. The Regional Group of Companies Inc., et al.* (2007), 85 O.R. (3d) 616, [2007] O.J. No. 298 at paras. 53 - 57; *Laurel Oak Marketing Ltd. v. Royal Canadian Golf Assn.*, 2010 ONCA 62, [2010] O.J. No. 286 (C.A.).

[417] I turn now to the express terms of the contracts.

3. Express Terms

[418] As noted earlier, the plaintiffs contend that the Always Fresh Conversion was a breach of the express terms of the franchise agreement. They argue that Tim Hortons also breached the franchise agreement by failing to sell par baked donuts, timbits, muffins and cookies at either commercially reasonable prices or at prices that were lower than the market price. The alternative complaint is that these items were not sold at prices that were offset by savings in labour, waste or operating costs. A similar complaint is made regarding the Lunch Menu: the ingredients for Lunch Menu items were sold at a price that was too high or, alternatively, the price at which Lunch Menu items were sold in the stores was not high enough to offset the excessive ingredient costs.

[419] Taken to its logical conclusion, the plaintiffs' submission is that every ingredient supplied by Tim Hortons, or by a distributor from whom franchisees were required to purchase, must be supplied at a commercially reasonable price or at a price that is lower than the market price. The plaintiffs appear to acknowledge that the price at which "loss leaders" might be sold need not be commercially reasonable when taken in isolation, but, subject to this exception, their argument must apply to every input they purchase.

Section 7.03

[420] The plaintiffs contend that the plain meaning of the introductory words of section 7.03(a) of the franchise agreement, namely,

In order that the Licensee may benefit from new knowledge gained by the Licensor as to improved methods, procedures and techniques, in the preparation, merchandising and sale of donuts and other food items, and in the operation of the Tim Hortons Shop ...[emphasis added] the Licensor may from time to time revise the contents of the Confidential Operating Manual ...,

limits Tim Hortons to making changes in its methods, procedures and techniques that are an "improvement" and a "benefit" to franchisees. In some respects, the plaintiffs have gone farther in their submissions, to assert that any such benefit must be a financial benefit, because the plaintiffs' real complaint is not that Always Fresh baked goods or the Lunch Menu were not "improvements", but rather than they were unprofitable.

Sections 3.00(f) and (i)

[421] The plaintiffs also allege that Tim Hortons breached:

- s. 3.00(f) of the Franchise Agreement, which requires the Franchisor, during the term of the franchise agreement, to provide certain services to the franchisee, including “to maintain a continuing advisory relationship with the Licensee, including consultation in the areas of marketing, merchandising and general business operations”; and
- s. 3.00(i), which requires that the franchisor to “use reasonable efforts to develop new products compatible with the “Tim Hortons System”.

[422] I pause here to ask whether the resolution of the contractual interpretation issues requires the weighing of evidence, evaluation of credibility or the drawing of inferences and, if so, whether a full appreciation of the evidence and issues can only be achieved by a trial. In my view, the resolution of the issue does not require this kind of fact-finding or the exercise of the court’s powers under Rule 20.04(2.1). The plaintiffs’ arguments turn almost entirely on the interpretation of the franchise agreements and the evidence concerning the factual matrix underlying the contracts – the contractual history between the parties – is not contentious and is primarily documentary.

[423] The plaintiffs’ interpretation of s. 7.03(a) of the Franchise Agreement is, in my view, plainly wrong and has no possibility of success at trial. The words “[I]n order that the Licensee may benefit from new knowledge gained by the Licensor as to improved methods, procedures and techniques ...” are not a positive covenant or promise – they are simply introductory or explanatory. They are not reasonably capable of bearing the interpretation that the Tim Hortons System or the Confidential Operating Manual cannot be changed unless the change is an improvement that benefits the franchisee.

[424] Even if the plaintiffs’ distorted interpretation was accepted, there is nothing in the contractual language, and no logical reason, to interpret a “benefit” derived from the “improved” method, procedure or technique, as having a financial component. The change might be to address safety issues, to simplify production, or to ensure franchise-wide consistency of products. It might be for any number of reasons that could be considered an “improvement” without necessarily resulting in a financial benefit to the franchisee.

[425] In my view, it would be unreasonable to interpret section 7.03 as meaning that every new method or new product introduced into the Tim Hortons System and the Confidential Operating Manual must be profitable in its own right. The franchisor is entitled to consider the profitability and prosperity of the system as a whole.

[426] In executing the franchise agreement and becoming a Tim Hortons franchisee, the franchisee obtains the benefit of, and agrees to be bound by, the Tim Horton System. The expression “Tim Horton System” is used some twenty-five times in the course of the franchise agreement. As I have observed, it is defined in the first recital of the agreement as including a body of knowledge, trademarks, procedures and products, “all of which may be improved, further developed or otherwise modified from time to time”. As part of that agreement, the franchisee agrees to follow the procedures specified by that system and to sell the products that are part of the system. These obligations are spelled out in, among others, section 5.06 under the heading “Operation of Tim Horton Shop”, above.

[427] It is quite obvious that new franchisees are brought into the system on a continuing basis. The franchise agreements are typically for ten year terms and they expire at different times. Some franchise agreements are renewed and some are not. Franchisees come and go. In order to keep the system healthy and competitive, the franchisor must be permitted to introduce new products, new methods of production or sale, and new techniques or systems during the life of a franchise agreement. The franchisees have an expectation that this will be done. The franchise agreement contemplates this and allows this. It is done for the benefit of both the franchisor and the franchisee. It would not be commercially reasonable to require that the franchisor can only implement system-wide changes over the life of a particular franchise agreement if the proposed change is demonstrated to be an improvement that benefits that particular franchisee. Nor would it be commercially reasonable to require the franchisor to demonstrate that every such change will be a financial benefit for every franchisee.

[428] The evidence is uncontroverted that the Always Fresh Conversion was beneficial to franchisees in a general sense, because it outsourced a process that was time-consuming, aggravating and wasteful. As time has passed, rising labour and ingredient costs have revealed the wisdom of this decision. There can be no doubt, as the plaintiffs’ own witness Mr. Gilson acknowledged, that a return to scratch baking would be an entirely retrograde step. The plaintiffs’ real issue with the Always Fresh Conversion is not that it was not an improvement for franchisees, but that the product was priced too high.

[429] The Lunch Menu was not a change in the Tim Hortons System or in the Confidential Operating Manual. Lunch items, sandwiches, chili and soup, had been part of the Tim Hortons menu since the early years. Again, even if there was a need to demonstrate that Lunch Menu items must be shown to be a “benefit” to franchisees, there is no question on the evidence that the Lunch Menu is beneficial because it brings customers in the stores in off-peak hours, contributes to the cross-selling of more profitable items and creates customer loyalty and goodwill in the face of aggressive competition for business in the fast food industry. It makes sense that people who are hungry at any time of the day or night will only come to the Tim Hortons shop if they can be assured of buying a reasonably-priced, nutritious and tasty meal. If they buy that meal, they are likely to purchase other items, such as beverages (coffee, tea, soft drinks) with high margins attached to them. If they like the meal, they are more likely to return in the morning to buy a coffee and donut. If they cannot find the meal, or if it is too expensive, or it

doesn't taste good, they will go somewhere else, like McDonald's or Mr. Sub. If they find the coffee in those stores is just as good, they may be lost forever as customers of Tim Hortons.

[430] Each party has referred to the recitals of the agreement as support for its position. As a general rule, the recitals in a contract are not legally binding promises. They help to introduce the contract, to put it in context, and to explain the spirit of the agreement and the motivations of the parties: *Canadian Faces Inc. v. Cosmetic Manufacturing Inc.*, 2011 ONSC 6171, [2011] O.J. No. 4766 (S.C.J.); *Sherbrooke Community Centre v. Service Employees International Union*, 2002 SKQB 101. Reference may be made to the recitals where the operative parts of the agreement are ambiguous: *Elliott Estate (Re.)*, [1962] O.J. 164 (C.A.).

[431] I accept that where the language of a contract is clear and unambiguous, it is not proper to refer to the recitals to alter the plain meaning of the contract: *Elliott Estate (Re.)*, above, at para. 11; *1124980 Ontario Inc. v. Liberty Mutual Insurance Co.*, [2003] O.J. No. 1468 at para. 71 (S.C.J.); *Lanston Monotype Machine Co. v. Northern Publishing Co.* (1992), 63 S.C.R. 482. I also agree that in the event of an inconsistency between a recital and an operative provision in a contract, the operative provision prevails: *On-Line Finance & Leasing Corp. v. Canada*, [2010] T.C.J. No. 380 at paras. 50-51 (T.C.C.).

[432] In this case, it is not necessary to refer to the recitals, except insofar as they define the "Tim Horton System", which, as discussed above, is stated to be a collection of products, trademarks and systems, developed by the franchisor, all of which "may be improved, further developed or otherwise modified from time to time". It seems to me that this definition simply reflects the expectations of both parties to a typical franchise agreement that the franchisor's system will continue to evolve and improve for the benefit of both parties.

[433] I do not accept the plaintiffs' submission that allowing the franchisor to make changes to the Tim Horton System that are not to the franchisee's financial benefit is inconsistent with section 15 of the Licence Agreement, which provides that the franchisee is an "independent contractor". The plaintiffs argue that this provision means that they are entitled to conduct their operations as efficiently as possible and to maximize their returns. In my view, the provision is a standard piece of contractual boilerplate, inserted for the purpose of negating any suggestion that one party is the partner, agent or employee of the other and it is not reasonably capable of the interpretation advanced by the plaintiffs. That interpretation ignores the other benefits flowing to the franchisee as a result of the agreement.

[434] As I have noted, the following words appear at the conclusion of some, but not all, versions of s. 7.03:

... provided that such changes shall not unreasonably alter the Licensee's right or obligations under this Agreement.

[435] These words are intended to refer to the franchisee's legal rights and obligations under the franchise agreement. They confirm that changes to the operating manual are not permitted to amend the franchise agreement by taking away the franchisee's legal rights or imposing new

legal obligations. Neither the Always Fresh Conversion nor the Lunch Menu imposed such changes. These words cannot reasonably be construed as limiting changes in the operating manual to changes that result in a financial benefit to franchisees.

[436] The plaintiffs make the submission, in their factum and oral argument, that they have adduced evidence to show that the Always Fresh Conversion resulted in financial harm to franchisees due to reduced margins and the failure to achieve the savings that Tim Hortons promised would result. They also submit that the defendants have failed to adduce any evidence that there has been a financial benefit to the franchisees. I have rejected the submission that Tim Hortons is required to demonstrate a financial benefit for every change in its method or procedures or that every such change must be for the franchisees' financial benefit. On the evidence, the change to "Always Fresh" was a rational business decision on the part of the franchisor that addressed legitimate problems experienced by franchisees with scratch baking and legitimate concerns by Tim Hortons concerning the long-term viability of the scratch baking method. The result was an improved method of producing donuts. The fact that the donuts may have cost more, and that this adversely affected the franchisees' bottom line, even if proven, was not a breach of any express contractual term.

[437] In sum, the evidence establishes that the Always Fresh Conversion and the Lunch Menu were reasonable commercial decisions that Tim Hortons was entitled to make, having regard to its own interests and to the interest of its franchisees. There is no evidence that these decisions were motivated by improper or extraneous considerations. The plaintiffs and their experts do not really disagree with the decisions themselves; they take issue with the price at which products were supplied to franchisees.

[438] Nor is there any evidence that the price of Always Fresh baked goods and Lunch Menu ingredients have been set at a level that prevents the plaintiffs and other franchisees from making a reasonable overall profit or rate of return on their investment. Unlike *Quizno's*, where the plaintiffs' complaints related to mark-ups on every single item supplied by the franchisor and where there were allegations that a substantial number of franchisees were operating in the red, the complaints in this case relate to a relatively small proportion of the franchisees' inputs. The evidence establishes that, in general, the plaintiffs and Tim Hortons franchisees make a reasonable return on their investments. This is driven to a considerable extent by coffee and other beverage sales, where the margins are very substantial.

[439] In light of my conclusion that there has been no breach of s. 7.03(a), it is not necessary to consider Tim Hortons' arguments to the effect that the interpretation put forward by the plaintiffs is inconsistent with other express provisions of the franchise agreement, namely s. 5.04(a) (acknowledging that the franchisor may make a profit, commission or rebate on the sale of goods to franchisees) and s. 16.13(d) (no implied warranties or representations) and inconsistent with the disclosure documentation executed by the plaintiffs, in which they acknowledged that the cost of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the goods and services available in the marketplace. That documentation makes it quite clear, however, as the plaintiffs themselves acknowledged on

cross-examination, that there was no provision in their franchise agreements that guaranteed them a particular return or profit, either on individual products they sold or on any particular product line in the store. To that, I would add that there was no express term of the franchise agreement that required the franchisor to supply ingredients or other inputs at prices that were lower than what they could obtain on the market or that were “commercially reasonable”.

[440] The obligations to consult with franchisees and to develop new products, described respectively by s. 3.00(f) and s. 3.00(i) of the franchise agreement are general obligations. There is absolutely no question that, on a general level, Tim Hortons maintained a continuing advisory relationship with the plaintiffs and with all franchisees and consulted with them in marketing, merchandising and general business operations. The record is replete with evidence that Tim Hortons fulfilled these obligations, in conferences and regional meetings, at the Advisory Board and in one-on-one discussions with franchisees, including the plaintiffs and Mr. Garland. Tim Hortons may not have agreed with everything the plaintiffs or Mr. Garland said, or complained about, but it was not required to agree. It was required to advise and consult, and it did so. The failure to price donuts and Lunch Menu items at the prices suggested by Mr. Garland or by the plaintiffs cannot reasonably be regarded as a breach of s. 3.00(f). Nor is there any evidence that Tim Hortons failed to consider the impact of the Always Fresh Conversion on franchisees. The unchallenged evidence of Mr. Madden, as well as the evidence of Mr. Clanachan, makes it clear that this was a matter of concern to Tim Hortons and that it was addressed in the pricing of the par baked donut.

[441] The evidence of the plaintiffs, set out earlier, concerning what was or was not said by Tim Hortons about the cost of the Always Fresh donut does not amount to a breach of the duty of consultation. As I noted earlier, neither of the plaintiffs was the direct recipient of any representation by Tim Hortons and the evidence does not establish that any general representation was made to franchisees.

[442] The record is also replete with evidence that Tim Hortons fulfilled its obligation under s. 3.00(i) to use reasonable efforts to develop new products compatible with the Tim Hortons System. This was a matter of constant concern to Tim Hortons' marketing department and was a regular topic of discussion at the Advisory Board. The Always Fresh donut was a manifestation of the fulfillment of this obligation, as was the creation of new Lunch Menu items from time to time. There is no basis for the assertion that new products, whether par baked donuts or specific Lunch Menu items, had to be capable of being sold at a profit or that the failure to permit a franchisee to do so was a breach of contract.

[443] I turn now to the question of whether Tim Hortons breached an implied term of the franchise agreements in connection with the Always Fresh Conversion and the Lunch Menu.

4. Implied Terms

[444] As noted earlier, the plaintiffs allege that Tim Hortons breached an implied term of their franchise agreements. They say that a term should be implied in the agreement that:

... the ingredients and commodities the Plaintiffs and Class A Members were required to purchase from the TDL Distribution System would be sold to franchisees at lower prices than they could obtain for the same products in the marketplace ...

[445] At various times, the plaintiffs have described this as an implied term that the prices for such ingredients and commodities would be “commercially reasonable”.

[446] As with the analysis of the allegations with respect to express contractual terms, I will begin with an outline of the legal principles applicable to the issue, followed by a discussion of the submissions of the parties, the determination of whether it is appropriate to grant summary judgment, and my conclusions.

(a) *Principles Applicable to Implied Terms*

[447] Once again, the parties agree on the principles applicable to the implication of terms in a contract. I will summarize those principles, borrowing liberally from statements and authorities referred to in the defendants’ factum, the content of which is accepted by the plaintiffs.

[448] Terms may be implied in a contract:

- (a) based on custom or usage;
- (b) as the legal incidents of a particular class or kind of contract; or
- (c) based on the presumed intention of the parties:
 - where the implied term is necessary to give “business efficacy” to the contract; or
 - where the implied term otherwise meets the “officious bystander” test - that is, a term that the parties would say, if questioned, “of course” that would be understood to be a term of the contract.

See: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999], 1 S.C.R. 619, [1999] S.C.J. No. 17 at para. 27; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 774; *The “Moorcock”* (1889), 14 P.D. 64.

[449] This does not mean that the court is entitled to use the implication of a term to reconstruct the parties’ contract based on its opinion of what would be equitable or of what the parties ought to have intended. The implication of the term must be used to give effect to the intention of the parties: *Brixham Investments Ltd. v. Hansink* (1971), 2 O.R. 589, [1971] O.J. No. 1556 (C.A.) at paras. 10-12, referring to *Luxor (Eastbourne), Ltd. et al. v. Cooper*, [1941] A.C. 108, per Lord Wright at 137.

[450] The parties agree that this case does not fall within the second category of implied terms – i.e., the legal incidents of a particular class or kind of contract. The real question is whether a term can be implied under category (i) custom or usage, or category (iii) the “business efficacy” or “officious bystander” test.

[451] The “custom or usage” category applies to a term that is implied in contracts in a particular trade or business. These are terms that everyone doing business in the particular trade or business can reasonably be assumed to know. Such a term, even though not expressed in writing, will apply because it is so notorious and so generally followed that it can be presumed to be part of the contract. The concept was expressed by the Supreme Court of Canada in *Georgia Construction Co. v. Pacific Great Eastern Railway Company*, [1929] S.C.R. 630 at 634 as follows:

In substance, the question for the learned trial judge was whether there was evidence to satisfy him judicially that the alleged usage is, to quote the language of Banks L.J., in *Laurie & Morewood v. Dudlin & Sons* (1926), 95 L.J.K.B. 191, at p. 193, “so all-pervading, and so reasonable and so well known that everybody doing business” in railway construction “must be assumed to know” it, and to contract subject to it.

[452] The concept is further described in *C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 774:

There is no doubt that the implication of terms in a contract on the basis of custom or usage is a well recognized category of implication that has been particularly important with respect to commercial contracts. It was noted in *Hutton v. Warren* (1836), 1 M. & W. 446, 150 E.R. 517, where Parke B. said at p. 475 M. & W. and at p. 521 E.R: "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." Implication on the basis of custom or usage was referred to by Lord Wilberforce in *Liverpool City Council*, where in his discussion of the various kinds of implication, he said at p. 253: "Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where

there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain." As the statements of Parke B. and Lord Wilberforce indicate, however, implication on the basis of custom or usage is implication on the basis of presumed intention. (Of course custom is being used here as more or less synonymous with usage and not in the sense of custom that has become a rule of law. Cf. *The "Freiya" v. The "R.S."*, [1922] 1 W.W.R. 409, for a discussion of the distinction between custom and usage.)

[453] Terms based on custom or usage can be implied where the usage is notorious, certain and reasonable, such that the parties would have understood that the custom was applicable to their contract – see *Machtinger v. HOJ Industries Ltd.*, above; *Knoch Estate v. Jon Picken Ltd.* (1991), 40 O.R. (3d) 385, [1991] O.J. No. 1394 (C.A.).

[454] A person will not be taken to have acquiesced in a custom or usage that is unreasonable: *Charles P. Rowen & Associates Inc. v. Ciba-Geigy Canada Inc.*, [1994] O.J. No. 1233 (C.A.), leave to appeal refused [1994] S.C.C.A. No. 400, referring to *The "Freiya" v. The "R.S."*, [1922] 65 D.L.R. 218 (Ex. Ct.) at paras. 20 and 25.

[455] An implied term in the third category, the business efficacy or officious bystander category is, like the term based on custom and usage, based on the presumed intention of the actual parties. The court does not substitute its views or discretion for what the parties should have intended.

[456] In a recent decision in *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, [2011] O.J. No. 3936, Horkins J. referred to the following explanation of the business efficacy/officious bystander test given by Professor Fridman in *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at p. 502:

The theory behind this doctrine is that had the "officious bystander" drawn the attention of the parties to the matter in issue, they would have agreed that the contract should provide for its resolution in the manner which is subsequently suggested in later litigation, as the implied term

And at p. 503:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[457] Horkins J. also referred to the following passage in the judgment of Scrutton L.J. in *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd. et al.*, [1918] 1 K.B. 592 at 605 (C.A.):

The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case", they would both have replied, "Of course, so and so will happen; we did not trouble to say that, it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

[458] In that case, Horkins J. declined to imply a term because she found that the proposed term was inconsistent with an express term, was not necessary for business efficacy and did not meet the "officious bystander" test.

[459] The court is required to determine what the actual parties intended and to give effect to that intention through the implication of a term, where appropriate: see *Venture Capital USA Inc. v. Yorkton Securities Inc.* (2005), 75 O.R. (3d) 325 [2005] O.J. No. 1885 (C.A.) at para. 31:

In *M.J.B Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 27, Iacobucci J. made clear that a contractual term may be implied "based on the presumed intention of the parties where the implied term must be necessary 'to give business efficacy to a contract or as otherwise meeting the "officious bystander" test as a term which the parties would say, if questioned, that they had obviously assumed'" (citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 775, LeDain J.); see also *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860 at para. 81; *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40 at para. 55 (C.A.). When implying a term, however, courts must be careful to do so based on actual evidence and not mere judicial discretion. As Iacobucci J. stated in *M.J.B. Enterprises* at para. 29:

What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree

of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. [Original emphasis.]

[460] As the foregoing extract points out, a term will not be implied where there is evidence of a contrary intention on the part of either party.

[461] Nor will a term be implied where it conflicts with an express term of the contract. It is well-settled that there is no room for the implication of a term “where the parties have made an express contract covering the very facts in litigation”: *Peter Kiewit Sons’ Co. v. Eikins Construction Ltd.*, [1960] S.C.R. 361 at 369. As the Court of Appeal stated in *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.*, [1983] O.J. No. 3181 (C.A.) at para. 9:

When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts... [emphasis added]

[462] The implication of a term based on business efficacy may require the court to examine the factual matrix in which the parties operated in order to determine whether the implied term is consistent with their dealings. The circumstances, when examined, may indicate a contrary intention. The need to examine the factual matrix is demonstrated by the decision of the Court of Appeal in *Marinangeli v. Marinangeli* (2003). 66 O.R. (3d) 40, [2003] O.J. No. 2819. In that case, a matrimonial dispute, the parties signed minutes of settlement providing that the husband would pay child support and spousal support. The minutes of settlement included a term allowing for a variation of the arrangements in the event of a material change in circumstances. A short while later, the husband cashed some substantial stock options. The issue was whether there was an implied term in the minutes of settlement that the husband would disclose any material change in circumstances.

[463] The Court of Appeal referred to *C.P. Hotels Ltd. v. Bank of Montreal* and *MJB Enterprises Ltd v. Defence Construction (1951) Ltd.*, above, in support of the proposition that a “contractual term may be implied based on the presumed intention of the parties where it is necessary to give business efficacy to the contract or where it meets the officious bystander test.” It noted that the Supreme Court had not made it clear whether this was one test or two, but had held that what is important in both formulations is a focus on the intentions of the actual parties.

It noted that in *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, the Supreme Court had found that the term at issue had “a certain degree of obviousness to it to the extent that the parties, if questioned, would clearly agree that this obligation had been assumed.”

[464] The Court of Appeal went on to examine the minutes of settlement and the surrounding documentation executed by the parties and found that reading these together and as a whole, they were indicative of an intention that there would be a disclosure of a change in the husband’s financial circumstances that would affect the physical comfort of his child. The Court of Appeal’s reasons indicate, however, that this was not the end of the inquiry. The Court of Appeal went on to examine all the surrounding circumstances – at para. 64:

The underlying rationale for implying a term of business efficacy is that it is necessary to make the transaction effective. In other words, if such a term was not implied, the very rationale for entering into the Minutes would be undermined. In the case of tendering contracts, bidders would not go to the expense and time of preparing a tender if the tender calling authority did not have an implied obligation to treat bidders fairly and equally. Here, it was obvious to the trial judge that the policy of encouraging negotiation and settlement of family law matters both under the Divorce Act and the Guidelines would be undermined if the Court were to approve the appellant’s non-disclosure of his changes of circumstances within such a short time after signing the Minutes. The lengthy protracted negotiations over four years, the appellant’s representation as to his financial situation, the disclosure respecting the options combined with the very short time frame after signing the Minutes within which the options were exercised, the fact that the appellant controlled the timing of the realization of his income from the options that had vested, and the fact the respondent had no means of accessing this information, are all factors supporting the trial judge’s conclusion that the appellant had an implicit obligation to disclose his change in circumstances in order to give business efficacy to the agreement.

[465] Even this was not sufficient. The Court of Appeal continued, at para. 65, that additional factors must be considered before a term would be implied based on “business efficacy” and the “presumed intention of the parties”:

Before a court will imply a term based on the doctrine of “business efficacy” and the presumed intention of the parties, there are additional factors that must be met, as set forth by Professor G.H.L. Fridman, in his book *The Law of Contract in Canada*, 3rd ed. (Scarborough: Carswell, 1994) at 475. To be implied a term must be (a) reasonable and equitable; (b) capable of clear

expression; and (c) not contradictory of an express term in the contract.

[466] After examining all these factors in the circumstances of the case, the Court of Appeal concluded that the implication of a term was appropriate.

[467] Against this background, I turn to the implied terms advanced by the plaintiffs, the defendants' submissions on the point, and my analysis.

(b) *Discussion of Implied Terms*

[468] The plaintiffs claim that it was an implied term of their agreements that ingredients would be sold to franchisees at commercially reasonable prices. The defendants say that such an implied term is inconsistent with the terms of the franchise agreements, is neither reasonable nor necessary, and does not meet any of the tests for the implication of a term.

[469] The plaintiffs say that the implied term that they propose is necessary, reasonable and consistent with custom and usage. The plaintiffs rely, in particular, on the evidence of Tim Hortons, that in sourcing products, it negotiated with suppliers, taking advantage of its buying power, to obtain the best commercial price available. There was also evidence that Tim Hortons generally obtained at least two competitive quotations for commodities and ingredients in order to obtain the best possible price. The plaintiffs rely on this as evidence of the "custom" or practice of Tim Hortons.

[470] The plaintiffs also rely on the evidence of Mr. Fisher, to the effect that the franchisor's purchasing power enables it to obtain prices that are generally lower than the prices that the franchisee can obtain on its own. His evidence, given in *Quizno's*, speaking generally with respect to the practice in the QSR business:

The franchisor negotiates the food and paper prices for the entire chain. Through the purchasing power that the franchisor has, prices are generally lower than those that any individual franchisee could obtain on their own.

[471] As was the case with the express terms, the evidence required to address the implied terms issue is limited and largely uncontroversial. The contractual matrix is, as I have noted, largely based on historical documentation. As well, as I will explain, there is either no evidence to support the alleged "custom" that the plaintiffs rely upon or the evidence the plaintiffs do rely upon does not support the custom they allege. In addition, the implied terms the plaintiffs assert are not only inconsistent with the other terms of their contracts, they are not supported by the contractual matrix. For these reasons, I have concluded that a trial of the implied terms issue is not required for the full appreciation of the evidence necessary to resolve the issue.

[472] The plaintiffs were unable to point to any evidence that it is customary in the franchise business in general, or in the QSR business in particular, that the franchisor supplies all

ingredients or other inputs to franchisees at prices that are lower than can be generally obtained in the marketplace. Nor did the plaintiffs point to any evidence that the practice of Tim Hortons has been to supply ingredients to franchisees at less than market price or at a “commercially reasonable” price. Put at its highest, the plaintiffs’ evidence, through Mr. Fisher, is that, as a matter of practice, a franchisor’s volume purchasing power permits it to obtain prices that are generally lower than its franchisees would be able to purchase on their own and that Tim Hortons’ experience reflects this. The evidence does not establish that it is the practice of franchisors generally, or of franchisors in the QSR business in particular, or of Tim Hortons, to pass on to their franchisees the benefit of their purchasing power in the case of every input they supply to franchisees.

[473] The plaintiffs, however, say the implication of such a term is both necessary and reasonable to restrain the franchisor from using the “captive supply provisions” of the franchise agreement to “insulate” itself from the “usual competitive forces of the marketplace”, allowing it to thereby “compel the franchisees to buy products at a monopoly premium that serves to generate extraordinary profits for the franchisor.” They say that without the implication of such a term, they would be at the mercy of the franchisor.

[474] The authorities suggest the implication of terms based on custom or usage is appropriate where the usage is so notorious and certain and invariably followed that everyone contracting in that particular trade or locale can be taken to have agreed to be bound by it. As I have noted, there is no such evidence in this case.

[475] Moreover, the existence of such a custom would be inconsistent with the regulatory scheme in Ontario, which contemplates that the price of goods supplied under a franchise agreement will not necessarily be lower than the market price. Under Ontario Regulation 581/00 made pursuant to the *Arthur Wishart Act*, the franchisor is required to provide a disclosure document to a prospective franchisee that stipulates that “the cost of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the goods and services available in the marketplace.” Thus, not only is there no evidence of any custom in the QSR business (or any other franchise business) that the franchisee invariably obtains lower prices than it could obtain in the market, the statutory regime intended for the protection of franchisees implicitly recognizes that the cost of goods supplied under franchise agreements is frequently not the lowest cost available in the marketplace.

[476] Indeed, section 5.04 of the franchise agreement, referred to above, expressly contemplates that Tim Hortons will make a profit, commission or rebate on the price of goods sold to franchisees and the franchisee disclaims any interest or right in such profits. As in *Chung v. Lite-Way Subs and Deli Inc.*, [2001] O.J. No. 3746 (S.C.J.), there is no basis on which to imply a term that is contrary to an express term.

[477] I recognize that, as in *Marinangeli v. Marinangeli*, above, it may be necessary to examine the factual matrix underlying the parties’ contract to determine whether the implication of a term is required to give business efficacy to the contract or to make it effective. In this case,

the plaintiffs do not rely on any aspect of the factual matrix underpinning their contracts and the evidence submitted by Tim Hortons, which is not in dispute, runs contrary to the implication of a term.

[478] The plaintiffs were no strangers to the operation of the Tim Hortons system. Mr. Jollymore had been a member of Tim Hortons' senior management for 17 years and had been a franchisee since 1994. Mrs. Jollymore had owned a franchise since 1988. They both understood how the system worked. They must have known that they were not necessarily acquiring ingredients at the lowest price available in the marketplace and that they had no right to do so.

[479] In July 2006, after the renewal of the franchise agreement for store #750, Mr. Jollymore on behalf of Brule signed an acknowledgment of receipt of an Ontario disclosure document that confirmed, as required by the Regulation, that “[t]he costs of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the goods and services available in the marketplace.” The disclosure document also confirmed that Tim Hortons “receives rebates and other benefits from various suppliers as a result of the purchase of goods and services by the Licensor for its Licensees or for direct purchase by the Licensees from designated manufacturers. Most rebates and other commissions or other benefits received by the Licensor are retained by it for its own benefit.”

[480] At the time that Mrs. Jollymore, on behalf of Fairview, signed a licence agreement for her new store #593, she acknowledged receipt of the disclosure document.

[481] Finally, the “Entire Agreement” provision in the franchise agreement, section 16.02, referred to above, confirms that the agreement contains the entire agreement between the parties and that no representations, warranties or promises have been made that are not contained in the agreement.

[482] In summary, there is no evidence of a custom in the QSR business that the franchisor supplies “inputs” at prices that are lower than market prices and it would not be reasonable to imply such a term into the contract between the parties.

[483] There is no basis on which to imply a term of the third kind, based on the “business efficacy” or “officious bystander” test. Such a term is not required in order to make the contract commercially effective. Nor would it be consistent with the express terms of the contract or the regulatory framework, both of which I have discussed.

[484] I will address below, under the subject of good faith and fair dealing, the implication of a term that the parties will “not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into”: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (C.A.) at para. 53; *Nareerux Imports Co. Ltd. v. Canadian Imperial Bank of Commerce* (2009), 97 O.R. (3d) 481, [2008] O.J. No. 4553 (C.A.) at para. 69. I will note that there is no evidence that the defendants have engaged in such conduct and in fact the evidence supports the conclusion that, on the whole, most franchisees, including the plaintiffs, are making a reasonable rate of return on their investments. Thus, although such a

term would be implied in this contract, there is no evidence of conduct by Tim Hortons that has eviscerated or defeated the objectives of the franchise agreement.

[485] I therefore conclude that the plaintiffs' breach of contract claim has no possibility of success and should be dismissed.

[486] I now turn to the plaintiffs' allegations that Tim Hortons has breached its common law and statutory duties of good faith and fair dealing in the performance of the franchise agreements.

C. Breach of Duty of Good Faith and Fair Dealing

[487] The plaintiffs plead that if Tim Hortons had the contractual right to require franchisees to convert to the "Always Fresh" baking method, as I have found it did, doing so was a breach of its duty of good faith and fair dealing, because it led to commercially unreasonable prices and reduced profits for the franchisees. There is a similar pleading in relation to the Lunch Menu, which alleges that franchisees are required to sell Lunch Menu items at prices that are too low to make a profit.

[488] The plaintiffs say that Tim Hortons breached its common law duty of good faith and breached its statutory duties under s. 3 of the *Arthur Wishart Act* and comparable provisions in other jurisdictions. The alleged breaches of the duty of good faith and fair dealing include the following:

- misrepresenting the cost of the Always Fresh donut as being 11 to 12 cents when Tim Hortons knew it would be 16 cents and that distribution costs would bring it to 18 cents;
- exploiting the "captive supply" provisions of the franchise agreement by imposing mark-ups that generated "extraordinary gains" without corresponding value to franchisees;
- failing to analyze the effect of Always Fresh Conversion on franchisee profitability and disregarding the interests of franchisees;
- misrepresenting that increased food costs would be offset by labour and other savings;
- imposing unreasonably high food costs for Always Fresh baked products;
- refusing to take reasonable steps to address franchisees' concerns; and

- requiring franchisees to sell Lunch Menu items at a cost that prevented them from earning a profit.

[489] The plaintiffs rely on the evidence of Mr. Garland and Mr. Jollymore, as well as the evidence of their experts, Mr. Fisher and Mr. Rosen, in support of their argument that franchisees suffered financial injury as a result of the Always Fresh Conversion and the Lunch Menu. They say that the price of par baked donuts was unreasonable and in excess of their fair value and the Lunch Menu was not profitable. They also rely on the evidence of Mr. and Mrs. Jollymore, Mr. Gilson, Mr. Loiello and Mr. Fisher, to the effect that the increased costs of the Always Fresh products were not offset by savings in labour, wastage and other savings. The plaintiffs say that the analysis of this evidence requires assessments of credibility and the weighing of evidence that would make the issue unsuitable for resolution on a summary judgment motion.

[490] I will begin the analysis by examining the nature and scope of the duty of good faith and fair dealing at common law and under the franchise statutes. I will then consider whether it is appropriate to grant summary judgment on the *Arthur Wishart Act* claims and, if so, whether I should do so.

1. *Arthur Wishart Act*

[491] The *Arthur Wishart Act (Franchise Disclosure) 2000* is, as its full name indicates, primarily directed to ensuring that there is sufficient disclosure of information to a prospective franchisee, before he or she enters the franchise agreement, to enable him or her to make an informed business decision. The statute contains other important provisions governing the relationship between the franchisor and the franchisee, including a duty of good faith and fair dealing (s. 3), and a right of franchisees to associate and to form or join a franchisees' organization (s. 4).

[492] Section 3(1) of the *Arthur Wishart Act* expresses the duty of fair dealing:

Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

[493] Subsection 3(2) gives a party a right to damages against the other party for the breach of the duty of fair dealing in the performance and enforcement of the agreement.

[494] Sub-section 3(3) provides that the duty of fair dealing includes “the duty to act in good faith and in accordance with reasonable commercial standards.”

[495] It is generally accepted that section 3(1) is a codification of the common law: *Landsbridge Auto Corp. v. Midas Canada Inc.*, at paras. 24, 59; *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 at para. 114 (Ont. S.C.J.); *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 at para. 66 (S.C.J.).

[496] The *Arthur Wishart Act* is unquestionably remedial legislation, designed to address the power imbalance between franchisor and franchisee. As such, it is entitled to a generous interpretation to give effect to its purpose: *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, above, at paras. 31, 74, and *TA & K Enterprises Inc. v. Suncor Energy Products Inc.*, [2010] O.J. No. 5532 at para. 41, both citing *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 at para. 26 (S.C.J.).

[497] In the leading case of *Shelanu Inc. v. Print Three Franchising Corporation* (“*Shelanu*”), above, the Court of Appeal referred to the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1, which recognized a duty of good faith in employment contracts. Such contracts were described as unique and having characteristics that set them apart from ordinary commercial contracts. The Court of Appeal found, at para. 66, that franchise contracts also have characteristics that give rise to a duty of good faith. These characteristics include unequal bargaining power, the imposition of a standard form contract of adhesion, and a power imbalance during the performance of the agreement:

The relative position of the parties as outlined by Iacobucci J. in *Wallace* also exists in the typical franchisor-franchisee relationship. First, it is unusual for a franchisee to be in the position of being equal in bargaining power to the franchisor: See *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42, 114 O.A.C. 357 (C.A.), per Goudge J.A. at para. 16; *Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261 (QL), 24 B.L.R. (3d) 228 (S.C.J.) at para. 109. The second characteristic, inability to negotiate more favourable terms, is met by the fact that a franchise agreement is a contract of adhesion. As I have indicated, a contract of adhesion is a contract in which the essential clauses were not freely negotiated but were drawn up by one of the parties on its behalf and imposed on the other. Further, insofar as access to information is concerned, the franchisee is dependent on the franchisor for information about the franchise, its location and projected cash flow, and is typically required to take a training program devised by the franchisor. The third characteristic, namely that the relationship continues to be affected by the power imbalance, is also met by the fact the franchisee is required to submit to inspections of its premises and audits of its books on demand, to comply with operation bulletins, and, often is dependent on, or required to buy, equipment or product from the franchisor. It is hardly surprising, therefore, that a number of courts, including the Manitoba Court of Appeal in *Imasco Retail Inc. (c.o.b. Shoppers Drug Mart) v. Blanaru*, [1995] 9 W.W.R. 44, 104 Man. R. (2d) 286 (Q.B.), affd (1996), [1997] 2 W.W.R. 295,

113 Man. R. (2d) 269 (C.A.) have recognized that a duty of good faith exists at common law in the context of a franchisor-franchisee relationship.

[498] The Court of Appeal noted, at para. 74 that the determination of whether a party has breached the duty of good faith will require an examination of all the circumstances of the case:

Whether or not a party under a duty of good faith has breached that duty will depend on all the circumstances of the case, including whether the party subject to a duty of good faith conducted itself fairly throughout the process. See by analogy: *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687, [2000] I.L.R. 1-3826 (Ont. C.A.), per O'Connor J.A., at paras. 28-37, leave to appeal to [the] Supreme Court of Canada dismissed, [2000] S.C.C.A. No. 258. See also the decision of Laskin J.A. in the Court of Appeal in *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, in dissent, aff'd [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19 (QL).

[499] In *117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, Kershman J. summarized the content of the duty of good faith in the franchise context as follows, at paras. 68-72:

- a party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party;
- if A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount;
- good faith is a minimal standard, in the sense that the duty to act in good faith is only breached when a party acts in bad faith. Bad faith is conduct that is contrary to community standards of honesty, reasonableness or fairness (e.g. serious misrepresentations of material facts); and
- good faith is a two way street. Whether a party under a duty of good faith has breached that duty will depend, in part, on whether the other party conducted itself fairly.

[500] The duty of good faith and fair dealing and the duty to act in accordance with reasonable commercial standards, as expressed in the *Arthur Wishart Act*, relate to the performance and enforcement of the franchise agreement. The duty is imposed in order to secure the performance of the contract the parties have made. It is not intended to replace that contract with another contract or to amend the contract by altering the express terms of the franchise

contract: *Pointts Advisory Ltd. v. 754974 Ontario Inc.*, [2006] O.J. No. 3504 at para. 55 (S.C.J.); *Agribrands Purina Canada Inc. v. Kasamekas*, [2011] O.J. No. 2786 at para. 51 (C.A.); *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 4656, 68 O.R. (3d) 457 (C.A.).

[501] It follows from this that in assessing whether a party has demonstrated good faith and fair dealing in the performance and enforcement of the agreement, the party's conduct must be considered in the context of and in conjunction with the contract that the parties have made. It is not a stand-alone duty that trumps all other contractual provisions. The Court of Appeal made this point in *IT/NET Inc. v. Cameron* (2006), 207 OAC 26, [2006] O.J. No. 156, an employment case. In allowing the employee's appeal, and rejecting the employer's argument that the employee had breached his duty of good faith, the Court of Appeal noted that the employee had complied with both a non-solicitation/non-competition clause in his contract and with a confidentiality provision. Goudge J.A., giving the judgment of the Court of Appeal, stated at para. 30:

I cannot agree that such a duty [of good faith] arises here. In *Transamerica Life Inc. et al. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.) this court made clear that Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. Unlike *TSP-Intl Ltd. v. Mills*, [2005] O.J. No. 616 (Ont. Sup. Ct.), in this case the appellant was bound by the two clauses of his written contract considered above. There is no room to import a separate duty of good faith where both express clauses have been complied with.

[502] The content of the duty of good faith and fair dealing has been expressed to include the following:

- to require the franchisor to exercise its powers under the franchise agreement in good faith and with due regard to the interests of the franchisee: *Shelanu*, at paras. 66 and 69;
- to require the franchisor to observe standards of honesty, fairness and reasonableness and to give consideration to the interests of the franchisees: *Landsbridge* at para. 15; *Shelanu* at paras. 5, 68-71;
- to ensure that the parties do not act in such a way that "eviscerates or defeats the objectives of the agreement that they have entered into": *Transamerica Life Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 at para. 53 (C.A.); or "destroy the rights of the franchisees to enjoy the fruits of the contract.": *Landsbridge*, at para. 17;

- to ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties: *Katotikidis v. Mr. Submarine Ltd.*, [2002] O.J. No. 1959 at para. 72 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.*, [2008] M.J. No. 316 at para. 272 (Q.B.); and
- where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised “reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.”: *Landsbridge*, at para. 17, citing *Carvel Corporation v. Baker*, 79 F. Supp. 2d 53 (D. Conn 1997) at para. 69; *CivicLife.com Inc. v. Canada (Attorney General)* [2006] O.J. No. 2474, 215 O.A.C. 43 (C.A.), at para. 50; *Shelanu* at para. 96.

[503] The duty of the franchisor to give consideration to the interests of the franchisee does not require the franchisor to prefer the franchisee’s interests to its own, and the franchisor is not a fiduciary in that sense: *Shelanu* at paras. 5, 68-71. As Kershman J. observed in *117304 Ontario Inc. (c.o.b. Harvey’s Restaurant) v. Cara Operations Ltd.*, above, at paras. 68-72, a party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party.

[504] Tim Hortons has referred to two decisions of United States Courts that discuss the duty of good faith in factual circumstances similar to this. Both cases involved complaints by franchisees of the Burger King chain that the franchisor had wrongfully imposed a “Value Menu” on franchisees, requiring them to sell certain menu items at a fixed maximum price of \$1.00. One of the requirements was that a “double cheeseburger” had to be sold for no more than \$1.00 as part of the “Value Meal”. This was later changed to a “Buck Double” said to be a double cheeseburger with one less slice of cheese.

[505] As in this case, there was a breach of contract claim and a bad faith claim. The U.S. District Court for the Southern District of Florida addressed the contract claim in *National Franchisee Association v. Burger King Corporation*, 715 F. Supp. 2d 1232, 2010 US Dist. LEXIS 50721 (S.D. Fla. 2010). The Court followed the decision of the United State Court of Appeals for the 11th Circuit in *Burger King Corp. v. E-Z Eating*, 572 F. 3d 1306, 2009 US App. LEXIS 14120 which had stated, at p. 1314:

Section 5(A) of the Franchise Agreement provided that the franchisee ‘agrees that changes in the standards, specifications and procedures may become necessary and desirable from time to time and agrees to accept and comply with such modifications, revisions and additions to the [operating manual] which [Burger King Corporation] in the good faith exercise of its judgment believes to

be desirable and reasonably necessary.’ There is simply no question that [Burger King Corporation] had the power and authority under the Franchise Agreements to impose the Value Menu on its franchisees.

[506] The Court dismissed the complaint that the imposition of the “Value Menu” was a breach of contract. It held that the franchise agreement unambiguously gave Burger King the right to offer specified menu items as part of the Value Meal and to unilaterally set maximum prices for those items.

[507] In a subsequent decision, the court dealt with the allegation that Burger King had acted in bad faith in setting the maximum price of the double cheeseburger at \$1.00, allegedly threatening the financial viability of the franchisees. The decision is reported as *National Franchisee Association v. Burger King Corporation*, 2010 WL 4811912, 2010 U.S. Dist. LEXIS 123065 (S.D. Fla.). The Court granted Burger King’s motion to dismiss the claim for bad faith and related claims.

[508] Burger King asserted that the plaintiffs had not adequately pleaded that it had breached a duty of good faith in setting prices. The plaintiffs had pleaded facts that bear some similarity to the facts the plaintiffs claim to have established in this case. They pleaded that the price set by Burger King caused franchisees to sell the Value Menu items at a loss, that the prices had been set despite the franchisees’ objections, that the information provided by Burger King to justify its decision was inaccurate and deceptive and that the prices were imposed in spite of information showing that the prices would cause franchisees to suffer a loss.

[509] The Court held that Burger King was entitled to set the price at which franchisees sold particular items, even if this resulted in a loss on franchisees’ sales of these items, unless it did so for an improper motive or unless it was established that the decision was so irrational and capricious that no reasonable person could have made the decision:

The purpose of Section 5 is to give [Burger King Corporation] broad discretion in framing business and marketing strategy by adopting those measures it judges are needed to help the business successfully compete. As explained above, to adequately raise a claim of bad faith, Plaintiffs must allege some facts suggesting that [Burger King Corporation] did not believe that the prices would be helpful to the businesses competitive position, but, for some other reason, deliberately adopted prices that would injure Plaintiffs’ operations. As currently pled, none of the allegations support such an inference of bad faith. Plaintiffs rely principally on their allegation that franchisees could not produce and sell [Double Cheeseburgers] or Buck Doubles at a cost less than \$1.00, and therefore that franchisees suffer “a loss” on each of these items sold. Even taken as true, there is nothing inherently suspect about a

such a pricing strategy for a firm selling multiple products. There are a variety of legitimate reasons why a firm selling multiple products may choose to set the price of a single product below cost. Among other things, such a strategy might help build goodwill and customer loyalty, hold or shift customer traffic away from competitors, or serve as "loss leaders" to generate increased sales on other higher margin products. See, e.g., *Parish Oil Co.. Inc. v. Dillon Cos.*, 523 F.3d 1244, 1254 (10th Cir. 2008) (stating that "loss leaders can have legitimate economic purposes and effects" including building goodwill and customer loyalty or attracting consumers to buy other items at regular or inflated prices). The issue is not whether such a strategy was wise or ultimately successful or mistaken. In the absence of some other evidence of improper motive, the question is whether it was so irrational and capricious that no reasonable person would have made such a decision. There is nothing about the pricing decision that suggests [Burger King Corporation] was doing anything other than seeking to promote the performance of its franchisees. Nothing about this action suggests bad faith.

Plaintiffs argue that Section 5 does not give [Burger King Corporation] the discretion to set a "below cost" price for any single product. The premise seems to be that requiring a franchisee to sell anything at below cost is per se bad faith. As the foregoing discussion makes clear, that is clearly not the case. Section 5 gives [Burger King Corporation] the right to set prices for products sold by franchisees. This includes the discretion to set prices for a single product below cost provided that the pricing decision is one "which [Burger King Corporation] in the good faith exercise of its judgment believes to be desirable and necessary." A decision to price a single product below cost is not automatically a bad faith exercise.

[510] The court found that the plaintiffs' claim based on loss of profits on two specific products could not support a claim for bad faith, in the absence of allegations of serious detriment to their overall business:

A further flaw with Plaintiffs' bad faith claim is that they do not allege the kind of serious injury that would support an inference of bad faith. Rather than claim a substantial impact on their overall business, plaintiffs focus on the losses allegedly incurred on the single product sold below cost-the [Double Cheeseburger] and the Buck Double. The terms used by Plaintiffs in paragraph 63 to describe their economic injury relate to the "loss," the absence of

"appropriate profit margin," and the "lost profits" on the [Double Cheeseburger] and Buck Double products standing alone. Almost any standard or specification set by [Burger King Corporation] - whether it relates to pricing, labor, advertising, or safety-could be characterized as resulting in "losses" or less margin or profit when viewed on one item alone. Further, even if Plaintiffs are alleging that the cumulative losses on the single product deprived them of "appropriate profits" in the overall business, the claim is so vague as to be meaningless. Again, any discretionary measure adopted by [Burger King Corporation] which imposed costs or reduced revenues on any single product could be characterized in some sense as depriving franchisees of profits.

[511] The Court continued:

As explained above, to the extent plaintiffs seek to raise a claim of bad faith by pointing to the injuries allegedly caused them by [Burger King Corporation's] decision, plaintiffs must allege that the damage to their overall business was so severe as to deprive them of their reasonable expectations under the contract. The basic question is whether the impact has been so injurious that the measure could not reasonably have been considered within contemplation of the parties. Plaintiffs come nowhere close to alleging such an impact. Significantly, nowhere do plaintiffs claim that their overall business has been appreciably impaired. Nor do they allege that their overall businesses are no longer profitable or that their competitive positions or economic viability going forward are threatened.

[512] I accept immediately that the statement of the law of bad faith expressed in these extracts is not necessarily reflective of our principle of good faith and fair dealing under the *Arthur Wishart Act* or at common law. That being acknowledged, the logic in the *Burger King* case is compelling – a determination of whether a franchisor has conducted itself in good faith cannot be based on isolated pricing decisions of particular menu items or groups of items. Regard must be had to the conduct of the franchisor taken as a whole and the benefits – or disadvantages – obtained by franchisees as a whole.

[513] With this background, I will turn to the plaintiffs' allegations.

2. Plaintiffs' Allegations: Breach of Duty of Good Faith and Fair Dealing

[514] The plaintiffs argue that Tim Hortons breached its duty of good faith and fair dealing by implementing the Always Fresh Conversion. Their allegations have been set out earlier. Their submissions are replete with pejorative language, such as "misrepresentation" of the costs of

donuts, “exploitation” of the “captive supply” provisions of the franchise agreement, and making “extraordinary gains” through the “diversion of profits” from the “inflated prices” at which frozen donuts were sold by the joint venture. They claim that they were misled about the cost of the Always Fresh Conversion, that Tim Hortons failed to analyze the effect of the conversion on the franchisees, that the price of the products was unreasonably high and that Tim Hortons failed to respond to their concerns about profitability.

[515] In connection with the Lunch Menu, the plaintiffs submit that Tim Hortons’ ability to set prices in relation to the Lunch Menu is not absolute and is subject to the duty of good faith and fair dealing. They say that Tim Hortons has breached its duty of good faith and fair dealing by setting prices on Lunch Menu items so that they cannot earn a profit on those items. They say that Tim Hortons failed to make the necessary investigations prior to fixing the prices and disregarded their interests after it set the prices.

3. Discussion of *Arthur Wishart Act* Claims

[516] I have concluded that this is a case in which it is appropriate to grant summary judgment because the underlying premise of the *Arthur Wishart Act* claims is flawed. The duty of good faith and fair dealing is in relation to the performance of the contract that the parties have made. The court's responsibility is to give effect to that contract and to require the parties to discharge their contractual obligations fairly, in good faith and in a commercially reasonable manner. Under the guise of their *Arthur Wishart Act* claims, the plaintiffs are really asking the court to re-write their contracts and to require Tim Hortons to perform those re-written contracts in a manner that the plaintiffs or their expert would find commercially reasonable. This is not the court's function.

[517] It is not necessary to make findings of fact about whether the prices of donuts, timbits or Lunch Menu ingredients were commercially reasonable, because that is not the issue.

[518] As I have said earlier, the core of the plaintiffs' *Arthur Wishart Act* claim is that they should have made more money on the sale of donuts and Lunch Menu items. Most of their other complaints are window-dressing which have the effect of obscuring the core allegation.

[519] There is nothing in the plaintiffs' franchise agreements that entitles them to make a profit on their franchises generally or on any particular product or product line. The evidence establishes that the plaintiffs' franchises have been generally profitable and that they have made reasonable returns on their investments. Moreover, by the plaintiffs' own admission, they were fully aware that they had no right to make a profit on any menu item or menu category. Mrs. Jollymore confirmed this on cross-examination:

Q. And do you agree with me that there's no term in the contract, written term whereby Tim's covenants or guarantees to you a return, an investment, or a return, or a profit on either our overall store or any product or any product line in the store?

A. Yes.

[520] Mr. Jollymore admitted to the same understanding:

Q. And we can look at the license agreements if you want, sir, but am I correct that in terms of your understanding, there wasn't a guarantee in terms of financial return for you either overall or for any product group or product in those license agreements?

A. No.

Q. That's a fault of the question. You agree with me that's your understanding, correct?

A. That's my understanding.

[521] The plaintiffs' franchise agreements permitted Tim Hortons to undertake the Always Fresh Conversion and to modify the Lunch Menu from time to time. It also permitted Tim Hortons to set the prices for all ingredients and supplies that franchisees are required to purchase from designated suppliers and to profit from the sale of any such items. Finally, it permitted Tim Hortons to specify the maximum price at which all menu items are sold, but did not restrict the ability of franchisees to sell at lower prices.

[522] The pricing of the Always Fresh donut and timbit was within the reasonable discretion of Tim Hortons. There is no evidence that this discretion was exercised arbitrarily or capriciously or for an improper motive – the decision of the franchisor to price the product at a level that generates a profitable return on its investment is not, on its own, an improper motive.

[523] There is no evidence that the price of the Always Fresh donut has been set at a level that deprives franchisees of the benefits of their agreements, defeats the purpose of the franchise agreement, or makes the operation of a Tim Hortons franchise unprofitable. On the contrary, the evidence supports the conclusion that most franchisees, including the plaintiffs, make a reasonable level of profit and a reasonable return on their investments.

[524] The evidence does not establish that Tim Hortons intentionally misrepresented the cost of the Always Fresh donut to its franchisees in general or to the plaintiffs in particular. Tim Hortons acknowledges that it informed franchisees that there would be an increase in their food cost and that it would be offset by labour and other savings; this statement has proven to be true over time. As well, as I have noted, there have been increases in the retail price of donuts over time, from 70 cents to 90 cents.

[525] When considered in the context of the franchisees' overall menu offerings, including the profitable items such as coffee, the pricing of less profitable items, such as donuts and timbits and Lunch Menu items, cannot be regarded as making the agreement as a whole commercially unreasonable or as characterizing the franchisor's performance of the agreement as commercially unreasonable.

[526] During the period 2003 to 2007, the cost of an unfinished par baked donut to franchisees was approximately 18 cents. It has increased to approximately 20 cents to date. In the same period, the retail price of a single donut has increased from 70 cents to 90 cents. An Always Fresh donut that now costs franchisees about 22 cents to make (when the franchisees' finishing costs are taken into account) sells in their stores for 90 cents on an individual basis and 56-57 cents on average. The evidence establishes that, were the scratch baking system still in place today, it would cost the franchisee about 30 cents to produce a donut.

[527] In summary, I find that the decision to move to Always Fresh was made honestly and reasonably, with due consideration for the interests of the franchisees as confirmed by the evidence of Mr. Clanachan and the unchallenged evidence of Mr. Madden. As well, Tim Hortons took reasonable measures to discuss the Always Fresh Conversion with franchisees in

advance, to obtain their support and to prepare and train them for the conversion. Far from being a decision that eviscerated the objectives of the franchise agreement or nullified the bargain made by the parties, the Always Fresh Conversion was part of the reasonable evolution of the Tim Hortons System and had benefits for both parties. Even if I were to find that the immediate financial benefit to Tim Hortons was greater than the financial benefit to the plaintiffs, this would not constitute a breach of the duty of good faith and fair dealing. Having regard to the franchise agreement as a whole and the benefits of the agreement that are received by the plaintiffs, the Always Fresh Conversion and the pricing of donuts and timbits was not a breach of the franchisor's duty of good faith and fair dealing.

[528] I turn to the Lunch Menu.

[529] The franchise agreement permitted Tim Hortons to require franchisees to sell the Lunch Menu, including such new Lunch Menu items as might be developed from time to time. It permitted Tim Hortons to set the prices at which Lunch Menu ingredients are sold to franchisees and to make a profit from the sale of such ingredients. It permitted Tim Hortons to specify the maximum price at which all menu items are sold.

[530] The development and expansion of the Lunch Menu was a reasonable commercial decision motivated by appropriate corporate concerns and having regard to the interests of the franchisor and the franchisees, including keeping the store busy at off-peak hours, cross-selling more profitable items, generating goodwill, and resisting competition from other QSR chains.

[531] As with the Always Fresh donut, the price of Lunch Menu ingredients was within the reasonable discretion of Tim Hortons and there is no evidence that the price of such menu items was set arbitrarily or capriciously or that the franchisor performed the agreement in a commercially unreasonable manner. The pricing of Lunch Menu items was done with due regard for and consideration of franchisees' interests and after consultation with them and their representatives on the Advisory Board.

[532] While the plaintiffs and their experts may disagree with Tim Hortons' requirement that every franchisee must sell the Lunch Menu, the franchisor is entitled to insist on uniformity across the system. There is no obligation on the franchisor to ensure that the franchisee makes a profit on every product it sells and there is no evidence that the pricing of Lunch Menu items makes the operation of the plaintiffs' stores unprofitable or unsustainable. Indeed, the overall performance of the plaintiffs' stores belies this proposition.

[533] For these reasons, I dismiss the plaintiffs' claims for breach of the *Arthur Wishart Act*.

D. Unjust Enrichment

[534] Tim Hortons says that the plaintiffs' claims for unjust enrichment have no prospect of success because, among other reasons, there is a "juristic reason" for any enrichment of Tim Hortons, namely the existence of a valid contract that permits Tim Hortons to make a profit on the sale of ingredients to franchisees.

1. Requirements of Unjust Enrichment

[535] There is no dispute between the parties about the law governing the plaintiffs' claim based on unjust enrichment. Three elements must be established: (1) enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21 at para. 30; *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 at para. 62.

[536] The first two elements are subject to a simple economic analysis: *Kerr v. Baranow*, [2011] 1 S.C.R. 269, [2011] S.C.J. No. 10 at para. 37. The plaintiffs acknowledge that the defendants' factum accurately describes the enrichment and corresponding deprivation requirements as follows:

Enrichment

The jurisprudence has recognized two types of benefit or "enrichment": a "positive" conferral of a benefit such as the payment of money and a "negative" benefit in the sense that the defendant was spared an expense which it would otherwise have been required to undertake. This has been characterized as an "incontrovertible benefit" which is either a demonstrable financial benefit not subject to debate and conjecture, or the saving of an "inevitable expense."

Corresponding Deprivation

It is not material that the plaintiff has suffered a loss if the defendant has gained no benefit. Unjust enrichment is a restitutionary remedy and the word "restitution" implies that something has been given to someone which must be returned or the value must be restored to the recipient. Accordingly, the plaintiff is obligated to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered.

[537] The requirement that there be a corresponding deprivation means that there must be a direct nexus between the enrichment of the defendants and the deprivation suffered by the plaintiffs: *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (S.C.J.) at para. 111; *VGI General Partner Inc. v. Ensis Management Inc.*, 2010 ONSC 3766, [2010] O.J. No. 2837 (S.C.J.) at para. 20.

[538] In *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, [1992] S.C.J. No. 101, McLachlin J., as she then was, giving the judgment of the Supreme Court (Lamer, C.J. concurring), stated 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. See, for example, Fridman and McLeod, *supra*, at p. 361; Maddaugh and McCamus, *supra*, at p. 717; and, Gautreau, *supra*, at pp. 265 et seq. 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. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant. This limit is also recognized in other jurisdictions. For example, German restitutionary law confines recovery to cases of direct benefits: Zwegert and Kotz, *Introduction to Comparative Law*, vol. II (2nd ed. 1987), at pp. 234-35.

[539] The plaintiffs contend that there may be circumstances where a broader interpretation of “corresponding deprivation” may be appropriate. They point to cases in which the defendant, in breach of a duty to the plaintiff, has exploited a profitable opportunity and has received a benefit from a third party at the expense of the plaintiff. They refer to Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, Loose-leaf (Aurora, Ont.: Canada Law Book, 2010) at 3-21 – 3-22:

...there are two senses in which it may be said that a benefit has been conferred at the plaintiff’s expense. First, where the benefit results from a transfer of wealth from the plaintiff to the defendant, the conferral is at the plaintiff’s expense in the sense that it involves a “subtraction” from the plaintiff. Alternatively, the benefit may have been acquired by the defendant through the breach of a duty owed to the plaintiff, such as the fiduciary’s duty of loyalty, in circumstances where the benefit is one that otherwise would have been obtained by the plaintiff. ...

Although the most typical pattern is an expense or loss of some kind sustained by the plaintiff resulting in the transfer of wealth to the defendant, it is also possible to conceive of circumstances in which wealth has been transferred to the defendant by a third party in circumstances in which the benefit may be said to be conferred at the plaintiff's expense in the subtraction sense. Thus, where a profitable opportunity is exploited by the defendant in breach of a fiduciary obligation to the plaintiff and it appears that the plaintiff would otherwise have exploited the opportunity, it may be reasonably said that the defendant's gain is matched by the plaintiff's loss.

[540] Although it is not necessary to my decision on this issue, it seems to me that this theory is not supported by the authorities, which restrict the "enrichment" and "corresponding deprivation" to benefits that have been directly and specifically conferred on the defendant at the expense of the plaintiff: see the observations of Cullity J. in *Landsbridge*, at paras. 66-67, discussed below, referring to *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 2218 (C.A.) at para. 20 and *Peel (Regional Municipality) v. Canada*, above, at para. 58

[541] The third element of the claim for unjust enrichment – absence of a juristic reason – is the most contentious in this case. In *Kerr v. Baranow*, Cromwell J., giving the judgment of the Supreme Court of Canada, described this requirement as follows, at para. 40-41:

The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of

the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

[542] The juristic reason requirement is considered in stages. First, the plaintiff must establish a *prima facie* case that the defendant's enrichment cannot be justified on the basis of a juristic reason from an established category. If the plaintiff is successful, then at the second stage of the analysis, the defendant can show that there is another reason to deny recovery, based on the reasonable expectations of the parties or public policy considerations. After considering these factors, the court may conclude that a new category of juristic reason should be established, that a juristic reason justified the enrichment in the particular circumstances of the case, or that there was no juristic reason for the enrichment: *Garland v. Consumer's Gas Co.*, at paras. 44-46.

[543] The Supreme Court observed in *Kerr v. Baranow*, at para. 43, that the two stage analysis for the juristic reason requirement was established in *Garland* to ensure that juristic reason did not become a purely subjective requirement, based on a particular judge's view of what was just as between the parties on a case by case basis. Only if the plaintiff shows on a *prima facie* basis that the case does not fall within an established category of juristic reason is it appropriate to proceed to the second stage.

[544] As the Supreme Court has noted in many cases, including *Kiss Estate v. Kiss*, [1983] 1 S.C.R. 623, *Pettkus v. Becker*, [1980] 2 S.C.R. 834 and *Kerr v. Baranow*, a contract may constitute a valid reason for the defendant's enrichment: see, for example, *Murray v. TDL Group Ltd.*, [2002] O.J. No. 5095 (S.C.J.) at paras. 262-5; *Pak v. Reliance Resources Group Canada Inc.*, [2002] O.J. No. 684, 2002 Carswell Ont. 663 (Ont. S.C.J.); *Re Collections Inc. v. Toronto-Dominion Bank Inc.*, [2010] O.J. No. 5686 (S.C.J.) at para. 143. I agree with the plaintiffs, however, that if the enrichment is the result of the breach of the contract, or if the contract is invalid, the contract cannot be a juristic reason for the enrichment. Put another way, the enrichment of the defendant as a result of the operation of a valid contract with the plaintiff is a juristic reason of the enrichment of the defendant.

2. Unjust Enrichment – Is a Trial Required?

[545] In my view, a trial of the plaintiffs' unjust enrichment claims is not required because, having found that any enrichment of Tim Hortons is the result of a lawful contract, the plaintiffs' claims fail as a matter of law. I will explain my reasons below.

3. Always Fresh – Unjust Enrichment

[546] The plaintiffs plead that by requiring franchisees to undertake the Always Fresh Conversion, the defendants fundamentally altered their franchise agreements, and by requiring them to purchase the Always Fresh products at inflated and commercially unreasonable prices, Tim Hortons made an unwarranted profit at their expense, resulting in losses to them. The plaintiffs say that there is no juristic reason for the enrichment and that the actions of the

defendants were a breach of their franchise agreements, a breach of the duties of good faith and fair dealing and a breach of the *Competition Act*.

[547] There are two reasons why the plaintiffs' claim for unjust enrichment fails. First, even if I were to find that there was a deprivation of the plaintiffs (and there is some question about this in light of the evidence adduced by Tim Hortons that the plaintiffs' profits have actually increased since the Always Fresh Conversion), there has been no corresponding enrichment of Tim Hortons as a result of the Always Fresh Conversion. I agree with the submission of the defendants that the revenues earned by Tim Hortons through the joint venture were indirect benefits that did not "correspond" to the alleged deprivation of the plaintiffs. The circumstances are similar to *Landsbridge*: see also *Boulangier v. Johnson & Johnson Corp.*, above.

[548] In *Landsbridge* it was alleged that the franchisor, Midas, had breached its franchise agreement by making fundamental and unilateral changes to the franchise system. This included ceasing to manufacture the products that it supplied to franchisees and entering into an agreement whereby a third party became the exclusive supplier of Midas-branded products to the franchisees. It was alleged by the plaintiff that this resulted in excessive charges for products and that Midas received unlawful and unjustified rebates from the supplier on purchases made by the franchisees, which it failed to pass on to the franchisees.

[549] Justice Cullity concluded that there was not the "necessary correspondence" between the alleged deprivation of the franchisees and the alleged benefit to Midas that would be required in order to certify a cause of action for unjust enrichment. He stated, at paras. 66-68:

The claim in respect of the increased revenue the defendants have received from alleged unlawful and unjustified receipts of rebates and allowances from product suppliers stands on a different footing [than the royalty claim]. Counsel for the defendants were, I believe, correct in their submission that the alleged deprivation consisting of higher prices that the Franchisees have been forced to pay under the new distribution system, and a loss of benefits under the Midas system, do not constitute a corresponding deprivation. Assuming as I must, that the new system produces advantages for Midas and disadvantages to the Franchisees, and that in implementing it, Midas breached its contractual obligations to the Franchisees, it does not follow that there is the necessary correspondence between the advantages and disadvantages to justify the grant of a restitutionary remedy that would attach a constructive trust to the amounts received by Midas. In this connection, counsel referred to, and relied on, *Boulangier v. Johnson & Johnson*, [2003] O.J. No. 2218 (C.A.), at para. 20, where Goudge J.A. referred to, and applied, a passage in the reasons of McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 in which it had been argued that the

remedy could extend to benefits that the plaintiffs indirectly conferred on the defendants. The learned judge stated, at para. 58:

This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant.

Similarly, there is, in my judgment, an insufficiently direct and clear correlation between the numerous disadvantages allegedly suffered by the Franchisees, and the benefits obtained by Midas, under the Uni-Select agreement.

[550] He therefore refused to certify the cause of action in unjust enrichment.

[551] The circumstances in this case are similar. Any “enrichment” of Tim Hortons as a result of its participation in the joint venture is indirect and does not have the necessary correspondence to the alleged deprivation of the plaintiffs.

[552] The second reason why the claim for unjust enrichment fails is that there was a juristic reason for the enrichment. The franchise agreement provided that the franchisee was required to purchase ingredients from either the franchisor or from manufacturers designated by the franchisor from time to time. The franchisee expressly acknowledged that Tim Hortons was entitled to make a profit or receive a commission on such purchases:

It is hereby acknowledged by the Licensee that in purchasing such products or supplies from the Licensor or manufacturers designated by it, the Licensor will make a profit or receive a commission or rebate on the price of goods sold to the Licensee and the Licensee agrees that such profits, commissions or rebates shall be the sole and absolute property of the Licensor and the Licensee shall have no claim to them in law or in equity;

[553] Tim Hortons had the right to stipulate that franchisees must purchase their supplies from the joint venture. As a participant in the joint venture, it had a right to profit from the sale of the supplies to franchisees, just as it had a right to profit from the sale of all other ingredients. Any enrichment of Tim Hortons was the result of the operation of a valid contract and the plaintiffs have no claim for unjust enrichment.

4. Lunch Menu – Unjust Enrichment

[554] The plaintiffs say that they have suffered a deprivation because they have been required to sell the Lunch Menu at unreasonably low margins, and that Tim Hortons has been enriched by marking up the price of ingredients sold to the plaintiffs and by royalties on sales of Lunch Menu

items. They say that the broad definition of “corresponding deprivation” advocated by Maddaugh and McCamus would encompass this case because there has been a transfer of wealth from the franchisees to Tim Hortons and a breach of duty owed by Tim Horton to the plaintiffs. They say that the franchise agreements cannot be a juristic reason for Tim Hortons’ enrichment, because Tim Hortons has not validly exercised its powers under those agreements.

[555] The plaintiffs’ unjust enrichment claim for Lunch Menu items fails for the same reason as the Always Fresh claim. The franchise agreement permits Tim Hortons to make a profit from the sale of Lunch Menu items.

E. *Competition Act*

1. The Maidstone Bakeries Joint Venture and Pricing of the Par baked Donut

[556] I have described earlier some of the factual background leading to the joint venture between Tim Hortons and IAWS for the establishment of the facility known as Maidstone Bakeries, which supplied par baked donuts and timbits to Tim Hortons franchisees. Maidstone Bakeries was an indirect subsidiary of CillRyan, an entity that was owned by the joint venture partners until Tim Hortons sold its interest in the joint venture to Arytza AG in 2010. The corporate structure was complicated. Maidstone Bakeries was owned by #3052877 Nova Scotia and was indirectly owned by CillRyan. CillRyan was, in turn, 50% owned by an affiliate of IAWS and 50% owned by three limited partnerships, which were in turn owned by a Delaware company that was the predecessor of THI. Thus, Maidstone Bakeries was, indirectly, 50% owned by TDI.

[557] As described earlier, Mr. Clanachan was directly involved in Tim Hortons’ search for new baking technology and in the negotiation of the joint venture. His evidence establishes that the decision to pursue the par baking technology and to joint venture with IAWS, was a prudent business decision, for the reasons I have outlined earlier. The evidence of Mr. Madden of IAWS and of Mr. Clanachan, establishes that the negotiations with IAWS were arms length.

[558] As part of the business plan developed by the joint venture partners, it was necessary to make certain assumptions in order to justify the \$94 million capital expenditure required to construct the baking facility. One of the most important assumptions was the price at which donuts would be sold from the plant. Tim Hortons wanted to ensure that all types of donuts would be sold at the same price, regardless of differences in production costs. A cruller might cost more to produce than a standard donut, but Tim Hortons wanted its franchisees to be able to offer a variety of donuts to their customers without being concerned that some donuts were more expensive than others. Thus, every donut leaving the plant was to be sold at the same price. The evidence establishes that Tim Hortons and IAWS made their financial projections and decided to proceed with the investment, based on the assumption that the par baked donut would be priced at 16 cents leaving the bakery and before distribution charges.

[559] In arriving at the price of 16 cents per donut, Tim Hortons believed that the price was approximately equivalent to the food and labour costs involved in producing a donut under the scratch baking system. In its opinion, if donuts were priced at this amount, the majority of franchisees would be able to sell the donuts at approximately the same level of profitability as under the old system.

[560] The supply agreement, under which CillRyan agreed with Tim Hortons to be the exclusive supplier of par baked donuts and timbits to franchisees, contained a complex formula for the pricing of the products. It included a provision requiring the parties to negotiate in good faith if the formula resulted in a price that was not competitive in the market, to ensure that the prices paid by franchisees were in fact competitive.

[561] The evidence of Mr. Peter Madden, who was involved in the negotiation of the joint venture on behalf of IAWS, is uncontradicted and supports the evidence of Tim Hortons. Mr. Madden testified that the 16 cent donut price was a matter of intense negotiation and that Tim Hortons sought to achieve a price that was fair to its franchisees and roughly equivalent to the production cost of a scratch baked donut.

[562] Mr. Madden swore as follows:

In the course of negotiating the Joint Venture agreement, I recall representatives of TDL, including Paul House, Tom Mc'Neely, and David Clanachan, on more than one occasion, making the point that one of the things that was critical to the success of the project was that the joint venture had to be in the best interest of the franchisees, and that the pricing mechanisms agreed by the joint venture had to be consistent with this objective.

A price of \$0.16 per donut, was finally agreed after 3 months of analysis and intensive negotiation, and it is my understanding that this price was acceptable as it represented a price that was roughly equal to the true cost of on-site scratch baking, while being at a level that provided the Joint Venture with an acceptable return on capital.

At all times during the negotiations, as an equal partner in the Joint Venture, my objective was to achieve the highest price possible of the product in order to maximize the return for the IAWS Group, however the final price agreed was a negotiated price and lower than that expected by me.

Given the size, complexity and novelty of the Joint Venture undertaking, as well as the uncertainty regarding the various operating and financial assumptions, there was risk to the partners in the Joint Venture in pursuing the Joint Venture. The sale price

of the donuts to the TDL franchisees was an important input into the financial modeling of the Joint Venture. Product mix was also an important part of the equation because the costs to produce different types of donuts varied. On the basis of a sale price of \$0.16 per donut, I was prepared to recommend to IAWS Group Plc to contribute the significant costs required and enter into the Joint Venture agreement. [emphasis added]

[563] Mr. Madden's evidence is inconsistent with the plaintiffs' contention that the establishment of Maidstone Bakeries was an attempt by Tim Hortons to "divert profits" from the franchisees. Mr. Madden was not cross-examined and his evidence concerning the negotiation of the price is consistent with the evidence of Mr. Clanachan and inconsistent with the plaintiffs' theory that the joint venture was an attempt to "divert profits" from the franchisees.

2. Distribution and Supply Agreements

[564] As has been previously noted, the franchise agreements provide that the franchisee is required to purchase all commodities and supplies from Tim Hortons or from manufacturers and suppliers designated by Tim Hortons from time to time. The franchise agreement specifically acknowledges that Tim Hortons may make a profit or may receive a commission or rebate on such transactions and that the franchisee has no claim to such profits. The franchisee disclosure documents provided to the plaintiffs contain similar statements.

[565] Tim Hortons acts as the distributor of some products directly to franchisees. In 2006, it built a distribution facility in Guelph, Ontario, which is used to distribute refrigerated and frozen products to franchisees in approximately 80% of the Province of Ontario.

[566] Most other products are distributed in Ontario and elsewhere in Canada by third party distributors. In those cases, Tim Hortons has entered into distribution agreements with third parties, on an arm's length basis, to undertake the distribution of commodities and supplies to its stores. The two principal third parties are GFS Canada Group Limited and Sysco Corporation. These companies provide warehousing, transportation and distribution services, moving products from suppliers to franchisees. Under these agreements, the distributor purchases products from a supplier, which may be either Tim Hortons, Maidstone Bakeries, or a third party supplier. The distributor is remunerated on what is referred to as a "cost plus mark-up" basis – it is entitled to charge a mark-up on the cost of the product. The maximum mark-up on any particular product is a matter of negotiation between Tim Hortons and the distributor. The evidence establishes that this type of arrangement is common in the franchise business.

[567] Tim Hortons negotiates the maximum price at which the product is to be sold by the distributor to the franchisee. The distributor remains free to charge a lower price than it has negotiated.

3. The Pleadings

[568] The plaintiffs plead that “given the intense competition in the Quick service restaurant industry” and the fact that Tim Hortons sets the maximum retail prices at which they can sell their products, their ability to receive competitively priced Baked Goods is critical to their profitability.

[569] They allege that Tim Hortons has, through the Always Fresh Conversion and its distribution system, engaged in conduct, and entered into agreement or arrangements for the purpose of fixing, maintaining or unreasonably enhancing the prices of Always Fresh baked goods, including the prices charged by the joint venture and the distributors, thereby raising the prices significantly above market prices and reducing the profits of the franchisees. Although the *Competition Act* claim includes muffins and cookies, the plaintiffs now limit their claim to donuts and timbits. Muffins and cookies are not produced at Maidstone Bakeries.

[570] They plead that since the Always Fresh Conversion:

... the Defendants have used agreements, promises and other like means in conjunction with other persons to, directly or indirectly, fix, maintain, increase or control the prices (or components of the prices) or to enhance unreasonably the prices thereof which the Plaintiffs and Class Members pay for the Always Fresh donuts and Timbits, and have thereby contravened section 61 of the *Competition Act* until its repeal effective March 11, 2009, section 45(1)(b) prior to March 12, 2010 and s. 45(1)(a) after that date.

[571] They then plead:

At all material times, the Defendants engaged in activities for the purpose of fixing, maintaining, increasing, controlling or enhancing unreasonably the prices paid by all franchisees for the AF [Always Fresh] Baked Goods pursuant to, *inter alia*, one or more of the following agreements, arrangements or other means:

- a. with respect to AF donuts and Timbits:
 - i. the Defendants and IAWS/Arytza agreed that the Brantford plant (“Maidstone Bakeries” or “Maidstone”) would ship donuts and Timbits to the Distributors;
 - ii. Maidstone would invoice CillRyan’s Bakery Limited (“CillRyan”) at marked up or inflated prices to be passed along by CillRyan to the Distributors;

- iii. CillRyan would invoice the Distributors at marked up or inflated prices to be passed along by the Distributors to the franchisees; and the Defendants and IAWS/Arytza would share the corresponding excessive profits between them; and
- iv. the Defendants would receive a rebate or other advantage from the Distributors corresponding to some or all of the excessive profits received by the Distributors for distributing products to the franchisees.

[572] The plaintiffs also plead that in its capacity as a distributor, Tim Hortons influenced upward the price at which CillRyan sells Always Fresh donuts to distributors and the price at which distributors sell to franchisees. They plead that in this capacity, Tim Hortons engaged in activities, agreements and arrangements for the purposes of fixing or maintaining prices or enhancing unreasonably the prices of Always Fresh donuts and timbits being charged to distributors and being charged by distributors to franchisees.

4. The Plaintiffs' Claims under the *Competition Act*

[573] As a preamble to the discussion of the *Competition Act* claims, I will make three observations. First, from a legal perspective, it has long been established that the purpose of the *Competition Act* is to promote the public interest by eliminating anti-competitive activities in the marketplace: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, at paras. 82-88. The interpretation of the legislation must be informed by this purpose. The purpose of the statute is set out in s. 1.1:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[574] The second observation is that there is nothing civilly or criminally wrong with a franchisor selling a product to its franchisee at a price that results in a profit – even a substantial profit – to the franchisor. This reality is recognized by the *Arthur Wishart Act* disclosure regulation and is expressly contemplated by Tim Hortons' franchise agreements. Nor is there any criminality associated with a franchisor entering into a joint venture agreement with a third party to supply a product to the franchisees at a price at which both joint venturers make a profit – even a substantial profit. This is simply normal commercial activity – the balance between the franchisor's share of the profits and the franchisee's share is a matter to be determined in the market place.

[575] The third observation is that this case was, at the outset, about the division of profits between Tim Hortons and the franchisees. When this action was commenced, the plaintiffs alleged that the Always Fresh Conversion reduced their profits and resulted in windfall profits to Tim Hortons. There was no claim under the *Competition Act*. The plaintiffs' complaints related simply to the allegedly high prices at which they were required to purchase the Always Fresh products and the ingredients for the Lunch Menu. The *Competition Act* claim was added by amendment after the decision of the Divisional Court in *Quizno's*. In *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 5948, I granted the plaintiffs leave to advance this pleading. Although I found that the pleading was far from elegant, I permitted the claims to proceed, provided particulars were given. That subsequently occurred.

[576] Unlike the *Quizno's* case, which had been a *Competition Act* claim from the outset, this case is essentially a breach of contract and *Arthur Wishart Act* case, with the *Competition Act* causes of action added later. As well, unlike *Quizno's*, no claim has been made against the distributor with whom the defendants have alleged to have conspired.

[577] I turn now to the claims under the *Competition Act*.

[578] Part VI of the *Competition Act* prohibits a number of "offences in relation to competition". These are serious criminal offences, including bid-rigging, price fixing conspiracies and, until 2009, resale price maintenance. These offences are subject to criminal prosecution and are punishable by substantial fines or imprisonment. Private parties who suffer damages as a result of the commission of an offence prohibited under Part VI are entitled to bring a civil action for recovery of their damages. Section 36 of the *Competition Act* provides:

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[579] The plaintiffs assert two types of claims under the *Competition Act*. The first is for price maintenance, which was, prior to March 2009, a criminal offence under s. 61 of the *Competition Act*. The second claim is for conspiracy under s. 45 of the statute. That provision was amended effective March 2010 and there are therefore two types of s. 45 claims asserted –

one under the statute as it existed prior to March 2010 and the other under the new statutory provision.

[580] I will begin the discussion with the claim for price maintenance under s. 61. I will then discuss the claim under the “old” section 45 and then the claim under the “new” section 45.

5. Price Maintenance: Section 61

[581] Section 61(1) of the *Competition Act* was in effect between May 1, 1993 and March 11, 2009, until it was repealed by S.C. 2009, c. 2, s. 417. It prohibited both vertical price maintenance (between a manufacturer and a retailer, for example, referred to as “resale price maintenance”) and horizontal price maintenance (where a party attempts to influence upward the price at which a competitor offers its product). The section provided:

61(1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person. [emphasis added]

[582] Sub-section 61(2) stated that it was not an offence if the alleged parties to the offence are affiliated corporations.

[583] It was not an offence under the *Competition Act* to impose maximum retail prices; nor was it an offence for a manufacturer to suggest retail prices. Sub-section 61(3) provided that a suggested minimum resale price by a supplier did not offend the section, provided the supplier made it clear to the person to whom the price was suggested that they were under no obligation to accept the suggestion and that their business relationship with the supplier would not suffer if they did not accept the suggestion. As I have noted earlier, the plaintiffs’ franchise agreements contained express provisions in order to comply with this requirement. A similar statement was contained in the statutory disclosure documents that were provided to the plaintiffs.

[584] Section 61 was a criminal offence carrying a maximum prison term of five years. It was also enforceable through the civil remedy under s. 36. On its repeal in 2009, it was replaced with a provision making it a civilly-reviewable practice and conferring jurisdiction on the

Competition Tribunal to grant a civil remedy. The plaintiffs' claim in relation to section 61 is confined to the period prior to the 2009 amendment.

[585] Section 61 does not prohibit a manufacturer or supplier from increasing the price at which it sells the product. As I have said earlier, it does not prohibit a supplier from making a large profit on a product it sells to someone downstream. It prohibits a person who produces or supplies a product from attempting, by means of agreement, to influence upward or discourage the reduction of the price at which another person sells the product. The provision is designed to protect the public by prohibiting an upstream supplier from preventing competition among retailers, thereby increasing the price paid by the ultimate consumer. It does not prohibit the upstream supplier from increasing the price at which it supplies the product to a downstream purchaser.

[586] The Competition Bureau has described price maintenance in its website in the following terms:

Price maintenance may occur when a supplier prevents a customer from selling a product below a minimum price by means of threat, promise or agreement. It may also occur when a supplier refuses to supply a customer or otherwise discriminates against them because of their low pricing policy.

[587] The typical price maintenance offence occurs where a supplier uses threats, promises or agreements to prevent a customer from selling a product below a minimum price or refuses to supply a product to a customer or otherwise discriminates against the customer due to its low pricing policy.

[588] Section 61 has been used, for example, to prosecute a beer company for maintaining the price at which discount beer was sold by convenience stores, resulting in a guilty plea and a fine of \$250,000: *R. v. Labatt Brewing Company*, Cour du Québec, Court File No. #500-73-02495-055. Similarly, in *R. v. H. D. Lee of Canada* (1980), 57 C.P.R. (2d) 186, 1981 CarswellQue 264 (Québec Court of Sessions), a manufacturer of jeans induced discount retailers, who had been supplying products at reduced prices, to increase the prices at which they were selling the products.

[589] The Manitoba Court of Appeal described the purpose of the previous section 38, the predecessor equivalent to the former section 61, in *R. v. Kito Canada Ltd.* (1976), 30 C.C.C. (2d) 531, [1976] M.J. No. 70, (C.A.), at para. 22:

In my opinion, the mischief aimed at by section 38 of the *Combines Investigation Act* was the practice of large corporations, with monopolistic or near monopolistic powers, artificially keeping retail prices high by coercing independent retailers into fixing prices and by refusing to supply such independent retailers if they

did not maintain the suggested list price of products. Before 1951, for instance, a retail gasoline station which undercut the suggested list price of gasoline was in danger of having its supply cut off as a punishment. I believe that Parliament wanted to protect the small retailer from undue pressure from large wholesalers, distributors and manufacturers. Parliament wanted to protect the weak against the strong, though it enacted words which catch the weak as well as the strong.

[590] In all these cases, the court was concerned with the protection of the public from conduct that interfered with the ability of retailers to engage in price competition.

[591] In *Quizno's*, the Divisional Court (Hennessy and Karakatsanis JJ., Swinton J. dissenting) described the offence of retail price maintenance as follows, at para. 53:

Price maintenance under s. 61(1) of the [*Competition Act*] occurs when a supplier of products purports to set a fixed minimum price at which another supplier in a vertical distribution chain may sell a product. Price maintenance may also occur horizontally, for example between competitors who agree to impose resale prices on vendors of their product. A supplier does not illegally “maintain” prices if it requires its purchasers to agree not to sell product at prices greater than a specified amount. Such an agreement is permissible as long as the purchaser remains entirely free to charge lower prices at its discretion. Price maintenance is a criminal offence and therefore intent must be proved. The courts have held that a specific intent to restrict or maintain prices is not required to violate the price maintenance provision; it suffices that the supplier intentionally engaged in proscribed behaviour which had the effect or would have the effect of maintaining prices ... [references omitted]

[592] There are three constituent elements of the offence under s. 61:

- (1) a person engaged in the business of producing or supplying a product;
- (2) who, directly or indirectly, attempts to influence upward or discourages the reduction of the price at which another person supplies or offers to supply a product within Canada;
- (3) by agreement, threat, promise or any like means.

See *Quizno's* (Div. Ct.) at para. 55.

[593] In my view, a trial is not required for the determination of the plaintiffs' claims under s. 61 because Tim Hortons is not a person engaged in the business of producing or supplying a product. Moreover, in this case, the setting of a wholesale price through a joint venture agreement that is specifically designed to supply ingredients to franchisees is not criminal price maintenance because it does not impair or limit the ability of downstream purchasers to sell at whatever price they choose.

[594] The facts giving rise to the claim are pleaded in paragraphs 56 and following of the Statement of Claim and are, in summary:

(a) Tim Hortons and IAWS/Arytza agreed that Maidstone would ship donuts and timbits to the distributors;

(b) Maidstone would invoice CillRyan at marked-up prices to be passed along by CillRyan to the distributors;

(c) CillRyan would invoice distributors at marked-up or inflated prices to be passed along by the distributors to the franchisees and the defendants and IAWS/Arytza would share the corresponding excessive profits between them;

(d) Tim Hortons would receive a rebate or other advantage from the distributors corresponding to some or all of the excessive profits received by the distributors for distributing goods to the franchisees;

(e) Tim Hortons promised to designate the manufacturers and/or distributors as the sole designated suppliers of Always Fresh products to franchisees, and promised to use its contractual powers under the license agreements to cause the Plaintiffs to purchase those products at prices higher than those available from alternative, lower-priced sources or to prevent them from demanding price reductions from the manufacturers and/or distributors;

(f) Tim Hortons has, through its conduct, influenced upward the price at which Always Fresh donuts and timbits are sold to distributors and the price at which distributors sell these products to the franchisees; and

(g) the Defendants have also discouraged the distributors from reducing their prices through their agreements with third parties, including IAWS/Arytza and CillRyan, by their control of the supply and distribution chain and by the imposition of fixed

minimum prices that franchisees pay for Always Fresh donuts and timbits.

[595] The plaintiffs say that they have pleaded all the necessary ingredients of the s. 61 price maintenance offence. They claim that Tim Hortons has unreasonably enhanced the price of donuts and timbits in excess of a commercially reasonable price by:

- entering into agreements to produce, distribute and supply the Always Fresh products to franchisees;
- using the “captive supply” provisions of the franchise agreements to force franchisees to buy these products from its distributors; and
- prohibiting franchisees from negotiating with distributors for lower prices.

[596] The evidence establishes the following:

- (a) the franchise agreements require franchisees to purchase supplies from Tim Hortons or from suppliers and distributors designated by Tim Hortons and entitle Tim Hortons to obtain a profit, commission or rebate which is the sole property of Tim Hortons;
- (b) prior to the Always Fresh Conversion, franchisees baked donuts and timbits using mixes and other ingredients supplied by Tim Hortons;
- (c) the joint venture agreement with IAWS was entered into by Tim Hortons for legitimate business reasons to address long term financial and strategic concerns about the viability of scratch baking; and
- (d) the sale price of donuts to franchisees was a matter of intense negotiation between the joint venture partners and reflected an intent to obtain the maximum return on their investments consistent with a price that would reasonably reflect, in Tim Hortons’ view, the cost of a scratch baked donut.

[597] Although there is a conflict in the evidence about whether the so-called “CillRyan mark-up” was commercially reasonable and whether it reflected the costs and risks assumed by CillRyan, there is no evidence that this price was anything other than the taking of a profit by Tim Hortons on an improved baking technology developed through its efforts. At its highest, the plaintiffs’ case is that the price charged by CillRyan to distributors for donuts and timbits was determined by Tim Hortons and IAWS to ensure that the joint venture achieved its profit targets.

[598] Nor is there any evidence that Tim Hortons attempted to “influence upward” the price at which the distributors or franchisees sold Always Fresh products. The alleged “influencing upward” was simply by the addition of a mark-up by CillRyan, which was jointly owned by Tim Hortons and IAWS.

[599] Section 61 does not prohibit a party from “influencing upward” the price of a product it sells. It prohibits doing so by “agreement, threat, promise or any like means ...”. The use of the words “like means”, indicates that the influencing upward of prices *per se* is not a contravention of the section: *R. v. Philips Electronics Ltd.*, 116 D.L.R. (3d) 298 (Ont. C.A.) at page 305:

It is significant that the present section, among other significant changes, has substituted the words "any like means" for "any other means whatsoever". This is a clear indication of the intention of Parliament to substantially restrict the type of attempts which constitute an offence under section 38(1).

[600] In my view, to be guilty of the criminal offence of price maintenance, a party must do something more than “influence upward” the price of its own product by making a profit on a product that it sells to a second party for sale to a third party. It must be shown that the first party has taken other measures to influence upward or discourage the reduction of the price at which the second party sells the product. If an ordinary commercial agreement between the first party and the second party could be an “agreement, threat, promise or any like means”, the section would criminalize routine commercial conduct, which could hardly have been the intent.

[601] It must also be shown that the conduct at issue was an attempt to do so for anti-competitive purposes: see *R. v. Royal LePage Real Estate Services Limited* (1993), 50 C.P.R. (3d) 161 at p. 171, [1993] A.J. No. 654: “Not any attempt to influence prices is prohibited, only those that eliminate competition or competitive market forces.”

[602] In this case, the plaintiffs complain that the price maintenance is effectuated because they are “captive” and have no ability to negotiate with suppliers or to buy from other suppliers. They say that CillRyan and other distributors in the supply chain have no incentive to engage in normal competitive behaviour, because they have a captive market. That may be true. Franchisees may be stuck with one price which is, for practical purposes, non-negotiable. That is not, however, the result of conduct of Tim Hortons that is directed towards the reduction of competition. It is the result of a bargain made between Tim Hortons and its franchisees whereby

franchisees give up the autonomy they would have as independent business people and agree to buy their products from suppliers and at prices specified by Tim Hortons.

[603] This lack of autonomy is the result of legitimate agreements entered into by the plaintiffs and Tim Hortons for legitimate purposes. Moreover, there is nothing in the distribution agreements that prohibits the distributors from charging lesser amounts to the franchisees. They cannot charge more than the stated prices, but they can charge less. The same applies to the franchisees. Tim Hortons specifies maximum prices, but the franchisees are free to reduce those prices. In a nutshell, there is no evidence whatsoever of any agreement or conduct by Tim Hortons that would interfere with the ability of distributors to sell the par baked products at prices of their choice, as long as they do not exceed the prices stipulated by Tim Hortons.

[604] I also accept Tim Hortons' submission that the s. 61 claim never gets out of the starting gate, because Tim Hortons is not a person "engaged in the business of producing or supplying a product" within the meaning of s. 61(1)(a). The "product" in question is par baked donuts and timbits. Tim Hortons is not directly engaged in the business or producing or supplying par baked donuts and there is no pleading that Tim Hortons is the "alter ego" of Maidstone Bakeries – I pointed this out at para. 37 of my decision on the plaintiffs' motion to amend to add the *Competition Act* claims.

[605] Any claim for price maintenance in relation to the supply of par-baked donuts would have to be directed against CillRyan, which is the alleged source of the mark-up causing the price of donuts to be influenced upward. Although Tim Hortons supplies par-baked donuts in its capacity as a distributor in Ontario, there is no evidence that there has been price maintenance between competing distributors. On the contrary, Tim Hortons' agreements with distributors do not prohibit the distributors from reducing the prices that they charge franchisees for the products. The fact that they do not do so is a reflection of a legitimate agreement led by market forces, as opposed to anti-competitive conduct.

[606] Nor is there evidence that Tim Hortons, in its capacity as a distributor, does anything to limit the ability of its customers, the franchisees, to sell the par-baked products at any price they choose, as long as that price does not exceed a maximum price.

[607] In that regard, it is worth noting that s. 61 of the *Competition Act* was aimed at the protection of the public, though proof of the offence did not require proof that there had in fact been an adverse effect on competition. There is absolutely no evidence that the donut and coffee business is anything other than intensely competitive, as the plaintiffs themselves acknowledge. There is no evidence at all of harm to the public as a result of the conduct at issue.

[608] The plaintiffs rely on both *Quizno's* and *Axiom Plastics Inc. v. E.I. Dupont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.), [2007] O.J. No. 3327, leave to appeal refused (2008), 90 O.R. (3d) 782, [2008] O.J. No. 1973 (Div. Ct.). Suffice to say that both authorities involved the application of the "plain and obvious" test under s. 5(1)(a) of the *C.P.A.* and were based on the pleadings. There was no determination of either claim on the merits.

[609] The plaintiffs also rely upon a Notice of Application to the Competition Tribunal commenced by the Competition Commissioner against Visa and Mastercard for allegedly impeding the ability of merchants to encourage customers to use lower cost methods of payment such as cash, debit cards and cards with lower fees. I agree with the defendants that these are nothing more than allegations; the commencement of these proceedings (which are, incidentally, under the new statutory regime, not the old s. 61) is not authority for anything.

[610] Finally, the plaintiffs also assert that Tim Hortons has threatened Mr. and Mrs. Jollymore and Mr. Garland with reprisals when they questioned its pricing practices. In his original affidavit, sworn May 22, 2009 in support of the motion for certification (which was before the claim was amended to assert the *Competition Act* breaches), Mr. Jollymore claimed that he had experienced unspecified threats and reprisals from Tim Hortons executives when he questioned their decisions and actions. He claimed that he had been told that he and his wife “did not fit in” with the Tim Hortons chain. He claimed that when Brule’s store #368 received a notice of default, he met with Don Schroeder, a senior officer of Tim Hortons, and asked why there had been no prior warning. He claimed that Schroeder had said that Tim Hortons wanted to deliver a message to him. This evidence was under the heading of “preferable procedure” in his affidavit, apparently to suggest that franchisees would be reluctant to bring claims on their own, due to concerns of reprisals by the franchisor. Similar suggestions were made by Mr. Garland in his initial affidavit.

[611] Similar statements were made by Mr. Jollymore in an affidavit sworn July 23, 2010, also prior to the amendment of the statement of claim. Mr. Jollymore’s evidence was that Tim Hortons had attempted to stifle dissent amongst franchisees concerning the costs of the Always Fresh Conversion and the Lunch Menu by intimidating franchisees. He also referred to the evidence of Mr. Gilson that he had been reprimanded when he questioned Mr. House about the cost of the Always Fresh donut.

[612] Mrs. Jollymore also gave evidence, in an affidavit also sworn July 23, 2010, concerning actions taken by Tim Hortons, including the termination of the agreement for store #368. Mr. Garland made allegations in an affidavit sworn the same date and suggested that by engaging in retaliatory action towards him, Tim Hortons was attempting to “set an example”, to show franchisees what would happen if they chose to openly challenge Tim Hortons’ policies and practices.

[613] In an affidavit sworn February 4, 2011, in support of the plaintiffs’ claims under the *Competition Act*, Mr. Garland deposed that, in response to his concerns about Tim Hortons’ pricing practices, he had been threatened with the loss of his franchises if he did not change his ways. He claimed that such threats of reprisal had enabled Tim Hortons to maintain the high prices that were charged for products by suppliers and distributors which in turn allowed the payment of rebates to Tim Hortons.

[614] As set out above, I have concluded that section 61 does not apply to Tim Hortons because it is not “engaged in the business of producing or supplying a product” – the par baked

donuts are supplied by CillRyan, not Tim Hortons. Were it necessary to do so, however, I find that there is no evidence of any threats or reprisals by Tim Hortons that were directed at the plaintiffs for the purpose of influencing upward, or preventing the reduction of the prices at which the plaintiffs sold their products.

6. Conspiracy – Old Section 45

[615] Section 45 of the *Competition Act*, prior to its repeal in 2010 (“Old Section 45”), prohibited price fixing.³ Section 45(1)(b) provided that anyone who conspires, combines, agrees or arranges with another person to enhance unreasonably the price of a product is guilty of an offence. Like section 61, a party who suffered loss or damage as a result of the breach of Old Section 45 was entitled to bring a civil action under s. 36.

[616] The section provided:

45(1) 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. [emphasis added]

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

³ It was repealed by S.C. 2009, c. 2, s. 410 and was in effect from June 2, 1992 to March 11, 2010.

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

[617] The *actus reus* of the offence under Old Section 45 has two elements:

(a) that the defendant conspired, combined, agreed or arranged with another person;

(b) to enhance unreasonably the price of a product or to otherwise restrain or injure competition unduly.

[618] As Old Section 45 is a criminal offence, proof requires that there be *mens rea* or criminal intent. The Supreme Court of Canada has held that this requires that there be both (a) a subjective intention on the part of the accused to agree and to put the agreement into effect; and (b) an objective intention to lessen competition unduly: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, at paras. 117-119. This objective intention can be established on the basis of what a reasonable person would have been likely to know. The Supreme Court observed at para. 119:

Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the *actus reus* that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

[619] The plaintiffs say that they have properly pleaded a cause of action under Old Section 45 because they allege:

(a) the Defendants agreed with IAWS and the distributors to charge a commercially unreasonable mark-up or inflated price for donuts and timbits;

(b) the agreement between the Defendants and IAWS and the distributors produced unreasonably high prices to franchisees for donuts and timbits and that such prices were higher than the market prices would have been but for the Defendants' breach of section 45; and

(c) this unreasonable enhancement was the Defendants' purpose in engaging in the agreement.

[620] While the pleading survives the "plain and obvious test" applicable to section 5(1)(a) of the *C.P.A.*, the evidence does not establish a breach of Old Section 45. Even if one were to accept that the price of the par baked donuts leaving CillRyan exceeded a "commercially reasonable" price or reflected something more than a reasonable rate of return and the risks assumed by the joint venture parties, the taking of excessive profits is still not prohibited by Old Section 45.

[621] Although it is not necessary to establish that the agreement, if implemented, would be likely to eliminate competition, it is necessary to show that it would, if implemented, be likely to unduly lessen competition. This in turn requires an analysis of the relevant geographic market: see *R. v. J.W. Mills and Son Ltd.*, [1968] 2 Ex. C.R. 275, *affd.* [1971] S.C.R. 63, [1970] S.C.J. No. 63. The plaintiffs have adduced no evidence of the relevant market or its characteristics.

[622] Applying the test in *R. v. Nova Scotia Pharmaceutical Society*, a reasonable person would not know that charging 16 cents per donut would lessen competition any more than charging 12 cents per donut, because the franchisees were bound to buy the donuts produced by CillRyan and to pay the price stipulated by Tim Hortons, whatever that price might have been. The franchisees remained free to sell the donuts and timbits at whatever price they chose, up to the price set by Tim Hortons. There is no evidence at all that the price charged by CillRyan had an anti-competitive effect. The plaintiffs' real complaint is that the price cut into their profits and that they should have been able to reap the profit that CillRyan and Tim Hortons took.

[623] Moreover, there is no evidence whatsoever that there has been an undue lessening of competition. On the contrary, the plaintiffs allege that the QSR business is intensely competitive.

[624] In my view, there is no genuine issue requiring a trial with respect to the breach of Old Section 45. The agreement with IAWS was made for legitimate business purposes. There is no evidence at all of an anti-competitive intent on the part of Tim Hortons and no evidence of any undue lessening of competition.

7. Conspiracy – New Section 45

[625] Section 45(1) (“New Section 45”), amended March 12, 2010, provides as follows:

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
- (a) to fix, maintain, increase or control the price for the supply of the product;
 - (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
 - (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product. [emphasis added]

[626] Section 45(4) provides a defence:

- (4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
- (a) that person establishes, on a balance of probabilities, that
 - (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
 - (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
 - (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

[627] Section 45(8) defines a “competitor” as follows: “‘competitor’ includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs 1(a) to (c).”

[628] The elements of the offence are:

- (a) a conspiracy, agreement or arrangement with a competitor;
- (b) to fix, maintain, increase or control the price for the supply of a product.

[629] New Section 45 does not require an analysis of whether there is an “undue” restraint on competition, because the impact of an agreement between competitors is so obvious that the analysis is not required.

[630] The plaintiffs' claim under this section relies on the same allegations as are set out in respect to the claim under Old Section 45. New Section 45 requires proof that the parties to the agreement are competitors with respect to the product that is the subject of the conspiracy. The plaintiffs allege that IAWS was a competitor of Tim Hortons.

[631] As I have noted, a "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to the product in the absence of the conspiracy. As the *Competition Collaboration Guidelines* issued by the Competition Bureau state, to be considered competitors for the purpose of s. 45, "the parties must compete or be likely to compete, with respect to the products that are the subject of the agreement alleged to contravene s. 45." The *Guidelines* provide:

Section 45 describes categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects. These are agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture) [...] Other forms of competitor collaboration, such as joint ventures and strategic alliances, may be subject to review under the civil agreements provision in section 90.1, which prohibits agreements only where they are likely to substantially lessen or prevent competition.

[632] In my view, there is no genuine issue requiring a trial with respect to the alleged breach of New Section 45, because Tim Hortons was not a "competitor" of IAWS with respect to par baked donuts. It did not compete, nor was it likely to compete, with respect to par baked donuts. It had, in the past, supplied donut mix to franchisees, but it had never produced or supplied either finished donuts or par baked donuts. Nor was there any evidence that, in the absence of the agreement with Tim Hortons, IAWS was likely to produce par baked donuts in Canada. There is no evidence that TDL is a "competitor" of IAWS.

[633] In any event, the establishment of the price at which donuts would be sold by the joint venture was ancillary to the broader agreement for the construction of the Maidstone Bakeries and the production of par baked donuts. New Section 45(4) confirms that the agreement of two parties to form a joint venture to produce a product and to sell that product at a particular price is not a prohibited price-fixing agreement. If that was the case, any price fixed by the agreement, no matter what the amount, would contravene the section – a manifest absurdity.

[634] For all the foregoing reasons, the *Competition Act* claims are dismissed.

8. The Limitations Defence

[635] The defendants argue that, in any event, the claims under s. 36 of the *Competition Act* are statute-barred.

[636] Section 36(4) of the *Competition Act* contains a two year limitation period for the commencement of civil actions arising out of the breach of Part VI (which includes the price maintenance offence in s. 61 and the conspiracy offences in both the present and the former s. 45). It states:

- (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 ... [emphasis added].

[637] Tim Hortons says that the “conduct” at issue in this case was either, or both, of:

- (a) the joint venture agreement concerning Maidstone Bakeries, which was entered into in March 2001; or
- (b) the distribution agreements with GFS and Sysco, which were entered into no later than May 2004.

[638] It relies upon the decision of the Federal Court of Canada in *Garford Pty Ltd. v. Dywidag Systems International Canada Ltd.*, 2010 F.C. 996, [2010] F.C.J. No. 1259 (“*Garford Pty v. Dywidag*”), in support of the submission that the limitation period begins to run when the agreements were consummated. In that same case, Russell J. held that the “discoverability” principle could not be used to extend the limitation period when the statute itself tied the commencement of the limitation period to a specific event, namely “the day on which the conduct was engaged in.”

[639] Tim Hortons also says that, even if the discoverability principle applies, the plaintiffs were aware of the relevant facts at least two years before the *Competition Act* claims were added to the pleading in November 2010. By November 2008 – two years earlier – the plaintiffs had been aware for years that the donuts were supplied by the joint venture and they knew the price being charged.

[640] I will begin by examining the nature of the offences. They have been set out earlier, but in summary:

(a) section 61(1)(a) prohibits a party from, directly or indirectly ...
(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada;

(b) under Old Section 45 (s. 45(1)(b)) prohibits a party from conspiring, agreeing or arranging with another party to enhance unreasonably the price of a product; and

(c) under New Section 45 (s. 45(1)(a)) prohibits a party from conspiring, agreeing or arranging with a competitor to fix, maintain, increase or control the price of a product.

[641] The plaintiffs plead that, since the Always Fresh Conversion, the defendants have used agreements, promises and other like means to fix, maintain, increase or control the price of Always Fresh donuts and timbits or to increase unreasonably the price thereof.

[642] In *Garford Pty v. Dywidag*, Russell J. concluded, based on *Laboratoires Servier v. Apotex Inc.* above, that the essence of the offence under s. 45 is the conspiracy or agreement, which is different from the effect of the offence, namely the undue lessening of competition. He referred to *Eli Lilly & Co. v. Apotex Inc.*, 2009 F.C. 991, [2009] F.C.J. No. 1229 in which Gauthier J., as she then was, held that the operative date for the commencement of the limitation period was the date of the agreement and not the occurrence of the effects of that behaviour. Russell J. concluded, at para. 43:

As the authorities show, the continuing effects of a conspiracy, agreement or arrangement are not what are actionable under subsection 36(1) of the *Competition Act*. The limitation period in subsection 36(4) is based upon "conduct" - i.e. the conspiracy or agreement in this case - and not upon its effects.

[643] I agree with Tim Hortons' submission. The Joint Venture Agreement was entered into in or about March, 2001. The various distribution agreements were entered into between TDL and Sysco and GFS in the period March 1, 2003 to May 5, 2004. Taking the Plaintiffs' pleading on its face and accepting that these agreements constituted "agreements, arrangements, or other means" in the language of the *Competition Act*, section 36(4) operates to bar the Plaintiffs' claims. The two year limitation period commences when the conduct in question – the agreements – occurred.

[644] The plaintiffs reply that there is a genuine issue requiring a trial about whether the limitation period has expired, for three reasons.

[645] First, the plaintiffs say that the conduct is continuing, since the price of Always Fresh donuts and timbits are constantly changing. This argument was addressed and rejected in *Garford Pty v. Dywidag*.

[646] Second, the plaintiffs say that the discoverability principle applies. The proposition that the discoverability rule applies to s. 36(4) of the *Competition Act* was rejected in *Garford Pty v. Dywidag* at paras. 31 to 33:

I think it is clear, then, that there is no general application of the discoverability rule as alleged by the Plaintiff, that it is always a matter of statutory construction, and that 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" (Ryan, above, at paragraph 24).

From these principles, it is clear why, in *Laboratoires Servier*, above, Justice Snider relied upon *Fehr*, above, to conclude that the time period in subsection 36(4) of the *Competition Act* ran from a specific date that was independent of knowledge and that the discoverability principle did not apply.

For these reasons, then, I think I must conclude that the Plaintiff cannot rely upon the discoverability principle to extend the limitation period in this case. In addition, even if the discoverability principle were applied in this case, on the evidence before me it is clear that the Plaintiff's subsection 36(4) claim would still be time-barred.

[647] Even if the discoverability rule applies, Tim Hortons' interest in the Joint Venture was publicly known as of March 2001 and the fact that donuts were being supplied by the Joint Venture was known to the Plaintiffs prior to their conversion to Always Fresh in October of 2002. The plaintiffs knew the prices at which donuts and timbits were being supplied by 2004 at the latest and the plaintiffs reasonably discovered the alleged breaches of the *Competition Act* well before November 2008 (i.e. two years prior to the inclusion of the claims in the Statement of Claim on November 28, 2010).

[648] Finally, the plaintiffs rely on the common law doctrine of fraudulent concealment to extend the limitation period. As described by the Court of Appeal in *Giroux v. Trillium Health Centre et al.* (2005), 74 O.R. (3d) 341, [2005] O.J. No. 226 (C.A.) at para. 29:

Stated succinctly, it is aimed at preventing unscrupulous defendants who stand in a special relationship with the injured party from using a limitation provision as an instrument of fraud.

[649] The facts of that case were particularly egregious. It was alleged that a physician treating the plaintiff's relative had lied to the deceased's family concerning communications with the deceased. He prepared a false set of notes to make it appear that he had diagnosed the deceased's cancer and claimed that he had informed the deceased who had refused treatment. The physician's conduct was manifestly dishonest, unprofessional and fraudulent. There is no basis for a conclusion in this case that Tim Hortons has engaged in such conduct.

[650] Accordingly, the *Competition Act* claims are statute-barred.

F. The Liability of THI

[651] In addressing the common issues, I have summarized the plaintiffs' pleading to the effect that THI is liable for the actions of TDL on the grounds of agency, holding out, or *alter ego*. Tim Hortons says that these claims have no prospect of success, that the plaintiffs have put forward nothing other than bare allegations for which there is no factual foundation and that there is no genuine issue requiring a trial concerning the liability of THI.

[652] In light of my conclusions on summary judgment, it is unnecessary to resolve this question, but I will set out my disposition of the issue.

[653] It has long been the law that a parent corporation and its subsidiaries are distinct legal entities and their independent nature is to be respected in the absence of exceptional circumstances. In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, [1996] O.J. No. 1568 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.), Sharpe J., as he then was, stated at para. 22:

... the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control," requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently.

[654] Perell J. summarized the law in *Miquelanti Ltda. v. FLSmidth & Co.*, [2011] ONSC 3293, [2011] O.J. No. 2490 at paras. 18-22:

The separate legal personality of the corporation, however, is not lightly disregarded and a shareholder is liable for the wrongs of a corporation only in very limited circumstances: *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. 3754 (C.A.); *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.* (1989), 60 D.L.R. (4th) 30

(B.C.C.A.); *Constitution Insurance Co. of Canada v. Kosmopoulos*, [1987] 1 S.C.R. 2; *801962 Ontario Inc. v. MacKenzie Trust Co.*, [1994] O.J. No. 2105 (Gen. Div.).

The corporate veil may be pierced when the corporation is incorporated for an illegal, fraudulent, or improper purpose, or where respecting the separate legal personality of the corporation would be flagrantly unjust: *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.); *Kosmopoulos v. Constitution Insurance Co.*, *supra*; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, *supra*; *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 (H.C.J.); *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256 at paras. 49-54.

The separate existence of a corporation may be ignored when the corporation is under the complete control of the shareholder and its existence is being used as a means to insulate the shareholder from responsibility from fraudulent or illegal conduct: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, *supra*; *Aluminum Co. of Canada v. Toronto (City)*, [1944] S.C.R. 267 (S.C.C.).

In order to pierce the corporate veil, two factors must be established: (1) the alter ego must exercise complete control over the corporation or corporations whose separate legal identity is to be ignored; and (2) the corporation or corporations whose separate legal identity is to be ignored must be instruments of fraud or a mechanism to shield the alter ego from its liability for illegal activity: *Transamerica Life Insurance Co. v. Canada Life Assurance Co.*, *supra*; *Haskett v. Equifax Canada Inc.* (2003), 224 D.L.R. (4th) 419 (C.A.); *Gregorio v. Intrans-Corp.*, *supra*; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, *supra* at paras. 49-54.

[655] The plaintiffs rely on *Wilson v. Servier* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, (S.C.J.) at para. 23, where on a certification motion Cumming J. refused to exclude the parent corporation from the action, stating, “[I]t is far too early to put the plaintiff to the task of unraveling the apparently complex corporate web of [the parent] and its affiliates, and of proving her case.” To state the obvious, that was a certification motion, based only on the pleadings. On this motion, the plaintiffs have an obligation to lead evidence on the issue or they risk losing. The plaintiffs respond that the defendants have failed to answer questions with respect to matters that are relevant to the liability of THI. That is not a sufficient answer – the plaintiffs have an obligation to do more than speculate on what the evidence might show. If they considered the issue important, they should have brought a motion to compel answers.

[656] In this case, there is absolutely no evidence that TDL was incorporated for any illegal, fraudulent or improper purpose or that the corporate structure is being used by THI to insulate itself from such conduct. Nor is there any evidence to support a finding that it would be unjust to respect the separate legal personalities of THI and TDL.

[657] The “group enterprise theory” has sometimes been asserted as a way of fixing a parent corporation with liability for the actions of its subsidiaries or other corporations in the “group”. This theory has not been accepted by Canadian courts: see *B.G. Preeco I (Pacific Coast) Limited v. Bon Street Holdings Ltd.*, [1989] B.C.J. No. 1032 at 7 (C.A.); *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 at paras. 43-49 (S.C.J.), var’d on other grounds (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal to the S.C.C. refused, [2002] S.C.C.A. No. 446; *801962 Ontario Inc. v. MacKenzie Trust Co.*, [1994] O.J. No. 2105 at paras. 25-38 (Gen. Div.). In the latter case, after a thorough review of the authorities, Spence J. summed them up as follows, at para. 37:

These decisions do not support a claim that the test in *Salomon v. Salomon* has been superseded by a new "business entity" or "single business entity" test. They merely illustrate the principle that, in particular fact situations; where the nature of the legal issue in dispute makes it appropriate to have regard to the larger business entity, the court is not precluded by *Salomon* from doing so. In a few cases, there are statements that the court will lift the corporate veil "where injustice would otherwise result". I am not able to conclude that such statements are intended to remove the authority of the *Salomon* principle. I think they may be more in the nature of a shorthand formulation reflecting the approach of the courts in the cases discussed above.

[658] The plaintiffs argue that THI could be held liable for the actions of TDL, because it exercises such control over TDL that TDL has become its agent or *alter ego*. They say that this control is exhibited since “TDL’s profits flow up to THI and THI may well guarantee TDL’s debts.” Even if these statements were supported by the evidence, they would not establish that TDL is the legal agent of THI or that THI is liable for its actions. The same allegations could likely be made about most parent-subsidiary relationships, but the mere facts do not create an agency.

[659] The plaintiffs rely on the case of *Buanderie central de Montréal Inc. v. Montréal (City)*, referred to earlier in my discussion of the common issues, in support of the proposition that TDL could be the *alter ego* of THI based on the close relationship between the companies and THI’s “control” of TDL. *Buanderie* was a tax case, and the Court’s observations about the *alter ego* concept must be considered in that context. Indeed, Gonthier J., who delivered the judgment of the Supreme Court of Canada, cautioned about the extension of the concept, at para. 36 of his reasons.

[660] Finally, the plaintiffs rely on agency by estoppel, discussed earlier. The plaintiffs say that THI has allowed TDL to appear to the world as its agent and that it is estopped from repudiating the existence of that agency.

[661] In order to establish agency by estoppel, the plaintiffs must show:

- (a) that THI has, by its words or conduct, allowed TDL to appear as its agent;
- (b) that the plaintiffs have dealt with TDL as THI's agent in reliance on such conduct or holding out; and
- (c) detriment to the plaintiffs as a result.

[662] The plaintiffs rely on the defendants' statement of defence in which it is acknowledged that THI carries on business in Canada through its subsidiary TDL. This is not holding out. Nor is it a statement that TDL is the agent of THI. It simply describes a common commercial arrangement in which a foreign parent does business in Canada through a Canadian subsidiary. It does not make the subsidiary the agent of the parent.

[663] Nor does the inability of the defendants' representatives on their cross-examinations to clearly isolate THI's role in various corporate activities mean that there was a holding out of agency. It simply reflects that the corporate structure was interconnecting and complex. There is nothing in THI's annual reports or public filings that reflects a holding out of an agency relationship.

[664] Finally, there is no evidence that the plaintiffs treated TDL as an agent of THI in reliance on any representation by THI.

[665] For these reasons, I would also dismiss the claim against THI.

G. Conclusions on Summary Judgment

[666] I have given anxious consideration to the directions given by the Court of Appeal in *Combined Air*. I have also considered the fact that this is a putative class action, that the claim meets the requirements of s. 5(1)(a) to (d) of the *C.P.A.* and that the dismissal of the claims of the representative plaintiffs will put the action in suspense and make it unlikely that another representative will come forward to take their place.

[667] I have concluded, however, that this action cannot possibly succeed, because the plaintiffs are asking the Court to do something it cannot do – rewrite their franchise agreements to give them a greater share of the profits they derive from the franchisor's business system, products, trademarks and know-how.

[668] The plaintiffs' real complaint about the Always Fresh Conversion, buried under boxes of financial statements, statistics, affidavits, expert opinions and transcripts, and expressed with eloquent and passionate advocacy by their counsel, is that they don't get a bigger share of the donut profits.

[669] Their real complaint about the Lunch Menu is exactly the same. They want a bigger share of the soup and sandwich profits.

[670] At its core, this case is not complex. True, the plaintiffs have amassed a huge record and the defendants have added their share to the pile. True, there are some conflicts in the evidence, but many of those conflicts are irrelevant to the issues. This is not a case in which it is necessary to make multiple findings of fact or to make findings of credibility.

[671] The mountain of evidence adduced by both parties is largely irrelevant, because the plaintiffs' claims are based on a contractual and legal argument that is fundamentally flawed. The plaintiffs' claims have been dressed up in inflammatory language, like "economic harm" and "mark-ups" and "commercially unreasonable", but in the final analysis they are flawed. They are flawed because the franchisor has done nothing more than what it is legally entitled to do.

[672] Tim Hortons, as franchisor, is entitled to tell the franchisees what to buy and where to buy it, and what to sell and how to sell it. It is entitled to make a profit on what the franchisees are required to buy and it is entitled to determine the amount of its profit.

[673] There are contractual and statutory limits to what Tim Hortons can do. It must abide by the terms of its contracts. It must deal fairly with its franchisees and act in good faith and in accordance with reasonable commercial standards in the performance and enforcement of its contract. It cannot deprive the franchisees of the benefits of the contract or undermine the very foundation of the contract. There is no evidence, considering the contract as a whole, that Tim Hortons has failed to discharge these obligations.

[674] It has been established beyond dispute that the Always Fresh Conversion was a rational business decision made by Tim Hortons for valid economic and strategic reasons, having regard to both its own interests and the interests of its franchisees. The evidentiary record provides ample support for the conclusion that scratch-baking was unsustainable in the long run and that the move to Always Fresh baking was beneficial for franchisees.

[675] The evidentiary record also provides ample support for the conclusion that the franchisor engaged in extensive discussion and communication with its franchisees before the Always Fresh Conversion and that the change was supported by the majority of franchisees. The franchisor informed the franchisees that the cost of raw materials would increase under Always Fresh, but that this would be offset by labour savings and other savings and conveniences. The experience of the franchisees over time has confirmed this assertion.

[676] It has also been established that the implementation and expansion of the Lunch Menu was a rational decision made by the franchisor after due consideration of the interests of the

franchisees, most of whom embraced the concept. There are commercial justifications for the Lunch Menu, including the desirability of keeping stores busy during off-peak hours, promoting sales of other products, such as coffee, tea and donuts in conjunction with Lunch Menu items and keeping up with competitive pressures from other QSR franchises.

[677] The Lunch Menu is not “imposed” on franchisees. The evidence is that it is carefully researched by Tim Hortons and that there is broad consultation with franchisees, through the Advisory Board, on menu changes and on the pricing of menu items. There is also consultation with franchisees on price increases and franchisees actually vote on any price increases.

[678] The unchallenged evidence is that in negotiating the price of the Always Fresh donut out of Maidstone Bakeries, Tim Hortons gave due regard to the interests of its franchisees, while at the same time considering its own interests, as it was entitled to do. There is absolutely no evidence of criminal conduct or anti-competitive effects.

[679] The fact of the matter is that under the Tim Hortons system, the franchisees are given the licence to sell Tim Hortons trademarked coffee – a brand that is about as iconic as there is in Canada. Coffee is the highest margin product the franchisee sells – the food cost is low, the labour cost is low, and the sale price is high. Coffee is an enormous part of every franchisee’s sales and accounts for a large part of every franchisee’s profits. There are other items in the menu that are also highly profitable. What matters, at the end of the day, is whether the franchisee makes sufficient profit overall to justify his or her investment and to remain in the business. The suggestion by the plaintiffs that the franchisor has an obligation to price every menu item so that they can make a profit on that particular item is not supported by the contract, by the law or by common sense. It is simply not the responsibility of the court to step in to recalibrate the financial terms of the agreement made by the parties.

VI. CONCLUSIONS

[680] For the foregoing reasons, the plaintiffs’ individual claims are dismissed. Counsel should arrange a case conference in due course to discuss future steps in this proceeding.

[681] Costs may be addressed by written submissions, in accordance with a timetable to be agreed upon between the parties. The submissions, excluding the costs outline, shall be no more than ten pages in length and shall be delivered to me care of Judges’ Administration.

G.R. Strathy J.

Released: February 24, 2012

Schedule “A”: Common Issues

Always Fresh frozen Baked Goods

Class A-1 Members: The conversion class

1. Did one or both Defendants breach s.7.03(a) of the License Agreement and/or Operating Agreement (collectively, the “Agreement”) entered into by each Class A-1 Member by:
 - a. requiring the franchisees to undertake the AF conversion;
 - b. following the AF conversion, requiring the franchisees to purchase the Always Fresh (“AF”) frozen donuts, timbits, muffins and cookie (the “AF Baked Goods”) at commercially unreasonable prices;
 - c. following the AF conversion, requiring the franchisees to purchase the AF Baked Goods at prices that were not offset by savings in labour, waste or operational savings;
2. Did one or both Defendants breach s.3.00(f) or (i) of the Agreement by:
 - a. representing to franchisees, through the Advisory Board members and directly, that they could deliver the frozen AF donut to the franchisees’ stores for 11 to 12 cents;
 - b. signing the JV agreement with IAWS Group plc (“IAWS”) on March 6, 2001 without reasonable analysis of the impact of the increased costs at the franchisee level;
 - c. requiring the franchisees to undertake the AF conversion;
 - d. following the AF conversion, requiring the franchisees to purchase the AF Baked Goods at commercially unreasonable prices;
 - e. following the AF conversion, requiring the franchisees to purchase the AF Baked Goods at prices that were not offset by savings in labour, waste or operational savings;
 - f. representing that the increased food cost of the AF Baked Goods would be offset by savings in labour, waste and other operational expenses;
 - g. failing to take reasonable steps to consider and redress the commercially unreasonable prices of AF Baked Goods;

3. With respect to the Class A-1 Members:
 - a. did the Agreement contain an implied term that the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers and distributors designated by the Defendants would be sold to the franchisees at commercially reasonable prices?
 - b. if so, did one or both Defendants breach that implied term by requiring the franchisees to purchase the AF Baked Goods at commercially unreasonable prices?
4. As a result of any of the conduct described in 2.a. to g. above, did one or both Defendants breach their duties to the Class A-1 Members:
 - a. under the *Arthur Wishart Act (Franchise Disclosure), 2000* or similar statute, to act fairly, in good faith and in a commercially reasonable manner; or
 - b. under the common law, to act fairly, in good faith and in a commercially reasonable manner?

Class A-2 Members: Post-conversion franchisees purchasing AF Baked Goods

5. With respect to the Agreement entered into by each Class A-2 Member:
 - a. did the Agreement contain an implied term that the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers and distributors designated by the Defendants would be sold to the franchisees at commercially reasonable prices?
 - b. if so, did one or both Defendants breach that implied term by requiring the franchisees to purchase the AF Baked Goods at commercially unreasonable prices;
6. As a result of the conduct described in 5.b. above, did one or both Defendants:
 - a. breach their statutory duties to the Class A-2 Members to act fairly, in good faith and in a commercially reasonable manner; or
 - b. breach their common law duties to the Class A-2 Members to act fairly, in good faith and in a commercially reasonable manner?

Class A-1 and Class A-2 Members

7. In requiring the franchisees to purchase the AF Baked Goods, did one or both Defendants breach the *Competition Act* in one or more of the following ways:
 - a. by agreement or other like means with other parties to the chain of supply of AF frozen donuts and Timbits, influencing upward or discouraging the reduction of prices for those products charged by those other parties in the supply chain, in contravention of s.61(1) until March 11, 2009;
 - b. by agreement with other parties to the AF frozen donut and timbit supply chain, enhancing unreasonably the price charged for those products by those other parties, in contravention of s.45(1)(b) until March 11, 2010; or
 - c. by agreeing with IAWS to fix, maintain, increase or control the price for the supply of AF frozen donuts and timbits, in contravention of s.45(1)(a) from and after March 12, 2010; and
 - d. if so, are the Class A-1 and/or Class A-2 Members entitled to recover from one or both Defendants the full costs of their investigations and the full costs of this proceeding on a complete indemnity basis under s.36(1) of the *Competition Act*?
8. By virtue of waiver of tort, are the Defendants liable on a restitutionary basis:
 - a. to account to the Class A-1 Members for any part of the Defendants' financial benefit from the AF conversion as a result of the conduct described in issues 1 to 4 and 7 above?
 - i. If so, in what amount and for whose benefit is such accounting to be made?
 - ii. Or, in the alternative, such that a constructive trust is to be imposed on all or any part of the Defendants' financial benefit from the AF conversion for the benefit of the Class A-1 Members? If so, in what amount and by whom are such profits held?
 - b. to account to the Class A-1 and Class A-2 Members for any part of the Defendants' financial benefit from the sale of some or all the AF Baked Goods as a result of the conduct described in issues 2.d., 4 (referable to 2.d.) and 5 to 7 above?
 - i. If so, in what amount and for whose benefit is such accounting to be made?
 - ii. Or, in the alternative, such that a constructive trust is to be imposed on all or any part of the Defendants' financial benefit from the sale of some or all the AF Baked Goods for the benefit of the Class A-1

and Class A-2 Members? If so, in what amount and by whom are such profits held?

9. Have the Defendants been unjustly enriched to the detriment of the Class A-1 or Class A-2 Members as a result of any of the conduct referred to in issues 1 to 7 above?

The Lunch Menu

Class B Members

10. Did one or both Defendants breach one or more of s.7.03(a), s.3.00(f) and s.3.00(i) by:
 - a. requiring franchisees to purchase the ingredients and commodities for the Lunch Menu at commercially unreasonably high prices from the Defendants and/or manufacturers and distributors designated by the Defendants and/or setting the maximum prices for Lunch Menu items at commercially unreasonably low prices, such that the Lunch Menu as a category generates revenue for the Defendants while franchisees lose money because the costs associated with selling the Lunch Menu exceed the revenue generated by those sales;
 - b. failing to perform any form of product category or menu analysis on the Lunch Menu, contrary to reasonable commercial practices;
11. With respect to the Class B Members:
 - a. did the Agreement contain an implied term that the ingredients and commodities franchisees were required to purchase from the Defendants and/or manufacturers and distributors designated by the Defendants would be sold to the franchisees at commercially reasonable prices?
 - b. if so, did one or both Defendants breach that implied term by requiring the franchisees to purchase the ingredients and commodities for the Lunch Menu at commercially unreasonable prices?
12. As a result of any of the conduct described in 10. above, did one or both Defendants breach their duties to the Class B Members:
 - a. under the *Arthur Wishart Act (Franchise Disclosure), 2000* or similar statute, to act fairly, in good faith and in a commercially reasonable manner; or
 - b. under the common law, to act fairly, in good faith and in a commercially reasonable manner?

13. By virtue of waiver of tort, are the Defendants liable on a restitutionary basis as a result of any of the conduct referred to in issues 10 to 12 above:
 - a. to account to the Class B Members for any part of the Defendants' financial benefit from the Lunch Menu? If so, in what amount and for whose benefit is such accounting to be made? Or, in the alternative,
 - b. such that a constructive trust is to be imposed on all or any part of the Defendants' financial benefit from the Lunch Menu for the benefit of the Class B Members? If so, in what amount and by whom are such profits held?
14. Have the Defendants been unjustly enriched to the detriment of the Class B Members as a result of any of the conduct referred to in issues 10 to 12 above?

All Class Members

15. If one or more of the common issues 1 to 7 or 10 to 12 are answered in the affirmative, is the Defendant Tim Hortons Inc. liable to the Class Members:
 - a. as a direct participant in the wrongful conduct;
 - b. on the basis of agency by estoppel and/or
 - c. on the basis that it is the *alter ego* of the Defendant The TDL Group Corp. or one or more of its corporate predecessors?
16. If one or more of the common issues 1 to 7 or 10 to 12 are answered in the affirmative, how are damages to be computed as payable between the Defendants and allocated for distribution to the Class Members?
17. Should one or both Defendants pay prejudgment and post-judgment interest, at what annual rate, and should the interest be compound interest?
18. Should one or both Defendants pay the cost 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 cost, why, in what amount and to what extent?

CITATION: *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252
COURT FILE NO.: CV-08-00356806-CP00
DATE: 20120224

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

**FAIRVIEW DONUT INC. AND BRULE
FOODS LTD.**

Plaintiffs/Moving Parties on Certification Motion/
Respondents on Summary Judgment Motion

- and -

**THE TDL GROUP CORP. AND TIM
HORTONS INC.**

Defendants/Respondents on Certification Motion/
Moving Parties on Summary Judgment Motion

REASONS FOR JUDGMENT

Strathy J.

Released: February 24, 2012

CITATION: Bennett v. Lenovo (Canada) Inc., 2017 ONSC 5853
COURT FILE NO.: CV-15-523714-CP
DATE: 20171003

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
DANIEL BENNETT	)	<i>Adrienne Boudreau and Sabrina Callaway</i>
	)	for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
LENOVO (CANADA) INC. and	)	<i>Jeff Galway and Kiran Patel</i> for the
SUPERFISH INC.	)	Defendant Lenovo (Canada) Inc.
)	
Defendants)	
)	
)	
	)	HEARD: September 26, 2017

2017 ONSC 5853 (CanLII)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Plaintiff Daniel Bennett brings a proposed national class action under the *Class Proceedings Act*,¹ against Lenovo (Canada) Inc., a computer manufacturer, and against Superfish Inc., a software developer in Palo Alto, California that developed a computer program known as Visual Discovery.

[2] Mr. Bennett moves for certification of his action. Lenovo (Canada) resists the motion. The focus of its challenge to certification is on the identifiable class and the common issues criterion.

[3] Superfish Inc. did not appear at the certification motion and I shall make no order with respect to it.

[4] Mr. Bennett brings his proposed class action on behalf of persons who purchased computers directly from Lenovo (Canada), and, in a disputed point, also on behalf of indirect purchasers; *i.e.* purchasers who bought from computer retailers, such as Best Buy or Canada Computer, who sell Lenovo (Canada)'s computers.

¹ 1992, S.O. 1992, c. 6.

[5] The theory of Mr. Bennett's case alleges two wrongdoings arising from the fact that Lenovo (Canada) installed two versions of Visual Discovery on certain of its laptop computers that were sold in Canada. (During the course of the hearing, Mr. Bennett's counsel clarified that his case does not concern whether Visual Discovery affected the performance standards of the Lenovo computers by, for instance, slowing its operating system.)

[6] The first wrongdoing is that in the originally installed version of Visual Discovery, there was a security defect that would permit a hacker to obtain the user's private information. Mr. Bennett submits that the installation of the original version (version 1.0.0.1) of Visual Discovery was: (a) for consumer purchasers, a breach of the implied warranties of the *Sale of Goods Act*;² (b) for all purchasers, an infliction of the tort of intrusion upon seclusion; and (c) for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador, respectively, a contravention of privacy statutes.³

[7] The second wrongdoing is that as a part of the operation of all installed versions of Visual Discovery (the original and an updated version 1.0.0.5), private information was sent to Superfish's computers, and Mr. Bennett alleges that this operative feature of Visual Discovery was: (a) for consumer purchasers, a breach of the implied warranties of the *Sale of Goods Act*; (b) for all purchasers, an infliction of the tort of intrusion on seclusion; and (c) for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador, respectively, a contravention of privacy statutes.

[8] Before the certification motion, in *Bennett v. Lenovo*, 2017 ONSC 1082, on a Rule 21 motion, Justice Belobaba concluded that Mr. Bennett's action satisfied the cause of action criterion for certification. The motion now before the court is to determine whether, and to what extent, the other criteria for certification as a class action have been satisfied.

[9] For the reasons that follow, I conclude that Mr. Bennett's action should be certified as a class action, as described below.

B. Factual Background

[10] Lenovo (Canada) is a subsidiary of Lenovo Group Limited, a corporation based in Beijing, China. Lenovo is the largest computer manufacturer in the world.

[11] Lenovo (Canada) supplies computers directly to consumers for personal and business uses through its consumer website and through a network of retail outlets (such as Best Buy), which in turn resell them to Canadian retail customers. The laptop computers sold by Lenovo (Canada) are not manufactured by it, but are manufactured by other Lenovo entities.

[12] Lenovo (Canada)'s computers come preloaded with an operating system and a variety of software. Seventeen (17) models of Lenovo (Canada)'s laptop computers were sold with Visual Discovery software preloaded. Visual Discovery operates to find products based on an image-to-image search technology that enables users to search for items based on the appearance of the item, rather than a text-based description.

² R.S.O. 1990, c. S.1.

³ *Privacy Act*, R.S.B.C. 1996, c. 373; *Privacy Act*, R.S.S. 1978, c. P-24; *Privacy Act*, C.C.S.M. c. P125; and *Privacy Act*, R.S.N.L. 1990, c. P-22.

[13] Upon first use and subsequently by use of the computer's add/remove software commands, the purchaser may remove Visual Discovery. If not removed and if made operational, Visual Discovery operates to intercept the user's internet connections and scans the user's web traffic to inject advertisements into the user's web browser.

[14] Mr. Bennett is a lawyer who lives in St. John's, Newfoundland and Labrador. In September 2014, he purchased a Flex 2 laptop computer from Lenovo (Canada) on-line for personal and for business use. His computer was preloaded with Visual Discovery.

[15] Mr. Bennett purchased his computer pursuant to a written agreement with Lenovo (Canada). Pursuant to the the Lenovo Licence Agreement, the laws of Ontario apply to govern, interpret, and enforce all rights, duties, and obligations arising from, or relating in any manner to, the warranties for the models sold in Canada, without regard to conflict of law principles.

[16] Section 9(2) of Ontario's *Consumer Protection Act, 2002*,⁴ provides that the implied conditions and warranties of s. 15 of the *Sale of Goods Act*, apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement and these terms cannot be varied or waived. Section 1 of the *Consumer Protection Act, 2002* defines consumer to mean "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes."

[17] The *Sale of Goods Act* contains the following implied condition as to quality or fitness:

Implied conditions as to quality or fitness

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[18] In the Lenovo (Canada) Sales Agreement, Articles 5.1 and 5.2 provide a limited warranty for the hardware and a disclaimer of any and all warranties for the installed software. The latter disclaimer acknowledges, however, that under provincial or state consumer protection laws, the disclaimer may not apply. Articles 5.1 and 5.2 state:

⁴ S.O. 2002, c. 30, Sched. A.

- 5.1 Lenovo hardware Products are warranted in accordance with the Lenovo Limited Warranty accompanying each Lenovo hardware Product ...
- 5.2 LENOVO MAKES NO WARRANTIES FOR SOFTWARE, SERVICE, SUPPORT OR THIRD PARTY PRODUCTS. SUCH SOFTWARE, SERVICE, SUPPORT AND PRODUCTS ARE PROVIDED "AS IS", WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND. SOME PROVINCES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS OF WARRANTIES, SO THESE LIMITATIONS MAY NOT APPLY TO CUSTOMER ...

[19] In versions of the software installed on Lenovo (Canada)'s computers from September 1, 2014 until December 1, 2014, when an updated version of the software was installed, there was a security defect in the software (a self-signed root certificate with a non-unique password). The presence of the security defect meant that in certain circumstances, when the user was using his or her laptop on an unsecure computer network, a third-party could gain access to the computer owner's confidential and private information. The defect did not affect users on a secure network such as typically provided by a home internet service, but the user's computer was exposed if used on an unsecure network such as in an airport or coffee shop where a hacker who knew the non-unique password and how to redirect the user's traffic to a malicious website, could obtain data from the user's computer.

[20] In all versions of Visual Discovery installed on Lenovo (Canada)'s computers between September 1, 2014 and January 16, 2015, when Lenovo (Canada) stopped loading the software, it was part of the operation of the software to send information from the user's computer to Superfish's servers in order to perform the search for items. The information included the URL of the website being visited, the main or first product image on the page, text associated with that product image, the name of the merchant's website, the user's IP address and country, a unique identifier created by the software, and session information.

[21] All information sent to Superfish's servers was received on an anonymous basis. The information did not contain the name, user name, password, physical address, email address, telephone number or other personally identifiable information of the user or computer owner. Visual Discovery did not log users' keystrokes and the information that Visual Discovery sent to Superfish could not be tracked back to any particular person. The information was not retained and each search was treated as a discrete search.

[22] After January 16, 2015, Visual Discovery was not preloaded on Lenovo computers.

[23] On February 19, 2015, from media reports, Lenovo (Canada) learned that the original version of Visual Discovery had a security defect. On that day, the Superfish servers were shut down, and Visual Discovery became inoperable on all Lenovo computer units on which it had been installed. Lenovo (Canada) issued an online statement explaining that the server connection had been shut down and providing online resources to help users remove the software.

[24] On February 20, 2015, Lenovo (Canada) issued another online statement containing a link to an automated tool to help users remove Visual Discovery and advising that Lenovo (Canada) was working with third parties to have the Superfish software quarantined or removed. Simultaneously, the antivirus software was updated to automatically disable and remove Visual Discovery.

[25] On February 23, 2015, Lenovo (Canada) posted an open letter from its Chief Technology Officer on its website, providing an update regarding Lenovo (Canada)'s efforts to eliminate the security defect associated with the Superfish software.

[26] On March 21, 2015, Lenovo (Canada) issued an "Important Security Message" to users directly via the Lenovo Messenger Advisory tool. The message went out to users whose computers still contained any version of Visual Discovery. The message advised the user of the security defect, recommended that the user uninstall the software, and provided a link to manually or automatically remove Visual Discovery.

[27] According to its sales records, between September 1, 2014 and January 19, 2015, Lenovo (Canada) directly sold 10,933 computers that had been loaded with Visual Discovery. Lenovo (Canada) does not know the extent to which the computers were purchased for business purposes or for personal, family or household purposes.

[28] There have been no reports or evidence in Canada or elsewhere that the security defect was exploited to access the private information of any user of the computers sold by Lenovo (Canada).

C. Procedural Background

[29] On March 11, 2015, Mr. Bennett commenced his proposed class action.

[30] The Statement of Claim was amended twice: on January 6, 2016 and on May 9, 2016 to add the defendant, Superfish Inc.

[31] Mr. Bennett's proposed class action initially advanced five causes of action: (1) breach of contract; (2) the implied condition of merchantability; (3) the tort of intrusion upon seclusion; (4) breach of provincial privacy laws; and (5) negligence.

[32] Mr. Bennett withdrew the negligence claim, and on February 17, 2017, on a Rule 21 motion, Justice Belobaba held that it was plain and obvious that the breach of contract claim would fail. Justice Belobaba concluded that it was not plain and obvious that the claims for: (1) the implied condition of merchantability; (2) the tort of intrusion upon seclusion; and (3) breach of provincial privacy laws, would fail.

[33] As noted in the introduction above, based on two alleged wrongdoings, Mr. Bennett alleges that for consumer purchasers, there has been a breach of the implied warranties of the *Sale of Goods Act*.

[34] As noted above, Mr. Bennett alleges for all purchasers, based on the two alleged wrongdoings, there has been a contravention of the tort of intrusion on seclusion. In *Jones v. TsigeI*,⁵ the Court of Appeal recognized three elements of this privacy tort: (1) the defendant's conduct must be intentional or reckless; (2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. The third element is generally presumed once the other elements have been established. Proof of actual loss is not an element of this cause of action.

⁵ 2012 ONCA 32.

[35] As noted above, Mr. Bennett alleges a contravention of privacy statutes for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador. Each of the four provincial statutes declares, in essence, that the unlawful violation of another's privacy is an actionable tort, without proof of loss.

[36] On March 10, 2017, Lenovo (Canada) delivered a Statement of Defence and a Crossclaim against Superfish.

[37] In the Statement of Claim, the proposed class was defined as:

All persons in Canada who purchased one or more of the following laptops (the “Affected Models”) **from Lenovo** from September 1, 2014 to March 11, 2015: [my emphasis added]

- G Series: G410, G510, G710, G40-70, G50-70, G40-30, G50-30, G40-45, G50-45, G50-50, G40-80, G50-80, G50-80Touch
- U Series: U330P, U430P, U330Touch, U430Touch, U530Touch
- Y Series: Y430P, Y40-70, Y50-70, Y40-80, Y70-70
- Z Series: Z40-75, Z50-75, Z40-70, Z50-70, Z70-80
- S Series: S310, S410, S40-70, S415, S415Touch, S435, S20-30, S20-30Touch
- Flex Series: Flex2 14D, Flex2 15D, Flex2 14, Flex 2 14(BTM), Flex2 15, Flex2 15(BTM), Flex2 Pro, Flex 10
- MIIX Series: MIIX2-8, MIIX2-10, MIIX2-11, MIIX 3 1030
- YOGA Series: YOGA2Pro-13, YOGA2-13, YOGA2-11, YOGA2-11BTM, YOGA2-11HSW, YOGA3 Pro
- E Series: E20-30
- Edge Series: Lenovo Edge 15 (collectively, the “Affected Models”);

[38] On February 27, 2017, Mr. Bennett served his notice of motion for certification. In a point that I will return to below, and of which Lenovo (Canada) places considerable emphasis and objection, is that the proposed class definition in the notice of motion expands from the definition set out in the Statement of Claim, which focuses on direct purchasers from Lenovo (Canada).

[39] The notice of motion for certification, in effect, includes indirect purchasers as Class Members. The definition in the notice of motion is:

All persons in Canada who purchased one or more of the following Lenovo laptops from September 1, 2014 to March 11, 2015

[40] The proposed common issues are:

Consumer Protection Act, 2002

- (i) Did the defendants, or either of them, breach s. 9 (2) of the *Consumer Protection Act, 2002*?
- (ii) Are the contracts for the sale of computers to the class members “consumer agreements” within the meaning of the *Consumer Protection Act, 2002*?
- (iii) If the answer to (i) is “yes”, does the implied condition under section 15 of the *Sale of Goods Act*, that goods be of merchantable quality, apply to the consumer agreement?
- (iv) Were the Affected Models of merchantable quality?

Intrusion Upon Seclusion

(v) Did the defendants, or either of them, invade, without lawful justification, the class members' private affairs or concerns by installing VisualDiscovery on the Affected Models?

(vi) Was the defendants' conduct intentional or reckless?

(vii) Would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

Breach of Provincial Privacy Acts

(viii) Did the defendants, or either of them, violate the privacy of the class members contrary to the following provincial privacy acts:

Section 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373?

Section 2 of *The Privacy Act*, C.C.S.M. c. P125?

Section 2 of the *Privacy Act*, R.S.S. 1978, c. P-24?

Section 3 of the *Privacy Act*, R.S.N.L. 1990, c. P-22?

Damages or Compensation

(ix) Can damages or compensation, or some portion thereof, be determined on an aggregate basis?

Punitive Damages

(x) Are the defendants, or either of them, liable to pay punitive or exemplary damages to the class members having regard to the nature of their conduct and, if so, what amount?

D. Certification - General Principles

[41] The court is required to certify the action as a class proceeding where 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.

[42] 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.⁶

[43] 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.⁷ 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;

⁶ *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

⁷ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification.⁸

[44] 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.⁹

[45] 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.¹⁰ 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.¹¹ Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.¹²

[46] In particular, there must be a basis in the evidence before the court to establish the existence of common issues.¹³ In order 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.¹⁴

[47] 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".¹⁵ The evidence on a motion for certification must meet the usual standards for admissibility.¹⁶ 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.¹⁷ In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.¹⁸

⁸ *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29; *Hollick v. Toronto (City)*, *supra* at paras. 15 and 16.

⁹ *Hollick v. Toronto (City)*, *supra* at para. 22.

¹⁰ *Hollick v. Toronto (City)*, *supra* at paras. 28 and 29.

¹¹ *Hollick v. Toronto (City)*, *supra* at paras. 16-26.

¹² *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, *aff'd* 2012 ONSC 3992 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. *ref'd* [2003] S.C.C.A. No. 106; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. *ref'd*, [2005] S.C.C.A. No. 545; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), *aff'd* (1999), 42 O.R. (3d) 576 (Div. Ct.).

¹³ *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.

¹⁴ *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.

¹⁵ *Hollick v. Toronto (City)*, *supra* at paras. 16-26; *Cloud v. Canada*, 2004, 73 O.R. (3d) 401 (C.A.) at para. 50, leave to appeal to the S.C.C. *ref'd*, [2005] S.C.C.A. No. 50, *rev'g* (2003), 65 O.R. (3d) 492 (Div. Ct.).

¹⁶ *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, *supra*; *Ernewein v. General Motors of Canada Ltd.*, *supra*; *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para. 13.

¹⁷ *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76.

¹⁸ *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, *aff'd* 2012 BCCA 260.

[48] 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; the focus at certification is whether the action can appropriately go forward as a class proceeding: *Pro-Sys Consultants v. Microsoft, supra; McCracken v. CNR Co.*¹⁹

E. Cause of Action Criterion

[49] 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. Carey Canada*²⁰ 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*.

[50] 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.²¹

[51] 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.²²

[52] Because of Justice Belobaba’s decision, it has already been determined that the cause of action criterion is satisfied for three causes of action.

F. Identifiable Class Criterion

[53] 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.²³

[54] 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.²⁴

¹⁹ 2012 ONCA 445.

²⁰ [1990] 2 S.C.R. 959.

²¹ *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref’d, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff’d (2004), 70 O.R. (3d) 182 (Div. Ct.).

²² *Hollick v. Toronto (City)*, *supra* at para. 25; *Cloud v. Canada (Attorney General)* *supra* at para. 41; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.

²³ *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

²⁴ *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev’g [2004] O.J. No. 317 (Div. Ct.), which had aff’d [2002] O.J. No. 2764 (S.C.J.).

[55] In *Western Canadian Shopping Centres v. Dutton*,²⁵ 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.

[56] Lenovo (Canada) makes a variety of arguments that challenge the class definition in the immediate case. I shall address the easiest objections first and then address the more complicated issue of whether indirect purchasers are or can be included as class members in Mr. Bennett's proposed class action.

[57] The proposed class definition identifies 44 computer models. However, the uncontested evidence is that only 19 models were preloaded with Visual Discovery in Canada. Lenovo (Canada) correctly submits that models that never contained Visual Discovery should be deleted from the class definition.

[58] I agree with this submission. Thus, the following models should be deleted from the class definition: (a) G Series: G410, G710, G40-30, G50-30, G40-45, G50-50, G40-80, G50-80, G50-80Touch; (b) U Series: U330P, U330Touch, U430Touch; (c) Y Series: Y430P, Y40-80, Y70-70; (d) Z Series: Z40-75, Z50-75, Z70-80; (e) S Series: S310, S410, S40-70, S415, S415Touch, S435, S20-30, S20-30Touch; (f) Flex Series: Flex2 14D, Flex2 15D, Flex 2 14(BTM), Flex2 15(BTM), Flex2 Pro, Flex 10; (g) MIIX Series: MIIX2-8, MIIX2-11, MIIX 3 1030; (h) YOGA Series: YOGA2-11, YOGA3 Pro; (i) E Series: E20-30; (j) Edge Series: Lenovo Edge 15.

[59] The uncontested evidence also establishes that the security defect did not exist in laptops containing the updated version of Visual Discovery, *i.e.*, the version contained in Lenovo (Canada) models shipped after December 1, 2014. Lenovo (Canada) submits that this circumstance means that the class definition is over-inclusive or that it is necessary to establish subclasses with another representative plaintiff to act for purchasers of the computers with updated software. Lenovo (Canada) submits that many subclasses would be required because they would have to differentiate the claimants from each of the four provinces that have privacy statutes.

[60] I disagree, I see no reason why Mr. Bennett cannot represent purchasers of the original or the updated version of the software both of which operated to send information to Superfish's computers. The matter of differentiating the claims of purchasers of the original software with its security defect as opposed to the claims of purchasers of the updated version of the software and the matter of differentiating the purchasers who have statutory claims in British Columbia, Saskatchewan, Manitoba and Newfoundland & Labrador can be addressed by carefully crafting the common issue questions.

²⁵ *Supra*, at para. 38.

[61] Similarly, Lenovo (Canada) submits that the class definition is overbroad by not differentiating between purchasers who are consumers under the *Consumer Protection Act* and purchasers who are not covered by the *Act*. The former but not the latter have *Sale of Goods Act* claims. Alternatively, Lenovo (Canada) submits that it is necessary to establish a subclass with another representative plaintiff to act for consumer purchasers since it is not clear that Mr. Bennett himself was a consumer under the *Consumer Protection Act* because he used his computer for both personal and business uses.

[62] Once again, I see no need to create subclasses, and the differentiation between consumers and non-consumers is a matter that can be dealt with by carefully crafting the common issue questions.

[63] Turning to the more difficult question of whether Mr. Bennett's action was brought or could now be brought on behalf of indirect purchasers of the 17 models of computer that contained Visual Discovery, I agree with Lenovo (Canada)'s argument that up until the 2017 notice of motion for certification, that Mr. Bennett's proposed class action was brought on behalf of only direct purchasers. I agree with this submission for three reasons.

[64] First, the original Statement of Claim defines the class as persons who purchased computers "from Lenovo". Those words, which identify direct purchasers, were deleted from the notice of motion for certification and in my opinion Mr. Bennett cannot, by this deft sleight of hand, add indirect purchasers as Class Members and plead a claim that was not pleaded in the original Statement of Claim. Second, a significant element of Mr. Bennett's Statement of Claim is his *Sale of Goods Act* claim, but this claim is not available to indirect purchasers because they have no privity of contract with Lenovo (Canada). Third, the evidence for the certification motion, and it would appear the argument for the Rule 21 motion, did not relate to or explore Lenovo (Canada)'s distribution of its computers to retailers, and thus, it would not be procedurally fair to extend class membership to persons who have a different and unexplored legal and factual relationship to Lenovo (Canada) and whose claims raise different issues about the common issues criterion, the preferable procedure, and the representative plaintiff criteria.

[65] I, therefore, conclude that, as currently drafted, the Statement of Claim does not include a claim by indirect purchasers, and, thus, the question becomes whether the class definition can be amended at this juncture to include indirect purchasers. I, however, agree with Lenovo (Canada)'s argument that it is not possible to revise the definition at this juncture. In particular, I agree with its argument that it would require a motion to amend the Statement of Claim, which motion has never been brought. Moreover, and more significantly, assuming that the motion was brought, it would inevitably fail because a claim by indirect purchasers is now statute-barred.

[66] The indirect purchasers' claim is now statute-barred because under the *Limitations Act, 2002*,²⁶ their claim would have been discovered between February 19, 2015 and at the latest March 21, 2015. In this regard, it should be recalled that pursuant to s. 5(2) of the *Class Proceedings Act*, there is a presumption that a person with a claim knew about his or her claim on the day the act or omission on which the claim took place, unless the contrary is proved. There is a two-year limitation period and, thus, the indirect purchasers' claim became statute-barred between February 19, 2017 and March 21, 2017.

²⁶ S.O. 2002, c. 24, Sched. B.

[67] Mr. Bennett commenced his action on behalf of the direct purchasers on March 11, 2015, and although s. 28(1) of the *Class Proceedings Act, 1992* suspends the running of a limitation period, it does so only for putative class members whose causes of action are asserted in the Statement of Claim,²⁷ which has yet to occur for the indirect purchasers, and thus their claims would be statute-barred.

[68] For the above reasons, in the case at bar, the following definition satisfies the identifiable class criterion:

All persons in Canada who purchased directly from Lenovo (Canada) one or more of the following Lenovo laptops containing Visual Discovery software:

- G Series: G510, G40-70, G50-70, G50-45
- U Series: U430P, U530Touch
- Y Series: Y40-70, Y50-70
- Z Series: Z40-70, Z50-70
- Flex Series: Flex2 14, Flex2 15,
- MIIX Series: MIIX2-10
- YOGA Series: YOGA2Pro-13, YOGA2-13, YOGA2-11BTM, YOGA2-11HSW

[69] It may be noted that the definition that I have approved does not contain a class period. A class period is unnecessary and, worse, it would be confusing to persons who, in order to determine whether they are Class Members, do not need to know when they purchased a computer from Lenovo (Canada).

G. Common Issues Criterion

[70] 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.²⁸ 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. 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.²⁹ In *Pro-Sys Consultants v. Microsoft*,³⁰ 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.

²⁷ *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 at para. 38; *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, 2011 ONSC 4914 at para. 83.

²⁸ *Hollick v. Toronto (City)*, *supra* at para. 18.

²⁹ *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Ernewein v. General Motors of Canada Ltd.*, *supra* at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. Canadian National Railway Co.*, *supra*, at para. 183.

³⁰ *Supra* at para. 106.

[71] 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.³¹ 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.³²

[72] The common issue criterion presents a low bar.³³ 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.³⁴ 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 for (or against) the class.³⁵

[73] In the context of the common issues criterion, the “some-basis-in-fact” standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.³⁶

[74] Notwithstanding the arguments of Lenovo (Canada), I am satisfied that there is “some-basis-in-fact” for common issues about the three causes of action that satisfy the cause of action criterion.

[75] I do agree with Lenovo (Canada) that there are problems with the current set of questions because they do not focus on the elements of the three causes of action that are common and because they do not differentiate the elements that are not common and that would have to be determined at individual issues trials. As examples, whether or not a Class Member is a consumer protected by the *Consumer Protection Act* is an individual issue as is the question of whether he or she had the original version of Visual Discovery or the undated version of the software on their computer. Whether a Class Member is from British Columbia, Saskatchewan, Manitoba, or Newfoundland & Labrador are not class-wide characteristics.

[76] Recasting the liability common issues from individual issues yields the following set of questions, which satisfy the common issues criterion:

Sale of Goods Act

- (i) Did the defendant Lenovo (Canada) breach s. 15 of the *Sale of Goods Act* for class members who are consumers as defined by the *Consumer Protection Act, 2002* who purchased the Affected Models preloaded with the original version of Visual Discovery?

³¹ *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6.

³² *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (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 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).

³³ *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)*, *supra*, at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), *aff'd* [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.

³⁴ *Cloud v. Canada (Attorney General)*, *supra*.

³⁵ *Harrington v. Dow Corning Corp.*, *supra*.

³⁶ *Hollick v. Toronto (City)*, *supra*; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *McCracken v. Canadian National Railway Company*, *supra*; *Williams v. Canon Canada Inc.*, *supra*; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *Dine v. Biomet*, 2015 ONSC 7050, *aff'd* 2016 ONSC 4039 (Div. Ct.).

(ii) Did the defendant Lenovo (Canada) breach s. 15 of the *Sale of Goods Act* for class members who are consumers as defined by the *Consumer Protection Act, 2002* who purchased the Affected Models preloaded with the updated version of Visual Discovery?

Intrusion Upon Seclusion

(iii) Did Lenovo (Canada) invade, without lawful justification, the class members' private affairs or concerns by installing the original version of Visual Discovery on the Affected Models?

(iv) Did Lenovo (Canada) invade, without lawful justification, the class members' private affairs or concerns by installing the updated version of Visual Discovery on the Affected Models?

(v) If the answer to question (iii) is "yes", was Lenovo (Canada)'s conduct intentional or reckless?

(vi) If the answer to question (iv) is "yes", was Lenovo (Canada)'s conduct intentional or reckless?

(vii) If the answers to questions (iii) and (v) are "yes", would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

(viii) If the answers to questions (iv) and (vi) are "yes", would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

Breach of Provincial Privacy Acts

(ix) For class members resident in British Columbia, did Lenovo (Canada) contravene the *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1?

(x) For class members resident in Saskatchewan, did Lenovo (Canada) contravene the *Privacy Act*, R.S.S. 1978, c. P-24, s. 2?

(xi) For class members resident in Manitoba, did Lenovo (Canada) contravene *The Privacy Act*, C.C.S.M. c. P125, s. 2?

(xii) For class members resident in Newfoundland and Labrador, did Lenovo (Canada) contravene the *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3?

[77] Moving on from the liability issues to remedy issues, Mr. Bennett also seeks to have certified as a common issue whether damages can be determined on an aggregate basis pursuant to s. 24(1) of the *Class Proceedings Act, 1992*, which 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.

[78] 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." If liability cannot be established through the other common issues, then an aggregate damages common issue cannot be certified.³⁷

³⁷ *Kalra v. Mercedes Benz*, 2017 ONSC 3795.

[79] In the case at bar, once the liability questions are determined, the action must necessarily move on to the individual issues stage because several questions of fact or law would remain to be determined: visualize: whether the class member was a consumer; what version of the software was on the class member's computer; whether Lenovo (Canada) has individual defences depending on the individual class member's type of use of the computer (he or she may never have activated the software or the software may have been removed or deactivated or the class member may never have used the computer on an unsecure network).

[80] I, therefore, conclude that aggregate damages may not be certified as a common issue.

[81] The remaining proposed common issue is: "Punitive Damages - Are the defendants, or either of them, liable to pay punitive or exemplary damages to the class members having regard to the nature of their conduct and, if so, what amount?"

[82] I shall not certify this common issue because as against Lenovo (Canada), on the current evidentiary record, there is no basis in fact for it. There is not a scintilla of evidence that: Lenovo (Canada) deliberately concealed the defect, refused to address such issues when discovered, or treated the purchasers of its computers in a high-handed or malicious manner. The matter of liability for punitive damages can be revisited by the judge at the common issues trial or by the judges of the individual issues trials.

[83] The result is that Mr. Bennett's action satisfies the common issues criterion in the way described above.

H. Preferable Procedure Criterion

[84] The fourth criterion 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.³⁸

[85] 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.

³⁸ *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

[86] 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.³⁹ 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.⁴⁰

[87] 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).⁴¹

[88] The court must identify alternatives to the proposed class proceeding.⁴² 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.⁴³

[89] In *AIC Limited v. Fischer*,⁴⁴ 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 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.

[90] In *AIC Limited v. Fischer*, 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 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?

[91] 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 proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the part of the

³⁹ *Cloud v. Canada (Attorney General)* *supra* at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

⁴⁰ *Markson v. MBNA Canada Bank*, *supra* at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

⁴¹ *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.).

⁴² *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City)*, *supra* at para. 28.

⁴³ *AIC Limited v. Fischer*, *supra* at paras. 48-49.

⁴⁴ *Supra* at paras. 24-38.

preferable procedure analysis that considers whether the claimants will receive a just and effective remedy for their claims.

[92] Lenovo (Canada) did not concede that Mr. Bennett's action satisfied the preferable procedure criterion, but, as noted above, it focussed its attack on the cause of action, identifiable class, and common issues criteria. In my opinion, with these three criteria satisfied and in other respects, Mr. Bennett's action also satisfies the preferable procedure criterion.

I. Representative Plaintiff Criterion

[93] 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.

[94] 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.⁴⁵

[95] 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.⁴⁶

[96] 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.⁴⁷

[97] While Lenovo (Canada) criticized Mr. Bennett's litigation plan, it did not challenge his qualifications as a representative plaintiff nor did it challenge the competence of putative Class Counsel. The litigation plan, which is always a work in progress, will need to be amended in accordance with these Reasons for Decision, but the plan is adequate for the purposes of satisfying the representative plaintiff criterion.

[98] I conclude that Mr. Bennett's action satisfies the representative plaintiff criterion.

J. Conclusion

[99] For the above reasons, I certify this action under the *Class Proceedings Act, 1992*.

⁴⁵ *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

⁴⁶ *Boulangier v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

⁴⁷ *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 41.

[100] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Bennett's submissions within 20 days from the release of these Reasons for Decision followed by Lenovo (Canada)'s submissions within a further 20 days.

Perell, J.

Released: October 3, 2017

CITATION: Bennett v. Lenovo (Canada) Inc., 2017 ONSC 5853
COURT FILE NO.: CV-15-523714-CP
DATE: 20171003

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DANIEL BENNETT

Plaintiff

– and –

LENOVO (CANADA) INC. and SUPERFISH INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: October 3, 2017

AIC Limited *Appellant*

v.

**Dennis Fischer, Sheila Snyder,
Lawrence Dykun, Ray Shugar
and Wayne Dzeoba** *Respondents*

- and -

CI Mutual Funds Inc. *Appellant*

v.

**Dennis Fischer, Sheila Snyder,
Lawrence Dykun, Ray Shugar
and Wayne Dzeoba** *Respondents*

INDEXED AS: AIC LIMITED v. FISCHER

2013 SCC 69

File No.: 34738.

2013: April 18; 2013: December 12.

Present: McLachlin C.J. and LeBel, Rothstein,
Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO**

Civil procedure — Class actions — Certification — Market timing — Investors suing mutual fund managers for breaching fiduciary duties to investors and negligence for failing to curb market timing activities — Investors seeking certification of action as class proceeding under provincial class action legislation — Whether proposed investor class action meets preferability requirement for certification given settlement payments made to investors following proceedings conducted by Ontario Securities Commission — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1)(d).

A group of mutual fund managers were the subject of an investigation conducted by the Ontario Securities Commission (“OSC”) into “market timing”, a practice which was alleged to have caused long-term investors

AIC Limitée *Appelante*

c.

**Dennis Fischer, Sheila Snyder,
Lawrence Dykun, Ray Shugar
et Wayne Dzeoba** *Intimés*

- et -

CI Mutual Funds Inc. *Appelante*

c.

**Dennis Fischer, Sheila Snyder,
Lawrence Dykun, Ray Shugar
et Wayne Dzeoba** *Intimés*

RÉPERTORIÉ : AIC LIMITÉE c. FISCHER

2013 CSC 69

N° du greffe : 34738.

2013 : 18 avril; 2013 : 12 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D’APPEL DE L’ONTARIO

Procédure civile — Recours collectifs — Certification — Arbitrage sur la valeur liquidative — Action intentée par des investisseurs contre des gestionnaires de fonds pour manquement à leurs obligations fiduciaires envers les investisseurs et négligence pour avoir omis de prendre des mesures en vue de restreindre les arbitrages — Motion en vue de faire certifier que l’instance est un recours collectif présentée par les investisseurs en vertu de la loi provinciale sur les recours collectifs — Le recours collectif projeté satisfait-il au critère de certification du meilleur moyen, compte tenu de l’indemnité versée aux investisseurs par suite de l’instance intentée par la Commission des valeurs mobilières de l’Ontario? — Loi de 1992 sur les recours collectifs, L.O. 1992, ch. 6, art. 5(1)d).

Un groupe de gestionnaires de fonds mutuels étaient visés par une enquête menée par la Commission des valeurs mobilières de l’Ontario (« CVMO ») sur l’« arbitrage sur la valeur liquidative », une pratique

to suffer losses in the value of their investments. The fund managers ultimately entered into agreements with the OSC that paid investors millions in settlement. The settlement agreements anticipated and did not preclude the possibility of civil proceedings against the mutual fund managers. Following the settlement agreements, the investors applied to certify a class action against the fund managers relating to the same market timing conduct. The motion judge found that a class action was not a preferable procedure and denied certification. The Divisional Court reversed the motion judge and granted certification. The Court of Appeal upheld the Divisional Court's result.

Held: The appeal should be dismissed.

The appeal focuses on one branch of the statutory requirement for certification, the requirement that “a class proceeding would be the preferable procedure for the resolution of the common issues”: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(d). The question is whether the proposed class proceeding, as compared to the non-litigation OSC proceedings, is preferable from the point of view of providing access to justice. It is clear that the preferability requirement is broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions. In assessing preferability, the court must look at the common issues in the context of the action as a whole. However, the court cannot engage in a detailed assessment of the merits or likely outcome of the class action or any alternatives to it. The party seeking certification of a class action must show some basis in fact for each of the certification requirements.

The preferability inquiry has to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. Access to justice is an important goal of class proceedings. Within the proper scope of the certification process, both substantive and procedural aspects must be assessed in determining whether a class action is the preferable procedure. A class action will serve the goal of access to justice if: (1) there are access to justice

qui aurait fait baisser la valeur des placements d'investisseurs à long terme. Les gestionnaires de fonds ont fini par conclure des ententes de règlement avec la CVMO en exécution desquelles ils ont versé des millions de dollars aux investisseurs. Les ententes envisageaient la possibilité de poursuites civiles contre les gestionnaires de fonds mutuels; elles n'y faisaient pas obstacle. Postérieurement aux ententes de règlement, les investisseurs ont demandé la certification d'un recours collectif visant les gestionnaires de fonds et reposant sur les mêmes actes d'arbitrage sur la valeur liquidative. Le juge saisi de la motion a conclu que le recours collectif n'était pas le meilleur moyen et a refusé de le certifier. La Cour divisionnaire a infirmé cette décision et accordé la certification. La Cour d'appel a confirmé la conclusion de la Cour divisionnaire.

Arrêt : Le pourvoi est rejeté.

Le pourvoi porte sur l'un des critères de certification établis par la loi, à savoir « le recours collectif est le meilleur moyen de régler les questions communes » (*Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6, art. 5(1)d)). La question est celle de savoir si le recours collectif projeté constitue un meilleur moyen de régler les questions en cause, dans l'optique de l'accès à la justice, que l'instance non judiciaire devant la CVMO. Il est clair que le critère du meilleur moyen est assez large pour englober tous les moyens raisonnables offerts pour régler les demandes des membres du groupe, notamment les voies de droit autres que les poursuites judiciaires. Dans l'analyse relative au meilleur moyen, le tribunal doit considérer les questions communes dans le contexte général de l'action. Or, le tribunal ne saurait à cette étape procéder à l'appréciation détaillée du bien-fondé du recours collectif ou des autres voies de droit ou de leur issue probable. Il incombe à la partie qui cherche à faire certifier un recours collectif d'établir un certain fondement factuel pour chacune des conditions de certification.

L'analyse relative au meilleur moyen s'effectue à la lumière des trois principaux objectifs du recours collectif : l'économie des ressources judiciaires, la modification des comportements et l'accès à la justice, mais la question à laquelle il faut ultimement répondre est celle de savoir s'il existe des moyens préférables de régler les demandes, non pas si le recours collectif projeté réalisera pleinement ces objectifs. L'accès à la justice est assurément un objectif important du recours collectif. Dans la mesure permise à l'étape de la certification, l'analyse servant à déterminer si le recours collectif est le meilleur moyen doit porter à la fois sur le fond et sur la

concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered. To determine whether both of these elements are present, it may be helpful to address a series of questions. These questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis.

The first question is: what are the barriers to access to justice? There are two potential barriers to access to justice in this case. First, an economic barrier arises from the nature of the claim. The individual claims are not large enough to support viable individual actions. The second barrier is related to the first. As a result of the nature of the claim, there is potentially no access to a fair process, geared towards protecting the rights of class members, to seek a resolution of the common issues for what could potentially be a class of over a million members. Thus, traditional litigation cannot achieve either the substantive or the procedural dimensions of access to justice in a case such as this. Although generally the most common barrier to access to justice is an economic one; they can also be psychological or social in nature. A common procedural barrier is that there is no other procedure available to afford meaningful redress.

The second question is: what is the potential of the class proceedings to address those barriers? This analysis is not made in isolation, but within the comparative analysis, for the purpose of assessing the class proceedings' potential to address the access to justice concerns in comparison to the alternative procedure's ability to do so. Even though a class action is a procedural tool, achieving substantive results is one of its underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice. In this case, the proposed class action addresses both barriers. It has the potential to make it economically feasible to advance on behalf of the class a group of individual claims that would otherwise not be economically feasible to pursue in the courts and it provides class members with a fair process to resolve their claims.

The third question is: what are the alternatives to class proceedings? The motions court must look at all

forme. Le recours collectif permet de réaliser l'objectif d'accès à la justice si (1) il existe des préoccupations à ce sujet auxquelles ce type d'action peut remédier et (2) ces préoccupations subsistent lorsque d'autres voies de droit sont envisagées. Pour établir si ces deux conditions sont remplies, il peut être utile de poser une série de questions. Elles ne sauraient être examinées isolément, ni dans un certain ordre, mais elles devraient éclairer une analyse comparative globale.

La première question est la suivante : quels sont les obstacles à l'accès à la justice? Deux obstacles potentiels à l'accès à la justice se dressent en l'espèce. Le premier, d'ordre financier, est lié à la nature de la demande. Le montant des demandes individuelles est trop modeste pour qu'un recours individuel soit viable. Le deuxième obstacle est lié au premier. La nature de la demande est telle qu'il n'existe peut-être pas d'autre moyen équitable de permettre aux membres du groupe d'exercer leurs droits et de mener au règlement des questions communes d'un groupe pouvant compter plus d'un million de membres. Ainsi, dans un tel cas, l'action en justice classique ne sert pas l'accès à la justice, ni du point de vue substantiel, ni du point de vue procédural. Si, en règle générale, l'obstacle à l'accès à la justice le plus fréquent est d'ordre financier, il peut également être d'ordre psychologique ou social. L'impossibilité d'exercer tout autre recours qui permettrait d'obtenir une véritable réparation constitue un obstacle d'ordre procédural fréquent.

La deuxième question est la suivante : dans quelle mesure le recours collectif permet-il d'éliminer ces obstacles? Cette analyse ne s'effectue pas en vase clos, mais s'inscrit dans l'analyse comparative et vise à confronter le recours collectif aux autres moyens, eu égard à leur capacité respective de répondre aux préoccupations en matière d'accès à la justice. Bien qu'il s'agisse d'un instrument de procédure, le recours collectif a, entre autres, pour objet sous-jacent de procurer des résultats positifs quant au fond. Dans l'évaluation de la capacité de ce type de recours d'aplanir les obstacles à l'accès à la justice, il faut prendre en compte la dimension procédurale et la dimension substantielle de la notion d'accès. En l'espèce, le recours collectif proposé élimine ces deux obstacles. Il permet à un groupe de faire valoir un ensemble de demandes individuelles qu'il serait autrement impossible pour des raisons d'ordre financier de soumettre aux tribunaux et il fournit aux membres du groupe une voie de droit équitable.

La troisième question est la suivante : quels autres moyens y a-t-il? Le tribunal saisi de la motion doit

the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim. There is no realistic litigation alternative in this case. The only alternative procedure that was advanced is the OSC proceedings and settlement agreements, the results of which are already known.

The fourth question is: to what extent do the alternatives address the relevant barriers to access to justice? The question is whether the alternative has the potential to provide effective redress for the substance of the claims and to do so in a manner that accords suitable procedural rights.

The last question is: how do the two proceedings compare? In comparing the two proceedings, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. The court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.

In answering the last two questions in this case, investor participation in the process leading to compensation is an important factor to consider and one that weighs heavily in favour of finding that the class proceeding meets the preferability requirement in this case. The regulatory nature of, and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address. Moreover, the focus and nature of the OSC process reinforce the concerns about whether substantial access to justice was achieved. The substantive outcome of the OSC proceedings cannot be dismissed as irrelevant to the question of whether the OSC proceedings addressed the access to justice barrier that is present in this case or whether the way in which it did so suggests that the class proceeding is not the preferred alternative.

However, the substantive outcome of the OSC proceedings and their impact on the preferability analysis must be examined through the appropriate evidentiary lens. In the rather unusual circumstances of this case, where the OSC proceedings have run their course and the results of those proceedings are known, the comparative analysis cannot ignore the question of whether a cost-benefit analysis supports the contention that the proposed

examiner de façon globale les autres moyens et déterminer s'ils permettent d'éliminer les obstacles à l'accès à la justice que soulève la demande. Il n'existe pas d'autre solution judiciaire réaliste en l'espèce. La seule autre voie de droit évoquée est l'instance devant la CVMO et les règlements intervenus, dont l'issue est connue.

La quatrième question est la suivante : dans quelle mesure les autres moyens permettent-ils d'aplanir les obstacles à l'accès à la justice? Il s'agit de déterminer si l'autre moyen permettra de régler utilement les demandes quant au fond tout en assurant la possibilité d'exercer des droits procéduraux adéquats.

La dernière question est la suivante : quel est le résultat de la comparaison des deux instances? Dans l'exercice de comparaison, le tribunal saisi de la motion doit déterminer, au vu de la preuve, s'il a été démontré que le recours collectif est le meilleur moyen de régler les préoccupations relatives à l'accès à la justice, sur le plan de la procédure et sur le plan du fond. Il doit aussi, sans outrepasser le cadre de l'audience sur la certification, comparer les coûts et les avantages du recours collectif projeté à ceux de l'autre moyen proposé.

En réponse aux deux dernières questions en l'espèce, il faut mentionner que la participation des investisseurs à la procédure menant à l'indemnisation constitue un facteur important, qui milite fortement en faveur de la conclusion que le recours collectif satisfait au critère du meilleur moyen en l'espèce. La nature réglementaire de l'instance devant la CVMO et les droits de participation limités qu'elle offrait aux investisseurs, conjugués à l'absence d'information sur les calculs effectués par son personnel en vue de l'indemnisation des investisseurs, étayaient la conclusion qu'il subsiste d'importants obstacles à l'accès à la justice sur le plan procédural auxquels le recours collectif peut remédier. Par ailleurs, l'objet et la nature de la procédure devant la CVMO accentuent les préoccupations en matière d'accès à la justice sur le plan du fond. On ne peut conclure que l'issue concrète de cette instance ne joue pas pour déterminer si cette voie de droit a permis de lever l'obstacle à l'accès à la justice en l'espèce ou s'il en ressort que le recours collectif n'est pas le meilleur moyen.

Toutefois, l'issue concrète de l'instance devant la CVMO et son effet sur l'analyse relative au meilleur moyen doivent être examinés à la lumière des normes de preuve applicables. Les circonstances de l'espèce sont plutôt inhabituelles, car l'issue de l'instance devant la CVMO est connue. L'analyse comparative doit donc aborder la question de savoir si l'examen des coûts et des avantages étaye la thèse selon laquelle le recours

class proceeding is the preferable way to address the claims here. The record in this case, which shows in detail the results of the completed proposed alternative proceedings, also shows that substantive access to justice concerns still remain. Further, there is no reason to believe that potential additional recovery would be consumed by the costs of the proceedings. The investors provided an appropriate basis to support the view that the class action proceeding would overcome access to justice barriers that subsisted after the completion of the OSC proceedings and that a cost-benefit analysis supported the conclusion that the class proceedings were the preferable proceeding for the investors to pursue their claims. The motion judge in this case erred in principle in his analysis and this justified appellate intervention in his exercise of discretion to refuse certification. The correct legal principles support the decision to certify the proposed class action.

Cases Cited

Applied: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; **referred to:** *Klay v. Humana, Inc.*, 382 F.3d 1241 (2004); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641; *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358; *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, aff'd (2004), 70 O.R. (3d) 182; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22, leave to appeal refused, [2003] 2 S.C.R. vi; *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, leave to appeal refused, [2008] 1 S.C.R. xiv.

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Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1).
Federal Rules of Civil Procedure, 28 U.S.C. app., r. 23(b)(3).

collectif est le meilleur moyen de régler les réclamations. La preuve présente l'issue de l'autre voie de droit en détail et révèle qu'il subsiste des préoccupations relatives à l'accès à la justice quant au fond. En outre, il n'y a aucune raison de croire que les coûts du recours annuleraient le montant des dommages-intérêts susceptibles d'être accordés. Les investisseurs ont bien étayé l'opinion que le recours collectif permettrait d'écartier les obstacles à l'accès à la justice subsistant après l'instance devant la CVMO et qu'à la lumière d'un examen des coûts et des avantages, il s'agit du meilleur moyen de faire valoir les demandes des investisseurs. L'analyse du juge saisi de la motion est entachée d'erreurs de principe. En conséquence, la révision en appel de l'exercice de son pouvoir discrétionnaire de refuser la certification est justifiée. Les bons principes juridiques applicables étayaient la décision de certifier le recours collectif projeté.

Jurisprudence

Arrêt appliqué : *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; **arrêts mentionnés :** *Klay c. Humana, Inc.*, 382 F.3d 1241 (2004); *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; *Rumley c. Colombie-Britannique*, 2001 CSC 69, [2001] 3 R.C.S. 184; *Webb c. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389; *Pearson c. Inco Ltd.* (2006), 78 O.R. (3d) 641; *Halabi c. Becker Milk Co.* (1998), 39 O.R. (3d) 153; *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477; *Irving Paper Ltd. c. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358; *Hague c. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1; *McCracken c. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745; *1176560 Ontario Ltd. c. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535, conf. par (2004), 70 O.R. (3d) 182; *Chadha c. Bayer Inc.* (2003), 63 O.R. (3d) 22, autorisation d'appel refusée, [2003] 2 R.C.S. vi; *Caputo c. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132; *Markson c. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano c. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, autorisation d'appel refusée, [2008] 1 R.C.S. xiv.

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APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O., Epstein J.A. and Pardu J. (*ad hoc*)), 2012 ONCA 47, 109 O.R. (3d) 498, 287 O.A.C. 148, 346 D.L.R. (4th) 598, 15 C.P.C. (7th) 81, [2012] O.J. No. 343 (QL), 2012 CarswellOnt 635, affirming a decision of Molloy, Swinton and Herman JJ., 2011 ONSC 292, 104 O.R. (3d) 615, 276 O.A.C. 84, 6 C.P.C. (7th) 139, [2011] O.J. No. 562 (QL), 2011 CarswellOnt 800, setting aside in part a decision of Perell J., 2010 ONSC 296, 89 C.P.C. (6th) 205, [2010] O.J. No. 112 (QL), 2010 CarswellOnt 135. Appeal dismissed.

James D. G. Douglas, David Di Paolo and Margot Finley, for the appellant AIC Limited.

Benjamin Zarnett, Jessica Kimmel and Melanie Ouanounou, for the appellant CI Mutual Funds Inc.

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POURVOI contre un arrêt de la Cour d’appel de l’Ontario (le juge en chef Winkler, la juge Epstein et la juge Pardu (*ad hoc*)), 2012 ONCA 47, 109 O.R. (3d) 498, 287 O.A.C. 148, 346 D.L.R. (4th) 598, 15 C.P.C. (7th) 81, [2012] O.J. No. 343 (QL), 2012 CarswellOnt 635, qui a confirmé une décision des juges Molloy, Swinton et Herman, 2011 ONSC 292, 104 O.R. (3d) 615, 276 O.A.C. 84, 6 C.P.C. (7th) 139, [2011] O.J. No. 562 (QL), 2011 CarswellOnt 800, qui avait infirmé en partie une décision du juge Perell, 2010 ONSC 296, 89 C.P.C. (6th) 205, [2010] O.J. No. 112 (QL), 2010 CarswellOnt 135. Pourvoi rejeté.

James D. G. Douglas, David Di Paolo et Margot Finley, pour l’appelante AIC Limitée.

Benjamin Zarnett, Jessica Kimmel et Melanie Ouanounou, pour l’appelante CI Mutual Funds Inc.

Allan C. Hutchinson, Peter R. Jervis, Joel P. Rochon and Remissa Hirji, for the respondents.

The judgment of the Court was delivered by

CROMWELL J. —

I. Overview

[1] In order to have a proposed class action certified, the plaintiff must show that there is some basis in fact to conclude that a class proceeding would be the preferable procedure for resolution of the common issues raised in the action: *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”), s. 5(1)(d). The main question on appeal in this proposed investor class action is whether it meets this preferability requirement given that settlement payments were made to investors following proceedings conducted by the Ontario Securities Commission (“OSC”).

[2] The issue is a thorny one: each of the three levels of court in the proceedings leading to this appeal adopted significantly different approaches. The motion judge found that a class action was not a preferable procedure and denied certification. Given the OSC’s restitutionary mandate, he held that it was not for the court to second-guess the access to justice provided to investors through the settlements or to give much weight to the difference between the mandate and processes of the OSC compared to the courts. The Divisional Court reversed the motion judge and granted certification. Its analysis focused on the level of recovery in the regulatory proceeding as compared to the quantum of damages claimed in the class action. The comparison led the court to conclude that substantial recovery could still be achieved by way of the class action. The OSC proceedings could therefore not be preferable to the proposed class action. The Court of Appeal upheld the Divisional Court’s result, but for substantially different reasons. The Court of Appeal focused on comparing the class members’ procedural rights in class proceedings with the regulatory nature and limited participatory rights of investors in the OSC proceedings. As the Court of Appeal put it, the

Allan C. Hutchinson, Peter R. Jervis, Joel P. Rochon et Remissa Hirji, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Aperçu

[1] Pour faire certifier un recours collectif, le demandeur doit établir un certain fondement factuel permettant de conclure qu’il s’agit du meilleur moyen de régler les questions communes en cause (*Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6 (« LRC »), al. 5(1)d)). La principale question que pose le présent pourvoi est celle de savoir si, compte tenu de l’indemnité versée aux investisseurs par suite de l’instance introduite devant la Commission des valeurs mobilières de l’Ontario (« CVMO »), le recours collectif projeté satisfait au critère du meilleur moyen.

[2] La question est épineuse; les trois juridictions qui se sont prononcées ont tenu des raisonnements très différents. Le juge saisi de la motion a conclu que le recours collectif n’était pas le meilleur moyen de régler les questions communes et il a refusé de le certifier. Selon lui, vu le mandat de la CVMO en matière de restitution, il n’était pas loisible au tribunal de remettre en question l’accès à la justice que représentent pour les investisseurs les règlements intervenus ou d’attacher beaucoup d’importance aux éléments qui distinguent le mandat et la procédure de la CVMO de ceux d’une cour de justice. La Cour divisionnaire a infirmé cette décision et accordé la certification. Son analyse a comparé le montant de l’indemnité versée à l’issue de la procédure réglementaire à celui des dommages-intérêts réclamés dans le cadre du recours collectif. Cette comparaison l’a amenée à conclure que ce dernier pouvait encore permettre le recouvrement d’une somme substantielle. Par conséquent, l’instance devant la CVMO ne pouvait se révéler préférable au recours collectif projeté. La Cour d’appel a confirmé cette conclusion, mais pour des motifs sensiblement différents. Son raisonnement procédait d’une comparaison entre les

preferable procedure inquiry must “focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding. . . . The *CPA* mandates that this must be a procedural discussion”: 2012 ONCA 47, 109 O.R. (3d) 498, at para. 79.

[3] The focus of this appeal is on the question of whether the proposed class proceeding, as compared to the OSC proceedings, is preferable from the point of view of providing access to justice. The case provides an opportunity for this Court to elaborate the analytical approach to this question under the *CPA*, building on the Court’s judgment in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158.

[4] I agree with the Divisional Court and the Court of Appeal that the motion judge erred in principle in his analysis and that this justified appellate intervention in his exercise of discretion to refuse certification. As I see it, the correct legal principles support those courts’ decision to certify the proposed class action. I would therefore dismiss the appeal. However, for reasons that I will develop, I also conclude that the preferability analysis is not solely focused on procedural considerations but must, within the proper scope of the certification process, consider both substantive and procedural aspects.

II. Facts and Proceedings

A. *Overview of the Facts*

[5] The appellants are two of the mutual fund managers who were the subject of an investigation conducted by the OSC into “market timing”, a practice which was alleged to have caused long-term investors to suffer losses in the value of their

droits procéduraux dont jouissent les membres d’un groupe ayant intenté un recours collectif, d’une part, et la nature réglementaire d’une instance devant la CVMO ainsi que les droits de participation limités qu’elle offre aux investisseurs, d’autre part. Comme la Cour d’appel l’indique, l’analyse visant à déterminer le meilleur moyen doit [TRADUCTION] « s’attacher à la nature et à l’objectif sous-jacents de l’autre voie de droit et les comparer à ceux du recours collectif. [. . .] La *LRC* exige qu’un tel examen englobe l’aspect procédural » (2012 ONCA 47, 109 O.R. (3d) 498, par. 79).

[3] La principale question qui se pose en l’espèce est de savoir si le recours collectif projeté constitue un meilleur moyen de régler les questions en cause, dans l’optique de l’accès à la justice, que l’instance devant la CVMO. Le présent pourvoi fournit à notre Cour l’occasion d’approfondir la démarche analytique que commande cette question intéressant la *LRC* et qu’elle a empruntée dans l’arrêt *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158.

[4] Je conviens avec la Cour divisionnaire et la Cour d’appel que l’analyse du juge saisi de la motion est entachée d’erreurs de principe. En conséquence, la révision en appel de l’exercice de son pouvoir discrétionnaire de refuser la certification est justifiée. À mon avis, les bons principes juridiques applicables étayaient la décision de ces cours de certifier le recours collectif projeté. Je suis donc d’avis de rejeter le pourvoi. Toutefois, pour les motifs que j’expose plus loin, je suis également d’avis que l’analyse relative au meilleur moyen ne saurait être uniquement axée sur des considérations d’ordre procédural et qu’elle doit tenir compte également de considérations de fond, dans la mesure permise à l’étape de la certification.

II. Faits et historique judiciaire

A. *Aperçu des faits*

[5] Les appelantes sont deux gestionnaires de fonds mutuels visés par l’enquête de la CVMO sur l’« arbitrage sur la valeur liquidative », une pratique qui aurait fait baisser la valeur des placements d’investisseurs à long terme. L’enquête de la

investments. The OSC probe focused on whether the fund managers had taken reasonable steps to protect the funds from harm that could arise from frequent trading market timing, rather than on the “market timers” whose activities directly caused harm to the fund. The fund managers ultimately entered into settlement agreements with the OSC. The appellants AIC Limited and CI Mutual Funds Inc. paid respectively \$58.8 million and \$49.3 million to their investors as a result of those agreements: motion decision, at para. 94. The settlement agreements anticipated and did not preclude the possibility of civil proceedings against the appellants. The investors who received payments from the appellants are more or less the same people who would ultimately form the class in this proposed class action against the appellants.

[6] Following the settlement agreements, the respondents applied to certify a class action against the fund managers relating to the same market timing conduct. The action alleged, among other things, that the managers had breached their fiduciary duty to investors and had been negligent by failing to take steps to curb market timing activities. (Although the proposed class action originally named five fund managers as defendants, the claims against three of them have settled so that the appellants in this Court are the only remaining defendants.)

B. *Decision on Certification Motion: Ontario Superior Court of Justice, 2010 ONSC 296, 89 C.P.C. (6th) 205 (Perell J.)*

[7] The judge identified the common issues raised by the proposed class proceeding as being whether the defendants (including the appellants in this Court) had fiduciary duties or duties of care to the proposed class members, and if so whether they had breached those duties. It was common ground on the certification motion that the OSC proceedings and settlement agreements did not bar the claims advanced in the action.

CVMO cherchait à déterminer si les gestionnaires de fonds avaient pris des mesures raisonnables contre le préjudice pouvant résulter de fréquents arbitrages sur la valeur liquidative. Elle ne portait pas sur les auteurs des opérations, dont les actions avaient directement causé le préjudice aux fonds. Les gestionnaires de fonds ont fini par conclure des ententes de règlement avec la CVMO. En exécution de ces ententes, les appelantes, AIC Limitée et CI Mutual Funds Inc. ont respectivement versé 58,8 et 49,3 millions de dollars à leurs investisseurs (décision relative à la motion, par. 94). Les ententes envisageaient la possibilité de poursuites civiles contre les appelantes; elles n’y faisaient pas obstacle. Le groupe de demandeurs participant au recours collectif projeté contre les appelantes serait en gros formé des investisseurs à qui une indemnité avait été versée.

[6] Postérieurement aux ententes de règlement, les intimés ont demandé la certification d’un recours collectif visant les gestionnaires de fonds et reposant sur les mêmes actes d’arbitrage sur la valeur liquidative. Dans le cadre du recours, les intimés avançaient notamment que les gestionnaires avaient manqué à leur obligation fiduciaire envers les investisseurs et avaient fait preuve de négligence en ne prenant pas de mesure pour restreindre les arbitrages. (Le recours collectif projeté visait initialement cinq gestionnaires de fonds, mais trois d’entre eux ont conclu un règlement de sorte que les appelantes demeurent les seules défenderesses.)

B. *Décision relative à la motion en vue de la certification (Cour supérieure de justice de l’Ontario, 2010 ONSC 296, 89 C.P.C. (6th) 205 (le juge Perell))*

[7] Selon le juge saisi de la motion, les questions communes consistaient à savoir si les défenderesses (dont les appelantes devant la Cour) avaient une obligation fiduciaire ou une obligation de diligence envers les membres du groupe projeté et, dans l’affirmative, si elles y avaient manqué. Il n’était pas contesté que l’instance devant la CVMO et les ententes de règlement ne faisaient pas obstacle aux demandes formulées dans le recours.

[8] The main contested issue in the motion was whether the proposed action would be the preferable procedure to resolve the common issues having regard to the purposes of class proceedings: judicial economy, behaviour modification and access to justice. The judge noted that if the class action were the preferable procedure, it should be certified conditional on the court approving a litigation plan.

[9] The judge focused his preferability analysis on access to justice. There was no dispute that the OSC proceedings and settlement agreements had achieved the goal of behaviour modification, and the judge concluded that if they had achieved access to justice, then they had also served the goal of judicial economy. The motion judge based his conclusion that the proposed class action was not the preferable procedure solely on the existence of the OSC proceedings and settlement agreements. This conclusion followed from two key findings: first, that the OSC proceedings and settlement agreements were properly part of the preferable procedure analysis; and second, that the OSC proceedings were a “genuine alternative that serve[d] the purposes of a class proceeding; namely, access to justice, behaviour modification, and judicial economy” (para. 234). The judge accepted the defendants’ submission that the court “should not second-guess the access to justice provided by the OSC once the court was satisfied that the OSC’s purpose was to obtain restitutionary compensation for the harm suffered by the investors and the process to do so was adequate” (para. 256). He reached these conclusions in spite of his finding “that there [was] some basis in fact for the Plaintiffs’ submission that the investors may not have been fully compensated as a result of the OSC settlement agreements” (para. 101).

[10] The motion judge therefore denied certification.

[8] À l’étape de la motion, le débat a principalement porté sur la question de savoir si, au regard des objectifs que vise le recours collectif, soit l’économie des ressources judiciaires, la modification des comportements et l’accès à la justice, il s’agissait du meilleur moyen de régler les questions communes. Selon le juge, si c’était le cas, il fallait certifier le recours, sous réserve de l’approbation d’un plan pour l’instance par le tribunal.

[9] C’est dans l’optique de l’accès à la justice que le juge a procédé à l’analyse relative au meilleur moyen. Il n’était pas contesté que l’instance devant la CVMO et les ententes de règlement avaient permis d’atteindre l’objectif de modification comportementale, et le juge a considéré que si elles avaient également permis de favoriser l’accès à la justice, elles auraient du même coup servi l’objectif d’économie des ressources judiciaires. En tenant compte uniquement de l’existence de l’instance devant la CVMO et des ententes de règlement, il a jugé que le recours collectif projeté n’était pas le meilleur moyen. Ce raisonnement découlait de deux conclusions importantes. Suivant la première, l’instance devant la CVMO et les ententes de règlement devaient entrer en ligne de compte dans l’analyse relative au meilleur moyen. Suivant la seconde, l’instance devant la CVMO avait offert [TRADUCTION] « une véritable autre voie de droit qui permet[tait] d’atteindre les objectifs d’un recours collectif, à savoir l’accès à la justice, la modification des comportements et l’économie des ressources judiciaires » (par. 234). Il a retenu l’argument des défenderesses selon lequel le tribunal, « dès lors qu’il est convaincu que la CVMO cherchait à obtenir la réparation du préjudice subi par les investisseurs et que la procédure était adéquate, ne devrait pas remettre en question l’accès à la justice qu’offre l’instance devant la CVMO » (par. 256). Et ce, même s’il avait par ailleurs conclu « que l’argument des demandeurs selon lequel les ententes de règlement n’ont peut-être pas indemnisé intégralement les investisseurs repos[ait] sur un certain fondement factuel » (par. 101).

[10] Le juge saisi de la motion a donc refusé de certifier le recours collectif.

C. *Ontario Superior Court of Justice, Divisional Court, 2011 ONSC 292, 104 O.R. (3d) 615 (Molloy J., Swinton and Herman JJ. Concurring)*

[11] The Divisional Court found the motion judge’s analysis of the preferability requirement to be in error in three respects: “(1) he failed to apply the proper low evidentiary burden on the plaintiffs at [the certification] 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” (para. 33). The court therefore allowed the appeal and certified the class action.

D. *Court of Appeal for Ontario, 2012 ONCA 47, 109 O.R. (3d) 498 (Winkler C.J.O., Epstein J.A. and Pardu J. (ad hoc) Concurring)*

[12] The Court of Appeal dismissed the appeal. It found that although the Divisional Court had not asked itself the right questions, it nonetheless came to the right result. In its view, the Divisional Court should not have focused on whether the OSC settlements provided investors with all or substantially all of the monetary relief they sought: this was an error because, at the certification stage, the amount that would be recoverable in the proposed class proceeding remains unknown, and thus there is no way of determining if the compensation was “substantial” (para. 77). Further, such a determination would be tantamount to making a finding on the merits of the case, which would be a marked departure from the evidentiary burden that applies on a motion for certification. The court was rather of the view that the preferable procedure inquiry had to focus on the purpose and nature of the alternative proceedings as compared with the class proceedings.

[13] The Court of Appeal thought that important procedural distinctions between the OSC proceedings and the proposed class proceeding supported the conclusion that a class proceeding was preferable for resolving the class members’ claims in this case. First, the OSC’s jurisdiction under

C. *Cour supérieure de justice de l’Ontario, Cour divisionnaire, 2011 ONSC 292, 104 O.R. (3d) 615 (la juge Molloy, avec l’accord des juges Swinton et Herman)*

[11] La Cour divisionnaire a relevé trois erreurs dans l’analyse du juge saisi de la motion : [TRADUCTION] « (1) il n’a pas appliqué la norme de preuve peu exigeante à laquelle les demandeurs doivent satisfaire à [l’]étape [de la certification]; (2) il a conclu à tort que l’instance devant la CVMO, qui avait pris fin, était le meilleur moyen de régler le reste des revendications des demandeurs; et (3) il a commis une erreur de droit en prenant en compte les critères d’approbation d’un règlement à l’étape de la certification » (par. 33). La cour a donc accueilli l’appel et certifié le recours collectif.

D. *Cour d’appel de l’Ontario, 2012 ONCA 47, 109 O.R. (3d) 498 (le juge en chef Winkler avec l’accord des juges Epstein et Pardu (ad hoc))*

[12] La Cour d’appel a rejeté l’appel, estimant que la Cour divisionnaire était parvenue au bon résultat sans toutefois poser les bonnes questions. Selon la première, la seconde avait fait erreur en s’attachant à savoir si les ententes de règlement conclues par la CVMO représentaient la totalité ou la quasi-totalité du montant de la mesure du redressement pécuniaire réclamée par les investisseurs. À l’étape de la certification, la somme qu’il sera possible de recouvrer étant inconnue, il n’est par conséquent pas possible de déterminer si l’indemnisation était [TRADUCTION] « quasi totale » (par. 77). En outre, tirer pareille conclusion équivaudrait à statuer sur le fond du litige, ce qui constituerait un écart marqué par rapport au fardeau de preuve applicable en matière de certification. La cour a plutôt jugé que, dans le cadre de l’analyse relative au meilleur moyen, il fallait comparer les objectifs et la nature des autres voies de droit et du recours collectif.

[13] La Cour d’appel était d’avis que les différences procédurales importantes entre l’instance devant la CVMO et le recours collectif projeté permettaient de conclure que ce dernier constituait le meilleur moyen de régler les demandes des membres du groupe. Premièrement, l’art. 127 de la *Loi*

s. 127 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, was regulatory, not compensatory and, as a result, the remedial powers available to the OSC were insufficient to enable it to fully address the class members' claims. Second, the OSC proceedings did not provide comparable rights of participation to the affected investors, which was an important access to justice consideration.

III. Brief Summary of the Positions of the Parties

[14] The appellants complain that the Court of Appeal wrongly equated access to justice with access to court-like procedures to the neglect of other important considerations and that it erroneously focused on theoretical considerations rather than the actual results achieved by the OSC proceedings. These fundamental flaws, the appellants say, led the Court of Appeal into a number of other errors. It wrongly focused on the fact that the OSC jurisdiction is regulatory and not compensatory. It erred in its assessment of investor participation in the OSC proceedings. It failed to take into account the no-fault, timely and no-cost aspects of the OSC process, and the impartiality and independence of the OSC. The appellants also argue that the Court of Appeal simply substituted its own discretion for that of the motion judge, contrary to the applicable standard of review.

[15] The respondents submit that the Court of Appeal appropriately focused its analysis on the importance of participatory rights coupled with the limited scope and nature of the OSC's jurisdiction and remedial powers, rather than the outcome of the OSC proceedings. The respondents contend that participation is at the heart of the concept of access to justice. They submit that given the lack of basic procedural rights to investors in the OSC proceedings, the non-binding nature of the settlements, as well as the non-disclosure of how the

sur les valeurs mobilières de l'Ontario, L.R.O. 1990, ch. S.5, confère à la CVMO une compétence d'ordre réglementaire, et non pas une compétence en matière d'indemnisation, de sorte qu'elle ne dispose pas de pouvoirs de redressement suffisants pour lui permettre de faire droit à la totalité des demandes des membres du groupe. Deuxièmement, l'instance devant la CVMO n'accorde pas aux investisseurs de droits de participation comparables à ceux que leur permettrait d'exercer un recours collectif, une importante considération d'accès à la justice.

III. Résumé des positions des parties

[14] Les appelantes reprochent à la Cour d'appel d'avoir confondu accès à la justice avec accès à une instance quasi judiciaire au détriment d'autres éléments importants. Elles prétendent aussi qu'elle se serait attachée à tort à des questions théoriques plutôt qu'aux résultats concrets de l'instance devant la CVMO. Selon les appelantes, de ces vices fondamentaux auraient découlé d'autres erreurs. Ainsi, la Cour aurait trop insisté sur le fait que la CVMO exerce des pouvoirs d'ordre réglementaire, non pas des pouvoirs d'indemnisation. Elle aurait mal apprécié la participation des investisseurs à l'instance devant la CVMO. Elle n'aurait tenu compte ni du fait que le régime offert par la CVMO est rapide et sans frais et n'exige pas que la faute soit démontrée, ni de l'impartialité et de l'indépendance de cet organisme. Les appelantes soutiennent en outre que la Cour d'appel a simplement substitué son propre pouvoir discrétionnaire à celui du juge saisi de la motion, en contravention à la norme de contrôle applicable.

[15] Pour leur part, les intimés font valoir que la Cour d'appel a axé à juste titre son analyse sur l'importance des droits de participation et sur la portée et la nature limitées de la compétence et des pouvoirs de redressement de la CVMO, plutôt que sur le résultat de l'instance devant cet organisme. Ils soutiennent que la participation est au cœur de la notion d'accès à la justice. Étant donné que les investisseurs ne jouissent d'aucun droit procédural fondamental devant la CVMO, que les ententes de règlement n'ont pas force exécutoire et que les

settlement agreements were achieved, the compensation received by investors was arbitrary and partial and was in no way preferable to a class action.

IV. Analysis

A. *Introduction*

[16] The appeal focuses on one branch of the statutory requirement for certification, the requirement that “a class proceeding would be the preferable procedure for the resolution of the common issues”: *CPA*, s. 5(1)(d). In the circumstances of this case, the question of preferability boils down to quite a narrow issue because there is substantial agreement on a number of points. There is no longer any dispute that the proposed class action meets all of the requirements for certification except for the disputed element of whether it is the preferable procedure. With regard to that requirement, it is no longer disputed that the class action would be a fair, efficient and manageable proceeding or that it would be preferable to any litigation alternatives. It is also common ground that to assess whether the class action would be preferable to any other alternative method of resolving the class members’ claims, the court compares the competing possibilities through the lens of the goals of behaviour modification, judicial economy and access to justice, bearing in mind, of course, that the ultimate question is whether the statutory requirement of preferability has been established. There is also no dispute that the appeal turns on how well the two proceedings can provide access to justice for the investors. This is so because the parties acknowledge that there is no other litigation alternative, that the OSC proceedings accomplished the purpose of behaviour modification, and the motion judge found that either proceeding would serve the goal of judicial economy, a finding that is not contested before this Court.

[17] While in general all three goals of class action procedures must be weighed in the balance, in the specific circumstances of this case, the question is

pourparlers qui les ont précédées sont demeurés secrets, l’indemnité versée aux investisseurs est arbitraire et partielle et ne saurait être préférable au recours collectif.

IV. Analyse

A. *Introduction*

[16] Le pourvoi porte sur l’un des critères de certification établis par la loi, à savoir « le recours collectif est le meilleur moyen de régler les questions communes » (*LRC*, al. 5(1)d)). Dans les circonstances de l’espèce, la question de savoir s’il s’agit du meilleur moyen est assez précise, vu que les parties s’entendent dans une large mesure sur plusieurs points. Il est à présent admis que le recours collectif projeté satisfait aux autres critères de certification. Quant au critère du meilleur moyen, qui fait l’objet du litige, nul ne conteste plus que le recours collectif constituerait une procédure juste, efficace et pratique ni qu’il serait préférable à toute autre voie de droit judiciaire. Les parties s’entendent également pour dire que le tribunal chargé de déterminer si le recours collectif serait préférable à toute autre voie extrajudiciaire pour régler les demandes des membres du groupe doit passer les possibilités au crible des objectifs que sont la modification des comportements, l’économie des ressources judiciaires et l’accès à la justice. Ce faisant, le tribunal doit, bien sûr, garder à l’esprit que la question fondamentale est de savoir s’il a été satisfait au critère légal du meilleur moyen. Il n’est en outre pas contesté que le pourvoi vise à déterminer lequel des deux moyens favorise le plus l’accès à la justice des investisseurs. Telle est la question parce que les parties reconnaissent que le recours collectif est la seule voie judiciaire possible, que l’instance devant la CVMO a permis d’atteindre l’objectif de modification des comportements et que le juge saisi de la motion a conclu que l’une ou l’autre option servirait l’objectif d’économie des ressources judiciaires. Cette conclusion n’est pas contestée dans le présent pourvoi.

[17] En général, les trois objectifs du recours collectif doivent être soupesés. Or, dans les circonstances particulières de l’espèce, il s’agit de

whether, from an access to justice perspective, certification should be denied on account of results already obtained in a non-litigation proceeding before the OSC.

[18] I will begin my analysis by outlining the main threads of the jurisprudence dealing with the preferability requirement with particular reference to cases in which it has been argued that some form of non-court, alternative dispute resolution was a preferable procedure to a proposed class action. I will then develop what, in my opinion, is the correct analytical approach to this issue and apply it to this case.

B. *The Preferability Requirement — Overview of the Principles*

(1) Statutory Provision

[19] The starting point is the relevant statutory provision. Section 5(1)(d) of the *CPA* requires the court to conclude that “a class proceeding would be the preferable procedure for the resolution of the common issues”. (See the attached Appendix for s. 5(1) *CPA* reproduced in full.) Although this provision could be read as requiring a procedure that is capable of producing a formal resolution of the common issues, that reading was rejected by the Court in *Hollick*. McLachlin C.J., writing for the Court, made clear that the preferability requirement is broad enough to take into account “all reasonably available means of resolving the class members’ claims” including avenues of redress other than court actions (para. 31). An alternative process need not necessarily decide the precise legal and/or factual questions raised by the common issues provided that it effectively resolves the class members’ claims. This broad understanding of the preferability requirement is critical in cases like this one in which individual court actions are not a viable option.

[20] This understanding of the role of non-litigation alternatives in the comparative analysis under the *CPA*’s preferable procedure criterion is different from its American counterpart under the

déterminer, dans une perspective d’accès à la justice, s’il y a lieu de refuser la certification par suite de l’issue de l’instance extrajudiciaire devant la CVMCO.

[18] J’expose d’abord les grandes lignes que trace la jurisprudence relative au critère du meilleur moyen, en m’attardant tout particulièrement aux affaires où un mode de règlement extrajudiciaire des différends était présenté comme étant préférable à un recours collectif. J’explique ensuite la démarche analytique à suivre en l’espèce selon moi et l’applique aux faits de l’espèce.

B. *Le critère du meilleur moyen — survol des principes*

(1) Disposition législative

[19] Commençons par la disposition législative applicable. L’alinéa 5(1)d) de la *LRC* requiert que le tribunal conclue que « le recours collectif est le meilleur moyen de régler les questions communes ». (Le paragraphe 5(1) est reproduit intégralement à l’annexe.) Bien que cette disposition puisse sembler exiger un moyen susceptible de mener au règlement formel des questions communes, la Cour rejette à l’unanimité cette interprétation dans *Hollick*. La juge en chef McLachlin y indique clairement que le critère du meilleur moyen est assez large pour englober « tous les moyens raisonnables offerts pour régler les demandes des membres du groupe », notamment les voies de droit autres que les poursuites judiciaires (par. 31). Dans la mesure où l’autre moyen permet de régler les demandes des membres du groupe, il n’est pas nécessaire qu’il tranche les aspects juridiques ou factuels précis des questions communes. Cette conception large du critère du meilleur moyen revêt une importance capitale dans les affaires où, comme en l’espèce, l’action en justice individuelle ne constitue pas une solution viable.

[20] Cette manière d’envisager le rôle des voies extrajudiciaires dans l’analyse comparative que requiert le critère du meilleur moyen prévu à la *LRC* diffère de celle que prévoient les dispositions

U.S. federal class action regime. The language of Rule 23 of the U.S. *Federal Rules of Civil Procedure* provides that the court must, among other things, satisfy itself “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”: 28 U.S.C. app., r. 23(b)(3). This wording invites a comparison between the class action and other forms of court action, and has tended to limit reliance on comparison with non-judicial alternatives: see W. B. Rubenstein, *Newberg on Class Actions* (5th ed. 2011) (WL), at § 4:86.

- (2) In Assessing Preferability, the Court Looks at the Common Issues in the Context of the Action as a Whole

[21] In order to determine whether a class proceeding would be the preferable procedure for the “resolution of the common issues”, those common issues must be considered in the context of the action as a whole and “must take into account the importance of the common issues in relation to the claims as a whole”: *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, “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”: para. 29, citing W. K. Branch, *Class Actions in Canada* (loose-leaf 1998, release 4), at para. 4.690.

- (3) The Preferable Procedure Analysis Considers the Extent to Which the Proposed Class Action Serves the Goals of Class Proceedings

[22] In *Hollick*, McLachlin C.J. indicated that the preferability inquiry had to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice (para. 27). This should not be construed as creating a requirement to prove that the proposed class action will *actually* achieve those goals in a specific case. Thus, when

fédérales américaines en matière de recours collectif. Aux termes de la règle 23 des *Federal Rules of Civil Procedure* des États-Unis, le tribunal doit notamment être convaincu que [TRADUCTION] « le recours collectif est supérieur à toute autre méthode pour trancher le litige de façon juste et efficace » (28 U.S.C. app., r. 23(b)(3)). Cette formulation invite à confronter le recours collectif à d’autres types de recours judiciaires et a généralement eu pour effet de limiter les comparaisons avec des voies de droit extrajudiciaires (voir W. B. Rubenstein, *Newberg on Class Actions* (5^e éd. 2011) (WL), § 4:86).

- (2) Dans l’analyse relative au meilleur moyen, le tribunal examine les questions communes dans le contexte de l’action dans son ensemble

[21] Pour déterminer si le recours collectif est le meilleur moyen de « régler les questions communes », il faut considérer ces dernières dans le contexte général de l’action et en « examiner l’importance [. . .] par rapport à l’ensemble des revendications » (*Hollick*, par. 30). Dans *Hollick*, la juge en chef McLachlin approuve le commentaire d’un observateur affirmant que, dans la comparaison du recours collectif avec d’autres voies de droit possibles, [TRADUCTION] « il importe de recourir à une analyse pratique tenant compte des coûts et des avantages et de prendre en considération l’incidence d’un recours collectif sur les membres du groupe, les défendeurs et le tribunal » (par. 29, citant W. K. Branch, *Class Actions in Canada* (feuilles mobiles 1998, envoi n° 4), par. 4.690).

- (3) L’analyse relative au meilleur moyen détermine dans quelle mesure le recours collectif projeté permet la réalisation des objectifs de ce type de recours

[22] Dans *Hollick*, la juge en chef McLachlin indique que l’analyse relative au meilleur moyen s’effectue à la lumière des trois principaux objectifs du recours collectif : l’économie des ressources judiciaires, la modification des comportements et l’accès à la justice (par. 27). On n’entend pas par là qu’il faille prouver que le recours collectif projeté réalisera *effectivement* ces objectifs dans

undertaking the comparative analysis, courts must focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized.

[23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: “Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs”: *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), at p. 1269, cited in Rubenstein, at § 4:85, fn. 2.

C. Access to Justice as a Goal of Class Proceedings

[24] There is no doubt that access to justice is an important goal of class proceedings. But what is access to justice in this context? It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. They are interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process. As the Honourable Frank Iacobucci put it, “access to justice must contain both a procedural and a substantive component. I find it difficult to accept that providing injured parties with a process to pursue their claims can be

un cas donné. En conséquence, dans son analyse comparative, le tribunal doit s’en tenir au critère légal du meilleur moyen et s’abstenir d’imposer au représentant des demandeurs le fardeau de prouver que tous les avantages du recours collectif se matérialiseront dans les faits.

[23] Il s’agit d’un exercice comparatif. Le tribunal doit certes examiner dans quelle mesure le recours collectif projeté permet la réalisation des trois objectifs de la *LRC*, mais la question à laquelle il doit ultimement répondre est celle de savoir s’il existe des moyens préférables de régler les demandes, non pas si le recours collectif projeté réalisera pleinement ces objectifs. Un arrêt de la Cour d’appel fédérale des États-Unis exprime bien cette nuance, qui vaut également pour la *LRC* : [TRADUCTION] « L’analyse ne porte pas sur les avantages ou les difficultés du recours collectif en soi, mais sur les avantages relatifs d’un tel recours par rapport aux autres types de recours judiciaires [et j’ajouterais : de règlement des différends] dont les demandeurs peuvent réellement se prévaloir en pratique » (*Klay c. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), p. 1269, cité dans Rubenstein, § 4:85, note de bas de page 2).

C. L’accès à la justice comme objectif du recours collectif

[24] L’accès à la justice est assurément un objectif important du recours collectif. Mais en quoi consiste-t-il dans le contexte qui nous occupe? Il comporte deux dimensions interreliées. L’une intéresse la procédure et la question de savoir si les demandeurs disposent d’une voie équitable de règlement de leurs réclamations. L’autre intéresse le droit substantiel — l’issue recherchée — et la question de savoir s’ils obtiendront une réparation juste et adéquate si le bien-fondé des réclamations est établi. Ces deux dimensions sont interreliées, car, dans bien des cas, des vices de forme soulèvent des doutes sur l’issue quant au fond et des vices de fond peuvent susciter des questions à propos de la procédure. Comme l’explique l’honorable Frank Iacobucci : [TRADUCTION] « . . . l’accès à la justice doit comporter un aspect procédural et un aspect substantiel. Je conçois mal qu’on puisse mettre à

divorced from ensuring that the ultimate remedy arising from the process provides substantive justice where warranted”: “What Is Access to Justice in the Context of Class Actions?”, in J. Kalajdzic, ed., *Assessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, at p. 20. While it may be analytically convenient to look at process and substance considerations separately, this must not be done at the expense of an overall assessment of the access to justice implications of the proposed class action.

[25] The Divisional Court focused its access to justice analysis on substance, relying heavily on its conclusion that there was some basis in fact to believe that the investors were entitled to significantly more than they had received from the OSC proceedings (paras. 4 and 8). The Court of Appeal, on the other hand, focused mainly on process, relying heavily on considerations such as participation rights and remedial jurisdiction. The correct approach, however, must include both substantive and procedural aspects in assessing whether a class action is the preferable procedure. The focus cannot be exclusively on process: a process may be fair but nonetheless not offer a real opportunity to recover compensation for all of the losses suffered. In other words, in some cases even if the process is fair, there will remain significant obstacles to recovery. In addition, an absence of a fair process may also heighten concerns about whether substantive justice has or will be done. Of course, as we shall see, consideration of these aspects must respect the limited scope of the certification process.

[26] A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Hollick*, at para. 33. To determine whether both of these elements are present, it may be helpful to address a series of questions. These

la disposition de parties lésées une procédure leur permettant de faire valoir leurs prétentions sans veiller à ce qu'elle débouche sur une juste réparation au fond si celle-ci est justifiée » (« What Is Access to Justice in the Context of Class Actions? », dans J. Kalajdzic, dir., *Assessing Justice : Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, p. 20). Bien qu'il soit peut-être commode sur le plan analytique d'étudier séparément la procédure et le fond, on ne doit pas le faire au détriment d'une évaluation globale des répercussions du recours collectif projeté sur le plan de l'accès à la justice.

[25] La Cour divisionnaire a axé son analyse relative à l'accès à la justice sur l'aspect substantiel. Elle s'est fondée dans une large mesure sur sa conclusion selon laquelle un certain fondement factuel permettait de croire que les investisseurs avaient droit à une réparation considérablement supérieure à ce qu'ils avaient obtenu devant la CVMQ (par. 4 et 8). La Cour d'appel, quant à elle, a plutôt mis l'accent sur l'aspect procédural, son analyse faisant principalement intervenir des facteurs comme les droits de participation et les pouvoirs de réparation. Or, la démarche à suivre pour déterminer si le recours collectif est le meilleur moyen doit porter à la fois sur le fond et sur la forme. On ne saurait s'attacher exclusivement à la procédure : une voie de droit peut être équitable sans néanmoins permettre véritablement au demandeur d'être indemnisé de toutes les pertes subies. Autrement dit, il arrive parfois que subsistent des obstacles importants à l'indemnisation malgré une voie de droit équitable. Qui plus est, l'absence d'une voie de droit équitable risque de faire douter que justice a été rendue ou le sera au fond. Bien sûr, ainsi que nous le verrons, l'analyse de ces éléments doit respecter la portée restreinte du processus de certification.

[26] Le recours collectif permet de réaliser l'objectif d'accès à la justice si (1) il existe des préoccupations à ce sujet auxquelles ce type d'action peut répondre et (2) ces préoccupations subsistent lorsque d'autres voies de droit sont envisagées (*Hollick*, par. 33). Pour établir si ces deux conditions sont remplies, il peut être utile de se

questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis. I will set out the questions and comment briefly on each.

(1) What Are the Barriers to Access to Justice?

[27] The sorts of barriers to access to justice may vary according to the nature of the claim and the make-up of the proposed class. They may relate to either or both of the procedural and substantive aspects of access to justice. 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. However, barriers are not limited to economic ones: they can also be psychological or social in nature. They may arise from such factors as the ignorance of the availability of substantive legal rights (Ontario Law Reform Commission, *Report on Class Actions*, vol. I (1982) (“OLRC Report”), at p. 127), ignorance of the fact that significant injuries have occurred (OLRC Report, at pp. 127-28), limited language skills (see e.g. Rubenstein, at § 4:65), elderly age of the claimants (see e.g. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)), frail emotional or physical state of the claimants (see e.g. *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184), fear of reprisals by the defendant (OLRC Report, at p. 128; see e.g. *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.)), or alienation from the legal system as a result of negative experiences with it (OLRC Report, at pp. 128-29). A common procedural barrier is that there is no other procedure available to afford meaningful redress.

(2) What Is the Potential of the Class Proceedings to Address Those Barriers?

[28] The next question concerns the potential of the proposed class action to address the barriers to access to justice which have been identified in the particular case. This analysis is not made in

poser une série de questions. Elles ne sauraient être examinées isolément, ni dans un certain ordre, mais elles devraient éclairer une analyse comparative globale. Un bref commentaire accompagne l'énoncé de chacune d'elles.

(1) Quels sont les obstacles à l'accès à la justice?

[27] Le type d'obstacles varie selon la nature de la demande et la composition du groupe projeté. Ils peuvent intéresser l'aspect procédural ou l'aspect substantiel de l'accès à la justice ou les deux. L'obstacle le plus fréquent est d'ordre financier. Il surgit lorsque les frais élevés d'une action en justice et les sommes modestes en jeu empêchent de s'adresser aux tribunaux. Toutefois, les obstacles ne sont pas que financiers; ils peuvent également être d'ordre psychologique ou social et découler de facteurs comme l'ignorance des droits substantiels susceptibles d'être exercés (Commission de réforme du droit de l'Ontario, *Report on Class Actions*, vol. I (1982) (« Rapport de la CRDO »), p. 127), l'ignorance de l'existence d'un préjudice important (Rapport de la CRDO, p. 127-128), des compétences linguistiques limitées (voir, p. ex., Rubenstein, § 4:65), l'âge avancé des demandeurs (voir, p. ex., *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)), une santé psychologique ou physique fragile (voir, p. ex., *Rumley c. Colombie-Britannique*, 2001 CSC 69, [2001] 3 R.C.S. 184), la crainte de représailles de la part du défendeur (Rapport de la CRDO, p. 128; voir, p. ex., *Webb c. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (C.S.J.)), et l'aliénation découlant de démêlés avec la justice (Rapport de la CRDO, p. 128-129). L'impossibilité d'intenter tout autre recours qui permettrait d'obtenir une véritable réparation constitue un obstacle d'ordre procédural fréquent.

(2) Dans quelle mesure le recours collectif permet-il d'éliminer ces obstacles?

[28] La question suivante intéresse la capacité du recours collectif d'éliminer les obstacles à l'accès à la justice dans une affaire donnée. L'analyse qu'elle commande ne s'effectue pas en vase clos,

isolation, but within the comparative analysis, for the purpose of assessing the class proceedings' potential to address the access to justice concerns in comparison to the alternative procedure's ability to do so.

[29] A class action may allow class members to overcome economic barriers “by distributing fixed litigation costs amongst a large number of class members . . . [and thus] making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own”: *Hollick*, at para. 15. It may also allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf.

[30] Through these procedural mechanisms, a class action provides access to the courts for class members. Thus, it is a “procedural tool” (*Hollick*, at para. 15): it does not guaranty results for class members.

[31] That being said, class proceedings exist not only to provide access to a procedure, but also to substantive results. The OLRC Report considered the various barriers to litigation and how class actions could play a role in overcoming those barriers. There is no doubt that achieving results for class members was at the heart of these discussions:

In the preceding sections, the Commission has examined the importance of providing increased access to the courts for persons who wish to pursue existing remedies but are unable to do so. 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.

Moreover, empirical evidence indicates that class actions do, in fact, provide access to justice for a broader

mais s’inscrit dans l’analyse comparative et vise à confronter le recours collectif aux autres moyens, eu égard à leur capacité respective de répondre aux préoccupations en matière d’accès à la justice.

[29] Le recours collectif peut permettre aux membres du groupe de surmonter l’obstacle d’ordre financier « en répartissant les frais fixes de justice entre les nombreux membres du groupe [. . .] [et ainsi] en rendant économiques des poursuites que les membres du groupe auraient jugées trop coûteuses pour les intenter individuellement » (*Hollick*, par. 15). Il peut aussi permettre de surmonter les obstacles d’ordre psychologique ou social par le truchement du représentant, qui informe les membres du groupe et dirige le recours pour leur compte.

[30] Par ces mécanismes procéduraux, le recours collectif donne aux membres du groupe accès aux tribunaux. En cela, il s’agit d’un « instrument de procédure » (*Hollick*, par. 15) : il ne leur garantit pas le résultat escompté.

[31] Cela dit, le recours collectif a pour objet d’offrir non seulement une voie de droit, mais également un résultat positif quant au fond. Le rapport de la CRDO abordait les divers obstacles à l’action en justice ainsi que la solution que le recours collectif pourrait représenter. Il ne fait aucun doute qu’une issue positive pour les membres tenait une large place dans l’analyse :

[TRADUCTION] Dans les sections précédentes, on a vu qu’il importe de faciliter l’accès aux tribunaux aux justiciables qui voudraient exercer un recours qui leur est reconnu mais qui ne sont pas en mesure de le faire. La Commission estime que nombre d’actions individuelles ne sont pas intentées, non pas qu’elles ne soient pas fondées ou ne revêtent pas d’importance aux yeux du demandeur, mais en raison d’obstacles d’ordre financier, social ou psychologique. Nous croyons que le recours collectif peut aider à lever ces obstacles et, en améliorant l’accès aux tribunaux, remplir une fonction sociale importante. De toute évidence, un accès réel à la justice est préalable à l’exercice de tout autre droit juridique.

En outre, il est empiriquement établi que le recours collectif rend effectivement la justice accessible à un

range of persons. The evidence suggests that individuals are interested in pursuing their claims by means of a class action. In addition, class actions seeking damages do confer a significant monetary benefit, notwithstanding the deduction of lawyers' fees and administrative costs. [Reference omitted; p. 139.]

[32] The *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990) ("*Report of the Attorney General*") also acknowledged the underlying goal of class proceedings of providing redress for class members in its opening lines:

A class action 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. [p. 15]

[33] The *Report of the Attorney General* also highlighted the substantive component of access to justice:

Ontarians also live in a society that strives to maximize access to justice for its citizens. Sophisticated and highly evolved rights and obligations are of little value if they cannot be asserted or enforced effectively and economically. Of what value is a right or obligation, or the judicial system itself, if its users must be told that the right is "too small" or "too complex" or "too risky" to justify its enforcement?

A class action can provide the means by which such claims can be asserted and given access to justice. A meaningful procedure can achieve economies in the use of judicial and court resources and provide widespread redress to many individuals who have suffered a loss or injury. [pp. 16-17]

[34] Thus, class actions overcome barriers to litigation by providing a procedural means to a substantive end. As one author put it in a memorable phrase, a class procedure has the potential to "breath[e] new life into substantive rights": M. Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009), 47 *Alta. L. Rev.* 185, at p. 188. Even though a class action is

grand nombre de personnes. La preuve révèle un intérêt individuel à faire valoir des revendications au moyen du recours collectif. De plus, les recours collectifs en dommages-intérêts procurent un avantage pécuniaire important, même après déduction des honoraires des avocats et frais d'administration. [Renvoi omis; p. 139.]

[32] Le *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990) (« rapport du procureur général ») reconnaît aussi, dans son entrée en matière, l'objectif sous-jacent du recours collectif qui consiste à offrir une réparation aux membres du groupe :

[TRADUCTION] Un recours collectif est [. . .] un mécanisme procédural ayant pour objet de fournir un moyen efficace d'obtenir la réparation d'un préjudice subi par un grand nombre de personnes, en permettant à une personne ou plus d'intenter une action pour le compte de nombreuses autres. [p. 15]

[33] Le rapport du procureur général souligne également l'aspect substantiel de l'accès à la justice :

[TRADUCTION] Les Ontariens vivent également dans une société qui s'efforce de favoriser le plus possible l'accès à la justice. Des droits et obligations complexes et très développés ont peu de valeur s'il est impossible de s'en prévaloir de façon efficace et économique. Que vaut un droit ou une obligation, voire le système judiciaire lui-même, si le justiciable reçoit comme message que son droit est « trop insignifiant », « trop complexe » ou « trop risqué » pour être exercé?

Un recours collectif peut fournir le moyen de faire valoir de telles demandes et de donner accès à la justice. Une voie procédurale utile est susceptible de favoriser l'économie des ressources judiciaires et de procurer une réparation à grande échelle aux nombreuses victimes de perte ou de préjudice. [p. 16-17]

[34] Ainsi, le recours collectif permet de surmonter les obstacles aux litiges en fournissant un moyen procédural d'arriver à une fin substantielle. Comme un auteur l'a exprimé de façon mémorable, le recours collectif pourrait avoir l'effet d'[TRADUCTION] « insuffle[r] un nouvel élan aux droits substantiels » (M. Good, « Access to Justice, Judicial Economy, and Behaviour Modification : Exploring the Goals of Canadian Class Actions »

a procedural tool, achieving substantive results is one of its underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice.

(3) What Are the Alternatives to Class Proceedings?

[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 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.

[36] The motions court must look at all the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim: *Hollick*, at para. 30. In some cases, non-litigation means of redress will be considered in conjunction with individual actions: see e.g. *Hollick*, *Cloud* and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.). In other cases, for example where there is no viable litigation alternative to a class action, the non-litigation means of redress will have to be considered on its own as a potential alternative to the class action: see e.g. *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Gen. Div.). The nature of the comparison analysis will vary, depending on the nature of the alternatives available for consideration.

(4) To What Extent Do the Alternatives Address the Relevant Barriers?

[37] Once the alternative or alternatives to class proceedings have been identified, the court must

(2009), 47 *Alta. L. Rev.* 185, p. 188). Bien qu’il s’agisse d’un instrument de procédure, il a, entre autres, pour objet sous-jacent de procurer des résultats positifs quant au fond. Dans l’évaluation de la capacité de ce type de recours d’aplanir les obstacles à l’accès à la justice, il faut prendre en compte la dimension procédurale et la dimension substantielle de la notion d’accès.

(3) Quels autres moyens y a-t-il?

[35] Le tribunal saisi de la motion en certification doit examiner les autres voies de droit possibles. Pour reprendre les propos de la juge en chef McLachlin dans *Hollick*, le tribunal, « dans l’analyse du meilleur moyen, doit examiner tous les moyens raisonnables offerts pour régler les demandes des membres du groupe, et non seulement la possibilité de recours individuels » (par. 31 (je souligne)). En l’espèce, le tribunal a examiné d’autres recours judiciaires possibles (comme la jonction ou la réunion d’instances, la cause type, etc. (*Hollick*, par. 28)) ainsi que des voies de droit extrajudiciaires.

[36] Le tribunal saisi de la motion doit examiner de façon globale les autres moyens et déterminer s’ils permettent d’éliminer les obstacles à l’accès à la justice que soulève la demande (*Hollick*, par. 30). Dans certains cas, une voie de droit extrajudiciaire peut être envisagée en plus des recours individuels (voir, p. ex., *Hollick*, *Cloud* et *Pearson c. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.)). Dans d’autres cas, par exemple lorsqu’il n’existe pas d’autre action en justice viable que le recours collectif, il faut envisager la possibilité d’une voie de droit extrajudiciaire au lieu de ce dernier (voir, p. ex., *Halabi c. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Div. gén.)). La nature des autres moyens possibles influera sur la nature de l’analyse comparative.

(4) Dans quelle mesure les autres moyens permettent-ils d’aplanir les obstacles?

[37] Après le recensement des autres voies de droit possibles, il faut évaluer la mesure dans laquelle

assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The court should consider both the substantive and procedural aspects of access to justice recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. This comparison, of course, must take place within the proper evidentiary framework that applies at the certification stage. I will return to that point in a moment.

(5) How Do the Two Proceedings Compare?

[38] The focus at this stage of the analysis is on whether, if the alternative or alternatives were to be pursued, some or all of the access to justice barriers that would be addressed by means of a class action would be left in place: *Hollick*, at para. 33. At the end of the day, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. As set out in *Hollick*, the court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.

D. *Evidentiary Considerations*

(1) What Is the Evidentiary Burden With Regard to the Preferability Requirement on a Motion for Certification?

[39] The questions I have just outlined are addressed within the confines of the certification process; the court cannot engage in a detailed assessment of the merits or likely outcome of the class action or any alternatives to it. In *Hollick*, McLachlin C.J. explained that the evidentiary burden applicable on a motion for certification was low:

elles résolvent les problèmes particuliers d'accès à la justice qui se posent dans les circonstances. Le tribunal doit examiner les aspects procéduraux et substantiels de la notion d'accès en gardant à l'esprit que la voie judiciaire n'est pas nécessairement la modalité idéale de règlement équitable et efficace des différends. Il doit se demander si l'autre moyen permettra de régler utilement les demandes quant au fond tout en assurant aux demandeurs la possibilité d'exercer des droits procéduraux adéquats. Il faut, bien sûr, procéder à cette analyse comparative en fonction des normes de preuve applicables à l'étape de la certification, point que j'aborde plus loin.

(5) Bilan de la comparaison

[38] À cette étape, il s'agit de décider si l'autre moyen laisserait en totalité ou en partie subsister des obstacles à l'accès à la justice que le recours collectif permettrait d'aplanir (*Hollick*, par. 33). En fin de compte, le tribunal saisi de la motion doit déterminer, au vu de la preuve, s'il a été démontré que le recours collectif est le meilleur moyen de régler les préoccupations relatives à l'accès à la justice, sur le plan de la procédure et sur le plan du fond. Comme la Cour le mentionne dans *Hollick*, il doit aussi, sans outrepasser le cadre de l'audience sur la certification, comparer les coûts et les avantages du recours collectif projeté à ceux des autres moyens proposés.

D. *Les questions de preuve*

(1) Fardeau de preuve applicable au critère du meilleur moyen à l'étape de la motion en vue de la certification

[39] L'examen des questions susmentionnées doit respecter le cadre de la certification; le tribunal ne saurait à cette étape procéder à l'appréciation détaillée du bien-fondé du recours collectif ou des autres voies de droit ou de leur issue probable. Dans l'arrêt *Hollick*, la juge en chef McLachlin explique que le fardeau de preuve applicable à l'étape de la motion en vue de la certification n'est pas élevé :

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 [v. Manufacturers Life Insurance Co.]* (1998), 40 O.R. (3d) 379 (Gen. Div.) held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 (“evidence on the motion for certification should be confined to the [certification] criteria”). The Act, too, obviously contemplates the same thing: see s. 5(4) (“[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence”). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is “plain and obvious” that no claim exists: see Branch, *supra*, at para. 4.60. [Emphasis added; para. 25.]

[40] This Court recently reaffirmed these principles in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, in the context of the similar British Columbia class actions regime. In his discussion of the standard of proof with regard to the commonality and preferability requirements (para. 101), Rothstein J. indicated that the “‘some basis in fact’ standard does not require that the court resolve conflicting facts and evidence at the certification stage” (para. 102). This reflects the fact that a certification court “is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight”: *Pro-Sys*, at para. 102, citing *Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.). Further, the “some basis in fact” standard cannot be assessed in a vacuum. As Rothstein J. puts it: “. . . there is limited utility in attempting to define ‘some basis

Je conviens que le représentant du groupe défini doit établir un certain fondement factuel pour la demande de certification. Comme le dit la cour dans *Taub [c. Manufacturers Life Insurance Co.]* (1998), 40 O.R. (3d) 379 (Div. gén.), cela ne signifie pas qu’il faut des affidavits des membres du groupe ou qu’il faut un examen au fond des demandes d’autres membres du groupe. Cependant, le rapport précité du comité consultatif du procureur général envisageait manifestement que le représentant du groupe serait tenu d’étayer sa demande de certification (à la p. 31) : ([TRADUCTION] « la preuve à l’appui de la demande devrait se limiter aux critères [de certification] »). De toute évidence, c’est ce que prévoit la Loi au par. 5(4) (« [l]e tribunal peut ajourner la motion en vue de faire certifier le recours collectif afin de permettre aux parties de modifier leurs documents ou leurs actes de procédure ou d’autoriser la présentation d’éléments de preuve supplémentaires »). À mon sens, le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions énumérées à l’art. 5 de la Loi, autre que l’exigence que les actes de procédure révèlent une cause d’action. Cette dernière exigence est régie bien sûr par la règle qu’un acte de procédure ne devrait pas être radié parce qu’il ne révèle pas de cause d’action à moins qu’il soit [TRADUCTION] « manifeste et évident » qu’il n’y a lieu à aucune réclamation : voir Branch, *op. cit.*, par. 4.60. [Je souligne; par. 25.]

[40] La Cour a récemment confirmé ces principes dans *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, dans le contexte du régime similaire de recours collectif établi en Colombie-Britannique. Dans son analyse de la norme de preuve applicable aux critères des questions communes et du meilleur moyen (par. 101), le juge Rothstein indique que la norme d’« un certain fondement factuel » n’exige pas que le tribunal se prononce sur les éléments de fait et les éléments de preuve contradictoires à l’étape de la certification » (par. 102), reconnaissant par là le fait que le tribunal saisi de la motion « n’est pas en mesure de statuer sur les éléments contradictoires de la preuve non plus que de déterminer sa valeur probante à l’issue d’une analyse nuancée » (*Pro-Sys*, par. 102, citant *Cloud*, par. 50; *Irving Paper Ltd. c. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (C.S.J.), par. 119, citant *Hague c. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (C.S.J. Ont.)). En outre, cette norme ne peut s’appliquer dans

in fact’ in the abstract. Each case must be decided on its own facts” (para. 104).

[41] Helpful elaboration of the “some basis in fact” standard may be found in the reasons of Winkler C.J.O. in *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745:

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.

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). [Emphasis added; paras. 75-76.]

[42] The jurisprudence emphasizes the importance of not allowing the requirement to establish “some basis in fact” to lead to a more fulsome assessment of contested facts going to the merits of the case. For example, in *Cloud*, the Ontario Court of Appeal indicated that the some basis in fact standard “does not entail any assessment of the merits at the certification stage” (para. 50). Similarly, in *Pearson*, the Ontario Court of Appeal, having concluded that the representative plaintiff had adduced evidence to show a negative impact on property values concluded that the “some basis in fact” standard with regard to the commonality of the issues had been met. The court pointed out that while the defendant disputed the plaintiff’s evidence, “the certification motion is not the place for resolving that controversy” (para. 76). These evidentiary principles equally apply to the preferability criterion: see e.g. *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002),

l’absolu. Comme le juge Rothstein le signale, « il serait peu utile de tenter de définir “un certain fondement” dans l’abstrait. L’issue d’une affaire dépend des faits qui lui sont propres » (par. 104).

[41] Les motifs du juge en chef Winkler à propos de cette norme dans *McCracken c. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, apportent des précisions utiles :

[TRADUCTION] Le principe posant qu’il faut établir un « certain fondement factuel » répond à deux préoccupations. Premièrement, tous les critères, hormis celui de la cause d’action, étayant l’ordonnance de certification doivent reposer sur une preuve.

Deuxièmement, dans l’esprit du régime procédural établi par la *LRC*, l’emploi du mot « certain » indique que la preuve n’a pas à être exhaustive et qu’il ne s’agit certainement pas d’une preuve propre à présider au débat sur le fond. Cette intention du législateur est exprimée à l’al. 2(3)a) de la *LRC* — qu’on honore le plus souvent en l’enfreignant — lequel exige du représentant des demandeurs qu’il présente la motion en vue de la certification dans les 90 jours suivant le dépôt de la défense ou de l’avis d’intention d’en présenter une ou de l’expiration du délai prescrit pour ce faire. Passé ce délai, il faut obtenir l’autorisation du tribunal (voir l’al. 2(3)b)). [Je souligne; par. 75-76.]

[42] La jurisprudence souligne qu’il importe de ne pas laisser l’exigence du « certain fondement factuel » mener à une appréciation poussée des faits litigieux qui toucherait au bien-fondé du recours. Dans *Cloud*, par exemple, la Cour d’appel de l’Ontario a indiqué que cette norme [TRADUCTION] « n’entraîne pas d’évaluation au fond à l’étape de la certification » (par. 50). Dans *Pearson*, elle a pareillement conclu, après avoir constaté que le représentant des demandeurs avait produit une preuve visant à établir la dépréciation d’immeubles, que celui-ci avait satisfait à la norme du « certain fondement factuel » à l’égard du critère des questions communes. Selon elle, bien que la défenderesse ait contesté cette preuve, [TRADUCTION] « il n’y a pas lieu de régler ce débat à l’audition de la motion en vue de la certification » (par. 76). Ces règles de preuve s’appliquent tout autant au critère du meilleur moyen (voir, p. ex., *1176560 Ontario Ltd. c. Great Atlantic & Pacific Co. of Canada Ltd.*

62 O.R. (3d) 535 (S.C.J.), at para. 27, aff'd (2004), 70 O.R. (3d) 182 (S.C.J. (Div. Ct.)).

[43] The standard of proof on a motion for certification was at the heart of the appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused, [2003] 2 S.C.R. vi. The decision makes clear that at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements. In *Chadha*, the court denied certification on the basis that there was *no* evidence that the loss component of liability could be proved on a class-wide basis (and thus that there was no common issue). It was not necessary to establish that there was a compelling method to prove such loss, but it was necessary to provide some basis in fact to think that there was *some* method to do so. The plaintiffs had failed to provide that basis. This Court reached the opposite conclusion in *Pro-Sys* with regard to the commonality of the issues, because there was “an expert methodology that ha[d] been found to have a realistic prospect of establishing loss on a class-wide basis” (para. 140).

[44] The limited scope of the factual inquiry on the certification motion means that the motions court will often not be able to compare the potential recoveries in the class action and in the alternative or alternatives to it. For example, in *Pro-Sys* it was argued that the class proceeding did not meaningfully further the objective of access to justice because the award would likely be distributed *cy-près* and not to individual class members. Rothstein J., however, rejected this argument noting that it was “premature to assume that the award . . . [would] result in *cy-près* distribution or that the objective of access to justice [would] be frustrated on this account” (para. 141).

[45] The limitations imposed by the nature of the certification process are directly relevant in this

(2002), 62 O.R. (3d) 535 (C.S.J.), par. 27, conf. par (2004), 70 O.R. (3d) 182 (C.S.J. (C. div.)))).

[43] La norme de preuve applicable à l'examen d'une motion en vue de la certification était au cœur de l'appel dans *Chadha c. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), autorisation d'appel refusée, [2003] 2 R.C.S. vi. La cour a statué clairement qu'à cette étape le tribunal ne peut procéder à une appréciation détaillée de la preuve et doit plutôt se borner à vérifier si les critères de certification reposent sur un certain fondement factuel. Dans *Chadha*, la cour n'a pas certifié le recours parce qu'*aucun* élément de preuve ne permettait d'établir l'un des préalables à une déclaration de responsabilité, soit la perte à l'échelle du groupe, de sorte qu'il n'y avait pas de question commune. Il n'était pas nécessaire de démontrer l'existence d'une méthode convaincante qui prouverait une telle perte, mais il fallait établir un certain fondement factuel permettant de penser qu'*une quelconque* méthode existait. Or, les demandeurs n'y sont pas arrivés. Notre Cour dans *Pro-Sys* tire la conclusion opposée quant à l'existence d'une question commune parce qu'il existait « une méthode proposée par un expert [qui] permettrait assez certainement d'établir la perte à l'échelle du groupe » (par. 140).

[44] La portée restreinte de l'examen factuel à l'étape de la certification fait en sorte que le tribunal saisi d'une telle motion n'est souvent pas en mesure de confronter les fonds que le recours collectif et les autres moyens permettraient de recouvrer. Dans *Pro-Sys*, par exemple, on a fait valoir que le recours collectif ne favorisait pas vraiment l'objectif d'accès à la justice parce que l'indemnité accordée serait probablement distribuée selon le principe de l'aussi-près et non pas versée aux membres individuels. Le juge Rothstein n'a pas retenu cet argument, indiquant qu'il était « trop tôt pour présumer que la réparation accordée [. . .] donnera[it] lieu à des versements selon le principe de l'aussi-près ou que, le cas échéant, l'objectif de favoriser l'accès à la justice sera[it] compromis » (par. 141).

[45] Les restrictions qu'emporte par sa nature la procédure de certification sont directement en

case. Somewhat unusually, a potential alternative procedure — the OSC proceeding — has run its course and the results of it are known with certainty. This might be seen, as it was by the Divisional Court in this case, as inviting a comparison of those known results with the likely outcome of the proposed class action. Simply put, is there enough left on the table to justify the time and expense of the proposed class proceeding? Viewed from this perspective, “[u]nless it can be said that the plaintiffs have achieved full, or at the very least substantially full, recovery”, they would be entitled to maintain a class action (Divisional Court decision, at para. 8). Based on the record in this case, the Divisional Court concluded that “the plaintiffs’ current claim against AIC and CI, over and above the OSC settlement, [was] \$333.8 million” (para. 4). The court qualified this as a “significant amount of money” (para. 8) which entitled the plaintiffs to maintain a class action.

[46] Although at first glance such an approach would seem to have something to commend it, its allure quickly fades when due attention is given to the nature and limitations of the certification process. The certification process is not the occasion for a searching examination of whether the “plaintiffs have achieved full, or . . . substantially full, recovery” (Divisional Court decision, at para. 8) in comparison to the likely outcome of the class proceeding on its merits. Without that sort of examination, the most that can be done is to assess on the appropriately limited evidentiary record whether the access to justice barriers that may be addressed by a class proceeding remain even after the alternative process has run its course.

[47] Nevertheless, when the results or the limits on recovery of an alternative procedure are known at the time of the certification motion, those uncontested facts cannot be ignored. For example, in *Rumley*, McLachlin C.J. observed that the alternative procedure was not preferable because, among other things, it limited recovery of any complainant to \$60,000 (para. 38). (Although the Court was dealing with the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50, in that case,

cause en l’espèce. Fait assez inhabituel, une voie de droit possible — l’instance devant la CVMO — a déjà été menée à terme, et son issue est connue. On pourrait, à l’instar de la Cour divisionnaire, être tenté de comparer ce résultat avec l’issue probable du recours collectif projeté, c’est-à-dire se demander si les fonds qui restent à recouvrer valent l’investissement en temps et en argent que requiert le recours collectif. Dans cette perspective, [TRADUCTION] « [à] moins qu’on puisse affirmer que les demandeurs ont obtenu la totalité — ou à tout le moins la quasi-totalité — de ce qu’ils réclamaient », ils sont autorisés à exercer un recours collectif (jugement de la Cour divisionnaire, par. 8). Compte tenu du dossier, la Cour divisionnaire a conclu que « la demande actuelle contre AIC et CI se chiffre à 333,8 millions de dollars outre le montant visé dans le règlement conclu par la CVMO » (par. 4). Selon la cour, il s’agit d’une « somme considérable » (par. 8) autorisant les demandeurs à exercer un recours collectif.

[46] Bien que ce raisonnement puisse séduire au premier abord, il perd rapidement de son lustre dès lors que la nature et les limites de la procédure de certification sont dûment considérées. Il n’y a pas lieu à cette étape de déterminer si [TRADUCTION] « les demandeurs ont obtenu la totalité — ou [. . .] la quasi-totalité — de ce qu’ils réclamaient » (jugement de la Cour divisionnaire, par. 8) et de comparer avec l’issue probable du recours collectif quant au fond. Le mieux que l’on peut faire, à défaut d’un tel examen, est de déterminer au vu de la preuve évidemment limitée si les obstacles à l’accès à la justice auxquels le recours collectif peut remédier subsistent une fois que l’autre moyen a suivi son cours.

[47] Quoi qu’il en soit, lorsque l’issue de l’autre moyen ou les plafonds qu’il impose sont connus lors de l’examen de la motion en vue de la certification, on ne peut faire abstraction de ces faits incontestables. Dans l’arrêt *Rumley*, par exemple, la juge en chef McLachlin indique que l’autre voie de droit ne constitue pas le meilleur moyen notamment parce qu’elle plafonne à 60 000 \$ l’indemnité qu’un plaignant peut recevoir (par. 38). (Bien que cet arrêt porte sur la *Class Proceedings Act*, R.S.B.C. 1996,

an analogous approach is implicit in the *CPA*.) In a case involving similar facts and dealing with the *CPA*, the Ontario Court of Appeal made similar comments with regard to the fact that the alternative procedure capped recovery: *Cloud*, at para. 92. The fact that the court considered the limits on recovery in the alternative procedure implies that it took into account the fact that the class action could address the full range of the class members' claims. Thus, the results and limits may be considered, but within the constraints of the evidentiary basis that is appropriate on a certification motion. In a case where the results of neither the alternative nor the class proceedings are known, the comparative exercise with regard to the substantive access to justice barriers will in general be very limited.

(2) Who Assumes the Burden?

[48] The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.

[49] With regard to the second aspect of the preferability requirement — that is, the comparative analysis — the representative plaintiff will necessarily have to show some basis in fact for concluding that a class action would be preferable to other litigation options. However, the representative plaintiff cannot be expected to address every conceivable non-litigation option in order to establish that there is some basis in fact to think

ch. 50, de la Colombie-Britannique, la *LRC* permet implicitement le même raisonnement.) Dans une affaire présentant des faits similaires et intéressant la *LRC*, la Cour d'appel de l'Ontario a elle aussi fait remarquer que l'autre moyen permettait le recouvrement d'une indemnité limitée (*Cloud*, par. 92). On peut supposer que, si la cour a tenu compte du plafond prévu par l'autre moyen, elle estimait que le recours collectif permettait de régler l'ensemble des demandes des membres du groupe. L'issue et les plafonds peuvent donc entrer en ligne de compte, mais uniquement dans le cadre de preuve limité applicable à l'étape de la certification. Dans une affaire où tant l'issue du recours collectif que celle de l'autre voie de droit sont inconnues, l'exercice de comparaison, eu égard aux obstacles à l'accès à la justice sur le plan du fond, sera généralement très limité.

(2) À qui incombe le fardeau de preuve?

[48] Il incombe à la partie qui cherche à faire certifier un recours collectif d'établir un certain fondement factuel pour chacune des conditions de certification (*Hollick*, par. 25). S'agissant du critère du meilleur moyen, le représentant des demandeurs doit démontrer (1) que le recours collectif serait un moyen juste, efficace et pratique de faire progresser l'instance et (2) qu'il serait préférable à tous les moyens raisonnables offerts pour régler les demandes des membres du groupe (*Hollick*, par. 28 et 31). Le défendeur peut présenter des éléments afin de [TRADUCTION] « réfuter l'existence du certain fondement factuel pouvant s'inférer de la preuve présentée par le demandeur » (M. Cullity, « Certification in Class Proceedings — The Curious Requirement of "Some Basis in Fact" » (2011), 51 *Rev. can. dr. comm.* 407, p. 417).

[49] Pour ce qui est du deuxième aspect du critère du meilleur moyen — c'est-à-dire l'analyse comparative — le représentant des demandeurs devra nécessairement établir un certain fondement factuel permettant de conclure que le recours collectif serait préférable aux autres voies judiciaires. On ne saurait toutefois exiger qu'il passe en revue toutes les voies de droit extrajudiciaires possibles pour faire cette preuve. Le défendeur qui

that a class action would be preferable. Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. As Winkler J. (as he then was) put it in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.): “. . . the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis It must be supported by some evidence” (para. 67). However, once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff.

E. Application

[50] There are two potential barriers to access to justice in this case. First, an economic barrier arises from the nature of the claim. The claim advanced here may be referred to as a small claims class action. As the motion judge found, the individual claims are not large enough to support viable individual actions (para. 62). The economic barrier to access to justice, therefore, is that individual claims are not viable to litigate individually. In the context of a small claims class action such as this one, access to justice requires access to a process that has the potential to provide in an economically feasible manner just compensation for the class members’ individual economic claims should they be established. The second barrier is related to the first. As a result of the nature of the claim, there is potentially no access to a fair process, geared towards protecting the rights of class members, to seek a resolution of the common issues for what could potentially be a class of over a million members. Thus, traditional litigation cannot achieve either the substantive or the procedural dimensions of access to justice in a case such as this.

[51] The proposed class action addresses both of these barriers. It has the potential to make it economically feasible to advance on behalf of the class a group of individual claims that would otherwise not be economically feasible to pursue in the courts and it provides class members with a fair process to resolve their claims. The class action process is

invoque l’existence d’une solution extrajudiciaire est tenu d’étayer son affirmation. Pour reprendre les propos du juge Winkler (plus tard juge en chef) dans *Caputo c. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (C.S.J. Ont.) : [TRADUCTION] « . . . les défenderesses ne peuvent se contenter d’affirmer que d’autres moyens sont préférables sans fondement probatoire [. . .] Leur affirmation doit être appuyée par des éléments de preuve » (par. 67). Toutefois, dès lors que la preuve relative à un autre moyen est produite, le fardeau de prouver qu’il est satisfait au critère du meilleur moyen repose à nouveau sur le demandeur.

E. Application

[50] En l’espèce, deux obstacles potentiels à l’accès à la justice se dressent. Le premier, d’ordre financier, est lié à la nature de la demande. Il s’agit d’un recours collectif portant sur de petites créances. Le juge saisi de la motion a estimé que le montant des demandes individuelles était trop modeste pour qu’un recours individuel soit viable (par. 62). Cet obstacle réside donc dans la non-viabilité des recours individuels. Dans un cas comme celui qui nous occupe, l’accès à la justice commande l’accès à une voie de droit susceptible de permettre l’indemnisation équitable — et possible sur le plan financier — des membres du groupe quant à leurs demandes pécuniaires individuelles, si elles sont établies. Le deuxième obstacle est lié au premier. La nature de la demande est telle qu’il n’existe peut-être pas d’autre moyen équitable de permettre aux membres du groupe d’exercer leurs droits et de mener au règlement des questions communes d’un groupe pouvant compter plus d’un million de membres. Ainsi, dans un tel cas, l’action en justice classique ne sert pas l’accès à la justice, ni du point de vue substantiel, ni du point de vue procédural.

[51] Or, le recours collectif proposé élimine ces obstacles. Il permet à un groupe de faire valoir un ensemble de demandes individuelles qu’il serait autrement impossible pour des raisons d’ordre financier de soumettre aux tribunaux et il fournit aux membres du groupe une voie de droit équitable. Le recours collectif assure une ample protection de

geared to protecting the class members' rights to a significant extent through such mechanisms as the requirement for a representative plaintiff who must "fairly and adequately represent the interests of the class", produce a workable litigation plan to advance the proceeding on behalf of the class and have no conflict of interests with other class members: *CPA*, s. 5(1)(e).

[52] As I have already noted, there is no realistic litigation alternative in this case. The only alternative procedure that was advanced is the OSC proceedings and settlement agreements, the results of which are already known. Thus, the question is to what extent this alternative has addressed the barriers to access to justice and whether those barriers remain now that those proceedings have been completed. This analysis has both a procedural and a substantive component.

[53] With respect to the procedural component, the appellants submit that the Court of Appeal wrongly focused on the fact that the OSC's jurisdiction is regulatory and not compensatory and erred in its assessment of investor participation in the OSC proceedings. I do not accept these submissions.

[54] The main jurisdiction of the OSC under s. 127 of the *Securities Act* — under which the OSC conducted the probe — is regulatory. Thus, it "is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets": *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at para. 42, quoting (1999), 43 O.R. (3d) 257, at p. 272, per Laskin J.A. There is no question in this case that the OSC had jurisdiction to approve the settlement agreements or, as the motion judge found, that Commission staff in this case sought to determine the extent of investor losses and to achieve compensation for them through the settlement agreements. Nevertheless, compensation of investors is not the primary focus of the OSC under its s. 127 jurisdiction. Further, there is no

leurs droits par le truchement de certains mécanismes, dont le critère qui exige la nomination d'un représentant qui « représenterait de façon équitable et appropriée les intérêts du groupe », a préparé un plan efficace pour faire avancer l'instance au nom du groupe et n'a aucun conflit d'intérêts avec d'autres membres du groupe (*LRC*, al. 5(1)e).

[52] Comme je l'ai déjà indiqué, il n'existe pas d'autre solution judiciaire réaliste en l'espèce. La seule autre voie de droit évoquée est l'instance devant la CVMO et les règlements intervenus, dont l'issue est connue. Par conséquent, la question qu'il faut poser est celle de savoir si cette instance a permis d'éliminer les obstacles à l'accès à la justice ou s'il en subsiste. Cette analyse comporte un aspect procédural et un aspect substantiel.

[53] S'agissant de l'aspect procédural, les appelantes soutiennent que la Cour d'appel a attaché trop d'importance au fait que la CVMO exerce une compétence d'ordre réglementaire et ne dispose pas de pouvoirs d'indemnisation. Selon elles, la cour a mal apprécié la participation des investisseurs à l'instance devant cet organisme. Je ne puis leur donner raison.

[54] La principale compétence que confère à la CVMO l'art. 127 de la *Loi sur les valeurs mobilières* — en vertu duquel l'organisme a procédé à l'enquête — est de nature réglementaire. En conséquence, elle « n'est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d'un éventuel préjudice aux marchés financiers en Ontario » (*Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132, par. 42, citant (1999), 43 O.R. (3d) 257, p. 272, le juge Laskin). En l'espèce, il ne fait aucun doute que la CVMO était habilitée à approuver les ententes de règlement ou, comme l'a conclu le juge saisi de la motion, que son personnel a voulu déterminer l'ampleur des pertes subies par les investisseurs et à faire en sorte qu'ils soient indemnisés par le

way to know how the OSC arrived at the settlement agreements; the details of the methodology used to calculate the amounts having remained confidential throughout. As the motion judge found, “how the OSC came to its calculation is not actually known” (para. 99).

[55] With regard to investor participation in the OSC proceedings, my view is that the respondents and the Court of Appeal are somewhat off the mark by placing virtually exclusive weight on this consideration in rejecting the OSC proceedings as a preferable alternative. Nevertheless, I agree that investor participation in the process leading to compensation is an important factor to consider and one that weighs heavily in favour of finding that the class proceeding meets the preferability requirement in this case. As the Court of Appeal noted, the OSC proceedings and the procedure by which the settlement agreements were arrived at in this case “provided little to no basis for investor participation” (paras. 58 and 60), whereas class proceedings “allow for the appointment of a representative plaintiff who shares a sufficient common interest with members of the class [and] conducts the litigation on behalf of class members under court supervision and within the presumptive principle of an open court” (para. 61). Moreover, as the motion judge found, nothing was known about how the OSC came to its assessment of compensation. In summary, the regulatory nature of and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation, support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address. Moreover, the focus and nature of the OSC process reinforce the concerns which I will turn to next about whether substantial access to justice was achieved.

truchement des ententes de règlement. Cependant, l’indemnisation des investisseurs ne constitue pas la raison d’être du pouvoir dévolu à la CVMO par l’art. 127. De plus, il n’existe aucun moyen de savoir comment la CVMO est parvenue aux ententes de règlement, puisque la méthode employée pour en fixer les montants n’a jamais été divulguée. Comme l’a indiqué le juge saisi de la motion, [TRADUCTION] « on ignore en fait comment la CVMO a effectué ses calculs » (par. 99).

[55] Quant à la participation des investisseurs à l’instance devant la CVMO, les intimés et la Cour d’appel s’égarent à mon avis quelque peu en fondant presque exclusivement sur ce point leur conclusion que cette instance n’est pas le meilleur moyen. J’estime néanmoins que la participation des investisseurs à la procédure menant à l’indemnisation constitue un facteur important, qui milite fortement en faveur de la conclusion que le recours collectif satisfait au critère du meilleur moyen en l’espèce. Selon la Cour d’appel, l’instance devant la CVMO et la procédure dont découlent les ententes de règlement [TRADUCTION] « laissai[en]t peu ou pas de place à la participation des investisseurs » (par. 58 et 60), tandis que le recours collectif « permet la nomination d’un représentant ayant en commun avec les membres du groupe suffisamment d’intérêts [et qui] voit au déroulement du recours pour le compte de ces derniers sous la supervision du tribunal et dans le respect du principe de publicité des débats judiciaires » (par. 61). En outre, ainsi que l’a conclu le juge saisi de la motion, on ne sait rien sur la façon dont la CVMO a fixé l’indemnité. Pour résumer, la nature réglementaire de l’instance devant la CVMO et les droits de participation limités qu’elle offrait aux investisseurs, conjugués à l’absence d’information sur les calculs effectués par son personnel en vue de l’indemnisation des investisseurs, étayaient la conclusion qu’il subsistait d’importants obstacles à l’accès à la justice sur le plan procédural auxquels le recours collectif pouvait remédier. Par ailleurs, l’objet et la nature de la procédure devant la CVMO accentuent les préoccupations, que j’aborde dans les paragraphes suivants, en matière d’accès à la justice sur le plan du fond.

[56] Turning to the substantive aspect of access to justice, the Court of Appeal found that the motion judge and the Divisional Court had erred by focusing on the substantive outcome of the OSC proceedings, commenting that this “is not a relevant factor in the comparative analysis under s. 5(1)(d) of the CPA” (para. 10). In my view, the Court of Appeal took too categorical an approach to this issue in the circumstances of this case. While of course any consideration of the substantive outcome must take place within the evidentiary framework that applies on a certification motion, access to justice as explained earlier is not a purely procedural concept. Access to justice requires access to just results, not simply to process for its own sake. However, I conclude that giving this substantive element the considerable weight that it deserves in this case reinforces the Court of Appeal’s conclusion that this class action should be certified.

[57] One of the barriers to access to justice in this small claims investor class action is that traditional litigation provides no economically feasible way to recover the investors’ claimed losses. The appellants’ position is that the OSC regulatory proceedings effected significant recovery for the investors at no cost to them. In these circumstances, the substantive outcome of the OSC proceedings cannot, in my view, be dismissed as irrelevant to the question of whether the OSC proceedings addressed the access to justice barrier that is present in this case or whether the way in which it did so suggests that the class proceeding is not the preferred alternative.

[58] That said, however, the substantive outcome of the OSC proceedings and their impact on the preferability analysis must be examined through the appropriate evidentiary lens. As I have explained, the plaintiffs’ burden is to provide “some basis in fact” to think that the class proceedings are preferable to the alternative. In the rather unusual circumstances of this case, where the OSC proceedings have run their course and the results of those proceedings are known, it seems to me that the comparative analysis cannot ignore the question of whether a cost-benefit analysis supports the respondents’ contention that

[56] Passons à l’aspect substantiel de l’accès à la justice. La Cour d’appel a estimé que le juge saisi de la motion et la Cour divisionnaire avaient eu tort de s’attacher à l’issue concrète de l’instance devant la CVMO qui, selon elle, [TRADUCTION] « ne constitue pas un facteur pertinent dans l’analyse comparative que commande l’al. 5(1)d de la LRC » (par. 10). À mon avis, la Cour d’appel s’est montrée trop catégorique sur ce point dans les circonstances. Tout examen de l’issue concrète doit évidemment s’en tenir à la norme de preuve applicable à une motion en vue de la certification. Or, comme je l’explique, l’accès à la justice ne ressortit pas seulement à la procédure. L’accès à la justice suppose une issue juste, et non pas une procédure engagée pour la forme. J’estime toutefois que le poids considérable que mérite cet élément se rattachant au fond renforce la conclusion de la Cour d’appel selon laquelle la certification de ce recours collectif s’impose.

[57] L’un des obstacles à l’accès à la justice dans ce recours collectif mettant en cause de petites créances provient de ce que l’action en justice classique n’offre pas aux investisseurs un moyen viable sur le plan financier de récupérer leurs pertes. Les appelantes font valoir que l’instance réglementaire devant la CVMO a permis à ces derniers de toucher une indemnité appréciable sans engager de frais. Dans ces circonstances, j’estime qu’on ne peut conclure que l’issue concrète de cette instance ne joue pas pour déterminer si cette voie de droit a permis de lever l’obstacle à l’accès à la justice en l’espèce ou s’il en ressort que le recours collectif n’est pas le meilleur moyen.

[58] Cela dit, l’issue concrète de l’instance devant la CVMO et son effet sur l’analyse relative au meilleur moyen doivent être examinés à la lumière des normes de preuve applicables. Je le répète, les demandeurs ont à démontrer l’existence d’un « certain fondement factuel » permettant de penser que le recours collectif est préférable aux autres moyens. Les circonstances de l’espèce sont plutôt inhabituelles, car l’issue de l’instance devant la CVMO est connue. À mon sens, l’analyse comparative doit aborder la question de savoir si l’examen des coûts et des avantages étaye la thèse des intimés,

the proposed class proceeding is the preferable way to address their claims.

[59] The answer to this question, as I see it, is quite straightforward in this case. The respondents have pleaded viable causes of action, the OSC proceedings and settlement agreements were without prejudice to those claims, and the motion judge was satisfied “that there [was] some basis in fact for the Plaintiffs’ submission that the investors may not have been fully compensated as a result of the OSC settlement agreements” (para. 101). The motion judge also found that the class members were not trying to “have their cake and eat it too”:

I do not agree with any arguments that suggest that the Plaintiffs [respondents in this Court] and the investors are being unfair, or perhaps piggish, in eating the cake of the OSC compensation and also having a class action. The investors are not playing “heads I win, tails you lose.” They did not ask the OSC to be their champion, and they did not do anything wrong in accepting the spoils secured by the OSC’s campaign. The putative representative plaintiffs do no wrong in attempting to certify their action as a class proceeding, and I have no reason to believe that they do not genuinely believe that they were under-compensated. [para. 218]

[60] The motion judge estimated the size of the proposed class against AIC at 264,036 members and 803,903 members against CI. These represent the numbers of settlement payments issued by each appellant pursuant to the OSC settlements: motion decision, at para. 56. AIC’s and CI’s OSC settlement payments were respectively \$58.8 million and \$49.3 million. The plaintiffs presented expert evidence which estimated that AIC’s investors’ losses could be as low as \$6.5 million or as high as \$251.0 million, and that CI’s investors’ losses could be as low as \$72.1 million or as high as \$349.3 million, depending on the method of calculation used. Based on an expert’s preferred method of calculation (he submitted a total of five), losses were estimated at \$192.6 million for AIC’s investors and \$349.3 million for CI’s investors: motion decision, at para. 94. Thus, in the plaintiffs’ expert’s view, AIC’s investors have received only 31% of

selon qui le recours collectif est le meilleur moyen de régler leurs réclamations.

[59] La réponse à cette question me paraît assez simple en l’espèce. Les intimés ont invoqué des causes d’action valables. L’instance devant la CVMO et les ententes de règlement en découlant ne portent pas atteinte à de telles demandes. Le juge saisi de la motion s’est dit convaincu de l’existence [TRADUCTION] « d’un certain fondement factuel étayant l’affirmation des demandeurs selon laquelle les ententes de règlement conclues par la CVMO n’ont peut-être pas indemnisé totalement les investisseurs » (par. 101). Il a également conclu que les membres du groupe ne cherchaient pas à « avoir le beurre et l’argent du beurre » :

[TRADUCTION] Je ne saurais admettre l’argument que les demandeurs [intimés devant la Cour] et les investisseurs se montrent déraisonnables, voire âpres au gain, en touchant l’indemnité obtenue par la CVMO et en intentant en plus un recours collectif. Les investisseurs ne jouent pas sur les deux tableaux. Ils n’ont pas demandé à la CVMO de prendre leur défense et de mener l’enquête en leur nom. Ils n’ont rien fait de mal en acceptant une part de ce gâteau. Les représentants proposés n’ont pas mal agi en tentant de faire certifier un recours collectif et je n’ai aucune raison de douter qu’ils estiment vraiment ne pas avoir été pleinement indemnisés. [par. 218]

[60] Selon l’estimation du juge saisi de la motion, le groupe partie au recours collectif compte 264 036 membres dans le cas d’AIC et 803 903 membres dans le cas de CI. Il s’agit du nombre de versements faits par chacune en exécution des ententes de règlement avec la CVMO (décision relative à la motion, par. 56). AIC et CI ont respectivement versé 58,8 et 49,3 millions de dollars en exécution de ces ententes. Les demandeurs ont soumis une preuve d’expert révélant des pertes, pour les investisseurs d’AIC, entre 6,5 et 251 millions de dollars, et pour les investisseurs de CI, entre 72,1 et 349,3 millions de dollars, en fonction de la méthode de calcul employée. La méthode préconisée par un expert (qui en avait présenté cinq en tout) permettait d’arriver à des pertes estimatives de 192,6 millions de dollars dans le cas des investisseurs d’AIC et de 349,3 millions de dollars dans le cas de ceux de CI (décision relative à la motion, par. 94). D’après

the compensation they are entitled to through the settlement agreements, and CI's investors have received only 14%: motion decision, at para. 94.

[61] Of course, the certification motion is not the proper setting to delve into the likely success of these claims or to debate the merits of these approaches to calculating the investors' losses. The record in this case, which shows in detail the results of the proposed alternative proceedings which have run their course, also shows that substantive access to justice concerns still remain. Further, there is no reason to believe that potential additional recovery would be consumed by the costs of the proceedings. In fact, the motion judge found that since the defendants were able to distribute the OSC settlement payments "by reviewing their own records to make decisions about entitlement, causation, and quantification", that "there is at least a realistic possibility that acceptable procedures could be fashioned by the common issues trial judge to address quantification and distribution issues in a fair, manageable and efficient manner" (para. 208). Accordingly, in my view, the plaintiffs (now respondents) provided an appropriate basis to support the view that the class action proceeding would overcome access to justice barriers that subsisted after the completion of the OSC proceedings and that a cost-benefit analysis supported the conclusion that the class proceedings were the preferable proceeding for the investors to pursue their claims.

[62] To conclude, I am of the view that the motion judge erred in principle in the preferability analysis. Respectfully, he erred by agreeing with the defendants' (now appellants') submission that he should not "second-guess the access to justice provided by the OSC once [he] was satisfied that the OSC's purpose was to obtain restitutionary compensation for the harm suffered by the investors and the process to do so was adequate" (paras. 256-57). On the contrary, it was precisely his role to compare and evaluate, within the limited scope of the

l'expert engagé par les demandeurs, l'indemnité versée en exécution de l'entente de règlement correspondait, dans le cas des investisseurs d'AIC, à seulement 31 % de la somme intégrale, et dans le cas des investisseurs de CI, à seulement 14 % (décision relative à la motion, par. 94).

[61] Naturellement, l'audience sur la motion en vue de la certification n'est pas le moment d'évaluer les chances de succès de ces demandes ou de débattre le bien-fondé des méthodes employées pour calculer les pertes des investisseurs. Or, la preuve présente l'issue de l'autre voie de droit en détail et révèle qu'il subsiste des préoccupations relatives à l'accès à la justice quant au fond. En outre, il n'y a aucune raison de croire que les coûts du recours annuleraient le montant des dommages-intérêts susceptibles d'être accordés. D'ailleurs, le juge saisi de la motion a indiqué que, puisque les défenderesses avaient été en mesure de verser les indemnités en exécution des ententes [TRADUCTION] « en s'appuyant sur leurs propres dossiers pour déterminer l'admissibilité, le lien de causalité et le montant », « il est à tout le moins envisageable que le juge qui procédera à l'examen des questions communes au procès puisse établir des modalités acceptables pour régler les questions de calcul et de distribution de façon juste, pratique et efficace » (par. 208). J'estime par conséquent que les demandeurs (intimés devant la Cour) ont bien étayé l'opinion que le recours collectif permettrait d'écartier les obstacles à l'accès à la justice subsistant après l'instance devant la CVMO et qu'à la lumière d'un examen des coûts et des avantages, il s'agit du meilleur moyen de faire valoir les demandes des investisseurs.

[62] En conclusion, l'analyse relative au meilleur moyen faite par le juge des motions était entachée d'une erreur de principe. J'estime qu'il a retenu à tort l'argument des défenderesses (appellantes devant la Cour) selon lequel il ne devrait pas [TRADUCTION] « dès lors qu'il est convaincu que la CVMO cherchait à obtenir la réparation du préjudice subi par les investisseurs et que la procédure était adéquate, [. . .] remettre en question l'accès à la justice assuré par cet organisme » (par. 256-257). Au contraire, son rôle consistait

certification motion, the access to justice provided by the two proceedings, both in the substantive and procedural dimensions of the term as part of his overall assessment of whether the plaintiffs had established the preferability requirement on the appropriate evidentiary standard. The fact that the results of the OSC process were known in this case added an element that would often not be present at the certification stage.

[63] I agree with the Court of Appeal that the motion judge erred in principle by “treating the negotiated payments that were made to investors in the OSC settlements as somehow eliminating the need to compare the purely regulatory function served by the OSC proceedings with the private remedial function to be played by the proposed class action” (para. 80). This led the motion judge to wrongly dismiss as irrelevant important access to justice considerations relating to the regulatory focus, absence of investor participation and the absence of information about how the investor losses were assessed in the OSC process. The process limitations of the OSC proceedings reinforce the concern that access to substantive justice will be better served by the proposed class action.

[64] I also agree with the Divisional Court and the Court of Appeal that the motion judge erred in principle by relying on the sorts of considerations that would be relevant to approving a settlement of a class action. The certification application, and particularly the preferability aspect of it, is not an appropriate point in the proceedings to engage in any in-depth analysis of either the merits of the plaintiffs’ claims or the likely quantum of recovery. As the Court of Appeal put it, at the certification stage, in most instances, “no reliable yardstick is available because the amount recoverable in the proposed class proceeding would be as yet unknown. Put another way, the preferability analysis should not be reduced to an *ex post facto* assessment of the adequacy of the award arrived at through the alternative procedure” (para. 77).

justement à comparer et à évaluer, dans le cadre limité de la certification, l’accès à la justice procuré par les deux voies de droit, au point de vue tant substantiel que procédural, dans son examen global de la question de savoir si les demandeurs avaient démontré qu’il était satisfait au critère du meilleur moyen selon la norme de preuve applicable. Le fait que l’issue de l’instance devant la CVMO est connue en l’espèce ajoute un élément qui joue rarement dans l’évaluation au stade de la certification.

[63] Je partage l’avis de la Cour d’appel selon qui le juge saisi de la motion a commis une erreur de principe en [TRADUCTION] « considérant que les ententes de règlement conclues par la CVMO éclipaient en quelque sorte toute comparaison entre l’objet purement réglementaire de cette instance et l’objet du recours collectif qui est d’offrir une réparation de droit privé » (par. 80). Cette opinion l’a amené à négliger à tort d’importantes considérations d’accès à la justice ayant trait à cette instance : nature réglementaire, non-participation des investisseurs et absence d’information sur la méthode d’évaluation des pertes de ces derniers. Il ressort de ces limites procédurales que l’accès à la justice quant au fond est mieux servi par le recours collectif projeté.

[64] Je conviens aussi avec la Cour divisionnaire et la Cour d’appel que le juge saisi de la motion a commis une erreur de principe en s’attachant à des considérations qui jouent au moment de l’approbation du règlement d’un recours collectif. L’examen en profondeur du bien-fondé des demandes ou du montant éventuel des dommages-intérêts ne s’effectue pas à l’étape de la certification et encore moins lors de l’analyse relative au meilleur moyen. À ce stade, comme la Cour d’appel l’a indiqué, le plus souvent [TRADUCTION] « on ne peut utiliser de point de référence sûr parce qu’on ignore encore le montant recouvrable à l’issue du recours collectif projeté. Autrement dit, l’analyse relative au meilleur moyen ne doit pas se réduire à une évaluation après coup visant à déterminer si l’indemnité versée par suite de l’autre voie de droit est adéquate » (par. 77).

[65] I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. *Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, “[t]he decision as to preferable procedure is . . . entitled to special deference because it involves weighing and balancing a number of factors”: *Pearson*, at para. 43. However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.

V. Disposition

[66] I would dismiss the appeal with costs.

APPENDIX

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

5. — (1) [Certification] 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,

[65] Je reconnais que la décision en matière de certification appelle une grande déférence (voir, p. ex., *Pearson*, par. 43; *Markson c. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, par. 33). Plus particulièrement, [TRADUCTION] « [I]a décision sur le meilleur moyen commande [. . .] une déférence spéciale parce qu’elle suppose l’appréciation et la mise en balance de plusieurs facteurs » (*Pearson*, par. 43). Je considère toutefois que la déférence ne saurait mettre une décision à l’abri d’une révision si elle est entachée d’erreurs de principe touchant directement la conclusion tirée, comme c’est le cas en l’espèce (voir, p. ex., *Cassano c. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, par. 23, autorisation d’appel refusée, [2008] 1 R.C.S. xiv; *Markson*, par. 33; *Cloud*, par. 39).

V. Dispositif

[66] Je suis d’avis de rejeter le pourvoi avec dépens.

ANNEXE

Loi de 1992 sur les recours collectifs, L.O. 1992, ch. 6

5 (1) [Recours collectif certifié par le tribunal] Le tribunal saisi d’une motion visée à l’article 2, 3 ou 4 certifie qu’il s’agit d’un recours collectif si les conditions suivantes sont réunies :

- a) les actes de procédure ou l’avis de requête révèlent une cause d’action;
- b) il existe un groupe identifiable de deux personnes ou plus qui se ferait représenter par le représentant des demandeurs ou des défendeurs;
- c) les demandes ou les défenses des membres du groupe soulèvent des questions communes;
- d) le recours collectif est le meilleur moyen de régler les questions communes;
- e) il y a un représentant des demandeurs ou des défendeurs qui :
 - (i) représenterait de façon équitable et appropriée les intérêts du groupe,

- (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.

Appeal dismissed with costs.

Solicitors for the appellant AIC Limited: Borden Ladner Gervais, Toronto.

Solicitors for the appellant CI Mutual Funds Inc.: Goodmans, Toronto.

Solicitors for the respondents: Rochon Genova, Toronto.

- (ii) a préparé un plan pour l'instance qui propose une méthode efficace de faire avancer l'instance au nom du groupe et d'aviser les membres du groupe de l'instance,
- (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe, en ce qui concerne les questions communes du groupe.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante AIC Limitée : Borden Ladner Gervais, Toronto.

Procureurs de l'appelante CI Mutual Funds Inc. : Goodmans, Toronto.

Procureurs des intimés : Rochon Genova, Toronto.

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

v.

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*

INDEXED AS: WESTERN CANADIAN SHOPPING CENTRES INC.
 v. DUTTON

Neutral citation: 2001 SCC 46.

File No.: 27138.

Hearing and judgment: December 13, 2000.

Reasons delivered: July 13, 2001.

Present: McLachlin C.J. and L’Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Practice — Class actions — Plaintiffs suing defendants for breach of fiduciary duties and mismanagement of funds — Defendants applying for order to strike plaintiffs’ claim to sue in representative capacity — Whether requirements for class action met — If so, whether class action should be allowed — Whether defendants entitled to examination and discovery of each class member — Alberta Rules of Court, Alta. Reg. 390/68, Rule 42.

L and W, together with 229 other investors, became participants in the federal government’s Business Immigration Program by purchasing debentures in WCSC,

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, La Compagnie Trust Royal, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill *Appellants/Intimés au pourvoi incident*

c.

Western Canadian Shopping Centres Inc. et Muh-Min Lin et Hoi-Wah Wu, représentants de tous les porteurs de débetures de catégories « A », « E » et « F » émises par Western Canadian Shopping Centres Inc. *Intimés/Appellants au pourvoi incident*

RÉPERTORIÉ : WESTERN CANADIAN SHOPPING CENTRES INC. c. DUTTON

Référence neutre : 2001 CSC 46.

N° du greffe : 27138.

Audition et jugement : 13 décembre 2000.

Motifs déposés : 13 juillet 2001.

Présents : Le juge en chef McLachlin et les juges L’Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D’APPEL DE L’ALBERTA

Pratique — Recours collectifs — Action intentée pour manquement à des obligations fiduciaires et mauvaise gestion de fonds — Requête en radiation d’une demande visant à poursuivre en qualité de représentants — Les conditions du recours collectif sont-elles réunies? — Le recours collectif doit-il être autorisé? — Les défendeurs peuvent-ils procéder à l’examen et à l’interrogatoire préalable de chaque membre du groupe? — Alberta Rules of Court, Alta. Reg. 390/68, règle 42.

L et W, ainsi que 229 autres investisseurs, ont participé au Programme fédéral d’immigration des gens d’affaires en achetant des débetures de WCSC qui

which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for \$5,550,000, the rights to a Crown surface lease and also agreed to commit a further \$16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of \$22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the 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 denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

Held: The appeal should be dismissed and the cross-appeal allowed.

In Alberta, class-action practice is governed by Rule 42 of the *Alberta Rules of Court* but, in the absence of 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. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact 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

avait été constituée en société par D, son unique actionnaire, dans le but de faciliter à des immigrants investisseurs l'obtention du statut de résident permanent au Canada. WCSC a sollicité des fonds dans deux offres d'investissement dans des propriétés de rapport. Après le dépôt des fonds des investisseurs, WCSC a acheté à CRI, pour la somme de 5 550 000 \$, les droits sur un bail de surface visant des terres publiques et s'est engagé à verser 16,5 millions de dollars supplémentaires pour des améliorations de surface. Pour financer les obligations de WCSC envers CRI, D a demandé l'émission des débetures de la série A pour un montant total en principal de 22 050 000 \$ à certains investisseurs. D a avancé des fonds additionnels à CRI et des débetures correspondantes ont été émises, notamment les débetures des séries E et F. Les débetures ont été regroupées par la suite. Quand CRI a annoncé qu'elle ne pouvait pas payer les intérêts sur les débetures, L et W, les représentants des demandeurs, ont intenté un recours collectif alléguant que D et divers associés et sociétés apparentées de WCSC avaient manqué à leurs obligations fiduciaires envers les investisseurs par une mauvaise gestion de leurs fonds. Les défendeurs ont demandé à la Cour du Banc de la Reine un jugement déclaratoire et une ordonnance radiant la partie de la déclaration dans laquelle les demandeurs disaient représenter, en vertu de la règle 42 des *Alberta Rules of Court* un groupe de 231 investisseurs. Le juge en chambre a rejeté la demande. La majorité en Cour d'appel a maintenu sa décision mais a accordé aux défendeurs le droit de faire l'interrogatoire préalable de chacun des 231 demandeurs. Les défendeurs ont fait appel devant notre Cour et les demandeurs ont fait un appel incident contre la décision de la cour d'appel d'autoriser l'interrogatoire individuel de chaque membre du groupe.

Arrêt : L'appel est rejeté et le pourvoi incident est accueilli.

En Alberta, la procédure des recours collectifs est régie par la règle 42 des *Alberta Rules of Court*, mais en l'absence de législation complète, les tribunaux doivent combler les lacunes en exerçant leur pouvoir inhérent d'établir les règles de pratique et de procédure applicables aux litiges dont ils sont saisis. Les recours collectifs devraient être autorisés en vertu de la règle 42 lorsque les conditions suivantes sont réunies : (1) le groupe peut être clairement défini; (2) des questions de droit ou de fait sont communes à tous les membres du groupe; (3) le succès d'un membre du groupe signifie le succès de tous; et (4) le représentant proposé représente adéquatement les intérêts du groupe. Si ces conditions sont réunies, le tribunal doit également être convaincu, dans

the benefits of allowing the class action to proceed. 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. 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”. On procedural matters, all potential class members should 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. This should be done before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

In this case, the basic conditions for a class action are met and efficiency and fairness favour permitting it to proceed. The defendants’ contentions against the suit were unpersuasive. While differences exist among investors, the fact remains that the investors raise essentially the same claims requiring resolution of the same facts. If material differences emerge, the court can deal with them when the time comes. Further, 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 to establish breach of fiduciary duty, the court may then consider whether the class action should continue. 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.

Finally, to allow individualized discovery at this stage of the proceedings would be premature. The defendants should be allowed to examine the representative plaintiffs as of right but examination of other class members

l’exercice de son pouvoir discrétionnaire, qu’il n’existe pas de considérations défavorables qui l’emportent sur les avantages que comporte l’autorisation d’un recours collectif. Le tribunal devrait prendre en considération les avantages que le recours collectif offre dans les circonstances de l’affaire ainsi que les injustices qu’il peut provoquer. En fin de compte, le tribunal doit concilier efficacité et équité. La nécessité de concilier efficacité et équité démentit l’idée qu’un recours collectif ne devrait être radié que lorsque le vice est « évident et manifeste ». En matière de procédure, tous les participants possibles devraient être informés de l’existence de la poursuite, des questions communes que la poursuite cherche à résoudre ainsi que du droit de chaque membre du groupe de se retirer, et ce avant que ne soit rendue une décision pouvant avoir une incidence, défavorable ou non, sur les intérêts des membres du groupe. Le tribunal conserve le pouvoir discrétionnaire de déterminer comment les questions individuelles devraient être abordées, une fois que les questions communes ont été résolues. Sans législation complète en matière de recours collectif, les tribunaux doivent régler les complications procédurales cas par cas, de manière souple et libérale, en cherchant à concilier efficacité et équité.

En l’espèce, les conditions essentielles à l’exercice d’un recours collectif sont réunies et l’efficacité et l’équité militent en faveur de son autorisation. Les arguments des défendeurs contre le recours ne sont pas convaincants. Si des différences existent entre les investisseurs, le fait est qu’ils ont essentiellement les mêmes revendications qui exigent la résolution des mêmes faits. Si des différences importantes surviennent, le tribunal peut régler la question le moment venu. De plus, on ne devrait pas interdire un recours collectif en raison de l’incertitude relative à la résolution de questions communes à tous les membres du groupe. Si on juge que les investisseurs doivent faire la preuve d’un lien de confiance individuel pour établir le manquement aux obligations fiduciaires, le tribunal peut alors décider si le recours collectif doit ou non se poursuivre. Cela s’applique aussi à l’argument selon lequel des défenses différentes seront invoquées envers différents membres du groupe. Cette simple possibilité n’interdit pas le recours collectif. Si différentes défenses sont invoquées, le tribunal peut alors résoudre le problème ou retirer l’autorisation du recours collectif.

Enfin, il serait prématuré d’autoriser l’interrogatoire préalable individuel à cette étape-ci. Les défendeurs devraient être autorisés à interroger les représentants des demandeurs comme ils en ont le droit, mais l’interroga-

should be available only by order of the court, upon the defendants showing reasonable necessity.

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

toire des autres membres du groupe ne devrait être autorisé que par ordonnance de la cour, si les défendeurs prouvent que cela est raisonnablement nécessaire.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No.1364 (QL), 1998 ABCA 392, dismissing an appeal from a decision of the Court of Queen's Bench (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Appeal dismissed and cross-appeal allowed.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No. 1364 (QL), 1998 ABCA 392, qui a rejeté un appel d'une décision de la Cour du Banc de la Reine (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Pourvoi rejeté et pourvoi incident accueilli.

Barry R. Crump, Brian Beck and David C. Bishop, for the appellants/respondents on cross-appeal.

Barry R. Crump, Brian Beck et David C. Bishop, pour les appelants/intimés au pourvoi incident.

Hervé H. Durocher and Eugene J. Erler, for the respondents/appellants on cross-appeal.

Hervé H. Durocher et Eugene J. Erler, pour les intimés/appelants au pourvoi incident.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

THE CHIEF JUSTICE — 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.

LE JUGE EN CHEF — Nous sommes appelés en l'espèce à décider dans quels cas un recours collectif peut être exercé. Le recours collectif existe sous une forme ou une autre depuis des siècles, mais son importance s'est accrue récemment. Il peut fournir le meilleur moyen d'aboutir à une solution juste et efficace, en particulier dans des affaires complexes mettant en jeu les intérêts d'un grand nombre de personnes. Cependant, en l'absence de disposition législative, beaucoup d'incertitude demeure quant aux conditions dans lesquelles un tribunal devrait autoriser l'exercice d'un recours collectif.

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc. (“WCSC”), 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 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

Les demandeurs souhaitaient immigrer au Canada. Pour être admissibles, dans le cadre du Programme d’immigration des gens d’affaires établi par le gouvernement canadien, ils ont investi dans la société Western Canadian Shopping Centres Inc. (« WCSC »). Ils ont perdu de l’argent et ont intenté un recours collectif. Les défendeurs (appelants) contestent l’opportunité du recours collectif et demandent à la Cour de le radier. Pour les motifs qui suivent, je conclus que les demandeurs peuvent exercer un recours collectif.

I. Les faits

Les demandeurs Muh-Min Lin et Hoi-Wah Wu, ainsi que 229 autres investisseurs, ont participé au Programme d’immigration des gens d’affaires d’Emploi et Immigration Canada en achetant des débetures de WCSC. WCSC a été constituée en société par Joseph Dutton, son unique actionnaire, dans le but de [TRADUCTION] « faciliter pour les investisseurs, leurs conjoints et leurs enfants jamais mariés l’obtention du statut de résident permanent au Canada ».

WCSC sollicite des fonds dans deux offres [TRADUCTION] « d’investissement dans des terrains situés dans la province de la Saskatchewan en vue de développer des biens productifs à usage commercial, non résidentiel ». Les notices d’offre prévoient que les produits de la souscription seront déposés auprès d’un dépositaire légal, plus tard désigné comme La Compagnie Trust Royal (« Trust Royal »), et seront remis à WCSC sous certaines conditions, modifiées par la suite.

Le litige découle d’événements survenus après le dépôt des fonds des investisseurs auprès de Trust Royal. En mai 1990, WCSC conclut une convention d’achat et de développement (« CAD ») avec Claude Resources Inc. (« CRI »), aux termes de laquelle WCSC achète à CRI, pour la somme de 5 550 000 \$, les droits sur un bail de surface visant des terres publiques adjacentes aux gisements d’or « Seabee » de CRI dans le Nord de la Saskatchewan. WCSC accepte également de s’engager à verser 16,5 millions de dollars supplémentaires pour des améliorations de surface et pour la construction d’une usine de traitement de l’or, qui appar-

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.

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.

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.

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

tiendra à WCSC. Une convention de bail, signée en même temps que la CAD, prévoit la location à CRI de l'usine de traitement de l'or et des installations connexes qui ne sont pas encore construites, avec les terrains de surface. Les paiements que CRI doit effectuer en vertu de cette convention de bail équivalent aux versements d'intérêts semestriels exigés de WCSC relativement aux investisseurs.

Pour financer les obligations de WCSC selon la CAD conclue avec CRI, Dutton demande à Trust Royal d'émettre des débentures pour un montant total en principal de 22 050 000 \$ à un sous-ensemble d'investisseurs qui ont déjà contribué à cette étape. Trust Royal émet donc des débentures de « série A » à 142 investisseurs. Après l'émission des débentures, WCSC distribue une lettre d'information à ses investisseurs qui décrit l'investissement dans CRI.

Dans une série distincte d'opérations effectuées vers la même époque, Dutton et CRI concluent une entente aux termes de laquelle (1) Dutton transfère dans les faits à CRI 49 pour 100 de ses actions dans WCSC; (2) CRI verse à Dutton 1,6 million de dollars comptant; (3) CRI consent à Dutton un prêt sans recours de 1,6 million de dollars; (4) Dutton conclut un contrat de travail avec CRI pour un salaire annuel de 50 000 \$; et (5) CRI et la société de gestion de Dutton, J.M.D. Management Ltd., signe un contrat de gestion de 200 000 \$ par an. Il semble que WCSC n'ait pas envoyé à ses investisseurs de lettre décrivant cette série d'opérations.

Au cours des mois suivants, Dutton avance des fonds additionnels à CRI et demande à Trust Royal d'émettre des débentures correspondantes. Les débentures de série E émises en décembre 1990 (montant total en principal de 2,56 millions de dollars), et les débentures de série F émises en mai 1991 (montant total en principal de 9,45 millions de dollars) sont particulièrement importantes dans le litige. Quand les débentures de série E sont émises, les débentures de séries A et E sont regroupées, de sorte que les investisseurs de ces séries ont acquis un droit au prorata sur la garantie totale engagée relativement aux deux séries. Quand les

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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 Muh-Min Lin and Hoi-Wah Wu 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.

déventures de série F sont émises, la garantie pour cette série est regroupée avec la garantie qui a été engagée relativement aux déventures de séries A et E. Il semble qu'après l'émission des séries E et F, WCSC ait distribué aux investisseurs des lettres les en informant, comme elle l'avait fait après l'émission des déventures de série A.

En décembre 1991, CRI annonce qu'elle ne peut pas payer les intérêts échus pour les déventures de séries A, E et F et Muh-Min Lin et Hoi-Wah Wu intentent la présente action. Le fondement de la plainte est que Dutton et divers conseillers et sociétés apparentées de WCSC ont manqué à leurs obligations fiduciaires envers les investisseurs par leur mauvaise gestion et le mauvais placement de leurs fonds.

II. Dispositions législatives

Alberta Rules of Court, Alta. Reg. 390/68

[TRADUCTION]

42 Lorsque de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée, une ou plusieurs d'entre elles peuvent poursuivre, être poursuivies ou être autorisées par la cour à agir en défense au nom ou pour le compte de toutes.

129(1) À toute étape des procédures, la cour peut ordonner que soit radié ou modifié un acte de procédure dans une action pour le motif

- a) qu'il ne révèle aucune cause d'action ou de défense, selon le cas,
- b) qu'il est scandaleux, frivole ou vexatoire,
- c) qu'il peut nuire à l'instruction équitable de l'action, ou encore la gêner ou la retarder,
- d) qu'il constitue par ailleurs un abus de procédure

et elle peut ordonner la suspension ou le rejet de l'action ou rendre un jugement en conséquence.

(2) Aucune preuve n'est admissible à l'égard d'une demande présentée en vertu de l'alinéa (a) du paragraphe (1).

(3) La présente règle, dans la mesure où elle est applicable, s'applique à un avis introductif d'instance et à une requête.

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

The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 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.

On the first issue, the chambers judge relied on the decision of Master Funduk in 353850 *Alberta Ltd. v. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

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. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774. He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

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

187 La personne pour le compte de qui une action est intentée ou contestée ou le cédant d'un droit d'action qui a donné lieu à l'action sont considérés comme partie à l'action aux fins de la communication de documents.

201 Le membre d'une entreprise qui est une partie et la personne pour le compte de qui une action est intentée ou contestée sont considérés comme partie à l'action aux fins de l'interrogatoire.

III. Décisions

Les appelants demandent à la Cour du Banc de la Reine de l'Alberta (1996), 41 Alta. L.R. (3d) 412, un jugement déclaratoire et une ordonnance radiant la partie de la déclaration modifiée dans laquelle les particuliers demandeurs disent représenter un groupe de 231 investisseurs, en vertu de la règle 42 des *Alberta Rules of Court*. Le juge en chambre formule quatre questions : (1) La cour a-t-elle le pouvoir en vertu de la règle 42 de radier la demande des investisseurs d'intenter une action en qualité de représentants? (2) La cour doit-elle tenir seulement compte de la déclaration modifiée? (3) Quelle est la norme de preuve exigée pour que la cour exerce son pouvoir discrétionnaire de radier la demande de recours collectif? (4) Cette norme est-elle respectée en l'espèce?

Sur la première question, le juge en chambre, citant la décision du protonotaire Funduk dans 353850 *Alberta Ltd. c. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL), juge que la règle 42 donne à la cour le pouvoir de radier une demande visant à intenter une action en qualité de représentant.

Sur la deuxième question, le juge en chambre conclut que la cour n'est pas tenue de limiter son examen aux actes de procédure, se fondant sur la décision 353850 *Alberta*, précitée, et sur la décision de la Cour suprême de la Colombie-Britannique dans *Shaw c. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774. Il conclut toutefois que la résolution du litige dont il est saisi n'exige pas de recourir à la preuve par affidavit.

Sur la troisième question, le juge en chambre est d'avis que la cour ne devrait radier un recours collectif aux termes de la règle 42 que s'il est [TRA-

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“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. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

DUCTION] « tout à fait clair », « hors de tout doute » ou « évident et manifeste » que la demande est viciée — critère appliqué aux demandes de radiation d’actes de procédure ne révélant aucune demande raisonnable : *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959.

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 (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.

Sur la dernière question, le juge en chambre, appliquant le critère du caractère « évident et manifeste », conclut que la déclaration modifiée n’est pas viciée en regard de la règle 42 et satisfait aux exigences énoncées dans *Korte c. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (C.A.) : (1) le groupe peut être défini clairement et précisément; (2) les principales questions de droit et de fait doivent être les mêmes; (3) une issue favorable à un demandeur signifie nécessairement une issue favorable à tous les membres du groupe de demandeurs; et (4) le règlement du litige ne doit pas exiger l’examen individuel des revendications de chaque membre du groupe. Cependant, il laisse au juge de première instance le soin de réexaminer la question.

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. 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 *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 2 S.C.R. 1069, 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.

Le juge Russell au nom de la majorité de la Cour d’appel de l’Alberta rejette l’appel, le juge Picard étant dissidente : (1998), 73 Alta. L.R. (3d) 227. La majorité rejette l’argument selon lequel le juge en chambre aurait dû régler de façon définitive la question de la règle 42 plutôt que d’en laisser décider le juge de première instance, en citant l’arrêt *Bande indienne Oregon Jack Creek c. Compagnie des chemins de fer nationaux du Canada*, [1989] 2 R.C.S. 1069, dans lequel notre Cour a laissé le juge de première instance décider si les demandeurs étaient autorisés à poursuivre pour le compte d’un groupe plus important. La majorité rejette également l’argument selon lequel les investisseurs doivent faire la preuve d’un lien de confiance individuel pour obtenir gain de cause. Elle accorde toutefois aux défendeurs le droit à l’interrogatoire préalable de chacun des 231 demandeurs au motif que la règle 201, interprétée de concert avec la règle 187, autorise l’interrogatoire préalable de toute personne pour le compte de qui l’action est intentée ou contestée et qu’il ne devrait pas être interdit aux défendeurs d’élaborer un argument fondé sur le véritable lien de confiance simplement parce qu’il est spéculatif.

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 *Oregon Jack Creek*, 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 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 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” (p. 237).

IV. Issues

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*

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

Le juge Picard aurait accueilli l’appel. À son avis, le juge en chambre a eu tort de renvoyer la question au juge de première instance parce que, contrairement à *Oregon Jack Creek*, l’affaire est limitée et que [TRADUCTION] « la cour disposait d’une preuve importante qui lui permettait de prendre une décision » (p. 235). Le besoin de faire la preuve d’un lien de confiance individuel est simplement l’un des nombreux problèmes auxquels les investisseurs auront à faire face s’ils sont autorisés à tenter un recours collectif. Citant les arrêts de notre Cour *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, et *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, elle conclut que [TRADUCTION] « [l’]étendue de l’obligation fiduciaire dans une affaire donnée exige l’examen rigoureux des faits, en particulier de tout contrat entre les parties » (p. 237). Elle juge que [TRADUCTION] « [l]a responsabilité de la preuve incombant aux investisseurs ne peut pas être assumée par un recours collectif, ni par l’attribution d’un droit à l’interrogatoire préalable des 229 autres parties à l’action » (p. 237).

IV. Questions en litige

1. Les tribunaux d’instance inférieure ont-ils appliqué le bon critère pour décider si les investisseurs satisfaisaient aux exigences du recours collectif en vertu de la règle 42?
2. Les tribunaux d’instance inférieure ont-ils fait erreur en rejetant la requête en radiation en vertu de la règle 42?
3. Si le recours collectif est autorisé, les défendeurs devraient-ils avoir droit à l’interrogatoire préalable et à la communication des documents de tous les membres du groupe?

V. Analyse

A. *L’historique et le rôle des recours collectifs*

Le recours collectif a pris naissance devant les tribunaux anglais d’equity à la fin du XVII^e siècle et au début du XVIII^e. Les cours de common law s’intéressaient principalement aux litiges individuels entre demandeurs et défendeurs. En revanche, les cours d’equity appliquaient la règle de la jonction obligatoire d’instances qui exigeait que

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to be made parties. The aim of the courts of equity was to render “complete justice” — that is, to “arrang[e] all the rights, which the decision immediately affects”: F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2nd ed. 1847), at p. 3; see also C. A. Wright, A. R. Miller and M. K. Kane, *Federal Practice and Procedure* (2nd ed. 1986), at § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at § 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.

toute personne ayant un intérêt dans l'affaire devienne partie au litige. Le but des cours d'équité était de rendre [TRADUCTION] « justice intégralement » — c'est-à-dire de « statuer sur tous les droits que la décision touche directement » : F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2^e éd. 1847), p. 3; voir également C. A. Wright, A. R. Miller et M. K. Kane, *Federal Practice and Procedure* (2^e éd. 1986), par. 1751; J. Story, *Equity Pleadings* (10^e éd. 1892), par. 76a. La règle de la jonction obligatoire d'instances [TRADUCTION] « permettait à la cour d'examiner tous les aspects du litige et donc de s'assurer que nul ne serait lésé par sa décision sans avoir eu la possibilité de se faire entendre » : J. A. Kazanjian, « Class Actions in Canada » (1973), 11 *Osgoode Hall L.J.* 397, p. 400. La règle avait également l'avantage d'éviter la multiplication des procédures.

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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, 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 made parties” (p. 265); see also Kazanjian, *supra*, at p. 401; G. T. Bispham, *The Principles of Equity* (9th ed. 1916), 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 Mone-

La règle de la jonction obligatoire d'instances s'est finalement avérée inadéquate. Appliquée aux conflits entre tenants et propriétaires terriens ou entre pasteurs et paroissiens, elle fermait la porte des tribunaux à des parties intéressées mais trop nombreuses pour être jointes. Les tribunaux d'équité ont réagi en assouplissant la règle de la jonction obligatoire d'instances lorsque son respect strict donnerait lieu à une injustice. Il en a résulté le recours collectif. Par exemple, dans *Chancey c. May* (1722), Prec. Ch. 592, 24 E.R. 265, des associés ont été autorisés à intenter une action en leur propre nom et au nom de 800 autres associés pour détournement de fonds par d'anciens trésoriers et gestionnaires de la société. La cour a autorisé l'action parce qu'[TRADUCTION] « elle était présentée en leur propre nom, et aux noms de tous les autres propriétaires de la même entreprise, sauf les défendeurs, et donc tous les autres étaient en réalité des parties », et parce qu'« il serait impossible qu'ils soient tous nommément parties, et il y aurait constamment des annulations pour cause de décès ou autres raisons, et que justice ne serait pas rendue si tous étaient parties à l'action » (p. 265); voir également Kazanjian, *loc. cit.*, p. 401; G. T. Bispham, *The Principles of Equity* (9^e éd. 1916), par. 415; S. C. Yeazell, « Group Litigation and Social Context: Toward a History of the Class

tary Relief in Canada: Formalism or Function?” (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

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 (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

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.

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, 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 cir-

Action » (1977), 77 *Colum. L. Rev.* 866, p. 867 et 872; J. K. Bankier, « Les recours collectifs au Canada pour obtenir le dégrèvement financier : formalisme ou fonction? » (1984), 4 *Windsor Y.B. Access Just.* 229, p. 236.

Le recours collectif s’est révélé utile dans les litiges commerciaux de l’Angleterre préindustrielle. La société à responsabilité limitée moderne n’existait pas, et les groupes de gens d’affaires n’avaient aucune existence juridique indépendante. Pour satisfaire à la règle de la jonction obligatoire d’instances, il aurait fallu qu’un plaignant traduisse devant la cour chaque membre du groupe. Le recours collectif a réglé cette difficulté : voir Kazanjian, *loc. cit.*, p. 401; Yeazell, *loc. cit.*, p. 867; *City of London c. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (qui a autorisé le demandeur à intenter une action contre des fiduciaires pour des arriérés de loyer sans que les bénéficiaires de la fiducie soient joints comme parties à l’action).

Le recours collectif exigeait que les membres du groupe aient un intérêt commun. Une grande partie des premiers recours collectifs ont pris la forme d’« actes de conciliation » (*bills of peace*), qui pouvaient être exercés quand les particuliers intéressés étaient nombreux, quand tous les membres du groupe avaient un intérêt commun dans la question à trancher et quand les représentants pouvaient défendre équitablement les intérêts de tous les membres du groupe : voir Wright, Miller et Kane, *op. cit.*, par. 1751; Z. Chafee, *Some Problems of Equity* (1950), p. 201; T. A. Roberts, *The Principles of Equity* (3^e éd. 1877), p. 389-392; Bispham, *op. cit.*, par. 417.

Les tribunaux d’équité ont adopté une démarche libérale et souple pour décider si un recours collectif pouvait être exercé. Ils ont [TRADUCTION] « toujours recherché un bon équilibre entre équité et efficacité » : Kazanjian, *loc. cit.*, p. 411. Comme le dit *Wallworth c. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, p. 244, [TRADUCTION] « la cour a le devoir d’adapter sa pratique et sa procédure à l’état actuel de la société, et non pas, en raison d’un respect trop strict de règles et formalités, adoptées

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cumstances, 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 action, 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*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.)). 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

dans d’autres circonstances, de refuser de rendre justice, et d’appliquer des droits pour lesquels il n’existe pas d’autres recours ».

La démarche souple et libérale envers les recours collectifs a régné jusqu’à la fusion de la common law et de l’équité par la *Supreme Court of Judicature Act, 1873* (R.-U.), 36 & 37 Vict., ch. 66, et l’adoption de la règle 10 des *Rules of Procedure* :

[TRADUCTION]

10. Lorsque de nombreuses parties ont le même intérêt dans une action, l’une ou plusieurs de ces parties peuvent poursuivre ou être poursuivies en justice, ou peuvent être autorisées par la cour à contester une telle action au nom ou pour le compte de toutes les parties ayant cet intérêt.

Quoique les premières décisions après l’adoption des nouvelles règles aient maintenu cette démarche libérale envers les recours collectifs (voir, par ex., *Duke of Bedford c. Ellis*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. c. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.)), des décisions postérieures ont parfois suivi une démarche restrictive (voir, par ex., *Markt & Co. c. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.)). Ce fait ajouté à l’usage répandu de la société à responsabilité limitée a eu pour conséquence de faire diminuer le nombre de recours collectifs.

Le recours collectif n’a toutefois pas été oublié pour toujours. De nouvelles conditions apparues dans la deuxième moitié du XX^e siècle ont une nouvelle fois prouvé son utilité. La production et la consommation de masse ont ravivé le problème qui avait motivé la création du recours collectif au XVIII^e siècle — le problème de nombreux poursuivants ayant la même réclamation. Comme au XVIII^e siècle, l’exigence d’une représentation individuelle aurait souvent fait obstacle à des poursuites. Et, comme au XVIII^e siècle, le recours collectif a fourni la solution.

Le recours collectif joue un rôle important dans le monde d’aujourd’hui. La montée de la production de masse, la diversification de la propriété commerciale, la venue des conglomerats, et la prise de conscience des fautes environnementales

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.

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.

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;

ont tous contribué à sa croissance. Un produit défectueux peut être vendu à de nombreux consommateurs. Une mauvaise gestion de société peut occasionner des pertes à d'innombrables actionnaires. Des politiques discriminatoires peuvent toucher des catégories entières d'employés. La pollution peut affecter des citoyens à travers tout le pays. Des conflits comme ceux-ci opposent un important groupe de plaignants à l'auteur présumé du méfait. Il arrive que des plaignants se trouvent dans une situation identique par rapport aux défendeurs. Dans d'autres cas, un aspect important de leur revendication est commun à toutes les plaintes. Le recours collectif fournit un moyen de résoudre efficacement de tels litiges d'une manière équitable pour toutes les parties.

Les recours collectifs procurent trois avantages importants sur une multiplicité de poursuites individuelles. Premièrement, par le regroupement d'actions individuelles semblables, les recours collectifs permettent de faire des économies au plan judiciaire en évitant la duplication inutile de l'appréciation des faits et de l'analyse du droit. Les gains en efficacité ainsi réalisés libèrent des ressources judiciaires qui peuvent être affectées à la résolution d'autres conflits, et peuvent également réduire le coût du litige à la fois pour les demandeurs (qui peuvent partager les frais) et pour les défendeurs (qui contestent les poursuites une seule fois) : voir W. K. Branch, *Class Actions in Canada* (1998), par. 3.30; M. A. Eizenga, M. J. Peerless et C. M. Wright, *Class Actions Law and Practice* (1999), par. 1.6; Bankier, *loc. cit.*, p. 230-231; Commission de réforme du droit de l'Ontario, *Report on Class Actions* (1982), p. 118-119.

Deuxièmement, comme les frais fixes peuvent être divisés entre un grand nombre de demandeurs, les recours collectifs donnent un meilleur accès à la justice en rendant économiques des poursuites qui auraient été trop coûteuses pour être intentées individuellement. Sans les recours collectifs, la justice n'est pas accessible à certains demandeurs, même pour des réclamations solidement fondées. Le partage des frais permet de ne pas laisser certains préjudices sans recours : voir Branch, *op. cit.*,

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Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

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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*

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In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, *Federal Rules 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

par. 3.40; Eizenga, Peerless et Wright, *op. cit.*, par. 1.7; Bankier, *loc. cit.*, p. 231-232; Commission de réforme du droit de l’Ontario, *op. cit.*, p. 119-122.

Troisièmement, les recours collectifs servent l’efficacité et la justice en empêchant des malfaisants éventuels de méconnaître leurs obligations envers le public. Sans recours collectifs, des personnes qui causent des préjudices individuels mineurs mais répandus pourraient négliger le coût total de leur conduite, sachant que, pour un demandeur, les frais d’une poursuite dépasseraient largement la réparation probable. Le partage des frais diminue le coût des recours en justice et dissuade donc les défendeurs éventuels qui pourraient autrement présumer que de petits méfaits ne donneraient pas lieu à un litige : voir « 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, p. 1809-1810; voir Branch, *op. cit.*, par. 3.50; Eizenga, Peerless et Wright, *op. cit.*, par. 1.8; Bankier, *loc. cit.*, p. 232; Commission de réforme du droit de l’Ontario, *op. cit.*, p. 11 et 140-146.

B. *Le critère applicable aux recours collectifs*

En reconnaissance de l’importance moderne du recours collectif, nombre d’autorités législatives ont adopté une législation complète en cette matière. Aux États-Unis, la *Federal Rules of Civil Procedure*, 28 U.S.C.A. § 23 (adoptée en 1938 et modifiée de façon importante en 1966), porte sur des aspects de la pratique du recours collectif, y compris l’accréditation des groupes, les avis et les règlements. Les règles de procédure anglaises de 1999 contiennent des dispositions détaillées régissant les litiges de groupe : Royaume-Uni, *Civil Procedure Rules 1998*, SI 1998/3132, règles 19.10-19.15. Au Canada, les provinces du Québec, de l’Ontario et de la Colombie-Britannique ont adopté des régimes législatifs complets sur la pratique du recours collectif : voir pour le Québec, *Code de procédure civile*, L.R.Q., ch. C-25, livre IX; pour l’Ontario, *Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6; pour la Colombie-Britannique, *Class Proceedings Act*, R.S.B.C. 1996, ch. 50.

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.

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.

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.

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

D’autres provinces canadiennes, dont l’Alberta et le Manitoba, envisagent le même type de lois : voir Commission de réforme du droit du Manitoba, Rapport #100, *Class Proceedings* (janvier 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (décembre 2000); voir aussi R. Rogers, « Vers une loi uniforme sur le recours collectif », Annexe O du Compte-rendu de la réunion de 1995 de la Conférence pour l’harmonisation des lois au Canada.

En l’absence de règles de procédure complètes en matière de recours collectif, les règles provinciales fondées sur la règle 10 (annexe) de la *Supreme Court of Judicature Act, 1873* s’appliquent. C’est le cas en Alberta, où la procédure en matière de recours collectif est régie par la règle 42 des *Alberta Rules of Court* :

[TRADUCTION]

42 Lorsque de nombreuses personnes ont un intérêt commun dans l’objet de l’action projetée, une ou plusieurs d’entre elles peuvent poursuivre, être poursuivies ou être autorisées par la cour à agir en défense au nom ou pour le compte de toutes.

L’intention du législateur albertain est claire. On peut intenter des recours collectifs mais les modalités de leur exercice sont en grande partie déterminées par les tribunaux.

La règle 42 de l’Alberta ne précise pas ce qu’on entend par « nombreuses » ni par « intérêt commun ». Elle n’indique pas quand les membres du groupe autres que les représentants peuvent subir un interrogatoire préalable. Elle ne précise pas non plus comment les membres éventuels du groupe sont avisés de l’action ni comment un tribunal devrait réagir à la possibilité que certains membres éventuels du groupe choisissent de s’en exclure. Elle ne prévoit pas non plus les frais ni la répartition des montants accordés en dommages-intérêts s’ils ont gain de cause.

Il serait clairement préférable de disposer d’un cadre législatif sur ces questions. En l’absence de législation complète, les tribunaux sont contraints de s’en remettre en grande partie à la gestion de dossiers judiciaires individuels pour structurer le recours collectif, ce qui est coûteux en termes de

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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.

ressources judiciaires et ce qui prive les parties de toute certitude avant l’instance quant à leurs droits procéduraux. L’une des plus importantes lacunes du régime albertain actuel est l’absence de disposition d’accréditation préalable. En Colombie-Britannique, en Ontario et au Québec, un recours collectif ne peut être intenté que si le tribunal certifie que le groupe et le représentant satisfont à certaines exigences. En Alberta, par contre, les tribunaux certifient en réalité a posteriori, et seulement après que la partie adverse dépose une requête en annulation. Il serait préférable que l’opportunité d’un recours collectif puisse être déterminée dès le début par des modalités d’accréditation.

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 (C.A.), leave denied [1991] 1 W.L.R. 711n (H.L.); *Newfoundland Association of Public Employees v. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. S.C.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.

En l’absence de législation complète, les tribunaux doivent combler ces lacunes en exerçant leur pouvoir inhérent d’établir les règles de pratique et de procédure applicables aux litiges dont ils sont saisis : *Bell c. Wood*, [1927] 1 W.W.R. 580 (C.S.C.-B.), p. 581-582; *Langley c. North West Water Authority*, [1991] 3 All E.R. 610 (C.A.), autorisation d’appel rejetée [1991] 1 W.L.R. 711n (H.L.); *Newfoundland Association of Public Employees c. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (C.S. 1^{ère} inst. T.N.) W. A. Stevenson et J. E. Côté, *Civil Procedure Guide*, 1996, p. 4. Si souhaitable soit-il d’avoir une législation complète en matière d’exercice des recours collectifs, quand cette législation n’existe pas, les tribunaux doivent décider de l’opportunité du recours collectif et des modalités de son exercice.

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.

Les tribunaux albertains ont entrepris de parer aux lacunes procédurales dans l’arrêt *Korte*, précité, qui prescrit quatre conditions d’exercice du recours collectif : (1) le groupe peut être défini clairement et précisément; (2) les principales questions de fait et de droit doivent être les mêmes; (3) une issue favorable à un demandeur signifie nécessairement une issue favorable à tous; et (4) il n’est pas nécessaire d’examiner individuellement les revendications de chaque demandeur.

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 and Leasing Ltd. v. Deloitte, Haskins and Sells*, [1984]

Les critères de l’arrêt *Korte* sont, dans les grandes lignes, assez similaires à ceux qui sont appliqués dans d’autres ressorts canadiens ne disposant pas de législation complète sur les recours collectifs : voir, par ex., *Ranjoy Sales and Leasing*

4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I.S.C.), at para. 24.

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.

Ltd. c. Deloitte, Haskins and Sells, [1984] 4 W.W.R. 706 (B.R. Man.); *International Capital Corp. c. Schafer* (1995), 130 Sask. R. 23 (B.R.); *Guarantee Co. of North America c. Caisse populaire de Shippagan Ltée* (1988), 86 R.N.-B. (2^e) 342 (B.R.); *Lee c. OCCO Developments Ltd.* (1994), 148 R.N.-B. (2^e) 321 (B.R.); *Van Audenhove c. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (C.S.), par. 7; *Horne c. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R.109 (C.S.Î.-P.-É), par. 24.

Les critères de l’arrêt *Korte* ressemblent également aux critères d’accréditation de groupes prévus dans les lois sur les recours collectifs de la Colombie-Britannique, de l’Ontario et du Québec. Aux termes des lois de la Colombie-Britannique et de l’Ontario, une action sera certifiée comme un recours collectif si (1) les actes de procédure ou l’avis de requête révèlent une cause d’action; (2) il existe un groupe identifiable d’au moins deux personnes qui seraient représentées par le représentant du groupe; (3) les demandes ou les défenses des membres du groupe soulèvent des questions communes (en Colombie-Britannique, [TRADUCTION] « que ces questions communes l’emportent ou non sur des questions touchant seulement certains membres du groupe »); (4) le recours collectif est le meilleur moyen de régler les questions communes; et (5) le représentant du groupe représente équitablement les intérêts du groupe, présente une méthode efficace de faire avancer l’instance et d’aviser les membres du groupe, et n’a pas de conflit d’intérêts avec d’autres membres du groupe en ce qui concerne les questions communes : voir pour l’Ontario, *Loi de 1992 sur les recours collectifs*, par. 5(1), et pour la Colombie-Britannique, *Class Proceedings Act*, par. 4(1). Au Québec, l’exercice d’un recours collectif est autorisé si (1) les recours des membres du groupe soulèvent des questions de droit ou de fait identiques, similaires ou connexes; (2) les faits allégués paraissent justifier les conclusions recherchées; (3) la composition du groupe rend peu pratique la jonction des parties; et (4) le représentant est en mesure d’assurer une représentation adéquate des intérêts des membres du groupe : voir *Code de procédure civile*, art. 1003.

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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, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

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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

Bien qu'il existe des différences entre les critères, il se dégage quatre conditions nécessaires au recours collectif. Premièrement, le groupe doit pouvoir être clairement défini. La définition du groupe est essentielle parce qu'elle précise qui a droit aux avis, qui a droit à la réparation (si une réparation est accordée), et qui est lié par le jugement. Il est donc primordial que le groupe puisse être clairement défini au début du litige. La définition devrait énoncer des critères objectifs permettant d'identifier les membres du groupe. Les critères devraient avoir un rapport rationnel avec les revendications communes à tous les membres du groupe mais ne devraient pas dépendre de l'issue du litige. Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. Il est toutefois nécessaire que l'appartenance d'une personne au groupe puisse être déterminée sur des critères explicites et objectifs : voir Branch, *op. cit.*, par. 4.190-4.207; Friedenthal, Kane et Miller, *Civil Procedure* (2^e éd. 1993), p. 726-727; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (C. Ont. (Div. gén.)), par. 10-11.

Deuxièmement, il faut des questions de fait ou de droit communes à tous les membres du groupe. Les critères de communauté ont toujours été une source de confusion pour les tribunaux. Il faut aborder le sujet de la communauté en fonction de l'objet. La question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition de l'appréciation des faits ou de l'analyse juridique. Une question ne sera donc « commune » que lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. Il n'est pas essentiel que les membres du groupe soient dans une situation identique par rapport à la partie adverse. Il n'est pas nécessaire non plus que les questions communes prédominent sur les questions non communes ni que leur résolution règle les demandes de chaque membre du groupe. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Pour décider si des questions communes motivent un recours collectif, le tribunal peut avoir à évaluer l'importance des questions communes par rapport

each class member with the same particularity as would be required in an individual suit.

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.

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.

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 condi-

aux questions individuelles. Dans ce cas, le tribunal doit se rappeler qu'il n'est pas toujours possible pour le représentant de plaider les demandes de chaque membre du groupe avec un degré de spécificité équivalant à ce qui est exigé dans une poursuite individuelle.

Troisièmement, en ce qui concerne les questions communes, le succès d'un membre du groupe signifie nécessairement le succès de tous. Tous les membres du groupe doivent profiter du succès de l'action, quoique pas nécessairement dans la même mesure. Le recours collectif ne doit pas être autorisé quand des membres du groupe sont en conflit d'intérêts.

Quatrièmement, le représentant du groupe doit adéquatement représenter le groupe. Quand le tribunal évalue si le représentant proposé est adéquat, il peut tenir compte de sa motivation, de la compétence de son avocat et de sa capacité d'assumer les frais qu'il peut avoir à engager personnellement (par opposition à son avocat ou aux membres du groupe en général). Il n'est pas nécessaire que le représentant proposé soit un modèle type du groupe, ni qu'il soit le meilleur représentant possible. Le tribunal devrait toutefois être convaincu que le représentant proposé défendra avec vigueur et compétence les intérêts du groupe : voir Branch, *op. cit.*, par. 4.210-4.490; Friedenthal, Kane et Miller, *op. cit.*, p. 729-732.

Même si les quatre facteurs mentionnés doivent être présents pour autoriser un recours collectif, le fait qu'ils le soient ne signifie pas que le tribunal doit l'autoriser. D'autres facteurs peuvent militer contre l'autorisation de poursuivre par recours collectif. Le défendeur peut souhaiter soulever différentes défenses relativement à différents groupes de demandeurs. Il peut s'avérer nécessaire d'interroger au préalable chaque membre du groupe. Certains membres peuvent soulever des questions importantes qui ne sont pas partagées par tous les membres du groupe. Ou le groupe proposé peut être si petit que la jonction serait une meilleure solution. Lorsqu'il existe de tels facteurs défavorables, le tribunal a le pouvoir discrétionnaire de

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tions 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 prose-

décider si le recours collectif devrait être autorisé, malgré le fait que les conditions essentielles à l’exercice du recours collectif sont remplies.

Les règles en matière de recours collectifs qui ont été adoptées par la Colombie-Britannique et par l’Ontario peuvent aider à déterminer les facteurs qui en général ne constitueraient pas des arguments défavorables à l’autorisation d’un recours collectif. Les deux régimes prévoient que l’autorisation ne devrait pas être refusée parce que, selon le cas, (1) la réparation demandée comporte une demande de dommages-intérêts qui exigerait une évaluation individuelle après le règlement des questions communes; (2) la réparation demandée porte sur des contrats distincts concernant différents membres du groupe; (3) différents membres du groupe cherchent à obtenir des réparations différentes; (4) le nombre de membres du groupe ou l’identité de chacun d’eux ne sont pas connus; (5) le groupe comprend des sous-groupes qui ont des demandes ou des défenses qui soulèvent des questions communes que ne partagent pas tous les membres du groupe : voir pour l’Ontario, *Loi de 1992 sur les recours collectifs*, art. 6; pour la Colombie-Britannique, *Class Proceedings Act*, art. 7; voir également Alberta Law Reform Institute, *op. cit.*, p. 75-76. Le bon sens recommande que ces facteurs ne fassent pas plus obstacle à un recours collectif en Alberta qu’en Ontario ou en Colombie-Britannique.

Quand les conditions nécessaires à un recours collectif sont remplies, le tribunal devrait exercer son pouvoir discrétionnaire de l’interdire pour des raisons défavorables de manière libérale et souple, comme les anciens tribunaux d’équité. Le tribunal devrait prendre en considération les avantages que le recours collectif offre dans les circonstances de l’affaire ainsi que des injustices qu’il peut provoquer. En fin de compte, le tribunal doit concilier efficacité et équité.

La nécessité de concilier efficacité et équité démentit l’idée exprimée par le juge en chambre qu’un recours collectif ne devrait être radié que lorsque le vice est « évident et manifeste ». Contrairement à la règle 129, qui pose la question de savoir s’il y a lieu de poursuivre l’action, la règle

cuted 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 Association*, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in *Hunt, supra*, at pp. 974-75). 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.

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 *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when *Naken* 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 *Naken* 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.

Second, *Naken* 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

42 pose la question de savoir comment la poursuivre. Le critère du caractère « évident et manifeste » est correct quand la radiation entraîne la fin permanente de l’action. Il exprime l’idée qu’un demandeur [TRADUCTION] « ne devrait pas être ‘privé d’un jugement’ à cette toute première étape à moins qu’il ne soit très clair que la cause d’action qu’il invoque n’a aucune chance de succès » : *Drummond-Jackson c. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.), p. 1102 (cité dans *Hunt*, précité, p. 975). Le refus d’un recours collectif en vertu de la règle 42, à l’opposé, ne met pas fin à la demande. Il place seulement les demandeurs dans la situation de toute autre partie qui se présente devant le tribunal à titre individuel. En outre, rien dans les règles de l’Alberta n’indique que les recours collectifs ne devraient être refusés que lorsqu’il est évident et manifeste que l’action ne devrait pas être intentée comme un recours collectif. La règle 42 et les règles analogues dans d’autres provinces ne font qu’énoncer qu’un représentant peut exercer un recours collectif si certaines conditions sont remplies.

46 La nécessité de concilier efficacité et équité démentit aussi l’idée que les recours collectifs devraient être abordés de façon restrictive. Les défendeurs soutiennent que l’arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, empêche d’aborder de manière libérale les recours collectifs. Avec égards, je ne suis pas d’accord. Premièrement, à l’époque de l’arrêt *Naken*, le recours collectif moderne n’était pas une procédure bien établie au Canada. Depuis lors, l’importance du recours collectif comme instrument de procédure dans les litiges modernes est devenue évidente. En fait, la réforme mise en œuvre depuis *Naken* est attribuable pour une large part à la reconnaissance des avantages que les recours collectifs offrent aux parties, à l’organisation judiciaire et à la société : voir, par ex., Commission de réforme du droit de l’Ontario, *op. cit.*, p. 3-4.

47 Deuxièmement, les faits de l’arrêt *Naken* invitent à la prudence. L’action était intentée pour le compte de toutes les personnes qui avaient acheté une voiture neuve de marque Firenza, modèle 1971

Motors had misrepresented the quality of the vehicles and that the vehicles “were not reasonably fit for use” (p. 76). 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.

ou 1972, en Ontario. La plainte disait que General Motors avait présenté de manière inexacte la qualité des voitures et que les voitures [TRADUCTION] « n’étaient pas raisonnablement propres à être utilisé[es] » (p. 76). La déclaration alléguait l’inobservation de la garantie et de la représentation, et sollicitait 1 000 \$ en dommages-intérêts pour chacun des quelque 4 600 demandeurs. Le juge Estey, auteur des motifs unanimes de la Cour, a rejeté le recours collectif. Même si tous les défendeurs avaient les mêmes demandes contre le défendeur, le règlement de ces demandes aurait exigé la présentation d’une preuve et une appréciation des faits individualisées pour établir tant la responsabilité que les dommages-intérêts. Loin d’éviter une duplication inutile, un recours collectif aurait inutilement compliqué le règlement de ce qui s’élevait à 4 600 demandes individuelles.

En résumé, les recours collectifs devraient être autorisés aux termes de la règle 42 de l’Alberta lorsque les conditions suivantes sont remplies : (1) le groupe peut être défini clairement; (2) des questions de droit ou de fait sont communes à tous les membres du groupe; (3) le succès d’un membre du groupe signifie le succès de tous; et (4) le représentant proposé représente adéquatement les intérêts du groupe. Si ces conditions sont remplies, le tribunal doit également être convaincu, dans l’exercice de son pouvoir discrétionnaire, qu’il n’existe pas de considérations défavorables qui l’emportent sur les avantages que comporte l’autorisation d’un recours collectif.

D’autres questions de procédure peuvent se poser. L’une d’elles concerne l’avis. Un jugement ne lie un membre du groupe que s’il a été avisé de la poursuite et a eu la possibilité de s’exclure de la procédure. En l’espèce, la question de savoir ce qui constitue un avis suffisant ne se pose pas. La prudence recommande cependant que tous les participants possibles soient informés de l’existence de la poursuite, des questions communes que la poursuite cherche à résoudre ainsi que du droit de chaque membre du groupe de se retirer, et ce avant que ne soit rendue une décision pouvant avoir une incidence, défavorable ou non, sur les intérêts des membres du groupe.

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.

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*

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

Une autre question de procédure pouvant se poser est la manière d’envisager les questions autres que les questions communes. Le tribunal conserve le pouvoir discrétionnaire de déterminer comment les questions individuelles devraient être abordées, une fois que les questions communes ont été résolues : voir Branch, *op. cit.*, par. 18.10. Les questions individuelles seront généralement tranchées dans des instances individuelles. Toutefois, comme sous le régime des lois de la Colombie-Britannique, de l’Ontario et du Québec, un tribunal peut préciser une procédure spéciale s’il le juge nécessaire ou utile : voir en Ontario, *Loi de 1992 sur les recours collectifs*, art. 25; en Colombie-Britannique, *Class Proceedings Act*, art. 27; au Québec, *Code de procédure civile*, art. 1039.

La variété des recours collectifs fait qu’il est difficile de prévoir toutes les complications procédurales qui peuvent surgir. Sans législation complète en matière de recours collectif, les tribunaux doivent régler les complications procédurales cas par cas. Ils doivent aborder ces problèmes de la même façon qu’ils décident si un recours collectif doit être autorisé : de manière souple et libérale, en cherchant à concilier efficacité et équité.

C. *Les investisseurs ont-ils satisfait à la règle 42?*

Les quatre conditions nécessaires à l’exercice d’un recours collectif sont remplies en l’espèce. Premièrement, le groupe est clairement défini. Les intimés Lin et Wu se représentent eux-mêmes et 229 autres [TRADUCTION] « immigrants-investisseurs [. . .] qui ont chacun investi 150 000 \$ au moins dans un fonds s’élevant au total à 34 065 000 \$, cette somme devant être gérée, administrée et garantie par [. . .] Western Canadian Shopping Centres Inc. ». Il est possible de déterminer qui fait partie du groupe grâce à la preuve documentaire que les parties ont déposée devant la cour. Deuxièmement, des questions communes de fait et de droit unissent tous les membres du groupe. La plainte des investisseurs repose essentiellement sur l’allégation que les défendeurs ont manqué aux obligations fiduciaires qu’ils avaient envers eux. Même si la déclaration modifiée des investisseurs fait état de réclamations fondées sur la négligence et sur la fausse déclaration, l’avocat

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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.

des investisseurs s'est engagé au cours des débats devant notre Cour à abandonner toutes les réclamations ne visant pas l'obligation fiduciaire. Troisièmement, à la présente étape de la procédure, il semble que le règlement de la revendication d'un seul membre concernant le manquement à l'obligation fiduciaire réglerait de fait les revendications de tous les membres du groupe. En raison d'ententes de regroupement des garanties prises par WCSC, chaque investisseur a maintenant un intérêt, proportionnel à son investissement, dans la même garantie sous-jacente. Enfin, les demandeurs sont des représentants appropriés.

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.

Les défendeurs soutiennent que l'action proposée ne peut pas faire l'objet d'un recours collectif parce que : (1) il existe en fait de nombreux groupes de demandeurs; (2) les défendeurs souleveront plusieurs défenses contre différentes causes d'action intentées par différents défendeurs; et (3) afin de l'emporter, les investisseurs doivent faire la preuve d'un véritable lien de confiance de la part de chaque membre du groupe. Je suis d'avis que ces arguments ne sont pas convaincants.

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.

L'argument des défendeurs selon lequel il existe de nombreux groupes de demandeurs n'est pas convaincant. Sans aucun doute, il y a des différences. Des investisseurs différents ont investi à différentes époques, dans des ressorts différents, en se fondant sur des notices d'offre différentes, par le biais de représentants différents, dans différentes séries de débentures, et ont entendu parler des événements sous-jacents par différents documents d'information. Certains investisseurs peuvent disposer de droits de résiliation que d'autres n'ont pas. Il demeure toutefois que les investisseurs soulevant essentiellement les mêmes revendications qui exigent la résolution des mêmes faits. Il est possible qu'en fin de compte émergent différents sous-groupes d'investisseurs qui auront des droits différents contre les défendeurs, cependant cette possibilité ne retire pas le droit des investisseurs de poursuivre collectivement. Si des différences importantes surviennent, le tribunal réglera la question le moment venu.

55 The defendants' contention that the investors should not be permitted to sue as a class because

L'argument des défendeurs selon lequel les investisseurs ne devraient pas être autorisés à

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.

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.

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*

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.

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

intenter un recours collectif parce que chacun d'eux doit démontrer un vrai lien de confiance pour établir un manquement à l'obligation fiduciaire n'est pas convaincant non plus. Dans les dernières décennies, les obligations fiduciaires ont été utilisées dans de nouveaux contextes, et toute la portée de leur utilisation reste à définir plus précisément. Les questions relatives aux obligations fiduciaires en l'espèce sont communes à tous les investisseurs. On ne devrait pas interdire un recours collectif en raison de l'incertitude relative à la résolution de questions communes à tous les membres du groupe. Si on juge que les investisseurs doivent faire la preuve d'un lien de confiance individuel, le tribunal peut alors décider si le recours collectif doit ou non se poursuivre.

Cela s'applique aussi à l'argument selon lequel des défenses différentes seront invoquées envers différents membres du groupe. Cette simple possibilité n'interdit pas le recours collectif. Si différentes défenses sont invoquées, le tribunal peut alors résoudre le problème ou retirer l'autorisation du recours collectif.

Je conclus que les conditions essentielles à l'exercice d'un recours collectif sont remplies et que l'efficacité et l'équité militent en faveur de son autorisation.

D. *Pourvoi incident*

Les investisseurs contestent dans le pourvoi incident l'autorisation par la Cour d'appel de l'interrogatoire préalable individuel de chaque membre du groupe. La Cour d'appel a jugé que les défendeurs ont droit, en vertu des règles 187 et 201, à l'interrogatoire et à l'examen de chaque membre du groupe. Les investisseurs soutiennent que la question de savoir si l'interrogatoire préalable de chaque membre du groupe doit être autorisé est une question qui relève du juge responsable de la gestion de l'instance nommé selon l'avis de pratique 7 des règles de procédure de l'Alberta.

Je conviens qu'il serait prématuré d'accorder l'interrogatoire préalable individuel à cette étape-ci. L'un des avantages du recours collectif est que l'interrogatoire préalable des représentants d'un

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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 and cross-appeal allowed with costs.

Solicitors for the appellant/respondent on cross-appeal The Royal Trust Company: Burnet, Duckworth & Palmer, Calgary.

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Solicitors for the appellants/respondents on cross-appeal Ernst & Young and Alan Lundell: Parlee McLaws, Edmonton.

groupe sera habituellement suffisant et rendra superflu l'interrogatoire de chaque membre du groupe. Les affaires exigeant l'interrogatoire préalable individuel des membres d'un groupe sont l'exception plutôt que la règle. En fait, le besoin de procéder à des interrogatoires préalables individuels peut être un facteur défavorable à l'autorisation du recours collectif.

Je suis d'avis d'autoriser les défendeurs à interroger les représentants des demandeurs comme ils en ont le droit. Par la suite, l'interrogatoire des autres membres du groupe ne devrait être autorisé que par ordonnance de la cour, si les défendeurs prouvent que cela est raisonnablement nécessaire.

VI. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi, d'autoriser les investisseurs à tenter un recours collectif et d'accueillir le pourvoi incident.

Les dépens du pourvoi et du pourvoi incident vont aux intimés.

Pourvoi rejeté et pourvoi incident accueilli avec dépens.

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Procureurs pour l'appellant/intimé au pourvoi incident Arthur Andersen & Co.: Lucas Bowker & White, Edmonton.

Procureurs pour les intimés/appellants au pourvoi incident: Durocher Simpson, Edmonton.

Pearson v. Inco Limited et al.

[Indexed as: Pearson v. Inco Ltd.]

78 O.R. (3d) 641
[2005] O.J. No. 4918
Docket: C42414

Court of Appeal for Ontario,
McMurtry C.J.O., Rosenberg and Gillese JJ.A.
January 19, 2006*

Civil procedure -- Class proceedings -- Environmental law -- Defendant operating refinery in Ontario town and discharging nickel into environment between 1918 and 1984 -- Plaintiff bringing environmental action against defendant alleging that property values in particular part of town were adversely affected by release of 2000 study showing high nickel levels in soil -- Plaintiff seeking certification of action as class proceeding -- Action meeting all requirements for certification.

From 1918 to 1984, the defendant operated a refinery in Port Colborne that processed nickel. In 2000, it was disclosed that the Ministry of the Environment had found higher than expected nickel levels in a soil sample from a property in a low-income area adjacent to and downwind of the refinery (the "Rodney Street area"). The plaintiff lived in the Rodney Street area. He brought an environmental action against the defendant and sought to have it certified as a class proceeding. When the motion was heard, the claim was broad and wide-ranging and included sweeping claims for damages from the alleged adverse health effects from nickel oxide contamination. The proposed class was defined as all persons owning or occupying property since March 26, 1995, in the City of Port Colborne within particular geographic boundaries. The motion was dismissed. The

motion judge found that the claim disclosed a cause of action, but he held that the plaintiff failed to meet the identifiable class requirement for certification as the geographic definition of the proposed class had the effect of arbitrarily both including and excluding areas where the soil contained the same level of nickel of which the plaintiff complained, and as the temporal component was arbitrary since it could exclude persons who had suffered harm but had moved away before 1995. He found that the common issue requirement was met. However, he found that a class proceeding would not advance the goals of judicial economy, access to justice and behaviour modification. The defendant had agreed to participate in a Community Based Risk Assessment ("CBRA") process, under which it would undertake remediation efforts on a "no questions asked" basis depending on the results from the scientific model and individual property characteristics. The motion judge found that the CBRA programme, standing alone, would not be a viable alternative to a class proceeding since the CBRA did not provide compensation, but that the CBRA had to be seen as part of the available alternative procedures, in conjunction with other alternatives such as joinder, test cases and the like. Behaviour modification was unnecessary as the defendant's activities in Port Colborne were the object of active involvement by the Ministry of the Environment, and as the defendant had made commitments to remedy some of the problems caused by the refinery and had funded the CBRA. Finally, the motion judge found that the plaintiff did not satisfy any of the requirements of a representative plaintiff. He was concerned about the plaintiff's limited financial resources, and stated that, absent a commitment from the Class Proceedings Committee to provide funding, a representative plaintiff must have concrete and specific alternative funding arrangements in place and must provide the specifics of those arrangements in the [page642] certification material. He found that the litigation plan was not sufficient as it was long on generalities and short on specifics. He was concerned that the plaintiff might have a conflict with other members of the proposed class as he was a resident of the Rodney Street area and likely had an interest in pursuing the claims in a much more aggressive fashion than other residents less affected by the contamination. The motion was dismissed. The Divisional

Court affirmed the motion judge's decision. The plaintiff appealed.

Held, the appeal should be allowed.

The decision of a motion judge on a certification motion is entitled to substantial deference. However, there had been two important developments since the motion judge's decision that dictated that the decision be overturned. First, the plaintiff had significantly narrowed his claim to a claim for damages for the devaluation of real property values arising from the soil contamination revealed by the release of the study in 2000. Second, recent case law suggested that a more liberal approach should be taken to certification proceedings.

The plaintiff met the identifiable class requirement for certification. Now that the claim had been limited to the decrease in property values, the basis for a finding of geographical arbitrariness disappeared. It is open to a plaintiff to define the class by using geographical boundaries notwithstanding that, of necessity, there will always be an element of arbitrariness in doing so. As reconfigured, the claim did not depend on nickel concentrations on the property of the proposed class members, but on whether their property values were impacted by the 2000 disclosure. The plaintiff had produced evidence that property values in the defined area were negatively impacted after the 2000 disclosure. That was sufficient to show that the class was not unnecessarily broad. The motion judge found that the class was under-inclusive because the evidence showed comparable amounts of contamination outside the defined area. With the change in the nature of the claim, that rationale no longer applied. The principle that a proposed class should not be under-inclusive must be approached with considerable caution. If this principle were applied too strictly, few environmental claims could ever be certified as class proceedings. The very nature of pollution is that its effects are often widespread and diffuse. Finally, the identifiable class requirement was met despite the temporal limitation (which was chosen to avoid limitation period issues). There was a logical connection between the claim and the definition of the class since the appellant now sought to

certify a class of owners whose property values appeared to have been directly impacted by the 2000 disclosures of high levels of nickel on their lands. The class definition would have to be further refined to limit the class to persons owning property since September 20, 2000, when the disclosures were made. The possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

Despite the fact that the claim was now much narrower, the plaintiff had met the common issue requirement.

A class proceeding in this case would have the advantage of judicial economy. The claim now concerned the single issue of the negative impact on property values. The plaintiff had staked his claim on the propositions that public knowledge of nickel contamination in the Port Colborne area had had a detectable impact on property values in that area and that, as the source of the contamination, the defendant had to pay damages to owners whose property values had fallen. Those propositions constituted a substantial element of each class member's claim. If the plaintiff was able to demonstrate this effect, the only individual issue remaining would be for each class member to show the amount of the effect on his or her [page643] own property. Resolution of the common issues would determine the question of the defendant's liability for the nickel pollution and whether knowledge of that pollution impacted on property values in the defined area.

The argument that the CBRA provided an adequate alternative was stronger in some respects now that the plaintiff had limited his claim to the impact on property value, but nevertheless, the existence of the CBRA still did not address the access to justice concerns. The CBRA did not address the core issue of the lawsuit: the alleged widespread damage to land values throughout Port Colborne caused by the past pollution. Remediation was limited to qualifying individual properties with significant contamination. It was open to the class members to argue that it did not address the injury already caused. The continued involvement of the Ministry was not a serious factor in addressing access to justice concerns.

The Ministry's involvement was prospective. It might prevent further contamination in this one location, but there was no suggestion that the Ministry's involvement could address monetary losses from the past pollution.

The motion judge took too narrow a view of the goal of behaviour modification. Modification of behaviour does not only look at the particular defendant, but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well suited to class proceedings. It was an error for the motion judge to take into account the possibility that the defendant might become less co-operative if the action were certified, thus delaying the implementation of the CBRA. Property owners are not required to abandon their legal rights and their right to be made whole in order to buy the co-operation of a defendant they say has caused widespread harm to the community. A class proceeding could achieve the goal of behaviour modification in view of the other inadequate alternatives. The narrower claim met the preferable procedure requirement.

The plaintiff met the three requirements for a representative plaintiff: fair and adequate representation, a workable litigation plan, and no conflict of interest on the common issues. The motion judge erred in his approach to this question. It was an error in principle to hold that it was incumbent on the plaintiff to have concrete and specific alternative funding arrangements in place and to provide the specifics of those arrangements in the certification material. There is nothing in the legislation itself that imposes such a rigorous requirement on a plaintiff. The capacity of the representative plaintiff to fund the litigation is merely one factor in determining whether the plaintiff can adequately represent the class. The motion judge also took an unreasonably rigid view by requiring that all the details for the litigation be within the four corners of the plan itself. Finally, the motion judge erred in finding that the plaintiff had a conflict of interest because he was likely to be more aggressive than

other residents of Port Colborne who were less affected by the pollution. It would be an odd result if the plaintiff's obvious interest in vigorously prosecuting the claim was seen as disqualifying him as the representative plaintiff. In any event, it was mere speculation that the plaintiff's keen interest in pursuing the litigation would lead to a conflict of interest. If it turned out that he was not properly representing the interests of the class, the court could take steps at that point. The motion judge also relied upon the fact that an interested citizen and supporter of the CBRA was unable to obtain assistance from the plaintiff's counsel in putting his position before the court. However, the conflict of interest with which s. 5(1)(e)(iii) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 is concerned is an interest in conflict with the interests of [page644] other class members on the common issues. There was no evidence to suggest that the difference of opinion about the efficacy of the CBRA represented a conflict of interest on the common issues.

Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 192 O.A.C. 239, 247 D.L.R. (4th) 667, [2005] 1 C.N.L.R. 8, 27 C.C.L.T. (3d) 50, 2 C.P.C. (6th) 199 (C.A.), supp. Reasons, [2005] O.J. No. 733, 7 C.P.C. (6th) 137 (C.A.); Mortson v. Ontario Municipal Employees Retirement Board, [2004] O.J. No. 4338, [2004] O.T.C. 920, 43 C.C.P.B. 102, 4 C.P.C. (6th) 115, 134 A.C.W.S. (3d) 766 (S.C.J.), apld

Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27, 31 B.L.R. (3d) 214, 23 C.L.R. (3d) 1, 31 C.P.C. (5th) 40 (C.A.), supp. Reasons, [2003] O.J. No. 1162, 223 D.L.R. (4th) 158 (C.A.); Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 56 O.R. (3d) 214n, 205 D.L.R. (4th) 19, 277 N.R. 51, 24 M.P.L.R. (3d) 9, 2001 SCC 68, 13 C.P.C. (5th) 1, affg (1999), 46 O.R. (3d) 257, [1999] O.J. No. 4747, 181 D.L.R. (4th) 426, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244 (C.A.), affg (1998), 42 O.R. (3d) 473, [1998] O.J. No. 5267, 168 D.L.R. (4th) 760, 31 C.P.C. (4th) 64 (Div. Ct.); Rumley v. British Columbia, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 205 D.L.R. (4th) 39, 275 N.R. 342, [2001] 11 W.W.R. 207, J.E. 2001-1970, 157 B.C.A.C. 1, 95 B.C.L.R. (3d) 1, 10

C.C.L.T. (3d) 1, 9 C.P.C. (5th) 1, 108 A.C.W.S. (3d) 775, *consd*

Other cases referred to

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, [1995] O.J. No. 16, 121 D.L.R. (4th) 496, 31 C.P.C. (3d) 197 (Div. Ct.); *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728, [2005] O.J. No. 842, 250 D.L.R. (4th) 756, [2005] O.T.C. 160, 9 C.P.C. (6th) 175, 137 A.C.W.S. (3d) 686 (S.C.J.); *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766, [2002] O.T.C. 459, 23 C.P.C. (5th) 360, 115 A.C.W.S. (3d) 19 (S.C.J.); *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231, [2004] O.J. No. 19, 40 C.C.E.L. (3d) 24, 44 C.P.C. (5th) 376 (S.C.J.); *Macleod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331, [2003] O.T.C. 71, 28 C.P.C. (5th) 160, 120 A.C.W.S. (3d) 13 (S.C.J.); *Markson v. MBNA Canada Bank* (2004), 71 O.R. (3d) 741, [2004] O.J. No. 3226, [2004] O.T.C. 692, 48 B.L.R. (3d) 129, 132 A.C.W.S. (3d) 638 (S.C.J.); *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, 37 L.J. Ex. 161, 19 L.T. 220, 33 J.P. 70; *Southwestern Refining Co. v. Bernal* [cf1], 22 S.W.3d 425, 43 Tex. Sup. 706 (2000); *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. *Western Canadian Shopping Centres Inc. v. Dutton*)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 10, 14, 24

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 14 [as am.]

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

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B

Authorities referred to

Fridman, G.H.L., *The Law of Torts in Canada*, 2nd ed.

(Scarborough: Thomson Carswell, 2002)

APPEAL from the order of the Divisional Court (O'Driscoll, Then and MacKenzie JJ.), [2004] O.J. No. 317, 6 C.E.L.R. (3d) 117 (S.C.J.) and a costs order reported at [2004] O.J. No. 3074, 10 C.E.L.R. (3d) 307 (S.C.J.) [page645] dismissing an appeal from the orders of Nordheimer J., [2002] O.J. No. 3532, 50 C.E.L.R. (N.S.) 88 (S.C.J.) and [2002] O.J. No. 2764, 33 C.P.C. (5th) 564 (S.C.J.) dismissing a motion to certify an action as a class proceeding.

Kirk M. Baert, Eric Gillespie and Celeste B. Poltak, for appellant.

Alan Lenczner, Larry P. Lowenstein and Mahmud Jamal, for respondent, Inco Limited.

David Estrin, David McRobert and Laura Young, for intervenor, The Environmental Commissioner of Ontario.

Paul Muldoon, for intervenor, the Canadian Environmental Law Association.

Robert V. Wright, for the intervenor, Friends of the Earth.

The judgment of the court was delivered by

[1] ROSENBERG J.A.:-- In this appeal, the court is called upon to consider whether a class proceeding is a suitable vehicle in an environmental case. In *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 201 D.L.R. (4th) 385, at para. 26, McLachlin C.J.C. wrote that the class action plays an important role in today's world. She noted that pollution cases may be especially suited to class proceedings. As she said, "Environmental pollution may have consequences for citizens all over the country." But, in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 205 D.L.R. (4th) 19, the

Supreme Court of Canada upheld the dismissal of an application to certify an environmental action as a class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6 the ("CPA"). Speaking for the court, at para. 37, McLachlin C.J.C. reiterated that in a proper case an environmental claim could be pursued through a class proceeding:

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.

[2] From 1918 to 1984, Inco operated a refinery in Port Colborne that processed nickel. Over that 66-year period the refinery spewed tons of nickel into the environment. It is alleged that this nickel contaminated the Port Colborne environment, especially a low-income area adjacent to and downwind from the refinery known as the Rodney Street area. Mr. Pearson, the proposed [page646] representative plaintiff, lives in the Rodney Street area. In September 2000, it was disclosed that the Ministry of the Environment ("MOE") had found higher than expected nickel levels in a soil sample from a Rodney Street property. This led the MOE to conduct widespread sampling in the Rodney Street area. The appellant alleges that the nickel was discharged by Inco and that it posed a risk to the natural environment and to human health for some of the residents of Port Colborne. The appellant says that disclosure of the high level of nickel contamination had a serious impact upon property values in the Port Colborne area. He seeks to have this action certified as a class proceeding on behalf of the former and present property owners of much of Port Colborne. He says that this is the kind of case that falls within the words of McLachlin C.J.C. in *Hollick*. I agree. I would, therefore, allow the appeal.

[3] Nordheimer J. case managed this action and is an

experienced class proceedings judge. His reasons for decision can now be found at [2002] O.J. No. 2764, 33 C.P.C. (5th) 264 (S.C.J.). I will make frequent reference to his thorough reasons. His decision refusing to certify this action as a class proceeding is entitled to considerable deference. However, there have been two important developments since his decision that, in my view, dictate that the decision be overturned. First, the appellant has significantly narrowed his claim to damages for the devaluation of real property values arising from soil contamination. The claim before the motion judge was much broader and included sweeping claims for damages from the alleged adverse health effects from nickel oxide contamination. Second, in December of 2004, this court released its decision in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.). That decision suggests a somewhat more liberal approach should be taken to certification of class proceedings. These two developments drive my decision to find that this action should be certified as a class proceeding.

The Facts

[4] As the appellant's claim was originally framed, this was a wide-ranging action that alleged various forms of damage. The appellant also named many other defendants besides Inco, including Her Majesty the Queen in right of Ontario, the Corporation of the City of Port Colborne, the Regional Municipality of Niagara, the District School Board of Niagara and the Niagara Catholic District School Board. The appellant and the school board reached a resolution of the matter prior to the certification [page647] motion and they did not participate in the motion. The motion judge found that there was no reasonable cause of action against the City or the Region and the appellant did not appeal that finding. The appellant settled the case against the Crown prior to the hearing of this appeal. As a result, only Inco responded in this court and I will limit my discussion of the facts to those that concern the claim against Inco.

[5] For 66 years the Port Colborne refinery operated by Inco emitted nickel into the natural environment until the refinery

ceased producing nickel in 1984. The appellant asserts that nickel contamination has affected the physical and emotional health and well-being of the residents of Port Colborne. The appellant also asserts that the contamination has caused widespread damage to the lands, homes and businesses in Port Colborne. The impact is said to be particularly severe for the residents of the Rodney Street area.

[6] The appellant asserts that the nickel contamination in Port Colborne is significantly higher than elsewhere in Ontario and soil sampling in some locations shows extremely high levels of contamination. The appellant claims that the Inco Refinery in Port Colborne is the source of this nickel contamination. While Inco appears to accept responsibility for release of nickel into the environment, the appellant claims that the company denies responsibility for high levels of contamination found inside the homes and five centimetres below the ground surface (where most of the contamination is now found). The appellant's and Inco's experts agree that at least 20,000 tonnes of nickel have been deposited by Inco across Port Colborne. The appellant submits that most, if not all, of the nickel is likely nickel oxide. Nickel oxide is classified by the federal government as a Group One-Carcinogenic to Humans toxic substance, meaning that there is a direct causal relationship between exposure to nickel oxide and cancer in humans, and that the risk of cancer exists at any level of exposure.

[7] In the original claim, the plaintiff also alleged that subsurface operations by Inco involved the taking of water for refining operations. Inco's attempts to control the migration of contaminants from its property have led to settling and subsidence, causing damage to homes and related structures.

[8] It would seem that the first event to trigger this lawsuit was the September 2000 disclosure of the results of testing by the MOE. The form of that disclosure is in dispute but it is conceded by Inco in its factum that: "The Rodney Street area became a focus of attention in September 2000 when it was announced that the MOE had found higher than expected nickel levels in a soil sample taken from a single property in

the area." The appellant [page648] claims that house sales in the Rodney Street neighbourhood have dropped, that mortgage financing has become difficult and that house prices have dropped or at least not risen at the same rate when compared to other areas in the Niagara Peninsula. The appellant attributes the impact on property values to the disclosure of the 2000 MOE test results and widespread testing thereafter by the MOE.

[9] Approximately 1,000 people live in the Rodney Street area and approximately 18,500 people live in Port Colborne. The homes in the Rodney Street area are very modestly priced and the owners tend to have limited incomes; many are elderly and on fixed incomes or are unemployed or underemployed.

[10] The appellant claims that "since the news of the contamination was announced . . . house prices in the Rodney Street area have declined by approximately 45[per cent] when compared to those in other parts of Port Colborne, Fort Erie and Welland. House prices across the balance of the east side of Port Colborne have also declined by more than 10 [per cent]" and on the west side by two to three per cent. (Reasons of motion judge, at para. 23).

[11] As I mentioned, the appellant's action as originally framed, and for which he sought certification, embraced the whole spectrum of potential losses, including health effects. The original claim also concerned contamination by other substances that the appellant claimed were emitted from the Inco refinery. A brief excerpt from the statement of claim will show the breadth of these complaints:

- (a) short term and long term exposure to substances including but not limited to the carcinogen oxidic nickel, copper, cobalt, chlorine, arsenic, zinc and lead, leading to irritation and inflammation of the skin, eyes, nasal passages and lungs, coughing, choking, inability to breathe, burning sensations in the chest and abdomen, nausea, vomiting, headaches, dizziness, collapse, loss of consciousness, loss of impairment of the senses of smell and taste, loss of appetite, swelling of exposed areas, pain and

suffering, loss of income, impairment of earning ability, future care costs, medical costs, loss of amenities and enjoyment of life, anxiety, nervous shock, mental distress, emotional upset, and out of pocket expenses, and;

- (b) short term and long term exposure to, but not limited to, oxidic nickel, copper, cobalt, chlorine, arsenic, zinc and lead, which exposure has led and will continue to lead to long term health consequences, including but not limited to increased risks of cancer and lung disease. As a result of this exposure, some Class members have already, and others will continue to experience needless illness, loss of amenities and enjoyment of life, and will die premature deaths.

[12] The appellant also pleaded damages for Family Law Act, R.S.O. 1990, c. F.3 claims because of the effects of the contaminants [page649] on the relatives of the Port Colborne residents. The appellant has since modified the claim, limiting it to the decrease in property values that followed the 2000 disclosure.

[13] As indicated, Inco does not deny that its refinery is the source, or at least the primary source, of the nickel contamination. It disputes that it has any responsibility for many of the other contaminants such as arsenic and lead. It claims that most of the nickel emissions occurred before 1960, and emissions since 1984 have been negligible. It points out that the MOE has been monitoring the facility for many years and has been doing tests of air and soil in the area since the 1970s. In 1999, the MOE undertook a study designed to augment earlier samplings of nickel and other contaminants in Port Colborne area surface soils. The study produced a map showing approximate areas and patterns of contamination. There is considerable variation in contaminant levels as they exist at the various locations within the geographical boundaries proposed for the class.

[14] While Inco accepts responsibility for nickel emissions in the Port Colborne area, it disputes the fundamental claim by

the appellant as to the impact of the contamination on property values. To quote from the respondent's factum, "The issue of Inco's emissions in Port Colborne is an old and very public one." It therefore disputes the appellant's claim that the 2000 disclosure caused the decline in property values. In fact, Inco has produced expert evidence suggesting no impact on property values from the announcement. It adduced expert evidence showing that the largest increase in Port Colborne average sale prices occurred after September 2000; even in the Rodney Street area there was a positive impact on sale prices. Inco criticizes the methodology used by the appellant's expert who reached the opposite conclusion.

[15] Inco denies that there is proof of any adverse health effects in Port Colborne attributable to nickel and it denies that there is any scientific evidence that nickel in any form in the levels found in Port Colborne has ever caused cancer.

[16] Inco takes the position that the existence and extent of impacts on residential property values can only be determined through a case-by-case assessment. It says that property values are affected by a myriad of factors. Further, even if a causal link could be established between any one environmental factor and property values, the impact on any one property would have to be determined by an individual assessment. It submits that the largest claims would be expected to come from agricultural property. It would be extremely difficult to prove any effect on crops from any particular contaminant. [page650]

[17] Inco points out that it has agreed to participate in the Community Based Risk Assessment ("CBRA") process that was initiated before the appellant made his claim. To benefit from the CBRA a resident of Port Colborne does not have to establish legal liability, show that the contaminants originated with Inco, show any harm or damage or meet judicial standards of proof. Rather, Inco will perform the necessary remediation on a "no questions asked" basis depending on the results from the scientific model and individual property characteristics. According to Inco's experts, such remediation efforts have been very effective in the United States in eliminating property value impacts caused by environmental contamination or

the publicity surrounding it.

[18] Inco submits that the appellant has entirely recast his case to make it suitable for certification as a class proceeding. It submits that while the appellant's focus is now on property values rather than the actual level of contamination, this claim was not to be found in the statement of claim that was before the motion judge. It also submits that the attempt to tie the diminution in value of the properties to the 2000 disclosure is simply an attempt to avoid limitation period problems that would otherwise arise from the fact that pollution from the Inco facility was well known for decades.

The Finding of the Motion Judge

[19] Section 5(1) of the CPA sets out the prerequisites for certification of a class action. They may be summarized as follows:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for resolution of the common issues; and
- (e) there is a representative plaintiff.

(a) Cause of action

[20] The motion judge noted that Inco conceded that the Fresh as Amended Statement of Claim disclosed reasonable causes of action against it. All the other prerequisites were in issue on the certification motion. [page651]

(b) Identifiable class

[21] Before the motion judge, the identifiable class was

defined [at para. 41] as "all persons owning or occupying property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/ Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west". The boundaries were marked on a map of Port Colborne. The motion judge found, at para. 100, that this geographic definition of the proposed class had the effect of "arbitrarily both including and excluding areas where the soil contains the same level of nickel of which the plaintiff complains". He also found, at para. 101, that the temporal component was arbitrary since it could exclude persons who had suffered harm but had moved away before 1995. The appellant chose the temporal requirement to avoid problems of limitation periods. However, this merely highlighted the arbitrary nature of the class definition since a person who only recently discovered the facts necessary to found a claim could have a valid claim despite the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B. Accordingly, the appellant failed to meet the identifiable class requirement.

(c) Common issues

[22] The appellant identified ten common issues relating to Inco. The motion judge found that the appellant had met the common issues requirement in relation to Inco. The common issues as framed before the motion judge that applied to Inco were as follows [at para. 103]:

- (i) Were the contaminants arsenic, chlorine, cobalt, copper, lead, nickel and zinc (the "Contaminants of Concern") discharged by Inco?
- (ii) How widespread is the distribution of the Contaminants of Concern?
- (iii) At what level do the Contaminants of Concern pose risks to the natural environment or to human health, or both?
- [(iv)] Did Inco owe a duty of care to the class to prevent the ongoing discharge of the Contaminants of Concern,

and if so, what duty was owed?

[(v)] What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of the Contaminants of Concern?

[(vi)] Did Inco breach the standard of care referred to in [(v)] above?

[(vii)] Did the ongoing discharge of the Contaminants of Concern by Inco amount to a public nuisance? [page652]

[(viii)] Did the ongoing discharge of the Contaminants of Concern by Inco amount to a trespass?

[(ix)] Is Inco strictly liable to the class for ongoing discharge of Contaminants of Concern as a result of failure to prevent the escape of dangerous substances (Rylands v. Fletcher)?

.

[(x)] Does the defendants' conduct justify an award of punitive damages to the class, and if so, what amounts of punitive damages is appropriate?

[23] Although the motion judge found that as against Inco the appellant had met the common issue requirement, he added a caveat at, para. 108, because of the complexity of the issues:

It would be fair to say that the proposed common issues relating to Inco would still pass the test as common issues, that is, they are all issues that would be common to each class member's claim and whose determination in favour of the representative plaintiffs would mark success for each member of the class. As I will point out later when I deal with the issue of preferable procedure, the fact that these issues are common does not in any way reduce the extreme complexity that will be involved in resolving those issues.

[24] Although the appellant succeeded before the motion judge

on the question of common issues, I will revisit that question below. It is necessary to do so because the appellant has so significantly narrowed his claim. By doing so, the appellant stripped out some of the complexity but he has also reduced the number of common issues. For example, (iii) obviously is no longer in issue. It is not possible to reach a conclusion on preferable procedure without having a clear understanding of the common issues.

(d) Preferable procedure

[25] The motion judge analyzed the question of preferable procedure by reference to the three accepted goals of a class proceeding: judicial economy, access to justice and behaviour modification.

(i) Judicial economy

[26] The motion judge found that a class proceeding would not advance the goal of judicial economy because the answer to the common issues would be "of no more than theoretical interest until the particular factual circumstances of each individual claimant is examined" (at para. 118). This is because:

... the process of determining whether a causal link exists for any given class member with respect to any given allegation of harm is extensive and very much individualized. Given the wide variety of harm alleged and the size of the proposed class, [the] class proceeding [would] quickly become unmanageable because it would inevitably disintegrate into the need for [page653] thousands of individual trials with potentially tens, if not hundreds, of thousands of individual issues to be resolved.

[At para. 119]

For example, each of the 20,000 members of the class would have to be examined for discovery. The motion judge noted that the exposure of the claimants to the contaminants was central to the claims but this could only be determined on an individual basis. Further, there would need to be an examination of each

person's health history, occupation, habits and so on. It would be necessary to know the degree of concentration of any contaminants found in the person's yard and home. The evidence demonstrated that there was considerable variation in contaminant levels. The motion judge found that, accordingly, this case was similar to *Hollick*, where the Supreme Court of Canada held that an environmental claim should not be certified as a class proceeding.

[27] The motion judge dealt directly with the question of property value, which is now central to the appellant's application for certification, at paras. 122 and 123:

In addition, individual issues would manifest themselves as to whether the presence of any contaminants affect property value and prices and, if so, to what extent. The plaintiff put forward evidence from certain real estate agents regarding a downward trend in housing prices in Port Colborne over the past few years. Inco put forward the opinion of a real estate economist who detailed the different factors that go into the value of any given house. He also reviewed recent sales information for the Port Colborne and surrounding areas and concluded that the data did not support a view that overall property values were adversely affected by the public announcement concerning contaminants that occurred in September 2000. In addition, he observed that, even if a property value impact can be shown and causally linked to a particular environmental factor to the exclusion of all others, a further individualized analysis is required to determine the actual economic effect such an impact had on the individual property owner. The existence of any gain or loss depends upon, among other things, when a property owner bought, sold, and/or refinanced his home and the knowledge or perception of the parties at the time of the various transactions.

I do not propose to review the evidence that was offered by both sides regarding the impact on property values in any greater detail. It is sufficient to say that property values are impacted by a wide variety of factors. For example, they may be affected by the quality of schools available, the

presence of criminal activity, heavy traffic, other industrial pollution, proximity to transit, restaurants, shopping malls, entertainment, and so on. Further, even if environmental concerns can be demonstrated to have adversely affected property values, whether that translates into an actual economic impact on any given home owner can only be determined on a case-by-case analysis given the myriad of other factors that go into determining actual property value. The issue of lost property value, which may form the bulk of the smaller claims advanced, alone demonstrates the enormous complexity and individualized nature of the inquiries that would be left once any common issues are determined.

[page654]

[28] The motion judge noted that this was a particular problem in considering the agricultural-related losses. The appellant presented no evidence as to how those claims might be valued. Inco's evidence demonstrated that the process would be extremely complex and highly idiosyncratic.

[29] In the result, the motion judge concluded that if "[the] action were certified as a class proceeding, it would quickly become unmanageable" (at para. 128).

(ii) Access to justice

[30] The motion judge reached a similar conclusion with respect to the goal of access to justice. He agreed with the appellant that the CBRA programme "standing alone" would not be a viable alternative to a class proceeding since the CBRA does not provide compensation. However, the CBRA had to be seen "as part of the available alternative procedures, in conjunction with other alternatives such as joinder, test cases and the like" (at para. 131). The motion judge was also concerned about the premature or precipitous determination of claims. Since the individual class members would be required to prove their own individual claims, the trial of these claims would present substantial issues of risk and expense. Some members of the class might not be prepared to pursue their claims at the time dictated by the class proceeding timetable. This could be unfair for claimants whose disease and condition might not

manifest until some time in the future. As the motion judge said, at para. 132:

In other words, given the nature of the claims and the substantial individual commitment required of class member[s] to prosecute them to conclusion, some of the proposed class members would appear to have a substantial interest in controlling their own litigation.

(iii) Behaviour modification

[31] Finally, the motion judge concluded that certifying the action as a class proceeding would not achieve the goal of behaviour modification. Inco's activities in Port Colborne were the object of active involvement by the MOE and its operations were subject to orders from the MOE and might well be in the future. Furthermore, Inco had made commitments to remedy some of the problems caused by the refinery and had funded the CBRA. According to the motion judge, at para. 133:

In other words, the modification of behaviour, insofar as that can occur, has already begun. Certification of this action as a class proceeding will not materially add to it. Indeed, it might have the opposite effect in that it might cause Inco to become less co-operative which in turn would only prolong the process towards an overall remedy. [page655]

[32] The motion judge also noted that in *Hollick*, the Supreme Court held that when dealing with environmental concerns other statutory avenues of redress are available and should be taken into account. These other avenues not only included the CBRA process and the MOE involvement but access to the regulatory regime under the Environmental Protection Act, R.S.O. 1990, c. E.19, and the Environmental Review Tribunal.

[33] Thus, the motion judge concluded that a class proceeding is not the preferable procedure for the resolution of the identifiable common issues.

(e) Representative plaintiff

[34] Section 5(1)(e) of the CPA provides that it must be shown that the 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 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.

The motion judge held that the appellant had not satisfied any of these requirements.

[35] The motion judge found that the ability of the representative plaintiff to bear the costs that would be necessary for the proper prosecution of the class action was an important consideration. The motion judge was also concerned that various cost orders had not been paid until the eve of the certification motion. He said, at para. 141, that this "raises a concern about the financial resources which the representative can bring to bear in the prosecution of this action especially given that this litigation will be complicated, time consuming and expensive". The motion judge considered the appellant's description of his financial arrangements, such as seeking funding through public donations, private contributions, corporate donations and through legal counsel, to be vague. In his view, absent a commitment from the Class Proceedings Committee to provide funding, the representative plaintiff must have "concrete and specific alternative funding arrangements in place and [must] provide the specifics of those arrangements in the certification material" (at para. 143). The motion judge did note the "Catch 22" problem with this position in that the Committee will only consider an application for funding after a statement of defence has been filed despite the fact that defendants often withhold [page656] filing a statement of defence until after

the issue of certification is resolved.

[36] The motion judge was also of the view that the litigation plan was not sufficient as it was "long on generalities and short on specifics" (at para. 144). In particular, he stated:

It does not address issues such as the experts that will be used, what investigations have been or are to be undertaken, witness interviews to be conducted, how documents are to be managed and, most importantly, how the myriad of individual issues that will remain, after the common issues are resolved, are going to be addressed. While some of the elements that are missing from the actual plan, such as the experts to be used, can be found from a review of the affidavit of Wolfgang Kaufman, filed on behalf of the plaintiff, I believe that a proper litigation plan should incorporate all of the required elements within the four corners of the plan itself.

[37] The motion judge was also concerned that the appellant might have a conflict with other members of the proposed class. The appellant was a resident of the Rodney Street area and likely had an interest in pursuing the claims "in a much more aggressive fashion" than other residents less affected by the contamination. Or, as he said, at para. 146:

Put another way, those individuals who live in areas where the level of contamination is much lower, and who would, as a result, more likely have very small claims, might well be amendable to a resolution of those claims of a much different character than would the individuals with the larger claims. It seems to me, therefore that there is an obvious potential for conflict between these two groups.

[38] The motion judge pointed out that this was not simply a hypothetical concern. The appellant filed an affidavit that was highly critical of the Public Liaison Committee. The City of Port Colborne established the PLC as part of the CBRA process. It is composed of residents of the City and "[i]ts role is to solicit public input, inform the public, monitor the progress

of the CBRA and provide input to Inco and the MOE" (at para. 79). A resident of Port Colborne who supported the work of the PLC came forward to dispute the allegations in the affidavit filed on behalf of the appellant but was rebuffed by the appellant's counsel. He therefore went to the City, which was then a defendant, and the City filed his affidavit as part of its material. The motion judge was of the view that the divergence in views expressed in the two affidavits "amply demonstrate[d] the potential for conflict among members of the proposed class going forward" (at para. 147).

[39] The motion judge did not believe that the problems with the litigation and potential for conflict could be dealt with after certification. He adopted a principle from *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 43 Tex. Sup. 706 (2000), at p. 435 S.W.: [page657] "we reject this approach of certify now and worry later".

[40] Accordingly, the motion judge dismissed the motion for certification. The appellant appealed to the Divisional Court.

Reasons of the Divisional Court

[41] Writing for the Divisional Court, in reasons now reported at [2004] O.J. No. 317, 183 O.A.C. 168, 6 C.E.L.R. (3d) 117, 44 C.P.C. (5th) 276 (S.C.J.), Mackenzie J. noted [at para. 10] that the appellant was putting forward a very different case than the case that faced the motion judge. He had deleted the allegations respecting health hazards and limited the claim for damages to the devaluation of real property arising from contamination of the soil as a result of Inco's nickel refining operation. While Inco objected to the recasting of the certification motion, the court was satisfied that there was no prejudice and that the appeal should be considered on its merits.

[42] The Divisional Court held, however, that the change in the nature of the claim did not detract from the thrust of the observations made by the motion judge about the identifiable class and preferable procedure requirements. It took the view that grounding the class in a geographic definition based on a

guideline for background levels of nickel was irrational and arbitrary (at para. 31). It held, in effect, that even when the claim was limited to diminution of property values, individual issues would overwhelm any common issues. The court was also of the view that the appellant had not put forward any methodology appropriate to establish loss on a class wide basis. In summary, the court found no error by the motion judge "on the criteria dealing with the class definition, regarding the common issues being overwhelmed by the individual claims and defences, and considering the preferable procedure requirement and advancing the ... objectives of the CPA" (at para. 36), nor was there a reversible error in the motion judge's reasons as they applied to the narrowed claims put before the court.

Analysis

[43] The decision of the motion judge on a certification motion is entitled to substantial deference. The judges hearing these motions have developed a special expertise. Furthermore, the judges have often case-managed the proceedings and are therefore especially familiar with the factual context, as was the motion judge in this case. The decision as to preferable procedure is, in my view, entitled to special deference because it involves [page658] weighing and balancing a number of factors. In *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728, [2005] O.J. No. 842 (S.C.J.), at para. 29, Winkler J. described the consideration of whether a class proceeding is the preferable procedure for determining the common issues as "a matter of broad discretion". As such, the reviewing court will intervene where the judge has made a palpable and overriding error of fact or otherwise erred in principle. Any errors of law are, however, reviewable on the correctness standard.

[44] However, in my view, less deference is owed to the decision of the motion judge in this case for the two reasons previously identified. The factual context has changed dramatically because the appellant has substantially narrowed the claim and there has been a shift in the legal landscape as a result of this court's decision in *Cloud*.

(a) Causes of action

[45] While the cause of action requirement for certification is not directly in issue, it is important to properly identify the appellant's claim against Inco. The appellant has framed his claim in nuisance, negligence, trespass and strict liability in accordance with the doctrine in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, 37 L.J. Ex. 161.

[46] With respect to negligence, the appellant claims, at para. 31 of the Fresh as Amended Statement of Claim, that Inco owed a duty of care to the persons living within close proximity of the refinery because it knew or ought to have known that a lack of sufficient care would cause damage to the class members. The claim sets out the various acts of negligence, such as the failure to provide adequate safety equipment or procedures to prevent the release of contaminants from the refinery and detect the release of contaminants, failure to warn class members of known hazardous emissions and failure to comply with specific statutory obligations under s. 14 of the Environmental Protection Act by causing contaminants to be discharged into the natural environment that have resulted in adverse effects.

[47] Inco takes the position that in framing the causes of action in the way that he did, the appellant is attempting to complicate the basis of liability. In this way, the appellant has artificially inflated the number and complexity of the common issues to make the action appear ripe for certification as a class proceeding. Inco submits in this court that its basis of liability is simple and straightforward given the doctrine in *Rylands v. Fletcher*. Inco appeared to concede that if nickel escaped from its property, [page659] and it clearly did, the only real issues would be causation and damages, which will require individual assessments.

[48] In effect, the appellant has done the opposite of what the plaintiff did in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 205 D.L.R. (4th) 39 where the plaintiffs elected to limit their allegations to systemic

negligence without reference to the circumstances of any individual class member. The election to limit the allegations may have made the individual component of the proceedings more difficult in Rumley. It would be easier for any given complainant to show causation if the established breach were that the defendant residential school had failed to address her own complaint of abuse. However, McLachlin C.J.C. agreed, at para. 30, with the British Columbia Court of Appeal that the plaintiffs in Rumley were "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".

[49] Inco's point is well taken. The appellant cannot broaden the grounds of liability to make a simple case appear complex to give the illusion that the case is suitable for certification. However, it is not clear that the appellant has done so in this case. The appellant is entitled to plead bases for negligence in the alternative. Inco has not yet pleaded to the claim. The appellant had no reason to assume that Inco would make any concessions concerning the application of the Rylands v. Fletcher doctrine [See Note 1 at the end of the document]. In considering whether the appellant has met the preferable procedure requirement, the court must look to what is really in issue in the case. If based on what is truly in dispute the common issues are relatively unimportant, a class action will not be the preferable procedure and the action should not be certified.

[50] Inco also strongly contests the basis for the cause of action. It says that the evidence fails to demonstrate any connection between the 2000 disclosure and property values. Inco also says that this damage theory was advanced for the first time in this court; that the appellant is recasting its case and that this theory of liability was not pleaded anywhere in the appellant's statement of claim.

[51] There is no doubt that the appellant's theory of liability has evolved in an attempt to make the action more amenable to [page660] certification. I do not think it is correct, however, to say that this theory has not been pleaded. It seems to me that para. 24 of the Fresh as Amended Statement

of Claim adequately captures the theory presented to this court:

24. The ongoing discharge of contaminants (including known carcinogens) and other activities at the Refinery, and the failure of the defendants to take proper or appropriate steps to prevent or minimize the effects of these contaminants and activities, has resulted in (but is not limited to) the following types of losses or injuries to property:

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- (b) loss of value of property owned, occupied or used by Class Members, including the complete devaluation of certain properties, and loss of the ability to sell, finance or mortgage numerous properties.

[52] The appellant was only required to plead the facts upon which he relies, not the evidence, such as the results of 2000 testing by the Ministry. There is no question that there is a conflict in the evidence about whether the 2000 disclosure and subsequent events such as the widespread testing did have an effect on property values. Inco says that its superior expert evidence shows that there is no connection. That is an issue for trial. Evidence is not admissible on the question of whether there is a cause of action pleaded within the meaning of s. 5(1)(a) of the CPA. See *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766, 23 C.P.C. (5th) 360 (S.C.J.), at paras. 34-37, *Markson v. MBNA Canada Bank* (2004), 71 O.R. (3d) 741, [2004] O.J. No. 3226 (S.C.J.), at para. 27, and *Macleod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331, 28 C.P.C. (5th) 160 (S.C.J.), at para. 5.

(b) Identifiable class

[53] The motion judge and the Divisional Court held that the proposed class was arbitrary, both geographically and temporally. The main concern was that the proposed class was under inclusive; I will deal first with the motion judge's treatment of this issue and then treatment by the Divisional

Court.

[54] The approach by the motion judge was largely a product of the nature of the claim as it was presented to him. He pointed out that using geographic boundaries to define the class had the effect of "arbitrarily both including and excluding areas where the soil contains the same levels of nickel of which the plaintiff complains" (at para. 100). Now that the claim has been limited to the decrease in property values, irrespective of actual levels of nickel contamination, the basis for a finding of geographical arbitrariness disappears. In light of *Hollick*, as discussed below, it is open to a plaintiff to define the class by using geographical [page661] boundaries notwithstanding that of necessity there will always be an element of arbitrariness in doing so.

[55] At the appeal before the Divisional Court, the appellant had narrowed his claim. The Divisional Court, however, did not take this change into account in their reasons. Rather, they adopted the position of the Crown, which was still a party before the Divisional Court, that "grounding of a class definition upon a MOE guideline number for background levels of nickel is itself irrational and arbitrary" (at para. 31). As reconfigured, the claim does not depend on nickel concentrations on the property of the proposed class members, but whether their property values were impacted by the 2000 disclosure. In view of this error, it is open to this court to determine whether the identifiable class requirement has been met.

[56] In my view, the appellant has met the identifiable class requirement. The appellant has defined the class by objective criteria. As in *Hollick*, at para. 17, "a person is a member of the class if he or she owned ... 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." Again, to use the words of *Hollick*, at para. 17, "while the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)". The class definition was slightly refined before this court as follows [at para. 4]:

All persons owning property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west, or where such person is deceased, the heir(s), executor(s), administrator(s), assign(s) or personal representative(s) of the estate of the deceased persons.

[57] That the class can be defined by objective criteria does not fully determine the identifiable class issue. The appellant must also show a rational relationship between the class and the common issues. In *Hollick*, at para. 21, McLachlin C.J.C. held that this requirement is not an onerous one, all that is required is "some showing" that the class is not "unnecessarily broad".

[58] *Hollick* involved an environmental claim arising from the operation of the Keele Valley landfill. The plaintiff claimed damages for noise and physical pollution and defined a geographical area comprising 30,000 people. In that case, the court found that the fact that there were several hundred complaints from different parts of the area over a ten-year period satisfied the requirement of showing some rational relationship between the class and the common issues. It is apparent that the court did not apply the unnecessarily broad requirement very strictly if all [page662] that was required was a showing that approximately two per cent of the proposed class had complained.

[59] In this case, the appellant has produced evidence that property values in the defined area were negatively impacted after the 2000 disclosure. That is sufficient to show that the class is not unnecessarily broad. While Inco disputes the value of the appellant's evidence, and has provided evidence to show that property values have not been affected and indeed have kept pace with property values in other parts of the Niagara region, that factual dispute is a matter for trial. It is not to be resolved at the certification stage where all that is required is some showing of a relationship between the proposed class and the common issues.

[60] I am also satisfied that the identifiable class requirement was met despite the finding by the motion judge that the proposed class definition was under inclusive. The motion judge reasoned that just as the class should not be unnecessarily broad, "the corollary is also true and that is that the class should not be defined in a manner that includes individuals with claims while at the same time arbitrarily excluding others who have the same claims" (at para. 100). The motion judge found the class was under inclusive because the evidence showed comparable amounts of contamination outside the defined area. With the change in the nature of the claim this rationale no longer applies. The Divisional Court did not specifically address this issue.

[61] The principle that a proposed class should not be under inclusive must be approached with considerable caution. If this principle were applied too strictly, few environmental claims could ever be certified as class proceedings. The very nature of pollution is that its effects are often widespread and diffuse. Air and water contamination rarely, if ever, stop at fixed boundaries. It seems counter-intuitive that Inco can defend against the certification motion by showing that it managed to contaminate an even wider area than that proposed by the appellant. The appellant submits that as a result of the 2000 disclosures that Port Colborne properties had higher than expected nickel contamination, property values in Port Colborne declined. Limiting the class to Port Colborne is logical and reasonable. I note that there was no suggestion in Hollick that the identifiable class in that case was under inclusive despite the obvious point that the noise and air pollution could not have stopped at any precise boundary.

[62] Finally, the identifiable class requirement was met despite the temporal limitation. In this case, the appellant has chosen a date to avoid limitation period issues. The motion judge was concerned that this definition was arbitrary because [page663] individuals who formerly lived in Port Colborne prior to March 1995, but who only discovered the facts necessary to found a claim after that date, might have a valid claim but would be excluded from the proposed class. However,

since the complaint has been refined to the reduction in property values, the temporal limitation is no longer a concern. There is now a logical connection between the claim and the definition of the class since the appellant now seeks to certify a class of owners whose property values appear to have been directly impacted by the 2000 disclosures of high levels of nickel on their lands. People no longer owning the land when the announcement was made can have no claim. It follows, of course, that the class definition must be further refined to limit the class to persons owning property since September 20, 2000, when the disclosures were made. The damage to property values resulting from the disclosure of Inco's alleged contamination of the Port Colborne property has become the sole focus of the claim. People who owned lands before this date might well have a claim against Inco from the alleged contamination, but that is not the claim encompassed by this proposed class action. As indicated, it is not a legitimate complaint that the appellant has chosen to define the class in a way that makes the claim more amenable to certification. See Rumley, *supra*, at para. 30.

[63] Finally, in any event, it is now clear as a result of this court's decision in *Cloud*, *supra*, at paras. 61, 81-82 and 95, that the possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

(c) Common issues

[64] By the time the case reached the Divisional Court, the appellant had recast the common issues in the following manner:

A. COMMON ISSUES OF FACT

1. (a) Is Inco the source of the elevated levels of nickel found on class members' lands?
 - (b) Did nickel contamination (from atmospheric deposition or fill) in the Rodney Street Area originate from Inco?

2. Is there sufficient evidence to establish, without individual testing, that all class members' lands have been contaminated with nickel in excess of 43 ppm?
3. Is there sufficient evidence to establish, without individual testing, that class members' lands initially contained levels of nickel below or at 43 ppm and that no source other than Inco has significantly added to this level of nickel? [page664]
4. Can class members' claims for property damages be assessed by group or area and, if so, what is the quantum of damages?

B. COMMON ISSUES OF LAW REGARDING INCO

5. Did Inco owe a duty of care to the class to prevent the ongoing discharge of nickel and, if so, what duty was owed?
6. What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of nickel?
7. Did Inco breach the standard of care referred to in issue 6 above?
8. Did the ongoing discharge of nickel by Inco amount to a public nuisance?
9. Did the ongoing discharge of nickel by Inco amount to a trespass?
10. Is Inco strictly liable to the class for the ongoing discharge of nickel as a result of a failure to prevent the escape of a dangerous substance (Rylands v. Fletcher)?

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C. PUNITIVE DAMAGES

14. Did the defendants' breach of conduct justify an award of punitive damages to the class, and if so, what amount of punitive damages is appropriate?

[65] I did not understand Inco to dispute that there remained common issues despite the recasting of the claim. Inco does, as noted above, take the position that many of the common issues are of no real moment to the litigation because the case will stand or fall on the Rylands v. Fletcher claim. That is a matter to be considered in discussing the preferable procedure. The common issue requirement is a "low bar" to certification: Cloud, supra, at para. 52. As Goudge J.A. wrote in Cloud, at para. 53, "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 event though many individual issues remain to be decided after its resolution". Further, as he wrote, at para. 58, "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."

[66] In my view, despite the fact that the claim is now much narrower, the appellant has met the common issue requirement.

(d) Preferable procedure

[67] In Cloud, at paras. 73-75, Goudge J.A. identified a number of principles that apply in determining whether the plaintiff has [page665] met the preferable procedure requirement. I would summarize them as follows:

- (1) The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
- (2) The analysis must keep in mind the three principle

advantages of class actions: judicial economy, access to justice, and behaviour modification.

(3) This determination 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.

(4) The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.

[68] I will consider the three aspects of the preferable procedure requirement bearing in mind these principles.

(i) Judicial economy

[69] Inco submits that the resolution of this case is determined by the result in *Hollick* where the Supreme Court found that a similar environmental claim did not meet the preferable procedure requirement. In *Hollick*, *supra*, at para. 32 McLachlin C.J.C. found that any common issues were "negligible in relation to the individual issues". This finding turned on the fact that "there [was] no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition". Thus, the plaintiff could not meet the judicial economy advantage of a class proceeding. It appears that the claim in *Hollick* was broadly framed, alleging that the air and noise pollution unreasonably interfered with the use and enjoyment of the class members' land. See the reasons of the Divisional Court in *Hollick* reported at (1998), 42 O.R. (3d) 473, [1998] O.J. No. 5267, 168 D.L.R. (4th) 760 (Div. Ct.), para. 10, and reasons of this court reported at (1999), 46 O.R. (3d) 257, [1999] O.J. No. 4747, 181 D.L.R. (4th) 426 (C.A.). At paras. 22 and 23 of the reasons of the Court of Appeal in *Hollick*, Carthy J.A. said the following:

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 [page666] 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. A trial judge dealing with liability as a common issue would immediately discover that there was no economy in the proceedings and that the trial would be unmanageable. Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified. To add to the already impossible task, complaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property or caused personal discomfort justifying compensation.

No common issue other than liability was suggested and I cannot devise one that would advance the litigation. An issue such as "Did the defendant emit pollutants into the atmosphere over a six-year period, and if so, when, and to what extent?" would result in a virtual Royal Commission into the operation of this landfill site without any measurable advance in the litigation. One could assume from the evidence of complaints that odours have escaped this site from time to time over the years. The issue is whether these odours caused sensible personal discomfort or interfered with the enjoyment of property to such an extent that the individuals affected are deserving of compensation.

[70] As the claim was originally framed in this case, a class proceeding would also not have the advantage of judicial economy. The individual claims of injury to health and related claims would dwarf the resolution of the common issues. With the narrowing of the claim that is no longer the case. The claim now concerns the single issue of the negative impact on property values. Inco argues, however, that even the resolution of this claim will require individual assessments since property values are highly idiosyncratic. But, that submission fails to meet the fundamental point of the appellant's claim. The appellant has staked his claim on the propositions that public knowledge of nickel contamination in the Port Colborne

area has had a detectable impact on property values in that area and that as the source of the contamination, Inco must pay damages to owners whose property values have fallen. As the appellant put the issue, in para. 22 of his factum, "what has been 'overlaid' on each property's value is a decline associated with the announcement of high levels of contamination". The appellant may or may not be able to demonstrate these propositions, but they constitute a substantial element of each class member's claim. If the appellant is able to demonstrate this effect, the only individual issue remaining will be for each class member to show the amount of the effect on his or her property. If the appellant is unable to demonstrate this connection, it would be open to the trial judge to decertify the action pursuant to s. 10 of the CPA. [page667]

[71] Framed in this way, the appellant's case resembles *Rumley* and *Cloud* rather than *Hollick*. Resolution of the common issues will determine the question of Inco's liability for the nickel pollution and whether knowledge of that pollution impacted on property values in the defined area. I would not describe resolution of these issues as negligible in relation to the individual issues. Even if Inco is right and the case does depend upon resolution of the *Rylands v. Fletcher* issue, that is not an inconsequential matter. To make out the strict liability claim based on that doctrine any plaintiff would have to show a non-natural use of land, the escape of something (here, nickel) likely to cause mischief, and damage. As Goudge J.A. said in *Cloud*, at para. 86: "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."

[72] The result in *Rumley* is also instructive. *Rumley* involved alleged sexual, physical and emotional abuse at a residential school for children with disabilities. In *Rumley*, the court found that the preferable procedure requirement was met even though under the British Columbia legislation the common issues must predominate over those affecting only individual class members. As McLachlin C.J.C. said in *Rumley*, *supra*, at para. 36:

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.

[73] The same can be said here. There is no dispute that the refinery emitted nickel. The essential question is whether Inco is liable in tort for those emissions and whether the emissions affected property values of the class members. Just as injury and causation would have to be litigated in individual proceedings following resolution of the common issues in Rumley, so too will there have to be individual litigation of the relatively narrow issue of quantifying the effect on particular properties. Furthermore, the individual issues of injury and causation in Rumley would seem to me to be much more substantial than the individual issues of causation and damages that would remain in this case.

[74] As was said in Cloud, at para. 84, "[t]his 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." [page668]

[75] Inco also relies upon this court's decision in Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (C.A.). In Chadha, the plaintiff alleged that the manufacturers of iron oxide pigments had entered into an unlawful conspiracy to fix the price of the pigments, thus illegally increasing the price of bricks and paving stones that use the pigments. The plaintiff alleged that this increase in price had been passed through to purchasers of new homes. On the certification motion, a crucial issue was whether the loss component of liability could be proved on a class-wide basis.

The plaintiff's expert simply assumed that increased cost had been passed on to consumers. There was no evidence to support that theory and no methodology suggested for proving it or dealing with the variables that affect the end price. Therefore, proof of loss as a component of liability could not be a common issue. The only remaining common issues in the case were not sufficient to justify a finding that a class proceeding was the preferable procedure.

[76] There are clearly some similarities between Chadha and this case. Inco disputes that the 2000 disclosures concerning nickel contamination caused any loss to Port Colborne property owners and submits that property valuation is an idiosyncratic exercise dependent upon a large number of variables. Unlike Chadha, however, the appellant has adduced expert evidence to show a link between the 2000 disclosures and the negative impact on property values. That evidence purports to demonstrate a negative impact on property values in Port Colborne as compared to other comparable communities in the Niagara Region during the relevant time, and shows that the only relevant event during the time was the disclosures about nickel contamination. While Inco disputes the value of this evidence, the certification motion is not the place for resolving that controversy. Contrary to the holdings by the motion judge and the Divisional Court, this is not an example of "certify now and worry later". (See reasons of the motion judge, at para. 148, and the Divisional Court, at para. 34.)

[77] If the appellant can prove that Inco is liable for the loss in value of the property there would then have to be individual assessments. But, this is not unusual in class proceedings. See *Cloud*, at para. 90. Alternatively, this may be a case for an aggregate assessment of damages as contemplated by s. 24 of the Act if the appellant can show that every member of the class was adversely affected by the disclosure of the nickel pollution by Inco. See *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231, [2004] O.J. No. 19 (S.C.J.), at paras. 63 and 64. [page669]

(ii) Access to justice

[78] In *Hollick*, the Supreme Court of Canada also found, at para. 33, that allowing a class proceeding in that case would not serve the interests of access to justice in relation to the alleged pollution arising from the Keele Valley landfill site. The City of Toronto operated the site under a Certificate of Approval issued by the Ministry of the Environment. The Certificate required the City to establish 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". See reasons of the Supreme Court of Canada in *Hollick*, at para. 3. McLachlin C.J.C. described the Trust Fund as "an ideal avenue of redress" (at para. 33) for the many small claims that would be superior to full-blown litigation. She noted that no claims had been made against the Fund which suggested to her that the claims are "either so small as to be non-existent or so large as to provide sufficient incentive for individual action" (at para. 33). She did, however, point out that "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" (at para. 33). The existence of such a scheme is, however, one consideration to take into account when assessing concerns of access to justice.

[79] *Inco* makes the same point here relying, as did the motion judge, on the existence of the CBRA. The CBRA provides for remediation but does not provide any kind of monetary compensation. The motion judge recognized that "standing alone" the CBRA was not a viable alternative but it should be considered as part of the "available alternative procedures, in conjunction with other alternatives such as joinder, tests cases and the like" (at para. 131). Now that the appellant has limited his claim to the impact on property value, the argument that the CBRA provides an adequate alternative is even stronger in some respects. The purpose of remediation is to alleviate the effects of the pollution by the addition of substances to existing soil to stabilize soil conditions, the use of certain vegetation that naturally absorb nickel from soil or the removal of contaminated soil. In theory, remediation should remove the impact of the pollution, including the impact on

property values.

[80] Despite the strong argument supporting the alternative of the CBRA, I am satisfied that it does not address the access to justice concerns. The CBRA does not address the core issue of this lawsuit: the alleged widespread damage to land values [page670] throughout Port Colborne caused by the past pollution. Remediation is limited to qualifying individual properties with significant contamination. It is open to the class members to argue that it does not address the injury already caused. Inco may be able to show that land values may rebound after remediation, but that is an issue for the trial.

[81] The motion judge was also concerned with the possibility for the premature or precipitous determination of claims because of "the possibility that diseases and conditions will manifest themselves at some future time" (at para. 132). The premature determination of claims is no longer a concern since the health claims have been dropped from the proposed class proceeding.

[82] The motion judge also took into account, at para. 130, that "the entire situation in Port Colborne is currently under the watchful eye of the MOE". He noted that the MOE had "already made orders requiring Inco to take certain remedial steps". I do not see that the continued involvement of the Ministry is a serious factor in addressing access to justice concerns. The Ministry's involvement is prospective. It may prevent further contamination in this one location but there is no suggestion that the Ministry's involvement can address monetary losses from the past pollution.

[83] Finally, the motion judge took into account that there may be many very large claims and that those claimants could band together to pursue their claims, presumably through joinder or a test case. The motion judge suggested that the smaller claimants might well benefit from findings made in these large lawsuits. The large claims would appear to fit into two classes. Claimants, such as people within the Rodney Street area who allegedly suffered the most serious health effects and owners of agricultural lands who might have large claims for

damage to crops. The large health claims are no longer part of the class proceeding. There is mention in the record of one lawsuit involving the Augustine family, but that action, which was launched in the mid-90s and relates to agricultural land, appears to be stalled at the discovery stage. The evidence is conflicting as to the reason for the delay. It is far from clear that this action or any like it could provide any alternative to the class proceeding for the vast majority of the members of the class. These claims involve entirely different and much more complex issues.

[84] On the other hand, it may well be the case that many of the people whose property values were most seriously impacted, such as the Rodney Street owners, are also the most vulnerable and least able to prosecute their individual claims. Many of them are "elderly persons and others on fixed incomes, as well [page671] as partially employed or unemployed persons, persons with disabilities and recipients of social assistance" (reasons of motion judge, at para. 22). Obviously, not all of these people would be property owners and would therefore not fall within the class in any event. However, those who do would find it extremely difficult to mount an action against Inco. In *Cloud*, at para. 88, Goudge J.A. quoted a passage from *Rumley*, at para. 39, that has some application 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.

(iii) Behaviour modification

[85] The motion judge also found that certifying the class action would not achieve the goal of behaviour modification since the MOE was already involved and Inco had established the CBRA. I have concerns with two aspects of the motion judge's reasoning in coming to this conclusion.

[86] First, according to the motion judge, Inco had "begun to take account of the costs arising from the operations of the

Refinery ... In other words, the modification of behaviour, insofar as that can occur, ha[d] already begun" (at para. 133). The motion judge also noted that in *Hollick, McLachlin C.J.C.*, at para. 35, took into account the other avenues by which the complainant could ensure that the defendant City took full account of the costs of its actions, outside the City's Small Claims Court Trust Fund, through procedures under Ontario environmental legislation. The same avenues are available to the plaintiffs in this case outside the CBRA. In particular, under the Environmental Protection Act, citizens affected by a cleanup order have a statutory right to appeal the order to the Environmental Review Tribunal, and from there, to the Divisional Court on a question of law and to the Minister on a question of fact or policy.

[87] In my view, the motion judge took too narrow a view of the goal of behaviour modification. In *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453, [1995] O.J. No. 16 121 D.L.R. (4th) 496 (Div. Ct.), at p. 472 O.R., p. 514 D.L.R., Moldaver J. adopted the following description of this goal: "modifying the defendants' behaviour so as to inhibit misconduct by those who might ignore their obligations to the public". In a similar vein, *McLachlin C.J.C.*, at para. 29 of *Western Canadian Shopping Centres*, supra, described how[page672]

... 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.

(Emphasis added)

[88] Thus, modification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often

has minimal impact on any one individual. This is why environmental claims are well suited to class proceedings. To repeat what McLachlin C.J.C. said in *Western Canadian Shopping Centres*, supra, at para. 26 "Environmental pollution may have consequences for citizens all over the country."

[89] Second, the motion judge speculated that certification might have the effect of making Inco less co-operative. In my view, it was an error in principle for the motion judge to take into account the possibility that Inco might become less co-operative if the action were certified, thus delaying the implementation of the CBRA. I do not agree with the proposition that property owners must abandon their legal rights and their right to be made whole in order to buy the co-operation of a defendant they say has caused widespread harm to the community. Furthermore, there is little evidence to support this suggestion and it seems inconsistent with Inco's approach to its responsibilities in Port Colborne. The following is drawn from para. 13 of Inco's factum in this court:

The appellant did not dispute that since the creation of the MOE, Inco has scrupulously complied with environmental standards and voluntary abatement measures. One of the appellant's own witnesses -- a former MOE employee assigned to monitor Inco's facility in the 1970s and 80s -- testified that Inco actively pursued voluntary abatement efforts, never installed anything without proper regulatory approval, never failed to install anything which had been approved, and never violated any conditions of approval.

In any event, even though the CBRA is a voluntary program, the motion judge noted the Ministry's indication that, "if Inco were to attempt to withdraw from the CBRA the MOE would use its regulatory authority to require Inco's continued participation" (at para. 130).

[90] While the impact of the narrower action will be more restrained, I am satisfied that a class proceeding can achieve the goal of behaviour modification in view of the other inadequate alternatives. [page673]

[91] To conclude, I am satisfied that the narrower claim meets the preferable procedure requirement.

(e) Representative plaintiff

[92] The motion judge held that the appellant failed all three requirements for a representative plaintiff. Those requirements are fair and adequate representation, a workable litigation plan, and no conflict of interest on the common issues. The Divisional Court did not consider this issue. In my view, the motion judge erred in principle in his approach to this question.

[93] In *Western Canadian Shopping Centres*, *supra*, at para. 41, McLachlin C.J.C. explained the concept of adequate representation as involving factors such as

... 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 ...

[94] In this case, the motion judge unreasonably emphasized the appellant's ability to pay any costs incurred. As the motion judge recognized, the appellant was unable to access funding through the Class Proceedings Committee because Inco and the other [then] defendants had not filed a statement of defence. Nevertheless, the appellant had paid significant cost orders made against him, albeit somewhat tardily. It was an error in principle to hold, as the motion judge did, that it was incumbent on the appellant to have "concrete and specific alternative funding arrangements in place and to provide the specifics of those arrangements in the certification material" (at para. 143). There is nothing in the legislation itself that imposes such a rigorous requirement on the plaintiff. The capacity of the representative plaintiff to fund the litigation

is merely one factor in determining whether the plaintiff can adequately represent the class.

[95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338, [2004] O.T.C. 920 (S.C.J.). In referring to the reasons of the motion judge in this case and the statement from *Western Canadian Shopping Centres* about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following, at paras. 91 and 94:

The statements in [*Western Canadian Shopping Centres*] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under [page674] the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA.

.

If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[96] If there are large costs orders outstanding when the certification motion is heard they can be taken into account by the motion judge. However, in this case the outstanding orders had been paid. I agree with Cullity J. that there is no requirement under our legislation for the plaintiffs to

demonstrate that they have concrete and specific funding arrangements.

[97] The motion judge was also not satisfied with the litigation plan. In my view, the motion judge took an unreasonably rigid view by requiring that all the details for the litigation be "within the four corners of the plan itself" (at para. 144). The elements of the litigation plan, especially for litigating the narrower issues with which we are now concerned, can be found in the litigation plan and in the affidavit of Mr. Kaufmann. Obviously, it would be easier for the judge hearing the certification motion to have all the elements of the plan in one place, but it would not be consistent with the generous approach required by the cases, especially *Cloud*, to defeat a motion for certification because there are two sources for the litigation plan.

[98] The motion judge also erred in principle in finding that the appellant had a conflict of interest. This finding was based in part on the possibility that as a resident of the Rodney Street Area the appellant was likely to be more aggressive than other residents of Port Colborne who were less affected by the pollution and who may have suffered less injury. In *Western Canadian Shopping Centres*, at para. 41, McLachlin C.J.C. held that the court should be satisfied that the representative plaintiff "will vigorously and capably prosecute" the claim. It would be an odd result if this appellant's obvious interest in vigorously prosecuting the claim was seen as disqualifying him as the representative plaintiff. I think the court should be more concerned with a "straw man" plaintiff who has no particular interest in [page675] the litigation. In any event, it was mere speculation that the appellant's keen interest in pursuing the litigation would lead to a conflict of interest. If it turns out that the appellant is not properly representing the interests of the class, the court can take steps at that point. For example, s. 14 of the CPA provides that to "ensure the fair and adequate representation of the interests of the class ... the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding".

[99] The motion judge also relied upon the fact that an interested citizen and supporter of the CBRA was unable to obtain assistance from the appellant's counsel in putting his position before the court. It is not surprising that residents of Port Colborne will have different views about the efficacy of the CBRA and similarly different views about proceeding by way of a class proceeding. However, the conflict of interest with which the CPA is concerned in s. 5(1)(e)(iii) is "an interest in conflict with the interests of other class members" "on the common issues". There was no evidence to suggest that the difference of opinion about the efficacy of the CBRA represented a conflict of interest on the common issues. Any residents of Port Colborne who disagree with pursuing this litigation may opt out of the class proceeding.

[100] In my view, the appellant has met the representative plaintiff requirements in s. 5(1)(e).

Costs

[101] The motion judge awarded significant costs against the appellant and there was considerable argument in this court about the principles that should apply to the awarding of costs against the proposed representative plaintiff on certification motions. While the court received very helpful submissions from the appellant, the respondents and the intervenors, in light of my conclusion on the certification motion, I need not address those issues.

Disposition

[102] In my view, the appellant has shown that the action satisfies the requirements for certification under s. 5(1) of the CPA. Accordingly, I would 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. The case should be remitted to the supervision of the regional senior justice or to such judge as he directs to manage the action.

[103] The parties may make written submissions as to costs

here and below. Those submissions are to be exchanged and filed [page676] within three weeks of the release of these reasons. Within a further two weeks, each party may then file a written reply. There will be no costs order for or against the intervenors.

Appeal allowed.

Notes

Note 1: I assume, as appears to be the case, that the Rylands v. Fletcher doctrine has not been totally subsumed in Canada by negligence or nuisance. See G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Scarborough: Carswell, 2002), at 218.

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
1291079 ONTARIO LIMITED)
) David Sterns and Andy Seretis, Counsel for
Plaintiff) the Plaintiff
)
– and –)
)
SEARS CANADA INC. and SEARS,) Peter F.C. Howard and Samaneh Hosseini,
ROEBUCK AND CO.) Counsel for the Defendants
)
Defendants)
)
)
) **HEARD:** June 11, 2014

2014 ONSC 5190 (CanLII)

REASONS FOR JUDGMENT

GRAY J.

[1] The plaintiff was a “Sears Hometown Store” operator. Sears is a well-known, large retailer.

[2] This case has to do with the relationship between operators of Hometown Stores and Sears. In substance, it is alleged that Sears has taken inappropriate and undue advantage of its position, to the unlawful disadvantage of the store operators.

[3] In this motion to certify an action as a class proceeding, the plaintiff seeks to represent a class of persons who had, or have, Hometown Store contracts with Sears. It is said that the contractual arrangements constitute the members of the class as “franchisees” and the defendants as “franchisors”, thus making applicable the provisions of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3. If so, the provisions of that *Act* bring into play certain

disclosure obligations that have not been fulfilled, and a number of substantive provisions that give rise to statutory causes of action and potential damages. In the alternative, it is alleged that the defendants have breached their common-law obligation of exercising discretion under the agreements in good faith, thus giving rise to damages.

[4] For the reasons that follow, the motion is granted and this action is certified as a class proceeding.

Background

[5] As I will discuss more fully later, the plaintiff is required to satisfy the requisites of section 5(1) of the *Class Proceedings Act*, S.O. 1992 c.6, as amended. With respect to the issue of whether a cause of action is disclosed, only the pleadings are to be examined. Regarding the other criteria, it is incumbent on the plaintiff to show that there is some basis in fact to support the conclusion that each criterion has been met.

[6] With these requirements in mind, I will discuss the basis of the claim and the defences as outlined in the pleadings, and some of the evidence that is relevant to the other criteria.

[7] The plaintiff alleges that the members of the class comprise a network of approximately 260 “Sears Hometown Stores” pursuant to a standard Dealer Agreement. The plaintiff alleges that the Dealer Agreement is a franchise agreement within the meaning of the *Arthur Wishart Act*.

[8] The plaintiff alleges that Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves unattainable revenues. The plaintiff alleges that Sears is aware that the Hometown Store program is not economically viable for the dealers.

[9] The plaintiff alleges that the Hometown Store program is profitable for Sears. It is alleged that Sears realizes high profit margins on sales made through the Hometown Stores while downloading high costs onto the dealers. While Sears maintains unilateral, discretionary power under the agreement to adjust the dealers’ financial compensation, Sears has ignored repeated pleas to exercise its discretion to increase compensation to a sustainable level.

[10] The plaintiff alleges that Sears conceals the economic reality about the Hometown Store program from prospective dealers. It disregards franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the system, it provides a common information package to prospective dealers which touts the system as “brilliant”, “better than a franchise”, and “a smart business model”.

[11] The plaintiff alleges that once the Dealer Agreement is signed, Sears exploits the dealer by maintaining a compensation structure that does not allow the dealer to make a living wage, let alone a return on its investment and efforts; Sears poaches sales in the dealers’ Market Areas by selling goods directly to customers; Sears charges an unauthorized “handling fee” on goods purchased online or by telephone and shipped to the dealers’ stores; and Sears has introduced new programs that actually claw back for many dealers what little economic benefits the program delivers to the dealers.

[12] The plaintiff alleges that these actions of Sears are contrary to its contractual duty of good faith and statutory duty of fair dealing.

[13] The plaintiff alleges that on goods sold through a Hometown Store, Sears realizes a gross margin of approximately 36 per cent. It is alleged that out of that amount, Sears pays the dealer approximately 10 per cent. Out of that commission, the dealer must pay rent, its employees, utilities and all other expenses. It is alleged that the vast majority of dealers barely earn enough commissions to cover their expenses and pay minimum wage to the principals.

[14] The plaintiff alleges that under the Dealer Agreement, the commissions can be changed by Sears in its sole discretion on 90 days notice. The plaintiff alleges that Sears has a duty of good faith and a statutory duty of fair dealing under the *Arthur Wishart Act* to exercise its discretion in a manner which is fair and commercially reasonable. Instead, it is alleged that Sears has perpetuated a predatory system of under-compensation. The plaintiff alleges that the commissions need to be increased to at least 15 per cent in order for the network to be viable. Instead, Sears has lowered commission rates and unlawfully competed within the dealers’

Market Areas by shipping directly to customers, and offered lowered prices through direct selling channels while prohibiting dealers from matching prices.

[15] Specifically, the plaintiff alleges that in August 2012, Sears reduced the average retail commission rates paid to dealers.

[16] The plaintiff alleges that the Dealer Agreement does not permit Sears to compete in the dealers' Market Areas using direct shipping through direct channels. Despite this, it is alleged that Sears actively competes by selling through direct channels and shipping directly to customers in the dealers' Market Areas. In the event that the Dealer Agreement does not specifically prohibit Sears from acting in this way, it is alleged that Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing.

[17] The plaintiff alleges that Sears charges a \$3.95 flat handling fee for customers that purchase items through a direct channel and choose to ship to a Hometown Store for pick up. This fee is kept by Sears and not by the dealer. The plaintiff alleges that the imposition of the fee is a breach of the Dealer Agreement or alternatively it constitutes a breach of the duties of good faith and fair dealing.

[18] The plaintiff alleges that Sears has changed the method of sharing advertising costs with the dealer, the result of which is that dealers are now paying more for local advertising. It is alleged that these changes are a breach of the Dealer Agreement, or alternatively they constitute a breach of the duties of good faith and/or fair dealing.

[19] The plaintiff alleges that Sears is a franchisor under the *Arthur Wishart Act*, and each dealer is a franchisee. Thus, it is alleged that Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of *Act*. It is alleged that the actions of Sears constitute violations of these duties.

[20] The plaintiff alleges that pursuant to the *Arthur Wishart Act*, Sears was required to deliver to prospective dealers a statutorily prescribed disclosure document. It is alleged that

Sears did not do so. Had it done so, Sears would have to had to disclose materials facts, including:

- a) over 70 per cent of dealers are not profitable;
- b) many dealers exhaust their resources and cease operating within a few years;
- c) revenues of Hometown Stores have been steadily declining;
- d) Sears competes directly by selling into dealers' Market Areas through direct channels;
- e) Sears charges an improper handling fee of \$3.95 for items purchased through a direct channel for shipment to a Hometown Store;
- f) Sears does not share the cost of local advertising undertaken by the dealer.

[21] The plaintiff claims that each dealer is entitled to damages pursuant to sections 3 and 7 of *Arthur Wishart Act*.

[22] In the event that the *Arthur Wishart Act* does not apply, the plaintiff claims that the members of the class are entitled to damages for breach of contract, including breach of the duty of good faith; and disgorgement of profits unreasonably retained as a result of Sears' unjust enrichment. It is pleaded that Sears has retained those profits unjustly, to the detriment of dealers and without juristic reason.

[23] The plaintiff claims that Sears has violated the Dealer Agreements by failing to account for commissions, and now claims a complete accounting of all commissions since the inception of the Dealer Agreements, and judgment for any shortfall arising therefrom.

[24] In the statement of defence, it is asserted that Sears Canada Inc. is a leading retailer of general merchandise in Canada. It is asserted that Sears, Roebuck and Co. does not carry on business in Canada. It is asserted that Sears, Roebuck is only a party to the Dealer Agreements because it is the owner of several Sears trademarks. Otherwise, Sears, Roebuck has no other duties or obligations under the Dealer Agreements.

[25] The defendants assert that the *Arthur Wishart Act* does not apply to the Sears Hometown Stores. It is asserted that the operators of the Hometown Stores are not franchisees within the meaning of the *Act*.

[26] The defendants deny that dealer commissions have been reduced. In fact, it is asserted that the August, 2012 changes to the compensation structure resulted in an increase to the average commission. It is asserted that direct sales have been part of Sears' business for many years, and there is nothing in the Dealer Agreement that precludes Sears from engaging in this practice. It is asserted that Sears provides a 4.5 per cent commission to dealers on catalogue and internet sales shipped to their stores. It is asserted that the changes to advertising subsidies led to the reduction of advertising expense for the dealers.

[27] The defendants deny that any amendments to the dealer compensation structure and advertising subsidies were detrimental to the dealers, or amounted to a breach of contract, breach of a duty of good faith (or breach of the statutory duty of fair dealing in the event that the *Arthur Wishart Act* applies, which is denied) or unjust enrichment.

Section 5(1) of the *Class Proceedings Act*

[28] As noted earlier, the plaintiff must satisfy the requisites of section 5(1) of the *Class Proceedings Act*. That subsection provides 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 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.

[29] I will discuss each requirement of section 5(1) in turn.

i. Do the pleadings disclose a cause of action?

[30] Under this requirement, all that is to be examined are the pleadings. No evidence is to be considered. With respect to the other requirements of section 5(1), the plaintiff must show that there is some basis in fact for each of those requirements.

[31] It is not in dispute that the test under section 5(1)(a) of the *Class Proceedings Act* is the same as the test under Rule 21.01(1)(b), as to whether a pleading discloses a reasonable cause of action: that is, whether it is “plain and obvious” that the pleading does not disclose a reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.). In assessing the claims made in the pleading, it is to be read generously, with allowances for deficiencies: see *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 (Ont. S.C.J.), at para. 26.

[32] The assertion that the *Arthur Wishart Act* applies to the relationship between Sears and the plaintiff is clearly a proper cause of action. The defendants do not contend otherwise, and indeed they concede that this allegation is properly a common issue. If the *Act* applies, the claims for damages under sections 3 and 7 of the *Act* are clearly appropriate as well.

[33] The defendants also do not deny that the plaintiff has pleaded valid causes of action based on the implied duty of good faith, and unjust enrichment.

[34] I should note that the plaintiff has asserted a cause of action based on negligent misrepresentation, but counsel advised me at the hearing of the motion that that cause of action will be abandoned and the statement of claim amended accordingly. I also note that it is agreed that if the *Arthur Wishart Act* applies, it will be applicable to all operators of stores, both within and outside Ontario.

[35] In the final analysis, the plaintiff has pleaded valid causes of action and accordingly section 5(1)(a) has been satisfied.

[36] I note that while Sears alleges that there is no cause of action against Sears, Roebuck, that is best determined on a motion for summary judgment if one is brought.

(ii) Is there an identifiable class of two or more persons?

[37] The class proposed by the plaintiff consists of all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.

[38] The requirements of a class capable of certification were summarized by Strathy J. (as he then was), in *Fairview Donut Inc. v. The TDL Group Corp*, [2012] O.J. No. 834 (S.C.J.), at para. 220, as follows:

- (a) membership in the class should be determinable by objective criteria without reference to the merits of the action;
- (b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;
- (c) the class must be bounded and not of unlimited membership;
- (d) there is a further obligation, although not onerous, to show that the class is 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;
- (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and
- (f) a proper class definition does not need to include only those persons whose claims will be successful.

[39] The defendants attack the proposed class definition, primarily on the basis that it does not distinguish between dealers who signed Dealer Agreements before and after August, 2012 when changes were made to the commission structure and advertising subsidies. Specifically, the defendants assert that claims based on the August, 2012 changes are not tenable for the following groups of dealers:

- (a) dealers who terminated Dealer Agreements prior to August, 2012;
- (b) dealers who had Dealer Agreements as of 2012, and have allowed their agreements to be renewed since then; and
- (c) dealers who entered into Dealer Agreements after August, 2012.

[40] The defendants also argue that the class definition should exclude dealers who entered into Dealer Agreements with knowledge of this action.

[41] I disagree with the defendants, and in my view the class definition as proposed is satisfactory.

[42] I do not read the claim based on the August 2012 amendments in the same way as the defendants appear to read it. Putting aside issues under the *Arthur Wishart Act*, assuming it applies, I read the allegations respecting the August 2012 amendments as examples of Sears' breaches of the obligation of good faith. As I read it, the statement of claim alleges that prior to the August 2012 amendments, Sears was already in breach of its obligation to exercise its discretion under the Dealer Agreements in good faith, and the August 2012 amendments simply resulted in further detriment to the dealers. Fundamentally, the plaintiff alleges that any dealer who was subject to a Dealer Agreement suffered in the same way, although the amount of harm at any particular point in time might have been different.

[43] I think the class as proposed is satisfactory and meets the criteria set out by Strathy J. in *Fairview Donut*, even though all class members do not share exactly the same interest in the resolution of one or more of the common issues.

(iii) Are there appropriate common issues?

[44] The term "common issues" is defined in section 1 of the *Class Proceedings Act* 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.

[45] The principles concerning the definition of appropriate common issues were summarized by Strathy J. in *Fairview Donut, supra*, at paras. 229 and 230, as follows:

- a. the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;
- b. 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;
- c. there must be a basis in the evidence before the court to establish the existence of common issues;
- d. there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;
- e. the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;
- f. 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 for (or against) the class;
- g. 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;
- h. a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

- i. where questions relating to causation or damages are proposed as a common issue, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;
- j. common issues should not be framed in overly broad terms;
- k. the core of a class proceeding is the element of commonality – there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this; and
- l. the common issues should be clear, neutrally-worded and fair to both parties.

[46] At the argument of the motion, I was furnished with revised proposed common issues by counsel for the plaintiff. They are as follows:

- a. Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the obligation to exercise contractual discretion in good faith by:
 - i. Failing to increase commissions paid to class members;
 - ii. Reducing commissions paid to class members in August 2012;
 - iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commissions to the class members for good sold directly to customers located within the class members' Market Areas through direct channels (as described below);
 - iv. Removing or reducing local store advertising subsidies required under Schedule A, paragraph H of the Dealer Agreement;

- v. Failing to provide a monthly accounting of how compensation was calculated as required under Schedule A, paragraph D of the Dealer Agreement; or
 - vi. Imposing handling fees payable by customers on catalogues sales made by dealers?
- b. Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?
- c. If Sears Canada or Sears Roebuck has breached its contractual duties, or been unjustly enriched, what is the appropriate measure of past damages or compensation?
- d. Are Sears Canada and Sears Roebuck, or either of them, a “franchisor” or “franchisor’s associate” within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (“*Wishart Act*”) and similar provisions under franchise legislations otherwise governing any such class member? If so:
- i. Are all class members entitled to the benefit of the *Wishart Act* by virtue of the choice of law provisions in the Sears standard Dealer Agreement?
 - ii. Did Sears breach the duty of fair dealing under s. 3 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member by any of the acts or omission set out in (a) (i) to (vi) above and, if so, what are the damages?
 - iii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member), at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof?

- e. Did Sears fail to disclose the material facts particularized in paragraph 93 of the statement of claim to each dealer before the dealer signed the Dealer Agreement?
 - i. If so, directions pursuant to s. 25(2) of the CPA for the calculation of individual damages for misrepresentation or under s.7(1) of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member); and
- f. What scale and quantum of costs should be awarded?

[47] The plaintiff must show, through evidence, that there are appropriate common issues. The test is not a high one. The plaintiff must show that there is “some basis in fact” for the proposition that there are appropriate common issues: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, at para. 99.

[48] It is clear from *Cloud, supra*, that the resolution of the common issue or issues need not resolve the entire action. It is sufficient if it resolves an issue or issues that will move the action some distance. The fact that there may be many individual issues left to be determined does not mean that common issues should not be certified. As Goudge J.A. stated in *Cloud* at para. 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 questions 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 elucidate the various individual issues which may remain after the common trial.

In my view, the question of whether the individual issues will unduly dominate the action is more properly part of the preferability inquiry: *Cloud*, at paras. 73-76; and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[49] Both parties have filed extensive evidence, primarily on the commonality issue.

[50] While Sears asserts that there are some differences in the contractual arrangements, in that there were a variety of supplementary agreements with individual dealers, Sears does not argue that those differences are sufficient to disqualify reliance on the Dealer Agreement by the

plaintiff as a basic common feature. Sears' argument, in the main, rests on the assertion that the plaintiff's allegations are founded on the effect of Sears' conduct on the members of the class, which will differ from dealer to dealer.

[51] Sears points out that, in its simplest terms, the plaintiff's allegation is that dealers do not make enough money. Sears asserts that each of the allegations under proposed common issue (a) involves business practices by Sears that are alleged to be breaches of the duty of good faith or unjust enrichment because they contribute to or exacerbate the inadequate state of dealer compensation.

[52] Sears submits that "adequacy" of dealer compensation is vague and subjective. In each case, what will be required is a determination of the negative impact of the alleged conduct by Sears, which is clearly an individual issue for each dealer. Determining whether there is negative impact would involve examining each dealer's revenues, expenses, and regional and local factors affecting each dealer, to determine whether the dealer is not making the requisite amount of profit, whatever that might be, and if so, whether that is due to Sears' business practices, to the dealer's own inadequate business practices, or to factors external to both parties.

[53] Alternatively, if the plaintiff is attempting to say that Sears' alleged conduct had a negative impact on the whole class, the plaintiff must adduce evidence that such harm can be determined on a class-wide basis and has failed to do so.

[54] The defendants primarily rely on *Fairview Donut, supra*; *Spina v. Shoppers Drug Mart Inc.*, [2013] O.J. No. 4979 (S.C.J.); and *909787 Ontario Ltd. v. Bulk Barns Food Ltd.* (2000), 138 O.A.C. 180 (Div. Ct.).

[55] In my view, Sears' reliance on *Fairview Donut* is misplaced. While it is true that Strathy J. held that some of the common issues were not certifiable, he did say that an issue as to whether franchisees were required to sell baked goods at "commercially unreasonable" prices could be certified if structured properly. He relied on the decision of the Divisional Court in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, (2009), 96 O.R. (3d) 252 (Div. Ct.), a decision that was affirmed by the Court of Appeal, 100 O.R. (3d) 721 (C.A.). At paras. 256 and 257 of *Fairview Donut*, Strathy J. stated:

256. On the other hand, in *Quizno's*, the Divisional Court was not concerned about the fact that the amount of loss or damage sustained by class members might vary from region to region or from time to time because of the “systemic” nature of the conduct potentially giving rise to liability. The system included a common contract, a common pricing system and a common distribution system. It included the addition of mark-ups and sourcing fees by the franchisor on every single product, with an additional mark-up being added by the distributor. In *Quizno's*, the complaint was not just in relation to some products acquired by franchisees; it related to all the products they sold. Moreover, the plaintiff alleged that some forty percent of *Quizno's* franchisees were operating at a loss.

257 The majority of the Divisional Court held in *Quizno's* that the breach of contract claim gave rise to common issues. The issue of the commercial reasonableness of the defendants' mark-ups and sourcing fees could be addressed in common by examining the franchisor's conduct, the services it provided and industry standards.

[56] I think Strathy J.'s reasoning as to the common features arising from the conduct of the defendant in that case is applicable here. As noted, the Divisional Court's decision in *Quizno's* was affirmed by the Court of Appeal.

[57] In *Spina*, Perell J. certified a number of issues as common issues but declined to hold that Shopper's Drug Mart's budgeting process gave rise to a common issue. The process itself involved setting a specific budget for each store. There was simply insufficient commonality, even on the part of the defendant's conduct, to say that there was a certifiable common issue.

[58] The Divisional Court's decision in *Bulk Barn* was considered by Strathy J. in *Fairview Donut*, at paras. 254 and 255, but he found more persuasive the Divisional Court's decision in *Quizno's*.

[59] Closer to the facts of this case is *Ontario v. Mayotte* (2010), 99 C.P.C. (6th) 229 (Ont. S.C.J.). In that case, it was alleged that the Province of Ontario had under-compensated private issuers of driver's licences.

[60] Perell J. held that the following issues were proper common issues:

- a. Does the contractual relationship between Ontario and the private issuers include a duty on Ontario to ensure that Issuer compensation is, and remains fair, rational,

objectively determined, and proportional to the effort required to do each transaction?

- b. Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensation:
 - i. to adequately increase the standard commission rate table,
 - ii. to update the time series analysis on which compensation was and continues to be based,
 - iii. to take into consideration all steps required to perform the required transactions, and
 - iv. to sufficiently increase the annual stipend?
- c. If so, has Ontario breached and is it continuing to breach any such contractual obligation?
- d. Was Ontario under a duty to increase compensation to the private issuers following the conclusions of the report of the Ministry of Transportation dated August 28, 2003?
- e. Has Ontario satisfied its duties by the increases in compensation which it has put into effect since August 28, 2003?
- f. If Ontario has not breached its contractual duties to the private issuers in respect of compensation, has Ontario been unjustly enriched by having under-compensated the private issuers?

[61] The defendant in *Mayotte* argued that to determine all or some of these questions it would be required that individual findings of fact be made about the circumstances of each contractual relationship. Perell J. disagreed. At para. 75, he stated “A trial judge might conclude that in the circumstances Ontario breached its contracts with all of the private issuers as of

August 28, 2003 when it is alleged that Ontario knew that the compensation rate paid to the private issuers was not fair, proportional, rational, or objective.”

[62] In the action before me, it is alleged that there is a common Dealer Agreement; dealers’ compensation is fixed by a common formula; advertising subsidies are commonly fixed, with a few exceptions; and Sears sells directly into each dealer’s Market Area. It is alleged that Sears knows that these features result in unreasonable rates of remuneration to dealers, which violates Sears’ obligation to exercise its discretion under the dealers’ agreements in good faith. In the alternative, it is alleged that Sears is unjustly enriched. If the *Arthur Wishart Act* applies, there are common questions as to whether it has been complied with. The resolution of the common issues will move the action a long way: *Cloud* at para. 82.

[63] As did Perell J. in *Mayotte*, I think the questions set out in proposed common issues (a) and (b) are suitable common issues. However, there are amendments I will make in order to make them more neutral and fair to both sides.

[64] As was the case in *Cloud*, there will be individual issues that must be determined. Assuming the plaintiff succeeds on the common issues, or some of them, the measure of damages for each member of the class will depend not only on the effect of Sears’ conduct, but on the individual circumstances of each dealer. However, the common issues trial judge will have ample tools at his or her disposal to determine appropriate damages on a class-wide basis, or an individual basis, or both: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.). As was the case in *Markson*, damages can be certified as a common issue, but might also be determined individually. The common effect of Sears’ conduct may give rise to damages that can be attributed to the class as a whole. There will likely also be damages that must be determined individually. That is something to be determined by the common issues trial judge after deciding the common issues.

[65] Costs are not a common issue.

[66] I have revised the proposed common issues, and they are attached to these reasons as Appendix A.

[67] I am prepared to consider further revisions, which will be discussed at the next case conference.

iv. Is a class proceeding the preferable procedure for resolving the common issues?

[68] The preferability inquiry involves answering two questions: first, would the class action be a fair, efficient and manageable method of advancing the claim? Second, would the class action be preferable to other reasonably available means of resolving the claims of class members? See *Cloud, supra*; and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.).

[69] As noted earlier in my discussion of *Cloud*, the preferability inquiry largely involves a determination of whether individual issues will overwhelm the common issues.

[70] For the reasons discussed earlier, I do not think the individual issues will overwhelm the common issues. Undoubtedly, there will be a number of individual matters that need to be addressed after the resolution of the common issues, assuming the plaintiff is successful. As noted, damages will need to be assessed, and to some extent at least this will involve individual determinations.

[71] However, as pointed out in *Markson*, the common issues trial judge has many tools at his or her disposal to deal with such issues once the common issues have been addressed.

[72] I am not persuaded that the individual issues will overwhelm the common issues. As noted earlier, I think the resolution of the common issues will move the action a long way.

[73] Assuming the common issues are proper and that the individual issues will not overwhelm them, the defendants do not suggest that there is any other reasonably available means of resolving the claims of class members. There is no alternative procedure required by legislation. The only issue is whether a common issues trial is the preferable method, or whether individual trials commenced by individual members of the class are preferable. In my view, a common issues trial is the preferable method.

v. Is the plaintiff an appropriate representative plaintiff?

[74] The plaintiff no longer operates a Hometown Store. Thus, it has no ongoing stake in the result of the litigation. At most, it will have a right to past damages.

[75] The defendants point out that the plaintiff is now essentially a shell company, with no ability to satisfy a costs order.

[76] James Kay, the principal of the plaintiff, swears that the plaintiff operated a Hometown Store from June, 2007 until it gave notice of termination of the Dealer Agreement in August, 2013, and the Agreement terminated effective December 14, 2013. He swears he has a real and genuine interest in resolving the issues in the lawsuit for himself and for the benefit of all dealers. He swears that the termination of the Dealer Agreement in no way affects his willingness and ability to be the class representative.

[77] Mr. Kay swears that he is aware of the duties owed by the class representative to the class and he is committed to contributing his time, knowledge, energy and leadership to bringing the case to a successful conclusion.

[78] Mr. Kay swears that neither he nor the corporate plaintiff have any interest in conflict with any of the members of the proposed class.

[79] Mr. Kay has proposed a plan for proceeding with the action. He sets out a plan of proceeding which sets out a method of advancing the case on a timely basis, including notice to be sent to the class members; the furnishing of affidavits of documents and productions; examinations for discovery and motions arising therefrom; the exchange of expert reports; mediation; a pre-trial conference; and a common issues trial. Individual hearings, if any, would be conducted after the common issues trial.

[80] Counsel for the defendants submits that the plaintiff is not a proper representative plaintiff. Counsel submits that the plaintiff has a conflict with other members of the class, in that it is no longer the operator of a Hometown Store. Counsel also submits that the plaintiff has no ability to satisfy a costs award. Counsel relies on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 S.C.C. 46, at para. 41, where McLachlin C.J.C. stated:

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). [Emphasis added]

[81] In my view, that statement by McLachlin C.J.C. must be considered in light of the decision of the Court of Appeal in *Pearson, supra*, and the decision of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.).

[82] At para. 95, of *Pearson*, Rosenberg J.A. stated:

[95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338. In referring to the reasons of the motions judge in this case and the statement from Western Canadian Shopping Centres about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following, at paras. 91 and 94:

The statements in [Western Canadian Shopping Centres] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have the result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place – a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of s.5(1)(e) of the CPA.

If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class – or the specific terms of s.5(1)(e) – should be considered to require them to demonstrate this.

[83] It is always open to the defendants to move under rule 56.01(1)(d) for security for costs, subject to any special considerations that may apply to class proceedings: see *Peter v. Medtronic Inc.* (2008), 66 C.P.C. (6th) 274 (Ont. S.C.J.); and *Dean v. Mister Transmission (International)*

Ltd. (2009), 79 C.P.C. (6th) 181 (Ont. S.C.J.). In the meantime, I do not think the plaintiff should be disqualified as an appropriate representative plaintiff in a class proceeding simply on the basis that it does not have the ability to pay costs.

[84] I do not think the plaintiff has any conflict of interest with the other class members. Its interests may not go as far as those of some other class members, but there is no conflict.

[85] As far as the litigation plan is concerned, the defendants have not made any particular criticism of it, other than to submit that it is generic. It is clear that a motion to certify a class proceeding should not be defeated simply on the basis of deficiencies in a litigation plan. I am prepared to entertain any suggestions for amendments to the plan at the next case conference.

[86] I am satisfied that the plaintiff is an appropriate representative plaintiff.

Disposition.

[87] For the foregoing reasons, this action is certified as a class proceeding.

[88] I assume that the parties can agree on the form and content of the formal order. If so, they should bring it to the next case conference and I will sign it. If they cannot agree, I will deal with any issues at the case conference.

[89] I will entertain written submissions with respect to costs, not to exceed five pages together with a costs outline. Counsel for the plaintiff shall have five days to file submissions, and counsel for the defendants shall have an additional five days to respond. Counsel for the plaintiff shall have three days to reply.

Gray J.

APPENDIX A

COMMON ISSUES

- (a) Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:
- i. Failing to increase commission paid to class members;
 - ii. Changing commissions paid to class members in August 2012;
 - iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
 - iv. Changing local store advertising subsidies;
 - v. Failing to provide a monthly accounting of how compensation was calculated; or
 - vi. Imposing handling fees payable by customers on catalogues sales made by dealers?
- (b) Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?
- (c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?
- (d) Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" of "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act*)? If so:
- i. Did Sears breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
 - ii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190

COURT FILE NO.: 3769/13

DATE: 2014-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

– and –

SEARS CANADA INC. and SEARS, ROEBUCK AND
CO.

Defendants

REASONS FOR JUDGMENT

Gray J.

Released: September 8, 2014

McCracken v. Canadian National Railway Company

[Indexed as: McCracken v. Canadian National Railway Co.]

111 O.R. (3d) 745

2012 ONCA 445

Court of Appeal for Ontario,
Winkler C.J.O., Laskin and Cronk JJ.A.
June 26, 2012

Civil procedure -- Class proceedings -- Certification -- Plaintiff bringing proposed class action alleging that defendant misclassified class members as managerial employees to avoid statutory obligation to pay overtime -- Motion judge correctly rejecting plaintiff's proposed common issues concerning misclassification -- Evidence indicating that individualized assessments of job duties and responsibilities of class members would be needed in order to determine if they were properly classified -- Motion judge erring in redrafting common issues and in certifying common issue with respect to what minimal requirements were to be classified as managerial employee of defendant -- Redrafting of common issue not eliminating need for substantial individual inquiries to determine whether defendant had properly classified class members as managerial employees.

The plaintiff brought a proposed class action pleading that the defendant misclassified class members as managerial employees so that the employees would [page746] be excluded under s. 167(2)(a) of the Canada Labour Code, R.S.C. 1985, c. L-2 from the requirement in s. 174 of the Code to pay overtime. A motion to certify the action as a class proceeding under the

Class Proceedings Act, 1992, S.O. 1992, c. C.6 was heard together with a motion by the defendant under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to dismiss the action. The motion judge struck, dismissed and stayed various elements of the plaintiff's claims in negligence and breach of contract. He granted the certification motion but significantly redrafted the common issues. The plaintiff appealed the Rule 21 order and the certification order, and the defendant appealed and cross-appealed the Rule 21 order and appealed the certification order.

Held, the defendant's appeal and cross-appeal from the

certification order should be allowed; the defendant's appeal from the certification order should be dismissed; the appeals from the Rule 21 order should be dismissed.

The motion judge was correct in rejecting the plaintiff's proposed common issues on whether the defendant misclassified class members 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-wise 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. 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 of the defendant. The same evidentiary deficiency -- the lack of evidence supporting a finding of a core of commonality concerning class members' job duties and responsibilities -- still remained. 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 collapsed.

As a result of the conclusions on the absence of a core of commonality, it was unnecessary to decide the correctness of the motion judge's rulings on the Rule 21 motion.

Cases referred to

Algoma Central Marine (Re), [2011] F.C.J. No. 340, 2011 FCA 94,

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Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 1, 2(3)(a), (b), 5(1), (a), (b), (c), (d), (e)(ii), 12, 13, 24, 25, 30

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6 [as am.]

Rules and regulations referred to

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Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 21.01(1), (b), (3), (a), 37.13(2), (a), 39.01(4) [page748]

APPEAL AND CROSS-APPEAL by the defendant from the order certifying the action as a class proceeding and from the order dismissing the Rule 21 motion, [2010] O.J. No. 3466, 3 C.P.C. (7th) 81 (S.C.J.); APPEAL by the plaintiff from the certification order and the Rule 21 order.

Louis Sokolov, Peter L. Roy, Steven Barrett, David F. O'Connor and Sean M. Grayson, for appellant/respondent by cross-appeal.

Guy J. Pratte, Morton G. Mitchnick, Sylvie Rodrigue, Jeremy J. Devereux and Michael Kotrly, for respondent/appellant by cross-appeal.

The judgment of the court was delivered by

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), 111 O.R. (3d) 346, [2012] O.J. No. 2885, 2012 ONCA 443 and *Fresco v. Canadian Imperial Bank of Commerce* (2012), 111 O.R. (3d) 501,

[2012] O.J. No. 2883, 2012 ONCA 444. 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. [See Note 1 below] 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 [page749] 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. 6, s. 30 (the "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 redrafted 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. [See Note 2 below] [page750]

[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 [page751] 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 [See Note 3 below] 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 eight 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. [page752]

(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 per cent 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 per cent 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 per cent 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" [page753] (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, [See Note 4 below] 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. [page754]

[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. [See Note 5 below] 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 [page755] "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. [page756]
- 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, [See Note 6 below] 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. City of Toronto*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 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. [page757] 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 [page758] 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?

[page759]

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". [See Note 7 below] 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 [page760]
- (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 Co.*, [2010] O.J. No. 4650, 2010 ONSC 6026 (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 [page761] 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 para. 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]?
[page762]

[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 Lagac, during cross-examination on his

affidavit:

Q. Have you ever analyzed the individual job functions [of FLSs]?

A. Not under my leadership. [See Note 8 below]

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? [page763]

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. [See Note 9 below] 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 per cent 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: [page764]

- 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 [See Note 10 below] 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. [page765]

- Affidavit evidence of John Caissie, who has held FLS positions [See Note 11 below] 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 [page766] 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 layoffs, 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. [page767]
- Some FLSs have the authority to approve overtime and leaves of absence, to coordinate 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 [page768] 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 [page769] 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] O.J. No. 299, 236 D.L.R. (4th) 348 (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 [page770] 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] O.J. No. 113, 2010 ONSC 42, 87 C.P.C (6th) 276 (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] S.C.R. 534, [2000] S.C.J. No. 63, 2001 SCC 46, 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] B.C.J. No. 2370, 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, [2009] S.J. No. 179, 2009 SKCA 43, 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, [2000] O.J. No. 3821 (S.C.J.), at para. 39, *affd* [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), *affd* [2003] O.J. No. 1160 and 1161, 226 D.L.R. (4th), 226 D.L.R. (4th) 131 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (S.C.J.), *affd* [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (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 [page771] class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 2001 SCC 69, 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), 101 O.R. (3d) 93, [2010] O.J. No. 716, 2010 ONSC 1148 (S.C.J.) and in *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, 84 C.C.E.L. (3d) 161 (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: *Algoma Central Marine (Re)*, [2010] C.I.R.B.D. No. 40, 2010 CIRB 531, affd [2011] F.C.J. No. 340, 2011 FCA 94; *Northwestel Mobility Inc. (Re)*, [2006] C.I.R.B.D. No. 4, 2006 CIRB 346; *Qubec-Tlphone v. Syndicat des agents de matrise de Qubec-Tlphone*, [1996] C.L.R.B.D. No. 36, 106 di 1, affd (1997), 75 A.C.W.S. (3d) 1056 (F.C.A.); *International Association of Machinists and Aerospace Workers v. Quebecair* (1978), 33 di 480, [1979] 3 Can. LRBR 550 (CLRB no. 163); *Cominco Ltd.* (1980), 40 di 75 (CLRB no. 240); and *Island Telephone Co.* (1990), 81 di 126 (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.

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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. [page772]

[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 (S.C.J.), 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 [page773] 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] O.J. No. 1853, 2012 ONSC 2377 (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 (C.L.R.B.); *Northwestel*, at paras. 10-14; and *Vancouver Wharves Ltd.*, [1975] 1 Can. L.R.B.R. 162, 5 di 30.

[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.* (1989), 79 di 35, 90 CLLC 16,007 (CLRB no. 767); *Canadian Union of Bank Employees v. Bank of Nova Scotia* (1977), 21 di 439, [1977] 2 Can. LRBR 126 (CLRB no. 91); and *Quebecair*. Moreover, even in cases where the employees' job descriptions were substantially similar, the Board [page774] 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 *Qubec-Tlphone*, at para. 40; *British Columbia Telephone Co.* (1977), 33 di 361, [1977] 2 Can. LRBR 385 (CLRB

no. 98), at p. 378 di.

- (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. [See Note 12 below] [page775]

[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] O.J. No. 4060, 40 C.P.C. (4th) 301 (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. [page776]

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 [page777] 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, 156 A.C.W.S. (3d) 1001 (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 per cent 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." [page778]

[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, layoffs 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 layoffs or participating in policy making. [page779]

(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. Lagac, 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. [See Note 13 below] 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 [page780] "sub-groups". However, he did not offer any concrete guidance on how to subdivide 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. [page781]

[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] O.J. No. 676, 38 C.P.C. (6th) 373 (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 [page782] 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.
[page783]

[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 [page784] 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 [page785] 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 unpleaded 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). [page786]

[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 of Canada v. Rastogi*, [2011] O.J. No. 202, 2011 ONCA 47, at para. 22, citing *CMLQ Investors Co. v. CIBC Trust Corp.*, [1996] O.J. No. 3171, 3 C.P.C. (4th) 62 (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. [page787]

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 ten days of the release of these reasons and the appellant/plaintiff's submissions to be delivered within ten days thereafter.

Defendant's appeal and cross-appeal from certification order allowed; plaintiff's appeal from certification order dismissed; appeals from Rule 21 order dismissed.

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? [page788]

- 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? [page789]

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? [page790]

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 receive 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?

Notes

Note 1: In Fulawka, the plaintiff's pleadings included a misclassification claim concerning Level 6 employees at Bank of Nova Scotia ("Scotiabank"). In 2008, Scotiabank reclassified 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.

Note 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 rule 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.

Note 3: Amended fresh as amended statement of claim, dated March 3, 2010.

Note 4: Most FLS positions exist in the operations division

in one of three departments: transportation, mechanical and engineering.

Note 5: These statutory and regulatory provisions are discussed in this court's reasons in Fulawka, at para. 35.

Note 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.

Note 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.

Note 8: Mr. Lagac assumed the role of director of compensation at CN in January 2001.

Note 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.

Note 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.

Note 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.

Note 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".

Note 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).

CITATION: Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138
COURT FILE NO.: 10-CV-403667CP
DATE: February 21, 2012

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Lorne Waldman

Plaintiff

- and -

Thomson Reuters Corporation and Thomson Reuters Canada Limited

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- Louis Sokolov, Jordan Goldblatt, and James Kosa for the Plaintiff
- Wendy Matheson and Andrew Bernstein for the Defendants

HEARING DATES: January 30 and 31, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Lorne Waldman moves for certification of a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6. Mr. Waldman's action is against Thomson Reuters Canada Limited ("Thomson") and Thomson Reuters Corporation. On consent, the parties ask that leave be granted to dismiss the action as against Thomson Reuters Corporation, a holding company and an indirect parent of Thomson. I grant leave and dismiss the action as against Thomson Reuters Corporation.

[2] This action arises because Thomson, through its legal publishing branch known as Carswell, copies court documents that have been authored by lawyers and reproduces them on an electronic data base and search and retrieval service known as "Litigator." Documents authored by Mr. Waldman, who is a lawyer, were included in Litigator without his express permission. In his proposed class action, Mr. Waldman alleges that Thomson infringes the copyright of the class members by making available, without permission and for a fee, copies of court documents authored by the lawyers and the law firms.

[3] Thomson asks that the certification motion be dismissed. It submits that Mr. Waldman is seeking to limit access to a publicly-filed court documents and that his

action is antithetical to the open court system and to access to justice, behaviour modification, and judicial economy, which are the rationales for class proceedings.

[4] Further, Thomson submits that the common issues trial would provide no judicial economy and no meaningful access to justice, and it submits that a class action would be unmanageable and not the preferable procedure because the prosecution of a mass claim of copyright infringement would lead inevitably to complex individual trials about the originality and the authorship of the court documents. Thomson submits that some of the Litigator documents are not copyrightable because they lack originality, which is to say the documents were prepared without the exercise of skill or judgment, and it submits that court documents are rarely, if ever, the creation of a single author and adjudicating the complex individual claims would require claimants to breach solicitor and client privilege and that too, makes the action unmanageable and also offensive to the administration of justice.

[5] Further still, Thomson challenges the commonality of the proposed common issues, and it also submits that Mr. Waldman's proposed action fails to satisfy the identifiable class criterion and the preferable procedure criterion for a class action. It submits that the class members do not, would not, and should not support a class action that advances a claim that is against public policy, in particular, against the policies of an open court system and freedom of expression.

[6] Thomson submits that the court should exercise its gatekeeper function and not certify a class action that has negative social utility and little interest from class members.

[7] However, notwithstanding Thomson's challenges, in my opinion, Mr. Waldman's action does satisfy the criteria for certification, and with some modifications to the class definition and to the common questions, his action should be certified.

[8] As my Reasons will reveal, Thomson's arguments about commonality and about the preferable procedure criteria of certification should be rejected. In the main, Thomson's arguments fail to recognize that certification is a technical and procedural legal phenomenon and the court's gatekeeper's role is limited to ensuring that the technical and procedural elements of the test are satisfied, which, subject to some adjustments, is the situation for the case at bar. Some of Thomson's arguments against certification, while relevant to the determination of the merits of the action and to Thomson's several defences, are not pertinent to whether, as a procedural matter, the action should be certified as a class action.

B. ORGANIZATION OF REASONS FOR DECISION

[9] My Reasons for Decision are organized under the following headings:

- Introduction
- Organization of Reasons for Decision
- Evidentiary Background
- Factual Background
 - Carswell, Litigator, and the Court Document Collection Service
 - Mr. Waldman and the Arar Factum
 - Mr. Slaght’s Expert Evidence
 - The Proposed Class Action
- Copyright and Copyright Infringement
 - Introduction to Copyright Law
 - Authorship, Copyright Ownership, and Copyright Infringement
 - The Problem of Client Ownership of Copyright in a Lawyer’s Work Product and the Privilege Problem
 - Remedies for Copyright Infringement
- The Criteria for Certification
 - Introduction – The Test for Certification
 - The Gatekeeper Argument
 - Disclosure of Cause of Action
 - Identifiable Class
 - Common Issues
 - Preferable Procedure
 - Representative Plaintiff and the Litigation Plan
- Conclusion

C. EVIDENTIARY BACKGROUND

[10] The evidence for the certification motion was provided by affidavits from:

- Lorne Waldman, an Ontario lawyer, who is one of Canada’s leading practitioners in immigration and refugee law
- Jilean Bell, the Director of the Legal and Regulatory Strategic Market Group at Carswell, who was involved in the services offered by Carswell, including the Litigator service on Westlaw Canada

- Ronald G. Slaght, one of Canada’s foremost civil litigation practitioners and a respected leader of the legal community and valued contributor to the administration of justice.

[11] Mr. Waldman and Ms. Bell were cross-examined on their affidavits. Mr. Slaght’s evidence was not challenged.

D. FACTUAL BACKGROUND

1. Carswell, Litigator, and the Court Document Collection Service

[12] Thomson Reuters Canada Limited operates a legal publishing division known as Carswell that publishes law reports, legal textbooks, loose-leaf services, and annotated statutes. Carswell offers numerous electronic publications and online services for legal research including a database service known as “Litigator.”

[13] One of the Litigator products is the “Court Document Collection,” which offers subscribers the means to examine documents copied from court files from across Canada. The subscriber may download, edit, and print the court documents. The text, or more likely portions of the text, can be incorporated into the subscriber’s own court documents.

[14] Lawyers and legal scholars and the editors of several of Carswell’s case reporting services select the court files, i.e. the actions and applications from which court documents will be extracted for the Litigator service. The documents are from significant cases in the provincial superior and appellate courts, the Federal Court, and the Supreme Court of Canada. The Litigator’s court documents include pleadings, notices of motion, affidavits, and factums.

[15] There are approximately 100,000 documents that have been selected for inclusion in Litigator. There are approximately 12,000 to 13,000 different lawyers’ names on the court documents in Litigator. There are approximately 6,500 different firm names listed.

[16] Carswell does not ask the lawyers or the law firms for permission to place the documents on Litigator. It says, however, that it will respond to requests from lawyers and law firms to remove their documents from the database.

[17] Carswell obtains copies of the documents from the courts’ files from across the country. It scans the document into portable digital format (“.pdf”), and then using

optical character recognition technology, it creates a document that can be searched on-line and edited off line. The documents are not translated or otherwise modified, but they are redacted to remove personal information such as social insurance numbers, bank account numbers, dates of birth or death, passport numbers, etc. for privacy and to comply with any publication bans.

[18] Carswell adds several features to its Litigator data-base; namely: (a) a citation; (b) a hyper-link to other motions and proceedings; (c) a classification by legal issue; (d) highlighting of relevant procedural rules; (e) links to related cases; and (f) hyperlinks to the full text of a decision and secondary sources; (g) the redaction.

[19] Litigator is connected to Westlaw Canada's research service, "Law Source," which provides cases, legislation and secondary sources electronically. A lawyer who finds a case of interest on Law Source may find considerable information about that case on Litigator, including the direct history, the case history, citing references, and a *Canadian Abridgement* digest.

[20] Carswell has made a substantial investment in Litigator. In addition to the expense of the technology and the expense of the editorial contribution, more than \$1 million has been paid to courts across the country for file access fees and photocopying charges. Adding new cases to the service requires a substantial investment each year.

[21] Subscribers to Litigator must sign a Licence Agreement. Under the agreement, subscribers are limited to use in "the regular course of legal and other research related work and study." The subscribers may only copy "insubstantial portions" of court documents to "give to a judge or other presiding officer ... in making filings or submissions and filing court documents ... in judicial or quasi-judicial or parliamentary proceedings."

[22] The Licence Agreement expressly permits copying but requires the subscriber to acknowledge the intellectual property rights of "Carswell or its suppliers and licensors" In this regard, s. 2.1 of the agreement states:

2.1 The Subscriber acknowledges that all intellectual property, including all copyright, trademarks, patents or rights to trade secrets in the Features and Data belongs to Carswell or its suppliers and licensors, as the case may be, and that the Subscriber's rights do not extend beyond the limited license expressly granted herein. Subject to Section 3, the Subscriber is permitted to:

(a) use the Features and browse and search the Data;

(b) download and temporarily store insubstantial portions of the Data (“Downloaded Data”) to a storage device within the Subscriber’s exclusive control, solely:

(i) to display internally such Downloaded Data; and

(ii) to quote and excerpt from such Downloaded Data (the parts of which are commentary, references and case law being appropriately cited and credited) by electronically cutting and pasting or other means in memoranda, facta, client communications and similar work product created by the Subscriber in the regular course of its research and work;...

[23] When a subscriber uses Litigator, a copyright notice appears from clicking “copyright” from the “What’s in Litigator” page, which includes the following language:

...Each reproduction (as permitted and/or required by the Licence Agreement for Westlaw Canada) of a portion of Westlaw Canada (specifically other than court documents) must contain notice of copyright as follows:

Copyright © CARSWELL, a division of Thomson Reuters Canada Limited, or its licensors.
All rights reserved....

[24] Every download of a court document occurs by way of telecommunication over the internet. A subscriber may save a downloaded document onto his or her own computer, or else download the document in Microsoft Word, WordPerfect, HTML, plain text format, .pdf format or rich text format.

[25] Where documents are downloaded by a subscriber in .pdf format, no enhancements are included. Where documents are downloaded in formats other than .pdf, or are viewed on the Litigator web-site, the enhancements are active.

[26] There are approximately 1,300 subscribers, including sole practitioners, law firms, in-house law departments, government lawyers, and law schools across Canada. Although Thomson does not have exact numbers, it estimates that over 10,000 lawyers across Canada currently have access to the Litigator service.

[27] Thomson’s marketing material indicates that subscribers may usefully copy portions of the court documents and use them for their own document creation. It praises the skill, experience, and ingenuity of the lawyers and law firms that prepared the court documents.

[28] Carswell has had only two complaints about its posting court documents on Litigator; i.e., Mr. Waldman’s complaint and a complaint from the law firm Sutts,

Strosberg in 2007. In response to these complaints, Carswell removed the documents, and it states that it will continue that practice in similar circumstances when it receives a complaint in writing from a lawyer or law firm with the appropriate authority to ask that the document be removed.

[29] Carswell is not the only source for copies of court documents. The Supreme Court of Canada permits users to download factums filed with the Supreme Court. Legal Aid Ontario provides a collection of primary and secondary legal materials, including court documents. The Legal Aid Ontario service is provided to Ontario lawyers representing clients who have legal aid certificates. The Canadian Bar Association operates the National Class Actions Database. This database provides court documents from class proceedings. Each of these services includes a specific caution against copyright infringement, and in contrast to Litigator, none of these services are for profit.

[30] Lawyers (and members of the public) are also able to attend at a court office and obtain copies of publicly-filed court documents for a service fee. It is not disputed that for a fee, process servers routinely obtain copies of court documents for lawyers. Mr. Waldman has no objection to these activities.

2. Mr. Waldman and the Arar Factum

[31] Mr. Waldman is a well-regarded and well-known lawyer who practices immigration and refugee law in Toronto.

[32] Mr. Waldman was counsel to Maher Arar, who was an intervenor in a proceeding before the Court of Appeal. Mr. Waldman drafted a factum that was filed with the court in Toronto. To be more precise, the Arar Factum was filed in the court file for *Bouzari v. Islamic Republic of Iran*, which was a claim for damages for acts of torture. *Bouzari* is an important constitutional law case.

[33] Mr. Waldman registered a claim with the Canadian Intellectual Property Office for the copyright in his factum.

[34] Without Mr. Waldman's permission, Carswell copied the factum from *Bouzari v. Islamic Republic of Iran* and made it available as part of the Litigator Service.

[35] Mr. Waldman provided copies of his Arar Factum to lawyers upon request and without restriction on how it might be used.

[36] Mr. Waldman admitted that once a lawyer has a copy of a court document, however retrieved or copied, the lawyer is free to make extensive use of the document including copying from it verbatim.

3. Mr. Slaght's Expert Evidence

[37] In response to the certification motion, Thomson delivered an affidavit from Mr. Slaght, who provided unchallenged expert evidence for the certification motion.

[38] Mr. Slaght testified about the creation of court documents by lawyers and law firms. He deposed that there may be one or more authors for any legal document, and that the author or authors are not necessarily the lawyers whose names are on the document. The signing of a court document does not necessarily indicate authorship.

[39] Mr. Slaght deposed that a junior lawyer might prepare a first draft of a factum or other court document. The junior lawyer may be assisted by a research lawyer, particularly in important cases. One or two senior lawyers may review the draft. A senior lawyer might author the court document in whole or in part or not at all. The lawyer who appears in court may not be the author of the court document he or she relies on.

[40] Mr. Slaght deposed that not all the work in a court document is original because lawyers frequently use precedents, pleadings, evidence (affidavits, exhibits, and transcripts), secondary sources, and reasons for decision in their court documents.

[41] Mr. Slaght deposed that clients often provide comments and revisions and may make a substantial contribution to the authorship of some documents. In terms of client involvement, Mr. Slaght deposed that affidavits are somewhat different from other court documents because there is a significant role for the affiant, who often will be a client. Affidavits are mostly prepared from information conveyed by the affiant. Affiants may write substantial portions of their own affidavits.

[42] Based on Mr. Slaght's evidence, Thomson submits that a court document may be a cooperative work of a group of co-authors that might include lawyers from one or more law firms and that clients may be co-authors of some court documents.

[43] Mr. Slaght also deposed that it is normal for lawyers to request copies of factums about an interesting case directly from one of the lawyers involved or to obtain copies from other sources, including hiring process servers and paying them to attend at the court office and make a copy of court documents filed by other lawyers.

[44] Mr. Slaght deposed that lawyers commonly provide precedents to their colleagues as a matter of professional courtesy, legal education, and collegiality.

[45] He testified that lawyers typically collect precedents without seeking permission from the lawyer or law firm from which the document originated. It was his opinion that lawyers know that once filed, court documents become part of the administration of justice and anyone can obtain a copy of them and use them.

4. The Proposed Class Action

[46] Mr. Waldman commenced his proposed class action by a Statement of Claim issued on May 25, 2010.

[47] In his Statement of Claim, Mr. Waldman alleges that Carswell has committed primary and secondary copyright infringement as defined by the *Copyright Act*. He also alleges that Carswell has infringed his “moral rights”, as well as those of the class as a whole, by asserting that they are the owners of copyright in the works. He pleads that Thomson encourages its subscribers to infringe copyright. He claims \$50 million in compensation for the proposed class members and punitive damages of \$1 million.

[48] Thomson delivered a Statement of Defence on December 20, 2011. It asserts, among other things, that: (a) the subscribers of Litigator are subject to terms and conditions that accord with the *Copyright Act*; (b) it did not engage in copyright infringement; (c) its conduct constituted “fair-dealing,” pursuant to s. 29 and s. 29.1 of the Act; (d) it has the consent and/or an implied licence to copy and sell copies of court documents; and (e) has a right supported by s.2(b) (freedom of expression) of the *Charter of Rights and Freedoms*, to copy and sell the works. Accordingly, it denies any wrongdoing.

[49] Thomson also disputes that Mr. Waldman is the author or the sole author of the Arar Factum. It submits that he knew that once filed with the Court of Appeal, the factum could be accessed and copied for a fee and that he accepted that commercial research services would have the same access to the court system as any member of the public. Thomson pleads that once Mr. Waldman filed the factum, he consented or implicitly licensed the factums reproduction and communication to the public. It submits that he acquiesced in the use of the factum by other lawyers as a precedent. It relies on a limitation period defence, and it submits that Mr. Waldman’s claim is statute-barred.

[50] Thomson also raises a public policy defence, and it relies on the public interest in an open court system and the public interest in the availability and dissemination of publically available materials as an exception to copyright under the *Copyright Act*.

E. COPYRIGHT AND COPYRIGHT INFRINGEMENT

1. Introduction to Copyright Law

[51] In order to understand Thomson's challenges to certification and to evaluate whether Mr. Waldman's action satisfies the test for certification as a class action, it is necessary to understand the nature of copyright and several other associated concepts. And, it is necessary to understand that there are copyright policy and public policy issues associated with copyright and copyright infringement. In particular, because they are central to several of Thomson's major arguments against certification, it is necessary to understand the concepts of authorship and ownership. It is also necessary to address the question of whether clients have a copyright in documents in which they had some role in drafting.

[52] In this section of my judgment, I will set out the legal framework for Thomson's major arguments against certification, and I will identify and describe some of the policy questions.

[53] In particular, in this section, I will address the law's approach to copyright infringement, the matter of client authorship of court documents, and the problem of solicitor and client privilege. I will return to these topics later during the discussion of the various criteria for certification. I will, however, in this section, make some findings or conclusions that are material to my decision about the satisfaction of the certification criteria.

2. Authorship, Copyright Ownership, and Copyright Infringement

[54] Copyright is a creature of the *Copyright Act*, R.S.C. 1985, c. C-42, and the rights and remedies it provides are exhaustive: *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 5.

[55] There is no ownership in ideas, but copyright provides a property interest to the person who puts the idea into written form: *Donoghue v. Allied Newspapers Ltd.* [1938] Ch. 106. The purpose of copyright law is not to protect the ideas or opinions expressed by the creator, but rather it protects the various means and forms by which those ideas

are communicated: *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra*, at para. 115; *CCH Canadian Limited v. Law Society of Upper Canada*, 2004 SCC 13 at para. 8.

[56] Copyright law is a matter of public policy. The *Copyright Act* is a balance between, on the one hand, promoting the public interest in the encouragement and dissemination of works of the arts and intellect and, on the other hand, ensuring that the creator of a work obtains a just reward and preventing others from appropriating the creator's just reward: *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra*, at para. 30.

[57] The *Copyright Act* balances user's rights with creator's rights and neither right should be interpreted restrictively: *CCH Canadian Limited v. Law Society of Upper Canada*, *supra*, at paras. 10, 48. In *Théberge*, Justice Binnie stated at paras. 31 and 32:

31. The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

32. Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and "ephemeral recordings" in connection with live performances.

[58] Under s. 27 (1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only permits owners to do, including authorizing the exercise of an owner's rights. The Act also prohibits "secondary" infringement, which includes selling or renting out copies of works that the defendants knew, or should have known, infringed copyright. Section 27 (1) of the Act states:

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

[59] For the purposes of the case at bar, it is important to note that for a class member to prove copyright infringement, the class member must prove four elements: (1) that copyright exists in the work; (2) that he or she is the owner of the copyright in the work;

(3) that Thomson has done a thing that only the owner of the copyright has the right to do; and (4) that the class member did not consent to Thomson's conduct.

[60] I will address each of these elements in turn beginning with whether copyright exists in the court documents found on Litigator. However, before addressing the four elements, for the purposes of the case at bar, it is also important to note that there are several standard defences to an infringement claim and that Thomson's Statement of Defence engages and relies on these defences.

[61] The defences to copyright infringement are conveniently summarized by Professor David Vaver in "Copyright in Legal Documents" (1993), 31 *Osgoode Hall L.J.* 661 at p. 670, where he states:

Anyone who copies a copyrighted legal document fully or substantially, or publishes, faxes, or translates an unpublished document, infringes copyright in the document, unless he can justify the act. The main defences or justifications occur where the copier:

- has the copyright owner's express or implicit consent;
- can rely on a specific exemption, such as fair dealing;
- wishes to use the idea of the document, but cannot practically avoid taking the expression; or
- can show a business or professional custom, or public policy reason, that allows copying.

[62] The first element of copyright infringement is that copyright exists in the work. Under the *Copyright Act*, there are different types of work, and the case at bar concerns court documents, which could qualify as literary works.

[63] Copyright exists in every literary work where the exercise of skill and judgment required to produce the work is not so trivial that it could be characterized as a purely mechanical exercise. In *CCH Canadian Limited v. Law Society of Upper Canada*, *supra* at para. 16, Chief Justice McLachlin stated:

16. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to

produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.

[64] Thomson does not dispute that many of the court documents available on Litigator are literary works. Indeed, the steps Carswell takes in providing a copyright notice and in inserting terms of use in its subscription contract recognizes the presence of copyrightable literary works on Litigator. However, Thomson submits that there are some documents on Litigator, for example, orders, judgments, routine notices of motion and case management forms that may not have the requisite originality to attract copyright protection, because they were created with little or no exercise of skill and judgment. These documents, Thomson submits, are not subject to copyright protection.

[65] Doctrinally, there is substance to Thomson's argument. Authorship of a copyrightable work connotes a creative process and ingenuity; an author is more than a scribe, editor, or amanuensis and expresses ideas in an original or novel form: *New Brunswick Telephone Company, Limited v. John Maryon International Ltd.*, [1982] N.B.J. No. 387 (N.B.C.A.); *Neugebauer v. Labieniec*, 2009 FC 666, affd. 2010 FCA 229.

[66] Thomson submits that each document in Litigator would have to be proven to be copyrightable and this means that the action is unmanageable as a class action and that all, or at least some, of the proposed common issues lack commonality because of this discrete element of an infringement claim.

[67] I agree with Thomson that whether a court document found on Litigator is copyrightable, in the sense of it being the product of creativity, will have to be proven to establish copyright infringement, but for reasons to be provided later, I disagree that this circumstance makes the action inappropriate for certification as a class action.

[68] I turn now to the matter of copyright ownership and the rights of authors and owners. If a literary work is copyrightable, the *Copyright Act*, among other things, confers rights on authors of literary works and on the owners of the copyright in a literary work.

[69] By operation of statutory law, the owners of copyright are granted the exclusive right to reproduce a work, publish a work, translate a work, or communicate the work to the public by way of telecommunication.

[70] Authors have certain rights, known as moral rights, which are personal and cannot be assigned. The author of a work is the person who actually created the work or the person who expresses the work in an original form. In the case of a sole author of a

legal document, the author is the drafter or compiler. The *Copyright Act* presumes that a person named on a work is the author.

[71] Having regard to Thomson’s arguments, for the case at bar, it is important to note that a literary work may have more than one author. If authors collaborate one with the other and the contribution of each is not distinct from the contribution of the others, the work will have more than one author.

[72] The constituent elements of joint ownership are: (1) each author makes a substantial although not necessarily equal contribution to the work; and (2) there is a joint labour in carrying out a common purpose or design: *Levy v. Rutley* (1871), 6 L.R. 976 (C.P.); *Neugebauer v. Labieniec, supra*. Some courts impose the additional requirement that the authors intend the work to be attributed to them as a joint work: *Neudorf v. Netzwerk Productions Ltd.* (1999), 3 C.P.R. (4th) 129 (B.C.S.C.); *Dolmage v. Erskine* (2003), 23 C.P.R. (4th) 495 (S.C.J.).

[73] Under s. 13 of the *Copyright Act*, the author or authors are the first owner(s) of copyright in a work. However, where the author of a work is in the employment of some other person at the time of the creation of the work, the author remains the author of the work, but the employer is the owner of copyright in the work.

[74] As noted, an author of a work has “moral rights” under the Act that cannot be assigned although they can be waived: *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34 at para. 15.

[75] The author has a moral right to the integrity of the work and a right to be associated with the work as its author by name or a right to keep his or her association anonymous. The integrity of the work is infringed only if the work is modified “to the prejudice of the honour or reputation of the author:” *Théberge v. Galerie d’Art du Petit Champlain inc., supra*, at para. 17. The need for prejudice to the honour or reputation of the author is an essential element of an infringement of the right of integrity; without prejudice, the right of integrity is not infringed: *Prise de parole Inc. v. Guerin Editeur Ltee* (1995), 66 C.P.R. (3d) 257 at 265, aff’d (1996), 73 C.P.R. (3d) 557; *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 at para. 290.

[76] In the case at bar, Mr. Waldman alleges that the author’s right to integrity has been infringed by the use of their works in association with Litigator, to the prejudice of their honour and reputation under s. 28.2(1) of the *Act*.

[77] An author may assign his or her copyright in a literary work, but an author cannot lose his or her moral rights associated with the literary work. An author who is

an employee many never have had the copyright in the literary work but will still have moral rights that cannot be assigned.

[78] I turn to the third element; i.e., whether Thomson has done a thing that only the owner of the copyright has the right to do. I will discuss this factor again later as a part of my discussion of the common issues. I foreshadow here to say that in my opinion, Thomson's conduct and its various defences associated with the use of court documents on Litigator are common issues and justify the certification of Mr. Waldman's action as a class action.

[79] For the present purposes of understanding the nature of copyright and copyright infringement and recalling the balancing of public policy interests that underlies the *Copyright Act*, the point to note is that the Act accepts that there are some rights of expression or copying that are not exclusive to the owner of the copyright. This point is demonstrated by the Supreme Court of Canada's judgment in *CCH Canadian Limited v. Law Society of Upper Canada*, *supra*, which plays a large role in my decision to certify Mr. Waldman's action as a class action.

[80] In *CCH Canadian Limited*, a group of legal publishers (including Thomson) sued the Law Society of Upper Canada, which operates the Great Library at Osgoode Hall. The publishers sued the Law Society for copyright infringement and for authorizing copyright infringement at the Great Library.

[81] The Great Library provided a service to photocopy legal materials for library users including lawyers and judges. The publishers alleged that the Law Society's Library infringed their copyrights in the published legal materials. The Law Society denied there was any infringement and pleaded that the photocopying service was "fair dealing" under s. 29 of the *Copyright Act*.

[82] Although arguably there may be distinguishing features, by way of analogy, the Great Library's photocopy service is comparable to Litigator in that legal materials (literary works) authored by lawyers were reproduced by the users of the photocopying service (subscribers) or the legal materials were reproduced by library staff and delivered to the users, who, in turn could use the copies for their own purposes, including incorporating the information into court documents.

[83] In *CCH Canadian Limited*, the Supreme Court described the nature of fair dealing under the *Copyright Act*. Chief Justice McLachlin explained at paras. 48-53 that the fair dealing exception was properly understood as an integral part of the *Copyright Act* and more than simply a defence.

[84] Fair dealing was a user's right and in order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair. "Research" has a large and liberal interpretation in order to ensure that users' rights are not unduly constrained and was not limited to non-commercial or private contexts. Research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums was research.

[85] What is a "fair" dealing is a question of fact and depends on the facts of each case. There is no standard test for fairness, but the following non-exhaustive factors may be considered to help assess whether a dealing is fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

[86] In *CCH Canadian Limited*, the Supreme Court made a detailed analysis of the various factors of fair dealing and concluded that the Law Society's dealings were research-based and fair. In the case at bar, it is a matter for another day whether Thomson's Litigator service is another example of fair dealing. I will return to the issue of whether that other day is at individual issues trials or at a common issues trial below, when I discuss the proposed common issues for the case at bar.

[87] The fourth element of the class member's infringement claim is that the class member did not consent to Thomson's conduct. Consent is a fundamental part of any copyright infringement case. The class member must establish that he or she is the owner of the copyright in a work, and that the work has been reproduced without consent.

[88] Consent can be express. It can also be implied, for example, through knowledge and conduct. See *Bishop v. Stevens*, [1990] 2 S.C.R. 467. Professor Vaver points out in his article at p. 670 that courts frequently use the device of an implied licence when a copyright owner is trying to exercise its rights too extensively. See *Netupsky v. Dominion Bridge Co.*, [1972] S.C.R. 368.

3. The Problem of Client Ownership of Copyright in a Lawyer's Work Product and the Privilege Problem

[89] Thomson submits that clients may be authors of court documents and thus clients may be co-owners or even the exclusive owner of a court document if the lawyer

made no significant contribution to the creation of the court document, which might be the case, for instance, with an affidavit. Thomson submits that the matter of authorship of a literary work is a factual determination of who made a substantial contribution of skill and judgment to the creation of the literary work and one of the contributors may be the client.

[90] This is an important point for Thomson because it adds to the fuel of a major argument that submits that Mr. Waldman's action should not be certified as a class action because the prospect of client ownership or co-ownership means that Mr. Waldman's proposed class action is unmanageable and, practically speaking, the action is impossible to prosecute, unless the client waives solicitor and client privilege associated with the court document.

[91] Thomson submits that in order to prosecute the class action, it would be necessary to determine for each of the 200,000 documents on Litigator who participated in the creation of the document, which might include client participants. This means that the client's file would be relevant and that in every case, it would be necessary for the class member to disclose and produce his or her file, which, however, would not be possible, unless the client waives his or her privilege associated with the client file.

[92] Thomson submits that copyright is entirely a matter of statute, and although, practically speaking, without the cooperation of their clients, lawyers cannot protect against copyright infringement of court documents, if this is a problem for lawyers, the fix must come from Parliament. Thomson submits that until Parliament addresses the problem, a class action would be unmanageable and also unseemly because it is offensive to the ethical responsibilities of lawyers for them to ask their client to waive solicitor and client privilege.

[93] The copyright in legal documents is not a settled matter. In his very interesting and informative article, Professor David Vaver identifies the uncertainties associated with copyright in legal documents. Professor Vaver's article is not specifically about court documents but about legal documents generally, and he points out several public policy concerns that arise because the extent of copyright in legal documents, if any, would affect the ability of lawyers to serve other clients and would detract from the profession's obligation to serve the public to the best of its ability, would promote needless variety when standardization and consistency in legal expression would be beneficial, and would monopolize legal services and suppress healthy competition. Professor Vaver suggests that it would be unethical and contrary to professional ethics for a lawyer to insist on copyright.

[94] Thus, there are serious policy questions about how much, if any, protection of legal documents, including court documents, should have. See also: S.F. Birch, Jr., “Copyright Protection for Attorney Work Product: Practical and Ethical Considerations” (2003), 10 J. Intell. Prop. L. 255; L.P. Wang, “The Copyrightability of Legal Complaints” (2004), 45 Boston College Law Rev. 705. D.H. Issacs, “The Highest Form of Flattery? Application of the Fair Use Defence against Copyright Claims for Unauthorized Appropriation of Litigation Documents” (2006), 71 Missouri Law Rev. 391.

[95] Given these unsettled policy issues which would influence how the *Copyright Act* is interpreted, I do not necessarily agree with Thomson’s submission that clients may be authors or co-owners of copyrightable court documents. For present purposes, I make no finding in this regard. I also make no finding whether there is a categorically justification for the infringement of any copyright in court documents based on the open court principle or some other matter of public policy.

[96] At this juncture of the proposed class action, it is both unnecessary and also inappropriate for me to decide these points. For the purposes of the certification motion, I need and should go no further than to note on the one hand that there is a reasonably strong argument that a client has the legal capability of being an author and or owner based on a fact-based determination that he or she made a substantial contribution to the creation of the court document, and on the other hand, there are reasonably strong arguments that: (a) clients categorically are never authors of court documents; (b) clients categorically have no moral rights with respect court documents; (c) clients categorically waive any moral rights; and (d) clients categorically assign any copyright in court documents to the lawyer of record.

[97] I foreshadow to say that although it is inappropriate for me to decide these matters, I disagree with Thomson’s argument that the presence of these complex and important issues makes a class action unmanageable and not the preferable procedure. I will return to this topic below, but I say here that I do not agree with Thomson that the possibility of client authorship or client copyright ownership makes the class action unmanageable or wanting for common issues. I will explain these conclusions later when I discuss the test for certification and the certification criteria.

[98] Based on my review of the authorities and the provisions of the *Copyright Act*, I do agree with Thomson that provided that clients are legally capable of being an author of a court document, then clients could be owners or co-owners of the copyright in the court document.

[99] I also agree with Thomson that it is entitled to require that every class member establish his or her entitlement to the rights of a copyright owner or his or her entitlement to the moral rights of an author, and I agree that this element of proof of copyright infringement means that whether there are co-authors or co-owners is a material issue in Mr. Waldman's proposed class action.

[100] I further agree with Thomson that if authorship or ownership is in issue, then the class member's solicitor and client file is relevant and should be disclosed and produced. The client file would be relevant even if there was no client contribution since the file could provide evidence of whether the class member was an author or co-author or not an author at all.

[101] I also agree that the class member cannot produce his or her solicitor and client file, unless the client waives his or her solicitor and client privilege.

[102] It is not necessary for me to review the law about solicitor and client privilege. See: *Canada (Privacy Commissioner) v. Blood Tribe Department*, 2008 SCC 44; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Maranda v. Richer*, 2003 SCC 67; *Lavallee, Racke & Heintz v. Canada (Attorney General)*, 2003 S.C.C. 61. It is uncontested that the lawyer's file for the client will contain communications for the purpose of obtaining legal advice and that those communications will provide source material for the court documents.

[103] I thus agree that the matter of solicitor and client privilege is a problem that has to be addressed in the prosecution of this class action for copyright infringement.

[104] I note that Thomson also argues in the alternative that in any event, there is no copyright infringement because the authors of court documents implicitly consent to the copying of their documents by delivering the document to the court file. Thomson also pleads, in any event, that it has public policy, fair dealing, and s. 2 (b) (freedom of expression) defences to the allegation of copyright infringement. I will return to these topics below when I discuss the certification criteria.

4. Remedies for Copyright Infringement

[105] A variety of remedies are available for copyright infringement. Part IV of the *Copyright Act* specifies the remedies for copyright infringement. Under s. 34 (1) of the Act, the copyright owner is entitled to all remedies, including an injunction, for the infringement of copyright in his or her work.

[106] In the case at bar, Mr. Waldman claims the following relief on behalf of the class: (a) general damages of \$50 million; (b) disgorgement of any profit made by Thomson in infringing copyright; (c) statutory damages; (d) a permanent injunction restraining Thomson from dealing with the class member's court documents; (d) punitive damages of \$1 million; (e) pre and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

F. THE CRITERIA FOR CERTIFICATION

1. Introduction – The Test for Certification

[107] 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.

[108] 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 (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[109] 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. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[110] 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 at paras. 26-29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 15 and 16.

[111] 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. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 28-29.

2. The Gatekeeper Argument

[112] In *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.) at para. 9, aff'd [2007] O.J. No. 5035 (Div. Ct.), Justice E. Macdonald stated that although not a test on the merits, the certification motion is an important screening mechanism for claims that are not appropriate for class actions, and the careful screening process highlights the gatekeeping role of the court on certification motions.

[113] In *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.) at p. 391, Justice Sharpe stated that: “the certification motion is intended to screen claims that are not appropriate for class action treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation.”

[114] Thomson relies on these statements to submit that the court has a jurisdiction to deny certification to a proposed class proceeding that is of little social utility or that arguably is socially detrimental. Thomson submits that the class members' copyright infringement claim is inimical to the public interest and indeed to the interest of the class members of the private practice bar. It argues that Litigator advances the open court principle, which is a fundamental principal of democracy and the administration of justice. Thomson submits that Mr. Waldman's copyright claim is detrimental to the advancement of the law, an impediment to the administration of justice, an obstacle to the education of the legal profession, inconsistent with the collegiality and professionalism of the bar and spiteful because Mr. Waldman Wellman is quite willing to share his court documents with other lawyers without monetary consideration and so loses nothing by Thomson's copying and making the factum available to other lawyers.

[115] Thus, Thomson asks the court to exercise its gatekeeper role and not certify Mr. Waldman's action as a court proceeding. However, Thomson (and for that matter many other defendants contesting certification) misconceives the scope of the court's gatekeeper function.

[116] The court does have a gatekeeper function, but this role is quite modest and limited because as noted by the Court of Appeal in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at paras. 40-42, the Ontario legislature made a conscious attempt to avoid setting the bar for certification too high. As the case law has

developed the courts have respected the directive of the legislature and, if anything, the appellate courts have lowered the bar.

[117] A review of the case law about the test for certification shows that the certification of a class action is not as difficult as the defendants insist it should be. The case law reveals that the various standards that plaintiffs must vault over are low bars.

[118] For factual issues, for certification, the plaintiff must establish an evidentiary basis for four of the five certification criteria. However, the merits of the plaintiff's claim are not assessed as an aspect of certification, and the plaintiff need only show some basis in fact for these criteria: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25.

[119] The some basis in fact standard sets a very low bar and is far below the evidentiary standard that confronts the defendant: *Lambert v. Guidant Corporation*, [2009] O.J. No. 1910 (S.C.J.) at paras. 56-74; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at paras. 49 to 52; *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (S.C.J.) at paras. 13-14, leave to appeal ref'd [2009] O.J. No. 4464 (Div. Ct.). The parties, however, are on a level playing field for the legal issues associated with certification: see *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520.

[120] For certification, the plaintiff need not present any evidence to satisfy the cause of action requirement. For this criterion, the facts set out in the statement of claim are assumed to be true and provable, and it is well established that the cause of action requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action. Since it is very difficult for a defendant to show that it is plain and obvious that no cause of action has been disclosed, it is conversely quite easy for the plaintiff to satisfy the cause of action requirement.

[121] Moreover, provided that the defendant is not prejudiced, the representative plaintiff may recast his or her claim to make it more amenable for a class proceeding: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 39; *L.R. v. British Columbia (sub nom. Rumley v. British Columbia)*, [2001] 3 S.C.R. 184 at para. 30; *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.) at para. 26, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 62.

[122] In practice, the identifiable class criterion is not difficult to satisfy, and it presents more a technical than a substantive problem. Sometimes the problems are

solved by amending the definition and other times the problems are solved by adding or subtracting representative plaintiffs.

[123] A plaintiff has considerable flexibility in defining class membership. The class must not be arbitrarily under-inclusive: *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368 (S.C.J.); however, the plaintiff is not obliged to sue on behalf of all persons who have the same interest in the common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 20; *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (S.C.J.) at para. 12, leave to appeal ref'd [2008] O.J. No. 1644 (S.C.J.).

[124] The class should not be defined wider than necessary, but where the class could be defined more narrowly, the court may allow certification on condition that the definition of the class be amended: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 21; *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.) at paras. 12-13, aff'd [2003] O.J. No. 3918 (Div. Ct.). On a motion to certify or on an appeal, the court may modify the definition of the class, if the court is of the view that such modification is required to accord with the Act: *Williams v. Mutual Life Assurance Co.*; *Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. No. 1160 and 1161 (C.A.) and *Zicherman v. The Equitable Life Assurance Company of Canada*, [2000] O.J. No. 5144 (S.C.J.); *Wilkins v. Rogers Communications Inc.*, [2008] O.J. No. 4381 (S.C.J.).

[125] The common issue criterion also presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), O.R. (3d) 401 (C.A.) at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. ref'd [2010] S.C.C.A. No. 348. 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.

[126] On a motion to certify or on an appeal, the court may modify the common issues if the court is of the view that such modification is required to accord with the Act: *Williams v. Mutual Life Assurance Co.*; *Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. No. 1160 and 1161 (C.A.), aff'g [2001] O.J. No. 4952 (Div. Ct.), which aff'd (2000), 51 O.R. (3d) 54 (S.C.J.) and *Zicherman v. The Equitable Life Assurance Company of Canada*, [2000] O.J. No. 5144 (S.C.J.).

[127] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 95, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R.

(3d) 492 (Div. Ct.), the motions judge refused to certify the action among other reasons because the action did not satisfy the common issues criterion. By the time of the appeal to the Divisional Court, the plaintiffs reworked their list of common issues, and in a dissenting judgment, Justice Cullity held that with some further refashioning, there were common issues sufficient to satisfy s. 5(1)(c). Justice Cullity's decision and approach about the common issues was adopted by the Court of Appeal.

[128] The preferable procedure criterion perhaps sets the highest bar for certification. However, where the court has found that there are appropriate common issues and the individual issues do overwhelm the common issues, the court should not be too quick to find that a class action is not the appropriate procedure: *Dean v. Mister Transmission Ltd.*, [2008] O.J. No. 4372 (S.C.J.) at paras. 91-95.

[129] There two core elements of the preferable procedure inquiry are manageability and whether a class action would be preferable to other reasonably available means of resolving the class members' claims. Practically speaking, the preferable procedure criterion is often not difficult to satisfy because there will be no reasonable alternative to a class proceeding.

[130] The last criterion, 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, is rarely a difficulty, and challenges to the qualifications of the representative are very rare.

[131] At the certification stage, the litigation plan need only provide a reasonable framework for the issues reasonably expected to arise as the case proceeds: *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147 (T.D.) at para. 159, leave to appeal ref'd [2005] N.J. No. 122 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 211; *Frey v. BCE Inc.*, [2007] S.J. No. 476 (Q.B.) at paras. 11-13. Litigation plans are a work in progress and may have to be amended during the course of the proceedings: *Cloud v. Canada (Attorney General)*, *supra*, at para. 95.

[132] Section 5 of the *Class Proceedings Act, 1992* uses mandatory language, and the court must certify if the certification criteria are satisfied: *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen. Div.) at para.41, leave to appeal ref'd [1993] O.J. No 4210 (Gen. Div.); *Banerjee v. Shire Biochem Inc.*, 2010 ONSC 889 at para. 14. See also *Logan v. Dermatech*, 2011 BCSC 1097 at para. 16. On the certification motion, the court does not assess the merits of the plaintiff's claim or opinion about the social utility of the class action; the court's gatekeeper function and screening function is limited to determining whether the certification criteria are satisfied.

[133] I, therefore, reject Thomson’s gatekeeper arguments and turn to considering whether the five certification criteria are satisfied in the case at bar.

3. Disclosure of Cause of Action

[134] 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. Carey Canada*, [1990] 2 S.C.R. 959 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: Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref’d, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff’d (2004), 70 O.R. (3d) 182 (Div. Ct.).

[135] Mr. Waldman has pleaded a cause of action for copyright infringement and for infringement of an author’s moral rights. Thomson delivered a statement of defence and did not challenge the legal adequacy of these causes of action.

[136] In the case at bar, the first criterion for certification is satisfied.

4. Identifiable Class

[137] Mr. Waldman proposes that the class be defined as follows:

All persons who are the authors of original legal documents, and all persons, law firms, or other legal entities who own copyright in the pleadings, affidavits, facts, notices of motion and other legal documents that the defendants have copied, used or otherwise dealt with in connection with the Litigator service.

[138] 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 (Gen. Div.).

[139] 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 (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 32, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[140] 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.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[141] Although it is necessary after a common issues trial to be able to determine whether a particular person is a class member and therefore bound with the benefits and burdens of the *res judicata*, and although it is necessary to be able to determine precisely who are the class members in order to administer a settlement, it is not necessary for certification to list each and every member of the class by name and the Act contemplates that it may be difficult to precisely name every member of the class: *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.).

[142] In my opinion, subject to my comments about over-inclusiveness and under-inclusiveness, the proposed class definition satisfies the technical requirements of a class action, and Thomson did not argue otherwise.

[143] Thomson's objections to the class definition are connected to its submissions about the alleged unmanageability of the action as a class action. In part, these objections focus on the possibility that a court document may have multiple co-authors including senior and junior lawyers, lawyers from more than one law firm, and clients as authors. These objections also draw attention to the question of whether the class definition is over or under-inclusive.

[144] As presently drafted, the definition for class membership includes lawyers from both the private sector and the public sector. It also includes lawyers from in-house law departments. The current definition for the class also includes self-represented litigants as class members, and the current definition includes clients and affiants as possible class members.

[145] During the course of the oral argument, I expressed the view that the inclusion of clients, self-represented litigants, in-house counsel, and public sector lawyers made the class over-inclusive. In response, Mr. Waldman indicated that he had no objection to narrowing the class definition.

[146] Mr. Waldman is a member of the private bar, and it is the interests of the private enterprise part of the bar that chiefly motivates Mr. Waldman's action and not the interests, if any, of clients, in-house lawyers, self-represented litigants, and public sector lawyers to have copyright protection for court documents.

[147] Although clients, in-house lawyers, self-represented litigants, and public sector lawyers would be proper parties to the class action brought by private sector lawyers for copyright infringement of court documents, they are not necessary parties. In other words, their joinder is justified, not by necessity, but as a matter of avoiding a multiplicity of actions.

[148] Clients, in-house lawyers, self-represented litigants, and public sector lawyers are not similarly situated to private sector lawyers because they are unlikely to have a commercial interest in protecting their court documents from copyright infringement. For example, a self-represented litigant does not create court documents as a part of its trade or business but simply because he or she is a litigant. The self-represented litigant has no commercial reason to protect his or court documents from copyright infringement. Under s. 12 of the *Copyright Act* where any work is prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty. Since there is likely no commercial interest to protect, the assessment of compensation for self-represented litigants, law departments, and public sector lawyers would be different from that of the private sector lawyers.

[149] In terms of access to justice and behaviour modification, clients, in-house lawyers, self-represented litigants, and public sector lawyers may be as well served by standing on the sidelines and just watching the outcome of the action by the private sector class members. If Mr. Waldman is successful in obtaining an injunction, then clients, in-house lawyers, self-represented litigants, and public sector lawyers will benefit even though they are standing on the side lines. If Thomson's defences of public policy, implied consent, fair dealing, or freedom of expression are successful, then there will be a precedent that would govern the situation of clients, in-house lawyers, self-represented litigants, and public sector lawyers.

[150] For the above reasons, my conclusion is that clients, self-represented litigants, law departments, and public sector lawyers should not be included as class members. This will have the advantage of modestly simplifying the prosecution and defence of the class action.

[151] If this conclusion is correct, then the appropriate class definition, with some editorial refinements from the original, is as follows:

All lawyers and paralegals in private practice and licensed to practice law in Canada, who:
(a) are the authors of the original legal documents that Thomson Reuters Canada Limited has copied, used, or otherwise dealt with in connection with its Litigator service, including

pleadings, affidavits, facts, notices of motion, and other legal documents, and (b) are the owners of the copyright in the original legal documents that Thomson Reuters Canada Limited has copied, used, or otherwise dealt with in connection with its Litigator service, including pleadings, affidavits, facts, notices of motion, and other legal documents

[152] I am satisfied that the second criterion for certification is satisfied in the case at bar.

5. Common Issues

[153] 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. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18.

[154] 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 at para. 39.

[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: *Fehring v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6. 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 (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 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.). An issue that has to be decided on an individual basis lacks commonality: *Kafka v. Allstate Insurance Co. of Canada*, 2011 ONSC 2305.

[156] While only a minimum evidentiary basis is required, there must be some evidence to show that the 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 (S.C.J.) at para. 61, aff'd 2010 ONSC 4724.

[157] An issue can satisfy the common issues requirement 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 determining the commonality of a question, the

focus is on the commonality of the question, and it is an error to focus on those aspects of the claim that would require individual determination. The focus is on whether the proposed common issue is a substantial ingredient of the claim and on whether the resolution of the issue would be necessary to resolve each class member's claim. The comparative extent of individual issues is not a consideration in the commonality inquiry although it is a factor in the preferability assessment. See *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 51-65, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[158] Mr. Waldman proposes the following common issues:

1. Copyright in Legal Documents

(a) Does copyright subsist in legal documents filed in Court, including, but not limited to Statement of Claim, Statements of Defence, facta, notices of motion and affidavits (the “Works” and each a “Work”)?

2. Ownership of Copyright

(a) Does the defendants’ Litigator service contain Works authored by Class Members?

(b) Does the defendants’ Litigator service contain Works whose copyright is owned by Class Members?

(c) If yes, what rights, if any, do Class Members have over the legal documents they authored?

3. Infringement

(a) Have the defendants’ activities infringed the rights of Class Members by dealing in the Works in a manner that only the author or owner had the right to do, including by way of any of:

(i) reproducing Works authored or owned by Class Members?

(ii) publishing Works authored or owned by Class Members?

(iii) making Works authored or owned by Class Members available to the public by way of telecommunication?

(iv) selling or renting copies of the Works authored or owned by Class Members?

(v) translating the Works?

(vi) authorizing its subscribers to infringe Class Members' copyright?

(vii) holding itself out as the owner or author of the Works?

(viii) infringing the moral rights of the authors of the copyrighted documents?

(b) If so, which rights have been infringed.

4. Defences

(a) If the answer to 3 is affirmative, do the defendants have a defence under the Copyright Act for these acts of infringement?

5. Relief

(a) Are Class Members entitled to statutory damages pursuant to section 38.1 of the *Copyright Act* for each act of infringement carried out by the defendants? If the answer to this question is "yes", what is the quantum of the statutory damages to which the Class Members are entitled?

(b) What other damages or, alternatively, other heads or categories of damages, are Class Members entitled to?

(c) Is there a reasonable likelihood that damages can be determined (in whole or in part) on an aggregate basis on behalf of the Class?

(d) If the answer to (c) is "yes", how is a damages award to be calculated and distributed to the Class?

(e) If the answer to (c) or (d) above is "yes" what is the quantum of those damages?

(f) Does the defendants' conduct justify an award of aggravated, exemplary, or punitive damages?

(g) Are the Class Members entitled to injunctive relief against the defendants under section 34(1) of the *Copyright Act*?

[159] Thomson submits that the proposed common issues require individual determinations or the questions pre-suppose or are dependent upon individual determinations and that the proposed common issues are not common and that, in any event, the proposed questions do not materially advance the action. Thomson thus submits that Mr. Waldman's action does not satisfy the common issues criterion for a class action.

[160] Thomson submits that many of the questions are tautological and pre-suppose or beg answers that would not substantially advance the litigation. For example, two of the proposed questions are whether Litigator contains works authored or owned by class members, but if there is copyright in these documents, the answer to these questions will always be “yes” in light of the class definition that describes members who wrote or own copyright in court documents available on Litigator. Similarly, the question about the rights of class members as authors of court documents is tautological; visualize, if class members are authors, which status is what makes them class members, then by definition, they will have the rights of an author under the *Copyright Act*.

[161] I agree with Thomson that the proposed common questions - as they are currently drafted - pre-suppose the determination of individual issues, except for some defence oriented questions and some questions about Thomson’s activities.

[162] And I also agree that unless Thomson’s defences of public policy, consent, fair dealing, and freedom of expression under the *Charter* succeed, there will necessarily have to be individual issues trials to determine: (a) whether a particular document is a literary work; (b) who is the author(s) of the literary work; (c) who is the owner of the copyright; (d) what is the quantification of compensation for infringement; and, (e) if Thomson’s conduct qualifies for condemnation, what is the quantification of the punitive damages. Further, if the common issues judge decides that the consent to copying defence was not proven systemically or innately across the class, the issue of whether a Litigator document was reproduced without the consent of the copyright owner also would be an individual issue.

[163] However, I do not agree that Mr. Waldman’s action does not satisfy the common issues criterion for certification as a class action. Although there are questions that are individual and not common in nature and, accordingly, they are not certifiable and although some of the proposed questions have technical problems, in my opinion, Mr. Waldman’s action does satisfy the common issues criterion.

[164] In my opinion based on the analysis of each of the questions that follows, there is a set of questions that with minor adjustments to address the technical problems are certifiable and that would substantially advance the proceeding. Several issues, and particularly the issues raised by Thomson’s defence, readily lend themselves to a resolution on a class-wide basis.

[165] If Thomson succeeds on the defence common issues, the action will be over. If Mr. Waldman succeeds at the common issues trial, then it is true that there will have to be individual trials, but that is not an obstacle to the certification of the action. I borrow

what Justice Sharpe stated in *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.) at pp. 172-173: “[I]ndividual proceedings ... are plainly contemplated by the *Class Proceedings Act*, 1992 ss. 24, 25, and it is well established that the need to deal with certain aspects of a claim on an individual basis does not mean that there can be no common issues within the meanings of the Act.”

[166] I turn now to an analysis of the proposed common issues.

(a) Copyright in Legal Documents

[167] Turning then to the questions, proposed question 1 asks whether copyright subsists in the Litigator documents. A class member needs a “yes” answer to this question, because while a court document is a literary work, copyright only exists in a literary work where the exercise of skill and judgment required to produce the work was not so trivial that it could be characterized as a purely mechanical exercise.

[168] Thomson submits that some court documents are the product of a purely mechanical exercise, and it points to notices of motion and court orders as examples. Assuming Thomson is correct (and I do not have to decide the point), it is also obvious that some court documents involve the exercise of skill and judgment. Factums are an obvious example.

[169] I would have thought that the overwhelming majority of documents on Litigator are the product of judgment and skill, especially since Thomson advertised this feature in promoting litigator, but, nevertheless, Thomson is entitled to assert that a particular document is not subject to copyright protection, and it cannot be simply assumed that originality exists in all of the court documents available on Litigator. Thomson’s position means that question 1 is not a certifiable question because it lacks commonality.

(b) Ownership and Infringement of Copyright

[170] Proposed question 2, which is a group of questions, focuses on authorship and ownership of copyright. Question 2 is essentially a qualification or entitlement question.

[171] I agree with Thomson that ultimately authorship and ownership is an individual issue about what class member has the copyright in a particular court document. If one borrows from the set theory of mathematics, there will be a correspondence between individual members of the set of authors and copyright owners and the set of documents

in Litigator, but this correspondence will be an individual correspondence and not a class-wide correspondence. Accordingly, question 2 is not certifiable because again it is not a common issue and its answer requires individual assessments.

[172] Proposed question 3, which is a group of questions, purports to focus on infringement. It asks whether Thomson's activities infringe the copyright and moral rights of class members.

[173] I agree with Thomson that infringement cannot be a common issue across the class because that would ignore that copyright and moral rights are ultimately individual issues of entitlement and that consent to copying may be an individual issue. In particular, the infringement of moral rights is an individual issue depending upon whether a particular author's honour or reputation has been prejudiced by the use of particular court documents.

[174] However, Thomson's conduct, which is the nub of question 3, is a common issue. In other words, although the individual issues of creativity, authorship, ownership, and individual consent, which are issues associated with individual class members and with discrete documents, would remain to be determined, Thomson's conduct, which does apply across the class and with respect to all the documents it selects for Litigator, is an important common element of the claim of copyright infringement. Thomson's conduct in so far as it is an element of the legal wrong of copyright infringement is connected to its common practices with respect to all of the documents on Litigator, and questions about this conduct have commonality.

[175] As a matter of judicial economy and of facilitating access to justice, it would be useful for every class members as he or she prosecutes a claim at an individual issues trial to already have a judgment from the common issues trial that Thomson, reproduced, published, telecommunicated, sold, rented, or translated court documents as part of its Litigator service or authorized those activities by subscribers to Litigator. As a matter of judicial economy and facilitating access to justice, it would be useful to determine before the individual issues trial whether Thomson held itself out as the author or owner of the works on Litigator or whether Thomson's activities could be an infringement of the moral rights of the class member at his or her individual issues trial.

[176] I conclude that within proposed question 3, there are certifiable common issues as follows:

Thomson's Conduct

Did Thomson through its Litigator service reproduce, publish, telecommunicate to the public, sell, rent, translate, or hold itself out as the author or owner of court documents?

Did Thomson through its Litigator service authorize subscribers to reproduce, publish, telecommunicate to the public, sell, rent, translate, or hold themselves out as the author or owner of court documents?

(c) Defences

[177] Question 4 asks whether Thomson has a defence under the *Copyright Act* to the allegations of copyright and moral rights infringement. In my opinion, although it wants for precision, this is a very productive common issue.

[178] In my opinion, Thomson's fair dealing, public policy, and implied consent defences can be established by general practice evidence and, therefore, questions about these defences have commonality.

[179] The commonality of questions about the conduct of an alleged mass copyright infringer is demonstrated by *CCH Canadian Limited v. Law Society of Upper Canada*, *supra*, the facts of which were discussed above. In that case, Chief Justice McLachlin decided that the Law Society's fair dealing defence could be established by general practice evidence. The fair dealing question was a common or generalized issue independent of particular instances of photocopying the publisher's legal texts. The Chief Justice stated at paras. 63-64:

63. This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright." The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

64. The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of

library materials, required for the purposes of research, review, private study and criticism ... may be provided to users of the Great Library." When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

[180] I appreciate that there are differences between Thomson's for profit service and the Law Society's not-for-profit photocopying service, but it will be for the common issues judge to determine whether Thomson's reproduction of legal works was systemically for the purpose of research by subscribers and a fair dealing for Thomson to facilitate the research efforts of the subscribers.

[181] Similarly, Thomson's public policy defences, which depend upon the court finding a balance between creator's rights and user's rights, has a commonality that does not depend upon any analysis of each document on Litigator but which analysis would apply to all documents. Further, in my opinion, the question of whether client's have a copyright in court documents or for that matter whether anybody has a copyright in court documents is a public policy determination that would apply to the situations of all class members whose court documents are on Litigator.

[182] I also appreciate and note that if the common issues judge decided that a common consent by class members to the use of the court documents by Thomson was not established, the issue of when a particular class member consented to the copying of the documents would be an individual issue.

[183] I conclude that within question 4, there are certifiable common issues as follows:

Defences

Did Thomson have the copyright owner's implicit consent to reproduce, publish, telecommunicate to the public, sell, rent, translate, or hold itself out as the author or owner of court documents?

Does Thomson have a public policy defence to copyright infringement or to the violation of moral rights based on (a) fair dealing, (b) the open court principle, (c) freedom of expression, (d) the necessity of using the idea of the court document as it

is expressed, or (e) a business or professional custom or public policy reason that would justify reproducing, publishing, telecommunicating to the public, selling, renting, translating, or holding itself out as the author or owner of court documents?

(d) Relief

[184] Section 38.1 provides the copyright owner with an election to recover damages and profits referred to in subsection 35(1) of the *Copyright Act* or an award of statutory damages for all infringements involved in the proceedings. Section 38.1 (1) states:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

[185] I agree with Thomson's argument that Mr. Waldman's series of questions about relief do not satisfy the common issues criterion. As presently drafted, these questions are largely tautological.

[186] In other words, by definition, a class member whose copyright under the *Copyright Act* has been infringed will have a remedy under the Act for the copyright infringement, be it statutory damages or other categories of damages or the remedy of an injunction. If there is a copyright infringement or a violation of moral rights and statutory or another head of damages becomes available to class members. Thus, the proposed questions about relief are not certifiable since they do little to advance the litigation.

[187] Further, I see no basis for an aggregate assessment of the class members' damages or any common issue about the quantification of damages. In this regard, it was conceded during argument that statutory damages are discretionary and would depend upon the circumstances of each individual case.

[188] Subsection 38.1 (1) of the *Copyright Act* is subject to subsections (2) to (4), which allow the court to adjust the minimum award. The minimum statutory award "of not less than \$500 or more than \$20,000 as the court considers just" is thus not standard and can be reduced depending on the individual circumstances of the copyright infringement, and while the so-called statutory minimum can be increased to the maximum of \$20,000, this requires individual determinations.

[189] Thus, the question about aggregate damages is not certifiable and with the exception of a modified version of the question about aggravated, exemplary, or punitive damages and with the exception of the question about injunctive relief, in my opinion there are no certifiable common issues about the class members claims for relief. These matters all need to be determined at individual issues trials.

[190] 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.

[191] I, therefore, conclude that within proposed question 4, there are certifiable common issues as follows:

Relief

Does Thomson's conduct justify an award of aggravated, exemplary, or punitive damages?

Are Class Members entitled to injunctive relief against Thomson under s. 34 (1) of the *Copyright Act*?

[192] Based on the common issues that are certifiable, I am satisfied that the third criterion for certification is satisfied in the case at bar.

6. Preferable Procedure

[193] 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 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[194] Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claim; 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 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[195] 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 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[196] 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 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[197] That the common issues trial may leave significant individual issues to be resolved does not necessarily mean that a class proceeding is not the preferable procedure because it will be common that the common issues trial will not be determinative of the defendant's liability and the *Class Proceedings Act, 1992*, provides powerful procedural mechanisms and powerful compensation distribution mechanisms that permits the court to take a variety of approaches to resolving the claims of class members: *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 at para. 60.

[198] In the case at bar, Thomson submits that the preferability requirement is not satisfied because the certification of this action as a class action would accomplish none of the goals of the *Class Proceedings Act, 1992* and would, in light of the individual and privilege issues, be unmanageable. It submits that the action would break down into a long series of discrete trials with multiple parties prosecuting complex factual and legal issues. It submits that there would be little judicial efficiency in a class proceeding.

[199] Thomson submits that Mr. Waldman's class action is not necessary for access to justice because the class members confront no economic or social barriers to making claims to enforce their legal rights. It submits that the private bar of litigators does not need the assistance of a class action to obtain access to justice.

[200] Thomson submits that its behaviour does not need to be modified; rather, it submits that in Litigator it provides a useful service that facilitates the open court principle, freedom of expression, the administration of justice, and the professionalism of the legal profession and a service that does not cause any damage to class members who lose nothing by having their court documents shared on Litigator. It submits that its behaviour should be encouraged not condemned or enjoined. Further, Thomson submits that Mr. Waldman's action does not advance judicial economy but rather depletes judicial resources for a common issues trial and for individual lawsuits that are unlikely to be brought forward because publicly-filed court documents are readily and widely available and class members have not suffered any damages. For those few class members who object to their court documents being available on Litigator, there is the simple alternative procedure of asking Thomson to remove the court documents from Litigator. For all these reasons, Thomson submits that Mr. Waldman's proposed class action does not satisfy the preferable procedure criterion.

[201] My own conclusion, however, is to the contrary. Putting aside the manageability factor, there is a fatal flaw in Thomson's arguments about access to justice, judicial economy, and behaviour modification. Thomson's argument depends upon a premise that cannot be taken as true at this juncture of the proposed class action. A necessary premise of Thomson's argument is that the court will, on the merits, decide that Thomson committed no legal wrong and that its Litigator service is not an infringement of copyright or a violation of individual class members' moral rights. If that premise were true, then it would follow that Mr. Waldman's action would not advance access to justice for class members, would not provide judicial economy, and would not achieve the behaviour modification of a wrongdoer. However, a certification motion is not a merits test, and it remains to be determined whether Thomson is a wrongdoer.

[202] Removing the premise that Thomson is necessarily innocent and analyzing the preferability criterion on the assumption that Thomson may not be innocent, then Mr. Waldman's proposed action satisfies the preferable procedure criterion.

[203] Assuming there was copyright infringement, a class proceeding is the only reasonable means to provide access to justice to class members. That some individual class members may have the financial means and that class members do not confront any social barriers and would not be intimidated in taking on Thomson, does not mean that a class action is unnecessary to provide access to justice. Class actions are suitable for cases where the individual class member's monetary loss, if any, is small, but the

defendant has wronged many who as individuals cannot sensibly take on the financial risk of suing the defendant, who simply gets away with its misdeeds.

[204] In the case at bar, for an individual class member, an individual action would not be financially viable. Thomson's offer to remove the court documents from Litigator, at best, stops future injury, but this approach does not compensate or atone for the copyright infringement and the past violation of moral rights. In the case at bar, damages are not a constituent element of the class member's individual claim, but, in any event, a class member is entitled to seek justice for the infringement of his or her rights even if that justice is a non-compensatory remedy enjoining the defendant from its misconduct.

[205] In the case at bar, an individual issues trial, would become viable only if the common issues were determined in favour of the class member, in which case, the court could employ its powerful procedural mechanisms and powerful distribution mechanisms to provide access to justice.

[206] In the case at bar, a class action would provide judicial economy. If the common issues were decided against Thomson, then the court would not have to decide those substantial issues again in the individual issues trial. If the common issues were decided against Thomson, then behaviour modification would be achieved. Thomson's alternative of removing court documents from Litigator is an expediency to avoid acknowledging that its behaviour may be wrongful.

[207] I do not agree that the certification of this action as a class action would result in an unmanageable proceeding. There is no suggestion that the common issues phase would be unmanageable and if any of Thomson's defences carry the day, that will end the litigation altogether. Viewed globally, the class action will not be unmanageable and indeed may not have to be managed much, if Thomson is correct that class members are not interested in pursuing claims. Those that do pursue claims will benefit from the productivity of the common issues trial.

[208] I borrow what Justice Lax stated in *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 66:

I consider that the ghostly spectre of unmanageability underlying the arguments presented against certification is unconvincing. As with most ghosts, it will either vanish in the daylight of case management, the direction of the trial judge, or agreement of the parties or it will return in the night to haunt this proceeding, in which case the defendant may move under section 10 of the *CPA* for decertification: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 70.

[209] If the action proceeds to individual issues trials and Thomson insists that authorship be proven, the problem of solicitor-client privilege will be a problem for the class members to solve but this problem does not make the action unmanageable.

[210] I agree with Thomson that solicitor and client privilege is a matter that has to be addressed even if it were determined that clients do not have authorship or ownership claims. This factor means that class members will have to obtain a waiver of the privilege from their client after insisting that their client obtain independent legal advice.

[211] If the client waiver is not forthcoming, then the class member will not be able to pursue its individual claim and there will no claim to manage. If the client waives solicitor and client privilege, then determining authorship and ownership will not make the action unmanageable. The class members will have dockets and file memoranda and draft documents that will facilitate the determination of authorship and ownership.

[212] I note that manageability concerns do not arise if Thomson does not contest the authorship or ownership of class members. Assuming it is unsuccessful after a common issues trial, then it may not be worthwhile for Thomson to challenge authorship or ownership because some class member will be the author or copyright owner and so Thomson does not benefit much by precisely identifying co-authors and co-owners.

[213] In any event, I am satisfied that a class proceeding is the preferable procedure and that the fourth criterion for certification has been satisfied.

7. Representative Plaintiff and the Litigation Plan

[214] 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 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, *aff'd* [2003] O.J. No. 4708 (C.A.).

[215] 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 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J.

No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[216] 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 at para. 41.

[217] It was not contested that Mr. Waldman is a suitable and satisfactory representative plaintiff. I conclude that the fifth criterion for certification is satisfied in the case at bar.

G. CONCLUSION

[218] For the above reasons, I am satisfied that all the certification criteria have been satisfied. Therefore, the action must be certified as a class action.

[219] The parties agreed that the successful party on this motion shall be entitled to costs in the cause fixed at \$15,000.00, inclusive.

[220] Order to go accordingly.

Perell, J.

Released: February 21, 2011

CITATION: Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138
COURT FILE NO.: 10-CV-403667CP
DATE: February 21, 2012

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Lorne Waldman

Plaintiff

- and -

**Thomson Reuters Corporation and Thomson
Reuters Canada Limited**

Defendants

REASONS FOR DECISION

Perell, J.

Released: February 21, 2012

1291079 ONTARIO LIMITED
Plaintiff

-and- **SEARS CANADA INC. et al.**
Defendants

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT MILTON

BOOK OF AUTHORITIES OF THE PLAINTIFFS
(Motion for Certification Returnable April 17, 2019)

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