TAB 21

2010 CarswellOnt 5919, 2010 ONSC 4520, 2010 C.L.L.C. 210-044, 3 C.P.C. (7th) 81

McCracken v. Canadian National Railway

Proceedings under the Class Proceedings Act, 1992

Michael Ian McCracken (Plaintiff) and Canadian National Railway Company (Defendant)

Ontario Superior Court of Justice

Perell J.

Heard: July 12-16, 2010
Judgment: August 17, 2010[FN*]
Docket: 08-CV-351183 CP

Counsel: Louis Sokolov, Steven Barrett, Peter L. Roy, Sean Grayson, Christine Davies for Plaintiff

Sylvie Rodrigue, Mary Gleason, Jeremy Devereux, Michael Kotrly for Defendant

Subject: Labour and Employment; Public; Civil Practice and Procedure; Torts

Labour and employment law --- Employment standards legislation — Hours of work

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Court had jurisdiction to determine whether it had subject-matter jurisdiction over plaintiff's claims and causes of action — Court had subject-matter jurisdiction and there was cause of action by force of statute to enforce overtime wage entitlements created by Code — It followed that defendant's motion under R. 21.01(3)(a) of Rules of Civil Procedure had to be dismissed — Plaintiff showed cause of action for unjust enrichment and for breach of contract based on express and implied terms, and terms implied by force of statute — It was desirable to stay claims for breach of express or implied term of contract — Claim for breach of duty of good faith was to be struck out as free-standing cause of action — It was plain and obvious that there were policy reasons to negate duty of care with result that

there was no reasonable claim for negligence — Criterion of identifiable class was satisfied — Six questions passed test for certification as common issues — Four additional questions involving aggregate assessment of damages could not be certified as common issues — Plaintiff was suitable representative plaintiff — Granting of certification was subject to condition that litigation plan be settled — Plaintiff's litigation plan was based on supposition that all of causes of action and common issues would be certified, which did not occur.

Labour and employment law --- Labour law — Labour relations boards — Jurisdiction — Concurrent jurisdiction — With courts

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Court had jurisdiction to determine whether it had subject-matter jurisdiction over plaintiff's claims and causes of action — Court had subject-matter jurisdiction and there was cause of action by force of statute to enforce overtime wage entitlements created by Code — It followed that defendant's motion under R. 21.01(3)(a) of Rules of Civil Procedure had to be dismissed — Parliament intended that courts have concurrent jurisdiction to enforce claims for overtime and holiday pay — Parliament intended that courts have subject-matter jurisdiction to enforce wage claims for overtime, and this conclusion led to adjunct conclusion that statutory rights were terms of contract by force of statute — Court proceeding was preferable procedure for resolving claims and common issues, and therefore it was appropriate that court not defer and that court exercise its subject-matter jurisdiction — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — This jurisdiction may exceptionally be used in aid of court's jurisdiction under R. 21 — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a), judge who hears motion may in proper case order that motion be converted into motion for judgment.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Jurisdiction

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Court had jurisdiction to determine whether it had subject-matter jurisdiction over plaintiff's claims and causes of action — Court had subject-matter jurisdiction and there was cause of action by force of statute to enforce overtime wage entitlements created by Code — It followed that defendant's motion under R. 21.01(3)(a) of Rules of Civil Procedure had to be dismissed — Parliament intended that courts have concurrent jurisdiction

to enforce claims for overtime and holiday pay — Parliament intended that courts have subject-matter jurisdiction to enforce wage claims for overtime, and this conclusion led to adjunct conclusion that statutory rights were terms of contract by force of statute — Court proceeding was preferable procedure for resolving claims and common issues, and therefore it was appropriate that court not defer and that court exercise its subject-matter jurisdiction — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — This jurisdiction may exceptionally be used in aid of court's jurisdiction under R. 21 — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a), judge who hears motion may in proper case order that motion be converted into motion for judgment.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — Plaintiff showed reasonable cause of action for breach of express term of contract of employment — Plaintiff pleaded reasonable cause of action based on implied contractual terms, and for breach of statutory implied term — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a) of Rules of Civil Procedure, judge who hears motion may in proper case order that motion be converted into motion for judgment — It was appropriate to exercise discretion and decide claim about holiday pay on its merits and to decide that terms of Code were terms of employment contracts by force of law — It was desirable to stay claims for breach of express or implied term of contract — Claim for breach of duty of good faith was to be struck out as free-standing cause of action — Pleading of material facts alleging breach of duty of good faith could remain to extent that material facts were pleaded in support of cause of action for breach of contract (breach of contract claims were to be stayed) — Plaintiff showed cause of action for unjust enrichment — It was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence.

Torts --- Negligence — Practice and procedure — Trials — Nonsuit or dismissal of action — Miscellaneous

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions;

cross-motion granted in part — It was plain and obvious that there was no cause of action in negligence — It was assumed that it was not plain and obvious that defendant did not have prima facie duty of care to first line supervisors — However, it was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence — Proposed tort was unnecessary intrusion of law of tort into area in which it was not needed and where it might cause confusion and uncertainty and disturb existing law that did not require fixing — Proposed tort would encourage much needless litigation — Proposed duty of care, if recognized, would establish liability for conduct that did not actually cause plaintiff's injury.

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

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Plaintiff showed cause of action for unjust enrichment and for breach of contract based on express and implied terms, and terms implied by force of statute — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — Plaintiff showed reasonable cause of action for breach of express term of contract of employment — Plaintiff pleaded reasonable cause of action based on implied contractual terms, and for breach of statutory implied term — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a) of Rules of Civil Procedure, judge who hears motion may in proper case order that motion be converted into motion for judgment — It was appropriate to exercise discretion and decide claim about holiday pay on its merits and to decide that terms of Code were terms of employment contracts by force of law — It was desirable to stay claims for breach of express or implied term of contract — Claim for breach of duty of good faith was to be struck out as free-standing cause of action — Pleading of material facts alleging breach of duty of good faith could remain to extent that material facts were pleaded in support of cause of action for breach of contract (breach of contract claims were to be stayed) — Plaintiff showed cause of action for unjust enrichment — It was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence.

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

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable

under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Criterion of identifiable class was satisfied — Plaintiff established that there was some basis in fact for his own cause of action and for his own job description — Therefore, there was sufficient evidentiary basis for him to submit that there was group of similarly situated claimants with similar claims — Plaintiff provided some basis in fact to identify persons who had potential claim against defendant — There were persons like him whom defendant classified as first line supervisors and who because of that classification (not job description) were not paid overtime.

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

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Following six questions passed test for certification as common issues: (1) Did class members receive overtime pay under Code as amended; (2) What were terms by force of statute of class members' contracts of employment with defendant respecting classification, regular and overtime hours, and recording of hours worked; (3) In accordance with meaning under s. 167(2) of Code of "employees who are managers or superintendents or exercise management functions", what were minimum requirements to be managerial employee; (4) Would defendant be unjustly enriched by failing to compensate class member with pay or overtime pay for hours worked in excess of his or her standard hours of work; (5) If defendant breached duty or its contract or was unjustly enriched, what remedies were available to class members; and (6) Would defendant's conduct justify award of aggravated, exemplary or punitive damages — These questions were necessary to resolution of each class member's claim — Four of these six questions could be answered before common issues trial and those answers would substantially advance litigation — Four additional questions involving aggregate assessment of damages could not be certified as common issues — Preconditions set by ss. 24(1)(b) and (c) of Class Proceedings Act, 1992 for aggregate assessment could not be satisfied.

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

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions;

cross-motion granted in part — It was plain that plaintiff's class action with its six common issues coupled with resources of s. 25 of Class Proceedings Act, 1992 would be preferable procedure for resolving claims of 1,550 class members — Class action as structured would be manageable — It would provide access to justice and judicial economy, and it would provide behaviour modification if that ultimately proved to have been necessary.

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

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Plaintiff was suitable representative plaintiff — It was overstatement for defendant to claim that plaintiff's animosity towards several members suggested that he would not fairly and adequately represent whole class — Plaintiff acted in rude and unprofessional manner, and while he ought not have let his emotions get better of him, his conduct did not warrant disqualifying him as representative plaintiff — But for his verbal indiscretions aimed at some identified class members, there was little suggestion plaintiff had not been able to carry out responsibilities or that he would not be able to carry out those responsibilities in future — Plaintiff may have had personality conflicts with several class members, but he had no conflict of interest in sense that his claim or position in class action was adverse in interest to those of other class members — Plaintiff was astute enough to hire seasoned class action counsel determined to establish overtime wage claims as appropriate for certification and to prosecute litigation notwithstanding resistance of equally seasoned and determined defence counsel.

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

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Certification was granted subject to condition that litigation plan be settled, which would be done by case conference or by motion if necessary — Plaintiff's litigation plan, which was subject to fulsome attack by defendant, was based on supposition that all of plaintiff's causes of action and common issues would be certified, which did not occur — It was not necessary to discuss defendant's objections because plaintiff had to prepare new litigation plan based on outcomes of motion and cross-motion — Given structure of class action that would go forward, there was no foreseeable, insurmountable

problem that would prevent litigation plan being drafted — Outcome was regarded as producing manageable proceeding.

Cases considered by *Perell J.*:

Abdool v. Anaheim Management Ltd. (1995), 1995 CarswellOnt 129, 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — referred to

Adams v. Cusack (2006), 47 C.C.E.L. (3d) 48, 2006 C.L.L.C. 220-017, 2006 NSCA 9, 2006 CarswellNS 27, 22 C.P.C. (6th) 152, 264 D.L.R. (4th) 692, 147 L.A.C. (4th) 225, 242 N.S.R. (2d) 66, 770 A.P.R. 66 (N.S. C.A.) — considered

A'Hearn v. T.N.T. Canada Inc. (1990), 1990 CarswellBC 867, 74 D.L.R. (4th) 663 (B.C. C.A.) — considered

A'Hearn v. T.N.T. Canada Inc. (1991), 133 N.R. 240 (note), 79 D.L.R. (4th) vi (note) (S.C.C.) — referred to

Anderson v. Wilson (1999), 36 C.P.C. (4th) 17, 44 O.R. (3d) 673, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 122 O.A.C. 69 (Ont. C.A.) — referred to

Anderson v. Wilson (2000), 138 O.A.C. 200 (note), 2000 CarswellOnt 1837, 2000 CarswellOnt 1838, 258 N.R. 194 (note), 185 D.L.R. (4th) vii (S.C.C.) — referred to

Andrzewski v. Greyhound Canada Transportation Corp. (August 13, 1998), M.R. Newman Referee (Can. Arb. Bd.) — referred to

Anns v. Merton London Borough Council (1977), (sub nom. *Anns v. London Borough of Merton)* [1977] 2 All E.R. 492, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — followed

Attis v. Canada (Minister of Health) (2003), 29 C.P.C. (5th) 242, 2003 CarswellOnt 347 (Ont. S.C.J.) — referred to

Attis v. Canada (Minister of Health) (2003), 2003 CarswellOnt 4868 (Ont. C.A.) — referred to

Avalon Aviation Ltd. v. Desgagne (1981), 1981 CarswellNat 568, 42 N.R. 337 (Fed. C.A.) — referred to

Banque Canadienne Impériale de Commerce c. Torre (2010), 2010 CarswellNat 844, 2010 FC 105, (sub nom. *Canadian Imperial Bank of Commerce v. Torre)* 2010 C.L.L.C. 210-026, 362 F.T.R. 232, 2010 CF 105, 2010 CarswellNat 180, 81 C.C.E.L. (3d) 258 (F.C.) — referred to

Beardsley v. Ontario (2001), 17 C.P.C. (5th) 94, 2001 CarswellOnt 4137, 151 O.A.C. 324, 57 O.R. (3d) 1 (Ont. C.A.) — referred to

Beaulne v. Kaverit Steel & Crane ULC (2002), 19 C.C.E.L. (3d) 252, 2002 CarswellAlta

1071, 2002 ABQB 787, 325 A.R. 237, 2003 C.L.L.C. 210-009, 219 D.L.R. (4th) 482 (Alta. Q.B.) — referred to

Bhadauria v. Seneca College of Applied Arts & Technology (1981), 2 C.H.R.R. D/468, 1981 CarswellOnt 117, 1981 CarswellOnt 616, [1981] 2 S.C.R. 181, (sub nom. *Seneca College of Applied Arts & Technology v. Bhadauria)* 124 D.L.R. (3d) 193, 37 N.R. 455, 14 B.L.R. 157, 81 C.L.L.C. 14,117, 22 C.P.C. 130, 17 C.C.L.T. 106 (S.C.C.) — referred to

Bisaillon c. Concordia University (2006), 51 C.C.P.B. 163, (sub nom. *Bisaillon v. Concordia University)* 149 L.A.C. (4th) 225, (sub nom. *Bisaillon v. Concordia University)* 348 N.R. 201, (sub nom. *Concordia v. Bisaillon)* 2006 C.L.L.C. 220-033, 2006 C.E.B. & P.G.R. 8200, 2006 SCC 19, 2006 CarswellQue 3689, 2006 CarswellQue 3690, (sub nom. *Bisaillon v. Concordia University)* 266 D.L.R. (4th) 542, [2006] 1 S.C.R. 666 (S.C.C.) — considered

Boulanger v. Johnson & Johnson Corp. (2002), 14 C.C.L.T. (3d) 233, 2002 CarswellOnt 1395 (Ont. S.C.J.) — referred to

Boulanger v. Johnson & Johnson Corp. (2002), 2002 CarswellOnt 1813 (Ont. S.C.J.) — referred to

Boulanger v. Johnson & Johnson Corp. (2003), 2003 CarswellOnt 1405, 32 C.P.C. (5th) 203, 226 D.L.R. (4th) 747, 170 O.A.C. 333, 64 O.R. (3d) 208 (Ont. Div. Ct.) — referred to

Boulanger v. Johnson & Johnson Corp. (2003), 2003 CarswellOnt 2129, 174 O.A.C. 44 (Ont. C.A.) — referred to

Buffa v. Gauvin (1994), 18 O.R. (3d) 725, 5 M.V.R. (3d) 235, 1994 CarswellOnt 38 (Ont. Gen. Div.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — considered

Canada (Procureur général) c. Gauthier (1980), [1980] 2 F.C. 393, 34 N.R. 549, 113 D.L.R. (3d) 419, 1980 CarswellNat 51, 1980 CarswellNat 51F (Fed. C.A.) — referred to

Canadian Imperial Bank of Commerce v. Bateman (1991), 91 C.L.L.C. 14,028, 42 F.T.R. 218, [1991] 3 F.C. 586, 1 Admin. L.R. (2d) 226, 1991 CarswellNat 792, 1991 CarswellNat 355 (Fed. T.D.) — referred to

Canadian Pacific Hotels Ltd. v. Bank of Montreal (1987), 77 N.R. 161, [1987] 1 S.C.R. 711, 21 O.A.C. 321, 41 C.C.L.T. 1, 40 D.L.R. (4th) 385, 1987 CarswellOnt 760, 1987 CarswellOnt 962 (S.C.C.) — referred to

Canadian Pacific International Freight Services Ltd. v. Starber International Inc. (1992), 12 C.C.L.T. (2d) 321, 44 C.P.R. (3d) 17, 1992 CarswellOnt 839 (Ont. Gen. Div.) — referred to

Canadian Transit Co. v. Nanni (2009), 2009 CarswellNat 4742 (Can. Arb. Bd.) — referred to

Cassano v. Toronto Dominion Bank (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. *Cassano v. Toronto-Dominion Bank)* 287 D.L.R. (4th) 703 (Ont. C.A.) — referred to

Centre Town Developments Ltd. v. Hull (1997), 108 O.A.C. 210, 1997 CarswellOnt 4285 (Ont. Div. Ct.) — referred to

Chadha v. Bayer Inc. (2001), 2001 CarswellOnt 1697, 200 D.L.R. (4th) 309, 8 C.P.C. (5th) 138, 15 B.L.R. (3d) 177, 147 O.A.C. 223, 54 O.R. (3d) 520 (Ont. Div. Ct.) — referred to

Chadha v. Bayer Inc. (2003), 223 D.L.R. (4th) 158, 168 O.A.C. 143, 2003 CarswellOnt 49, 63 O.R. (3d) 22, 23 C.L.R. (3d) 1, 31 B.L.R. (3d) 214, 31 C.P.C. (5th) 40 (Ont. C.A.) — referred to

Chadha v. Bayer Inc. (2003), 320 N.R. 399 (note), 65 O.R. (3d) xvii, 2003 CarswellOnt 2810, 2003 CarswellOnt 2811, 191 O.A.C. 397 (note) (S.C.C.) — referred to

Childs v. Desormeaux (2006), 30 M.V.R. (5th) 1, 80 O.R. (3d) 558 (note), 210 O.A.C. 315, 2006 CarswellOnt 2710, 2006 CarswellOnt 2711, 2006 SCC 18, 347 N.R. 328, 266 D.L.R. (4th) 257, 39 C.C.L.T. (3d) 163, [2006] 1 S.C.R. 643, [2006] R.R.A. 245 (S.C.C.) — referred to

Chrysalis Restaurant Enterprises Inc. v. 212 King Street West Ltd. (1994), 1994 CarswellOnt 3693 (Ont. Gen. Div.) — referred to

Cloud v. Canada (Attorney General) (2003), 41 C.P.C. (5th) 226, 2003 CarswellOnt 4630, 65 O.R. (3d) 492 (Ont. Div. Ct.) — referred to

Cloud v. Canada (Attorney General) (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — considered

Cloud v. Canada (Attorney General) (2005), 2005 CarswellOnt 1866, 2005 CarswellOnt 1867, 344 N.R. 192 (note), [2005] 1 S.C.R. vi (note), 207 O.A.C. 400 (note) (S.C.C.) — referred to

CMLQ Investors Co. v. CIBC Trust Corp. (1996), 1996 CarswellOnt 3376, 3 C.P.C. (4th) 62 (Ont. C.A.) — referred to

Conrad v. Imperial Oil Ltd. (1999), 1999 CarswellNS 123, 1999 NSCA 29, 174 N.S.R. (2d) 62, 532 A.P.R. 62, 173 D.L.R. (4th) 286 (N.S. C.A.) — considered

Cooper v. Hobart (2001), [2002] 1 W.W.R. 221, 2001 CarswellBC 2502, 2001 CarswellBC 2503, 2001 SCC 79, 8 C.C.L.T. (3d) 26, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (

sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 277 N.R. 113, [2001] 3 S.C.R. 537, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.))* 261 W.A.C. 268 (S.C.C.) — considered

Corktown Films Inc. v. Ontario (1996), 1996 CarswellOnt 4078, 34 B.L.R. (2d) 168, 18 O.T.C. 308 (Ont. Gen. Div.) — referred to

Corless v. KPMG LLP (2008), 2008 CarswellOnt 4708 (Ont. S.C.J.) — considered

D. (B.) v. Children's Aid Society of Halton (Region) (2007), 39 R.F.L. (6th) 245, 49 C.C.L.T. (3d) 1, 284 D.L.R. (4th) 682, 2007 CarswellOnt 4789, 2007 CarswellOnt 4790, 2007 SCC 38, 365 N.R. 302, 227 O.A.C. 161, (sub nom. *Syl Apps Secure Treatment Centre v. D. (B.))* [2007] 3 S.C.R. 83, 86 O.R. (3d) 720 (note) (S.C.C.) — referred to

Dennis v. Ontario Lottery & Gaming Corp. (2010), 318 D.L.R. (4th) 110, 2010 ONSC 1332, 2010 CarswellOnt 1975 (Ont. S.C.J.) — considered

Drady v. Canada (Minister of Health) (2007), 2007 CarswellOnt 4631 (Ont. S.C.J.) — referred to

Dumoulin v. Ontario (2005), 2005 CarswellOnt 4544, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72 (Ont. S.C.J.) — considered

Falloncrest Financial Corp. v. Ontario (1995), (sub nom. *Nash v. Ontario)* 27 O.R. (3d) 1, 1995 CarswellOnt 910 (Ont. C.A.) — referred to

Fischer v. IG Investment Management Ltd. (2010), 2010 CarswellOnt 135, 2010 ONSC 296 (Ont. S.C.J.) — referred to

Folland v. Ontario (2003), 2003 CarswellOnt 1087, 104 C.R.R. (2d) 244, 17 C.C.L.T. (3d) 271, 225 D.L.R. (4th) 50, 170 O.A.C. 17, 64 O.R. (3d) 89 (Ont. C.A.) — referred to

Folland v. Ontario (2003), 194 O.A.C. 200 (note), 2003 CarswellOnt 3811, 2003 CarswellOnt 3812, 229 D.L.R. (4th) vi (note), 325 N.R. 391 (note) (S.C.C.) — referred to

Frame v. Smith (1987), 1987 CarswellOnt 969, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347 (S.C.C.) — referred to

Franklin v. University of Toronto (2001), 2001 CarswellOnt 3978, 14 C.C.E.L. (3d) 85, 13 C.P.C. (5th) 340, 56 O.R. (3d) 698 (Ont. S.C.J.) — referred to

Fredericks v. 2753014 Canada Inc. (2008), 272 N.S.R. (2d) 186, 869 A.P.R. 186, 2008 CarswellNS 714, 2008 NSSC 377 (N.S. S.C.) — referred to

Fresco v. Canadian Imperial Bank of Commerce (2009), 2009 C.L.L.C. 210-032, 71 C.P.C. (6th) 97, 2009 CarswellOnt 3481 (Ont. S.C.J.) — followed

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — referred to

Fulawka v. Bank of Nova Scotia (2010), 2010 C.L.L.C. 210-025, 2010 CarswellOnt 1057, 2010 ONSC 1148 (Ont. S.C.J.) — distinguished

Fulawka v. Bank of Nova Scotia (2010), 2010 ONSC 2645, 2010 CarswellOnt 3419 (Ont. Div. Ct.) — referred to

G. Ford Homes Ltd. v. Draft Masonry (York) Co. (1983), 43 O.R. (2d) 401, 2 O.A.C. 231, 2 C.L.R. 210, 1 D.L.R. (4th) 262, 1983 CarswellOnt 732 (Ont. C.A.) — considered

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Toronto Police Assn. v. Toronto Police Services Board (2008), 256 O.A.C. 391 (note), 2008 CarswellOnt 5593, 2008 CarswellOnt 5594, 390 N.R. 398 (note) (S.C.C.) — referred to

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Vezina v. Loblaw Cos. (2005), 2005 CarswellOnt 1942, 17 C.P.C. (6th) 307 (Ont. S.C.J.) — referred to

Vlahakos v. Ridley Inc. (2002), 2002 MBQB 301, 2002 CarswellMan 518, 169 Man. R. (2d) 157, 21 C.C.E.L. (3d) 192 (Man. Q.B.) — considered

Voutour v. Pfizer Canada Inc. (2008), 2008 CarswellOnt 4673, 64 C.P.C. (6th) 136 (Ont. S.C.J.) — referred to

Wallace v. United Grain Growers Ltd. (1997), 123 Man. R. (2d) 1, 159 W.A.C. 1, 152 D.L.R. (4th) 1, 1997 CarswellMan 455, 1997 CarswellMan 456, 219 N.R. 161, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1997] L.V.I. 2889-1, 97 C.L.L.C. 210-029 (S.C.C.) — considered

Watson v. Wozniak (2004), 36 C.C.E.L. (3d) 202, 2004 CarswellSask 540, 2004 SKQB 339, 252 Sask. R. 153 (Sask. Q.B.) — referred to

Web Offset Publications Ltd. v. Vickery (1999), 1999 CarswellOnt 2270, 123 O.A.C. 235, 43 O.R. (3d) 802 (Ont. C.A.) — referred to

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Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Williams v. Mutual Life Assurance Co. of Canada (2000), 2000 CarswellOnt 3739, 24 C.C.L.I. (3d) 298, 51 O.R. (3d) 54, [2001] I.L.R. I-3896 (Ont. S.C.J.) — referred to

Wilson v. Ingersoll (Town) (1916), 38 O.L.R. 260 (Ont. H.C.) — referred to

Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. (1995), 18 C.L.R. (2d) 1, [1995] 1 S.C.R. 85, 23 C.C.L.T. (2d) 1, 43 R.P.R. (2d) 1, [1995] 3 W.W.R. 85, 1995 CarswellMan 19, 176 N.R. 321, 1995 CarswellMan 249, 74 B.L.R. 1, 50 Con. L.R. 124, 100 Man. R. (2d) 241, 91 W.A.C. 241, 121 D.L.R. (4th) 193 (S.C.C.) — referred to

Zicherman v. Equitable Life Insurance Co. of Canada (2003), 2003 CarswellOnt 1206, [2003] I.L.R. I-4182, 226 D.L.R. (4th) 131, 47 C.C.L.I. (3d) 60 (Ont. C.A.) — referred to

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), 1972 CarswellOnt 1010, 25 D.L.R. (3d) 386, [1972] 2 O.R. 280 (Ont. C.A.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, 2002 CarswellOnt 4272 (Ont. S.C.J.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2003), 2003 CarswellOnt 998, 169 O.A.C. 343, 64 O.R. (3d) 42 (Ont. Div. Ct.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2007), 2007 CarswellOnt 1768, 45 C.P.C. (6th) 375 (Ont. S.C.J.) — considered

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2007), 2007 CarswellOnt 3923 (Ont. Div. Ct.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2008), 2008 CarswellOnt 3428 (Ont. S.C.J.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2009), 70 C.P.C. (6th) 27, 2009 CarswellOnt 2533, 96 O.R. (3d) 252, 250 O.A.C. 87 (Ont. Div. Ct.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2010), 100 O.R. (3d) 721, 87 C.P.C. (6th) 375, 2010 ONCA 466, 2010 CarswellOnt 4305 (Ont. C.A.) — referred to

Statutes considered:

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Generally — referred to

Pt. I — referred to

Pt. II — referred to

Pt. III — referred to

Pt. III, Div. I — referred to

Pt. III, Div. IX — referred to

s. 3(1) "employee" — referred to

s. 166 "employer" — referred to

s. 166 "general holiday" — referred to

s. 166 "inspector" — referred to

s. 166 "order" — referred to

s. 166 "overtime" — considered

s. 166 "standard hours of work" — referred to

s. 166 "wages" — considered

s. 167(1)(a) — referred to

s. 167(1)(b) — referred to

s. 167(1)(c) — referred to

s. 167(2) — pursuant to

s. 168(1) — considered

s. 169(1) — referred to

s. 171(1) — referred to

s. 174 — considered

s. 191 "employed in a continuous operation" (b) — referred to

s. 198 — considered

s. 198(a) — considered

s. 198(b) — considered

s. 199 — considered

s. 240(1) — considered

s. 240(1)(a) — referred to

ss. 240-245 — referred to

s. 241(3) — considered

s. 242(1) — referred to

s. 242(4) — considered

s. 243 — referred to

s. 244 — referred to

s. 246(1) — considered

s. 247 — considered

s. 248(1) — referred to

s. 249(1) — considered

s. 249(2) — considered

s. 249(7) — considered

s. 251(1) — referred to

s. 251.1(1) [en. 1993, c. 42, s. 37] — referred to

s. 251.1(2) [en. 1993, c. 42, s. 37] — referred to

s. 251.11(1) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(1) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(4) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(6) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(7) [en. 1993, c. 42, s. 37] — referred to

s. 252(2) — referred to

s. 252(3) — referred to

s. 256 — referred to

s. 257(1) — referred to

s. 257(2) — referred to

s. 258 — considered

s. 261 — considered

s. 264 — referred to

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

Generally — referred to

s. 1 "common issues" — considered

s. 1 "common issues" (a) — considered

s. 1 "common issues" (b) — considered

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(b)-5(1)(e) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 12 — considered

s. 13 — considered

s. 23 — considered

s. 24 — considered

s. 24(1) — considered

s. 24(1)(b) — considered

s. 24(1)(c) — considered

s. 24(2)(d) — referred to

s. 24(3) — considered

s. 25 — considered

Code civil du Québec, L.Q. 1991, c. 64

art. 2925 — referred to

Employment Standards Act, 1974, S.O. 1974, c. 112

s. 2(2) — referred to

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s. 2(2) — referred to

Employment Standards Act, R.S.O. 1990, c. E.14

s. 2(2) — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

Hours of Work and Vacations with Pay Act, R.S.O. 1960, c. 181

Generally — referred to

Labour Standards Act, 1969, S.S. 1969, c. 24

Generally — referred to

s. 17 — referred to

Limitation Act, R.S.B.C. 1996, c. 266

s. 3(2)(a) — referred to

s. 3(5) — referred to

Limitation of Actions Act, R.S.M. 1987, c. L150

s. 2(1)(b) — referred to

s. 2(1)(e) — referred to

s. 2(1)(i) — referred to

s. 2(1)(k) — referred to

Limitation of Actions Act, R.S.N.B. 1973, c. L-8

s. 3 — referred to

s. 6 — referred to

s. 7 — referred to

s. 9 — referred to

Limitation of Actions Act, R.S.N.S. 1989, c. 258

s. 2(1)(b) — referred to

s. 2(1)(e) — referred to

Limitation of Actions Act, R.S.N.W.T. 1988, c. L-8

s. 2(1)(b) — referred to

s. 2(1)(f) — referred to

s. 2(1)(h) — referred to

s. 2(1)(j) — referred to

Limitation of Actions Act, R.S.Y. 2002, c. 139

s. 2(1)(b) — referred to

s. 2(1)(f) — referred to

s. 2(1)(h) — referred to

s. 2(1)(j) — referred to

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

s. 3(1) — referred to

Limitations Act, S.N. 1995, c. L-16.1

s. 5(a) — referred to

s. 5(b) — referred to

s. 5(h) — referred to

s. 6(1)(f) — referred to

s. 6(1)(h) — referred to

s. 9 — referred to

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

s. 24(3) — referred to

Limitations Act, S.S. 2004, c. L-16.1

s. 5 — referred to

Nunavut Act, S.C. 1993, c. 28

s. 29 — referred to

Real Property Limitations Act, R.S.O. 1990, c. L.15

s. 45(1)(g) — referred to

Statute of Limitations, R.S.P.E.I. 1988, c. S-7

s. 2(1)(b) — referred to

s. 2(1)(e) — referred to

s. 2(1)(g) — referred to

Rules considered:

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

R. 21 — referred to

R. 21.01(1) — considered

R. 21.01(1)(a) — considered

R. 21.01(1)(b) — considered

R. 21.01(2) — considered

R. 21.01(3) — referred to

R. 21.01(3)(a) — considered

R. 37.13(2)(a) — considered

R. 57.01(4) — considered

R. 57.02-57.07 — referred to

Regulations considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Canada Labour Standards Regulations, C.R.C. 1978, c. 986

Generally — referred to

s. 24(2)(d) — referred to

MOTION by plaintiff for certification of class action; CROSS-MOTION by defendant to stay or dismiss action.

***Perell J.*:**

Reasons for Decision

Introduction and Overview

1 Under s. 167(2) of the *Canada Labour Code*, R.S. 1985, c. L-2, which is found in Part III of the *Code*, the overtime and maximum hours of work rules of the *Code* do *not* apply to

employees who "are managers or superintendents or who exercise management functions".

2 Under s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6, the plaintiff, Michael Ian McCracken, moves for certification of a class action against the defendant Canadian National Railway Company ("CN"). Mr. McCracken alleges that CN has unlawfully classified all its "first line supervisors" ("FLSs") as "managers" thus depriving them of overtime and holiday wages payable under the *Code*.

3 Mr. McCracken advances claims of violation of the *Code*, breach of contract, breach of a duty of good faith, unjust enrichment, and negligence. He submits that common issues arising from these claims are informed by the contract of employment, CN's duties and obligations under the *Code*, and CN's failure to develop and implement reasonable and effective systems, procedures, and practices to ensure that first line supervisors are or were properly classified and that all of their hours worked, including overtime and holiday hours, were properly recorded.

4 Mr. McCracken brings his action on behalf of the proposed Class Members, who are:

> All current and former non-unionized CN employees who were first line supervisors on or after July 5, 2002.

5 The date of July 5, 2002 in the proposed class definition is the date that CN is alleged to have misclassified the first line supervisors as managers. The proposed Class is estimated to be 1,550 persons, of which 842 are currently CN employees.

6 In his statement of claim, Mr. McCracken makes many claims for relief including, but not limited to, the following:

- He claims $250 million in damages and an order pursuant to s. 24 of the *Class Proceedings Act, 1992* directing an aggregate assessment of damages. He seeks an order from the court directing the distribution of payments to Class Members. He seeks an order pursuant to s. 23 of the Act admitting into evidence statistical information.

- He claims an order directing CN to disgorge amounts withheld in respect of unpaid hours, including overtime and holiday hours worked by each member of the class. He seeks a declaration that CN has been unjustly enriched to the deprivation of Class Members by the value of the unpaid overtime and holiday hours.

- He seeks a declaration that CN has breached the *Code* by: (1) misclassifying Class Members as exempt from overtime compensation; (2) failing to pay overtime at the prescribed rates; (3) failing to pay holiday pay; and (4) violating the anti-retaliation provisions of s. 256 of the *Code*.

- He seeks a declaration that CN has breached the obligation under the *Canada Labour Standards Regulations* C.R.C. c. 986 (the "*Regulations*") to accurately record and maintain records of Class Members' hours of work.

- He seeks a declaration that the duties of the *Code* or the *Regulations* are express or im-

plied terms of the Class Members' contracts of employment. He seeks a declaration that CN has breached the express or implied terms of its contracts of employment with each Class Member.

- He seeks a declaration that CN owes the Class Members a duty to act in good faith and has breached that duty in the performance of its contracts with Class Members.

- He seeks punitive, aggravated, and exemplary damages of $50 million.

- He seeks injunctive relief restraining CN from enforcing its "Compensation Management - Time Management Policy."

7 On his motion for certification, Mr. McCracken argues that all of the criteria for certification as a class proceeding have been satisfied. Further, he submits that his action is a "misclassification case" and these cases are "inherently amenable to resolution by way of class proceeding".

8 For its part, CN argues that all five criteria for certification have not been satisfied and that the motion for certification should be dismissed.

9 Although it challenges whether there is some basis in fact for the class definition, CN does not contest the definition, as such, and relying essentially on an argument developed for a cross-motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 set out below, it submits that the first criterion for certification (cause of action) has not been satisfied, and it disputes the inherent amenability of misclassification cases for certification. It submits that there are no common issues that would support certification as a class action. Among other challenges, CN disputes that there could be an aggregate assessment of damages, and it submits that the proceeding would inevitably require 1,550 individual assessments of liability and of damages. CN argues that a class action would not be the preferable procedure, and it submits that the putative Class Members' claims would be much more efficiently addressed by the administrative process established under Part III of the *Code*. Finally, it submits that certification should be refused because Mr. McCracken would not be a suitable representative plaintiff and because he has not prepared an adequate litigation plan.

10 As mentioned, CN brings a cross-motion pursuant to Rule 21 of the *Rules of Civil Procedure* to have Mr. McCracken's action stayed or dismissed, and this cross-motion forms part of its defence to the certification motion. On its Rule 21 motion, CN submits that the Superior Court does not have or ought not to exercise subject matter jurisdiction to hear Mr. McCracken's claims. It also submits that Mr. McCracken has not pleaded a reasonable cause of action under any of: (a) the *Code* or its *Regulations*; (b) contract; (c) duty of good faith; (d) unjust enrichment; (e) negligence; and (f) punitive damages. CN also submits that certain claims of the Class Members are statute-barred. More particularly, CN's line of argument is as follows:

- CN submits that under Rule 21.01(3)(a), it may move to have Mr. McCracken's action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action. It submits that the test under Rule 21.01(3)(a) is not the "plain and obvious test" of Rules 21.01(1)(a) or 21.01 (1)(b), and the issue under Rule

21.01(3)(a) is simply whether or not the Superior Court has jurisdiction over the subject matter of the claims advanced by Mr. McCracken.

• CN submits that the subject matter of Mr. McCracken's claims is an entitlement to overtime pay and holiday pay under the *Code* arising from CN's alleged misclassification of the first line supervisors and breaches of the *Code* regarding record-keeping and anti-reprisal. CN submits that Mr. McCracken's claims are purely statutory and are not common law or equitable claims.

• Then, CN submits that since Mr. McCracken's claims under the *Code* do not exist at common law or equity, the next issue, which is a matter of statutory interpretation, is whether Parliament intended to create a common law cause of action for enforcement of these rights from the *Code*.

• On the statutory interpretative issue, CN submits that an analysis of the *Code* reveals that the *Code* is a comprehensive scheme and that Parliament did not intend to confer any jurisdiction on the courts to enforce the rights created by the *Code*, and, therefore, Mr. McCracken and the Class Members must seek any remedy exclusively under the administrative process of the *Code* and not in the Superior Court.

• Further, CN submits that Mr. McCracken cannot avoid the conclusion that the jurisdiction to decide the subject matter of his claims rests only with the officials and tribunals of the *Canada Labour Code* by characterizing his claim as a breach of contract, a tort, breach of duty of good faith, or a restitutionary claim that ordinarily are within the jurisdiction of the Superior Court.

• Shifting the analysis to Rules 21.01(1)(a) and 21.01(1)(b), CN then argues that if the Superior Court does have jurisdiction, then it is plain and obvious that Mr. McCracken does not have any reasonable cause of action.

• It is CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), it is plain and obvious that the breach of contract cause of action is not viable because it depends upon express or implied contractual terms that are inconsistent with the express terms of the first line supervisors' contracts of employment, and, in any event, some of the alleged breaches by CN are not breaches under the *Canada Labour Code* and its Regulations. I foreshadow the discussion to note that for its Rule 21 motion, this argument must accept that CN has breached the *Canada Labour Code*, but CN, nevertheless, submits that there would not be a breach of any contract term.

• It is CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), it is plain and obvious that the cause of action based on a breach of an alleged duty of good faith is not a reasonable cause of action, and since this claim is based on conduct in 2002, the claim is statute-barred.

• (Although its position changed during argument,) it was CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), the cause of action based on unjust enrichment is not a reasonable cause of action.

• It is CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), it is plain and obvious that the cause of action based on the tort of negligence is not a reasonable cause of action and if it is legally viable, the action is statute-barred.

• Finally, CN submits that with all other causes of action being struck, the claim for punitive damages cannot stand alone.

11 CN also argues that *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.), and *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 716 (Ont. S.C.J.), leave to appeal to the Div. Ct. granted, 2010 ONSC 2645 (Ont. Div. Ct.), which are cases about overtime claims under the *Code*, are distinguishable or wrong to the extent that they support the holding that Mr. McCracken has viable claims in contract, tort, unjust enrichment, or breach of a duty of good faith and to the extent that they suggest that any of the criterion for certification have been satisfied.

12 Mr. McCracken's response to the Rule 21 motion is to make numerous arguments. His main arguments are:

• He argues that the *Code* can be enforced by a civil cause of action before the Superior Court.

• He argues that CN's jurisdictional arguments are premised on a mischaracterization of his claim and that the correct characterization is that the claims are in contract, unjust enrichment, breach of a duty of good faith, or negligence, all of which are within the Superior Court's ordinary jurisdiction.

• He argues that CN's Rule 21 motion does not present a question of law amenable to determination on a Rule 21 motion.

• He argues that CN is using Rule 21 in a procedurally unsuitable manner, to advance defences without having to plead and without being subjected to discovery.

• He argues that *Fresco v. Canadian Imperial Bank of Commerce*, *supra*, and *Fulawka v. The Bank of Nova Scotia*, *supra*, are correct on the inherent amenability of misclassification cases for certification as class proceedings but that *Fulawka* is correct on the cause of action point but wrong on the matter of the jurisdiction of the Superior Court to enforce the *Code* directly.

13 On the two motions, there were five days of hearings, eight factums totaling over 700 pages, nine gowned lawyers (and others in the courtroom), twenty-five proposed common issues for certification, twenty-six volumes of motion records or compendiums, forty-three affiants, who provided the factual background, and over 400 cases and statutes referred to in the factums and bound in the case books to provide the legal background.

14 The discussion of the issues will lead to the following main conclusions or orders:

• The Superior Court has subject matter jurisdiction to decide Mr. McCracken's claims for overtime and holiday wages.

- The provisions of the *Code* about overtime and holiday wages are terms of the contracts of employment of the first line supervisors by force of statute.

- Mr. McCracken's proposed causes of action for negligence and breach of a duty of good faith should be struck from his statement of claim. The pleadings of the material facts in support of these causes of action should be struck from the pleadings except to the extent that these material facts are pleaded in support of the remaining causes of action.

- Mr. McCracken's claim for failure to pay holiday pay should be dismissed.

- With qualifications or conditions, Mr. McCracken has satisfied all five criteria for certification of his action as a class proceeding.

- One of the qualifications or conditions is that Mr. McCracken's claims for breach of an express or implied contract term should be stayed, but the claims for unjust enrichment and for breach of a contract term implied by force of statute may proceed.

- A consequence of the certification and Rule 21 motions is that several common issues will have been determined.

- The main common issue and the focus of the common issues trial will be the question: "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?"

15 My ultimate conclusions are that I grant CN's motion, in part, and I grant Mr. McCracken's motion for certification with qualifications and conditions.

16 It should be noted that consequences of the terms of the court's orders on the two motions will be that several common issues will be decided in favour of the plaintiff, two causes of action will be stayed, and one claim will be dismissed - all before the common issues trial. These consequences also influenced the common issues that were certified to be tried at the common issues trial. My Reasons for Decision will need to discuss the court's jurisdiction to decide a common issue, dismiss a claim, stay a claim, and sculpture the common issues before the common issues trial.

17 The above introduction reveals that there are many issues to discuss in these Reasons for Decision. What the introduction does not reveal is that there are also latent issues about the operation of the *Class Proceedings Act, 1992* that require discussion such as the issue of how the "some basis in fact" standard operates and the issue of how the aggregate assessment provisions of the Act operate. It will prove necessary for me to address some important general issues about the Act in these Reasons for Decision.

18 To discuss the issues, I have organized my Reasons for Decision under the following titles in the following order:

- Introduction and Overview

- Evidence on the Certification Motions
- Factual, Contractual, and Legal Background
    - Introduction
    - Michael Ian McCracken
    - Canadian National Railway Company and First Line Supervisors
    - The *Canada Labour Code*
    - Classification as a Manager under the *Canada Labour Code*
    - The Employment Contract and Mr. McCracken's Claims
- Rule 21 and s. 5 (1) (a) of the *Class Proceedings Act*
- The Court's Jurisdiction under Rule 21 to Determine its Jurisdiction
- Whether the Court has Subject Matter Jurisdiction
    - General Principles
    - The Concurrent Jurisdiction to Enforce Wage Claims
        - Introduction
        - First Stage of the Analysis
        - Second Stage of the Analysis
        - Third Stage of the Analysis
        - Conclusion of the Analysis and the Effect of the Conclusion
    - Deferring to the Administrative Process under the *Canada Labour Code*
- The Claim in Contract
    - Introduction
    - Breach of an Express Contractual Term
    - Breach of an Implied Contractual Term
    - Breach of a Statutory Implied Term
- The Motion for Judgment and Deciding or Staying Common Issues
- The Claim for Breach of a Duty of Good Faith

- The Unjust Enrichment Claim
- The Negligence Claim
- Rule 21 and CN's Limitation Period Argument
- The Criteria for Certification
- The "Some Basis in Fact" Test and Certification
- Disclosure of Cause of Action
- Identifiable Class
- Common Issues
    - General Principles
    - Evolution of the Common Issues
    - Analysis of the Common Issues
- Process of Elimination and Commentary
- The Approved Common Issues, and Commentary
    - *Fresco* and *Fulawka* and Commonality
    - *Fresco* and *Fulawka* and the Commonality of Misclassification Cases
- Aggregate Assessment of Damages
- Preferable Procedure
    - Introduction
    - Evidentiary Background to the Preferable Procedure Dispute
    - Analysis
- Representative Plaintiff
    - Introduction
    - Evidentiary Background to the Dispute about the Representative Plaintiff
    - Analysis
    - The Litigation Plan
- Conclusion

• Schedule A - Excerpts from the *Canada Labour Code*

Evidence on the Certification Motion

19 Mr. McCracken supported his motion for certification with:

• affidavits from 11 current or former first line supervisors, including Mr. McCracken, who was cross-examined;

• an affidavit from Enzo Fabrizi, a CN employee who was unsuccessful in an application for overtime and statutory holiday pay pursuant to the administrative process of the *Canada Labour Code*;

• affidavits from two union representatives; namely: Rex Beatty and John Dinnery; and

• affidavits from three expert witnesses; namely: (1) Judith Ann Fudge, who is a Professor of Law and the Lansdowne Chair in Law at the Faculty of Law at the University of Victoria and an employment and labour law scholar; (2) Richard Drogin, who is Emeritus Professor of the Department of Statistics from the University of California, Berkeley, and (3) Cristina G. Banks, who is President and Founder of Lamorinda Consulting LLC and a senior lecturer at the Haas School of Business at the University of California, Berkeley, who is a consultant in strategic human resource management, all of whom were cross-examined.

20 CN supported its opposition to the motion for certification with:

• affidavits from 19 current or former first line supervisors;

• an affidavit from Barry Hogan, a CN labour relations manager;

• an affidavit from Louis Lagacé, CN's Director of Compensation, who was cross-examined;

• an affidavit from Jim Vena, CN's Senior Vice-President Operations, Southern Region, who had been a first line supervisor before promotions to executive positions in several regions and who was cross-examined;

• affidavits from four expert witnesses; namely: (1) Richard Chaykowski, who is a professor at the School of Policy Studies with a cross-appointment to the Faculty of Law, both at Queen's University, with a doctorate in the field of industrial and labour relations; (2) Lorne Sossin, who is a Professor of law (and recently appointed Dean of Osgoode Hall Law School) and an administrative law scholar; (3) Elizabeth Becker, who is Managing Director at Huron Consulting Group, which provides forensic statistical services, and who holds a Ph.D. in applied economics from Clemson University; and (4) Colm O'Muircheartaigh, who is a Professor at the Harris School of Public Policy and Senior Fellow at the National Opinion Centre, both at the University of Chicago, and who is a statistician and consultant on survey research.

Factual, Contractual, and Legal Background

Introduction

21 With several exceptions, the factual, contractual, and some legal background to the two motions and about the *Code* are set out in the next parts of my Reasons for Decision. The exceptions concern several issues, such as the criteria for certification, the possibility of an aggregate assessment, the question of whether the procedure under *Code* is the preferable procedure to a class action, and Mr. McCracken's qualifications as a representative plaintiff. I will set out the legal and factual background to these particular issues later in these Reasons for Decision.

22 The factual background is taken from Mr. McCracken's Amended Fresh as Amended Statement of Claim, which is the fifth version of his pleading, documents incorporated by reference into the statement of claim, and from affidavit and transcript evidence found in the voluminous record for the certification motion.

Michael Ian McCracken

23 Mr. McCracken began work at CN in April 1998 as a unionized employee. In October 2005, he became a "Manager of Corridor Operations," which is a first line supervisor position that CN alleges has attendant management responsibilities and authority.

24 In January 2008, Mr. McCracken was promoted to the position of Senior Manager, Corridor Operations, also known as Senior Operations Officer, which CN states is a higher ranking managerial position in the hierarchy at CN than a first line supervisor.

25 CN submits that Mr. McCracken knew from the outset of his promotion from unionized ranks to a first line supervisor position that he would be required to long work hours and that he would not be paid overtime by the hour under the *Code*.

26 Some time in 2007 to early 2008, Mr. McCracken came to the view that first line supervisors should have been paid overtime pay and holiday pay under the *Code*, and he retained the lawyers who were representing the proposed representative plaintiffs in *Fresco v. Canadian Imperial Bank of Commerce*, *supra*, and *Fulawka v. The Bank of Nova Scotia*, *supra* , the two Ontario class actions involving claims for overtime pay associated with the *Code* that are currently before appellate courts. I will have more to say about these cases later.

27 On March 18, 2008, Mr. McCracken commenced his proposed class action against CN.

28 Mr. McCracken's superiors at CN apparently were offended, affronted, and felt betrayed that the proposed class action was commenced without Mr. McCracken having first discussed his concerns or grievances with them.

29 On March 26, 2008, the day after CN was served with the statement of claim, McCracken was demoted to a unionized employee position. He deposed that Mike Cory, CN's Vice-President of Operations for the Eastern Region, told him he was demoted to dispatcher

because he had commenced the proposed class action.

30 Mr. McCracken pleads that his demotion was intimidation and a retaliatory response to the proposed class action. He alleges that CN's conduct was in breach of the anti-retaliation provisions of s. 256 of the *Code* and was a breach of CN's Anti-Harassment Policy both or which he alleges are incorporated into the Class Members' employment contracts. He submits CN's conduct warrants an award of punitive damages. CN denies retaliation and submits that it had good reason to demote Mr. McCracken and to remove him from the management side of its business.

31 Two years later, on March 21, 2010, Mr. McCracken resigned from his employment at CN. He did not leave quietly. CN alleges that before his resignation, Mr. McCracken sent e-mails to Class Members that insulted and libeled CN and several fellow Class Members.

32 The record indicates that there is no love lost between Mr. McCracken and CN. I will have more to say about this circumstance when I discuss the representative plaintiff criterion for certification.

Canadian National Railway Company and First Line Supervisors

33 CN is a federally-regulated company headquartered in Montreal that operates the largest rail network in Canada. It has routes in 8 provinces and 16 states in the U.S.A. It has approximately 15,000 employees in Canada, of which approximately 3,000 are non-unionized. The proposed class constitutes about half of the non-unionized positions at CN.

34 CN has three regions (Western, Eastern, and Southern) with three main functions: (1) train operations; (2) sales and marketing; and (3) support services (human resources, finance, information technology, public affairs, etc.).

35 Train operations in each region have three main departments: (1) mechanical (maintaining the trains); (2) engineering (maintaining the railroad); and (3) transportation (movement of locomotives, cars, and crews).

36 CN operates a "precision," *i.e.* centrally controlled railroad in a continuous and uniform manner over a massive geographic area. It has an intricate and integrated "Service Plan" that is designed by the Service Design Group and sent to the General Managers and Superintendents for their review and input before implementation. Whether the dictates of the Service Plan preclude first line supervisors from being managers is a contested issue between the parties.

37 In CN's employment hierarchy, first line supervisors are immediately above the unionized workforce.

38 More than 90% of first line supervisors are employed in the Operations Division, supervising employees who work in Transportation (*i.e.* movement of trains) Engineering (*i.e.* repair and maintenance of track and signals) and Mechanical (*i.e.* repair and maintenance of train cars and engines).

39 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).

40 CN stated that it does not maintain detailed job descriptions for first line supervisors, but there are 70 different positions based on payroll codes.

41 Mr. McCracken presented evidence from first line supervisors with the job classifications of: (1) assistant track supervisor: (2) chief train dispatcher (also known as Manager of Corridor Operations or MCO); (3) Coordinator Operations; (4) Supervisor Crew Management (5) Supervisor Mechanical; and (6) Trainmaster.

42 On the certification motion, CN made much of the fact that the court only had evidence from affiants that had experience in 14 of the 70 jobs and that there was no evidence from employees from the other 56 job descriptions. CN submits that there is no basis in fact for including employees from these job descriptions as Class Members.

43 Mr. McCracken points out that from CN's list of pay code classifications, the vast majority of currently employed Class Members (nearly 80%) would fall within 10 job titles; namely (1) Assistant Track Supervisor-160; (2) Trainmaster-151; (3) Track Supervisor-70; (4) Shop Supervisor-87; (5) Mechanical Supervisor-61; (6) Signals and Communications Supervisor-46; (7) Chief Train Dispatcher-30; (8) Crew Management Supervisor-26; (9) Program Supervisor-25; and (10) Bridges and Structures Supervisor-14.

44 CN led evidence to show that members of the proposed class 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.

45 The salary range of first line supervisors is between $56,000.00 and $105,000.00. They are eligible for bonuses equivalent to 15% to 30% of their base pay. They are entitled to benefits, including a defined benefit pension plan and a share purchase plan.

46 With a few exceptions, from at least 1998, CN has not paid hourly overtime to first line supervisors, and it takes the position that it is not required to pay overtime to them under the *Code*.

47 CN does not keep records of the hours worked by first line supervisors. There was evidence that many FLSs do not work on pre-established work schedules or specific shifts but rather set their own hours of work.

48 The evidence on the motion for certification establishes that there is some basis in fact

for Mr. McCracken's allegations that: (a) first line supervisors on average work over 50 hours per week and sometimes as many as 90 hours per week; (b) they regularly work 12-hour shifts on consecutive days; (c) they are given pagers so that they are available at all times, including while off duty; and (d) they are frequently called for unscheduled work and to substitute for unionized and non-unionized employees.

The Canada Labour Code

49 It is not disputed that because CN is federally regulated, it is subject to the *Canada Labour Code*. Mr. McCracken submits that the provisions of the *Code* inform the duties that CN owes to the plaintiff and the Class Members, be they contractual duties, a duty of good faith, or a tort duty of care independent of contract.

50 Mr. McCracken relies on the provisions of the *Code* that require that contracts of employment not fall below minimum standards, including the requirement to pay overtime pay and holiday pay. He submits that to the extent that the contract of employment between the parties includes a term denying overtime pay to the Class, such term is inconsistent with the *Code* and is therefore illegal and void.

51 Mr. McCracken submits that the following provisions from the *Code* are incorporated and implied into the employment contracts of each Class Member: (a) they will be paid for all hours worked, including overtime at the rate of 1 1/2 times their regular hourly rate for all hours worked in excess of 8 hours in a day or 40 hours in a week; (b) they will be compensated for all hours worked on holidays; (c) CN will maintain accurate records of all hours worked; and (d) CN will act in good faith in classifying employees, and will re-classify employees only where there is a change in duties and responsibilities.

52 With respect to Mr. McCracken's claim and to the issue of whether the Superior Court has subject matter jurisdiction, the most pertinent sections of the *Code* are set out in Schedule A to these Reasons for Decision. In addition to those provisions, for the purposes of the motions before the court, several other features of the *Code* are pertinent to the parties' arguments. In this regard, it should be noted that:

- Part I of the *Code* contains the provisions dealing with labour relations and provides for the constitution of both the Canada Industrial Relations Board ("CIRB") and labour arbitrators, who are charged with interpreting and applying collective agreements). Under Part I of the *Code*, the Minister of Labour possesses jurisdiction (with the consent of the CIRB) to institute penal proceedings for breaches of certain of the obligations contained in Part I of the *Code*. Part I of the *Code* contains a privative clause that shields the decisions of the CIRB and labour arbitrators from judicial review.

- Part II of the *Code* contains provisions dealing with health and safety matters in federally-regulated undertakings. Part II of the *Code* creates administrative tribunals and protects their decisions with a privative clause. Under Part II, the Minister of Labour may institute proceedings for breaches of Part II of the *Code*.

- Part III of the *Code*, in a series of Divisions, prescribes minimum employment stand-

ards about overtime pay and regulates many other matters including: (I) hours of work; (II) minimum wages; (III) equal wages; (IV) annual vacations; (V) general holidays, (VI) multi-employer employments; (VII) reassignment, maternity leave, parental leave and compassionate care leave; (VIII) bereavement leave: (IX) group termination of employment; (X) individual terminations of employment; (XI) severance pay; (XII) garnishment; (XIII) sick leave; (XIII.1) work-related illness and injury; (XIV) unjust dismissal; (XV) payment of wages; (XV.1) sexual harassment; (XV.2) leave of absence for members of the reserve.

• Part III constitutes various administrative tribunals and protects their decisions from judicial review with a privative clause. Under Part III, the Minister may institute prosecutions for breaches of the requirements of Part III of the *Code*.

• Under Parts I and III of the *Code*, orders of the various tribunals may be filed with the Federal Court for enforcement purposes, and, once filed, have the same force and effect as an order of that Court.

• The *Code* and *Regulations* require employers to keep records for employees who are overtime-entitled. Employers are required to keep records of hours worked each day for three years: *Canada Labour Code*, s. 252(2) and (3) and *Regulations*, C.R.C. 1978, c. 986, s. 24(2)(d).

53 Unlike several provincial employment standards acts, including the version of the Ontario *Employment Standards Act* in force from 1974 to 2000 (*Employment Standards Act*, S.O. 1974, c. 112, s. 2(2); *Employment Standards Act*, R.S.O. 1980, c. 137, s. 2(2); *Employment Standards Act*, R.S.O. 1990, c. E-14, s. 2(2)), the *Code* contains no section stating that its requirements are implied into employees' contracts of employment. The *Code* also contains no section stating that any contractual provision that derogates from the statute is void.

Classification as a Manager under the Canada Labour Code

54 In this section of the Reasons for Decision, I will discuss the law associated with the status of being a manager under the *Canada Labour Code*, the evidence submitted by the parties on this issue, and the parties' competing positions in this regard. It will be well to recall this discussion when I come to discuss the common issues for certification and the commonality criterion.

55 As mentioned above, Mr. McCracken, in his statement of claim, pleads that all first line supervisors are subject to uniform and consistent CN policies and practices concerning their duties and entitlements. He pleads that the first line supervisors are not managers, superintendents, or employees exercising management functions within the meaning of s. 167 (2) of the *Code*. He submits that the status of first line supervisors is a common issue.

56 In paragraphs 14 and 15 of his statement of claim, Mr. McCracken pleads:

14. As a result of the Defendant's uniform and consistent corporate policies and prac-

> tices, the Plaintiff and other members of the class have been deliberately, improperly and illegally misclassified by the Defendant as exempt from entitlement to compensation for hours worked in excess of 40 hours per week or 8 hours per day when, in fact, they do not fall under any exemption from overtime pay under the *Code* or otherwise at law.
>
> 15. The Plaintiff and members of the class have been regularly scheduled, as a matter of uniform company policy, to work, and, in fact have worked in excess of 40 hours per week or 8 hours per day without receiving overtime pay, in breach of their contracts of employment, contrary to law and in violation of the *Code*.

57 CN's position is that although all its first line supervisors are managers, as a matter of adjudication, this cannot be proved globally in a class action. CN's argument is that the status of each first line supervisor must be assessed individually, supervisor by supervisor. It submits that there is considerable diversity in the roles and degree of managerial authority of the first line supervisors such that a global determination of the status of Class Members is not possible.

58 Underlying the position of both parties is the question of what is the legal nature of a manager or a person who exercises a management function.

59 The case law about who is a manager or who exercises a management function provides that this question is a question of fact for each case and in the context of the overall organization in which the person is employed: *Island Telephone Co. v. Canada (Minister of Labour)*, [1991] F.C.J. No. 978 (Fed. T.D.); *Leontsini v. Business Express Inc.*, [1997] F.C.J. No. 26 (Fed. T.D.); *McKinley Transport Ltd. v. Sirianni*, [1998] C.L.A.D. No. 759 (Can. Arb. Bd.) (R.H. McLaren, Arbitrator); *Hrooshkin v. ECL Group of Cos.*, [2002] C.L.A.D. No. 419 (Can. Arb. Bd.) (W.F.J. Hood, Referee).

60 Being a manager relates to the nature of the work actually performed: *Lee-Shanok v. Banca Nazionale del Lavoro of Canada Ltd.*, [1987] F.C.J. No. 548 (Fed. C.A.); *Leontsini v. Business Express Inc.*, [1997] F.C.J. No. 26 (Fed. T.D.).

61 An employee's title or job description is not determinative of whether the employee is a manager, and his or her status is determined by what the employee does or has been charged to do in the business enterprise: *Canadian Imperial Bank of Commerce v. Bateman*, [1991] F.C.J. No. 414 (Fed. T.D.); *Banque Canadienne Impériale de Commerce c. Torre*, [2010] F.C.J. No. 85 (F.C.).

62 An essential element of being a manager is that the person performs an administrative and leadership role and not just an operational role in the organization: *Canadian Imperial Bank of Commerce v. Bateman, supra*; *Lee-Shanok v. Banca Nazionale del Lavoro of Canada Ltd., supra*; *Canada (Procureur général) c. Gauthier*, [1980] 2 F.C. 393 (Fed. C.A.); *Avalon Aviation Ltd. v. Desgagne* (1981), 42 N.R. 337 (Fed. C.A.); *Banque Canadienne Impériale de Commerce c. Torre, supra.*

63 The case law reveals that certain activities or functions are regarded as management

functions, such as representing the employer in collective bargaining or in discipline or grievance procedure, setting a budget, determining the organization's structure, determining the organization's policies; controlling day-to-day operations; determining staffing levels, supervising and reviewing the performance of subordinates, hiring and firing employees, and dealing with emergencies, but the mere presence of these activities is not enough and they must be accompanied by a significant level of autonomy and real decision-making authority and discretion: *Island Telephone Co. v. Canada (Minister of Labour)*, [1991] F.C.J. No. 978 (Fed. T.D.); *Banque Canadienne Impériale de Commerce c. Torre*, *supra*; *Msuya v. Sundance Balloons International Ltd.*, [2006] F.C.J. No. 398 (F.C.); *Isaac v. Listuguj Mi'gmaq First Nation*, [2004] C.L.A.D. No. 287 (Can. Adjud. app. under Can. Lab. Code) (A.E. Bertrand, Adjudicator); *Lonestar C.C. Inc. v. Flett-Jodoin*, [2004] C.L.A.D. No. 486 (Can. Arb. Bd.) (C.R.B. Dunlop, Referee); *RTL - Robinson Enterprises Ltd. v. Baird*, [2007] C.L.A.D. No. 73 (Can. Arb. Bd.) (C.R.B. Dunlop, Referee); *Canadian Transit Co. v. Nanni*, [2009] C.L.A.D. No. 108 (Can. Arb. Bd.) (N. Dissanayake, Referee).

64 The degree of autonomy and decision-making authority needs to be significant, but it need not be absolute or unfettered, and a manager may have to report to and be supervised by more senior managers and officials in the organization: *Canadian Imperial Bank of Commerce v. Bateman*, *supra*; *Leontsini v. Business Express Inc.*, *supra*; *Lonestar C.C. Inc. v. Flett-Jodoin*, *supra*; *RTL - Robinson Enterprises Ltd. v. Baird*, *supra*.

65 In some cases, s. 167 (2) of the *Code* has been interpreted restrictively to include as managers only those in the most senior positions who act as administrators, having power of independent action, autonomy and discretion: *Island Telephone Co. v. Canada (Minister of Labour)*, [1991] F.C.J. No. 978 (Fed. T.D.); *Canada (Procureur général) c. Gauthier*, *supra*, and *Avalon Aviation Ltd. v. Desgagne*, *supra*.

66 However, many cases have not been so restrictive. Where an employee has significant decision-making authority and responsibilities, he or she may be a manager without being at the more senior level of the organization: *Canadian Imperial Bank of Commerce v. Bateman*, *supra*; *Island Telephone Co. v. Canada (Minister of Labour)*, *supra*; *Andrzewski v. Greyhound Canada Transportation Corp.*, [1998] C.L.A.D. No. 485 (Can. Arb. Bd.) (M.R. Newman, Referee); *McKinley Transport Ltd. v. Sirianni*, *supra*; *Hrooshkin v. ECL Group of Cos.*, *supra*; *Shoreline Bus Lines Ltd. v. Klingler*, [2008] C.L.A.D. No. 77 (Can. Arb. Bd.) (M.V. Watters, Referee).

67 In some cases, evidence that other employees or the public regarded the employee as exercising management duties and responsibilities was a factor in deciding whether a person is a manager. See: *Lynx Warehousing & Transportation Ltd. v. Hurtubise*, [2001] C.L.A.D. No. 403 (Can. Arb. Bd.) (H.R. Jamieson, Referee); *Hrooshkin v. ECL Group of Cos.*, *supra*.

68 CN offered evidence that first line supervisors are expected to play a pivotal role in managing CN's workforce because they are the primary point of contact between management and the unionized employees. It was CN's evidence that many FLSs undergo extensive training to acquire the management skills required for their jobs. It was CN's evidence that the training received by FLSs was designed to empower and equip them to exercise independent

judgment in matters of supervision and discipline. It was CN's evidence that some first line supervisors have the authority to approve overtime and leaves of absence for unionized employees, to co-ordinate crews, to schedule shifts, to approve changes to the vacation schedule, to complete job performance appraisals of the employees being supervised, to administer collective agreements, and to oversee compliance with applicable safety legislations. It was CN's evidence that FLSs are expected to actively manage operations essential to CN's core business and make a multitude of key operational decisions using independent judgment and discretion.

69 However, to show diversity and an absence of commonality, CN also lead evidence to show that how First Line Supervisors carry out their role depended upon their experience and aptitudes, the character of the senior manager(s) to whom they report, the nature of the workforce they manage and the particular position held by the FLS. In para. 79 of its factum, CN submitted:

> Some FLSs manage a large number of employees, while others exercise control over significant budgets in the millions of dollars. Some FLS positions include participation in the union grievance process, while others do not. Most FLSs play a role in disciplining and evaluating subordinates, but the level of responsibility delegated for these matters varies widely from job to job and person to person. Some FLSs represent the company with third parties, while others do not. Still others make decisions and exercise control over CN's day-to-day operations while others do not. The Record demonstrates the level and type of responsibility delegated to FLSs may vary, depending on the location where they work. For example, FLSs working at different locations have different numbers of employees reporting to them and at smaller yards where there are fewer senior managers on site, more authority is typically delegated to the FLSs.

70 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.

71 Thus to summarize, while CN maintains that all FLSs are managers under the *Code*, it submits that the adjudicative determination of whether FLSs are managers as defined under the *Code* cannot be determined on a class-wide basis. This submission, which is directed at the common issues and preferable procedure criteria for certification, is a hotly contested point on the certification motion because Mr. McCracken submits that he can prove on a global basis that all first line supervisors are not managers.

The Employment Contract and Mr. McCracken's Claims

72 CN's overtime policy for its employees is set out, in part, in a document entitled "*Compensation Management Time Management Policy*" (the "*Policy*"). The *Policy* expressly states that it is for "non-unionized professional and administrative support employees working in

Canada". The *Policy* expressly excludes from its scope "managers, supervisors or anyone who exercises management functions".

73 CN has applied this *Policy* to exclude all its first line supervisors from being paid overtime compensation.

74 Although nothing seems to turn on it, it may be noted that the *Code* speaks of managers, superintendents and employees who exercise management functions, but CN's overtime policy speaks of supervisors and does not mention superintendents.

75 Although the *Policy* states that it does not apply to "managers, supervisors or anyone who exercises management functions", it does mention some rights of supervisors to wages. The *Policy* states that first line supervisors may be paid a discretionary lump sum for overtime work in extraordinary circumstances.

76 CN's *Policy* also mentions the rights of first line supervisors with respect to holiday compensation. The *Policy* states:

> First Line Supervisors required to work on a General Holiday will receive, in addition to their regular wages, time off at the regular rate. Likewise, if the General Holiday falls on a rest day, time off will be provided at the regular rate. Time off will be scheduled at a period that is convenient to both the employee and the supervisor. For First Line Supervisors working on a 4/3 schedule throughout the year, these terms will be applied for the 9 General Holidays set out under the *Canada Labour Code*.

77 CN's "*Company Holiday Non-Unionized Employees - Canada Policy*" also mentions first line supervisors. It provides:

> **1 Objective**
>
> CN will grant paid holiday time to all non-unionized employees on Company recognized holidays.
>
> **2. Scope**
>
> This policy applies to all non-unionized employees in Canada
>
> . . . . .
>
> **4. Eligibility and Payment**
>
> CN will grant, in full compliance with the *Canada Labour Code*, paid holiday time to all non-unionized permanent employees [...]
>
> For First Line Supervisors working on a 4/3 schedule throughout the year, the Company recognizes the 9 general holidays set out in the *Canada Labour Code*.

78 Mr. McCracken pleads and submits that when the contractual sources for the first line supervisors' contract of employment are viewed as a whole, the contract includes a term by

which CN has agreed to abide by the *Code* with respect to overtime and holiday pay and several other matters.

79 Mr. McCracken pleads that the terms of the *Code* are implied terms of the contracts of employment of first line supervisors. In his statement of claim, he pleads that class members have an entitlement to overtime and to holiday compensation under the *Code*. He pleads that CN is required to comply with the minimum conditions set out in the *Code* in respect of such matters as wages, hours of employment, severance entitlement and holiday compensation. He states that Division I of Part III of the *Code* applies to all federally regulated employees except those excluded under s. 167 (2) of the *Code*. He pleads that class members are not among the excluded employees. In paragraph 27 of his statement of claim, he pleads:

> 27. The implied *Code* Terms are implied terms in the contracts of employment of the Class. As a result, the Defendant is contractually bound to not exclude FLSs (who are not managers, superintendents or persons who exercise management functions) from entitlement to and pay for overtime of 1.5 times their normal wages for all hours worked in excess of eight hours per day or 40 hours per week.

80 In a recently delivered amendment to his statement of claim, Mr. McCracken alleges that CN expressly contracted to abide by the minimum standards of the *Code*. In paragraph 32a of his statement of claim, he pleads:

> 32a. Moreover, it is an express term in the contracts of employment of the Class that the Defendant will abide by the minimum standards of the *Code* concerning, inter alia overtime, holiday compensation, record-keeping and classification of employees as managers, superintendents or persons exercising management functions.

81 Mr. McCracken also pleads that the various obligations to pay overtime and holiday compensation form part of the contracts independently of the requirements of the *Code*. In paragraph 53 of his statement of claim, he pleads:

> 53. The Defendant has breached the express, Implied *Code* Terms and/or otherwise implied terms of its contracts of employment with the Class Members that it pay all hours worked, including its obligation to pay overtime at a rate of one and one-half times the Class Members' regular hourly rates for all hours worked in excess of 8 hours in a day or 40 hours in a week, that it properly compensate the Class Members for all hours worked on holidays, and that it keep accurate records of all hours worked. The Plaintiff pleads that these terms form part of the employment contracts independently of the requirements of the *Code*. These terms arise by virtue of the nature of the relationship or contact, the usage or custom in the industry, the intention or presumed intention of the parties, the provisions of the Defendant's Overtime and Holiday Policies and applicable prior versions thereof (save for and except any provisions of those Polices that are contrary to the *Code* and in particular section 168, or otherwise illegal, unenforceable or void) and other policies, practices, representations, training materials of class-wide application including, but not limited to, the CN *Code* of Business Conduct and Labour Relations Workshops Participants Manuals.

82 Mr. McCracken pleads that CN has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members. He pleads that the Class Members have suffered a deprivation and that there is no juristic reason why CN should be permitted to retain the benefit of the unpaid hours of work.

83 Mr. McCracken pleads that CN owes him and the Class Members a duty of care to ensure that they are properly classified and compensated for the hours worked at the appropriate rates and that CN has breached that duty and is liable for the tort of negligence.

84 Mr. McCracken pleads that the Class Members are in a position of vulnerability and that CN owes them and has breached a duty of good faith including a duty to honour its statutory and contractual obligations to them and not act in a manner so as to eviscerate or defeat the objectives of the Class Members contracts of employment or the *Code*.

85 Mr. McCracken pleads that on or about July 5, 2002, CN began the illegal policy of uniformly classifying first line supervisors as managerial employees. He alleges that before that date they were treated as non-managerial employees who received wages for overtime and statutory holiday work.

86 He alleges that the reclassification that occurred in July 2002 was arbitrary and not based on any analysis or any proper analysis of the job functions of first line supervisors, which did not change as a part of the reclassification. In paragraph 35 of his statement of claim, he alleges: "In so doing, it failed to implement and follow proper systems, procedures and practices regarding the classification of the Class Members to determine whether it was in compliance with s. 167 (2) of the *Code* in respect of FLSs."

87 CN denies that first line supervisors were treated as non-managerial employees before 2002. It states that it always regarded them as managers who were excluded from the overtime provisions of the *Code*. However, CN did pay overtime wages to its first line supervisors for a time, but these payments stopped in 1998, not 2002, as alleged by Mr. McCracken.

88 CN refers to the First Line Operation Supervisors Changes to Overtime Provisions at p. 49 to make the point that until 2002, CN's overtime policy for the Operational FLSs provided that they were not paid overtime on an hourly basis but rather they were paid a stipend of either 5 or 10% of base salary, which is a compensation scheme for overtime pay that is different from the scheme provided under the *Code*.

89 Mr. McCracken alleges that CN is intentionally avoiding its obligations under the *Code*. He pleads in paragraph 41 of his statement of claim:

> 41. ... the Defendant has used the Policy, and its internal job level grading system, as a pretext to avoid paying Class Members overtime and holiday compensation that it is obligated to pay pursuant to the express and implied *Code* Terms of Class Members' contracts of employment, under the *Code*, and otherwise at law. The Plaintiff pleads that the Policy is an illegal attempt by the Defendant to contract out of statutorily mandated standards under the *Code*, and is void and of no effect.

90 Mr. McCracken alleges that CN knowingly or otherwise engaged in an illegal policy and practice of not maintaining the appropriate records of hours of work in violation of the *Code*. CN denies that it was obliged to keep these records for management employees including the first line supervisors.

91 With this legal and factual background, I can now turn to the two motions before the Court. I will first discuss CN's motion under Rule 21, the substance of which overlaps with the requirement in s. 5(1)(a) of the *Class Proceedings Act, 1992* that the plaintiff show a reasonable cause of action in order for his action to be certified as a class proceeding.

Rule 21 and s. 5 (1) (A) of the Class Proceedings Act

92 CN's Rule 21 motion is brought pursuant to rles 21.01(1)(a), 21.01(1)(b) and 21.01(3)(a), which state:

> 21.01 (1) A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
> >
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> > (a) the court has no jurisdiction over the subject matter of the action;...
>
> and the judge may make an order or grant judgment accordingly.

93 As I will repeat below, the test for a motion under rule 21.01 3(a) is different from the test for deciding an issue of law under rule 21.01(1)(a) or the test for determining whether a reasonable cause of action has been disclosed under rule 21.01(1)(b). Rules 21.01(1)(a) and 21.01(1)(b) use a "plain and obvious" test. That test, however, does not apply to a motion under rule 21.01 (3)(a), where the test is whether or not the court has jurisdiction over the subject matter of the action: *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19 (Ont. C.A.), leave to appeal granted, [2009] S.C.C.A. No. 77 (S.C.C.).

94 To make an order under either rule 21.01 (1)(a) or rule 21.01 (1)(b), the court must be satisfied that it is plain and obvious that the allegations pleaded are incapable of supporting a cause of action and that the claim cannot succeed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (Ont. C.A.); *MacDonald v. Ontario Hydro* (1994), 19 O.R. (3d) 529 (Ont. Gen.

Div.), aff'd (1995), 86 O.A.C. 37 (Ont. Div. Ct.); *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.).

95 Under rules 21.01 (1)(a) or 21.01 (1)(b), matters of law that are not fully settled should not be disposed of on a motion to strike an action as not showing a reasonable cause of action: *Falloncrest Financial Corp. v. Ontario*, *supra*; *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (Ont. C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 249, 229 D.L.R. (4th) vi (note) (S.C.C.); *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.).

96 The law must be allowed to evolve and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, [1982] S.C.C.A. No. 277, 35 O.R. (2d) 64n (S.C.C.); *MacKinnon v. Ontario (Municipal Employees Retirement Board)*, [2007] O.J. No. 4860 (Ont. C.A.). However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 20; *Silber v. DDJ High Yield Fund*, [2006] O.J. No. 2503 (Ont. S.C.J.); *Harris v. GlaxoSmithKline Inc.*, [2010] O.J. No. 1710 (Ont. S.C.J.).

97 In assessing the cause of action or the defence, the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof: *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.); *Falloncrest Financial Corp. v. Ontario*, *supra* ; *Folland v. Ontario*, *supra*; *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9; *Harris v. GlaxoSmithKline Inc.*, *supra*.

98 Rule 21.01 (1)(a) may be applied to strike a claim where the limitation period has expired and no additional facts could be pleaded to alter that conclusion: *Beardsley v. Ontario*, [2001] O.J. No. 4574 (Ont. C.A.) at para. 21.

99 Rule 21.01(2) restricts what evidence is admissible if the motion is brought under rules 21.01(1)(a) or 21.01(1)(b). However, the ordinary rules about evidence on motions applies to a motion pursuant to subrule 21.01(3)(a). Rule 21.01(2) states:

> 21.01 (2) No evidence is admissible on a motion,
>
> (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
>
> (b) under clause (1) (b).

100 Thus, no evidence is permitted on a motion under rules 21.01(1)(a) or 21.01(1)(b). The court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof: *Falloncrest Financial Corp. v. Ontario*, *supra*.

101 A motions judge, however, is entitled to consider any documents specifically referred to and relied on in the pleading: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d)

802 (Ont. C.A.); *Corktown Films Inc. v. Ontario* (1996), 34 B.L.R. (2d) 168 (Ont. Gen. Div.); *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.); *Harris v. GlaxoSmithKline Inc., supra.*

102 The law with respect to a Rule 21 motion is also applied to determine whether or not a proposed representative plaintiff has satisfied the first criterion for certification of an action as a class proceeding.

103 The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) is used to determine whether the proposed class proceedings discloses a cause of action: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.); *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (Ont. S.C.J.) at para. 25; thus, a claim will be satisfactory unless it has a radical defect or it is plain and obvious that it could not succeed.

104 In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and a pleading will be struck out only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed. See: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

The Court's Jurisdiction under Rule 21 to Determine Its Jurisdiction

105 Mr. McCracken makes what is, in effect, a preliminary objection to the court exercising it jurisdiction under Rule 21 in the circumstances of this case.

106 Mr. McCracken argues that for the purposes of the Rule 21 motion, it is a presumptive fact from the statement of claim that first line supervisors are not managers and that they do not exercise management functions. The non-managerial status, he submits, is a pleaded fact that must be taken as true for the purposes of the Rule 21 motion. He then submits that with this presumptive fact, there is not a question of law amenable to determination on a Rule 21 motion and, therefore, the Rule 21 motion should be dismissed.

107 I agree that whether the first line supervisors are non-managerial employees is not an issue that could or should be determined under Rule 21. However, that is not the issue that I will decide. The issue that I will decide is: "Given that for the purpose of the motion, the first line supervisors are not managers, does the Superior Court have subject matter jurisdiction to determine their grievance that they have not been paid overtime and holiday pay or is the subject matter jurisdiction exclusively that of the officials and administrative tribunals under the *Canada Labour Code*?" In my opinion, that is an issue of law amenable to the Court's jurisdic-

tion under rule 21.01(3)(a).

108 As the Court of Appeal noted in *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19 (Ont. C.A.), leave to appeal granted, [2009] S.C.C.A. No. 77 (S.C.C.) at paras. 3, 5, and 92, the term "jurisdiction" has many meanings. When there is a straightforward question about whether a court has jurisdiction over the subject matter of a dispute, the question is properly determined without reference to extrinsic evidence of facts not pleaded. In such cases, as noted in *Telezone Inc.*, as long as the "facts pleaded in the statement of claim raise a claim cognizable in the Superior Court, the Superior Court has jurisdiction to decide the claim" unless there is "legislation or... an arbitral agreement that clearly and unequivocally removes that jurisdiction". Unlike a rule 21.01(1) motion to strike a claim, there is no forgiving "plain and obvious" standard, whereby the moving party must establish beyond peradventure that the court lacks jurisdiction. Either the court has jurisdiction or it does not.

109 Mr. McCracken relies on *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141 (S.C.C.) at paras. 27-34 for the proposition that it is inappropriate to move under rule 21.01 (3) to resolve a question of jurisdiction that turns on contested facts and that the jurisdictional issue must be determined on a full evidentiary record. In *Goudie*, there was a contested factual question that was within the jurisdiction of the court and outside the jurisdiction of a labour arbitrator under a collective agreement. In *Goudie*, animal control officers alleged that they had pre-employment contracts that promised them that they would continue to receive certain employee benefits. That contested factual allegation was within the subject matter jurisdiction of the courts and had to be decided before that matter could be arbitrated.

110 The rule 21.01(3)(a) motion in the case at bar, however, does not turn on contested facts. For the purposes of this motion, I do not have to decide whether Mr. McCracken and the Class Members are managerial or non-managerial, which would be the contested matter to be determined on a full evidentiary record. All I need to decide the matter is Mr. McCracken's statement of claim and the assumed to be true fact that the first line supervisors are not managers. The authority of *Goudie* is irrelevant to the circumstances of the case at bar.

111 Mr. McCracken also argues that CN is using Rule 21 in a procedurally unsuitable manner, to advance defences without having to plead, let alone being subjected to discovery or cross-examination. I disagree with this argument. CN is not advancing the obvious defence, which would be one of mixed fact and law; that Mr. McCracken and all or most of the first line supervisors have been correctly treated as managerial employees, because for the purposes of this motion that defence is not open to them. Rather, they are advancing the argument that as a matter of jurisdiction, it is exclusively for the officials and the tribunals under Part III of the *Code* to decide this issue of mixed fact and law.

112 I, therefore, disagree with Mr. McCracken's preliminary objection to the rule 21.01(3)(a) motion. In my opinion, this Court has the jurisdiction to determine whether it has subject matter jurisdiction over Mr. McCracken's claims and causes of action.

Whether the Court Has Subject Matter Jurisdiction

General Principles

113 Pursuant to rule 21.01(3)(a), CN submits that Mr. McCracken's claims should all be dismissed because the Superior Court does not have subject matter jurisdiction to decide these claims. Then, assuming that the Court has jurisdiction, pursuant to rules 21.01(1)(a) and 21.01(1)(b), CN goes on to argue that Mr. McCracken has not shown a reasonable cause of action. I have outlined CN's arguments in the introduction to these Reasons for Decision. In this part of my Reasons for Decision, I will focus my attention on the arguments under rule 21.01(3)(a).

114 For the reasons that follow, it is my opinion that the Court does have subject matter jurisdiction and there is a cause of action by force of statute to enforce the overtime wage entitlements created by the *Code*. On this point, I disagree with and decline to follow *Fulawka v The Bank of Nova Scotia, supra*. Thus, for the reasons set out below, I dismiss CN's motion made pursuant to rule 21.01(3)(a).

115 I begin the discussion about subject matter jurisdiction with the point that at common law, there is no entitlement to overtime pay or holiday pay at a special rate. These are rights conferred by employment and labour law statutes. See: *Macaraeg v. E Care Contact Centers Ltd.* (2008), 295 D.L.R. (4th) 358 (B.C. C.A.), leave to appeal ref'd [2008] S.C.C.A. No. 293 (S.C.C.); *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234-242 (Ont. C.A.).

116 Since the rights to be paid a special rate of pay for overtime and for holiday work are statutory rights that did not exist at common law or equity, the question of subject matter jurisdiction is a question of determining what Parliament intended about the enforcement of those rights. In the case of the *Canada Labour Code*, Parliament has set out a scheme that provides for administrative agencies and tribunals to enforce claims for overtime and holiday pay, and the precise question is whether or not Parliament also intended to confer jurisdiction on the courts to enforce the rights provided by the *Code*.

117 It is important not to misstate this question, because the question is not whether Parliament intended to oust the court's existing jurisdiction over employment law or contracts generally. In the case at bar, there is no indication in the *Code* that Parliament intended to interfere with the court's existing employment law or contract law jurisdiction. Indeed, the statutory indications that I will discuss below are expressly to the contrary. But overtime and holiday wages are statutory rights that did not exist at common law and equity and the question is whether Parliament intended to add these statutory rights to the court's common law and equitable jurisdiction.

118 Speaking generally, jurisdiction may be expressly conferred on a court to enforce rights that are created by statute. An everyday example is the considerable jurisdiction expressly conferred on courts to divide matrimonial property and to order child and spousal support, some of which jurisdiction would not be available to the court but for it having been statutorily conferred on the court.

119 It is, therefore, not true to say that a Canadian superior court has a universal jurisdiction, and such an idea would be contrary to the rule of law. There are many areas of the law where the court's jurisdiction to deal with a matter has to be created. This point is important in

the case at bar because Mr. McCracken relies on the principles that: (a) Ontario's Superior Court is a superior court of general jurisdiction and has universal jurisdiction over all matters of substantive law; and (b) it requires clear and unequivocal language for Parliament or a legislature to oust the Superior Court's substantive law jurisdiction: *Michie Estate v. Toronto (City)* (1967), [1968] 1 O.R. 266 (Ont. H.C.) - 271; *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.) - 284; *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19 (Ont. C.A.), leave to appeal granted, [2009] S.C.C.A. No. 77 (S.C.C.); *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84 (Eng. K.B.), at pp. 87 -88. He relies on the principle that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.).

120 In the case at bar, in reaching my conclusion that the court has subject matter jurisdiction, I do not rely on these principles about the Superior Court's general jurisdiction. I do not dispute the principles, but they beg the question of what is the Superior Court's jurisdiction. The Superior Court's jurisdiction may be called universal, but that universe is not comprehensive of all the jurisdictional universes that exist. Sometimes, it takes a statute to create and confer jurisdiction where none existed before, and in those circumstances, if the jurisdiction is conferred exclusively on an administrative tribunal and if the legislation is constitutionally *infra vires*, then it is not correct to speak of the Superior Court's jurisdiction being ousted because it did not exist to be ousted. As will be seen, I come to my conclusion based only on interpreting the intent of Parliament as expressed in the *Canada Labour Code*.

121 It is necessary to emphasize that there is a difference between a court not having jurisdiction in the first place and having its jurisdiction ousted. Mr. McCracken argues that CN's jurisdictional arguments are premised on a mischaracterization of his claim and that the correct characterization is that the claims are in contract, unjust enrichment, or negligence all of which are within the Ontario Superior Court's jurisdiction. I agree, of course, that the Superior Court has jurisdiction over claims in contract, unjust enrichment, and tort, but I disagree with Mr. McCracken's suggestion that CN's argument about the court's subject matter jurisdiction is premised on a mischaracterization of Mr. McCracken's claims. The point of CN's argument is that however the claims may be characterized, they are not within the subject matter jurisdiction of the Superior Court.

122 In *TeleZone Inc. v. Canada (Attorney General)*, *supra*, at para. 3, the Court of Appeal stated that where jurisdiction to adjudicate a claim exists, it takes clear legislative language to remove jurisdiction. In the case at bar, however, the question is not whether Parliament intended to remove the court's employment law jurisdiction; rather, the question is one of determining whether Parliament's language conferred or recognized a superior court jurisdiction to adjudicate Mr. McCracken's claims that are based on the *Code*.

123 Still speaking generally, a legislature or Parliament may confer jurisdiction exclusively on an administrative tribunal; for example, a labour relations board or a landlord or tenant tribunal may be the recipient of an exclusive jurisdiction, which jurisdiction, however, might be subject to judicial or appellate review by a court. The conferral of jurisdiction on to an administrative tribunal, which must be constitutionally valid, may or may not oust the Su-

perior Court's jurisdiction. That would depend upon whether there was an existing jurisdiction to be ousted. But, if the administrative tribunal's jurisdiction is indeed exclusive, then the Court would not have subject matter jurisdiction but for its judicial review jurisdiction under the principles of administrative and constitutional law, which may, however, also be curtailed by privative clauses in the legislation that confers the subject matter jurisdiction.

124 In the circumstances where an administrative tribunal has exclusive jurisdiction, there is a principle that a plaintiff may not cast his or claim as one within the court's existing jurisdiction to thereby circumvent the administrative tribunal's exclusive jurisdiction. If the essential character of the dispute, in its factual context, arises from the statutory scheme, the fact that the claim is asserted for a cause of action that is ordinarily within the subject matter jurisdiction of the court and upon which the statute may be silent does not provide the court with jurisdiction over the dispute. If the substance of the claim falls within the ambit of the statute and the statute is comprehensive or exhaustive, then the court does not have subject matter jurisdiction whatever jurisdictional label the claimant chooses to describe his or her claim: *Snopko v. Union Gas Ltd.*, [2010] O.J. No. 1335 (Ont. C.A.) at para. 24.

125 The characterization of the dispute is resolved by whether the subject matter of the dispute expressly or inferentially is governed by the statute: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.); *Giorno v. Pappas* (1999), 42 O.R. (3d) 626 (Ont. C.A.); *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360 (S.C.C.); *Toronto Police Assn. v. Toronto Police Services Board*, [2007] O.J. No. 4156 (Ont. C.A.), leave to appeal to S.C.C. ref'd Sept. 25, 2008 [2008 CarswellOnt 5593 (S.C.C.)].

126 The jurisdictional principal that it is necessary to determine the substance and not the legal form of the claim in order to determine whether a court or tribunal or both have subject matter jurisdiction is important to the case at bar. This principle does not seem to have been argued before Justice Strathy in *Fulawka v Bank of Nova Scotia*, *supra*, and I will return to these points below, but I note here three points about the matter of how a claim is characterized that are relevant to a discussion of *Fulawka* and, more importantly, that are relevant to determining the case at bar.

127 First, in the principle that involves characterizing the essential nature of a dispute, rests the rebuttal to Mr. McCracken's argument that his claims are within the Ontario Superior Court's ordinary subject matter jurisdiction to enforce contracts, torts, and other causes of action. His claims are indeed dressed up as causes of action within the Superior Court's subject matter jurisdiction, but, substantively, their subject matter are claims within the jurisdiction of the officials and tribunals under Part III of the *Canada Labour Code*. Under the characterization principle, if Parliament intended to confer an exclusive jurisdiction on the officials of the *Code* to enforce claims for overtime wages, then the Superior Court would not have jurisdiction no matter how the claim was jurisdictionally labeled.

128 Second, and this point is a corollary to the first point, if it is determined that the officials under the *Code* have exclusive subject matter jurisdiction to enforce claims for overtime wages, then the statutory rights cannot inform claims for negligence or breach of contract.

129 Third, conversely, if Parliament intended to confer or maintain a concurrent jurisdiction in the civil courts, there would have to be a means for the claimant of the statutory right to pursue his or her claim in the civil courts. As the discussion below will show, one means is by implying contract terms by force of statute.

130 Returning to general principles, a legislature or Parliament may expressly and clearly confer a civil remedy or indicate an intention to confer a civil remedy so that a court will have jurisdiction, sometimes a concurrent jurisdiction, to enforce the statutory right. The case at bar is not such a case because there is no section in the *Code*, as there is in some provincial employment statutes, that makes it indisputable that Parliament intended to confer a concurrent jurisdiction

131 Still further, speaking generally, a legislature or Parliament may confer jurisdiction on an administrative tribunal but not expressly indicate whether that jurisdiction is exclusive and exhaustive. In these instances, which are the circumstances of the immediate case, it is a matter of interpretation of the statute to determine whether a legislature or Parliament intended the court to have subject matter jurisdiction to enforce the statutory rights.

132 The general interpretative principle, which is subject to exceptions, is that if a statute establishes a legal right or entitlement and provides its own remedy, then the court does not have jurisdiction to enforce a claim under the statute: *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.). More precisely, if the Act provides a right and a remedy, the statutory scheme is exclusive, but the general rule would give way if the scope and language of the Act indicates that the legislature did not intend the Act's remedy to be exclusive: *Stewart v. Park Manor Motors Ltd.*, *supra*. Another general principle is that the breach of a statute does not give rise to common law cause of action: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.); *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.).

133 There are many cases where courts have been asked to apply these principles, and in making their arguments, the parties have referred me to many of those many cases. I was referred to employment law cases where courts have ruled that they have subject matter jurisdiction to enforce statutory rights. See: *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.); *Hopkins v. Paul Revere Insurance Co.*, [1989] O.J. No. 2424 (Ont. Dist. Ct.); *Poletek v. Thomas Cook Group (Canada) Ltd.*, [1997] O.J. No. 1289 (Ont. Gen. Div.); *Ostashek v. Dental Aesthetics Ltd.*, [1998] A.J. No. 718 (Alta. Master) (Master Breitkreuz); *Franklin v. University of Toronto* (2001), 56 O.R. (3d) 698 (Ont. S.C.J.); *Kumar v. Sharp Business Forms Inc.*, [2001] O.J. No. 1729 (Ont. S.C.J.); *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066 (Alta. Q.B.); *Fredericks v. 2753014 Canada Inc.*, [2008] N.S.J. No. 570 (N.S. S.C.).

134 I was referred to cases, where applying the above principles, courts have ruled that they are without jurisdiction because an administrative tribunal has exclusive jurisdiction. See: *Sitka Forest Products Ltd. v. Andrew*, [1988] B.C.J. No. 2069 (B.C. S.C.) (employment standards); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) and *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.) (labour arbitrators with respect to collective agreements); *Bhadauria v. Seneca College of Applied Arts & Technology*,

[1981] 2 S.C.R. 181 (S.C.C.) and *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362 (S.C.C.) at para 63 (human rights tribunal); See also *Politzer v. 170498 Canada Inc.*, [2005] O.J. No. 5224 (Ont. S.C.J.) and *Mackie v. Toronto (City)*, 2010 ONSC 3801 (Ont. S.C.J.) (landlord and tenant tribunal).

135 In this last regard, CN referred me to employment law cases where courts have ruled that employment standards legislation has been held to provide a comprehensive *Code* that did not give the employee the right to pursue a civil cause of action based on the statutory obligations created by the legislation. See: *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.); *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 (Alta. Q.B.); *Thiessen v. Carriere Toyota NWT Ltd.* (1995), 15 C.C.E.L. (2d) 203 (N.W.T. S.C.) and *Macaraeg v. E Care Contact Centers Ltd.* (2008), 295 D.L.R. (4th) 358 (B.C. C.A.), leave to appeal ref'd [2008] S.C.C.A. No. 293 (S.C.C.), rev'g [2006] B.C.J. No. 3211 (B.C. S.C.).

136 I was referred to *Bisaillon c. Concordia University*, [2006] 1 S.C.R. 666 (S.C.C.), which is interesting because it was a proposed class action. In this case, a member of the University's pension plan sought to commence a class action. The proposed class included unionized and non-unionized members of the pension plan. The plaintiff was a unionized employee, and his collective agreement mentioned the pension plan. By a narrow split decision (4 to 3), the Supreme Court of Canada held that the subject matter of the action fell within the exclusive jurisdiction of a labour arbitrator despite the fact that the pension plan applied to employees represented by nine different unions as well as several hundred non-unionized employees.

137 I was referred to *Adams v. Cusack* (2006), 264 D.L.R. (4th) 692 (N.S. C.A.). In this case, the Nova Scotia Court of Appeal held that the plaintiff, a non-unionized public servant, had no recourse to a civil action for constructive dismissal because all of his possible employment-related claims fell within the authority of the Public Service Commission and Public Service Labour Relations Board.

138 In opposition to the cases referred to by CN, Mr. McCracken referred me to *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.), which I regard as a very important and helpful case to resolve the issues at bar, because it sets out and explains the general principles to be applied.

139 In *Stewart*, an employee was not granted a vacation as required by the *Hours of Work and Vacations with Pay Act*, R.S.O. 1960, c.181. Under the Act, it was a summary conviction offence to fail to pay vacation pay and upon conviction, the summary convictions court had jurisdiction to order that the vacation pay be paid to the employee. However, no summary conviction proceedings were initiated, and the employee sued the employer in the County Court. The employee's action for vacation pay was successful, and the employer appealed. The Court of Appeal dismissed the appeal. The Court of Appeal held that the Act created the new obligation of paying vacation pay. Following *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.) and several English authorities, the Court of Appeal held that where a statute creates a new right or obligation and also provides a scheme for enforcement, it is a question of interpreting the words and operation of the statute to determine whether the legislator intended the

statutory remedy to be exclusive. The general rule is that if the Act provides a right and a remedy, the statutory scheme is exclusive, but the general rule would give way if the scope and language of the Act indicated that the Legislature did not intend the Act's remedy to be exclusive. The Court of Appeal analyzed the Act and concluded that the Legislature had not intended to preclude court proceedings.

140 In a point that is significant to the case at bar, the Court of Appeal in *Stewart* also held that where the interpretation of the statute leads to the conclusion that a court action was not precluded, then the effect of the statute is to introduce by force of the statute a term of the contract between the parties. Thus, Justice Schroeder stated at para. 10:

> ... the statute under review should not be construed as excluding the respondent's right to invoke the jurisdiction of the civil Courts. It appears to me that the true answer to the position taken by the appellant is this, that the essential effect of the Act is to introduce a further contractual term into a contract of employment by proving for the granting of an annual vacation or payment in lieu thereof at a stated rate. Thus that amenity becomes by force of the statute a term of the contract between the parties as fully and effectively as if it had been included therein by their own agreement.

141 The *Stewart* case was adopted by the Saskatchewan Court of Appeal in *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask. C.A.), which overturned the older case of *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.). See also *Watson v. Wozniak*, [2004] S.J. No. 511 (Sask. Q.B.).

The Concurrent Jurisdiction to Enforce Wage Claims

Introduction

142 Moving from the general principles to the particulars of the case at bar, the *Canada Labour Code* does not unequivocally make the jurisdiction of its officers and tribunals about overtime and holiday pay an exclusive jurisdiction, and, in the case at bar, the *Code* does not expressly confer jurisdiction on the court with respect to enforcing employment standards under Part III of the *Code*. Thus, it is open for analysis and argument about what Parliament intended.

143 I will make my analysis in three stages as follows:

144 In the first stage, I will analyze the *Canada Labour Code* in the light of the general principles discussed above and several other principles that are relevant to the analysis.

145 In the second stage, I will discuss several cases that CN relied on to argue that the Superior Court does not have subject matter jurisdiction and several rebuttal cases relied on by Mr. McCracken.

146 In the third stage, I will discuss the relatively few court cases that have directly addressed the question of the court's subject matter jurisdiction under the *Canada Labour Code*.

First Stage of the Analysis

147 In the first stage of my analysis, I will review the text of the *Canada Labour Code* to determine Parliament's intentions about the jurisdiction of the court to enforce statutory rights found in Part III of the *Code*.

148 I will begin with Mr. McCracken's "quick kill" argument that s. 261 of the *Code* makes it clear that the courts have concurrent jurisdiction with the administrative process under the *Code*.

149 Section 261 provides that "no civil remedy of an employee against his employer is suspended or affected by this Part". Mr. McCracken argues that standing alone, s. 261 shows that Parliament intended to confer jurisdiction on the Superior Court to enforce claims for breach of the *Code*.

150 In my opinion, however, standing alone, s. 261 actually begs the question of whether there is a civil remedy. It preserves existing rights, but the section does not explain what those rights might be. In *A'Hearn v. T.N.T. Canada Inc.* (1990), 74 D.L.R. (4th) 663 (B.C. C.A.), leave to appeal ref'd (1991), [1990] S.C.C.A. No. 530 (S.C.C.), the British Columbia Court of Appeal came to the same conclusion when a similar argument was made about how to interpret a similar provision in the British Columbia legislation. Similarly, see also: *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 (Alta. Q.B.) and *Thiessen v. Carriere Toyota NWT Ltd.* (1995), 15 C.C.E.L. (2d) 203 (N.W.T. S.C.) at para. 9.

151 Mr. McCracken's argument, in effect, is to read s. 261 as if it read: "the civil remedy of an employee against his employer is not suspended or affected by this Part," but that is not what the section says.

152 There is, however, a more elaborate argument available to Mr. McCracken that s. 261 indicates that Parliament intended the courts to have jurisdiction to enforce wage claims for overtime. The more elaborate argument is that it may be inferred from reading the whole *Canada Labour Code* that Parliament intended the courts to have this jurisdiction or else there would be no need to include a provision like s. 261 in the Act.

153 The precise line of the elaborate argument is that: (a) under s. 166, "wages" includes "every form of remuneration for work performed"; (b) under s. 166, "overtime" means hours of work in excess of standard hours of work; (c) s. 174 provides for overtime pay "at a rate of wages"; (d) therefore, overtime pay is included in wages; (e) s. 247 requires an employer to pay "to any employee any wages to which the employee is entitled"; (f) therefore, an employer is obliged to pay overtime pay as wages; (g) s. 258 provides that where an employer has been convicted of an offence, the convicting court shall "order the employer to pay to the employee any overtime pay, vacation pay, holiday pay or other wages or amounts to which the employee is entitled;" (h) therefore, under the administrative process of the *Code* an employer may be ordered to pay overtime wages; (i) however, under s. 261 "no civil remedy for arrears of wages [which includes overtime pay] is suspended or affected by [the administrative process of Part III]"; and (j) therefore, by inference, there must be a civil claim for overtime pay, because otherwise s. 261 would have no purpose in preserving a civil claim for overtime pay which is included in wage claims.

154 There are other indications that Parliament intended that there be a civil claim to enforce wage claims including payment of overtime.

155 Under s. 249 (1) of the *Code*, the Minister of Labour is empowered to appoint inspectors, and under s. 249 (2), the inspectors have considerable powers of inspection, examination, and to compel disclosure with respect to wages and other matters. Section 249(7) provides that "no inspector, and no person who has accompanied or assisted the inspector in carrying out the inspector's duties and functions, shall be required to give testimony in any civil suit or civil proceedings". This provision presupposes that there would be civil proceedings that would benefit by testimony from the inspector to enforce wage claims, which would include claims for overtime pay.

156 Under s. 240 (1) of the *Code*, a complaint may be made to an inspector for unjust dismissal, and pursuant to subsections 241(3) and (4) where the complaint is not settled, there may be a reference to an adjudicator. Under s. 242(4), where an adjudicator decides that a person has been unjustly dismissed, the adjudicator may order the employer to pay the person compensation not exceeding the amount of money that is equivalent to the remuneration [which could include overtime pay] that would, but for the dismissal, have been paid by the employer to the person. Section 246(1) provides that no civil remedy of an employee against his employer is suspended of affected by sections 240 to 245. Once again, s.246 (1) presupposes that there must be a civil action for compensation for wages including overtime pay.

157 Section 168(1) of the *Code* provides that Part III applies notwithstanding any other law or any custom, contract or arrangement, but nothing in Part III shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part. Under s. 168(1) contract rights that are more favourable than the rights under the *Code* are not affected. This suggests that, for example, a more favourable right to overtime pay could be enforced by an action in the courts for breach of contract. This example, in turn, suggests that Parliament intended that there be a civil action to enforce rights to overtime.

158 This last example is particularly interesting in the case at bar, because, as noted above in the factual background, it was CN's evidence that until 2002, CN's overtime policy for the Operational FLSs provided that they were not paid overtime on an hourly basis, but rather they were paid a stipend of either 5% or 10% of base salary, which is a compensation scheme for overtime pay that is different from and presumably more favourable than the scheme provided under the *Code*. It would also appear that the FLSs would have been able to enforce this entitlement to overtime pay by a court action.

159 Moving on from just the textual analysis, it may be recalled that in *Stewart v. Park Manor Motors Ltd.*, *supra*, the Court of Appeal concluded that the prosecution provisions of the employment legislation were inadequate to protect employees and did not preclude a civil action. In contrast, the *Code* provides not only for prosecution but also for enforcement of wage claims by payment orders made by inspectors under s. 251(1) that may be confirmed or varied by a referee under s. 251.12(4).

160 I concede the more extensive provisions of the *Canada Labour Code* favour CN's argument that where there is an adequate scheme under the statute, then the statutory jurisdiction precludes resort to the courts. However, as postulated in *Stewart v. Park Manor Motors Ltd.*, there are exceptions to the general rule and ultimately it is a matter of statutory interpretation as to what was the legislator's intent. The provisions that I have reviewed from the *Code* suggest that Parliament did not view the Act's scheme for the enforcement of wage claims, including overtime pay, as comprehensive and in a variety of ways indicated that the courts should have a concurrent subject matter jurisdiction.

161 Subject to continuing the analysis through its second and third stages, I conclude that Parliament intended the courts to have a concurrent jurisdiction to enforce claims for overtime and holiday pay.

162 Before moving on to the second stage of my analysis, I note that in interpreting the intent of Parliament, I did not rely on anything said in the reports in *Hansard* about the debates in Parliament about the legislation, notwithstanding the submissions of Mr. McCracken that I do so. I did not find the debates helpful in determining Parliament's intent.

Second Stage of the Analysis

163 In the second stage of the analysis, I will discuss several cases that CN relied on to argue that the Superior Court does not have subject matter jurisdiction and several rebuttal cases relied on by Mr. McCracken.

164 *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.) was a case about the right to overtime pay under s. 17 of Saskatchewan's *Labour Standards Act*, S.S. 1969, c. 24. In this case, Justice Tucker reluctantly came to the conclusion that the plaintiffs' claims for unpaid overtime wages were outside the subject matter jurisdiction of the Court of Queen's Bench. Justice Tucker reasoned that the legislation conferred a new right and also a special and particular remedy for enforcing the right. In these circumstances, the rule taken from *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.) and other cases was that *prima facie* a person claiming that the statute had been infringed can use only the statutory remedies but the object and provisions of the statute as a whole had to be examined to determine whether the statutory remedies were to be the sole remedies available. After making this examination of the *Labour Standards Act*, Justice Tucker decided that the *prima facie* rule applied and the Court did not have subject-matter jurisdiction.

165 In my opinion, Justice Tucker applied the correct methodology, which is the methodology adopted by the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.*, *supra*. It is the same methodology that I have applied above. I need not decide whether his conclusion that the Saskatchewan statute did not provide the court with subject matter jurisdiction is correct. I need not make that decision because it would not be helpful in deciding the case at bar that must address a statute that is not identical with the Saskatchewan statute and that therefore, ultimately requires its own analysis of its text and operation.

166 In any event, as noted above, the Saskatchewan Court of Appeal overturned the *Pateman* decision in *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask.

C.A.), which was a case about a claim for unpaid holiday pay under the *Labour Standards Act* , R.R.S. 1998, c. L-1. The appellate court overturned *Pateman* by adopting *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.) and by concluding that the legislature had intended that the Court have jurisdiction notwithstanding that there was an administrative scheme to enforce rights newly created by statute.

167 In *Kolodziejski*, the Saskatchewan appellate court, reinforced its conclusion by relying on *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.) by taking from these cases an interpretative principle that labour standards legislation is "benefits-conferring legislation" and, accordingly, in any cases of doubt about the statute's interpretation, the court should choose the interpretation that would be most beneficial to the beneficiary of the rights conferred and that would extend the legislation's protections as much as possible.

168 Digressing for a moment from the case law analysis to the case at bar, it is not necessary for me to rely on the interpretative principle employed by the Saskatchewan Court of Appeal in *Kolodziejski* because my conclusion is that based on a reading of the whole statute, the intention of Parliament was to confer a concurrent jurisdiction on the Superior Court. That conclusion is based on my analysis of the *Canada Labour Code* independent of this interpretative principle about benefits-conferring legislation. That said, I will rely on the principle because it reinforces my conclusion.

169 *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 (Alta. Q.B.) is an Alberta case that applied the Saskatchewan case of *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.). As occurred in *Pateman*, Justice Conrad applied the correct methodology, and after reviewing the totality of the Alberta legislation, he concluded that the legislature had indicated that the statute was a complete *Code*. Justice Conrad stated that he must interpret the statute before him, and he concluded that the plaintiff could not enforce his statutory rights in the courts. I must interpret the *Canada Labour Code*, and there is nothing in the *Kenney* case that persuades me that Parliament intended to make the *Code* a complete code that would preclude resort to the courts to enforce a claim for overtime wages.

170 In advancing its argument, CN relied heavily on the decision of the British Columbia Court of Appeal in *Macaraeg v. E Care Contact Centers Ltd.* (2008), 295 D.L.R. (4th) 358 (B.C. C.A.), leave to appeal ref'd [2008] S.C.C.A. No. 293 (S.C.C.), rev'g [2006] B.C.J. No. 3211 (B.C. S.C.). In *Macaraeg*, in a proposed class action, the Court of Appeal held that overtime rights under British Columbia legislation could not be enforced by a civil action.

171 In *Macaraeg*, Justice Chiasson stated at para. 45: "the question is not whether the legislation takes away the right to bring a civil action, but whether it [the Legislature] intended that civil action be available as an exception to the general rule that rights conferred by statute are to be enforced in the statutory regime". As the discussion above and below reveals, that is indeed the question to be asked to determine whether the court has subject matter jurisdiction.

172 Justice Chiasson then undertook a detailed analysis of numerous cases about employ-

ment standards legislation from across the country, including *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask. C.A.); *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.) and *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066 (Alta. Q.B.), ultimately to return to the law as it was set out in *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.), which law, in turn, had been taken from *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.). The heart of his judgment comes in paragraphs 74 and 78 of his judgment, where he states, with my emphasis added:

> 74. In my view, in ascertaining the intention of the legislators an important *indicium* is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and prima facie there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. It is at this stage of the analysis in the context of employment standards legislation that the issue of implied contractual terms arises.
>
> 75. I do not accept the proposition articulated by the court in *Kolodziejski* at para. 21 when interpreting Stewart:
>
> The decision [in *Stewart*] re-states the underlying basis of the employment standards legislation which is to introduce further terms into employment contracts which can be enforced in the same manner as any other contractual term.
>
> 76 The proposition is based, in part, on the characterizing of employment standards legislation as "benefits-conferring" (*Re Rizzo & Rizzo Shoes Ltd.*). In my view, there is no correlation between "benefits-conferring" and the importation of terms into a contract. There is a relationship between "benefits-conferring" and enforcement. That is, if the statutory enforcement mechanism were inadequate to enforce the conferred benefit, the recipient of the benefit should have recourse to a civil cause of action.
>
> 77 I reject the broad proposition that rights granted by employment standards legislation are implied terms of employment contracts. In my view, the cases relied on by the learned chambers judge do not support such a conclusion. *Machtinger* and *Kenpo Greenhouses* do not concern statutorily-implied terms. While asserting the broad proposition that statutory rights are implied contractual terms, in my view, *Stewart* and *Kolodziejski* are on much more solid ground insofar as the statutory enforcement regimes in those cases were determined to be unsatisfactory and this afforded the plaintiffs a cause of action for breach of contract. *Parry Sound* concerned the jurisdiction and obligation of arbitrators in a collective agreement setting to apply laws of general application in the context of the exercise of management rights.
>
> 78 In my view, the judge erred concluding as a general proposition that rights in employment standards legislation are implied by law into employment agreements. The implication of terms is an adjunct to the conclusion, based on a consideration of the legislation as a whole, that the Legislature intended the rights could be enforced by civil

action, a conclusion that may be derived from the absence of an effective statutory enforcement regime.

173 I agree with paragraph 78 of the *Macaraeg* judgment. The implication of terms by force of statute is an adjunct to a conclusion based on a consideration of the legislation as a whole that the Legislature intended the rights by the statute could be enforced by civil action. My analysis of the *Code*, set out above, leads me to the conclusion that Parliament intended that courts have a subject matter jurisdiction to enforce wage claims for overtime and this conclusion leads to the adjunct conclusion that the statutory rights are terms of the contract by force of statute.

Third Stage of the Analysis

174 In the third stage of the analysis, I will discuss the relatively few cases that have directly addressed the question of the court's subject matter jurisdiction under the *Canada Labour Code*.

175 In *Jordan v. Direct Transportation System Ltd.*, [1986] O.J. No. 1887 (Ont. Dist. Ct.), Justice Hoilett followed *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.) and distinguished *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.) to arrive at the conclusion that the *Code* was an exhaustive code that precluded a court action. For the reasons expressed above and since it is my view that Parliament intended the court to have concurrent jurisdiction, I would not follow *Jordan*.

176 In *Jumbo Motor Express Ltd. v. Hilchie*, [1988] N.S.J. No. 375 (N.S. Co. Ct.), Judge Palmater of the Nova Scotia County Court held that a claim for overtime pay under the *Canada Labour Code* was not within the jurisdiction of the small claims court because it was a statutory right and not a contractual right. Judge Palmater relied on *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.) for the proposition that where adequate protection is found to exist within the statutory enforcement mechanism there is no right to bring a court civil action. For the reasons expressed above and since it is my view that Parliament intended the court to have concurrent jurisdiction, I would not follow *Hilchie*.

177 *Conrad v. Imperial Oil Ltd.* (1999), 173 D.L.R. (4th) 286 (N.S. C.A.) concerned a claim that an employer had contravened the group termination provisions of the *Canada Labour Code*. In a decision upheld by the Nova Scotia Court of Appeal, Justice Gruchy ruled that the *Code* is a comprehensive statutory scheme with its own enforcement mechanisms and he declined to exercise the court's jurisdiction.

178 While at first blush it might appear that the *Conrad* judgment stands against my conclusion that the courts have subject matter jurisdiction, upon further analysis, the *Conrad* judgment actually supports my conclusion that the courts have subject matter jurisdiction to enforce claims for overtime wages.

179 At para. 8 of the Court of Appeal's judgment, the Court noted that while the *Code* preserved an employee's right to bring a civil action against an employer for arrears of wages,

it did not contemplate a resort to the civil courts by employees who have lost tangible benefits as the result of an employer's breaches of the termination provisions of Division IX of Part III of the *Code*. This comment indicates that the appellate court was not deciding that courts do not have jurisdiction to enforce other claims that might arise under Part III of the *Code*. It was focusing on the group termination provisions of the *Code* and deciding a different and narrower point from the one that I must decide and the court was noting that the *Code* preserves the right to bring a civil action for wages.

180 Further, the Court of Appeal interpreted Justice Gruchy as having jurisdiction, but declining to exercise it. This interpretation indicates that the Court was moving from the question of subject matter jurisdiction to the matter of whether the court ought to exercise its subject matter jurisdiction, and in this regard, the appellate court decided that the Superior Court ought not to exercise its jurisdiction. I will deal with this point about the discretion to defer the court's jurisdiction in the next section of these Reasons. For present purposes, the point to note is that deferring jurisdiction presupposes that there is a jurisdiction to defer.

181 I, therefore, conclude that the *Conrad v. Imperial Oil Ltd.* judgment supports my conclusion that the Superior Court has subject matter jurisdiction over claims for overtime pay.

182 *Vlahakos v. Ridley Inc.*, [2002] M.J. No. 491 (Man. Q.B.) was an appeal from a Small Claims Court judgment that had refused an employee's claim for overtime pay under the *Code*. Justice Kennedy allowed the appeal. He regarded the court as having a discretion to enforce a civil claim for overtime, and he regarded *Conrad v. Imperial Oil Ltd.*, *supra*, as a case where the court decided to defer its jurisdiction to that of the administrative process under the *Code*. Justice Kennedy also relied upon s. 168 (1) of the *Code*, which preserves contractual rights that are more favourable to the employee than the rights or benefits under the *Code*. The *Vlahakos* judgment supports my opinion that the court has subject matter jurisdiction.

183 Lastly, there is *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 716 (Ont. S.C.J.), leave to appeal to the Div. Ct. granted, 2010 ONSC 2645 (Ont. Div. Ct.). *Fulawka* is a class action by a group of bank employees for overtime wages. Their employer was subject to the *Code*, and the employees' eligibility for overtime wages under the *Code* was not an issue. Justice Strathy concluded, however, that the *Code* does not give rise to a direct civil cause of action for overtime and holiday pay, and he struck out Ms. Fulawka's claims that sought to directly enforce the *Code*. At para. 97 of his judgment, Justice Strathy concluded that viewed as a whole, the *Code* demonstrated a parliamentary intention to enact a comprehensive and exclusive jurisdiction. For the reasons set out above, while I agree that Justice Strathy applied the correct methodology, I do not agree with his conclusion. I would place greater significance on several sections of the *Code* than he did, and thus, I come to the different conclusion that the court has subject matter jurisdiction.

184 In *Fulawka*, having decided that there was no direct jurisdiction under the *Canada Labour Code*, Justice Strathy, nevertheless, went on to allow Ms. Fulawka's claims for breach of contract, breach of a duty of good faith, and negligence to proceed in the Superior Court "informed" by the *Code*. Practically speaking, his decision circumvented his conclusion that the court did not have jurisdiction to enforce the *Code*. For the reasons set out above associated

with the principle that the essential character of the dispute determines whether the court has subject matter jurisdiction, which principles do not appear to have been argued in *Fulawka*, I disagree with Justice Strathy's conclusion that the common law actions could be informed by the *Code*.

185 I will have more to say about *Fulawka* below when I discuss the criteria for certification, but I have said enough for the purposes of deciding the question of the court's subject matter jurisdiction. My conclusion is to do directly what Justice Strathy did indirectly and recognize that the provisions of the *Code* may be enforced in the Superior Court.

Conclusion of the Analysis and the Effect of the Conclusion

186 From the above analysis, I conclude that the Superior Court has subject matter jurisdiction to decide Mr. McCracken's claims. It follows from this conclusion that CN's motion under Rule 21.01(3)(a) should be dismissed.

187 But there is more to this conclusion, because the conclusion has an effect on Mr. McCracken's action and his proposed class proceeding. As noted above in the discussion of the case law, the effect of a conclusion that the courts have a jurisdiction to enforce the statutory right is that the right is an implied term of the contract of employment by force of statute. In other words, as a matter of law, the statutory provisions become contractual stipulations.

188 This determination that contractual terms are implied by force of statute is a substantive conclusion, and it has occurred before the common issues trial where the question could have been posited as a common issue. This is a remarkable consequence and, as far as I am aware, it is an unprecedented phenomenon in class proceedings. I will return to discuss this matter later in these Reasons for Decision when I discuss the claim in contract and the common issues and preferable procedure criteria of the test for the certification of an action as a class proceeding.

Deferring to the Jurisdiction under the Canada Labour Code

189 Having found that the Court does have subject matter jurisdiction, it is necessary to deal with CN's argument that if the Court has concurrent jurisdiction with the officials under the *Canada Labour Code*, then it has the discretion to defer to the jurisdiction and to the expertise of the administrative officials and tribunals under the *Code*. CN submits that the Court should exercise its discretion and refuse to adjudicate Mr. McCracken's and the Class Members' claims.

190 Here, I can be brief in dealing with this point, because the matter of deferring to the administrative officials and tribunals under the *Code* is subsumed by the preferable procedure analysis that I will undertake later in these Reasons for Decision.

191 This use of the preferable procedure criterion to determine whether the Court should exercise its jurisdiction or defer to another tribunal's jurisdiction has been used to resolve the competition between jurisdiction under the *Class Proceedings Act, 1992* and the jurisdiction of an arbitrator to decide the plaintiff's claim. See *Smith v. National Money Mart Co.*, [2005]

O.J. No. 2660 (Ont. S.C.J.), appeal quashed [2005] O.J. No. 4269 (Ont. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 528 (S.C.C.); *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (Ont. S.C.J.), leave to appeal ref'd [2007] O.J. No. 2404 (Ont. Div. Ct.); and see *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 2248 (Ont. S.C.J.), aff'd on other grounds [2008] O.J. No. 4327 (Ont. C.A.), where I discuss the jurisprudence about this approach.

192 As I have already foreshadowed, my opinion is that a court proceeding is the preferable procedure for resolving the claims and common issues in the case at bar. Therefore, in the case at bar, the court should not defer and it should exercise its subject matter jurisdiction.

The Claim in Contract

Introduction

193 Since I have just decided that the court has jurisdiction to decide Mr. McCracken's claims and since I will decide that the court ought to exercise that jurisdiction, it is necessary for me to address CN's arguments based on rules 21.01(1)(a) and 21.01(1)(b) that it is plain and obvious that Mr. McCracken's actions for breach of contract, breach of a duty of good faith, unjust enrichment, or negligence are not reasonable causes of action. This analysis is also necessary in any event because of Mr. McCracken's motion for certification and its requirement under s. 5 (1)(a) of the *Class Proceedings Act, 1992* that he show a reasonable cause of action.

194 As part of its Rule 21 motion, CN argues that it is plain and obvious that Mr. McCracken does not have a reasonable cause of action for breach of contract. More precisely, since Mr. McCracken pleads the breach of both express and also implied contractual terms, CN's argument is two branched and asserts that it is plain and obvious that Mr. McCracken does not have a reasonable cause of action for: (a) breach of an express contract term or (2) breach of an implied term.

195 CN also submits that Mr. McCracken has not pleaded his claim with sufficient particularity. In the context of a proposed class action that has had a two-year run up with 21 volumes of affidavit and documentary evidence and cross-examinations of Mr. McCracken and other witnesses, this technical argument becomes hollow, and I will say no more about it other than I disagree with the submission.

196 I note and foreshadow that CN also submits that Mr. McCracken has not shown some basis in fact for his claims based on a breach of contract. I will have more to say about this argument when I come to discuss the some basis in fact test and the commonality and preferable procedure criteria for certification.

197 Mr. McCracken's counter-argument to refute the attack against his claim in contract is that CN is misapplying Rule 21, which, he submits, was not designed to decide the merits of the claim or the defence but rather was designed to test whether the claims or defences are tenable under the law. In effect, Mr. McCracken submits that he has pleaded a legally viable claim for breach of contract and it will be for a trial court or a court on a motion for summary

judgment to determine the merits of that adequately pleaded breach of contract claim.

198 For the reasons that follow, with an exception, I agree with Mr. McCracken's counter-argument.

Breach of an Express Contractual Term

199 The first branch of CN's argument addresses Mr. McCracken's claim that an express term of the contract has been breached. Here, CN submits that apart from the express terms in the employment contract about holiday pay, which terms, it submits, have not been breached, there are no express contract terms promising first line supervisors compensation under the overtime provisions of the *Code*. Thus, CN submits that since there are no express terms, it is plain and obvious that there can be no cause of action for breach of an express contractual term.

200 It is relatively easy to plead a claim for breach of contract. The constituent elements are the existence of a contract, which is not disputed in the case at bar, and the breach of a described express or implied term of that contract.

201 It is trite that a contract can be an oral contract or it can be in writing or it can be both oral and in writing. As noted above, in paragraph 32a of his statement of claim, Mr. McCracken pleads: [I]t is an express term in the contracts of employment of the Class that the Defendant will abide by the minimum standards of the *Code* concerning, *inter alia* overtime, holiday compensation, record-keeping and classification of employees as managers, superintendents or persons exercising management functions. Mr. McCracken pleads that these described express terms have been breached.

202 CN may be correct that the alleged express terms do not actually exist, that is, they cannot be proven, but that is a matter for a trial judge or a judge on a motion for summary judgment to determine. At this juncture, it is not plain and obvious, which is a very high bar for CN to vault, that a court might interpret the contract in the way pleaded by Mr. McCracken.

203 Thus, I agree with Mr. McCracken's argument that CN has misconceived the function of Rule 21, which is not to adjudicate the truth of a claim or defence. Truth finding is a function of a trial court.

204 CN's argues, however, that at least Mr. McCracken's claim of breach of a contract term about holiday pay should be struck out because it is plain and obvious that this term has not been breached.

205 CN's argument about holiday pay relies on s. 199 of the *Canada Labour Code* and the factual record that shows that CN provides days in lieu rather than holiday pay.

206 CN submits that even if it misclassified the first line supervisors as managers, the alleged failure to pay holiday pay could not be a breach of contract or of the *Code* because days in lieu as a matter of law are compliant with the *Code* for both managers and non-managers.

207 Section 199 of the *Code* provides that managers should receive holiday pay or time in lieu of holiday pay if they work on a holiday. Section 199 states:

> 199. Notwithstanding sections 197 and 198, an employee excluded from the application of Division I under subsection 167(2) who is required to work on a day on which the employee is entitled under this Division to a holiday with pay shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer.

208 Section 198 of the *Canada Labour Code* provides for non-managerial employees to receive holiday pay. Under s. 198 of the *Code*, an employee who is required to work on a day on which the employee is entitled to a holiday with pay shall: (a) be paid at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day; or (b) shall be given a holiday with pay at a time convenient to both the employee and the employer.

209 As appears both s. 198 and s. 199 provide time in lieu as a lawful alternative to wages as compensation for working on a holiday.

210 Mr. McCracken admitted in his cross-examination that he had received his days off in lieu of pay as compensation for the general holidays he worked, and his only rebuttal to CN's argument that it met any obligations under the *Code* to pay holiday wages is his submission that while time in lieu may be a lawful alternative to holiday wages, CN still breached the contract of employment and the *Code* because the *Code* should be interpreted so that the employee has the absolute right to choose how he or she receives holiday wages. I see, however, no basis or reason for interpreting the *Code* in that way.

211 Thus, I agree with CN that Mr. McCracken and the Class Members have no provable claim for breach of contract with respect to holiday pay. But that is not the same thing as showing that it is plain and obvious that they do not have a viable claim in law for breach of contract. I repeat that the function of Rule 21 is not to adjudicate the genuine merits of a claim or defence. However, there is a way on any motion to obtain a judgment on the merits. It is by a motion for judgment, the nature of which I will discuss below.

212 In my opinion, it is appropriate to use the motion for judgment jurisdiction in the case at bar to dismiss Mr. McCracken's claim for holiday pay on its merits. This jurisdiction may exceptionally be used in aid of the court's jurisdiction under Rule 21. (As will be seen, it is also appropriate to use this jurisdiction and jurisdiction provided by the *Class Proceedings Act, 1992* to decide common issues on their merits before the common issues trial.)

213 My conclusion, therefore, is that Mr. McCracken has shown a reasonable cause of action for breach of an express term of the contract of employment. However, his cause of action based on an alleged failure to pay holiday wages should be dismissed by way of a motion for judgment.

Breach of an Implied Contractual Term

214 Mr. McCracken alleges Class Members' employment contracts contain implied terms. These terms allegedly arise by virtue of the nature of the relationship or contract, the usage or custom of the industry, the intention or presumed intention of the parties, and the legal provisions of the Defendants Overtime and Holiday Policies. He submits that the terms of the Class Members' contracts of employment are not set out in a single document and are determined by CN's representations, general custom in the industry, the expectations of the parties, and the totality of CN's written and unwritten policies and practices.

215 The second branch of CN's argument about Mr. McCracken's claim in contract addresses Mr. McCracken's claim based on implied contractual terms. The alleged implied terms would impose obligations on CN of: (1) paying overtime pay at time and half; (2) paying holiday compensation; (3) keeping accurate records of overtime hours worked; and (4) acting in good faith in classifying employees.

216 CN's argument is that these implied terms would be inconsistent with the express term that excludes the first line supervisors from overtime pay under the *Canada Labour Code* . CN argues that these terms cannot be implied because they are contrary to the express terms of the employment contract. CN's argument is that regardless of whether it breached the *Code*, it cannot be the case that it breached any contract term that would imply what has been expressly excluded; namely the operation of the *Code*.

217 Terms may be implied in a contract: (1) based on custom or usage; (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 that the parties would say, if questioned, that they had obviously assumed: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 137.

218 In *G. Ford Homes Ltd. v. Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (Ont. C.A.) at para. 9, Justice Cory described the general principles about when a term may be implied in a contract. He stated:

> 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.

219 In its factum for the Rule 21 motion, CN submits that it is plain and obvious that the implied terms do not and could not exist because they would be inconsistent with the express

terms of the contract. In his responding factum, Mr. McCracken responds with a complicated counter-argument based on the principles of contract illegality and the prohibition against contracting out of statutory protections to negate the express provisions that CN argues preclude the implied terms pleaded by Mr. McCracken. To which CN replies in its reply factum with a counter-counter-argument about the law associated with illegal contracts.

220 For present purposes these complicated and elaborate arguments, counter-arguments, and counter-counter arguments need not be resolved, but since none of them are fanciful, they do demonstrate that it is not plain and obvious that a court would not imply terms into the contracts of employment of the first line supervisors.

221 CN's arguments ultimately may be correct, but that is a matter for a trial judge or a judge on a motion for summary judgment to determine. At this juncture, it is not plain and obvious that a court might interpret the contract in the way pleaded by Mr. McCracken.

222 Thus, again I agree with Mr. McCracken's argument that CN has misconceived the function of rule 21.01 (1)(a) and rule 21.01 (1)(b), which is not to adjudicate the genuine merits of a claim or defence but to determine whether it is plain and obvious the claim and defence have legal viability.

223 I conclude that Mr. McCracken has pleaded a reasonable cause of action based on implied contractual terms.

Breach of a Statutory Implied Term

224 I have just decided that Mr. McCracken has pleaded a reasonable cause of action based on implied contractual terms. This decision is supported by the discussion earlier about the court's subject matter jurisdiction, which noted that statutory rights may be implied terms of a contract by force of statute. However, that earlier discussion does more than indicate that it is not plain and obvious that Mr. McCracken does not have a cause of action for breach of an implied contractual term. It goes further and concludes that Mr. McCracken actually has a cause of action for breach of a statutory implied term.

225 As noted in the previous part of these Reasons for Decision, contractual terms may be implied as a fact arising from the circumstances of the contractual relations and they may be implied as the legal incidents of a particular class or kind of contract. Contractual terms may also be implied as a matter of law. Mr. McCracken's statement of claim seeks a declaration that the duties of the *Code* are implied terms of the Class Members' contracts of employment. The discussion about the court's subject matter jurisdiction determines that the overtime provisions of the *Code* are part of the employment contract between the parties by force of statute.

226 This determination does not mean that it has been proven that CN has breached the terms of the employment contract. The determination of whether there has been a breach depends upon the outcome of the contested issue of mixed fact and law about whether the first line supervisors are managers.

227 The determination does mean however that Mr. McCracken has proven an issue that

might otherwise have been decided at the common issues trial. I will explain in the next section of these Reasons for Decision how it is that the court has jurisdiction to decide this point now and before the common issues trial.

Motion for Judgment and Deciding or Staying Common Issues

228 In my opinion, the court has the jurisdiction to decide or to stay what would otherwise be a common issue on a motion for certification. Under Rule 37.13(2)(a), a judge who hears a motion may in a proper case order that the motion be converted into a motion for judgment: *Wilson v. Ingersoll (Town)* (1916), 38 O.L.R. 260 (Ont. H.C.); *Janisse v. Livesey*, [1944] O.J. No. 185 (Ont. H.C.); *CMLQ Investors Co. v. CIBC Trust Corp.* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.).

229 The jurisdiction under this rule is narrow, and a judge may resort to it only where the motion for judgment would result in the resolution of the case, either by granting judgment in favour of the plaintiff or dismissing the plaintiff's action and where all the necessary evidence is before the court and where the parties have had full opportunity to argue their positions: *Centre Town Developments Ltd. v. Hull*, [1997] O.J. No. 4458 (Ont. Div. Ct.); *McNab v. Lechner* (2002), 21 C.P.C. (5th) 16 (Ont. C.A.); *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725 (Ont. Gen. Div.); *CMLQ Investors Co. v. CIBC Trust Corp.* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.); *Chrysalis Restaurant Enterprises Inc. v. 212 King Street West Ltd.*, [1994] O.J. No. 1983 (Ont. Gen. Div.).

230 The court's jurisdiction to grant judgment on any motion is augmented and enhanced by ss. 12 and 13 of the *Class Proceedings Act, 1992*, which state:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> 13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

231 In the circumstances of the case at bar, in my opinion, it would be propitious to the advancement of the class action to and fair to both the class members and to the defendant CN to exercise the court's jurisdiction and decide the claim about holiday pay on its merits.

232 In the circumstances of the case at bar, in my opinion, it would be propitious to the advancement of the class action to and fair to both the class members and to the defendant CN to exercise the court's jurisdiction to decide that that the terms of the *Canada Labour Code* are terms of the employment contracts by force of law.

233 It also is desirable to stay the claims for a breach of an express or implied term of the contract. With the court having concluded that the terms of the *Canada Labour Code* are

terms of the contract by force of statute, these causes of action are academic or moot and they need not be decided on their merits while the claim based on contract terms by force of statute proceeds.

234 The resources of the parties need not be further expended on the issue of the terms of the employment contract, and the focus of the action can turn to the crucial issue of whether the first line supervisors are managers and therefore excluded from the terms of the *Canada Labour Code*. That issue is really what this proposed class action is all about, and it is the issue around which the goals of class proceedings of access to justice, behaviour modification, and judicial economy may be achieved.

The Claim for Breach of a Duty of Good Faith

235 I turn now to Mr. McCracken's claim for breach of a duty of good faith. He pleads good faith as an independent cause of action and in relation to his other causes of action.

236 Mr. McCracken pleads that the Class Members are in a position of vulnerability and that CN owes them a duty of good faith including a duty to honour its statutory and contractual obligations and to not act in a manner so as to eviscerate or defeat the objectives of the Class Members contracts of employment or the *Canada Labour Code*.

237 He alleges that CN breached its duty of good faith by: (a) failing to establish procedures to ensure that the Class Members were correctly classified; (b) failing to pay overtime and holiday pay; (c) failing to advise the Class Members of their entitlements to be paid under the terms of their contracts or under the *Code* and the Regulations; (d) retaining for itself the alleged benefits of unpaid overtime and holiday work; (e) creating a working environment that requires overtime or holiday work and dissuades employees from reporting or obtaining compensation for such hours; (f) imposing overtime approval requirements that are impractical, unfair, dangerous, and unconscionable and (g) carrying out reprisals against the Plaintiff and other Class Members.

238 Good faith is a nebulous legal term that presents itself in a wide variety of different legal contexts. It appears in contract law, in property law, in municipal law, in administrative law, in procedural law, in tort law, and in numerous statutes.

239 In the territory of contract law, there are several different contexts for good faith, including the context of contract negotiation, contract interpretation, contract performance, and contract enforcement. Good faith is sometimes viewed as associated with duties and relationships where it falls in between contractual relationships and duties and fiduciary relationships and duties.

240 In some contexts, the meaning and application of good faith is well-established, but in other contexts its meaning and application may be in the state of development. Thus, good faith is a huge topic, and good faith's meaning and application depends on context, and its application ranges from being well established to being in a state of development.

241 In several cases, the Ontario Court of Appeal has held that Ontario law does not re-

cognize a stand-alone duty of good faith that is independent of the terms of a contract or the objectives of the contract. See: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.) at para. 53; *Nareerux Import Co. v. Canadian Imperial Bank of Commerce* (2009), 97 O.R. (3d) 481 (Ont. C.A.) at para. 69.

242 In *Transamerica Life Canada Inc. v. ING Canada Inc.* at para. 53, the Ontario Court of Appeal held that a duty of good faith cannot be implied to impose new and unbargained-for obligations on the parties but can be implied with a view to securing the performance of the contract between the parties. In *Transamerica Life Canada Inc.*, the Court struck out a general pleading of good faith that was not tied to performance or enforcement of the contract. In this case, Associate Chief Justice O'Connor stated at para. 53:

> I agree with Transamerica 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. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into....

243 In my opinion, in the case at bar, Mr. McCracken's pleadings of breach of a duty of good faith to the extent that they set out a claim for breach of a free-standing duty of good faith should be struck from the statement of claim. This ruling, however, would not preclude pleading good faith as a doctrine that is relevant to the other causes of action.

244 In any event, at the hearing of the certification motion, Mr. McCracken took the position that he was not advancing breach of a duty of good faith as a cause of action but only as a legal doctrine that was relevant to his other causes of action.

245 In my opinion, this position was tenable as a matter of law, and it follows that Mr. McCracken's claim for breach of a duty of good faith should be struck out as a free-standing cause of action. However, the pleading of the material facts alleging a breach of duty of good faith may remain to the extent that the material facts are pleaded in support of the cause of action for breach of contract. (Once the amendments are made, the breach of contract claims will be stayed for the reasons already expressed and to the extent already expressed.)

The Unjust Enrichment Claim

246 Mr. McCracken pleads that CN has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members. He pleads that CN has been enriched, the Class Members have suffered a deprivation, and that there is no juristic reason why CN should be permitted to retain the benefit of the unpaid hours of work, which are the constituent elements of a claim for unjust enrichment. See: *Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21 (S.C.C.).

247 At the hearing of the certification motion, CN conceded that if its jurisdictional objection based on the court's subject matter jurisdiction did not prevail, then Mr. McCracken had properly pleaded a claim for unjust enrichment.

248 I conclude that Mr. McCracken has shown a cause of action for unjust enrichment.

The Negligence Claim

249 Mr. McCracken pleads that CN owes him and the Class Members a duty of care to ensure that they are properly classified and compensated for the hours worked at the appropriate rates and that CN has breached that duty in a variety of ways and is liable for the tort of negligence.

250 He pleads that CN was negligent by: failing to undertake a proper and adequate analysis in determining whether FLSs exercised management functions; failing to take reasonable steps to monitor and record all hours worked by FLSs; failing to take reasonable steps to ensure that FLSs were properly compensated for hours worked; failing to implement and maintain an effective, reasonable and accurate class-wide system - centrally and uniformly controlled - to ensure its duties were complied with; and failing to advise FLSs of their right to be properly classified and recover for unpaid hours.

251 CN argues, however, that there is no duty of care and that if there is duty of care, then it is negated by policy factors.

252 For the reasons that follow, it is my opinion, that it plain and obvious that Mr. McCracken and the Class Members do not have a cause of action in negligence. In reaching this opinion, I have assumed that it is not plain and obvious that CN does not have a *prima facie* duty of care to the first line supervisors, but I conclude that it is plain and obvious that there are policy reasons to negate the duty of care with the result that Mr. McCracken and the Class Members do not have a reasonable claim for the tort of negligence.

253 The contemporary Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions adapting and explaining the House of Lord's decision in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.). See: *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.); *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.); *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.); *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.); *D. (B.) v. Children's Aid Society of Halton (Region)*, [2007] 3 S.C.R. 83 (S.C.C.); and *Mustapha v. Culligan of Canada Ltd.* , [2008] 2 S.C.R. 114 (S.C.C.).

254 The contemporary analysis of whether a duty of care exists begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new category of claim. If the claim falls within an established category, then precedent will have established that there is a duty of care associated with the relationship between the parties: *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.) at para. 14.

255 In *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), the House of Lords adopted a two-step analysis to determining whether there was a duty of care between a plaintiff and a defendant: (1) Is there a sufficiently close relationship between the defendant and the plaintiff such that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff? and, (2) Are there any considerations that ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owned; or the damages to which a breach of it may give rise.

256 As developed by the subsequent case law in Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying three requirements: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any prima facie duty established by foreseeabilty and proximity.

257 Proximity focuses on the relationship between the parties and asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.). Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 49; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at para. 24.

258 The proximity inquiry focuses on the facts of the particular relationship and asks whether the relationship discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care to prevent the type of harm that was suffered. The focus is on the nature of the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate? See *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 (S.C.C.) at para. 23.

259 This second stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.) at para. 37; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 51. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair: *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.) at para. 37; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 51.

260 In the case at bar, the alleged duty of care does not fall within an established cat-

egory. However, in the context of motion under Rule 21, I will assume that it is not plain and obvious that CN does not have a duty of care to its first line supervisors to ensure that they are properly classified and compensated for the hours worked at the appropriate rates. Thus, I will assume without deciding that Mr. McCracken's proposed tort satisfies the first stage of the duty of care inquiry and that there is a proximate relationship and a duty of care owed by CN to its first line supervisors.

261 I, therefore, move on to the second stage of the duty of care analysis to consider whether there any overriding policy considerations that would negate any *prima facie* duty established by foreseeabilty and proximity. Here, in my opinion, it is plain and obvious that the policy considerations negate the duty of care. There are at least three policy reasons for not recognizing a duty of care as proposed by Mr. McCracken.

262 First, the tort proposed by Mr. McCracken is an unnecessary intrusion of the law of tort into an area in which it is not needed and where it might cause confusion and uncertainty and disturb existing law that does not require fixing.

263 The tort proposed by Mr. McCracken is an economic tort that claims compensation for purely economic losses. He has suffered no personal injury and there is no injury to property; his losses are purely monetary. Although the categories for negligence are not closed, the law in Canada has so far recognized only five categories of negligence claims for pure economic loss; namely: (1) negligent misrepresentation; (2) negligent performance of a service; (3) defective products or buildings; (4) relational economic loss; and (5) independent liability of statutory public authorities: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.). The case at bar does not fall within the recognized categories of torts for pure economic losses.

264 Courts are reluctant to extend the categories of torts for purely economic loses, especially when the subject matter of the alleged loss is already governed by contract or the law of unjust enrichment. See: *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.). Part of the court's reluctance is a concern about indeterminate liability, which would seem not to be a serious concern in the case of the tort proposed by Mr. McCracken, but another part of the court's reluctance to acknowledge new types of purely economic loss claims is the prospect that the tort would unnecessarily interfere with commercial and contractual relations. This concern is present in the case at bar.

265 Mr. McCracken posits that an employer should have a duty of care to properly categorize its employees because the employees could foreseeable be economically harmed by a wrong classification. The law of tort would regulate the commercial and contractual relations between the employer and the employee. Assuming this duty existed as the foundation for a negligence claim, the adjudication of the claim would have the law of tort regulate the employer's management rights and the court would have to determine whether the employer met the standard of a reasonably competent employer in categorizing its employees.

266 In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), a majority of

the Supreme Court rejected a tort for breach of a good faith and fair dealing obligation by employers in dismissing employees as overly intrusive and inconsistent with established principles of employment law and a change in the law better left to the legislatures. In *Piresferreira v. Ayotte*, [2010] O.J. No. 2224 (Ont. C.A.), the Court of Appeal rejected a duty of care on employers to shield employees from the acts of other employees that might cause mental suffering as unnecessary. In my opinion, the proposed tort of the immediate case is equally intrusive and inconsistent and ought to be rejected on similar policy grounds.

267 In the case at bar, the law's involvement is unnecessary to protect the employee who already has a strict liability claim under the *Canada Labour Code*'s administrative process or for breach of contract by force of statute if he or she has not been correctly categorized. Upon analysis, there is no need for the tort at all. The duty of care proposed by Mr. McCracken would be an intrusion by tort law into an area adequately governed by the statutory law, contract law, and the law of restitution.

268 In *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.), the Supreme Court declined to recognize a tort duty to regulate the conduct of commercial negotiations. In a judgment written by Justice Iacobucci and Major, the court identified the introduction of an unnecessary common law regulatory function as a policy reason that would negate a duty of care. The court stated:

> [T]o extend the tort of negligence into the conduct of commercial negotiations would introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct. It is undesirable to place further scrutiny upon commercial parties when other causes of action already provide remedies for many forms of conduct. Notably, the doctrines of undue influence, economic duress and unconscionability provide redress against bargains obtained as a result of improper negotiation. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.

Much the same thing could be said about the undesirability of court's unnecessarily scrutinizing an employer's classification of its employees.

269 The proposed tort would also be a source of confusion. One problem is that there is the prospect that the alleged breach of duty to properly classify may only become a breach after-the-fact of classification. The misclassification would arise because a first line supervisor did not actualize his or her managerial authority and responsibilities and thus caused his or her classification as a manager to be wrong. This prospect would produce a litany of confusing did-didn't, could-couldn't, should-shouldn't factual disputes about classification.

270 Second, the tort proposed by Mr. McCracken would encourage needless litigation and lots of it. The discouragement of needless litigation was another policy factor that would negate a duty of care. This policy factor was identified in *Martel Building Ltd. v. R.*, *supra* at para. 71.

271 Third, the duty of care proposed by Mr. McCracken, if it were recognized, would establish liability for conduct that that did not actually cause the plaintiff's injury. This may be

just another way of saying that the tort is needless, confusing or mongering, but the point is that the employee is not economically injured by the employer's failure to take due care in categorizing the employee, the employee is actually injured by the employer's strict liability failure to pay overtime wages when it is contractually or statutorily obliged to do so. The proposed tort is not an example of useful concurrent liability. It is an example of useless and superfluous surrogate liability. Visualize, if a categorization was negligently performed but nonetheless correct, the employee would suffer no damages from the negligently performed categorization. If the categorization was negligently performed and wrong, the employee would be entitled to recover no more or no differently than he or she would contractually or statutorily under the *Canada Labour Code*.

272 Apart from the fact that Mr. McCracken would like to use the proposed tort to get a leg up on satisfying the criteria for certification and finding a class-wide basis for liability, the proposed tort is unnecessary, has no social utility, and would actually be disruptive. I conclude that Mr. McCracken has not pleaded a reasonable cause of action in negligence.

Rule 21 and CN's Limitation Period Argument

273 CN's limitation period argument is limited to the claims and causes of action based on CN allegedly improperly classifying its first line supervisors as managers. These causes of action focus on the act of classifying as opposed to the failure to pay overtime pay. As pleaded, these claims arose on or after July 5, 2002.

274 CN's argument is that since these particular claims allegedly arose on July 5, 2002 and since the amended pleading making these claims was not delivered until July 28, 2008, the pleading comes after the expiry of the various provincial limitation periods applicable to the Class Members' claims.

275 The limitation statutes are: *Limitations Act, 2002*, S.O. 2002, c. 24, s. 24(3); *Limitations Act*, R.S.O. 1990, c. L.15, s. 45(1)(g); *Limitations Act*, R.S.B.C. 1996, c. 266, ss. 3(2)(a), 3(5); *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1); *Limitations Act*, S.S. 2004, c. L 16.1, s. 5; *Limitations Act*, C.C.S.M. c. L150, ss. 2(1)(b), 2(1)(e), 2(1)(i) and 2(1)(k); *Code Civil du Québec*, S.Q. 1991, c. 64, Art. 2925; *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, ss. 3, 6, 7 and 9; *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, ss. 2(1)(b) and 2(1)(e); *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, ss. 2(1)(b), (e) and 2(1)(g); of the *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 5(a), 5(b), 5(h), 6(f), 6(h) and 9; of the *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, ss. 2(1)(b), 2(1)(f), 2(1)(h) and 2(1)(j); *Nunavut Act*, S.C. 1993, c. 28, s. 29; *Limitation of Actions Act*, R.S.Y. 2002, c. 139, 2(1)(b), 2(1)(f), 2(1)(h) and 2(1)(j).

276 Because of my conclusions above that there is no reasonable cause of action for negligence or for a breach of a free-standing duty of good faith, it is not necessary to address CN's limitation period argument or Mr. McCracken's counter-arguments. In other words, the limitation period arguments apply to claims that are not proceeding, and thus the limitation period arguments and counter-arguments are moot.

The Criteria for Certification

277 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.

278 For an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

279 On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

280 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 behavior modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 26-29; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 15 and 16.

281 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 28-29.

282 Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would be determined at a trial when the merits of the claims of class members are in issue: *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at para. 82.

The "Some Basis in Fact" Test and Certification

283 In the case at bar, the matter of the evidentiary burden for certification is both important and also problematic with respect to the debate between the parties about the class definition, the common issues, preferable procedure, and the representative plaintiff criteria for certification.

284 *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 16-26; *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at paras. 56-74; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (Ont. C.A.) at paras. 49 to 52; *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (Ont. S.C.J.) at para. 21; *LeFran-*

cois v. Guidant Corp., [2009] O.J. No. 2481 (Ont. S.C.J.) at paras. 13-14, leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (N.L. C.A.) are all 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.

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 (Ont. 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 (Ont. Div. Ct.) at paras 101-102, aff'd. [2010] O.J. No. 2683 (Ont. C.A.).

286 For the discussion that follows, it is important to keep in mind that the low evidentiary basis for a certification motion applies both: (a) to evidence that this is some factual support for the plaintiff's claim; and also (b) to evidence to satisfy the four criteria for certification other than the criteria of showing a cause of action.

287 There are many subtle points here. One of them is that although the plaintiff need not adduce some basis in fact for criteria 5 (1)(a) and indeed no evidence is admissible in this regard, there still must be some basis in fact for the plaintiff's class action claims. Justice Cullity made this point in *Dennis v. Ontario Lottery & Gaming Corp.*, [2010] O.J. No. 1223 (Ont. S.C.J.) at para. 84, where he stated:

> There is one other aspect of the inquiry required by section 5(1)(a) that is of particular importance in this case. It is fundamental to the requirements for certification that the relevant question under section 5(1)(a) is whether the pleading discloses a cause of action of the plaintiffs. It is not whether causes of action of the other class members have been pleaded. The existence of claims of such other class members is to be considered under the requirements in section 5(1)(b) and 5(1)(c) that there be a class whose members share issues in common. For these purposes, evidence is required to satisfy the minimum burden of "some basis in fact" referred to in *Hollick* at para. 25.

288 In *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.), leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.), Justice Cullity stated the orthodox position about the some basis in fact test at para.14:

> [T]he minimum evidential standard affirmed in *Hollick*, applies to factual issues that may be determinative of both the requirements for certification and the merits of the claims advanced on behalf of the class. The usual process of fact-finding is, therefore, not intended to be a feature of certification motions and this court has deprecated the delivery of extensive motion records by the parties and taken this into account when awarding costs.

289 These legal propositions about the operation of class proceedings legislation have caused dismay to defendants, although as I will shortly show, their concerns are overstated or not justified.

290 In *LeFrancois v. Guidant Corp.*, at para. 15, Justice Cullity noted the complaint of defendants and of the defence bar that: "the requirements for certification in sections 5(1)(b) and 5 (1)(c) are too easily satisfied and do not provide sufficient protection for the rights of [defendants]." Moreover, defendants confront a tougher evidentiary standard than do plaintiffs. As Justice Cullity pointed out in *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at para. 68, a very heavy evidentiary burden has been placed on defendants in contrast to the very light burden placed on plaintiffs. He stated:

> [A]lthough a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter.

291 The festering point of the complaint by defendants is that that the some basis in fact test is applied to the criteria for certification rather than to the plaintiff just showing some factual basis for his or her cause of action. More precisely, the objection of the defendants is that the some basis in fact test is applied so as to entail the satisfaction of the criteria for certification, and applied in this way, the criterion for certification become devoid of any utility as a qualification for certification, because the criteria inevitably will be satisfied by a some basis in fact test.

292 In other words, it is not objectionable that the plaintiff must present a very modest evidentiary basis about his or her claims as a prerequisite to certification of his or her action as a class proceeding, but it is the view of defendants that it is arguably unfair and unjust that a plaintiff may successfully argue that because there is some basis in fact for each of the criteria for certification, therefore, certification must necessarily be granted.

293 I agree that it would be unfair and unjust if the some basis in fact test was applied in the way described by defendants. The case at bar can be used to demonstrate the unfairness. A crucial and contested issue is the status of the first line supervisors as managers or as non-managers and whether this issue can be resolved at the common issues trial on a class-wide basis. 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. 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 here are some questions that are not common issues and rather are fundamentally or intrinsically or unavoidably individual questions.

294 Here, an example of a hypothetical proposed class action is helpful to make my point. The example I used during the hearing of the motions is a proposed class action by a class of public school students in grade seven, say at Pearson Public School. Using this example, a question that might be proposed as a common issue about this group of students is: "What are the requirements for grade seven students at Person Public School to be promoted to grade eight?" The some basis in fact test would not be problematic for this question. Another ques-

tion is: "Do the grade seven students at Pearson Public School satisfy the requirements to be promoted into grade eight?" For this question, a plaintiff could lead evidence that two grade seven students at Pearson Public School out of a class of thirty had report cards stating that they had been promoted to grade eight and thus the plaintiff would be able to assert that there was some basis in fact for the proposed common question about the grade seven students having satisfied the requirements to enter grade eight. Nevertheless, the genuine truth of the matter is that the question of whether the class of grade seven students qualified for grade eight is inherently an individual question and not a common or class-wide issue.

295 In *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.), Justice Cullity was aware of the problem of accepting that commonality have been established based simply on the some basis in fact test. He stated at para. 27:

> Where, for example, commonality itself depends on a disputed question of fact - as it will infrequently do - the question must I think be decided by the motions judge on a balance of probabilities. The necessity for a minimum evidential basis for the common issues relates not to the question whether commonality exists but, rather, to whether the claims to which they relate have any factual support.

296 Justice Cullity, however, modified these observations in *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.), leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.) and, as noted above, in that case, he expressed the orthodox position that the some basis in fact test applies both to showing some factual support for the cause of action and also to the various criteria for certification. This was also his approach in *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (Ont. S.C.J.), where he 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..."

297 The preferable procedure criterion provides another illustration of unfairness if the some basis in fact test were being applied to this criterion for certification in the way maligned by defendants. In some cases, and the case at bar is an example, the debate about the preferable procedure is a contest about whether a class proceeding is preferable to individual actions, arbitration, or an administrative process. In this debate, there will always be some basis in fact for asserting that a class proceeding is the preferable procedure because the mere existence of this choice makes it a factual possibility that it is the preferable procedure. In the case at bar, as there will be virtually in every case, there will be some basis in fact for the submissions that a class proceeding will provide access to justice, behaviour modification, and judicial economy, which are the lens through which preferably procedure is analyzed. Thus, in every case there is always some basis in fact that a class proceeding is the preferable procedure and, practically speaking, the preferable procedure criterion would become a constant and not something to be proven if a plaintiff can move from showing some basis in fact for preferability to have proven preferability. Applying the some basis in fact test in this way would make the criterion a meaningless criterion because it always would be satisfied.

298 These examples demonstrate potential unfairness if the some basis in fact test were

applied in the way suggested by defendants. However, the defendants' complaints of unfairness lose their validity because the some basis in fact test is not applied in the way condemned by them. Rather, the test is applied as a necessary but not sufficient condition for establishing the various criteria for certification. It is not applied as a necessary and sufficient condition.

299 If one returns to the fountainhead case of *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), one sees that Chief Justice McLachlin did not make the move from some basis of fact being established to concluding that the criteria for certification had been satisfied. In the *Hollick* case there was some basis in fact for commonality, and she concluded that there were some common issues. However, in *Hollick*, she concluded that the preferable procedure criterion had not been satisfied after she analyzed the evidence through the lens of access to justice, behaviour modification, and judicial economy. In other words, while it was necessary for the plaintiff to show an evidentiary basis for a class procedure being the preferable procedure, establishing the evidentiary basis was not sufficient in itself to satisfy the preferable procedure criterion.

300 In *Taub v. Manufacturers Life Insurance Co.*, [1998] O.J. No. 2694 (Ont. Gen. Div.), another seminal case about the some basis in fact test, Justice Sharpe stated at para. 4: "[T]here must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied." Justice Sharpe said that there must be some basis in fact to determine whether the common issue and preferability requirements are satisfied; he did not say that the common issue and preferability requirements are satisfied if there is some basis in fact. Satisfaction of the some basis in fact test is necessary but not sufficient for the satisfaction of the various criteria.

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.

302 Applying the some basis in fact test to the case at bar, Mr. McCracken must show that there is some basis in fact for his cause of action and some basis in fact for each of the certification criteria other than the first one. CN, however, if it is able to do so, may show that there is no evidentiary basis for the claims or the certification criteria. If the evidentiary basis is established, then whether the certification criteria have been satisfied remains a matter of argument between Mr. McCracken and CN on a level playing field

303 With this general background, I turn now to the five criteria for certification of Mr. McCracken's proposed class action.

Disclosure of Cause of Action

304 For the reasons set out earlier in these Reasons for Decision, I conclude that Mr. McCracken has satisfied the first criterion for certification. He has shown a cause of action for unjust enrichment and for breach of contract based on (a) express terms, (b) implied terms, and (c) terms implied by force of statute.

Identifiable Class

305 The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

306 In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.).

307 Class membership identification is not commensurate with the elements of the cause of action; there simply must be a rational connection between the class member and the common issue(s): *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 32, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

308 CN does not dispute that Mr. McCracken has identified a class that technically satisfies the requirements of the *Class Proceedings Act, 1992*. However, CN argued that the class definition was deficient because there was no evidence about first line supervisors in 56 job descriptions and therefore no basis in fact for including these first line supervisors as class members.

309 This argument, however, is fallacious because Mr. McCracken had established that was some basis in fact for his own cause of action and for his own job description, therefore, there is a sufficient evidentiary basis for him to submit that there was a group of similarly situated claimants with similar claims.

310 Mr. McCracken has provided some basis in fact to identify the persons who have a potential claim against CN. They are persons like him whom CN classifies as first line supervisors and who because of that classification (not job description) are not paid overtime.

311 In my opinion, the second criterion for certification has been satisfied.

Common Issues

General Principles

312 Section 1 of the *Class Proceedings Act, 1992* 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.

313 For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 18.

314 For an issue to be common, it cannot be dependent on individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada*, [2000] O.J. No. 3821 (Ont. S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952 (Ont. Div. Ct.), aff'd [2003] O.J. No. 1160 (Ont. C.A.) and [2003] O.J. No. 1161 (Ont. C.A.).

315 The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

316 The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

317 For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 39-40.

318 The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 65, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 33.

319 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: *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21.

320 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: *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21.

Evolution of the Common Issues

321 In the case at bar, the list of proposed common issues evolved during the course of the argument of the certification motion.

322 Mr. McCracken initially proposed the following 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 first line supervisors?

Common Issue Three - Breach of Contract

3.(a) What are the relevant terms of (express or implied or otherwise) of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

(b) Did the Defendant breach any of the foregoing terms? If so how?

Common Issue Four - Duties of the Defendant

4.(a) Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?

(b) If so, did the Defendant breach this duty?

(c) Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?

(d) If so, did the Defendant breach this duty?

(e) Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members, including (but not limited to) a duty to take reasonable steps to ensure that Class Members were properly classified?

(f) If so, did the Defendant breach this duty?

(g) Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?

(h) If so, what is the standard of care?

(i) Did the Defendant fall below the standard of care? If so how?

Common Issue Five - Unjust Enrichment

5.(a) Was the Defendant enriched by (i) failing to compensate the Class Members with pay or overtime pay for hours worked in excess of their standard hours of work, or (ii) failing to compensate the Class Members with holiday pay?

(b) If the answer to question 5(a)(i) or (ii) is "yes," did the Class suffer a corresponding deprivation?

(c) If the answer to question 5(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?

(d) If the answer to question 5(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

Common Issue Six - Damages or other Relief

6.(a) If an answer to any of the foregoing common issues is in favour of the Class, what remedies are Class Members entitled?

(b) If an answer to any of the foregoing common issues is in favour of the Class, is the Defendant potentially liable on a class-wide basis? If "yes":

1. Can damages be assessed on an aggregate basis? If "yes":

a. Can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?

b. What is the quantum of aggregate damages owed to Class Members?

c. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

Common Issue Seven - Punitive Damages

7.(a) Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct?

(b) If the answer to 7(a) is "yes," can that damage award be determined on an aggregate basis?

(c) If the answer to 7(b) is "yes," what is the appropriate method or procedure for distributing the aggregate aggravated, exemplary or punitive damage award to the Class?

323 This initial list of questions was premised on Mr. McCracken's submission that the court, at the common issues trial, could and should determine whether first line supervisors

were properly or improperly classified as managers on a class-wide basis.

324 During the course of the argument of the certification motion, I expressed reservations about the commonality of some of the proposed common issues, and to focus the discussion about my concerns, I prepared an amended list of questions and asked for the parties' submissions. My amended list was prepared on the assumptions that the Court had jurisdiction over the subject matter and that Mr. McCracken had shown reasonable causes of action.

325 The Amended Revised List of Common Issues was as follows:

Common Issue One - Payment of Overtime Pay

1. Did the Class Members receive overtime pay and or holiday pay under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two - Breach of Contract

2.(a) What are the terms (express or implied or otherwise) of the Class Member's contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

Common Issue Three - Duties of the Defendant

3.(a) Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?

(b) If so, did the Defendant breach this duty?

(c) Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?

(d) If so, did the Defendant breach this duty?

(e) Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members to ensure that Class Members were properly classified?

(f) If so, did the Defendant breach this duty?

(g) Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?

(h) If so, what is the standard of care?

(i) Did the Defendant fall below the standard of care? If so how?

Common Issue Four - Unjust Enrichment

4.(a) Would the Defendant be enriched by (i) failing to compensate a Class Members

with pay or overtime pay for hours worked in excess of his or her standard hours of work, or (ii) failing to compensate the Class Member with holiday pay?

(b) If the answer to question 4(a)(i) or (ii) is "yes," would the Class Member suffer a corresponding deprivation?

(c) If the answer to question 4(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?

(d) If the answer to question 4(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

Common Issue Five - Damages or other Relief

5. If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

Common Issue Six - Punitive Damages

6. Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

326 With three reservations, Mr. McCracken adopted the Amended Revised List of Common Issues and asked that they be certified as common issues.

327 The first reservation was that Mr. McCracken urged the court that a common issue about the misclassification of the whole class should be certified as a common issue as initially submitted. The second reservation, which arose as a result of the discussion about the Amended Revised List of Common Issues, was that he submitted that there should be an additional common issue about how management status can be determined on a class-wide basis. The third reservation was that Mr. McCracken asked the Court to certify a common issue about the aggregate assessment of damages, which question had been removed in the Amended Revised List of Common Issues.

328 For its part, whether from the initial Revised List of Common Issues or from the Amended Revised List of Common Issues, CN disputes that any of the proposed questions are proper common issues.

329 CN submits that each question fails for one or more or all of the following reasons: (a) the question is not common to the Class; (b) it depends on individual findings of fact for each claimant; (c) it is not necessary to the resolution of each Class Member's claim; (d) its resolution would not significantly advance the litigation; and (e) it lacks a factual basis in the evidence.

Analysis of the Common Issues

Process of Elimination and Commentary

330 In my opinion, a process of elimination followed by some explanatory commentary reduces the size of the list of common issues from twenty-five to six certifiable questions.

331 From the initial Revised List of Common Issues, questions 1; 2; 3(a), (b); 4(a), (b), (c), (d), (e), (f), (g), (h), (i) and 7(a) are unacceptable as common issues on the grounds that these questions lack commonality or would depend on individual findings of fact for each claimant. In my opinion, these questions cannot be determined on a class-wide basis and rather require individual questions to be answered.

332 Recalling the discussion above about the some basis in fact test, as I attempted to demonstrate with my example about grade seven students, there are some questions that inherently require individual answers and not a collective answer. In the case at bar, the rights under Division I of Part III of the *Canada Labour Code* are not collective rights. As a group, first line supervisors are not entitled to the protections of the *Code*. Rather, first line supervisors are entitled to the protections of the *Code* as individuals, and their entitlements must be determined on an individual basis.

333 This is particularly true because how the *Canada Labour Code* determines whether a person is a manager (see the discussion above) depends upon who the person is as an individual in the organization (his or her role) and upon what he or she does as an individual in the organization (his or her potential and actual actions). The common label of being a first line supervisor tells almost nothing about entitlement under the *Code*.

334 My conclusion that proposed questions 1; 2; 3(a), (b); 4(a), (b), (c), (d), (e), (f), (g), (h), (i) and 7(a) lack commonality is supported by *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.), which was a proposed class action for unpaid overtime pay against an employer that, like CN, was subject to the *Code*.

335 In *Fresco*, unlike the case at bar, there was no issue that the plaintiff and the other Class Members were eligible to overtime pay. The problem in *Fresco* was that it was alleged that the defendant Canadian Imperial Bank of Commerce ("CIBC") had an illegal overtime policy that denied Class Members their wages for overtime work unless the work had been authorized. Justice Lax dismissed the motion for certification of the action as a class action. In the course of doing so, Justice Lax found that the central issue in the case could not be stated as a common issue because it lacked commonality. She concluded that the central issue, whether the employees had been unlawfully denied overtime pay, was an individual not a collective issue.

336 In *Fresco*, Justice Lax concluded that the CIBC's overtime policy, which required that overtime work be pre-approved, was not illegal, but for the purposes of discussing the common issue and the preferable procedure criteria, Justice Lax assumed that the policy was illegal. Notwithstanding that assumption, Justice Lax concluded that there was no asserted common issue capable of being determined on a class-wide basis that would sufficiently advance the litigation to justify certification. As Justice Lax analyzed the situation, the illegal policy was beside the crucial point which was whether CIBC had wrongfully denied Class Members their entitlement to overtime pay. The crucial point was not a point that could be as-

sessed in common. At para. 62 of her judgment, Justice Lax stated that: "This evidence shows a variety of individual circumstances that give rise to unrelated bases for unpaid overtime claims that can only be resolved individually by considering the evidence of the affiant advancing the claim, the evidence of various other current and former CIBC employees who managed and/or worked with that affiant, and various records maintained on a non-centralized basis by CIBC."

337 In *Fresco*, the illegality of the policy, which might be said to be common, did not change the individual nature of the claims. At para. 70 of her judgment, Justice Lax stated that the central flaw in the plaintiff's case is that instances of unpaid overtime occur on an individual basis. Much the same sort of thing may be said about the alleged illegality of CN's classifying the first line supervisors as managers. Ultimately, that illegality must be determined on an individual and not a common basis.

338 Moving on, from the initial Revised List of Questions, questions 4(e), (f), (g), (h) and (i) are unacceptable as common issues on the grounds that they are based on a cause of action that does not satisfy the first criterion for certification, which is to show a reasonable cause of action.

339 From the initial Revised List of Questions, questions 4(a), (b), (c), (d), (e), (f), (g), (h) and (i) are unacceptable on the grounds that the determination of the question is not necessary to the resolution of each Class Member's claim.

340 From the initial Revised List of Questions, questions 6 (b) and 7(b) and (c) are not acceptable on the grounds that an aggregate assessment of damages is not available in the circumstances of this case. (I will discuss the matter of an aggregate assessment further below.)

341 From the initial Revised List of Questions, question 7(a) is not acceptable because given the law about the availability of punitive damages, this question is not capable of being answered at the common issues trial. (I will discuss the matter of punitive damages further below.)

342 I turn now to the Amended Revised List of Questions.

343 From the Amended Revised List of Questions, questions 3(g), (h) and (i) are unacceptable as common issues on the grounds that they are based on a cause of cause that does not satisfy the first criterion for certification, which is to show a reasonable cause of action.

344 From the Amended Revised List of Questions, questions 3(a), (b), (c), (d), (e), (f), (g) and (i) are unacceptable on the grounds that the determination of the question is not necessary to the resolution of each Class Member's claim.

345 Save for the questions about an aggregate assessment of damages, I have not eliminated any questions from either list based on CN's objection that the question lacks a factual basis in the evidence. In this regard, I refer back to my discussion above about the evidentiary burden for certification. In my opinion, Mr. McCracken has met the low standard of showing that there is some basis in fact for his proposed common issues. I have eliminated questions

for other reasons that establish that Mr. McCracken has not met the legal burden for satisfying the criteria for a common issue.

346 By way of explanation and commentary, little more needs to be said about the elimination of questions that lack commonality and that cannot be answered on a class-wide basis. These questions are by definition not common issues. In this regard, *Macleod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331 (Ont. S.C.J.), is an example, like the case at bar, where finding the answer to the question of whether there were implied terms of contract would require individual determinations and thus the question was not a common issue.

347 Little also needs to be said about the questions eliminated because they are based on a cause of action that has been found not to be reasonable.

348 I will defer the explanation and the commentary about the questions about an aggregate assessment of damages to later in these Reasons for Decision. For the moment, I will simply remove these questions from the list.

349 By way of explanation and commentary about removal of the question concerning punitive damages, I rely on my judgment in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.), aff'd [2010] O.J. No. 3056 (Ont. Div. Ct.). I, however, have substituted a question, discussed below, about whether CN's conduct would justify an award of punitive damages.

The Approved Common Issues, Answers, and Commentary

350 With some refinements, with some more explanatory commentary, and subject to the matter of one additional question about how management status can be determined for FLSs on a class-wide basis, which question (Minimum Requirements for Manager Status) I will now add to the list, the above process of elimination yields, the list of six common issues set out below.

351 In my opinion, the following questions pass the test for certification as common issues; that is:

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 "employ-

ees 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?

352 The refinements are to: (a) Common Issue One, where the words "and/or holiday pay" have been deleted; (b) Common Issue Two, where the title has been changed from "Breach of Contract" to "Contract Terms" and where the reference to holiday pay has been removed and where I have substituted the words "by force of statute" for the words "(express or implied or otherwise)"; and (c) Common Issue Four where clause 4(ii) has been removed and the series of questions collapsed into a single question.

353 All of the above questions are necessary to the resolution of each Class Member's claim. Indeed, as I will explain, four of the six questions 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.

354 The answers to the remaining two questions, questions two and six, are not readily available, but they are common issues that would substantially advance the litigation for both parties and they would establish the foundation for individual issue trials that would be productive and manageable and that would provide access to justice fairly to both parties to the litigation.

355 The answer to question one is already known. It is not disputed that CN did not pay overtime pay to the first line supervisors. CN believed it did not have to do so, because it classified the first line supervisors as managers, which status is really what this litigation is all about.

356 In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.), Justice Winkler noted that a common issue of fact or law does not cease to be a common issue simply because the defendant concedes or admits the issue and that the issue should be included in the certification order in order to bind members of the Class, and, I would add, to bind the defendant and advance the litigation.

357 The answer to question two is also now known as a by-product of CN's motion under

rule 20.01(3)(a), which questioned the court's subject matter jurisdiction. 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 first line supervisors. Answering this question substantially advances the litigation and makes it unnecessary or moot to answer several factually or legally more difficult questions.

358 Questions 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.

359 The answers to questions one, two, four and five advance the litigation but the answers 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.

360 Question six about whether CN's conduct would justify an award of aggravated, exemplary or punitive damages is another subjunctive question. It can be extracted from the larger questions of whether punitive damages should be awarded and the quantification of those punitive damages. Question six can be answered at the common issues trial, where a trial judge could determine whether or not CN's conduct warranted punitive damages on the assumption that it breached the *Code* by failing to pay overtime pay to those first line supervisors who were not managers, which fundamental issue would again remain to be decided.

361 However, in the case at bar, the quantum of punitive damages cannot be rationally determined at the common issues trial. As I explain in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.), aff'd [2010] O.J. No. 3056 (Ont. Div. Ct.), an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the quantum of punitive damages is not greater than necessary to accomplish its purposes. In the case at bar, these factors will not be ascertained until after the common issues trial and after the individual liability and quantum issues are determined.

362 This brings the discussion to Common Issue Three - Minimum Requirements of Manager Status at CN which is the new question: "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?"

363 Common Issue Three asks a meta-question, a question about another question, and it avoids the problems of commonality of that other question, which is about the status of a Class Members as a manager or non-manager on a class-wide basis. As I have already explained, I agree with CN that the status of the first line supervisors as managers for the purposes of the *Code* cannot be determined on a class-wide basis because whether a person is a

manager is inherently an individual matter. However, I think that Common Issue Three, which is about the minimum standards for being a manager at CN, can be determined on a class-wide basis and can achieve a substantial advancement in the litigation for both the Class Members and for CN.

364 The determination of this question would not provide an answer to whether all the Class Members were or were not managers, but it would divide the whole class into three groups; namely; (1) Class Members who satisfy the minimum standards for being a manager at CN because of who they are and what they do; (2) Class Members who could not possibly satisfy the minimum standards for being a manager at CN; and (3) Class Members whose status as a manager at CN remained to be determined.

365 The *Class Proceedings Act, 1992* would provide the common issues judge with ample resources to address the remaining liability issues for the groups. The Act's resources ensure that the court has the means to conduct, manageable, cost-effective, and timely determinations of individual issues following the common issues trial: *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.) at para. 62.

366 More precisely, s. 25 of the Act states:

> 25(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
>
> (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
>
> (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
>
> (c) with the consent of the parties, direct that the issues be determined in any other manner.
>
> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

(7) A determination under clause (1) (c) is deemed to be an order of the court.

367 Using the resources of s. 25 of the *Class Proceedings Act, 1992*, the individual claims of Class Members of the first group would be dismissed because it could quickly be determined that the members of this group are managers and not entitled to overtime wages. The claims of the Class Members of the second group would move on to individual issue trials to quantify the amount of their claims for overtime pay. The individual claims of the Class Members of the third group would move on to individual issues trials to determine both whether they individually were a manager and also, if not so, what was the quantification of the claim for overtime pay.

368 A thought experiment about what could occur at a common issues trial is helpful in explaining why Common Issue Three is a suitable common issue. At the common issues trial, just as they did for the purposes of this certification motion, the parties would lead evidence about what it is to be a manager at CN. This evidence would be tendered to reflect the legal standard and relevant criteria for determining managerial status as it has been developed by the case law, discussed above, about the *Canada Labour Code.*

369 Based on the evidence adduced by both parties, the common issues judge could articulate a test or measure appropriate for the context of CN's business enterprise. The test or measure of a minimum standard would not require that the powers and responsibilities of FLSs as managers be identical.

370 For example, the common issues judge might decide based on the evidence presented by the parties that a manager at CN is a person who performed any one of the following roles at CN: (a) a leadership position representing CN at collective bargaining; (b) regularly representing CN at discipline or grievance procedures; (c) setting and administering a budget in excess of $10 million; (d) controlling day-to-day operations at a site employing more than 12 employees; (e) supervising and reviewing the performance of more than 12 subordinates with the authority to hire and fire them; or (f) dealing with emergencies. Or the common issues judge might decide based on the evidence that a manager at CN performed at least two of those roles or some other measurement that applied the *Code* to the factual circumstances at CN.

371 It may be noted that while the answer to Issue Three would ultimately divide the Class into three groups, until the question was answered all FLSs would have common cause to prove that the minimum standards for being a manager at CN were set high and thus no

FLSs qualified. That effort was demonstrated as a part of the certification motion, as was CN's determination to show that it was correct in classifying all FLSs as managers.

372 To return to the hypothetical example I used earlier in these Reasons for Decision, just as the question of what are the minimum requirements to pass from grade seven to grade eight may be stated as a class-wide question for all the students in the class, the question of the test or measure of who is a manager at CN can be stated on a class-wide basis. Based on this test, all the Class Members could be divided into the three groups that I have described above and the common issues judge could use the considerable resources of the *Class Proceedings Act, 1992* to achieve manageable individual proceedings.

373 Interestingly, determining what are the minimum *indicia* for who is a manager at CN would be the means that the parties themselves would use to settle their dispute, if they were inclined to do so. To settle this case, the parties would first have come to terms on a test to divide the Class Members into those who were or were not managers. Then, the parties would use that test to determine which Class Members were entitled to overtime pay. Once the number of Class Members who were entitled to overtime pay was determined, the parties could come to an agreement about the quantum of overtime pay. The last question would be how to distribute that sum across the Class, which would largely be a matter for Mr. McCracken and Class Counsel to determine. The Court would also have to approve the fairness and reasonableness of the settlement. This approach to settlement was successfully used in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.), an overtime pay case that was settled and not litigated.

374 In my opinion, the above list of six common issues satisfy the third criterion for certification of an action as a class proceeding.

Fresco and Fulawka and Commonality

375 Before concluding the discussion about common issues, it is necessary to make some additional comments about *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.), and [2010] O.J. No. 716 (Ont. S.C.J.), leave to appeal to the Div. Ct. granted, 2010 ONSC 2645 (Ont. Div. Ct.) of which there was a great deal of argument.

376 *Fresco*, *Fulawka*, and the case at bar share the circumstance that there was a great deal of contention and debate about whether the respective plaintiffs could state a common issue that would justify a class proceeding. As noted above, in *Fresco*, Justice Lax concluded that the plaintiff could not state a question with sufficient commonality. In *Fulawka*, as I will shortly explain in a little more detail, Justice Strathy distinguished *Fresco* and found several common issues that were appropriate for a class action. In the case at bar, I have found there to be several common issues that are appropriate for certification.

377 In arriving at my conclusions about commonality in the case at bar, I do not need to distinguish *Fresco*, with which I agree. The commonality analysis in *Fresco* is consistent with my own analysis. I simply certified a different list of questions as raising common issues and those questions avoid the commonality problems that troubled the plaintiff in *Fresco*.

378 I do, however, need to distinguish or disagree or reconcile my judgment with the judgment in *Fulawka* because Mr. McCracken relies on it as authority for the commonality of several questions that I have not certified. It is therefore necessary to resume the discussion and analysis of both *Fresco* and *Fulawka*. This discussion may begin by explaining how it is that Justice Strathy distinguished the *Fresco* case.

379 Both *Fresco* and *Fulawka* involved claims for unpaid overtime under the *Canada Labour Code*. There was no issue in either case about the eligibility of the class members for overtime, and both cases involved overtime policies that allegedly were being used in ways that were alleged to be unlawful and that were denying the employees overtime pay.

380 However, a major difference between the two cases was that in *Fresco*, Justice Lax found that a systemic class-wide wrong was neither pleaded nor shown to have some basis in fact. As described above, she therefore concluded that there were only individual claims lacking commonality for a class action. In contrast, in *Fulawka*, Justice Strathy found a pleaded cause of action in negligence and for breach of contract at a systemic level; *i.e.* at a class-wide level, and these causes of action provided the commonality for the common issues that he certified. The existence of a viable claim for systemic wrongdoing provided the basis for Justice Strathy to distinguish the *Fresco* judgment.

381 In *Fulawka*, in arriving at his conclusion that there was a systemic wrongdoing, Justice Strathy concluded that it was not plain and obvious that the defendant bank did not have a duty of care to the class members. In the case at bar, I assumed this to be the case as well, but I went on to decide that there are policy reasons to negate the duty of care. That argument was not made in *Fulawka*, where the claim in negligence is discussed in two short paragraphs, but the argument was made in the case at bar, and the existence of the argument suggests that the case at bar is distinguishable from *Fulawka* on the grounds that there is no systemic wrongdoing in the case at bar upon which to base commonality on a class-wide basis.

382 Thus, I have a way to distinguish *Fulawka*, but to be candid and fair to Mr. McCracken's argument that the questions he posed do have sufficient commonality, I have to do better than rely on the fact that his claims for systemic negligence have been struck out.

383 I, therefore, will be more direct and say that I do not see anything in *Fulawka* that refutes the analysis in the case at bar that the alleged wrongdoing was not a class-wide wrongdoing but rather was a wrongdoing perpetrated at an individual level when a first line supervisor who was not a manager or performing managerial functions was permitted or required to do overtime work and was not paid for it by CN in accordance with the *Canada Labour Code*. In the case at bar, the wrongdoing, which depends on the individual status of the first line supervisor, occurs at an individual level and there is no basis for commonality. If I am wrong and *Fulawka* stands against my analysis, then I disagree with the reasoning in *Fulawka* to the extent that it applies to the case at bar.

Fresco and Fulawka and the Commonality of Misclassification Cases

384 Finally, before concluding this discussion about commonality and moving on to ex-

plain why an aggregate assessment of damages is not an appropriate common issue for the case at bar, I will briefly comment on the submissions of the parties about the *Fresco* and *Fulawka* cases and the suggestion that misclassification cases are inherently amenable to certification as class actions.

385 Justice Lax in *Fresco* in Justice Strathy in *Fulawka* remarked that overtime misclassification cases are amenable to certification. Their comments were *obiter*, and in any event, the comments cannot be taken to be a categorical assertion that each and every misclassification case is inevitably appropriate and certifiable as a class action.

386 As it happens, the overtime wage claims in the case at bar are going to be certified as a class proceeding. That is no guarantee that the next overtime wage claim will pass all the criteria for certification as a class proceeding.

Aggregate Assessment of Damages

387 Mr. McCracken asked that four questions involving an aggregate assessment of damages be certified as common issues. I have decided that these four questions cannot be certified as common issues. In this section, I will explain why. I have two reasons.

388 Subsection 24 (1) of the *Class Proceedings Act, 1992* provides that in certain circumstances, the court may determine the aggregate of a defendant's liability to class members, and Mr. McCracken requested that the common issues include the following four questions: (1) Is the Defendant potentially liable on a class-wide basis? (2) If yes, can damages be assessed on an aggregate basis? (3) If yes, can aggregate damages be assessed on the basis of statistical evidence, including statistical evidence based on random sampling? and (4) What is the appropriate measure or procedure for distributing aggregate damages awarded to Class Members?

389 Mr. McCracken proposes an aggregate assessment of damages as a common issue based on a statistical analysis of a random sample of class members. The random sample would determine an average number of hours of uncompensated overtime for a first line supervisor.

390 CN's evidence from its expert witnesses was that the amount of overtime cannot be reasonably be determined in the aggregate.

391 It was CN's evidence that: (1) it would not be possible to gather accurate data; (2) if accurate data could be obtained, an aggregate assessment would still be subject to unacceptable error; (3) an aggregate assessment could not reasonably be conducted; and (4) distribution of an aggregate assessment on a *pro rata* basis would be unfair.

392 CN's expert, Dr. Colm O'Muircheartaigh, opined that: "it is not feasible to design and implement a survey of the members of the proposed class such that accurate and precise information can be obtained from them on their job responsibilities and the number of hours they may have worked in excess of 40 hours per week or 8 hours per day over the range of jobs they may have occupied and the periods of time during which they occupied them since July 5, 2002."

393 CN's other statistics expert, Dr. Elizabeth Becker, was also of the opinion that it would not be possible to gather accurate data in this case.

394 I accept, however, that Mr. McCracken submitted evidence from an expert in statistics that statistical random sampling can be used at the damages phase of this action and that Mr. McCracken has shown that there is some basis in fact that both an aggregate assessment and an averaged or proportional distribution could be efficiently and manageably conducted in this case. Under the law, I am compelled not to weigh the expert evidence at the certification hearing, and I must accept that Mr. McCracken's expert is correct and provides some basis in fact for an aggregate assessment of damages.

395 Further, I accept that if class-wide liability is a possibility, it is not objectionable that some individual class members would not be able to prove damages at individual trials. The Act anticipates in s. 24(3) that when a damages award is distributed, the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award.

396 I also accept that an aggregate assessment is a wonderful thing for the purposes of a class proceeding. If it is available, it virtually assures that a class proceeding will be the preferable procedure, and if it is available it provides great judicial economy. For what it is worth, I think, it would be a good thing if the common law substantively developed aggregate awards for mass wrongdoing.

397 The problem, however, remains that wishing for a wonderful thing does not make it so, and the requirements of the Act, which is a procedural statute, must be satisfied before there can be an aggregate assessment, so I turn to considering whether the preconditions for certifying an aggregate assessment as a common question have been satisfied in the case at bar.

398 My first reason for not certifying the above four questions is my opinion that the precondition set by s. 24 (1)(c) of the *Class Proceedings Act, 1992* for an aggregate assessment cannot be satisfied.

399 Subsection 24(1) of the *Class Proceedings Act, 1992* states:

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

400 In interpreting s. 24 (1), it needs to be kept in mind that the *Class Proceedings Act, 1992* is a procedural statute and it does not create substantive legal entitlements: *Bisaillon c. Concordia University*, [2006] 1 S.C.R. 666 (S.C.C.) at para. 22; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.); *Hislop v. Canada (Attorney General)*, [2009] O.J. No. 1756 (Ont. C.A.) at para. 57, leave to appeal ref'd [2009] S.C.C.A. No. 264 (S.C.C.).

401 In the case law, very little attention has been given to s. 24(1)(c) and, therefore, it is necessary to investigate its origin and to analyze its meaning. This investigation may begin with Chapter 14 of the Ontario Law Reform Commissions' *Report on Class Actions* (Ministry of the Attorney General: Toronto, 1982), where the Commission explored monetary relief in class actions, the aggregate assessment of damages, and the distribution of monetary awards after an aggregate assessment had been made.

402 In its report at p. 532, the Commission said it would consider the question whether and, if so, in what circumstances, the total amount of the monetary relief that is owing to class members may properly be determined as a common issue.

403 The Commission, at p. 532 of its report, defined an aggregate assessment as a determination in a single proceeding of the total amount of monetary relief to which the class members are entitled where the underlying facts permit this to be done with an acceptable degree of accuracy.

404 A reading of the chapter reveals that what the Commission meant by referring to "the total amount of monetary relief to which the class members are entitled" was that it meant a fair and more or less accurate assessment of the extent of the defendant's actual liability to the class members. Thus, at p. 548, the Commission states that "the proposed question should be whether the proposed procedure strikes an appropriate balance between the risk of imposing liability upon defendants for an amount that exceeds the injury actually inflicted and the possibility of denying recovery to persons who have been injured."

405 At p. 549 of its report, the Commission states: "The fundamental question that must be answered concerns the reliability of aggregate assessment as a means of determining the defendant's monetary liability."

406 The Commission, which eventually recommended that aggregate assessments be authorized by class action legislation, saw the solution to any problems with aggregate assessment to be that of ensuring that the evidence was sufficient so that the court could come to a fair assessment of the extent of the defendant's liability. If such evidence was available, then it would advance the access to justice, behaviour modification, and juridical economy purposes of class proceedings to permit an aggregate assessment. At p. 549, the Commission stated:

> Commentators agree that the defendant should have the opportunity to argue that the questions of damages are so individualized that a "gross award" cannot be calculated or that the specific evidence introduced is too inadequate to be relied upon. If, however, on the facts of the particular case, the court finds neither of these arguments persuasive, and concludes that the total liability of the defendant can be established by satisfactory evidence in com-

mon proceedings, it is argued that this is no more unfair to the defendant that the class treatment of other elements of liability.

407 Ultimately, in language that is quite similar to the language of s. s. 24(1) of the *Class Proceedings Act, 1992*, the Committee made its recommendation at p. 555 of its report and stated:

> Accordingly, the Commission recommends that, where monetary relief is claimed on behalf of members of the class [see now s. 24 (1)(a)], no questions of fact or law other than the assessment of monetary relief remained in order to be determined in order to establish the defendant's liability to some or all class members, [see now s. 24 (1)(b)] and the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by individual class members with the same degree of accuracy as in an ordinary action, the court should determine the aggregate amount of the defendant's liability and give judgment for that amount [see now s. 24 (1)(c)].

408 As appears, in enacting s. 24 (1)(c), changes made by the legislature from the recommendation of the Commission include changing:

> the total amount of the defendant's liability, or a part thereof ... can be assessed... with the same degree of accuracy as in an ordinary action

to:

> the aggregate or a part of the defendant's liability... can reasonably be determined.

409 From this analysis, it appears to me that the intent of the legislature was to adopt a liberalized version of the recommendation of the Law Reform Commission as to the accuracy of the aggregate assessment of the defendant's liability. The legislature's version is more liberal than the Commission's recommendation because "reasonably be determined" seems to be more flexible and generous than "assessed with the same degree of accuracy as in an ordinary action."

410 If I am correct in this interpretation of s. 24(1)(c), then I am persuaded by the evidence and the arguments of CN that its liability to some or all Class Members cannot reasonably be determined without proof by individual Class Members. I am further persuaded that that the aggregate of CN's liability cannot reasonably be determined by the survey techniques for which there is some basis in fact. In addition to the numerous concerns raised by CN's expert witnesses, common sense would indicate that an aggregate assessment of overtime to be reasonably accurate would have to somehow take into account exigencies since July 5, 2002 such as the idiosyncratic effects of economic conditions, special projects, and emergencies on whether overtime was required or permitted for first line supervisors. To return to the language used by the Ontario Law Reform Commission in its report, the questions of damages are so individualized that a gross award cannot be calculated and the specific evidence introduced is too inadequate to be relied upon.

411 In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at

para. 19, Justice Winkler discussed whether an aggregate assessment of damages was available in a case about personal injury and property damage claims. He stated:

> These claims cannot "reasonably be determined without proof by individual class members" as required by section 24(1)(c). Furthermore, each individual claim will require proof of the essential elements of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".
>
> In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and any other individual considerations.

412 Much the same thing can be said about the case at bar. The claims for overtime pay cannot reasonably be determined without proof by individual Class Members that their status as non-managerial employees caused them an entitlement to overtime wages. Each individual claimant would require proof of whether or not he or she was a non-managerial employee. Then, while it is already known that they all were not paid overtime in accordance with the *Code*, the quantification of damages would be idiosyncratic and depend upon whether the particular first line supervisor worked in excess of the standard hours of work and, if so, whether the employee was required or permitted to do so.

413 My second reason for not certifying the above four questions is that the precondition set by s. 24(1)(b) of the *Class Proceedings Act, 1992* for an aggregate assessment also cannot be satisfied in the case at bar.

414 Under s. 24 (1), an aggregate assessment is available after liability has been established. An aggregate assessment provides a method to assess the quantum of damages on a global basis but not the fact of damages having occurred: *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 49, aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at paras. 40 and 55, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.).

415 The aggregate damages provisions in s. 24 and the statistical evidence provisions in s. 23 cannot be utilized to show that class-wide injury can be proven as a common issue, nor can those provisions allow a plaintiff to avoid proof of class-wide injury, if he or she seeks an aggregate assessment of damages: *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2010] O.J. No. 2472 (Ont. S.C.J.) at para. 45.

416 However, for the purposes of certifying a common issue, the precondition of s. 24(1)(b) can be satisfied where potential liability can be established on a class-wide basis: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at paras. 46-48, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974 (Ont. S.C.J.) at para. 25.

417 In my opinion, however, in the case at bar, it cannot be determined at this juncture whether there is any potential for liability to be established on a class-wide basis. The case at bar is not a case where there is the possibility of determining that a breach of the employment contract has occurred across the class with just damages to be determined.

418 In the case at bar, the common issues trial will determine the circumstances when a breach of the employment contract would occur. Those circumstances, namely the situation of a first line supervisor not being a manager at CN and thus entitled to overtime pay, will be determined at the common issues trial, but the common issues trial will not determine whether there has been a breach of contract or class-wide liability or damages.

419 In effect, the common issues trial will determine the how but not the whether of breach of contract. In the case at bar, questions of fact or law associated with liability, namely questions about whether Class Members are not managers, will remain to be determined after the common issues have been determined. The questions that will remain after the common issues trial are not questions relating only to the assessment of monetary relief.

420 In the case at bar, damages will not be amenable to aggregate assessment at the conclusion of a common issues trial. I hasten to add that this is not fatal to certification of a class proceeding, and in my opinion, the six questions discussed above will substantially advance the class proceeding.

421 An analogy will help explain why I think that the preconditions for an aggregate assessment cannot be satisfied in the case at bar. If a passenger ship sank due to the negligence of its captain and its 1,550 passengers were rescued but suffered personal injuries, there could be a common issue about the aggregate assessment of the passengers' claim for a refund of the cost of their tickets because there would be a potential class-wide liability for breach of a contract for a safe voyage. However, there could not be a common issue for an aggregate assessment of damages for the 1,550 personal injury claims because personal injury damages are inherently individual and would remain to be determined at individual trails. By analogy, in the case at bar, there is no class-wide breach of contract and the predicate for liability, that is, whether a first line supervisor is not a manager, is inherently personal, and there is no potential for it to be proven on a class-wide basis and the common issues trial will not decide on a class-wide basis whether there has been a breach of the employment contract.

422 Strictly speaking, it is for the common issues judge to determine whether the conditions for an aggregate assessment have been satisfied because it will be he or she who makes the assessment. Nevertheless, the practice has developed to certify questions about an aggregate assessment of damages where the court on the certification motion believes that there is a reasonable likelihood that the three conditions to s. 24(1) will be satisfied at trial. In the case at bar, I do not have the basis for that belief.

423 It is for these two reasons that I have not certified the above four questions as common issues.

Preferable Procedure

Introduction

424 For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.).

425 Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

426 The determination of preferable procedure involves two major tests. The first test is whether a class proceeding would be a fair, efficient, and manageable procedure. The second test is whether a class proceeding is preferable to any alternative method of resolving the class members' claims. See *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 112 (Ont. S.C.J.).

427 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.).

428 Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

Evidentiary Background to the Preferable Procedure Dispute

429 There are two potential alternatives to class proceedings: (1) CN's internal dispute resolution process; and (2) the administrative process administered by Human Resources and Skills Development Canada.

430 CN offered evidence that it has an internal complaints process for its employees who may raise concerns with their immediate supervisor, with CN's Human Resources Department and confidentially with CN's Ombudsman. CN acknowledges, however, that its internal complaints process would not be a preferable procedure. Thus, a major issue to decide is whether

the administrative process under the *Code* or a court action is the preferable procedure to determine the Class Members' claims.

431 Part III of the *Canada Labour Code* establishes an administrative process for the recovery of unpaid wages, including overtime pay. It is enforced by Human Resources Skills Development Canada ("HRSDC"). I have already outlined several features of this administrative process earlier in these Reasons for Decision.

432 To these features, I add the following. Under Part III of the *Code*, both inspectors and referees may expand their inquiries to multiple employees. The *Code* affords inspectors the power to investigate beyond the complaint of a single employee and the HRSDC inspectors in practice do conduct group investigations and audits, and there was evidence that CN was the subject of a group audit as a result of a complaint single employee. Referees possess jurisdiction to make a party to the appeal any person who, or group that, in the referee's opinion has substantially the same interest as one of the parties and could be affected by the decision.

433 There was evidence provided by CN that three FLSs had made complaints about overtime that had been investigated and adjudicated by HRSDC. In each case, HRSDC decided the FLS was properly excluded from the *Code* based on the employee's managerial status.

434 However, Mr. McCracken submits that existing employees, who are without the protection of being unionized, are reticent to use the administrative process under the *Code* because of fear of reprisal if they brought an individual proceeding against CN. He presented evidence that there was a power imbalance and that individual employees do not have the resources to pursue complaints and that Class Members would require the assistance of a lawyer. He presented evidence that HRSDC does not have the resources to proactively pursue prosecutions against employers who do not comply with the *Code*.

435 To quote his factum, Mr. McCracken provided evidence that the administrative process under the *Code* "are not a reasonable, workable, or viable alternative for resolving Class Members' claims." He provided evidence that the "HRSDC process is incapable of addressing a substantial portion of Class Members' claims."

436 Mr. McCracken presented evidence to support the proposition that the alternative procedure of proceedings before the officials and tribunals of the *Canada Labour Code* would not remedy the systemic problem of unpaid overtime and would likely not be used by employees still employed by CN.

437 Professor Fudge gave evidence for Mr. McCracken. It was her opinion that the range of enforcement mechanism under the *Code* were inadequate to ensure compliance with Part III of the *Code* and that there were insufficient resources dedicated to the enforcement mechanisms. She opined that employees may be discouraged from complaining due to the associated costs and that the mechanisms in Part III of the *Code* were inadequate to protect employees against reprisals and that there was some evidence to suggest that fear of retaliation is of particular concern at CN.

438 Mr. McCracken relied on the opinion of Professor Harry Arthurs who was commissioned by the federal government in 2006 to prepare a report. In his report, *Fairness at Work, Federal Labour Standards for the 21st Century*, Professor Arthurs concluded that the *Code*'s enforcement system is inadequate and was not been used by employees.

439 Several of Mr. McCracken's deponents testified that they feared retaliation if they raised their grievances about overtime entitlements. Several deponents testified that they could not afford the costs of the administrative process under the *Code* and would be disadvantaged if they sought to pursue a claim without the assistance of a lawyer.

440 This evidence was matched by evidence from CN's affiants that they were not afraid of pursuing claims and by the evidence from the expert witnesses who conceded that there was no empirical evidence to support the alleged fear factor.

441 CN strongly denied the allegation that it operates in a "culture of fear" where employees do not enforce their employment rights because they are afraid of retaliation and reprisals. Several of CN's affidavits stated that he or she had have never been fearful of raising their concerns with their superior or upper management at CN.

442 Dr. Richard Chaykowski delivered an expert report for the certification motion. He was an expert witness for CN. It was his opinion that: "[t]he *Canada Labour Code* Part III and related regulations represent a reliable and effective means of accomplishing the government's objectives in regard to setting and achieving compliance with labour standards." He noted that there is no empirical research evidence that the current enforcement mechanisms are ineffective.

443 Professor, now Dean, Lorne Sossin also provided an expert opinion for CN. It was his opinion that Part III of the *Code* is a comprehensive and effective scheme enacted in the public interest. His opinion was that the mechanisms established under the *Code* represented Parliament's decision to promote and regulate fair, safe, health, and equitable environments and workplace practices through a comprehensive scheme. It was his view that the administrative process is more accessible, flexible, and responsive than the courts are in protecting employee rights. He disagreed with Professor Fudge who opined that the existing enforcement mechanisms and resources developed to enforcement were inadequate.

444 CN also countered Mr. McCracken's submissions with evidence to show that the administrative process under the *Code* was effective and had been used by CN employees, in both individual and group claims. It submitted that individual claims under the *Code* would be preferable to a class proceeding.

Analysis

445 At the outset of my analysis of the preferable procedure criterion, I wish to comment about what in my opinion is an unfortunate and unnecessary approach to preferable procedure that was used by Mr. McCracken and by CN in the case at bar.

446 It is my opinion that in the case at bar and in other cases an inappropriate use is made

of the so-called filters to determine whether a class action would be the preferable procedure. The filters are access to justice, behaviour modification, and judicial economy, and these factors are sometimes used by the parties in a way that diverts attention from the appropriate and central concerns of whether a class proceeding would be a fair, efficient, and manageable procedure and whether a class proceeding is preferable to any alternative method of resolving the class members' claims.

447 The unfortunate trend is that plaintiffs with the aid of the some basis in fact standard of proof feel the need to prove that: (a) adjudicators other than judges of the Superior Court are inefficient and under-resourced bureaucrats who are incapable of providing access to justice, behaviour modification, and judicial economy; and (b) the defendant is a despicable villain who requires behaviour modification and who is using its corporate might to avoid being brought before the seat of justice.

448 As demonstrated by twenty-six volumes of motion records or compendiums, these trends played themselves out in the case at bar, where Mr. McCracken attacked and maligned the administrative regime established by Part III of the *Canada Labour Code*. The goal, apparently, was to show that an underutilized administrative process under the *Code* was such a failure that it could not be a preferable procedure.

449 He also attacked the behaviour and the reputation of CN with the apparent goals of showing that: (a) CN was a ruthless, mean, powerful, and revengeful employer that needed behaviour modification; (b) CN and others like it needed to taught a lesson; and (c) CN could only be brought to justice through a class proceeding that would provide Class Members "collective strength and anonymity".

450 CN took the bait, and through the evidence of many affiants and of Dr. Richard Chaykowski and Dean Sossin, it spent a great deal of effort defending the availability, efficacy, advantages, resources, and fairness of the administrative process under the *Code*. And through the evidence of its own lay and expert witnesses, CN presented itself as an honourable employer who did not ruthlessly resort to reprisals nor seek to avoid having its employees have access to justice. Paragraphs 462 and 473 of CN's first factum are examples of the resulting argument. They state:

> 462. The advantages to an employee of the administrative wage recovery procedure under Part III of the *Code* are numerous: it is free; HRSDC will conduct the required investigation and issue orders without charge to the employee; in the event of dispute a quasi-judicial hearing is held, where costs may be awarded (but are virtually never awarded to the employer); and the resulting orders may be summarily filed and are enforceable as any court order. Similar advantages in proceedings under the *Employment Standards Act* rendered the class proceeding not to be a preferable procedure for the recovery of wages.
>
> 473. Moreover, there is no basis in fact to suggest a fear of retaliation at CN for the assertion of rights at CN. The only evidence of any actual possible reprisal concerns the Plaintiff's demotion to a unionized position following the commencement of this ac-

> tion. However, as demonstrated above in this Factum, the demotion was not an issue of reprisal, but rather a response to the fact that McCracken, a second level supervisor - more senior than an FLS - had breached the trust that CN places in its senior managers by not raising his concerns with CN senior management prior to launching the class action.

451 I do not propose to take the bait, because without in any way disparaging the work being done by the inspectors and referees under Part III of the *Canada Labour Code*, and without having to determine whether big corporate employers in general or CN in particular are rapacious villains, and whether the Class Members are cowering and intimidated victims of reprisals, furtively and anonymously seeking access to justice not available to them from the administrative process under the *Code*, it is plain to me that Mr. McCracken's class action with its six common issues coupled with the resources of s. 25of the *Class Proceedings Act, 1992*, would be the preferable procedure for resolving the claims of the 1550 Class Members.

452 The class action as it has now been structured will be manageable. It will provide access to justice and judicial economy and it will provide behaviour modification if that ultimately proves to have been necessary.

453 Like all of the criteria for certification, the preferable procedure criterion does not present a high hurdle for a plaintiff particularly when the resources of the *Class Proceedings Act, 1992* are added to the mix. In some types of case, the preferable procedure criterion, is no hurdle at all because it will be obvious just from the pleadings that a class proceeding would be the only way to provide access to justice, behaviour modification, and judicial economy.

454 The effort to vilify the defendant as an element of the preferable procedure criteria is often not necessary and it sometimes gets in the way of advancing or settling the action because the defendant who might be prepared to acknowledge liability for a civil misdeed may not be so ready to settle a claim of moral or criminal misconduct that would besmirch its reputation.

455 Proving behaviour modification is often unnecessary because in some cases, the defendant did not intend to do wrong and was not trying to get away with anything. For instance, in the case at bar, Mr. McCracken would have satisfied the preferable procedure criteria without showing some basis in fact that CN was a despicable boss that required behaviour modification.

456 If I were to assume that CN acted in good faith and had no intent to exploit, intimidate, or oppress the first line supervisors but simply made a mass mistake in thinking that the first line supervisors were managers, behaviour modification would not be a necessary ingredient for justifying a class action. The class action would still be preferable to the administrative process under the *Code* because a class action would provide access to justice and judicial economy for a mass mistake in an efficient and manageable way. The *Class Proceedings Act, 1992* was designed precisely to address mass wrongdoing.

457 I conclude, therefore, that Mr. McCracken has satisfied the preferable procedure cri-

terion of the test for certification.

Representative Plaintiff

Introduction

458 The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (Ont. S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (Ont. S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (Ont. C.A.).

459 Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (Ont. S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) at para. 55.

460 Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 41.

461 CN submits that Mr. McCracken's attitude towards his fellow Class Members, as evidenced by an e-mail to his now former co-workers, suggests that he is not an appropriate representative of the proposed Class, may not vigorously pursue Class Members' interests, and does not appreciate the responsibilities of his role, which is akin to that of a fiduciary.

Evidentiary Background to the Dispute about the Representative Plaintiff

462 Before his resignation, Mr. McCracken sent an e-mail message to Claude Mongeau, Chief Executive Officer of CN. In his message, Mr. McCracken accused his supervisors and managers, some of whom are putative Class Members, at the Toronto Rail Traffic Control Centre, of inadequate leadership, a lack of teamwork, and failing to provide positive feedback.

463 On the day of his resignation from CN, Mr. McCracken sent an e-mail to all CN Rail Traffic Controllers, Senior Managers and Chief Train Dispatchers in Toronto, some 80 persons, including 23 putative Class Members.

464 In his e-mail message, Mr. McCracken accused Rich Desforges, a former first line supervisor and now a second line supervisor of lying and duplicity in failing to support the

class action out of fear of harming his career. He refers to Crystal Garbut, a first line supervisor, as a "snake" and as "Old Teary Eyed" and says that she is incompetent and negligent in performing her duties.

465 It was an ill-tempered and self-indulgent departing shot.

466 Mr. Deforges intends to opt-out if the action is certified, and Ms. Garbut does not know if she will remain a Class Member if the action is certified.

Analysis

467 In my opinion, it is an overstatement for CN to suggest, as it does, that Mr. McCracken's animosity towards several members suggests that he will not fairly and adequately represent the whole class.

468 What Mr. McCracken did was rude and unprofessional, and while he ought not to have let his emotions have the better of him, in my opinion, his conduct does not warrant disqualifying him as a representative plaintiff. As Chief Justice McLachlin noted in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 41, the proposed representative plaintiff need not be typical of the class nor the best possible representative.

469 But for his verbal indiscretions aimed at some identified Class Members, there would be little to suggest that Mr. McCracken has not been able to carry out his responsibilities as a representative plaintiff or that he would not be able to carry out those responsibilities in the future for the class.

470 Mr. McCracken may have personality conflicts with several class members, but he has no conflict of interest in the sense that his claim or position in the class action is adverse in interest to those of the other Class Members.

471 Mr. McCracken was astute enough to hire seasoned class action counsel who are determined to establish overtime wage claims as appropriate for certification as a class action and to prosecute the litigation notwithstanding the resistance of equally seasoned and determined defence counsel.

472 I, therefore, conclude that Mr. McCracken is a suitable representative plaintiff.

The Litigation Plan

473 CN made a fulsome attack on Mr. McCracken's litigation plan. That plan, however, was based on the supposition that all of Mr. McCracken's causes of action and all his common issues would be certified, which is not what has occurred.

474 It is not necessary for me to discuss CN's objections because, I think, Mr. McCracken must go back to the drawing board and prepare a new litigation plan based on the outcomes of the motion and cross-motion.

475 Given the structure of the class action that will go forward, I do not foresee any insurmountable problem that would prevent a suitable litigation plan being drafted. I regard the outcome as producing a manageable proceeding.

476 In these circumstances, I grant certification subject to the condition that a litigation plan be settled, which I will do by case conference or by motion if necessary.

Conclusion

477 For the above reasons, I grant CN's motion in part and I dismiss it in part.

478 I grant Mr. McCracken's motion for certification with qualifications and conditions.

479 The parties may settle the terms of the court's certification order at a case conference, if necessary.

480 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. McCracken's submissions within 20 days of the release of these Reasons for Decision, followed by CN's submissions within a further 20 days.

481 I would appreciate it if the costs submissions would address the fact that Rule 57.01(4) provides that nothing in that rule or rules 57.02 to 57.07 affects the authority of the court to award or refuse to award costs in respect of a particular issue or part of a proceeding and to what I said in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2008] O.J. No. 2276 (Ont. S.C.J.) at paras. 20-25, rev'd on other grounds, [2009] O.J. No. 1874 (Ont. Div. Ct.), which was that in awarding costs under Ontario's *Class Proceedings Act, 1992*, the court should not only be sensitive to whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest, but the court should also keep in mind the purposes of the Act and be prepared to exercise its discretion about costs creatively and flexibly using all of the discretionary tools available. This may mean developing some hybrid and complex orders that preserve access to justice, including ordering costs in the cause or deferring an award of costs.

482 I thank counsel for their hard and superb work in assisting the Court in deciding the Rule 21 motion and the certification motion.

483 Orders accordingly.

Schedule "A"

Excerpts from the Canada Labour Code

With respect to Mr. McCracken's claim and to the issue of whether the Superior Court has subject matter jurisdiction, the most pertinent sections of the *Canada Labour Code* are as follows:

Definitions

3. (1) In this Part [Part I],

"employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations

Definitions

166. In this Part [Part III],

"employer" means any person who employs one or more employees; "general holiday" means New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for any such holiday pursuant to section 195;

"inspector" means any person designated as an inspector under section 249; "order" means any order of the Minister [of Labour] made pursuant to this Part or the regulations;

"overtime" means hours of work in excess of standard hours of work; "standard hours of work" means the hours of work established pursuant to section 169 or 170 or any regulations made pursuant to section 175;

"wages" includes every form of remuneration for work performed but does not include tips and gratuities;

Application of Part

167. (1) This Part [Part III] applies

(a) to employment in or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;

(b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (a);

(c) to and in respect of any employers of the employees described in paragraph (b);...

Non-application of Division I to certain employees

(2) Division I does not apply to or in respect of employees who

(a) are managers or superintendents or exercise management functions; or

(b) are members of such professions as may be designated by regulation as pro-

fessions to which Division I does not apply.

Saving more favourable benefits

168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

Standard hours of work

169.(1) Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

. . . . .

Maximum hours of work

171. (1) An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

Overtime pay

174. When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

Definition of "employed in a continuous operation"

191. In this Division, the expression "employed in a continuous operation" refers to employment in...

(b) any operations or services concerned with the running of trains, planes, ships, trucks and other vehicles, whether in scheduled or nonscheduled operations;....

Holiday work in continuous operation employment

198. An employee employed in a continuous operation who is required to work on a day on which the employee is entitled under this Division to a holiday with pay

(a) shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day;

(b) shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer; or

(c) shall, where a collective agreement that is binding on the employer and the employee so provides, be paid in accordance with section 196 for the first day on which the employee does not work after that day.

Holiday work for managers, etc.

199. Notwithstanding sections 197 and 198, an employee excluded from the application of Division I under subsection 167(2) who is required to work on a day on which the employee is entitled under this Division to a holiday with pay shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer.

Complaint to inspector for unjust dismissal

240. (1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer,... may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

. . . . .

Where complaint not settled within reasonable time

241(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

Reference to adjudicator

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear

and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

. . . . .

Where unjust dismissal

242(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Decisions not to be reviewed by court

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

No review by certiorari, etc.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

Enforcement of orders

244.(1) Any person affected by an order of an adjudicator under subsection 242(4), or the Minister on the request of any such person, may, after fourteen days from the date on which the order is made, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order, exclusive of the reasons therefore.

Idem

(2) On filing in the Federal Court under subsection (1), an order of an adjudicator shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order were a judgment obtained in that Court.

Civil remedy

246.(1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

Payment of wages

247. Except as otherwise provided by or under this Part, an employer shall

(a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and

(b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the entitlement to the wages or other amounts arose.

Inquiries

248. (1) The Minister [of Labour] may,

(a) for any of the purposes of this Part, cause an inquiry to be made into and concerning employment in any industrial establishment; and

(b) appoint one or more persons to hold the inquiry.

Inspectors

249.(1) The Minister [of Labour] may designate any person as an inspector for the purposes of this Part.

Powers of inspectors

(2) For the purposes of this Part and the regulations, an inspector may

(a) inspect and examine all books, payrolls and other records of an employer that relate to the wages, hours of work or conditions of employment affecting any employee;

(b) take extracts from or make copies of any entry in the books, payrolls and other records mentioned in paragraph (a);

(c) require any employer to make or furnish full and correct statements, either orally or in writing, in such form as may be required, respecting the wages paid to all or any of his employees, and the hours of work and conditions of their employment;

(d) require an employee to make full disclosure, production and delivery to the inspector of all records, documents, statements, writings, books, papers, ex-

tracts therefrom or copies thereof or of other information, either orally or in writing, that are in the possession or under the control of the employee and that in any way relate to the wages, hours of work or conditions of his employment; and

(e) require any party to a complaint made under subsection 240(1) to make or furnish full and correct statements, either orally or in writing, in such form as may be required, respecting the circumstances of the dismissal in respect of which the complaint was made.

Evidence in civil suits precluded

(7) No inspector, and no person who has accompanied or assisted the inspector in carrying out the inspector's duties and functions, shall be required to give testimony in any civil suit or civil proceedings, or in any proceeding under section 242 with regard to information obtained in carrying out those duties and functions or in accompanying or assisting the inspector, except with the written permission of the Minister.

Payment order

251.1(1) Where an inspector finds that an employer has not paid an employee wages or other amounts to which the employee is entitled under this Part, the inspector may issue a written payment order to the employer, or, subject to section 251.18, to a director of a corporation referred to in that section, ordering the employer or director to pay the amount in question, and the inspector shall send a copy of any such payment order to the employee at the employee's latest known address.

Where complaint unfounded

(2) Where an inspector concludes that a complaint of non-payment of wages or other amounts to which an employee is entitled under this Part is unfounded, the inspector shall so notify the complainant in writing.

Appeal

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

Appointment of referee

251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

(a) the payment order or the notice of unfounded complaint; and

(b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

. . . . .

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;

(b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

(c) award costs in the proceedings.

Order final

(6) The referee's order is final and shall not be questioned or reviewed in any court.

No review by certiorari, etc.

(7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.

Records to be kept

252.(2) Every employer shall make and keep for a period of at least thirty-six months after work is performed the records required to be kept by regulations made pursuant to paragraph 264(a) and those records shall be available at all reasonable times for examination by an inspector.

Offences and punishment

256. (1) Every person who

(a) contravenes any provision of this Part or the regulations, other than a provision of Division IX, subsection 252(2) or any regulation made pursuant to section 227 or paragraph 264(a),

(b) contravenes any order made under this Part or the regulations, or

(c) discharges, threatens to discharge or otherwise discriminates against a per-

son because that person

(i) has testified or is about to testify in any proceedings or inquiry taken or had under this Part, or

(ii) has given any information to the Minister or an inspector regarding the wages, hours of work, annual vacation or conditions of work of an employee, is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

Idem

(2) Every employer who contravenes any provision of Division IX or any regulation made pursuant to section 227 is guilty of

(a) an offence punishable on summary conviction and liable to a fine not exceeding ten thousand dollars; or

(b) an indictable offence and liable to a fine not exceeding one hundred thousand dollars.

Idem

(3) Every employer who

(a) refuses or fails to keep any record that by subsection 252(2) or any regulation made under paragraph 264(a) the employer is required to keep, or

(b) refuses to make available for examination by an inspector at any reasonable time any such record kept by the employer, is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars for each day during which any such refusal or failure continues.

Procedure

257.(1) A complaint or information under this Part may relate to one or more offences by one employer in respect of one or more of his employees.

Limitation period

(2) Proceedings in respect of an offence under this Part may be instituted at any time within but not later than three years after the time when the subject-matter of the proceedings arose.

Order to pay arrears of wages

258.(1) Where an employer has been convicted of an offence under this Part in re-

spect of any employee, the convicting court shall, in addition to any other punishment, order the employer to pay to the employee any overtime pay, vacation pay, holiday pay or other wages or amounts to which the employee is entitled under this Part the non-payment or insufficient payment of which constituted the offence for which the employer was convicted.

Reinstatement of pay and position

(2) Where an employer has been convicted of an offence under this Part in respect of the discharge of an employee, the convicting court may, in addition to any other punishment, order the employer

(a) to pay compensation for loss of employment to the employee not exceeding such sum as in the opinion of the court is equivalent to the wages that would have accrued to the employee up to the date of conviction but for such discharge; and

(b) to reinstate the employee in his employ at such date as in the opinion of the court is just and proper in the circumstances and in the position that the employee would have held but for such discharge.

When inaccurate records kept

(3) In determining the amount of wages or overtime for the purposes of subsection (1), if the convicting court finds that the employer has not kept accurate records as required by this Part or the regulations, the employee affected shall be conclusively presumed to have been employed for the maximum number of hours a week allowed under this Part and to be entitled to the full weekly wage therefor.

Civil remedy

261. No civil remedy of an employee against his employer for arrears of wages is suspended or affected by this Part.

Regulations

264. The Governor in Council may make regulations for carrying out the purposes of this Part and, without restricting the generality of the foregoing, may make regulations

(a) requiring employers to keep records of wages, vacations, holidays and overtime of employees and of other particulars relevant to the purposes of this Part or any Division thereof;

Motion granted with qualifications and conditions; cross-motion granted in part.

FN* Additional reasons at *McCracken v. Canadian National Railway* (2010), 100 C.P.C. (6th) 334, 2010 ONSC 6026, 2010 CarswellOnt 8330 (Ont. S.C.J.).

END OF DOCUMENT

TAB 22

1990 CarswellBC 216, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 117 N.R. 321, 43 C.P.C. (2d) 105, [1990] 6 W.W.R. 385, 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.O.H.S.C. 173, J.E. 90-1436

1990 CarswellBC 216, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 117 N.R. 321, 43 C.P.C. (2d) 105, [1990] 6 W.W.R. 385, 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.O.H.S.C. 173, J.E. 90-1436

Hunt v. T & N plc

CAREY CANADA INC. (CAREY-CANADIAN MINES LTD.) et al. v. HUNT, T & N plc and FLINTKOTE MINES LIMITED; FLINTKOTE MINES LIMITED et al. v. HUNT, T & N plc and CAREY CANADA INC.

Supreme Court of Canada

Lamer C.J.C.[FN*], Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

Heard: February 22, 1990
Judgment: October 4, 1990
Docket: Nos. 21508, 21536

Counsel: *J. Giles, Q.C.*, and *R. McDonell*, for Carey Canada Inc.

D.M.M. Goldie, Q.C., for Lac d'Amiante du Québec Ltée.

M. Koenigsberg, for National Gypsum Co.

D. Martin and *M.P. Maryn*, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.

J.A. Macaulay and *K.N. Affleck*, for T & N plc.

R. Ward and *S.E. Fraser*, for Flintkote Mines Limited.

J.J. Camp, Q.C., and *P.G. Foy*, for Hunt.

Subject: Torts; Civil Practice and Procedure; Labour and Employment

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Cause not known in law.

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Facts pleaded not supporting claim.

1990 CarswellBC 216, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 117 N.R. 321, 43 C.P.C. (2d) 105, [1990] 6 W.W.R. 385, 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.O.H.S.C. 173, J.E. 90-1436

Civil procedure — Pleadings — Striking out — No reasonable cause of action — Plaintiff suffering from disease allegedly caused by exposure to asbestos suing some defendants in negligence and alleging all defendants conspired to withhold information about dangers associated with asbestos — Defendant applying to have conspiracy action dismissed on grounds that statement of claim disclosed no reasonable cause of action — Action to be struck where it is "plain and obvious" statement of claim discloses no reasonable cause of action — Plaintiff's claim raising difficult points of law but still disclosing reasonable cause of action — Allegation of negligence not barring allegation of conspiracy — Determination of plaintiff's chance of success being improper on motion to strike.

The plaintiff was exposed to asbestos fibres during his employment as an electrician servicing various mining operations run by the defendants. He alleged that all of the defendants knew that asbestos could cause disease in those exposed to its fibres. In addition to suing the defendant mining companies for negligence, the plaintiff alleged that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of the conspiracy he contracted mesothelioma. One of the defendants applied to have the action against it, based solely on the conspiracy allegation, dismissed on the basis that it disclosed no reasonable claim. The trial judge allowed the motion. The Court of Appeal allowed an appeal from that decision stating that it was not possible at this stage of the proceedings to determine whether the facts supported an action in conspiracy. The defendants appealed.

Held:

Appeal dismissed.

The test to be applied to determine whether an action may be struck for disclosing no reasonable claim is to consider, assuming that the facts as stated in the statement of claim can be proved, whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action. If there is a chance that the plaintiff might succeed, then the plaintiff should be allowed to proceed to have the action tried. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect, such as those listed in R. 19(24) should the relevant portions of a plaintiff's statement of claim be struck for disclosing no reasonable claim.

Here, it was plain and obvious that allowing this action to proceed would not amount to an abuse of process. While there has clearly been judicial reluctance to extend the scope of the tort of conspiracy beyond the commercial context, this court has never suggested that the tort could not have application in other contexts. Further, although the view has been expressed that modern commercial realities suggest that the action has lost much of its usefulness, it would be highly inappropriate to deny the plaintiff the opportunity to present his case when his allegations expressly fit within the court's previous pronouncements on the law on civil conspiracy.

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justi-

fy striking out part of the statement of claim. On the contrary, if a statement of claim raises such points of law, then it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

A cause of action in conspiracy is not precluded on the ground that the plaintiff also alleges another cause of action. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be ascertained when it has first been established that the defendant did in fact commit the other alleged torts. Further, it is inappropriate on a motion to strike out a statement of claim to get into the question of whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence as to the other torts can be led and decided upon accordingly before turning to the determination of the tort of conspiracy.

Cases considered:

A.G. Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.] — *considered*

A.G. of Duchy of Lancaster v. London & North Western Ry. Co., [1892] Ch. 274 (C.A.) — *considered*

Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 145 D.L.R. (3d) 385, 72 C.P.R. (2d) 1, 47 N.R. 191 [B.C.] — *considered*

Drummond-Jackson v. Br. Medical Assn., [1970] 1 W.L.R. 688, [1970] 1 All E.R. 1094 (C.A.) — *considered*

Dumont-Jackson v. Can. (A.G.), [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159 — *considered*

Dyson v. A.G., [1911] 1 K.B. 410 (C.A.) — *considered*

Evans v. Barclays Bank & Galloway, [1924] W.N. 97 (C.A.) — *referred to*

Frank v. Smith, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40 — *distinguished*

Gilbert Surgical Supply Co. v. F.W. Horner Ltd., [1960] O.W.N. 289, 34 C.P.R. 17 (C.A.) — *considered*

Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark, [1899] 1 Q.B. 86 (C.A.) — *considered*

Kemsley v. Foot, [1951] 2 K.B. 34, [1951] T.L.R. 197, [1951] 1 All E.R. 331 (C.A.) [affirmed [1952] A.C. 345, [1952] 1 All E.R. 501 (H.L.)] — *referred to*

Lonrho v. Shell Petroleum Co., [1982] A.C. 173, [1980] 1 W.L.R. 627 (H.L.) — *considered*

McNaughton v. Baker, [1988] 4 W.W.R. 742, 25 B.C.L.R. (2d) 17, 28 C.P.C. (2d) 49 (C.A.) — *referred to*

Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563 — *referred to*

Metro. Bank, Ltd. v. Pooley, 10 App. Cas. 210, [1881-85] All E.R. Rep. 949 (H.L.) — *considered*

Minnes v. Minnes (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C.C.A.) — *considered*

Mogul S.S. Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598 [affirmed [1892] A.C. 25 (C.A.)] — *referred to*

Nagle v. Feilden, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 — *referred to*

Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 [Fed.] — *considered*

Peru Republic v. Peruvian Guano Co. (1887), 36 Ch. D. 489 — *considered*

R. v. Clark, [1943] O.R. 501, [1943] 3 D.L.R. 684 (C.A.) [leave to appeal to S.C.C. refused [1944] S.C.R. 69, [1944] 1 D.L.R. 495] — *considered*

Ross v. Scottish Union and National Ins. Co. (1920), 47 O.L.R. 308, 53 D.L.R. 415 (C.A.) — *considered*

Statutes considered:

Business Concerns Records Act, R.S.Q. 1977, c. D-12

Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66)

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 19(24) [am. B.C. Reg. 517/79]

Ontario Rules of Civil Procedure, O. Reg. 560/84

R. 21.01

Rules of the Supreme Court, 1883

O. 18, r. 19

O. 25, r. 4

Authorities considered:

Baker, An Introduction to English Legal History, 2nd ed. (1979), p. 69.Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C.L. Rev. 229, p. 254.Fridman, The Law of Torts in Canada (1990), vol. 2, pp. 265-66.36 Hals. (4th) 4, para. 2, n. 7.36 Hals. (4th) 26, para. 35, n. 5.MachLachlin and Taylor, British Columbia Practice, 2nd ed. (1979), vol. 1, p. 19-71.Milsom, Historical Foundations of the Common Law, 2nd ed. (1981), p. 72.

Appeal from judgment of British Columbia Court of Appeal, [1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*), setting aside judgment of Hollinrake J. dismissing action against one defendant for failing to disclose reasonable claim.

The judgment of the court was delivered by *Wilson J.*:

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

1. The Facts

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

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

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

16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.

17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.

18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.

19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

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

(a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;

(b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;

(c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

(d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and

(e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

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

(24) At any stage of a proceeding the court may order to be struck out or amended the

whole or any part of an endorsement, pleading, petition or other document on the ground that

(*a*) it discloses no reasonable claim or defence as the case may be, or

(*b*) it is unnecessary, scandalous, frivolous or vexatious, or

(*c*) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(*d*) it is otherwise an abuse of the process of the court,

and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) Supreme Court of British Columbia

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

> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey J. refers to the "predominant purpose" of the defendants' conduct [see *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 145 D.L.R. (3d) 385, 72 C.P.R. (2d) 1, 47 N.R. 191 [B.C.]]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in *Can. Cement LaFarge Ltd.*

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

(b) British Columbia Court of Appeal

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

8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal [[1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*)] and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

> (1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the market-

> place and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to the very different social considerations.
>
> (2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law: see *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122, 34 D.L.R. (2d) 497 (B.C.C.A.).

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

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

3. The Issues

10 The issues that arise in this appeal are:

11 1. *In what circumstances may a statement of claim (or portions of it) be struck out?*

12 2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

13

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

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

> 21.01 (1) A party may move before a judge,
>
> (*a*) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs; or

(*b*) *to strike out a pleading on the ground that it discloses no reasonable cause of action* or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(*a*) under clause (1)(*a*), except with leave of a judge or on consent of the parties;

(*b*) under clause (1)(*b*). [emphasis added]

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

(a) England

16 In *Metro. Bank, Ltd. v. Pooley*, 10 App. Cas. 210, [1881-85] All E.R. Rep. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even though there was no written rule stating that courts could do so. The Lord Chancellor noted that "[t]he power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure." That is, it was open to courts to ensure that their process was not used simply to harass parties through the initiation of actions that were obviously without merit.

17 Before the advent of the Supreme Court of Judicature Act, 1873, and the new Rules of the Supreme Court (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see 36 Hals. (4th) 4, para. 2, n. 7, and 26, para. 35, n. 5; Milsom, Historical Foundations of the Common Law, 2nd ed. (1981), at p. 72; and Baker, An Introduction to English Legal History, 2nd ed. (1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in *Pooley*, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4, of the 1883 Rules of the Supreme Court came into force:

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

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

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

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

19 In one of the better known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated (*Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86 at 91 (C.A.)):

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

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

ation at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial.

20 The Master of the Rolls had made this very point some six years earlier (*A.G. of Duchy of Lancaster v. London & North Western Ry. Co.*, [1892] 3 Ch. 274 at 276-77 (C.A.)):

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

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

21 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see *Dyson v. A.G.*, [1911] 1 K.B. 410 (C.A.); *Evans v. Barclays Bank & Galloway*, [1924] W.N. 97 (C.A.); *Kemsley v. Foot*, [1951] 2 K.B. 34, [1951] 1 T.L.R. 197, [1951] 1 All E.R. 331 (C.A.); and *Nagle v. Feilden*, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.). Lord Justice Fletcher Moulton's observations in *Dyson*, at pp. 418-19, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. *But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.* They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of

> law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. *To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.* [emphasis added]

22 A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in *Drummond-Jackson v. Br. Medical Assn.*, [1970] 1 W.L.R. 688, [1970] 1 All E.R. 1094 (C.A.). I note that in *Drummond-Jackson* the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C., O. 25, r. 4, in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

> 19. — (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (*b*) it is scandalous, frivolous or vexatious; or
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).

23 Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some 80 years earlier in *A.G. of Duchy of Lancaster*: length and complexity were *not* appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-1102:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases ...
>
> In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the evident intention of the rule

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

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

Salmon LJ said:

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

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

Lord Pearson concluded at p. 1102:

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

24 In England, then, the test that governs an application under R.S.C., O. 18, r. 19, has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of

the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

(b) Canada

(i) Ontario and British Columbia Courts of Appeal

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

Ontario

26 In Ontario, for example, the Court of Appeal dealt with R. 124 (the predecessor to R. 21.01) in *Ross v. Scottish Union and National Ins. Co.* (1920), 47 O.L.R. 308, 53 D.L.R. 415 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4, and read as follows:

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

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

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

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

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

28 At an early date, then, the Ontario Court of Appeal had modelled its approach to R. 124 on the approach that had been consistently favoured in England. And over time the

Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *R. v. Clark*, [1943] O.R. 501 at 515, [1943] 3 D.L.R. 684 (C.A.):

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

29 More recently, in *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289 at 289-90, 34 C.P.R. 17 (C.A.), Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

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

British Columbia

31 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122-23, 34 D.L.R. (2d) 497 (B.C.C.A.), Tysoe J.A. observed:

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

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

> I might add that upon the motion, with respect, *it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial.* All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was dis-

> closed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [emphasis added]

The law as stated in *Minnes v. Minnes* was recently reaffirmed in *McNaughton v. Baker*, [1988] 4 W.W.R. 742, 25 B.C.L.R. (2d) 17 at 23, 28 C.P.C. (2d) 49 (C.A.), per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on *Minnes v. Minnes* in this appeal.

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

(ii) Supreme Court of Canada

33 While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the court in *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.], stated:

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

34 I had occasion to affirm this proposition in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 [Fed.]. At pp. 486-87 I provided the following summary of the law in this area (with which the rest of the court concurred):

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

And at p. 477 I observed:

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

35 Most recently, in *Dumont v. Can. (A.G.)*, [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

36 Thus, the test in Canada governing the application of provisions like R. 19(24)(*a*) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(*a*).

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

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

38 In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt (*Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563 at 593, per Slade L.J.):

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

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defend-

ants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

39 In *Lonrho v. Shell Petroleum Co.*, [1982] A.C. 173, [1980] 1 W.L.R. 627, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

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

40 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fueled the development of the tort in the late 19th and early 20th centuries, namely, that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise" (see *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 616, per Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem*, [1901] A.C. 495, and accepted as good law in the *Crofter* case [1924] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

41 Having set out this groundwork and having thereby confirmed that the tort of conspir-

acy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

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

42 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in *Lonrho* (see *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, supra) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy." The Court of Appeal continued:

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

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

43 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in *Lonrho*. Indeed, this court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in *Lonrho* in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, supra. Justice Estey stated at p. 468:

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

44 This passage made clear that this court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the

defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

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

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) *where the conduct of the defendants is unlawful*, the conduct is directed towards the plaintiff (alone or together with others), and *the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.* In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [emphasis added]

46 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As G.H.L. Fridman has noted in The Law of Torts in Canada (1990), vol. 2, at p. 265:

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

Fridman goes on to observe at pp. 265-66:

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

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

47 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in *Can. Cement LaFarge Ltd.*, when he prepared paras. 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr.Hunt's statement of claim, it is certainly *not* that paras. 18 or 19 fail to follow the language of this court's most recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

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

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

49 Finally, the defendants point to my observations in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which a father was suing his former wife for denying him access to

his children. Although I was in dissent in the final result, the court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context" (at p. 124). I concluded that even though the tort could in theory be extended to the facts of *Frame*, it was not desirable to extend the tort to the custody and access context.

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

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

52 I note that in *Frame v. Smith*, at p. 126, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination" [p. 125]. But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has

some chance of success.

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

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

55 The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

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

57 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff *alleges* that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the *facts* as pleaded are true, I do

not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants') submission that "[u]pon proof of the commission of the tortious acts alleged" in para. 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

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

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

5. Disposition

60 The appeal should be dismissed with costs.

Appeal dismissed.

FN* Chief Justice at the time of judgment.

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TAB 23

2009 CarswellOnt 1985, 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947

Glover v. Toronto (City)

GERALD CLAYTON GLOVER, LINDA GLOVER, CACHITA WHITE by her Estate Representative CLARENCE WHYTE, CLARENCE WHYTE, ANNA RADA by her Estate Representative SONIA RADA, SONIA RADA, ADELINE DAVIDSON by her Estate Representative THOMAS DAVIDSON AND THOMAS DAVIDSON (Plaintiffs) and CITY OF TORONTO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (Defendants)

Proceeding under the Class Proceedings Act, 1992

Ontario Superior Court of Justice

Lax J.

Heard: September 16-18, 2008
Judgment: April 15, 2009
Docket: Toronto 05-CV-299031CP

Counsel: William V. Sasso, Sharon Strosberg for Plaintiffs

Robert W. Traves, Cheryl M. Woodin, Leslie Mendelson, Mark Skuce for City of Toronto

Kim Twohig, Lise G. Favreau for Her Majesty the Queen in Right of Ontario

Subject: Civil Practice and Procedure; Public; Torts

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease — When autopsy tests from deceased residents found Legionnaire's, Toronto Public Health offered treatment to staff and residents and shut down cooling tower and ventilation system for testing — Lab obtained Binax test kits and confirmed Legionnaire's, and samples from cooling tower matched samples from deceased — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation

plan — Statement of claim disclosed cause of action against city and province — Pleading of declaration that defendants were negligent and liable for damages was superfluous and added nothing to action, since same issues were raised by claim for negligence — Claim for declaration for vicarious liability was not duplicative, but was not well pleaded since it did not specify for whom city was vicariously liable, so leave was granted to amend — Pleading made out adequate claim for breach of contract, pleading that each resident entered into residence contract with city, which required city to reasonably maintain premises — Constituent elements of tort of negligence against province for use of ELISA test were adequately pleaded or could be readily inferred from allegations of fact.

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Class definition was appropriate — Plaintiffs proposed class of persons excluding defendants' employees who, between Sept. 1 and Oct. 13, 2005, lived, worked or visited at seniors home or within 3 km radius of it, and contracted Legionnaire's disease or Pontiac fever — Epidemiological investigation of class period identified total of 135 people infected, of which 38 were confirmed cases of Legionnaire's, while rest were probable cases of Legionnaire's or its milder form, Pontiac fever — Possibility that some class members would not be able to prove that they contracted either disease or, if they did, that it was from cooling tower source was no reason to reject class definition — Proposed class period was appropriate since there was evidence that first probable case could have been contracted as early as Sept. 1 — Class definition and period could not be defined more narrowly without arbitrarily excluding some potential members.

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Common issues were whether city and province owed duty of care, and if so, whether they breached standard of care, and whether city breached contract — Existence of issues as to city's conduct in design, maintenance and testing of cool-

ing tower had basis in fact and could be resolved on class-wide basis — Meaning of term in standard contract between seniors home and resident could be dealt with at common issues trial — Plaintiffs did not need to provide evidence that province's alleged delay in diagnosis caused harm, since causation and damages were individual issues — Focus of proposed common issues was conduct of defendants, and their resolution would eliminate need for separate adjudication on issues of duty and standard of care — Proposed common issue as to aggregate damages was not appropriate since causation would be individual issue.

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease — When autopsy tests from deceased residents found Legionnaire's, Toronto Public Health offered treatment to staff and residents and shut down cooling tower and ventilation system for testing — Lab obtained Binax test kits and confirmed Legionnaire's, and samples from cooling tower matched samples from deceased — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Enormous costs of marshalling necessary expert evidence would be deterrent to pursuing individual actions and would defeat objective of access to justice — Avoiding expensive, repetitive and time-consuming individual litigation with potential for conflicting findings advanced goal of judicial economy — Damage claims were likely to be modest, and most class members would likely find it uneconomical to pursue individual claims — Class proceeding had procedural advantages of discovery and case management — Individual causation and damages issues did not present overwhelming obstacles, being less complex than in other certified actions — Only class proceeding had potential to achieve goal of behaviour modification, by encouraging those responsible to take greater care, although goal had little applicability against province, which had already shifted to Binax test use.

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Proposed plaintiffs were estate representatives for residents who had died, one of whom was also probable case of Legionnaire's himself — Proposed plaintiffs also included superintendent of next-door building who was ill with Legionnaires, and his wife — Son's and superintendent's more difficult issues of causation as non-residents of home did not raise conflict of interest with other class members, since representative

plaintiffs need not be typical of class — Since differences did not impact common issues, they did not create conflict of interest — Reading transcripts of plaintiffs' affidavits and cross-examinations generously, proposed plaintiffs other than superintendent and wife understood they were representing class and had basic understanding of nature of claim — All other proposed plaintiffs had sufficient understanding and motivation to vigorously and capably prosecute claim.

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Proposed litigation plan provided sufficient detail of steps necessary to reach trial of common issues and dissemination of notice — Plan terminated representation of proposed class members at doorstep of individual assessment, with provision that class counsel had option to represent some class members in pursuing individual claims — Unexplained abandonment of class members at crucial juncture was deeply problematic, and provision raised troubling questions as to how counsel would decide to exercise option — In class proceeding, client did not have right to choose own lawyer or terminate retainer, and so class counsel could not unilaterally choose to terminate representation — Class counsel was bound to represent those class members who wished to pursue individual claims — Proposed abandonment of class members following determination of common issues was at odds with counsel's fiduciary duty — Counsel could address this issue at case conference, whether by amendment to plan or otherwise.

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

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease — When autopsy tests from deceased residents found Legionnaire's, Toronto Public Health offered treatment to staff and residents and shut down cooling tower and ventilation system for testing — Lab obtained Binax test kits and confirmed Legionnaire's, and samples from cooling tower matched samples from deceased — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Representative plaintiffs who were not residents of home did not have any conflict of interest with resident members class — Proposed plaintiffs were estate representatives for residents who had died, one of whom was also probable case of Legionnaire's himself — Representative plaintiffs also included superintendent of next-door building who was ill with Legionnaires, and his wife — Son's and superintendent's different and more difficult issues of causa-

tion did not raise conflict of interest with other class members, since representative plaintiff need not be typical of class — Since differences did not impact common issues, they did not affect ability to adequately and fairly represent class and did not create conflict of interest.

Cases considered by *Lax J.*:

Andersen v. St. Jude Medical Inc. (2003), 2003 CarswellOnt 3478, 38 C.P.C. (5th) 122, 67 O.R. (3d) 136 (Ont. S.C.J.) — referred to

Andersen v. St. Jude Medical Inc. (2005), 2005 CarswellOnt 318 (Ont. Div. Ct.) — referred to

Anderson v. Wilson (1999), 36 C.P.C. (4th) 17, 44 O.R. (3d) 673, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 122 O.A.C. 69 (Ont. C.A.) — referred to

Arabi v. Toronto Dominion Bank (2007), 2007 CarswellOnt 8294, 233 O.A.C. 275, 53 C.P.C. (6th) 135 (Ont. Div. Ct.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — followed

Cassano v. Toronto Dominion Bank (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. *Cassano v. Toronto-Dominion Bank)* 287 D.L.R. (4th) 703 (Ont. C.A.) — considered

Cassano v. Toronto Dominion Bank (2008), 2008 CarswellOnt 1729, 2008 CarswellOnt 1730 (S.C.C.) — referred to

Cloud v. Canada (Attorney General) (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — referred to

Cloud v. Canada (Attorney General) (2005), 2005 CarswellOnt 1866, 2005 CarswellOnt 1867, 344 N.R. 192 (note), [2005] 1 S.C.R. vi (note), 207 O.A.C. 400 (note) (S.C.C.) — referred to

Dumoulin v. Ontario (2005), 2005 CarswellOnt 4544, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72 (Ont. S.C.J.) — considered

Elliott v. Canadian Broadcasting Corp. (1993), 52 C.P.R. (3d) 145, 16 O.R. (3d) 677, 24 C.P.C. (3d) 143, 22 Admin. L.R. (2d) 272, 1993 CarswellOnt 492, 108 D.L.R. (4th) 385 (Ont. Gen. Div.) — referred to

Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155, 2002 CarswellOnt 3569 (Ont. S.C.J.) — referred to

Fehringer v. Sun Media Corp. (2003), 2003 CarswellOnt 3841, 39 C.P.C. (5th) 151 (Ont. Div. Ct.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Heward v. Eli Lilly & Co. (2007), 39 C.P.C. (6th) 153, 2007 CarswellOnt 611, 47 C.C.L.T. (3d) 114 (Ont. S.C.J.) — referred to

Heward v. Eli Lilly & Co. (2008), 2008 CarswellOnt 3837, 56 C.P.C. (6th) 309, 91 O.R. (3d) 691, 239 O.A.C. 273, 295 D.L.R. (4th) 175, 58 C.C.L.T. (3d) 99 (Ont. Div. Ct.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City))* 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City))* 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City))* [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City))* 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — referred to

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Hoy v. Medtronic Inc. (2003), [2003] 7 W.W.R. 681, 2003 CarswellBC 1290, 2003 BCCA 316, 183 B.C.A.C. 165, 301 W.A.C. 165, 14 B.C.L.R. (4th) 32 (B.C. C.A.) — referred to

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Lau v. Bayview Landmark Inc. (2004), 50 C.P.C. (5th) 113, 2004 CarswellOnt 2710, 71 O.R. (3d) 487 (Ont. S.C.J.) — considered

Lavier v. MyTravel Canada Holidays Inc. (2008), 2008 CarswellOnt 4088, 59 C.P.C. (6th) 57 (Ont. S.C.J.) — referred to

Lavier v. MyTravel Canada Holidays Inc. (2009), 2009 CarswellOnt 1688 (Ont. Div. Ct.) — referred to

LeFrancois v. Guidant Corp. (2008), 2008 CarswellOnt 2073, 56 C.P.C. (6th) 268 (Ont. S.C.J.) — considered

LeFrancois v. Guidant Corp. (2008), 2008 CarswellOnt 3566, 65 C.P.C. (6th) 32 (Ont. S.C.J.) — considered

Macleod v. Viacom Entertainment Canada Inc. (2003), 28 C.P.C. (5th) 160, 2003 CarswellOnt 305 (Ont. S.C.J.) — referred to

Markson v. MBNA Canada Bank (2007), 43 C.P.C. (6th) 10, 2007 ONCA 334, 2007

CarswellOnt 2716, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273, 224 O.A.C. 71, 85 O.R. (3d) 321 (Ont. C.A.) — considered

Mignacca v. Merck Frosst Canada Ltd. (2008), 2008 CarswellOnt 8813 (Ont. S.C.J.) — referred to

Peter v. Medtronic Inc. (2007), 50 C.P.C. (6th) 133, 2007 CarswellOnt 7975 (Ont. S.C.J.) — referred to

Peter v. Medtronic Inc. (2008), 2008 CarswellOnt 2759, 55 C.P.C. (6th) 242 (Ont. Div. Ct.) — referred to

R. v. Neil (2002), 317 A.R. 73, 284 W.A.C. 73, 168 C.C.C. (3d) 321, 6 Alta. L.R. (4th) 1, 6 C.R. (6th) 1, [2002] 3 S.C.R. 631, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, 2002 SCC 70, (sub nom. *Neil v. R.)* 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 294 N.R. 201 (S.C.C.) — referred to

Rumley v. British Columbia (2001), 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 10 C.C.L.T. (3d) 1 (S.C.C.) — referred to

Sauer v. Canada (Minister of Agriculture) (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — referred to

Sauer v. Canada (Minister of Agriculture) (2009), 246 O.A.C. 256, 2009 CarswellOnt 680 (Ont. Div. Ct.) — referred to

Serhan v. Johnson & Johnson (October 16, 2006), Doc. M33963 (Ont. C.A.) — referred to

Serhan Estate v. Johnson & Johnson (2004), 49 C.P.C. (5th) 283, 2004 CarswellOnt 2809, 11 E.T.R. (3d) 226, (sub nom. *Serhan (Estate Trustee) v. Johnson & Johnson)* 72 O.R. (3d) 296 (Ont. S.C.J.) — referred to

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

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

Smith v. National Money Mart Co. (2007), 2007 CarswellOnt 29, 29 E.T.R. (3d) 199, 37 C.P.C. (6th) 171 (Ont. S.C.J.) — considered

Smith v. National Money Mart Co. (2007), 2007 CarswellOnt 2177, 30 E.T.R. (3d) 163 (Ont. Div. Ct.) — referred to

Tiboni v. Merck Frosst Canada Ltd. (2008), 60 C.P.C. (6th) 65, 2008 CarswellOnt 4523, 295 D.L.R. (4th) 32 (Ont. S.C.J.) — referred to

Vezina v. Loblaw Cos. (2005), 2005 CarswellOnt 1942, 17 C.P.C. (6th) 307 (Ont. S.C.J.) — referred to

Ward-Price v. Mariners Haven Inc. (2004), 3 C.P.C. (6th) 116, 2004 CarswellOnt 2238, 71 O.R. (3d) 664 (Ont. S.C.J.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 24(1) — referred to

s. 25 — referred to

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

Generally — referred to

s. 61 — referred to

Homes for the Aged and Rest Homes Act, R.S.O. 1990, c. H.13

Generally — referred to

Rules considered:

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

R. 21.01(1)(b) — referred to

MOTION by plaintiff for certification of class action against city and province following outbreak of Legionnaire's disease at seniors home.

***Lax J.*:**

1 In September and October, 2005, there was an outbreak of Legionnaire's disease at the Seven Oaks Home for the Aged in Toronto. Seven Oaks is a long-term care facility owned and operated by the defendant City of Toronto ("Toronto"). The cause of the outbreak was ultimately determined to be *Legionella pneumophila* which was found in the cooling tower located on the roof at Seven Oaks. A total of 135 were infected: 70 residents, 21 visitors, 39 staff and 5 members of the community who lived or worked near Seven Oaks. Twenty-three residents died. The Legionnaires' outbreak was the first time since SARS in 2003 that Ontario faced the threat of an illness that could not be easily or quickly identified. For the first 10 days, the cause of the outbreak was unknown.

2 Investigation of the outbreak was managed by Toronto Public Health ("Toronto") which was assisted by the Central Public Health Laboratory of the Ontario Ministry of Health and Long Term Care ("Ontario"). The plaintiffs bring this action against Toronto and Ontario. They move to certify it as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992 c. 6. They seek to represent a class of persons (except Toronto or Ontario's employees) who lived, worked or visited at Seven Oaks or within a three kilometre radius of Seven Oaks between September 1, 2005 and October 13, 2005 and contracted Legionnaires' disease or Pontiac fever. In the proposed class action, the plaintiffs assert causes of action for negligence, breach of contract and declarations.

3 The plaintiffs allege that Toronto was negligent and in breach of contract because it failed to prevent the growth of Legionella in the cooling tower, resulting in the dissemination of *Legionella pneumophila* into Seven Oaks and the neighbourhood. They claim that as a result of Toronto's alleged negligence, class members were infected with Legionnaires' disease or Pontiac Fever and became ill or died.

4 The Central Public Health Laboratory was responsible for testing urine samples collected from residents and others in order to identify the cause of the outbreak. The plaintiffs allege that Ontario was negligent because it failed to use the correct test on the urine samples to identify the cause of the outbreak in a timely manner. In particular, the claim alleges that Ontario was negligent in using the 'ELISA' or in-house test to test for Legionnaires' disease and that it ought to have used the Binax test. The plaintiffs claim that as a result of Ontario's alleged negligence, class members did not receive timely appropriate treatment for Legionnaires' disease.

5 Subject to a serious concern I have about the litigation plan which will need to be addressed, I have concluded that this is an appropriate case for certification.

Background

6 *Legionella pneumophila* is a ubiquitous aquatic organism that causes 90% of the cases of the disease known as Legionellosis. Legionellosis takes two forms: a) Legionnaires' disease: a severe form of infection that causes pneumonia with symptoms of breathing problems, fever, chest pains and coughing: b) Pontiac fever: a milder respiratory illness that resembles acute influenza with symptoms of fever, muscle and joint aches, headache, cough, nausea and sore throat. Legionnaires' disease can be fatal for the elderly.

7 Infection is not transmitted from person to person, but is contracted by inhaling small droplets of water or aerosols containing *Legionella pneumophila.* Aerosolized bacteria are carried by wind currents from the source and are emitted into the atmosphere. It is an environmental disease. The most probable incubation period is two to ten days. The incubation period for Pontiac fever is much shorter, about four to sixty hours.

8 Beginning on October 1, 2005, urine samples of ill residents and staff members were submitted for testing to the Central Public Health Laboratory. ELISA urine antigen tests for Legionella were conducted. All samples came back negative. On October 6, 2005, cultures from autopsy lung tissues from three deceased residents tested positive for *Legionella pneumophila serogroup 1.* Based on the October 6, 2005 test results, Toronto Public Health announced that the likely cause of the outbreak was Legionnaire's disease. It offered prophylactic antibiotic treatment to all staff and residents. It ordered Seven Oaks to shut down its cooling tower and ventilation system for testing.

9 On October 21, 2005, *Legionella pneumophila serogroup 1* was positively identified as the source of the outbreak based on test results which matched samples from the cooling tower with samples of the cultured lung tissues from the deceased residents. Toronto Public Health issued a press release that explained how the disease spread. The press release stated:

> Lab tests showed that the cooling tower contained the same legionella bacterium found in samples taken from residents. An air intake is located near the cooling tower. Droplets containing the bacterium were spread through the Home by the air handling system. The disease then affected a vulnerable population of elderly residents as well as staff and visitors.

10 The ELISA test did not detect *Legionella pneumophila serogroup 1* in either the autopsy lung tissues or in the urine samples that were submitted for testing. Subsequently, the Central Public Health Laboratory obtained Binax test kits from hospitals in the United States on October 12, 2005, which confirmed *Legionella pneumophila* in the urine samples of the proposed representative plaintiffs, Anna Rada, Cachita White, Adeline Davidson and Gerald Glover. Anna, Cachita and Adeline were residents of Seven Oaks. Anna and Adeline died. Gerald and Cachita were hospitalized. The proposed representative plaintiff, Clarence Whyte is the son of Cachita White. Neither test confirmed *Legionella pneumophila* in his urine samples, although he was hospitalized with symptoms consistent with Legionnaires' disease.

11 Following the outbreak, the provincial government convened an expert panel to investigate the matter. The panel produced a report entitled "*Report Card: Progress in Protecting the Public's Health*" (the "Walker Report"). Its purpose was to assess the response to the out-

break.

Certification Requirements

12 Section 5(1) of the CPA sets out the criterion for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
>
> (c) the claims of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

13 The defendants vigorously contested certification on numerous grounds that are now familiar in contested class proceedings, including an overly broad class definition, lack of commonality, a failure to demonstrate that a class action is the preferable procedure and lack of evidentiary support for the certification requirements, in particular the proposed common issues.

14 The plaintiffs relied on affidavits from the proposed representative plaintiffs and produced the opinion evidence of Dr. Janet Stout, a microbiologist and Associate Professor and Director of the Special Pathogens Laboratory at the University of Pittsburgh. Dr. Stout has studied Legionnaires' disease for 25 years and has published widely on the subject. The defendants challenged the sufficiency of Dr. Stout's evidence and delivered responding affidavits from Dr. Paul Edelstein, Dr. Thomas Marrie and Dr. Donald Low. They are each experts in infectious diseases. Dr. Edelstein has particular expertise in Legionnaires' disease. The defendants criticized Dr. Stout's opinion on a number of grounds and ask me to conclude that there is no evidence or no admissible evidence to raise common issues against either defendant.

15 The plaintiffs have an evidentiary burden to show "some basis in fact" for each of the

certification requirements other than the requirement in section 5(1)(a) that the claim discloses a cause of action. "Some basis in fact" is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is. 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.

16 These thresholds do not have to be met on a certification motion as there is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action. As such, the court is required to assess whether there is 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 the behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para.14, leave to appeal to Div. Ct. refused, (Ont. Div. Ct.).

17 The essential issue to be resolved in this action is whether one or both defendants were negligent. I use that term loosely for the moment. If this action is certified, the plaintiffs will seek to prove at a common issues trial that Toronto owed a duty of care to the class in relation to the design, maintenance and testing of the cooling tower at Seven Oaks. They will seek to prove that Ontario owed a duty of care to the class, including those whose urine was tested at the Central Public Health Laboratory. They will seek to prove that both defendants breached a duty of care and that their conduct fell below the standard of care. On this motion, the plaintiffs have no obligation to do this. They are only required to show by some evidence that these issues can be resolved on a class-wide basis and that if they are set down for trial, their resolution will significantly advance the proceeding.

5(1)(a) - Disclosure of a Cause of Action

18 The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):

- no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25.

- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;

- the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi (note) (S.C.C.).

- matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 17(e).

• the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), at 679.

Toronto

19 Toronto does not dispute that there is a properly pleaded cause of action in negligence against it. It raises two issues. It disputes the plaintiffs' submission that the claim for declaration is a cause of action and denies that there is a properly pleaded claim in contract.

20 The declaratory relief sought by the plaintiffs in this case consists of a declaration that (i) the defendants were negligent and liable for damages, and (ii) a declaration that the defendants are vicariously liable in damages, although it is not specified for whom they are said to be vicariously liable.

21 A declaration is not a cause of action *per se*, but a remedy granted by a court when a plaintiff has established a breach - or a threatened breach - of his or her rights. Declarations are the relief sought, not causes of action: *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (Ont. Gen. Div.), at 696; see also, L. Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Carswell, 2007) at 1.[FN1]

22 In support of their inclusion of "declarations" as a cause of action, the plaintiffs rely on *Smith v. National Money Mart Co.*, [2007] O.J. No. 46 (Ont. S.C.J.) at paras. 22-25, 37 C.P.C. (6th) 171, leave to appeal refused, [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Ont. Div. Ct.) and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 (Ont. C.A.) at paras. 41 and 49. In both cases, the plaintiffs sought declarations that the fees charged by the defendant constituted a criminal rate of interest and that the agreements that they entered into with the defendant were therefore void. Declaratory relief was the only available means for enforcing the right asserted.

23 In this case, the plaintiffs have sued the City for negligence (an actual cause of action), and seek a remedy in damages. I agree with the submission of Toronto that the pleading of declaration that the defendants were negligent is superfluous and adds nothing to this action in the way of common issues. Any common issues raised by the pleading that the defendants were negligent and liable to pay damages are the very same issues raised by a pleading for a declaration that the plaintiff was negligent and liable for damages.

24 The claim for a declaration for vicarious liability in damages is not duplicative, but it is not well pleaded. Leave to amend is granted.

25 The thrust of the breach of contract claim is that Toronto failed to perform its contractual and statutory obligations to provide a safe and healthy environment for residents. It is pleaded that each resident class member, including three representative plaintiffs who were residents at Seven Oaks, entered into a standard form residence contract with Toronto, which expressly or implicitly required Toronto to maintain the premises, including the cooling tower and other systems to a standard reasonably required in the circumstances and that Toronto

failed to do this. I am satisfied that the pleading makes out an adequate claim for breach of contract.

Ontario

26 The nub of the claim against Ontario is its alleged negligent use of the ELISA test. Ontario disputes that the plaintiffs have sufficiently pleaded a claim in negligence against it and submits that pleas of breach of a standard of care and proximity are lacking. The claim makes the following allegations:

- the plaintiffs and class members were in a position of special reliance on the Central Public Health Laboratory to identify the cause of the outbreak.

- Ontario knew or should have known that the plaintiffs and class members would continue to be exposed to *Legionella pneumophila* and would not receive the most effective treatment until Legionnaires' disease was identified as the cause of the outbreak.

- Serogroup 1 is the most common and dangerous subtype of *Legionella pneumophila*. Ontario owed a duty of care to the plaintiffs and class members to identify Serogroup 1. It knew or ought to have known that the ELISA test failed to identify this subtype.

- Ontario was negligent in failing to discontinue use of the ELISA test and implement the Binax test. But for Ontario's failure to identify Legionnaires' disease earlier in the outbreak, the plaintiffs and class members would have received timely and effective antibiotic therapy tailored to Legionnaires' disease.

- Severely ill class members were not given Rifampin which is recommended for treatment of Legionnaires' disease.

- Class members and family class members have suffered loss and damage.

27 In my opinion, the constituent elements of the tort of negligence have been adequately pleaded or can be readily inferred from the allegations of fact.

5(1)(b) - Class Definition

28 Section 5(1)(b) requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of a class definition is (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para.10.

29 The plaintiffs propose the following class definition:

> Those persons who, in the Class Period, (excluding any of Toronto's and Ontario's employees) lived, worked or visited at Seven Oaks or within a radius of three kilometres of Seven Oaks, and contracted Legionnaires Disease or Pontiac Fever.

30 As well, there is a family class defined as:

A family member of a Class Member as defined by section 61 of the *FLA*.

31 The class period is defined as the period between September 1, 2005 and October 13, 2005.

32 Toronto Public Health conducted an epidemiological investigation of the outbreak that covers the period September 1 to October 13. The plaintiffs rely upon this for the purpose of defining class membership and class period. The epidemiological investigation identified a total of 135 people who were infected during the outbreak, including 70 residents, 39 staff, 21 visitors and 5 people who lived or worked near Seven Oaks. Once staff members are excluded, the class size is 97. Of this group, 38 were identified as cases of confirmed Legionnaires' disease. The remainder were either probable cases of the disease or were cases of probable Pontiac fever.

33 The defendants rely on evidence from Dr. Edelstein that the classification of affected persons for epidemiological purposes is not equivalent to the requirement to prove on a balance of probabilities that a particular individual was in fact infected with Legionnaires' disease by bacteria emanating from the Seven Oaks cooling tower. First, they point out that Legionella is ubiquitous and there were other Legionella sources in proximity to Seven Oaks, for example, the Shoniker building next door. The proposed representative plaintiff Gerald Glover was the superintendent of the Shoniker building and responsible for weekly inspections of its cooling tower, which was found to also have the Legionella bacteria, although it did not match the strain found in the Seven Oaks cooling tower.

34 Second, they argue that absent laboratory confirmation of Legionnaires' disease, it is likely that certain of the proposed class members actually contracted an unrelated illness, with similar clinical symptoms. For example, they say, the proposed representative plaintiff Clarence Whyte appears to fall into this category, as testing in his case was consistently negative for Legionnaires' disease.

35 They submit that the number of people who in fact contracted Legionnaires' disease from Seven Oaks will be much lower because there will be people within the proposed class who contracted the disease from somewhere else and because there will be people within the proposed class who, while they may have been sick with symptoms consistent with Legionnaires' disease, did not in fact contract the illness at all. They particularly object to the inclusion of Pontiac fever as there is no reliable laboratory test to diagnose it.

36 None of these arguments persuade me that the class definition as it relates to membership is improper. There is a basis in fact for believing that each of the representative plaintiffs may have contracted Legionnaires' disease from the Seven Oaks cooling tower. The fact that there may be another source for Legionnaires' disease is a matter to be pleaded in defence. That some class members will be unable to prove that they contracted either disease or, if they did, that it was from the cooling tower is not a reason to reject the class definition. A proper class definition does not need to include only those persons whose claims will be successful. As Cullity J. stated in *Tiboni*:[FN2]

> [78] ... In any class action involving claims in tort for personal injury or economic loss, it is possible that the claims of some class members will be unsuccessful. This is virtually ordained by the authorities that preclude merits-based definitions.

37 As to class period, Dr. Edelstein expressed the opinion that transmission began later than September 1 and ended earlier than October 13. However, his opinion is based on when the first *confirmed* case of Legionnaires' disease occurred and he does not take account of any cases of Pontiac fever. Allowing for the possibility that incubation periods can run longer than ten days as Dr. Edelstein acknowledged, the proposed class period is appropriate as there is evidence to show that the first case of probable Legionnaires' disease could have been contracted as early as September 1 if the incubation period was slightly longer than the norm. The shorter class period proposed by the defendants would satisfy the standard of medical certainty, but exclude some potential class members who might be able to satisfy the civil standard of proof on a balance of probabilities.

38 I agree with the plaintiffs that the proposed class definition and class period cannot be defined more narrowly without arbitrarily excluding some potential class members. The definition includes a type of harm (contracted Legionnaires' disease or Pontiac fever), but it is not overly broad compared to the interest that class members have in common. A proposed class definition that lacked this qualifier could well be criticized as too broad. The inclusion of community members does not trouble me. There is evidence that community members were infected. If they contracted Legionnaires' disease or Pontiac fever during the class period, they have the same interest in the resolution of common issues as visitors and residents. Each could advance an individual claim. On the record before the court, there is a basis in fact for concluding that for the proposed class period, class members have a claim against the defendants for which there would be common issues rationally connected to the class.

39 I think the wording of the class definition can be improved and will be clearer to potential class members if it read:

> Those persons (excluding employees of the City of Toronto and the Province of Ontario) who, lived, worked or visited at Seven Oaks Home for the Aged, 7 Neilson Road, Toronto, Ontario or within a radius of three kilometers, between September 1 2005 and October 13, 2005, and who contracted Legionnaires Disease or Pontiac Fever.

40 The definition of the family class can also be improved. It should track the language of section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and specifically identify the relationships to a class member.

41 Subject to these comments, I accept the proposed class definition.

5(1)(c) - Common Issues

42 For an issue to be common, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick*, at para. 18. An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant. *Fehringer v.*

Sun Media Corp., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Ont. S.C.J.), aff'd, 39 C.P.C. (5th) 151 (Ont. Div. Ct.). The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

43 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.

44 The plaintiffs ask the court to certify the following common issues:

> 1. Did Toronto owe a duty of care to the Class Members in relation to the design, maintenance and testing of the Cooling Tower at Seven Oaks Home for the Aged? If so, what was the standard of care? Did Toronto breach the standard of care? Was Toronto negligent and/or in breach of contract? If so, when and how?
>
> 2. Did Ontario owe a duty of care to the Class Members including those whose urine was tested at CPHL? If so, did Ontario breach the standard of care? Was Ontario negligent and if so, when and how?
>
> 3. Can the damages of the Class Members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?
>
> 4. Should one or both of the defendants pay punitive damages to the Class Members and Family Class Members, and if so, in what amount?
>
> 5. Should one or both of the defendants pay prejudgment interest to the Class Members and Family Class Members, and if so, at what annual rate?
>
> 6. Should one or both of the defendants pay to administer and distribute any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

45 The most significant of the common issues are Issues 1 and 2. In argument, the plaintiffs agreed that they do not require the negligence question and are content that it be deleted. As causation and damages are likely to be individual issues, a composite negligence question is inappropriate.

46 The defendants dispute that questions of duty and standard of care can be addressed on a class-wide basis. They say that different duties may be owed at different times to different class members or may not be owed at all. I do not find this argument persuasive. Common issues include common but not necessarily identical issues of law that arise from common but not necessarily identical facts. The *Class Proceedings Act* gives the court the flexibility to

deal with differentiation among class members. The trial judge has the power to adopt a nuanced approach and create subclasses when this is necessary: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.) at paras. 31-32.

47 The defendants' other objections to the certification of these common issues turn largely on the evidentiary requirement. This is addressed below.

Common Issue 1

48 Dr. Stout provided her opinion that the circumstances of the outbreak as described in the October 21 press release from Toronto Public Health strongly suggest that Toronto failed to implement reasonable maintenance and monitoring procedures in accordance with accepted industry standards (the "ASHRAE Guidelines") to minimize and control *Legionella pneumophila* in the cooling tower.

49 Toronto criticized Dr. Stout's opinion because "it lacks a sufficient factual basis." The Walker Report concluded that Toronto's maintenance of the cooling tower was acceptable. Toronto submits that this is "the only factual information about the City's conduct." I disagree. Dr. Stout's opinion was informed by the factors described in the press release and her expert knowledge of how Legionella develops, spreads, and can be controlled. It is true that her opinion is based on circumstantial evidence, but this is perfectly admissible evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) at §2.78.

50 Toronto contends that there continues to be "vigorous debate within the expert community about where Legionnaires' disease comes from." This surely is an issue for trial. On this motion, there is more than sufficient evidence to show that the source of this outbreak was the cooling tower at Seven Oaks and that Legionella was dispersed thorough an air intake valve located near the tower. There is evidence that as a result of the outbreak at Seven Oaks, some residents, visitors, staff and community members contracted or probably contracted Legionnaires' disease or Pontiac fever and became ill or died. Even without Dr. Stout's opinion, there is a basis in fact for the existence of issues that can be resolved on a class-wide basis to address Toronto's conduct in its design, maintenance and testing of the cooling tower at Seven Oaks.

51 I also reject Toronto's submission that I cannot certify the breach of contract claim as a common issue. The plaintiffs have produced evidence of a standard form contract between Seven Oaks and the representative plaintiff, Anna Rada. It incorporates a Residents' Bill of Rights as set out in the *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13, which the plaintiffs plead and rely on. Item 18 of the Bill of Rights, which forms part of the contract provides: "Every resident has the right to live in a safe and clean environment."

52 The plaintiffs will argue at trial that this is a contractual term to provide clean, uncontaminated air. Whether this term is found to be express or implied can be dealt with at a common issues trial because it applies to all residents and does not depend upon the individual knowledge, understanding or circumstances of each class member as in *Arabi v. Toronto*

Dominion Bank (2007), 233 O.A.C. 275, 53 C.P.C. (6th) 135 (Ont. Div. Ct.) and *Macleod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331, 28 C.P.C. (5th) 160 (Ont. S.C.J.). See also, *Lavier v. MyTravel Canada Holidays Inc.*, [2008] O.J. No. 2753, 59 C.P.C. (6th) 57 (Ont. S.C.J.) at para. 123, rev'd on other grounds, (Ont. Div. Ct.).

Common Issue 2

53 The negligence claim against Ontario has two parts: if Ontario had identified Legionnaires' disease earlier,

> (i) fewer people would have contracted the disease; and
>
> (ii) the representative plaintiffs and potential class members would have received appropriate treatment earlier.

54 Dr. Stout's evidence is that Serogroup 1 is by far the most common and dangerous pathogen causing Legionnaires' disease and that to the knowledge of the Central Public Health Laboratory, the Binax test was specifically developed for rapid identification of this subtype through a urine sample. There would appear to be no dispute in the evidence that early and appropriate antibiotic treatment reduces both disease severity and mortality and that Legionnaires' disease treatment delay adversely affects patient outcomes.

55 Ontario criticized Dr. Stout's "speculative statement" that the delay in identifying the cause of the outbreak caused an increase in morbidity and mortality. It produced evidence from Dr. Low and Dr. Marrie that an earlier diagnosis of Legionnaires' disease would have made no difference because the treatment for Legionnaires' disease and community acquired pneumonia ("CAP") are the same if physicians followed relevant guidelines for treating CAP. The Walker Report, on which Ontario relies, found nothing to criticize in the treatment that patients received. Thus, Ontario submits that even if it were found that Ontario fell below the standard of care in initially using the ELISA test, the plaintiffs have not put forward any evidence that this alleged failure was the cause of any damages or harm class members may have suffered.

56 There are two responses to this submission. First, the plaintiffs are not required to produce evidence on each element of a cause of action pleaded. One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged. Second, whether or not the delay caused harm to any class member is dependent on proof of causation and damages, which Ontario asserts are individual issues. The plaintiffs are only required to show some basis in fact for the existence of common issues.

57 Ontario has acknowledged that there was a 5-day delay in identifying Legionnaires' disease in the samples tested by the Central Public Health Laboratory and that it did not initially use the Binax test. The epidemiological curve in the Walker Report shows a sharp decrease in the number of new cases after October 1 (the first day the Central Public Health Laboratory received urine samples) but the same curve shows that some people could have been infected after October 1 based on an incubation period of 2 to 10 days.

58 I do not have to decide whether a court would conclude that Ontario has duties to some or all class members, but the facts presented by the case raise the question of whether Ontario knowingly or carelessly put class members into harm's way when the Central Public Health Laboratory failed to identify Legionnaires' disease on October 1. The cooling tower was not shut down until on or after October 6 and until then, there was continued exposure. As Legionella is carried by wind currents into the atmosphere, it is not known precisely when the risk of transmission ended. Toronto's expert, Dr. Edelstein, concluded that the transmission period likely ended October 1, but this is a question to be resolved at trial and not on this motion.

59 The focus of proposed common issues 1 and 2 is the conduct of the defendants. The answers to them are not dependent upon findings of fact that would have to be made with respect to each class member. Their resolution will eliminate the need for each class member to separately have these issues adjudicated. All class members share an interest in determining whether they are owed a duty of care and whether either defendant fell below a standard of care. No class member can prevail without showing this: *Rumley*, at paras. 27 and 34; *Cloud* at paras. 51-53, 65 and 66. The evidence shows that there is a basis in fact for the court to conclude that these issues can be resolved on a class-wide basis. The submissions of the defendants essentially addressed the weight to be accorded the evidence, and in particular, the opinion evidence of Dr. Stout. While the expert evidence adduced by the defendants may ultimately lead a court to conclude that the defendants have no liability for the outbreak or its consequences, this is not a matter that can be resolved on this motion.

60 Issues of duty, standard of care and breach of the standard of care have been certified as common issues in many other class proceedings where the essential ingredient of commonality was the defendant's alleged negligence.[FN3] As in those cases, a finding with respect to the duty of care and the breach would significantly advance this proceeding. There is of course the possibility, often ignored by the defendants on a certification motion, that they will be successful, bringing an end to the proceeding.

61 I approve common issues 1 and 2, amended to read:

> 1. Did Toronto owe a duty of care to the Class Members or any subclass or subclasses in relation to the design, maintenance and testing of the Cooling Tower at Seven Oaks Home for the Aged? If so, what was the standard of care? Did Toronto breach the standard of care? Was Toronto in breach of contract to residents of Seven Oaks? If so, when and how?
>
> 2. Did Ontario owe a duty of care to the Class Members or any subclass or subclasses including those whose urine was tested at CPHL? If so, what was the standard of care? Did Ontario breach the standard of care?

Common Issue 3

62 Common Issue 3 raises the question whether aggregate damages should be certified as a common issue. Strictly speaking, it is not necessary to state this as a common issue as this

determination is made by the common issues trial judge. It has become the practice to do this if the court is satisfied that that there is a reasonable likelihood that the preconditions in s. 24(1) of the Act can be satisfied: *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974, 17 C.P.C. (6th) 307 (Ont. S.C.J.) at para. 25; *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.) at para. 139; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401 (Ont. C.A.) at para. 45, leave to appeal to S.C.C. refused, (S.C.C.).

63 These conditions are (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.

64 This issue was addressed in *Bywater* where Winkler J. (as he then was) said at para. 18:

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

65 In my view, this is a case like *Bywater* where causation will be an individual issue. The amount of damages claimed by each class member will vary in accordance with their individual circumstances. Proof of loss will be individual. As I do not believe that there is any reasonable likelihood that conditions (b) and (c) can be met, proposed common issue 3 should not be included as a common issue.

66 Common issues 4, 5 and 6 were not seriously challenged and have been included as common issues in other cases: *Tiboni*, at para. 95; *Cassano*, at para. 72. I believe it is appropriate to include them in the issues to be tried.

67 The plaintiffs have satisfied this criterion for certification.

5(1)(d) - Preferable Procedure

68 This criterion requires a consideration of the extent to which the resolution of the common issues will achieve the three objectives of the *Class Proceedings Act*: access to justice, judicial economy and behaviour modification. It has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The preferability requirement can be met even where there are substantial individual issues to be resolved after the common issues trial as the preferability analysis is a quantitative and not a qualitative inquiry. The court is to assess the importance of the common issues in relation to the claim as a whole: *Cloud*, at paras. 73 - 75.

69 The core submission of the defendants is that the nature, complexity and difficulty of the individual issues will outweigh or overwhelm common issues such that the resolution of the common issues in favour of the plaintiffs would not advance the litigation to contribute in any meaningful way to the three goals of the Act. The only proposed alternative to a class proceeding is individual litigation. The defendants suggest that it would be feasible that those wishing to purse individual claims could proceed thorough the Simplified Procedure or the Small Claims Court. They submit that the policy objectives of access to justice and judicial economy are better served by these existing and available procedures.

70 In my opinion, this submission overlooks the enormous costs of marshalling the expert evidence that would be required to pursue this as an individual action. This is borne out by the evidence filed on this motion. The defendants emphasized the complexity of the medical evidence that would be required for individual trials. Clearly, this would be a deterrent to pursuing an individual action and would defeat the objective of access to justice. This result would immunize the defendants from liability for purely economic reasons. In contrast, the fixed costs of litigating the important common issues of duty of care, standard of care and breach will be shared among class members if the action is certified. These issues need only be litigated once, which improves access to justice: *Hollick*, at para. 15. As well, expensive, repetitive and time-consuming individual litigation with the potential for conflicting findings is avoided, advancing the goal of judicial economy.

71 The damage claims in this action are likely to be very modest. Close to half of the claims belong to quite elderly individuals: the average age of confirmed cases of Legionnaires' disease was 84.5 years; the median age of probable cases of Legionnaires' disease was 73 years. It is likely that most class members would find it uneconomical to pursue an individual claim. Moreover, a class proceeding has the procedural advantages of discovery and case management. These are not available in an action in the Small Claims Court or under the Simplified Procedure.

72 In *Cassano*, Chief Justice Winkler reminded us that section 25 of the CPA confers broad jurisdiction on the common issues trial judge to fashion procedures to facilitate the determination of individual claims where damages cannot be assessed in the aggregate as I expect will be the case here. As he noted, "the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice" (para.63). Otherwise, the goals of class proceedings will not be realized.

73 It bears repeating that idiosyncratic and difficult issues of causation and damages did not prevent certification in *Bywater*, *Cloud* and *Rumley* and in numerous other cases of medical complexity such as *St. Jude*, *Medtronic*, *Tiboni* and *LeFrancois*. Similar arguments as to the significance and difficulty of the individual issues were made and rejected in these cases. I believe that this case is quite a bit less challenging in respect of the individual issues that will remain. As Legionnaires' disease is a reportable disease, a great deal of the evidence, including medical evidence, that will be necessary to adjudicate the individual claims is already available. Toronto Public Health took active steps to identify potential cases at the time and investigated all reported cases. I do not see the individual causation and damage issues presenting the overwhelming obstacles predicted by the defendants.

74 The nature and complexity of the causation and damages issues in the individual claims are not similar to those faced in *Dumoulin v. Ontario*, [2005] O.J. No. 3961, 19 C.P.C. (6th) 234 (Ont. S.C.J.). There, the court expressed concern about proving causation and damages in claims for exposure to toxic mould by occupants of a court house over a five year period because the health consequences of exposure to mould were matters of considerable scientific and medical controversy. Consequently, there was no scientifically-justified basis for treating the proposed class members as having a common disorder with a common cause. Unlike *Dumoulin*, there is a scientific basis for treating the proposed class members as having a common disorder with a common cause. Moreover, this is a focused class with a small number of members whose harm is alleged to have occurred over a short period of time.

75 The 1982 *Report of the Ontario Law Reform Commission on Class Actions* recognized at p. 269 that "mass accident" cases would be based primarily on common law negligence and were appropriate for class treatment, notwithstanding the individual issues that would remain:

> ... although the Commission recognizes that, in the majority of cases, individual assessment of damages will be required, an expanded class action procedure could achieve economies for both the parties and the courts by determining in one proceeding the same basis factual and legal issues that would have to be litigated several times, and deferring individual issues for subsequent resolution.

76 Finally, only a class proceeding has the potential to achieve the goal of behaviour modification. The elderly are at greater risk of developing Legionnaires' disease when exposed to *Legionella pneumophila*. A successful prosecution of this action will encourage those who are responsible for their well-being to take greater care in preventing an outbreak, which can have serious consequences for them and for others who are exposed. I agree that behaviour modification is not a driving feature of the claim against Ontario as following the outbreak the Central Public Health Laboratory started using the Binax test as well as the ELISA test to screen for Legionnaires' disease. Currently it only uses the Binax test as the supply of antibodies required to produce the ELISA test is unavailable. However, a class proceeding will meet the other objectives of the CPA. I find that a class proceeding is a fair, efficient and manageable method of advancing the claim and is the preferable procedure to resolve the claims of class members.

5(1)(e) - a Representative Plaintiff with a Workable Litigation Plan

Representative plaintiffs

77 Gerald Glover, Cachita White, Clarence Whyte, Anna Rada and Adeline Davidson ask to be appointed representative plaintiffs for the primary class consisting of persons who contracted Legionnaires' disease or Pontiac fever during the class period. Cachita White, Anna Rada and Adeline Davidson were residents of Seven Oaks. Each was diagnosed with Legionnaires' disease. Only Cachita survived the disease. Anna died on October 6, 2005. Adeline died on October 28, 2005. Cachita died of other causes in October 2007. Clarence Whyte is Cachita's son and was a regular visitor at Seven Oaks. He is listed as a "probable case of Legionnaire's disease" in the epidemiological study compiled by Toronto Public Health.

78 Gerald Glover was the superintendent at the Shoniker building, a residential building for senior citizens located next door to Seven Oaks. On October 5, 2005, Gerald became extremely ill and was hospitalized. Subsequent testing confirmed that he was infected with Legionnaires' disease. Linda Glover is his wife. Sonia Rada, Clarence Whyte and Thomas Davidson bring the action as estate representatives. Ms Rada, Mr. Davidson and Ms Glover bring derivative claims under the *Family Law Act*, R.S.O. 1990, c. F.3.

79 The defendants objected to the suitability of the proposed representative plaintiffs for two reasons: (i) the non-resident members of the class, including Mr. Glover and Mr. Whyte, have or may have a conflict of interest with the resident members of the class and (ii) none of the proposed representative plaintiffs have adequate knowledge of the action and an adequate understanding of the role and responsibilities of a representative plaintiff.

80 As to the first objection, the defendants argue that because Mr. Glover and Mr. Whyte have different and more difficult issues of causation to contend with than do resident members of the class, this raises a conflict of interest. I do not accept this argument. A representative plaintiff need not share every characteristic of every member of the class or be typical of the class: *Western Canadian Shopping Centres* at para. 41. As well, if the differences between the situation of the representative plaintiff and the class members do not impact on the common issues, then the differences do not affect the plaintiff's ability to adequately and fairly represent the class and they do not create a conflict of interest: *Hoy v. Medtronic Inc.*, 94 B.C.L.R. (3d) 169, [2001] B.C.J. No. 1968 (B.C. S.C. [In Chambers]) at paras. 83-85, aff'd, 14 B.C.L.R. (4th) 32 (B.C. C.A.). The fact that these plaintiffs may face more difficult issues of causation does not impact on their ability to represent the class on the common issues.

81 As to the second objection, the proposed representative plaintiffs have each sworn affidavits attesting to their understanding of the major steps in the class action and the responsibilities of a representative plaintiff. They each depose that they are willing to perform these responsibilities. As a result of their cross-examinations, the defendants put their ability to do this in issue.

82 I have carefully reviewed the affidavits and the cross-examination transcripts of each of the proposed representative plaintiffs. In my opinion, it is incumbent on the court to read the transcripts generously. Cross-examination can be an intimidating experience for litigants, particularly those who are unsophisticated. Before concluding on the suitability of a proposed representative, the court must ensure that the questions asked by cross-examining counsel have been put clearly and fairly.

83 Whether a proposed representative plaintiff can provide adequate representation was addressed by Chief Justice McLachlin in *Western Canadian Shopping Centres* at para 41:

> ... In assessing whether the proposed representative plaintiff 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 class members). 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 (citation omitted).

84 In order to be satisfied that a proposed representative will vigorously and capably prosecute the interests of the class, I would expect a representative to have, as a minimum, an understanding that they are representing a class and a basic understanding of the nature of the claim. I am satisfied that with the exception of Mr. and Mrs. Glover, the proposed representatives more than satisfy this criterion. I am also satisfied that each has the motivation to vigorously and capably prosecute the claim. It is not an objection to their adequacy that none had reviewed the Walker Report or the affidavits of the defendants' experts. When read in context, their evidence on cross-examination demonstrates a sufficient understanding of this action and of their roles in it.

85 Unfortunately, Mr. and Mrs. Glover do not cross this threshold. They appear to have no appreciation that they are representing a class. Nor do they understand the nature of the plaintiffs' complaints against Toronto and Ontario. Both thought the claim was about late notice of the outbreak and that they are involved in the litigation to further their individual interests. I am not persuaded that either is a suitable representative plaintiff.

86 I appoint Cachita White, Anna Rada and Adeline Davidson by their respective estate representatives as representatives for class members. I appoint Sonia Rada and Thomas Davidson as representative plaintiffs for family class members.

Litigation Plan

87 The proposed litigation plan provides sufficient detail of the steps that will be necessary to reach a trial of common issues as well as the dissemination of notice. Should the common issues trial be determined in favour of the plaintiffs, the court will be asked to appoint an Administrator who will, *inter alia*, determine eligibility of class membership, and to appoint a Referee(s) to review any issues as to eligibility and to conduct damages assessments for some class members. The common issues judge will be asked to give directions as to a hearing or hearings for the adducing of generalized evidence about the nature of Legionnaires' disease and Pontiac fever and other topics which shall be applicable to all references.

88 The plan contemplates the possibility of categorizing and assigning a minimum damage assessment in accordance with a grid, but it also contemplates that there will be hearings of individual issues before a Referee(s). So, for example, if the common issues trial judge decides that causation is an individual issue, there will be hearings before a Referee and the trial judge will give directions as to whether and when the Referees' hearings may be in writing or when a hearing with oral evidence is necessary depending on the nature and the complexity of the claim. The plan proposes that all individual issues will be decided by a Referee(s). The court will be asked to authorize the Referees to hold hearings to allow class members to adduce general and expert evidence which may be applicable to some or all individual hearings.

89 Finally, the plan contemplates that the defendants will be participants at each stage of the adjudication of any individual issues, including class membership eligibility, hearings on causation, and damages assessments. Notably absent, however, is class counsel. The litigation

plan terminates the representation of proposed class members at the doorstep of individual assessments. As individual assessments of relatively modest claims are likely to be necessary in this class proceeding, the unexplained abandonment of class members at this crucial juncture is deeply problematic.

90 Under the heading, "Class Counsel Fees and Administration Expenses", the plan provides that the court will be asked to fix the amount of class counsel fees and to direct the Administrator and defendants to pay the fees "out of the monies recovered or owing" as a first charge and to fix the costs of the Administrator and the Referees and to order payment by the defendants as a second charge. It then provides:

> 68. Class counsel's retainer does not include representation of each individual Class Member or Family Class Member in pursuing their claims after the determination of the common issues. However, Class counsel will make every effort to secure representation for those Class members who request legal assistance, including the option to represent some Class Members and Family Class Members in pursuing their claims.

91 This provision raises a number of troubling questions. How will any class member be able to adduce general and expert evidence, including evidence about the nature of Legionnaires' disease and Pontiac fever at a hearing before the Referee without legal representation? What is the basis on which class counsel will decide whether to exercise "the option" to represent some class and family members, but not others? Is it contemplated that class counsel can choose to pursue the economically viable claims and abandon the rest? If class counsel does not exercise "the option", but is successful in securing legal representation for those class members who request it, what will be the arrangement for the sharing of fees? Is any lawyer likely to accept a retainer on behalf of a class member when class counsel fees are to be a first charge on any amount recovered or owing?

92 There is little doubt that if this action is certified, a solicitor-client relationship will exist between counsel for the representative plaintiffs and the members of the class. Justice Nordheimer addressed this issue in *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (Ont. S.C.J.):

> [7] ... I have earlier expressed the view that there is no solicitor and client relationship between counsel for the representative plaintiff and members of the proposed class prior to the certification of the action as a class proceeding - see *Pearson v. Inco* (2001), 57 O.R. (3d) 278 (S.C.J). At the same time, it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of a class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably".

93 Justice Nordheimer was analyzing the nature of the relationship between class counsel and class members after certification, but before the expiry of the opting out period. In *Lau v.*

Bayview Landmark Inc., 71 O.R. (3d) 487 (Ont. S.C.J.), Cullity J. held that this analysis applied, *a fortiori*, where the opting out period has expired.

94 In a class proceeding, a client does not have a right to choose his or her lawyer or have a right to terminate the retainer. If a class member is dissatisfied with counsel of record, he or she may opt out of the class, but by the time this proceeding reaches the stage of individual assessments, that time will have long passed. In my opinion, class counsel cannot unilaterally choose to terminate representation, but is bound to represent those class members who wish to pursue individual claims on the same basis as the retainer agreement provides until the class member or the court directs otherwise. It seems to me that the proposed abandonment of class members following the determination of common issues is completely at odds with the fiduciary duty that a lawyer has to a client, which includes the duty of loyalty: *R. v. Neil*, [2002] 3 S.C.R. 631 (S.C.C.). It is also completely at odds with the goals of class proceedings. Earlier I made reference to Chief Justice Winkler's remarks in *Cassano* and I repeat them here: "the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice". I am not satisfied that this goal can be achieved under the litigation plan that has been put forward.

95 At the hearing, plaintiffs' counsel provided me with a supplementary brief of authorities which includes the litigation plans in *LeFrancois* and *Tiboni* and the supplemental reasons of Cullity J. in *LeFrancois v. Guidant Corp.* In that case, the plaintiffs were successful in having the action certified if satisfactory amendments were made to the plaintiffs' litigation plan. The defendants challenged the adequacy of the amendments and the hearing of the certification motion resumed.

96 In supplemental reasons, reported at [2008] O.J. No. 2402 (Ont. S.C.J.), Cullity J. describes the plaintiffs' revised litigation plan as consisting of two documents of which one - a Revised Compensation Plan - is a schedule to the other and incorporated in it. Unfortunately (and I believe inadvertently), the document provided to me purporting to be the *LeFrancois* litigation plan bears no resemblance to this. Nonetheless, I have reviewed both plans, which I presume were given to me as precedents. As far as I can tell, neither plan has a comparable provision to the one in issue here. If the court has approved a litigation plan with a similar provision, I am not aware of it.

97 I therefore invite counsel to address this issue. Upon being satisfied of the concern I have raised, whether by amendment to the plan or otherwise, a certification order will issue in accordance with these reasons. Unless one of the parties requires a hearing, I am content to have this addressed at a case conference at which time a schedule for costs submissions can also be settled.

Order accordingly.

FN1 "The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights."

FN2 *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, (Ont. S.C.J.).

FN3 *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, *Andersen v. St. Jude Medical Inc.* (Ont. Div. Ct.); *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828, 50 C.P.C. (6th) 133 (Ont. S.C.J.), aff'd 55 C.P.C. (6th) 242 (Ont. Div. Ct.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404, 39 C.P.C. (6th) 153 (Ont. S.C.J.), aff'd (2008), 91 O.R. (3d) 691 (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397, 56 C.P.C. (6th) 268 (Ont. S.C.J.); *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), aff'd (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.), leave to appeal to *Serhan v. Johnson & Johnson* (October 16, 2006), Doc. M33963 (Ont. C.A.), leave to appeal to S.C.C. refused, [2007] 1 S.C.R. x (note) (S.C.C.).

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TAB 24

2011 CarswellOnt 6829, 2011 ONSC 4257, 107 O.R. (3d) 201

Pennyfeather v. Timminco Ltd.

St. Clair Pennyfeather, Plaintiff and Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmelbusch, Robert Deitrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich, and John P. Walsh, Defendants

Ontario Superior Court of Justice

Perell J.

Heard: June 29, 2011
Judgment: July 13, 2011
Docket: 09-CV-378701CP

Counsel: Won J. Kim, Victoria Paris, for Plaintiff

Alan D'Silva, Lesley Mercer, for Defendants Timminco Limited, Heinz Schimmelbusch, Rene Boisvert, Robert Dietrich, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich

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

Civil practice and procedure --- Pleadings — Application for particulars — Grounds for ordering particulars — General principles.

Cases considered by *Perell J.*:

Abdulrahim v. Air France (2010), 2010 CarswellOnt 5320, 2010 ONSC 3953, 99 C.P.C. (6th) 254 (Ont. S.C.J.) — referred to

Andersen v. St. Jude Medical Inc. (2006), 2006 CarswellOnt 5612, 33 C.P.C. (6th) 159 (Ont. Master) — considered

Andersen v. St. Jude Medical Inc. (2006), 2006 CarswellOnt 9773, 63 C.P.C. (6th) 328 (Ont. S.C.J.) — referred to

Antonacci v. Great Atlantic & Pacific Co. of Canada Ltd. (2000), 2000 CarswellOnt 61, 48

C.C.E.L. (2d) 294, 181 D.L.R. (4th) 577, 2000 C.L.L.C. 210-010, 128 O.A.C. 236 (Ont. C.A.) — considered

Balanyk v. University of Toronto (1999), 1 C.P.R. (4th) 300, 1999 CarswellOnt 1786 (Ont. S.C.J.) — referred to

Blatt Holdings Ltd. v. Traders General Insurance Co. (2001), 6 C.P.C. (5th) 174, 27 C.C.L.I. (3d) 308, 2001 CarswellOnt 782 (Ont. S.C.J.) — referred to

Canadian Imperial Bank of Commerce v. Deloitte & Touche (2008), 2008 CarswellOnt 4983, 47 C.B.R. (5th) 39 (Ont. S.C.J.) — considered

CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), (sub nom. *Mondor v. Fisherman)* 15 C.P.R. (4th) 289, 18 B.L.R. (3d) 260, 8 C.C.L.T. (3d) 240, 2001 CarswellOnt 4206 (Ont. S.C.J.) — referred to

Copland v. Commodore Business Machines Ltd. (1985), 52 O.R. (2d) 586, 3 C.P.C. (2d) 77, 1985 CarswellOnt 410 (Ont. Master) — referred to

Curry v. Advocate General Insurance Co. of Canada (1986), 9 C.P.C. (2d) 247, 1986 CarswellOnt 617 (Ont. Master) — referred to

Fairbairn v. Sage (1925), [1925] 2 D.L.R. 536, 56 O.L.R. 462 (Ont. C.A.) — referred to

George v. Harris (2000), 2000 CarswellOnt 1714 (Ont. S.C.J.) — referred to

Henrickson v. Henrickson (1962), [1962] O.W.N. 75 (Ont. H.C.) — referred to

Hughes v. Sunbeam Corp. (Canada) Ltd. (2000), 2000 CarswellOnt 4614, 2 C.P.C. (5th) 335, 11 B.L.R. (3d) 236 (Ont. S.C.J.) — referred to

Hughes v. Sunbeam Corp. (Canada) Ltd. (2002), 2002 CarswellOnt 2919, 28 B.L.R. (3d) 1, 61 O.R. (3d) 433, 165 O.A.C. 68, 25 C.P.C. (5th) 230, 219 D.L.R. (4th) 467 (Ont. C.A.) — referred to

Hughes v. Sunbeam Corp. (Canada) Ltd. (2003), [2003] 1 S.C.R. xi (note), 2003 CarswellOnt 1925, 2003 CarswellOnt 1926, 189 O.A.C. 200 (note), 320 N.R. 193 (note) (S.C.C.) — referred to

Jane Doe v. Escobar (2004), 2004 CarswellOnt 2659 (Ont. Master) — referred to

L. (T.) v. Alberta (Director of Child Welfare) (2010), 492 A.R. 394, 2010 ABQB 203, 2010 CarswellAlta 543 (Alta. Q.B.) — referred to

Lana International Ltd. v. Menasco Aerospace Ltd. (1996), 28 O.R. (3d) 343, 1 O.T.C. 298, 1996 CarswellOnt 1534 (Ont. Gen. Div.) — referred to

Magill v. Expedia Canada Corp. (2010), 2010 ONSC 5247, 2010 CarswellOnt 7160, 1 C.P.C. (7th) 129 (Ont. S.C.J.) — referred to

Obonsawin v. Canada (2001), [2001] 2 C.T.C. 96, 2001 CarswellOnt 306, [2001] G.S.T.C. 26 (Ont. S.C.J.) — referred to

Ontario (Minister of Health) v. Wilston (1975), 11 O.R. (2d) 631, 1975 CarswellOnt 973 (Ont. Dist. Ct.) — referred to

Physicians Services Inc. v. Cass (1971), [1971] 2 O.R. 626, 1971 CarswellOnt 655 (Ont. C.A.) — referred to

Queen v. Cognos Inc. (1993), 1993 CarswellOnt 801, 1993 CarswellOnt 972, D.T.E. 93T-198, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — followed

Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality) (1990), 1990 CarswellOnt 701, 12 O.R. (3d) 750 (Ont. H.C.) — referred to

Romagnuolo v. Hoskin (2001), 2001 CarswellOnt 3183 (Ont. S.C.J.) — referred to

Steiner v. Lindzon (1976), 1 C.P.C. 237, 14 O.R. (2d) 122, 1976 CarswellOnt 296 (Ont. H.C.) — referred to

Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd. (1991), 3 O.R. (3d) 684, 1991 CarswellOnt 895 (Ont. Gen. Div.) — referred to

Thermionics Ltd. v. Philco Products Ltd. (1940), 1940 CarswellNat 40, (sub nom. *Philco Products Ltd. v. Thermionics Ltd.)* [1940] S.C.R. 501, (sub nom. *Philco Products Ltd. v. Thermionics Ltd.)* [1940] 4 D.L.R. 1 (S.C.C.) — referred to

Wood Gundy Inc. v. Financial Trustco Capital Ltd. (1988), 26 C.P.C. (2d) 274, 1988 CarswellOnt 379 (Ont. Master) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2003), 2003 CarswellOnt 5808 (Ont. Master) — considered

Statutes considered:

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

Generally — referred to

s. 2(3) — considered

s. 5(1) — considered

s. 5(1)(a) — considered

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

Generally — referred to

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

Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

Rules considered:

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

Generally — referred to

R. 25.06(1) — considered

R. 25.06(8) — considered

R. 25.10 — considered

***Perell J.*:**

A. Introduction

1 The Defendants, Timminco Ltd., Dr. Heinz Schimmelbusch, Robert Dietrich, Rene Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey M. Yaksich, (the "Timminco Defendants") bring a motion for particulars of the Plaintiff St. Clair Pennyfeather's Amended Statement of Claim in a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

2 With a few exceptions, Mr. Pennyfeather and his predecessor plaintiff, Mr. Sharma, refused to provide particulars after the Timminco Defendants served a Demand for Particulars that contained some 58 requests. Mr. Pennyfeather now resists the motion for particulars.

3 In resisting the motion, Mr. Pennyfeather's two major arguments raise doubts about the convention that a defendant in a class action is not required to deliver a pleading until after the certification motion.

4 Mr. Pennyfeather's first major argument is the categorical argument that since particulars of a Statement of Claim are ordered only if the defendant shows that he or she needs the particulars in order to plead and since pre-certification, the Defendants are not yet pleading a defence, therefore, the Timminco Defendants do not need particulars and, thus, their motion for particulars is premature. He also submits that ordering the plaintiff before certification to provide particulars would not advance the proceeding, would provide a tactical manoeuvre for defendants, and would delay the hearing of the leave and certification motion, causing prejudice to the plaintiff and class members.

5 Mr. Pennyfeather's first argument has some added weight because of the circumstance that his proposed action includes a claim under Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c.S-5, for which leave is required to bring the claim. Thus, his argument goes that since a Statement of Defence cannot be delivered until the matter of leave is determined, it is premature for a defendant to demand

particulars.

6 As a second and alternative major argument, Mr. Pennyfeather submits that if in the case at bar, the demand for particulars is not premature, then, the Defendants have not satisfied the test for the court to order particulars because the Defendants did not deliver an affidavit attesting to their need for the particulars and the evidentiary record for the certification and leave motion reveals that they do not need any more information from Mr. Pennyfeather.

7 As will be seen in the discussion that follows, the Defendants have answers to Mr. Pennyfeather's arguments. The Defendants. main answers are that while, technically, they do not need the particulars to plead, they eventually will need the particulars, and, in any event, they need particulars now in order to know the case they must meet for the imminent certification and leave motion, which they do not seek to delay.

8 Therefore, I conclude that the Defendants. Demand for Particulars should be determined on its merits. In this regard, I conclude that the Defendants. proper demands for particulars should be answered by Mr. Pennyfeather. I say proper demands, because some of the 58 demands are overbroad or not proper demands for particulars, and I will need to specify what demands should be answered. Further, some of the Defendants. demands are mischaracterized as a demand for particulars but reveal different problems with Mr. Pennyfeather's Statement of Claim that require attention.

9 Thus, for the reasons that follow, I grant the motion for particulars. However, as a term of my order, I direct that after the particulars are delivered, the Timminco Defendants must deliver a Statement of Defence. As I will also explain in my Reasons for Decision, it is time to revisit the convention that defendants do not deliver a Statement of Defence before the certification motion.

10 My experience as a case management judge in class proceedings reveals to me that as a general rule, it would be preferable that pleadings be closed before the action moves to a certification motion.

11 In any event, for the case at bar, once the matter of particulars and other challenges to the Statement of Claim are resolved, I am ordering the Timminco Defendants to deliver their Statements of Defence. As a matter of my case management powers, I am also directing the other Defendants to delivery any challenges they may have to Mr. Pennyfeather's Statement of Claim or to deliver their Statement of Defence. I direct Mr. Pennyfeather to serve a copy of these Reasons for Decision on the other Defendants who did not appear on this motion.

12 In the discussion that follows, I will also discuss the consequences to the certification motion of closing the pleadings. I foreshadow to say that completing the pleadings will influence the determination of the s. 5 (1)(a) criterion for certification and, in my opinion, facilitate the hearing of the certification motion.

B. Factual and Procedural Background to the Motion for Particulars

13 On May 12, 2009, Ravinder Kumar Sharma commenced a proposed class action on behalf of persons who purchased securities of Timminco during the period from March 17, 2008 to November 11, 2008. His claim is for negligence and misrepresentation and for damages of $520 million and

punitive damages of $20 million.

14 Timminco produces and sells metals, alloys, including silicon. Some of the silicon is sold to the solar photovoltaic energy industry. In March 2007, Timminco announced it had developed a proprietary process to produce solar-grade silicon. It is pleaded that the Defendants made misrepresentations in Timminco's public documents, in public oral statements, and in expert's opinions about its proprietary process and the significance of it to Timminco's business prospects and profitability. The Statement of Claim alleges that the misrepresentations would reasonably be expected to affect the market price of the shares of Timminco.

15 The Statement of Claim also mentions the Plaintiff's intention to bring a motion seeking leave of the Court to assert secondary market claims pursuant to Part XXIII.1 of the *Securities Act*. The Statement of Claim alleges negligence, negligent misrepresentation, reckless misrepresentation, as well as the statutory causes of action contained in Part XXIII.1.

16 On November 25, 2009, at a case conference, the Timminco Defendants advised that they would be serving a Demand for Particulars, and on December 11, 2009, the Demand was served.

17 The Timminco Defendants sought particulars in respect of 58 paragraphs of the Statement of Claim. Six Demands, numbered 1, 3, 5, 11, 26 and 57, are no longer in issue.

18 Demands for Particulars were also delivered by other Defendants on December 22, 2009 (Photon Defendants) and January 8, 2010 (Mr. Walsh). On the motion now before the court, the other Defendants are not pursuing their demands for particulars.

19 On January 8, 2010, Plaintiff's counsel wrote counsel for the Timminco Defendants and advised that the Plaintiff would not be providing a further response to the Demand for Particulars since the demand was premature.

20 In the winter of 2010, Mr. Sharma's counsel asked the Defendants to consent to an order substituting Mr. Pennyfeather as proposed Representative Plaintiff, and by letter dated June 10, 2010, the Defendants. counsel indicated that any consent would need to reserve the Defendants. position "that any proposed pleading must incorporate the answers to the Demand for Particulars, or, alternatively, that [the Defendants] are still entitled to Particulars (on consent or by order) prior to any further step in this proceeding".

21 Following a case conference held March 10, 2010, Mr. Sharma brought a motion for, among other things, removal of himself and the substitution of Mr. Pennyfeather as the proposed Representative Plaintiff. Mr. Pennyfeather had purchased 57 shares of Timminco Ltd. in 2008, for a $1,041.43. As of June 24, 2011, his shares were valued at $21.09, representing a loss of 98%.

22 On March 31, 2011, I allowed the substitution of Mr. Pennyfeather as Plaintiff, without prejudice to the rights of the parties to assert or challenge respectively whether Mr. Sharma and Mr. Pennyfeather qualify as Plaintiffs or Representative Plaintiffs under the *Class Proceedings Act, 1992*.

23 At a case conference held May 16, 2011, I directed Mr. Pennyfeather to deliver the motion material for his motions for leave to assert secondary market *Securities Act* claims and class certifica-

tion in this proceeding, as well as "a further reply to the Demand for Particulars as the Plaintiff may be advised."

24 On May 17, 2011, Mr. Pennyfeather delivered an Amended Statement of Claim. With a few exceptions, the Amended Statement of Claim did not provide the particulars requested in the Timminco Defendants. Demand for Particulars.

25 On May 31, 2011, Mr. Pennyfeather served motion materials on the leave and certification motions. There are six fat volumes of evidentiary material. However, no formal Reply to the Demand for Particulars has been received by the Timminco Defendants, and the Timminco Defendants brought this motion to compel answers to the Demand for Particulars. They did not file any affidavits or any other evidence, in support of their motion. Mr. Pennyfeather has filed an affidavit stating that he is not in a position to furnish further particulars, and that the particulars are within the knowledge of the Timminco Defendants.

C. The Argument Premised on Prematurity

26 Mr. Pennyfeather has delivered an Amended Statement of Claim, and the Timminco Defendants demand particulars, but Mr. Pennyfeather submits that the demand is premature because a Statement of Defence is not due for delivery and, therefore, he submits that particulars are not needed and ought not to be ordered. He regards the Demand for Particulars as a tactical manoeuvre to delay the class proceeding that ought not to be permitted.

27 In my opinion, the hidden premise of this argument - that the determination of the certification motion is a prerequisite for the Defendants. pleading its defence - is wrong, the ultimate conclusion that particulars are premature is wrong, and, in any event, I am removing the prematurity point by imposing as a term of my Order for particulars that the Timminco Defendants deliver a Statement of Defence after the matter of particulars and any other challenges to the Statement of Claim have been resolved.

28 In this last regard, I note that there may be an issue about whether Mr. Pennyfeather has a negligence claim independent of his claims of misrepresentation.

29 Mr. Pennyfeather begins his argument with the premise that the reason that defendants are permitted to deliver a Statement of Defence after the certification motion is that the certification motion will determine the causes of action and the common issues that will proceed to trial and therefore influence and prescribe the content of the Statement of Defence.

30 This premise, however, is false. All the causes of action that are pleaded have the potential to be tried not just the ones that are certified for the common issues trial. The non-certified causes of action are not struck out of the plaintiff's pleading. The defendant pleads to the original statement of claim and not some truncated version of it. The pleadings are then closed, and the litigation plan and the certification order will define the nature of the common issues trial, which may be followed by individual issues trials or procedures. All of this is based on the original Statement of Claim, which may or may not have to be augmented by pleadings and discoveries in the individual issues trial, if there are any.

31 Depending on the litigation plan and the certification order, the representative plaintiff could try all of his or her own claims at the common issues trial, which in many respects will be a normal trial between a plaintiff and a defendant. In a comprehensive trial, the result of a common issues trial is a judgment that is: (a) binding on the representative plaintiff and the defendant with respect to all of the pleaded claims and defences that are tried; and (b) binding on the class members to the extent of the determination of the causes of action and common issues that have been certified.

32 I appreciate that a common issues trial and the examinations for discovery that proceed it can - and usually are - restricted to just the issues that have been certified. Master McLeod explained the rationale for this approach in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, [2003] O.J. No. 5703 (Ont. Master) at paras. 6 and 9 as follows:

> 6. In any proceeding the starting point to determine relevance is the pleadings. Relevance of course is the touchstone in determining whether or not a question is proper. A class proceeding, however, takes place in two stages. Firstly there is a trial on the common issues. Thereafter a mechanism is established for resolution of the issues that have not been defined as common issues. Discovery of the representative plaintiffs at the present stage in the case before me is limited by the definition of common issues. In other words, the pleadings inform interpretation of the common issues and set out the facts to be relied upon but a question is only a proper question in this phase of the action if it relates to the common issues and not the individual claims. It is therefore the certification order as informed by the pleadings and not the pleadings at large that define relevance for the first phase of the trial.
>
> 9. ... The certification motion is procedural but, like any order defining the issues for trial, it limits the scope of relevant inquiry. What a definition of issues for trial does is to remove other items from consideration at that trial. In that sense the certification order defining the common issues is similar to an order for trial of an issue on an application or to an order under Rule 20.05(1) defining the issues to be tried. The issues that are not to be tried do not exist for purposes of discovery at this time. Defining and narrowing the issues, does not guarantee success on the issues and it narrows the issues for both parties. ...

33 See also: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 3659 (Ont. Master), aff.d [2006] O.J. No. 5769 (Ont. S.C.J.); *L. (T.) v. Alberta (Director of Child Welfare)*, 2010 ABQB 203 (Alta. Q.B.) at para. 18; *Abdulrahim v. Air France*, 2010 ONSC 3953 (Ont. S.C.J.).

34 However, the approach of restricting the scope of the common issues trial and the associated discovery process to the certified questions is not an absolute rule and much will depend upon the exigencies of each particular class action. A products liability class action without personal injury claims may not need individual trials and is different from a products liability action where there are individual damage assessments because of personal injuries. And, of course, a products liability class action with personal injury claims is a different species from a *Competition Act* class action. Different types of class actions may take different approaches to what is tried at the common issues trial.

35 The rule that non-certified issues are not tried at the common issues trial is not an absolute rule. In *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2008] O.J. No. 3304 (Ont. S.C.J.), the plaintiff sought to limit the examinations for discovery in a class action to the common is-

sues. Justice Sanderson, however, ruled that when Justice Winkler had certified the class action, he also held that the scope of the discoveries should cover all the issues in the action and not just those associated with the common issues. Justice Sanderson ruled that restricting the defendant's discovery rights would prejudice the defendant's rights without substantially promoting judicial economy.

36 In any event, in the case at bar, with my order that the Defendants deliver a Statement of Defence before the certification motion, they will be pleading an answer to all of the Statement of Claim.

37 Class actions are subject to the *Rules of Civil Procedure*, and there is nothing in the *Class Proceedings Act, 1992* that precludes defendants from pleading before the certification motion. It is informative that the convention of not closing the pleadings is not a statutory rule, and if the Plaintiff insists on the delivery of a pleading, a defendant may need to seek the permission of the court to delay the delivery of the pleading.

38 Moreover, the provisions of the *Class Proceedings Act, 1992* indicate that it was the Legislature's intention that the general rule is that the Statement of Defence should be delivered before the certification motion. Section 2 (3) of the Act indicates that the timing of the certification motion is measured by the delivery of the Statement of Defence. Section 2 (3) states:

> 2 (3) A motion under subsection (2) shall be made,
>
> (a) within ninety days after the later of,
>
> (i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
>
> (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or
>
> (b) subsequently, with leave of the court.

39 In the case at bar, as a term of my Order requiring particulars to be brought, I am directing that the Defendants, all of them, be required to deliver their Statements of Defence. Practically speaking, this direction removes Mr. Pennyfeather's argument that the particulars are premature. At the end of these Reasons for Decision, I will discuss the advantages of the approach of completing the pleadings before the certification motion.

40 Independent of the direction to deliver Statements of Defence, I also would have ordered the delivery of particulars in the case at bar. As noted above, the main explanation for the Order is that the Defendants need the particulars now in order to know the case they must meet for the imminent certification and leave motion, which they do not seek to delay.

41 For many of the demands for particulars, answers will be helpful in determining whether the criteria for certification have or have not been satisfied. The criteria for certification are heavily influenced by the nature of a plaintiff's case, and this is true for the case at bar which is about alleged mis-

representations by the various Defendants. Having particulars is a matter of procedural fairness for the Defendants in order for them to know the case they must meet at the certification motion.

42 In my opinion, the fact that Mr. Pennyfeather is also seeking leave to assert a statutory cause of action under Part XXIII.1 of the *Securities Act* is not a reason to delay particulars of the Statement of Claim nor the delivery of a Statement of Defence to the claim as currently pleaded. If leave is granted, Mr. Pennyfeather will amend his Statement of Claim and the Defendants will have a right to amend their Statement of Defence if they need to do so. In the meantime, particulars can be provided to the current Statement of Claim and then the Defendants can challenge the particularized pleading or deliver a Statement of Claim. The Statement of Claim with particulars will be helpful for determining the motion for leave under Part XXIII.1 of the *Securities Act*.

43 Thus, I conclude that Mr. Pennyfeather's argument based on the premise of prematurity fails. I also foreshadow to say that Mr. Pennyfeather's second argument also fails. That argument is based on the usual law associated with providing particulars and the absence of an affidavit from the Defendants attesting to their need for particulars in order to plead. In my opinion, the deficiencies of the current Statement of Claim are such that particulars should be ordered.

D. The Merits of the Demand for Particulars

1. Introduction

44 The outcome of the above analysis is that I reject Mr. Pennyfeather's first major argument and the Timminco Defendants. Demand for Particulars should be considered for its merits as should Mr. Pennyfeather's second major argument that the Timminco Defendants have not satisfied the test for when particulars are ordered.

45 Fifty-two demands remain in issue, but, for analytical purposes, some of them can be grouped, and this grouping will economize the determination of whether the court should order that particulars be provided.

46 In order to make a determination of the merits of the Demand for Particulars, it is necessary to describe some of the law about proper pleadings, about the role of particulars, and about pleading negligence, negligent misrepresentation, and fraudulent misrepresentation claims. This description of the pleading points will be the starting point of the analysis. After the discussion of the pleading principles, I will apply the law about pleadings to the various demands or groups of demands and make an order requiring that Mr. Pennyfeather answer various of the demands for particulars.

47 I say at the outset of the discussion in this section of my Reasons for Decision that my analysis will reveal that some of the Defendants. demands for particulars are proper, some of the demands are not proper but expose defects in Mr. Pennyfeather's Statement of Claim that require attention, and some of the Defendants. demands are overbroad or not proper.

48 I wish to make it clear that I am only deciding whether particulars should be ordered. I am not deciding whether the s. 5 (1)(a) criterion of showing a cause of action has been satisfied in the case at bar.

2. Pleading Principles and Cause of Action Fundamentals

49 The following principals about pleadings are relevant to determining the merits of the Timminco Defendants. Demand for Particulars.

50 Rule 25.06(1) requires that a Statement of Claim "contain a concise statement of the material facts on which the party relies for the claim". This is the most important rule. It directs the disclosure of the "material" facts, which include facts that establish the constituent elements of the claim or defence: *Thermionics Ltd. v. Philco Products Ltd.*, [1940] S.C.R. 501 (S.C.C.) at p. 505.

51 The material facts are to be stated concisely, which is to say that they should be set out with precision and clarity. If a material fact necessary for a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars.

52 In a point that is particularly important for the case at bar, before particulars are ordered, the pleadings themselves should satisfy the requirements of the rules: *Copland v. Commodore Business Machines Ltd.* [1985 CarswellOnt 410 (Ont. Master)], *supra*. When a pleading fails to meet the requirements of the rules, the appropriate remedy is not particulars but the striking out of the pleading usually with leave to amend: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.); *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300 (Ont. S.C.J.); *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.); *Henrickson v. Henrickson*, [1962] O.W.N. 75 (Ont. H.C.); *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247 (Ont. S.C.J.) at paras. 40-41.

53 A pleading of a cause of action may not be based on speculation. It is not proper to plead breach of duty, conspiracy, malice, intention to injure etc. baldly and without pleading material facts to support the allegation: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.) at p. 56; *Romagnuolo v. Hoskin*, [2001] O.J. No. 3537 (Ont. S.C.J.) at paras. 58-61.

54 I foreshadow to say that several of the Timminco Defendants. demands for particulars are rather challenges that a constituent element of the misrepresentation cause of action is missing.

55 Rule 25.06(8) provides that "[w]here fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred."

56 I foreshadow to say that several of the Timminco Defendants. demands for particulars rely on rule 25.06 (8) and its requirement of "full particulars." However, in my view, the Timminco Defendants overlook the qualifier that "knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred."

57 If a statute is pleaded, the particular sections relied on should be identified: *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247 (Ont. S.C.J.) at para. 131.

58 Rule 25.10 provides that where "a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may or-

der particulars to be delivered within a specified time".

59 In *Antonacci v. Great Atlantic & Pacific Co. of Canada Ltd.* (2000), 181 D.L.R. (4th) 577 (Ont. C.A.) at para. 34, the Court of appeal explained the role of particulars. The Court stated:

> [t]he function of particulars is to limit the generality of pleadings and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case to be made against him at the trial and to have such particulars of his opponent's case as will prevent him from being taken by surprise.

60 In J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Markham, LexisNexis Canada Inc., 2010) at p. 347, I describe the role of particulars as follows:

> In between material facts and evidence, is the concept of "particulars". Particulars are additional details that enhance the material facts, and particulars have a role to play different from just being evidence: *Copland v. Commodore Business Machines Ltd.* (1985), 3 C.P.C. (2d) 77 at 80-81 (Ont. S.C.J.), affd (1985), 3 C.P.C. (2d) 77n (Ont. H.C.J.). Particulars are ordered primarily to clarify a pleading sufficiently to enable the adverse party to frame his or her answer, and their secondary purpose is to prevent surprise at trial: *Steiner v. Lindzon*, (1976) 14 O.R. (2d) 122 (H.C.J.). Particulars have the effect of providing information that narrows the generality of pleadings: *Mexican Northern Power Co. v. Pearson* (1913), 25 O.L.R. 422 (Ont. S.C.). Particulars define the issues, enable preparation for trial, prevent surprise at trial and facilitate the hearing: *Physicians' Services Inc. v. Cass*, [1971] 2 O.R. 626 (C.A.) at p. 627; *Areva NP GmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 4372 (S.C.J.) at paras.39-40; *Obonsawin v. Canada*, [2001] O.J. No. 369 (S.C.J.) at para. 33. A function of particulars to a statement of claim is to define the claim sufficiently to allow a defendant to respond intelligently to it: *International Nickel Co. v. Travelers Indemnity Co.*, [1962] O.J. No. 56 (C.A.); *Hou v. Wesbild Holdings Ltd.*, [1994] B.C.J. No. 2021 (B.C.S.C.); *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (S.C.J.).
>
> In *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369at para. 15 (B.C.C.A.), the British Columbia Court of Appeal identified six functions for particulars: (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved; (2) to prevent the other side from being taken by surprise at the trial; (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial; (4) to limit the generality of the pleadings; (5) to limit and decide the issues to be tried, and as to which discovery is required; and (6) to tie the hands of the party so that he or she cannot without leave go into any matters not included.

61 Particulars for pleadings are normally ordered only if: (a) they are not within the knowledge of the party demanding them; and (b) they are necessary to enable the other party to plead his or her response: *Fairbairn v. Sage* (1925), 56 O.L.R. 462 (Ont. C.A.); *Physicians Services Inc. v. Cass*, [1971] 2 O.R. 626 (Ont. C.A.); *Obonsawin v. Canada* [2001 CarswellOnt 306 (Ont. S.C.J.)], *supra; Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (Ont. S.C.J.); *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Ont. Gen. Div.); *George v. Harris* , [2000] O.J. No. 1762 (Ont. S.C.J.); *Jane Doe v. Escobar*, [2004] O.J. No. 2760 (Ont. Master); *Ontario (Minister of Health) v. Wilston* (1975), 11 O.R. (2d) 631 (Ont. Dist. Ct.).

62 A motion for particulars usually will not be granted unless the moving party deposes that the particulars are not within his or her knowledge and that they are needed to plead; however, a supporting affidavit is not required if the allegations are so general and bald that it is clear that particulars of them are necessary: *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (Ont. H.C.); *Wood Gundy Inc. v. Financial Trustco Capital Ltd.*, [1988] O.J. No. 275 (Ont. Master); *Curry v. Advocate General Insurance Co. of Canada*, [1986] O.J. No. 2564 (Ont. Master).

63 Moving from the general rules about pleadings to the specifics of different causes of action, the Supreme Court of Canada described the elements of a negligent misrepresentation claim in *Queen v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.). Justice Iacobucci stated at p. 643:

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggest five general requirements:
>
> (1) there must be a duty of care based on a 'special relationship' between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

64 See also *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2000), 2 C.P.C. (5th) 335 (Ont. S.C.J.), at para. 22, aff.d in part and rev.d in part on other grounds (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal refused, (2003), [2002] S.C.C.A. No. 446 (S.C.C.).

65 A plaintiff must establish the following elements to succeed in a claim of fraudulent misrepresentation: (1) that the representor knowingly made a false representation, or made the representation recklessly, caring not whether it was true or false; (2) that the representation was intended to induce reliance; and (3) the plaintiff relied upon the representation to his or her detriment and suffered loss and damage. See *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4620 (Ont. S.C.J.) at para. 33.

3. Rulings on the Demand for Particulars

66 Turning now to the details of the Demand for Particulars, for the purposes of their motion, the Timminco Defendants divided their Demand for Particulars into five categories; namely: (1) requests for particulars concerning the alleged misrepresentations; (2) requests for particulars of facts supporting allegations of the defendants. recklessness or negligence; (3) requests for particulars concerning the plaintiff's alleged reliance and causation of damages; (4) requests for particulars concerning the meaning of vague terms or phrases used by the Plaintiff in the Amended Statement of Claim, which

are undefined therein; and (5) requests for identification of the specific statutory provisions on which the plaintiff relies in its pleading.

67 For the purposes of their motion, the Timminco Defendants submitted a chart using the above five categories. I will use their chart to make my own rulings about the various Demands for Particulars. The Defendants. Chart, which has been expanded by a column setting out my rulings, is set out below. In the chart and in the paragraphs following the chart, I will set out my reasons for my rulings.

68 Category 1: Particulars Concerning Alleged Misrepresentations

Particular	Amended SOC	Brief Description of Request	Ruling
1	16	Form, content, date and identity of defendant(s) making alleged statements	[Withdrawn]
3	21	Form, content, date and identity of defendant(s) making alleged statements	[Withdrawn]
9	42	Specifics as to which statements were material and untrue in identified documents; specifics as to alleged omissions from same	Identify: (a) the statements (s) alleged to be false; and who made them (b) the unexpressed qualifying or discrediting information not disclosed.
12	52	The identities of Defendants who retained Photon consultants.	No particulars required since the allegation is that all Defendants retained the Photon consultants.
15 (b)(c)	65	Which statements on the conference call were allegedly false or misleading	Identify the statements alleged to be false.
16 (c)	70	Which statements are alleged to have falsely implied Timminco's production capability	Identify the statements alleged to be false.
17	72	Specifics as to which statements were material and untrue in identified documents; specifics as to alleged omissions from same	Identify: (a) the statement(s) alleged to be false; and who made them (b) the unexpressed qualifying or discrediting information not disclosed.
18	74	Specifics of which questions posed by analysts on the conference call were allegedly "downplayed"	Identify the questions posed by the analysts or strike the second sentence from paragraph 74 as argument or colour.
19	77	Specifics of which representations on the conference call were allegedly false and the exact representations	Identify the false statements and the statements about quantity and cost.

		made as to quantity and cost	
20 (c)	82	Which statements on the conference call misleadingly implied Timminco's production capability	Identify the statements alleged to be false and who made them.
21	85	The exact statements allegedly made on the conference call regarding contamination in production process	Identify the statements alleged to be false and who made them.
22	86	The exact statement allegedly made which disclosed Timminco's process was "flawed", who made the statement, and how.	Identify the statements that disclosed that Timminco's process was flawed and who made them.
23	87	Which alleged misrepresentations were uncorrected by the August 11, 2008 News Release and conference call	Identify the false statements that were not corrected by the August 11 2008 News Release and conference call.
24	93	What "other established market communication mechanisms" were allegedly used	Identify the other established market communication mechanisms
26	100	Form, content, date and manner of disclosure of allegedly inaccurate "revenue and production forecasts"	[Withdrawn]
27	107	Form, content, date, and manner of disclosure of alleged misrepresentations "implicitly" made by Timminco	No particulars required; rather, paragraph 107 should be struck out as redundant and as argument inserted for colour.
49	107	Specific facts relied upon for allegation that the referenced documents/ communication contained misrepresentations or "were false and materially misleading"	No particulars required; rather, paragraph 107 should be struck out as redundant and as argument inserted for colour.
57	115	When and how securities price became inflated; dates on which alleged misrepresentations were corrected and market adjusted downward	[Withdrawn]

69 Category 2: Particulars Concerning Recklessness or Negligence

Particular	Amended SOC	Brief Description of Request	Ruling
29	21	Particulars of facts to support allegation that Defendants made alleged misrepresentations "negligently"	Particulars required.
30	42	Particulars of facts to support allega-	No particulars required be-

		tion that Mr. Schimmelbusch and/or Mr. Dietrich "ought to have known" referenced documents contained misrepresentation	cause under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
31	72	Particulars of facts to support Mr. Schimmelbusch and/or Mr. Dietrich "ought to have known" referenced documents contained misrepresentation	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
34	99	Particulars of facts to support allegation that Defendants "ought to have known" that the disclosure documents referenced were "false or materially misleading"	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
35	101	Particulars of facts to support allegation that defendants were "negligent"	No particulars required because para. 101 does not contain allegation that defendants were "negligent."
36	110	Particulars of facts to support allegation that Defendants made alleged misrepresentation while they "ought to have known" the statements were false and/or materially misleading	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
37	111	Particulars of facts to support allegation that Defendants "ought to have known" that securities would be artificially inflated and documents would be relied upon by investors.	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
38	21	Particulars of facts to support the allegation that Defendants made misrepresentation "recklessly"	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
39	32	Particulars of facts to support the allegation Mr. Schimmelbusch "falsely" represented company's position	Identify the statements of Mr. Schimmelbusch alleged to be false
40	36	Particulars of facts to support the al-	Identify the statements al-

		legation that defendants "falsely" made representations in the 2007 Annual Information Form	leged to be false and who made them.
41	40	Particulars of facts to support allegation that the defendants "falsely" made representations in 2007 MD&A	Identify the statements alleged to be false and who made them.
42	42	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich knew or were reckless as to whether the referenced documents contained untrue material facts	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
43	65	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich "falsely" represented the company's competitive position	Identify the statements alleged to be false and who made them.
44	70	Particulars of facts to support allegation that the Defendants "falsely" implied production capability	Identify the statements alleged to be false and who made them.
45	72	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich knew or were reckless as to whether the referenced documents contained untrue material statements	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
46	77	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Rogol "falsely" represented that the production process "works"	Identify the statements alleged to be false and who made them.
47	82	Particulars of facts to support allegation that Mr. Schimmelbusch "falsely" represented Timminco was a "low cost producer"	Identify the statements alleged to be false and who made them.
48	100	Particulars of facts to support allegation that the Defendants "knew" the referenced public disclosure documents contained misrepresentations or were false and materially misleading	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
50	110	Particulars of facts to support allegation that Defendants "knew" or "were reckless in not knowing" their alleged misrepresentations were false and mis-	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the

		leading when made	circumstances from which it is to be inferred.
51	111	Particulars of facts to support allegation that the Defendants "knew" plaintiff would rely on alleged misrepresentations, and that share price would be "artificially inflated"	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
55	104	Particulars of facts to support allegation that a special relationship existed and defendants intended disclosures to be relied upon	No particulars required; rather the paragraph should be struck out as argument and not a pleading of material facts.
58	118	Particulars of facts to support allegations that Defendants were "motivated by selfinterest"	No particulars required; rather the statement that the Defendants were motivated by self-interest should be struck out as argument and not a pleading of a material fact.

70 Category 3: Particulars Concerning Plaintiff's Reliance/Causation

Particular	Amended SOC	Brief Description of Request	Ruling
25	95	Which analyst reports were allegedly relied on by the plaintiff	Identify the analyst's reports.
52	92	Particulars of facts to support allegation of efficient market and effect on share price	No particulars required as information not necessary in order for Timminco to plead.
53	111	Particulars of facts to support allegation of artificial inflation of share price	No particulars required; rather this conclusionary statement should be struck out as argument.
54	94	Particulars of the "analysis" allegedly undertaken by the plaintiff and other class members	No particulars required as information not necessary in order for Timminco to plead.
56	112	The specific documents or oral statement, the plaintiff heard, read, relied or acted upon, and when	Identify the statements relied upon and who made them and when they were made.

71 Category 4: Particulars Concerning Clarification of Undefined Terms/Phrases

Particular	Amended SOC	Brief Description of Request	Ruling
2	20, 22, 92, 94,	Meaning of the term "securities" as	No particulars required.

	95, 96, 111, 113, 115	used by the plaintiff	
4	26	Meaning of the phrase "cost-efficient commercial scale"	Particulars required.
6, 10, 14, 15(a), 16(a)/(b), 20(a)/(b)	30, 46, 57, 65, 70, 82	Meaning of the phrase "commercially acceptable impurity composition"	Particulars required.
7	38	Meaning of the phrase "commercially viable"	Particulars required.
8	40	Meaning and specifics as to the "refurbished common industrial equipment" allegedly used	Particulars required.
10	46	Meaning of the term "commercial quantity"	Particulars required.

72 Category 5: Particulars Concerning Sections of Legislation Relied upon by the Plaintiff

Particular	Amended SOC	Brief Description of Request	Ruling
28	121, 124	The specific subsections of *Securities Act* relied upon	Particulars required
32	97	The specific subsections of *Securities Act* relied upon regarding duty of care	Particulars required
33	98	The specific subsections of *Securities Act* relied upon regarding standard of care	Particulars required

4. Explanation for the Rulings

73 In the above chart, I have offered some explanation for my rulings. In this section, I will supplement that explanation as follows.

74 For Demand #2 particulars are not required because the statement of claim refers to securities or shares purchased by class members and that description is adequate for the Defendants to plead and to respond to the certification and leave motions.

75 Demand #9 concerns paragraph 42 of the Statement of Claim which states:

> 42. At the time of the said certifications, Schimmelbusch and Dietrich knew or ought to have known or were reckless in not knowing, that the 2007 Annual Report, the 2008 First Quarter Results and the MD&A Q1 2008 contained untrue statements of material fact and further or in the alternative, omitted to state a material fact required to be stated or that was necessary to make a statement not misleading in light of the circumstances in which it was made, as set out above.

76 Paragraph 42 states that various documents contained untrue statements of material fact but

does not identify the specific statements nor does it identify which of the Defendants made the statements. If the untrue statements are to be attributed to particular Defendants - as opposed to being statements made by the Defendant Timminco in its various documents and regulatory filings - then paragraph 42 does not identify the speaker of the allegedly untrue statements. With respect to its alternative pleading of an omission to state a required material fact, the non-disclosed material fact is not identified.

77 In my opinion, although the problems of paragraph 42 can be solved by providing particulars, the absence of the identification of the statement and the maker of it or the absence of the identification of the non-disclosed fact are really substantive defects that go to the constituent elements of Mr. Pennyfeather's misrepresentation causes of action and go beyond a failure to provide particulars.

78 In any event, each individual Timminco Defendant is entitled to know the case against him. He is entitled to know what is the basis of his alleged liability be it direct liability for his own words or conduct or be it vicarious liability for the words or conduct of other Defendants, including Timminco, which must act through its human agents. Therefore, demand #9 should be answered, and Mr. Pennyfeather should identify: (a) the statement(s) alleged to be false and who made them; and (b) the unexpressed qualifying or discrediting information not disclosed by the Defendant(s).

79 Demands #15(b)(c), #16(c), #17, #18, #19, #20 (c), #21, #22, #23, #24, #25, #39, #40, #41, #43, #44, #46, #47 and #56 should be answered for reasons similar to those provided for Demand #9, set out above.

80 Demand #29 concerns paragraph 21 of the Statement of Claim, which concludes with the following sentence: "The Misrepresentations were made negligently and recklessly and without regard for the truth of their contents." Demand #29 asks for "particulars of facts to support allegation that Defendants made alleged misrepresentations 'negligently.." The third constituent element of a negligent misrepresentation claim is that the representor must have acted negligently in making the misrepresentation. The Timminco Defendants are entitled to particulars of the discrete acts of each Defendant that are the acts of negligence that would constitute the third constituent element of the tort.

81 Demands #4, #6, #7,# 8, #10, #14, #15 (a), #16 (a)(b), and #20 (a)(b) concern the following undefined terms in the Statement of Claim: "cost efficient commercial sale," "commercially acceptable impurity composition," "commercially viable," "refurbished common industrial equipment" and "commercial quantity." The Timminco Defendants are entitled to know whether these terms are being used argumentatively or rhetorically or are being used as material facts, in which case the meaning of these terms has not yet been made clear. Unless, the use and meaning of these words becomes clear from the answers to the other demands for particular, particulars should be provided.

82 For Demands #28, #32, and #33 particulars are required because of the principle that if a statute is pleaded, the particular sections relied on should be identified.

E. Closing the Pleadings Before the Certification Motion

83 In the case at bar, as discussed above, I am ordering the Defendants to deliver their Statements of Defence before the certification motion. This order is useful and necessary for the immediate case.

84 Moreover, in my opinion, it would be advantageous for the immediate case and for other cases, if the current convention ended and defendants were required in the normal course to deliver a Statement of Defence before the certification motion. As I will illustrate, there would be several advantages to this approach, and as I mentioned above, the Legislature intended that the general rule should be that the pleadings should be completed before the certification motion.

85 Before I provide some examples of the advantages of closing the pleadings before certification, it is helpful to recall that under s. 5 (1) of the *Class Proceedings Act, 1992*, a plaintiff must satisfy five interdependent criteria for his or her action or application to be certified as a class proceeding. The Plaintiff must: (1) show a cause of action; (2) identify a class; (3) define common issues; (4) show that a class proceeding would be the preferable procedure; and (5) qualify as a representative plaintiff with a litigation plan and adequate Class Counsel.

86 A major advantage of closing the pleadings is that controversies about the first of the five criteria for certification might be resolved or at least narrowed or confined before the certification motion.

87 The delivery of a Statement of Defence could be a fresh step that could foreclose any subsequent attack by the defendant for any pleadings irregularities and, more to the point, typically defendants do not deliver a statement of defence if there is a substantive challenge to the Statement of Claim. Rather, they bundle all their challenges to the Statement of Claim and bring a motion to have the Statement of Claim or portions of it struck out on both technical and substantive grounds. (In the immediate case, however, as noted above, the Timminco Defendants. attack is only about pleading deficiencies, not about whether the s. 5 (1)(a) criterion has been satisfied.)

88 In other words, the requirement of delivering a Statement of Defence will call out the defendant to make its challenges to the Statement of Claim and, thus, the s. 5 (1)(a) criterion might be removed as an issue as would any challenge to the pleading for wanting in particulars or for breaching the technical rules for pleading. The s. 5 (1)(a) criterion for certification might be decided before the certification motion.

89 If the defendant brings a comprehensive pleadings challenge before the certification motion, then, the s. 5 (1)(a) criterion would be resolved before the certification hearing one way or the other. It would be particularly useful to resolve a s. 5 (1)(a) challenge before the certification motion when the challenge is based on the court not having subject-matter jurisdiction over the plaintiff's claim. If that challenge is upheld, then the class action would be dismissed or stayed and the enormous costs of a comprehensive certification motion is avoided.

90 Further, hearing an interlocutory motion about the sufficiency of the pleading might be preferable to having the challenge heard at the certification motion as an aspect of the s. 5 (1)(a) analysis because a common outcome of this analysis is to grant the plaintiff leave to amend his or her Statement of Claim, which outcome, at a minimum, exacerbates the complexities of determining the certification motion because of the interdependency of the certification criteria.

91 In many cases, the technical or substantive adequacy of a plaintiff's statement of claim is not an issue and, therefore, requiring the completion of the pleadings will involve no interlocutory steps and the analysis of the other four certification criteria would be facilitated by a completed set of

pleadings.

92 For instance, having the Statement of Defence before the certification motion would provide useful information for analyzing the preferable procedure criterion and the plaintiff's litigation plan. Moreover, it may emerge that there are issues worthy of certification in the defendant's Statement of Defence.

F. Conclusion

93 For the above reasons, I order Mr. Pennyfeather to respond to the demand for particulars as identified above and for the Defendants once the particulars have been provided and any motions to challenge the Statement of Claim have been resolved to deliver their Statements of Defence. All of this is to be completed before the return date of the scheduled motion for certification and for leave under Part XXIII.1 of the *Securities Act*.

94 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Timminco Defendants within 15 days of the release of these Reasons for Decision followed by Mr. Pennyfeather's submissions within a further 15 days.

95 As it may assist the parties, my tentative view is that the costs of this motion should be in the cause.

END OF DOCUMENT

TAB 25

2012 CarswellOnt 1904, 2012 ONCA 107

2012 CarswellOnt 1904, 2012 ONCA 107

Sharma v. Timminco Ltd.

Ravinder Kumar Sharma, Plaintiff (Respondent) and Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmelbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh, Defendants (Appellants)

Ontario Court of Appeal

Robert Armstrong J.A., S.E. Lang J.A., S.T. Goudge J.A.

Heard: November 2, 2011
Judgment: February 16, 2012
Docket: CA C53624, C53642, C53644

Proceedings: reversing *Sharma v. Timminco Ltd.* (2011), 2011 CarswellOnt 2174, 2011 ONSC 8024 (Ont. S.C.J.)

Counsel: Alan L.W. D'Silva, Daniel S. Murdoch, Lesley Mercer, for Appellants Timminco Limited, Dr. Heinz Schimmelbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich

Paul Le Vay, Brendan Van Niejenhuis, for Appellant, Photon Consulting LLC

Derek J. Bell, for Appellant, John P. Walsh

Michael C. Spencer, Won J. Kim, Victoria Paris, for Respondent

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

Civil practice and procedure --- Limitation of actions — Principles — Statutory limitation periods — Interpretation

Plaintiff commenced proposed class action alleging misrepresentations by defendants that ad-

versely affected value of shares of defendant T Ltd. in secondary market — Misrepresentations were alleged to have commenced on March 17, 2008 and continued until November 11, 2008 — Plaintiff's statement of claim alleged two common law causes of action, negligence and negligent misrepresentation — It also indicated plaintiff would seek order granting leave to assert statutory cause of action for misrepresentation provided by s. 138.3 of Part XXIII.1 of Securities Act (SA) — By end of February 2011, plaintiff had not yet sought that leave — Section 138.8(1) of SA provides that action under s. 138.3 may not be commenced without leave of court — Section 138.14 of SA provides that action under s. 138.3 must be commenced within three years of misrepresentation — Plaintiff brought successful motion for order declaring that limitation period in s. 138.14 of SA was suspended pursuant to s. 28 of Class Proceedings Act, 1992 (CPA), effective as of date of issuance of statement of claim — Defendants appealed — Appeal allowed and plaintiff's motion for order declaring that limitation period in s. 138.14 of SA was suspended dismissed — There had been no leave granted pursuant to s. 138.8 of SA, plaintiff's class proceeding was not action commenced under s. 138.3 of SA, and leave was required to add s. 138.3 cause of action to plaintiff's class proceeding — For s. 138.3 cause of action to be asserted in class proceeding, so as to trigger suspension provision in s. 28(1) of CPA, leave must be granted — As plaintiff had not obtained leave, s. 28(1) of CPA had not been activated.

Cases considered by *S.T. Goudge J.A.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Coulson v. Citigroup Global Markets Canada Inc. (2010), 92 C.P.C. (6th) 301, 2010 CarswellOnt 1593, 2010 ONSC 1596 (Ont. S.C.J.) — considered

Coulson v. Citigroup Global Markets Canada Inc. (2012), 2012 CarswellOnt 2048, 2012 ONCA 108 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 28 — considered

s. 28(1) — considered

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

Pt. XXIII — considered

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — considered

s. 138.3 [en. 2002, c. 22, s. 185] — considered

s. 138.8 [en. 2002, c. 22, s. 185] — referred to

s. 138.8(1) [en. 2002, c. 22, s. 185] — considered

s. 138.14 [en. 2002, c. 22, s. 185] — considered

Words and phrases considered

assert

The suspension provision in s. 28(1) of the [*Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the *CPA*)] provides that "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding". These words must be read in their grammatical and ordinary sense, in the full context of the scheme of the *CPA*, its object and the intention of the legislature. See: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26.

The Canadian Oxford Dictionary, 2d ed., defines "assert" as "make or enforce a claim to (*assert one's rights*)". *Black's Law Dictionary* defines "assert" as "to invoke or enforce (a legal right)": see Henry C. Black, *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004). By contrast, *The Canadian Oxford Dictionary* defines "mention" as "refer to or remark on incidentally". *Black's Law Dictionary* does not include the word. Clearly, "assert" is a significantly more forceful concept.

Without leave having been granted, a s. 138.3 [of the *Securities Act*, R.S.O. 1990, c. S.5] cause of action cannot be enforced. It cannot be invoked as a legal right. Section 138.14 [of the *Securities Act*] says as much. Thus, giving the suspension provision in s. 28(1) of the *CPA* its ordinary meaning, the s. 138.3 cause of action cannot be said to be asserted in the respondent's class proceeding since no leave has been granted.

. . . . .

. . . in my view as applied to the s. 138.3 cause of action, the grammatical and ordinary meaning of the s. 28(1) suspension provision is that without leave being granted the cause of action cannot be said to be asserted in a class proceeding.

APPEAL by defendants from judgment reported at *Sharma v. Timminco Ltd.* (2011), 2011

CarswellOnt 2174, 2011 ONSC 8024 (Ont. S.C.J.), granting order declaring that limitation period in s. 138.14 of *Securities Act* was suspended pursuant to s. 28 of *Class Proceedings Act, 1992*.

S.T. Goudge J.A.:

1 The issue raised by this appeal is whether s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the *CPA*) can operate to suspend the limitation period applicable to the statutory cause of action for misrepresentation provided by s. 138.3 of Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the *OSA*) before an action under that part is commenced.

2 At first instance the motion judge answered that question affirmatively. For the reasons that follow, I have come to the opposite conclusion and I would therefore allow the appeal.

3 The essential facts are easily stated. On May 14, 2009 the respondent commenced a proposed class action alleging misrepresentations by the appellants that adversely affected the value of shares of Timminco Limited in the secondary market. These misrepresentations are alleged to have commenced on March 17, 2008 and continued until November 11, 2008.

4 The respondent's statement of claim alleges two common law causes of action, negligence and negligent misrepresentation. It also indicates that the respondent will seek an order granting leave to assert the statutory cause of action for misrepresentation provided by s. 138.3 of Part XXIII.1 of the *OSA*.

5 By the end of February 2011, the respondent had not yet sought that leave and, as a result, was faced with a possible limitation issue. Part XXIII.1 imposes a limitation period of three years from the misrepresentation for the commencement of an action under this Part. It also provides that such an action can be commenced only with leave.

6 Faced with this, the respondent moved for an order declaring that this limitation period is suspended pursuant to s. 28 of the *CPA*. The result was the order that is now appealed.

7 The relevant statutory provisions in the *OSA* are found in Part XXIII.1 of the legislation, which was proclaimed in effect on December 31, 2005. Part XXIII.1 provides for statutory civil liability where misrepresentations are made that adversely affect the value of securities purchased in the secondary market (as opposed to purchases from an issuer in a primary distribution). Enacted after much careful study, this Part provided the counterpart to Part XXIII, which, for some time, has provided a statutory cause of action for misrepresentation to purchasers of securities in the primary market.

8 In Part XXIII.1, section 138.3 provides a statutory cause of action against an issuer and those acting on its behalf for misrepresentation to persons who acquire the issuer's securities in the secondary market.

9 Section 138.8(1) provides that an action under s. 138.3 may not be commenced without leave of the court. This differs from Part XXIII, which does not require leave for commencement of an action. Section 138.8(1) reads as follows:

> **Leave to proceed**
>
> 138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

10 Section 138.14 provides that an action under s. 138.3 must be commenced within three years of the misrepresentation:

> **Limitation period**
>
> 138.14 No action shall be commenced under section 138.3,
>
> (a) in the case of misrepresentation in a document, later than the earlier of,
>
> (i) three years after the date on which the document containing the misrepresentation was first released, and
>
> (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;
>
> (b) in the case of a misrepresentation in a public oral statement, later than the earlier of,
>
> (i) three years after the date on which the public oral statement containing the misrepresentation was made, and
>
> (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

11 The relevant provision of the CPA is s. 28(1). It provides for the suspension of the limitation period applicable to a cause of action asserted in a class proceeding, and for the circumstances under which it resumes running:

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

12 The motion judge granted the respondent's motion. His order declares that the limitation period in s. 138.14 of the *OSA* is suspended pursuant to s. 28 of the *CPA*, effective as of the date of the issuance of the statement of claim on May 14, 2009.

13 At para. 50 of his reasons, the motion judge held that s. 28 of the *CPA* applies to "any limitation period applicable to a cause of action" and that this includes a cause of action under Part XXIII.1 of the *OSA*. He saw no justification for s. 28 to operate for Part XXIII causes of action, but not for Part XXIII.1 causes of action just because of the leave requirement for the latter. He pointed to s. 28 speaking of a cause of action being "asserted" and concluded that this did not

depend on the commencement of litigation. Rather, in his view, s. 28 requires only that a cause of action be mentioned in an already commenced class proceeding for the limitation period applicable to it to be suspended. He held that to require that leave be granted before s. 28 of the *CPA* applied would defeat its purpose.

14 He therefore concluded that because the class proceeding commenced by the respondent for common law negligence and negligent misrepresentation mentioned the s. 138.3 cause of action, the limitation period applicable to it was suspended.

Analysis

15 It is not disputed that there has been no leave granted pursuant to s. 138.8 of the *OSA*, that the respondent's class proceeding is not an action commenced under s. 138.3, and that leave is required to add the s. 138.3 cause of action to the respondent's class proceeding. The question is whether the respondent's mention in his class proceeding of his intention to seek leave is enough to activate s. 28 of the *CPA*, so as to suspend the limitation period applicable to the s. 138.3 cause of action. Is it enough to be able to say that this cause of action has been asserted in the respondent's class proceeding?

16 The suspension provision in s. 28(1) of the *CPA* provides that "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding". These words must be read in their grammatical and ordinary sense, in the full context of the scheme of the *CPA*, its object and the intention of the legislature. See: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26.

17 *The Canadian Oxford Dictionary*, 2d ed., defines "assert" as "make or enforce a claim to (*assert one's rights*)". *Black's Law Dictionary* defines "assert" as "to invoke or enforce (a legal right)": see Henry C. Black, *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004). By contrast, *The Canadian Oxford Dictionary* defines "mention" as "refer to or remark on incidentally". *Black's Law Dictionary* does not include the word. Clearly, "assert" is a significantly more forceful concept.

18 Without leave having been granted, a s. 138.3 cause of action cannot be enforced. It cannot be invoked as a legal right. Section 138.14 says as much. Thus, giving the suspension provision in s. 28(1) of the *CPA* its ordinary meaning, the s. 138.3 cause of action cannot be said to be asserted in the respondent's class proceeding since no leave has been granted.

19 The respondent argues that it is significant that s. 28(1) requires not that a cause of action be "commenced", but only that it be "asserted". However, this choice of language is entirely appropriate. A cause of action is not commenced. That is a concept applicable not to a cause of action but to the litigation in which it is asserted.

20 Thus, in my view as applied to the s. 138.3 cause of action, the grammatical and ordinary meaning of the s. 28(1) suspension provision is that without leave being granted the cause of action cannot be said to be asserted in a class proceeding.

21 Indeed, the mention of the s. 138.3 cause of action in the respondent's statement of claim appears to reflect this view, namely that leave is required before this cause of action can be asserted in the respondent's class proceeding.

22 Paragraph 117 of the statement of claim reads as follows:

> **PART XXIII.1 OF THE SECURITIES ACT**
>
> 117. The Plaintiff intends to deliver a notice of motion seeking, among other things, an Order permitting the Plaintiff to assert the statutory causes of action particularized in Part XXIII.1 of the Securities Act, and if granted, to amend this Statement of Claim to plead these causes of action.

23 The statutory context of the suspension provision in s. 28(1) of the CPA provides additional support for this interpretation. The balance of the subsection lists the various circumstances that cause the suspended limitation period to resume running. They do not include any reference to the leave motion required to add the s. 138.3 cause of action to the respondent's class proceeding. If mention of the intention to seek leave were enough to trigger the suspension of the applicable limitation period, surely the failure to proceed with the leave motion or the denial of leave would be included as circumstances causing its resumption. Assume, for instance, that having pleaded his intention to seek leave, the respondent decides not to do so. The consequence of his argument would mean that since the statutory cause of action is mentioned in his pleading, the limitation period applicable to it is suspended and remains so even though the class proceeding could never be the vehicle to vindicate the class members' rights under Part XXIII.1. That cannot have been the legislature's intention.

24 It is also clear that the interpretation I propose is consistent with the purpose of s. 28(1) of the *CPA*. In *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 (Ont. S.C.J.), at para. 49, Perell J. described this purpose to be to protect class members from the operation of limitation periods without the need to themselves pursue individual actions in order to avoid being out of time until it has been determined whether they can get access to justice through the class proceeding. That purpose was approved in this court in *Coulson v. Citigroup Global Markets Canada Inc.*, 2012 ONCA 108 (Ont. C.A.). In the context of this case, the respondent's class proceeding gives class members no possibility of access to justice for their s. 138.3 causes of action because no leave to assert it has been granted. The purpose of s. 28(1) of the *CPA* does not therefore require that the limitation period applicable to these causes of action be suspended pending the outcome of this class proceeding, since that action cannot give class members access to justice for their claims.

25 Indeed, the respondent's proposal would reflect a different purpose that cannot have been intended by the legislature. It would suspend the applicable limitation period for the s. 138.3 cause of action on the mere mention of that cause of action. This is a benefit that would not come to the respondent if he were suing in an individual capacity and did the same thing. It cannot have been the purpose of s. 28(1) of the *CPA* to put the class plaintiff in a better position than he would have been had he commenced an individual action.

26 The purpose of s. 138.14 of the *OSA* is also served by the interpretation of s. 28(1) of the *CPA* that I have described. Section 138.14 was clearly designed to ensure that secondary market claims be proceeded with dispatch. That requires the necessary leave motion to be brought expeditiously. To suspend that limitation period with no guarantee that the s. 138.3 cause of action, including the prerequisite leave motion, will be proceeded with expeditiously is inconsistent with that purpose.

27 Finally, the interpretation I have given for s. 28(1) of the *CPA* does not make it inapplicable to a s. 138.3 cause of action under Part XXIII.1 of the *OSA*. It simply requires that leave be granted before that happens. The fact that by comparison no leave is required for s. 28(1) to apply to Part XXIII causes of action is simply a reflection of the legislative policy to require leave for secondary market causes of action but not for their primary market counterparts.

28 In summary, I conclude for a s. 138.3 cause of action to be asserted in a class proceeding, so as to trigger the suspension provision in s. 28(1) of the *CPA*, leave must be granted. Since the respondent has not obtained leave, s. 28(1) has not been activated.

29 I would therefore allow the appeal and dismiss the respondent's motion for an order declaring that the limitation period in s. 138.14 of the *OSA* is suspended.

30 As we indicated during argument, the parties may make written submissions of no more than eight pages addressing costs here and below. These are to be filed within 30 days of the release of these reasons.

Robert Armstrong J.A.:

I agree

S.E. Lang J.A.:

I agree

Order accordingly.

END OF DOCUMENT

TAB 26

2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708

2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708

Nortel Networks Corp., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

Ontario Court of Appeal

S.T. Goudge, K.N. Feldman, R.A. Blair JJ.A.

Heard: October 1, 2009
Judgment: November 26, 2009[FN*]
Docket: CA C50986, C50988

2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708

Proceedings: affirming *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List])

Counsel: Mark Zigler, Andrew Hatnay, Andrea McKinnon for Appellants, Nortel Networks Former Employees

Barry E. Wadsworth for Appellant, CAW-Canada

Suzanne Wood, Alan Mersky for Respondents, Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation

Lyndon A.J. Barnes, Adam Hirsh for Respondents, Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Benjamin Zarnett for Monitor, Ernst & Young Inc.

Gavin H. Finlayson for Informal Nortel Noteholder Group

Thomas McRae for Nortel Canadian Continuing Employees

Massimo Starnino for Superintendent of Financial Services

Alex MacFarlane, Jane Dietrich for Official Committee of Unsecured Creditors

Subject: Insolvency; Constitutional; Labour and Employment; Public; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — Stay provisions are im-

portant part of restructuring process under Act — Periodic payments were not for services rendered, and were not excluded by s. 11.3(a) of Act — Fact that rights to payment were vested and could be enforced under earlier collective agreements indicated they were not for current services — Fact that at time of hearing business was likely to be sold rather than restructured did not affect order.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — Statutes governing labour and employment — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found key factor was not payment obligation arose but rather when services performed — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — CCAA overrides provincial Employment Standards Act which requires immediate payment of termination and severance obligations — Paramountcy doctrine dictated that intent of parliament to freeze debt obligations through Act would be frustrated if stay order did not apply to statutory termination and severance payments regarding past services.

Cases considered:

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 184 O.A.C. 33, 16 R.P.R. (4th) 1, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1 (S.C.C.) — referred to

Dayco (Canada) Ltd. v. C.A.W. (1993), 1993 CarswellOnt 883, 1993 CarswellOnt 978, 14 Admin. L.R. (2d) 1, (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada)* [1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada)* 102 D.L.R. (4th) 609, 63 O.A.C. 1, 152 N.R. 1, 13 O.R. (3d) 164 (note), (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032 (S.C.C.) —

2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708

referred to

Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board) (1999), 178 D.L.R. (4th) 440, 45 O.R. (3d) 622, 22 C.C.P.B. 1, 123 O.A.C. 384, 1999 CarswellOnt 2669 (Ont. C.A.) — considered

Mirant Canada Energy Marketing Ltd., Re (2004), 1 C.B.R. (5th) 252, 2004 CarswellAlta 352, 2004 ABQB 218, 36 Alta. L.R. (4th) 87 (Alta. Q.B.) — referred to

Multiple Access Ltd. v. McCutcheon (1982), 1982 CarswellOnt 128, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 738 (S.C.C.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Windsor Machine & Stamping Ltd., Re (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

s. 11 — referred to

s. 11(3) — considered

s. 11(4) — referred to

s. 11(5) — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — referred to

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

Employment Standards Act, 2000, S.O. 2000, c. 41

2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708

Generally — referred to

APPEALS by union and former employees from judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]), dismissing motion for continued payments under collective agreement.

S.T. Goudge, K.N. Feldman JJ.A.:

1 On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

2 In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

3 The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

4 The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

5 We will address each of the two appeals in turn.

The Union Appeal

Background

6 The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and

severance payments to unionized employees who have been terminated or who have severed their employment at Nortel.

7 Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

8 The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[FN1]

> 11.3 No order made under section 11 shall have the effect of
>
> > (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

9 The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the *CCAA*.

10 The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

11 The Union challenges this conclusion.

2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708

12 In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

13 Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

14 Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

15 In our opinion, this argument must fail.

Analysis

16 Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

17 Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

18 Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those

employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Mirant Canada Energy Marketing Ltd., Re* (2004), 36 Alta. L.R. (4th) 87 (Alta. Q.B.).

20 Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

21 The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board)* (1999), 45 O.R. (3d) 622 (Ont. C.A.), at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

22 Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.), at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

23 In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

24 The Union's appeal must be dismissed.

The Former Employees' Appeal

Background

25 The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

26 After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

27 For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

28 Neither the provincial nor the federal governments responded to the notice on this appeal.

29 Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrange-

ments;

11. THIS COURT ORDERS that each of the Applicants shall have the right to:

. . .

(b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court.*

. . .

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

[Emphasis added.]

30 Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

31 As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

32 Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1; [the Bankruptcy and Insolvency Act and the Winding Up Act]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

33 As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

34 Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[FN2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

35 As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.) at para. 43.

36 The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.):

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

37 However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in , [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

38 Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

39 The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

40 The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

41 In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been considered or classified for ultimate treatment

under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

42 While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

43 The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

44 However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

45 Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

46 Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the *CCAA* process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

47 The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

48 We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

49 The appeal by the former employees is also dismissed.

R.A. Blair J.A.:

I agree.

Appeals dismissed.

FN* A corrigendum issued by the court on December 8, 2009 has been incorporated herein.

FN1 The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

FN2 The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd., Re*, [2009] O.J. No. 3195 (Ont. S.C.J. [Commercial List]), decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

END OF DOCUMENT

TAB 27

2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

Nortel Networks Corp., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009[FN*]
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Alan Mersky, Derrick Tay for Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.

Gail Misra for Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler, S. Philpott for Certain Former Employees of Nortel

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Cases considered by *Morawetz J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

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

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Rules considered:

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

R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act.*

***Morawetz J.*:**

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

> (i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
>
> (ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460

people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently coordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:

(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Net-

works Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments

and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the

Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it

severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification.

In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the

fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

FN* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

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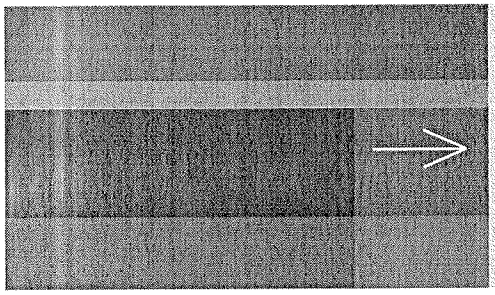
TAB 28



OSC Staff Notice 51-719

Emerging Markets Issuer Review

March 20, 2012

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PURPOSE OF THE EMERGING MARKET REVIEW

Introduction

On July 5, 2011, the OSC announced the commencement of a regulatory review (EMIR Review or the Review) of emerging market issuers (EM issuers) that would examine a targeted selection of Ontario reporting issuers that were listed on Canadian exchanges and had significant business operations in emerging market jurisdictions.

We conducted the Review in the face of notable concerns that began to surface involving some EM issuers that were listed for trading and raising capital in our markets. We also did this work in recognition of our increasingly globalized marketplace and the corresponding importance of remaining focused on investor protection and the integrity of our markets.

Given the importance of EM issuers in both the global and Canadian marketplace, we wanted to ensure that any systemic or specific issues that affect these issuers were identified and addressed. This is important to investors and for the integrity of the Canadian capital markets.

Several securities regulators in other jurisdictions had also been taking action in similar areas due to some concerns relating to information about title to assets and operations of issuers headquartered in foreign jurisdictions, as well as access to that information. In addition, the body responsible for the oversight of auditors in the U.S., the Public Company Accounting Oversight Board (PCAOB), focused on the fraud risks that auditors might encounter in audits of companies with operations in emerging market jurisdictions and published in October, 2011, a Staff Audit Practice Alert on auditors' responsibilities for addressing those risks, and certain other auditor responsibilities under PCAOB auditing standards. In Canada, the Canadian Public Accountability Board (CPAB) issued a special report in February, 2012, outlining its significant findings and recommendations following its review of audit files for Canadian public companies with their primary operations in China.

The purpose of the Review was to assess the quality and adequacy of selected EM issuers' disclosure and corporate governance practices, as well as the adequacy of the gatekeeper roles played by auditors, underwriters and the exchanges, to identify any broad policy issues and entity-specific concerns. In addition, the Review also examined the legal vehicles through which EM issuers have accessed the Ontario market. In undertaking the Review, staff contacted issuers and their advisors, and organizations such as Canadian exchanges, CPAB and other provincial securities regulators.

We understand the importance of Ontario's markets being attractive globally to quality issuers seeking capital investment. We want Ontario investors to have access to a wide variety of investment opportunities but also want to ensure that this access is balanced with the right level of investor protection. The Review was undertaken to determine if there are areas in the regulation of EM issuers that we can improve or strengthen, including the oversight of the performance of different entities that play a role in bringing these issuers to our market.

A snapshot of EM issuers in Canada

While the term 'emerging market' has different meanings in different contexts, for the purposes of conducting the Review, staff considered a number of criteria in determining whether a reporting issuer was an EM issuer. Staff focused on issuers with the following characteristics:

- whose mind and management are largely outside of Canada and
- whose principal active operations are outside of Canada, in regions such as Asia, Africa, South America and Eastern Europe

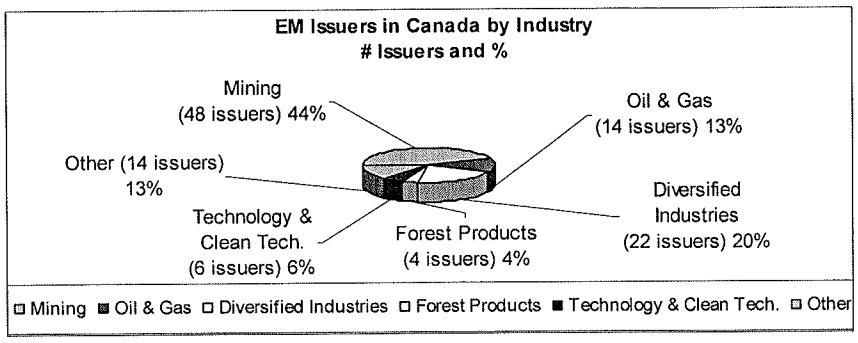
TMX Group issuers listed on the TSX and TSXV and CNSX issuers listed on the CNSX as at April 30, 2011, and having headquarters in jurisdictions other than Canada, the US, the UK, Western Europe, Australia and New Zealand, totalled 108.

At April 30, 2011, these 108 issuers had a total market capitalization of approximately $40 billion. This was in contrast to a total of nearly 4,000 exchange-listed reporting issuers in Canada, having a total market capitalization of $2.39 trillion.

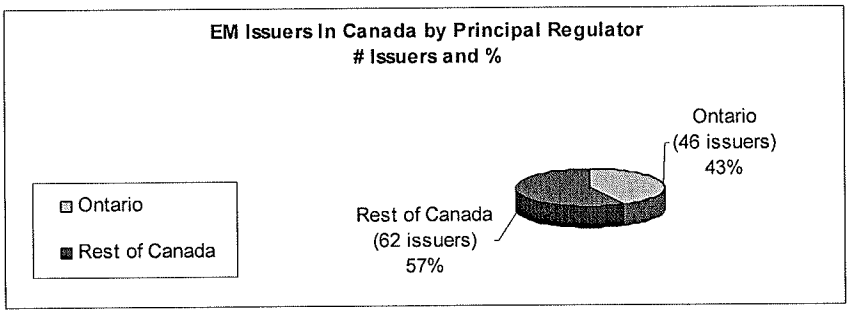
EM Issuers – Canada
All data as at April 2011, as supplied by TMX Group and CNSX

	# Issuers	Market Cap. (CAD $ mill)
TSX	50	$37,108
TSXV	55	$3,228
CNSX	3	$33
Total	**108**	**$40,369**

EM issuers were present and operated in a variety of industries, primarily mining, as indicated in the chart below.



Of the 108 EM issuers in Canada, approximately 43% had the OSC as their principal regulator.



The number of EM issuers in Ontario is relatively small compared to the total number of reporting issuers in Ontario. However, staff wished to assess if investors in EM issuers could be exposed to any inappropriate risks or associated risks that were not fully understood. While we appreciate the importance of EM issuers to our markets, we thought it was important to determine if any issues existed that could impact the reputation and integrity of Ontario's market, either at home or abroad.

Who we looked at

Staff selected and reviewed 24 issuers, which represented more than 50% of the EM issuers for which Ontario is the principal regulator. All had operations in emerging market jurisdictions and were listed on Canadian exchanges. The issuers ranged across a number of industries, including mining, forestry, financial services, technology and clean energy, and diversified industries and operated in a variety of countries.

Integrity of public disclosure is the bedrock of investor protection

The integrity of public disclosure by reporting issuers, including financial reporting, is core to investor information and protection. This disclosure depends critically on each of the following performing their duties responsibly:

- the Chief Executive Officer (CEO)
- the Chief Financial Officer (CFO)
- the board of directors (board)
- the audit committee of the board
- the external auditor
- the underwriter
- the exchange

Integrity of public disclosure starts with management. The CEO and CFO are the key individuals that investors rely on to provide accurate and comprehensive information on an issuer's performance and prospects through the issuer's disclosure. The CEO and CFO must ensure the issuer's disclosure is accurate and complete and certify the disclosure and the internal controls over financial reporting.

Effective oversight of management by the board is a critical component of the investor protection framework. The board has a duty to act honestly and in good faith in the best interests of the issuer and must supervise the issuer's management. It plays a pivotal role in effective governance and is responsible for overseeing the general business direction of the issuer.

The board appoints the audit committee whose primary responsibility is to oversee the financial reporting process and manage the issuer's relationship with its external auditors. The external auditor has a unique role in the reporting process for annual financial statements which are relied upon by the board, audit committee and, most importantly, investors to provide an independent assessment of whether the information presented in the issuer's annual financial statements has been fairly presented.

Underwriters are uniquely situated to verify information about an issuer, its operations and management and act as gatekeepers to our markets. In prospectus offerings, underwriters certify that they have undertaken due diligence and that to the best of their knowledge, information and belief the issuer's prospectus constitutes full, true and plain disclosure of all material facts relating to the offered securities. As part of the EMIR Review, staff reviewed the underwriters' activities as they are essential contributors to the oversight of the integrity of public disclosure.

Staff also acknowledge the important role played by other professionals such as lawyers, experts and consultants in bringing issuers to market and confirming the completeness and accuracy of issuers' ongoing public disclosure. Although they were not the focus of the Review, staff also encourage these professionals to be cognizant of the role they play in the disclosure process, and of the importance of due diligence, professional scrutiny and full disclosure of the risks in their work on emerging market related matters.

What we did

The Review involved a broad examination of the public disclosure record of each selected EM issuer and an examination of the issuer's board and audit committee activities. In addition, staff examined the detailed files of auditors of the EM issuers because of the integral role they play in enhancing the degree of confidence that the investing public place on the information presented in an EM issuer's annual financial statements. The auditor's report is a critical third party communication that investors rely on to ensure that the issuer's annual financial information has been sufficiently examined and verified. Staff also reviewed the due diligence activities undertaken by issuers' underwriters, focusing on the depth of the due diligence they performed when underwriting a public offering of securities.

The exchanges undertake a fundamentally important role in promoting market integrity and fostering investor confidence in our markets. The exchanges have detailed and prescriptive listing requirements that require the filing of audited financial statements and, in many cases, sponsorship by an exchange participating organization. We examined whether the core processes of the exchanges are sufficiently robust to address the unique concerns raised by EM issuers and if the review processes would benefit from additional due diligence in the emerging market context.

Purpose of this Report

The purpose of this Report is to identify areas of concern arising from the Review. At this time our observations are preliminary and identify the key policy areas that we believe merit further examination.

The ultimate goals of the EMIR Review and Report are to identify areas of concern and recommend changes that will contribute to the protection of investors and strengthen the integrity of our markets.

Much of the information staff reviewed is protected by confidentiality provisions in the *Securities Act* (Ontario) and therefore cannot be publicly disclosed. As a result, this Report is general in its

discussion, rather than citing specific instances or examples.

Where the Review resulted in significant staff concerns about an issuer's, auditor's or underwriter's apparent regulatory non-compliance, files were referred to the Enforcement Branch of the OSC for further assessment and, if warranted, the initiation of enforcement proceedings.

GENERAL CONCERNS

In this section of the Report, we identify four principal concerns arising from our EMIR Review including:

- the level of EM issuer governance and disclosure
- the adequacy of the audit function for an EM issuer's annual financial statements
- the adequacy of the due diligence process conducted by underwriters in offerings of securities by EM issuers
- the nature of the exchange listing approval process

For each of these four areas of concern, we have identified the main focus for additional examination and analysis. We anticipate that these concerns can be addressed by a combination of action by issuers, auditors, underwriters, exchanges, securities regulators, other oversight bodies and gatekeepers working together to strengthen our markets and protect investors.

Overall concerns

As noted, the regulatory framework for issuers involves a system of reliance and connection between different groups – the issuers themselves, their boards and audit committees, auditors, underwriters and exchanges. We found examples of practices in all of these areas that concerned us and we believe further work is warranted to improve compliance by all of these important groups of market participants with their regulatory obligations.

One of our central concerns was the apparent 'form over substance' approach to compliance with applicable standards for disclosure, issuer governance, board oversight, audit practices and due diligence practices. In our view, the level of rigor and independent-mindedness applied by boards, auditors and underwriters in doing their important jobs – management oversight, audit, due diligence on offerings – should have been more thorough.

The fact that the core operations and assets of many of the issuers were located in an emerging market jurisdiction, with very little presence in Canada in most cases, contributed to a separation between the issuer's Canadian governance and local management functions. It also contributed to challenges for both the audit process and the performance of due diligence by underwriters.

The need for a good understanding of local business practices, how the business operates in the emerging market jurisdiction, and the degree of reliance that can be placed on local members of management, should generally have been given more prominence in management oversight,

audits and due diligence functions. Language barriers and translation issues also appeared to be important factors in how well those functions were performed.

EM issuers

Staff conducted in-depth reviews of the public disclosure record of the selected EM issuers and examined information concerning the function of each selected EM issuer's board and audit committee. Our principal concerns are set out below.

EM issuers, their management and boards are expected to discharge all of their responsibilities in a way that promotes the protection of Ontario investors and confidence in our markets. They are expected to do this on a basis that is fully informed by both the business and cultural practices of all of the jurisdictions in which the EM issuer operates.

Corporate governance practices

An issuer's board and audit committee must have a thorough understanding of the business and the operating environment of the issuer as this understanding is the foundation upon which the executives will execute all of their responsibilities. For Canadian reporting issuers whose businesses are based in Canada, the Canadian directors serving on their boards are expected to have a thorough understanding of the Canadian marketplace and its legal, business and political environment.

We recognize that board members of EM issuers may face a steeper learning curve to understand these same aspects of the EM issuer's business and operating environment. The time zone, language, location of key books and records and cultural differences may make communication especially complicated in these situations. Nevertheless, all board members of Canadian reporting issuers, regardless of where they are located and where the business operations are located, are required to adhere to Canadian regulatory requirements.

It appeared to us that the level of engagement by boards and audit committees in their oversight of management and sense of responsibility for the stewardship of an EM issuer with public investors was in certain cases deficient. For example, in some cases it appeared that the board had very little contact with senior management in the emerging market jurisdiction running the business.

We were concerned with the extent of knowledge of boards and audit committees of the cultural and business practices of the jurisdictions in which the issuer operated. In some situations, it appeared that the board was not aware of environmental factors that could have a significant impact on the issuer, such as banking practices, currency restrictions and the regulatory and legal environment specific to the industry in which the issuer operated. To the extent there was

knowledge of relevant cultural and business practices, the manner of board oversight was not, in some situations, appropriately adjusted to reflect those practices. For instance, we observed situations in which it appeared that board members relied solely on a member of management to provide an overview of key business documents in a foreign language and did not obtain appropriate translations in order to read and assess the documents themselves.

Corporate structures

An issuer's structure should be designed to facilitate the conduct of its business. Emerging market jurisdictions may present additional challenges to issuers as they must navigate the political, legal and cultural realities of those markets and design an appropriate corporate structure. In some cases, the legal or regulatory system may present impediments to foreign ownership or control and may result in the need for specific structures to enable the issuer to do business in that market.

Complex structures may increase the risk profile of an issuer. These structures may be difficult to adequately describe to investors in disclosure, and they may impact the ability of the board to properly oversee management or understand the full extent of the issuer's operations. In particular, boards should consider the potential for complex structures to facilitate inappropriate activity, such as fraud or misappropriation of assets, or misrepresentations about an issuer's financial performance or condition.

In the Review, we observed structures that caused us to question their appropriateness and transparency, such as the presence of multiple legal entities supporting a single operating business. We were concerned that the complexity of certain corporate structures did not appear to be clear or necessary to support the EM issuer's underlying business model. The quality of controls in place to manage the risks arising from the complexity of the structure was also a concern in these cases.

Related party transactions

Related party transactions (RPTs) warrant careful scrutiny by investors so that they may evaluate the fairness of the transactions and the impact they may have on an issuer's operations and financial results. Although not unique to EM issuers, transactions with other issuers in the same group of issuers, or with parties linked to an issuer's shareholders, directors or management may represent a heightened risk for issuers conducting business in these markets. Some of this may be due to differences between local business practices and cultural norms and the legal requirements in North America. Nevertheless, they need to be understood and disclosed accurately.

While RPTs may provide the issuer with benefits that are not available from other arms-length parties or to other issuers on the same terms, they can also be abusive if they only benefit the related party and not the issuer. We are concerned about transactions of this nature as they can be detrimental to investors in the issuer and can undermine the integrity of our capital markets.

Boards and audit committees are expected to approach their oversight role with an appropriate degree of independent-mindedness. In the case of the RPTs involving some EM issuers we reviewed, we observed that this could have been done better. In these cases, we were particularly concerned with the extent and frequency of RPTs and the quality of the management and board processes in place to identify and approve RPTs. Our disclosure reviews also revealed deficiencies in the completeness and appropriate clarity of related party disclosures.

Risk management and internal controls

The board's responsibility for the stewardship of an issuer includes the identification of principal risks to the issuer's business and oversight of the implementation of appropriate systems to manage those risks. The board oversees management, which is responsible for identifying and quantifying an issuer's exposure to risks and for adopting suitable risk management systems to address those risks.

Boards of EM issuers should be particularly sensitive to the unique risks associated with operations in emerging market jurisdictions, especially those that could result in a serious disruption to business operations. Board members should ensure that they have a sufficient understanding of the political and cultural risks impacting the EM issuer and assess those risks in the context of the emerging market jurisdiction, and not only from a North American viewpoint. Risk analysis and mitigation techniques that may seem appropriate in a Canadian or North American business context may not be effective in emerging market jurisdictions. It is important that boards obtain a clear understanding of how the risks of operating in emerging market jurisdictions could impact the corporate structure, operations and material assets of the issuer.

Internal controls are an important way to manage risk. Boards should review and be satisfied that management has put in place appropriate internal controls to manage the risks facing the issuer. For example, effective internal controls help reduce the risks of inaccurate financial reporting. A breakdown of the integrity of financial reporting often stems from a lack of, or a circumvention of, internal controls. It is therefore important for board members to oversee the design and implementation of internal controls and to assess the appropriateness of the remediation of significant deficiencies and material weaknesses. Board members should also be aware of the risks if there is a material weakness in the issuer's internal controls.

Staff concerns with some EM issuers' internal controls related to the risks of doing business in emerging market jurisdictions, and linked to this, the quality and extent of work performed by the CEO and CFO to support their certification of annual and interim filings. We would have expected to see the internal controls adjusted to reflect the particular risks of having significant business operations located in an emerging market, including those associated with political, legal and cultural factors, as well as the location of books and records and language barriers. However, in certain cases, this was not what we observed.

For EM issuers, internal controls may be particularly important to assist in mitigating such risks. For example, it is particularly challenging for a board whose members principally reside in Canada to govern an issuer whose operations are located in a foreign jurisdiction. This challenge may further be magnified in circumstances where the CEO, being the principal decision-maker, resides in the emerging market, and the CFO resides in Canada.

In the Review, we noted risks that may not have been appropriately identified, understood or managed by the board including risks related to:

- political factors, such as government instability and changing governmental policy that may affect legal rights, such as property ownership
- the legal and regulatory framework, given that emerging market jurisdictions may have less developed legal or regulatory systems
- the movement and conversion of currency out of the foreign jurisdiction, which could hinder the repatriation of profits to Canadian investors
- legal title to assets

We also found that risk disclosures by the issuers were not as specific or relevant as they should have been to be helpful and informative to investors.

Auditors

In the course of the Review, we identified several areas of potential concern with respect to the way in which the external audit function was performed for EM issuers. We were concerned that auditors may not have performed sufficient procedures in some instances to understand and appropriately scrutinize the information provided to them by an issuer and/or foreign 'component' auditor. On February 21, 2012, CPAB issued a special report "Auditing in Foreign Jurisdictions" outlining its significant findings and recommendations following its review of audit files for Canadian public companies with their primary operations in China. The observations noted in CPAB's report are largely consistent with our principal concerns, as set out below.

Level of professional scepticism

The level of professional scepticism exhibited by auditors when examining the information gathered in the course of their audit was generally lacking. We were concerned that in some instances the auditor accepted management's representations at face value and did not perform sufficient alternative procedures to independently verify the information they received. There were also instances where, in our view, auditors should have been uncomfortable based on the work performed and information received – for example if responses received were unusual or unexpected, we would have expected an auditor to further challenge or examine the response to ensure they understood the situation.

In addition, we saw conclusions for areas of judgement that were not supported by an underlying analysis, for example, broad-based conclusions (i.e., a conclusion that no issues were noted) with no underlying analysis regarding the procedures or evidence obtained to support the general statement. This disconnect raised issues on what work, if any, was done to substantiate the auditor's conclusion or ensure that risks were sufficiently mitigated.

Degree of knowledge auditors had of the local cultural and business practices

It was unclear in some instances what was done to understand an issuer's business environment. For example, if checklists were prepared it was questionable that responses resulted in sufficient understanding of the cultural and business practices of the jurisdictions in which the issuer operated. Some auditors appeared to have an insufficient understanding of the legal environment (i.e. use of corporate seals) and/or procedures to obtain licenses and/or permits in the emerging market. In some cases auditors appeared to accept certain information provided by management at face value without performing any procedures to support those representations with independent external information.

Extent of delegation to a foreign 'component' auditor

Applicable auditing standards have no defined parameters for the extent of work that can be delegated to a component auditor, and we were concerned that this resulted in group auditors' insufficient involvement with the audit of underlying operations in some circumstances. This was particularly true in situations where an issuer's underlying operations were entirely in the emerging market and the foreign component auditor performed all audit procedures in the emerging market.

A key concern noted was that some component working paper files could not be removed from a foreign jurisdiction. This could prevent regulators (i.e., the Commission or CPAB) from reviewing files or group auditors from including key working papers from a component auditor in their files. It was also unclear to us the extent of review that group auditors were choosing to, or were able to,

perform on audit files of component auditors or whether group auditors were visiting the foreign jurisdiction.

It appeared in some instances that group auditors asked component auditors to do the work to understand the business and environment but did not receive sufficient communication back to understand what the component auditor learned or understood. In fact, we do not believe there was enough communication in general between group and component auditors, particularly communication from the component auditor to the group auditor. We would expect to see more group auditor executives visiting foreign operations or interacting with members of issuers' management.

Inability to access audit working papers

We experienced difficulty in obtaining domestic auditor working papers voluntarily, so other means were generally needed to obtain audit working papers. When an auditor resided in a foreign jurisdiction, or a portion of the audit work was done by a component auditor, we were unable to obtain those working papers.

Language barriers

We observed that language barriers impacted an auditor's ability to communicate with management or examine documentation. We could not discern how audit executives addressed these language concerns in some audits or why this was not an issue for consideration in connection with the audit. For example, in some instances the communication between audit executives and key client executives appeared to be insufficient due to language differences. Perhaps more importantly, there also appeared to be insufficient translation of key documents despite audit engagement executives not being fluent in the local language. It was not clear from the Review how auditors addressed language barriers in client documents for audit executives who did not speak the local language.

Underwriters

Underwriters, as gatekeepers to our securities markets, are uniquely situated to verify information about an issuer, its operations and management. In prospectus offerings, underwriters must certify that to the best of their knowledge, information and belief, the prospectus constitutes full, true and plain disclosure of all material facts relating to the offered securities. In the listing process, the underwriters may act as sponsors. In this role, they conduct due diligence and may prepare reports on, among other things, the issuer's business and financial position, the issuer's directors and officers, and the issuer's qualifications for meeting all relevant listing criteria. The role of the sponsor in the listing process is a critical part of the listing review and approval.

Underwriters should participate in the offering process with a healthy amount of scepticism regarding management claims. Their due diligence must be designed to detect if there are material misstatements or omissions in prospectus disclosure. An underwriter must also develop a full understanding of an issuer's finances, management, operations, industry and country of origin, in order to be able to certify the prospectus. They should also document their findings in a clear and concise manner.

Staff reviewed the work of underwriters in the public offerings of securities by selected EM issuers. Our principal concerns are set out below.

Variations in due diligence practices

While there is some general guidance on due diligence practices for Canadian underwriters, there are no explicit, standard requirements for the conduct of due diligence by underwriters. As a result, it was evident during the Review that underwriters adopted a varied array of policies, procedures and practices. Some underwriters provided internal policies and due diligence checklists, while others had limited processes. Some of the reviews appeared to be thorough and some were not. We also noted that internal committee memoranda, due diligence committee meeting minutes and due diligence checklists were largely not provided to us. We observed in some cases that risks were not always documented, and if they were raised, there was little or no follow-up recorded or evident in the due diligence materials.

We reviewed transcripts of due diligence calls with issuers and observed a number of instances where several customers of a single issuer provided identical answers to questions posed by the underwriters. We think the similarity of these responses should have raised some degree of scepticism and further questioning by the underwriter, yet this did not occur. In addition, in some cases, questions posed during the course of due diligence calls were deflected, not answered or inadequately explained by the issuer's management and the questions were not pursued nor were satisfactory explanations provided. We also noted situations where site visits were attempted unsuccessfully and these were not rescheduled, nor were additional questions asked about the site's availability during the remainder of the due diligence process.

Level of professional scepticism and rigor

In the underwriter material we examined, we observed that the level of professional scepticism and rigor that appeared to be applied in the due diligence process was lacking. We noted several instances where 'red flags' (such as significant growth or a change in the issuer's business in the recent past, financial metrics that were superior to an industry average, unusual year-over-year growth results and a high degree of reliance on government relationships or the founder/CEO)

should have prompted further probing or questions. Our review indicated little or no follow-up in these instances to either understand or analyze the concerns, or disclose them.

Approval process for offerings

We observed some cases where, due to a lack of documentation of due diligence meetings, site visits and bring-down calls (calls among the underwriter, issuer, auditors and legal counsel to reconfirm statements previously made during the due diligence investigation), it was not always evident that the approvals process called for by the underwriter's own internal process was followed.

Understanding of emerging market jurisdictions

The due diligence information and process we examined in connection with a number of EM issuer offerings contained little documentation or discussion of the risks associated with the issuer's operations. Even where the due diligence policies and procedures of a firm contemplated additional factors or steps that should be considered or taken in light of additional risks, it was evident from the documentation that these were not taken into account in performing the due diligence.

Due diligence documentation

In the Review, we noted that the amount and degree of due diligence documentation varied widely. In some circumstances, the documentation did not reflect the process by which due diligence was undertaken and completed nor the risks identified in connection with the offering (including those related to the issuer's industry group or market, if appropriate).

In terms of due diligence calls, while we found the lists of questions to be asked of the issuer were documented, in some cases the names of the participants on the calls were not provided and written transcripts were not provided.

Exchanges

The exchanges are important gatekeepers to our securities markets as they set standards for issuers seeking to list their securities on Canadian markets. The exchanges undertake a vigorous review process, including review and reliance on third party reports to determine if the issuer meets the listing requirements, which is a critical part of the access to public capital. As part of this process, when sponsorship is required, the sponsors conduct due diligence and prepare reports on the issuer's business and financial position, the issuer's directors and officers, and the issuer's qualifications for meeting all relevant listing criteria.

We examined the listing processes in place and the listing review that was undertaken for the EM

issuers selected for this study. We considered whether the core processes of the exchanges are sufficiently robust to address the unique concerns raised by EM issuers that have come to light as a result of the EMIR Review and other recent events. We also considered whether the exchange review processes would benefit from additional due diligence in the emerging market context, particularly with respect to reliance on work performed by third parties and the quality of third parties' work.

We also examined the methods by which EM issuers selected for review accessed the Ontario market and raised capital from Ontario investors. An issuer can become a reporting issuer through different methods, including:

- an initial public offering (IPO), which involves the preparation of a prospectus to be filed with securities regulators and is often accompanied by an application for a public listing on an exchange
- a direct listing on a recognized Canadian exchange, which may be facilitated if the issuer is already listed on another exchange in a foreign jurisdiction
- a reverse take-over (RTO) (also known as a back door listing or reverse merger), which usually involves a transaction with an existing issuer that is already a reporting issuer. The form of transaction varies but typically involves an amalgamation or issuance of shares in exchange for other shares or assets.

The EM issuers in our review sample accessed our market through different methods, including IPOs, direct listings and RTOs. We did not identify any particular method of accessing the market and becoming a reporting issuer as being specifically problematic.

In conducting this work, we worked co-operatively with staff at the TSX and considered:

- how the issuers 'went public'
- the various parties involved in the listing of an EM issuer
- the inter-reliance of those parties and their interconnectivity with the exchange listing framework applicable to EM issuers
- the listing requirements and review processes of Canadian exchanges that generally apply to the types of reporting issuers selected for review

Our principal concerns are set out below.

Specific listing requirements for EM issuers

The exchanges have supplemental procedures and policies geared to EM issuers. However, a re-examination of the sufficiency of those procedures and policies may be warranted in light of our

increased understanding of risks associated with emerging markets. There also does not appear to be a requirement for an EM issuer whose primary listing is in Canada to maintain a meaningful 'Canadian presence' (which could include having a combination of directors, key officers, employees, books and records and assets (such as cash) located in Canada).

Transparency when exchanges waive any listing requirements

In accordance with the exchanges' listing requirements, the exchanges have broad discretion in how they apply the listing requirements. The exchanges may, in their discretion, take into account any factors they consider relevant in assessing the merits of a listing application, resulting in the granting or denial of a listing application notwithstanding the published criteria. There does not generally appear to be any public disclosure that is made about waivers of listing requirements granted to specific issuers.

Strong reliance on third parties in conducting due diligence

The listing process involves the exchanges' review of various documents prepared for the issuer by outside experts, such as auditors, geologists or sponsors. In particular, the exchanges place significant reliance on the role of sponsors to conduct due diligence of prospective listings. Sponsors are expected to undertake a comprehensive review of the issuer being sponsored, including, potentially, site visits, reviewing all relevant documentation and evaluating past conduct of directors and officers, among other things. Notwithstanding the prescribed exchange requirements for a sponsorship report, the actual terms of a sponsorship report are generally negotiated between the sponsor and the issuer seeking a listing, and the sponsor is paid a fee for providing this service. In addition, there does not generally appear to be publicly available information regarding a particular sponsor's role in a new listing or the sponsor's due diligence report.

RECOMMENDATIONS AND NEXT STEPS

All issuers, including emerging market issuers, their management and boards are expected to discharge all of their responsibilities in a way that promotes the protection of Ontario investors and confidence in our markets. They are expected to do so on a basis that is fully informed by the business and cultural practices of all of the jurisdictions in which the EM issuer operates. Auditors, underwriters and all other advisors to issuers are also expected to discharge their responsibilities in a similar manner with a full appreciation of the reliance that Ontario investors place on them.

This Report raises particular issues associated with EM issuers coming to market. Emerging market issuers are an important growth market for Canadian investors and this Report identifies areas for improvement related to governance and the critical work of auditors, underwriters and other experts. We will continue to follow up with individual issuers and their advisors as appropriate, and will continue to refer matters to our Enforcement Branch as warranted. We will also continue to work with CPAB to address audit related concerns, with staff at the Canadian exchanges to address concerns related to the listing process and with the Investment Industry Regulatory Organization of Canada (IIROC) on the underwriter practices we observed in the Review.

The concerns we have identified in this Report are, to varying degrees, unfolding on a global basis. With that in mind, we will continue to engage in dialogue with other securities regulators within and outside of Canada to share perspectives and best practices to address areas of common concern.

Staff expect that EM issuers, their auditors, underwriters and their other advisors, as well as the exchanges, will address the concerns identified in this Report and will, where necessary, take immediate steps to improve their practices to effectively discharge their responsibilities to protect investors in Ontario.

What follows is a list of recommendations for further work needed to address the principal concerns in this Report. In most cases, these recommendations do not involve the creation of new policies or rules but instead involve the development of guidance, best practices or enhanced vigilance to support compliance with current requirements.

EM issuers

- establish guidance to improve corporate governance practices, particularly in the areas related to the responsibilities of the board and its committees to understand the business, operating environment and risks for issuers whose principal operations are in foreign jurisdictions
- clarify the regulatory expectations of CEOs and CFOs in conducting reasonable due diligence to support their certifications for companies whose principal operations are in foreign jurisdictions
- require better disclosure to investors of complex corporate structures and their purpose
- require better explanations of risk factors relevant to EM issuers
- raise investor awareness of risks associated with investments in issuers whose principal operations are in foreign jurisdictions
- ensure the maintenance of appropriate books and records in Canada
- consider a minimum language competency component for Canadian-resident board members in the applicable local language where the issuer's principal business operations are located
- consider minimum Canadian director residency requirements

Auditors

- facilitate access by the OSC to the audit working papers of Ontario reporting issuers
- determine what should be done to address situations where regulators are unable to access foreign audit files relating to reporting issuers
- work with CPAB to analyse whether securities rules can be enhanced to allow more information sharing in connection with the oversight of audit firms
- examine whether suitability standards for auditors of reporting issuers should be developed
- analyse whether auditors should be required to publicly disclose their resignation from a file, and to explain the reasons for that resignation
- develop greater cooperation among securities regulators and audit oversight bodies to monitor the quality of audits of public companies with operations in emerging markets
- continue to discuss the audit-related concerns in this Report with CPAB and audit firms
- bring these concerns to the attention of both the Canadian Audit and Assurance Standards Board and the International Auditing and Assurance Standards Board

Underwriters

- establish a consistent and transparent set of requirements for the conduct of due diligence by underwriters
- ensure these requirements include a process that addresses:
  - the issuer's operational structure
  - internal controls and risk management
  - translation and foreign language issues
  - business practices and business environment in which the issuer operates
  - government relationships
  - asset ownership
  - CEO/founder shareholdings and RPTs
  - cultural norms that affect the issuer's structure, operations, governance and the ability to do business
  - review of key documents
  - review of key members of management
  - review of customers, suppliers and others parties relevant to the issuer's business
  - reporting on results of site visits
- develop best practices around documentation of all aspects of an underwriter's due diligence
- develop best practices for due diligence calls and site visits

Exchanges

- assess whether additional listing requirements are needed for EM issuers to address specific risks associated with them, or if additional exchange review procedures are required to assess if significant risks are present and how those risks could be addressed
- provide greater transparency regarding waivers of any listing requirements
- assess whether the extent of reliance on third parties in conducting due diligence is appropriate in the listings process or whether additional due diligence steps are warranted
- review the role of sponsors (if applicable) in bringing EM issuers to market to ensure that there is adequate accountability placed on the sponsor and if there is an appropriate level of transparency regarding the sponsor's due diligence work

OSC staff will continue to work on the issues identified in this Report with other provincial securities regulators, CPAB, IIROC, the exchanges and other interested parties so that we can advance the work we have begun through the EMIR Review. We think it is also important to recognize that some of the policy issues we may pursue from the EMIR Review could have broader applications and a more general benefit to our markets.

We are focused on our markets remaining open and attractive to issuers from all jurisdictions. Fostering markets that are fair and efficient and that protect investors interests will continue to attract both domestic and foreign issuers.

ONTARIO SECURITIES COMMISSION

Emerging Markets Issuer Review

As the regulatory body responsible for overseeing the capital markets in Ontario, the Ontario Securities Commission administers and enforces the provincial Securities Act, the provincial Commodity Futures Act and administers certain provisions of the provincial Business Corporations Act. The OSC is a self-funded Crown corporation accountable to the Ontario Legislature through the Minister of Finance