Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff (moving party)

and

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

Defendants (responding parties)

Proceeding under the *Class Proceeding Act, 1992*

RESPONDING PARTY BOOK OF AUTHORITIES OF THE DEFENDANT, ESL INVESTMENTS, INC.

(Motion Returnable April 17, 2019)

April 12, 2019

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TO: **THE LITIGATION SERVICE LIST**

Litigation Service List
Last Updated Mar. 8, 2019 at 11:27 AM

Court File No. CV-18-611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P., EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

Court File No. CV-18-611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P.,
EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY,
WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and
DONALD ROSS

Defendants

Litigation Service List
Last Updated Mar. 8, 2019 at 11:27 AM

Court File No. CV-18-611217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. 4114/15 (Milton)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

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

Defendants

Proceeding under the Class Proceedings Act, 1992

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LIST OF AUTHORITIES

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CITATION: *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7
COURT FILE NO.: 11-CV-432919CP
DATE: January 2, 2014

ONTARIO
SUPERIOR COURT OF JUSTICE

2014 ONSC 7 (CanLII)

BETWEEN:	)	
BOB BRIGAITIS and CINDY RUPERT	)	*Theodore P. Charney* and *Andrew Eckart* for the Plaintiffs
Plaintiffs	)	
– and –	)	
IQT, LTD., c.o.b. as IQT SOLUTIONS, IQT CANADA, LTD., JDA PARTNERS LLC, IQT, INC., ALEX MORTMAN, DAVID MORTMAN, JOHN FELLOWS and RENAE MARSHALL	)	*Jeffrey E. Goodman* and *Jodi Gallagher Healy* for the IQT Inc., IQT. Canada Ltd., JDA Partners LLC, David Mortman and Alex Mortman.
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: November 25, 26, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] Pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, the Plaintiffs Bob Brigaitis and Cindy Rupert bring a motion for certification of this action against the Defendants IQT, Canada Ltd., IQT Inc., JDA Partners LLC, David Mortman, Alex Mortman, John Fellows, and Ranae Marshall. Mr. Fellows and Ms. Marshall did not defend and have been noted in default.

[2] The Plaintiffs claim is brought on behalf of the 521 dismissed employees of the now bankrupt IQT, Ltd. The employees have common law claims, including: wrongful dismissal, conspiracy, negligence, inducing breach of contract (which was incorrectly pleaded as an interference with economic relations tort), and breach of fiduciary duty. They have claims under the *Employment Standards Act, 2000*, S.O. 2000, c. 41. They also advance an oppression remedy claim under the Ontario *Business Corporation Act*, R.S.O. 1990, c. B.16, and the employees rely on alleged breaches of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 and the *Assignment and Preferences Act*, R.S.O. 1990, c. A.33.

[3] The Defendants IQT Inc., IQT, Canada Ltd., JDA Partners LLC, David Mortman, and Alex Mortman resist the certification motion and bring a Rule 21 cross-motion.

[4] Because of the operation of s. 97 of the *Employment Standards Act, 2000*, which bars an employee who files a complaint under the *Act* for unpaid wages, termination pay, and severance pay from commencing a civil proceeding for unpaid wages or for wrongful dismissal, and because of the design of Defendants' challenge to the certification of the action, in order to decide the Plaintiffs' certification motion, it is necessary to divide the putative Class Members into three groups based on whether: (1) they voluntarily made a claim under the *Employment Standards Act, 2000*; (2) they involuntarily made a claim under the *Act* for unpaid wages and vacation pay; or (3) they did not make a claim under the *Act*.

[5] The first group is the "Section 97 Group", which is made up of the 236 former employees who made claims under the *Employment Standards Act, 2000* and who have reviews pending before the Ontario Labour Relations Board ("OLRB") of the orders made by the Ministry of Labour. The Ministry ordered that the Directors of IQT, Ltd. pay to the employees outstanding wages, vacation pay, termination pay, and severance pay. These orders are called "Director's Order to Pay" or "DOTP," and the Defendants submit, in effect, that the Section 97 Group of employees, who are the beneficiary of the DOTPs, should be excluded from the class action.

[6] The second group is the "Assessed Group", which is made up of 136 former employees who are also parties to the pending OLRB review proceeding, although they did not file claims under the *Employment Standards Act, 2000*. Although they did not file claims, they were, nevertheless, assessed by the Ministry of Labour as being owed unpaid wages and vacation pay. Pursuant to a DOTP, the directors of IQT, Ltd. were ordered to pay the unpaid wages and vacation pay of the Assessed Group. The Defendants submit, in effect, that the Assessed Group employees should be excluded from the class action.

[7] The third group is the "No DOTP Group", which is made up of the 149 former employees who are not listed in any Ministry of Labour order to pay made against the directors. This third group have not made a claim under the *Employment Standards Act, 2000*, and this group of former employees is not a party to the OLRB review proceedings that are still pending.

[8] The Defendants submit that the Court has no jurisdiction over the claims of the Section 97 Group and that the Court ought not to assume jurisdiction over the claims of the Assessed Group. The Defendants submit that the claims of the Section 97 Group and the claims for unpaid wages and vacation pay of the Assessed Group are an abuse of process and should be stayed because there is another proceeding pending (the OLRB review) between the same parties in respect of the same subject matter.

[9] In their Rule 21 motion, the Defendants submit that the Plaintiffs' Amended Statement of Claim fails to disclose reasonable causes of action in: (a) corporate oppression under s. 248 of the Ontario *Business Corporations Act*; (b) unlawful interference with economic relations; (c) breach of fiduciary duty and aiding and abetting a breach of fiduciary duty; and (d) breaches of the *Bankruptcy and Insolvency Act*, the *Fraudulent Conveyances Act*, and the *Assignment and Preferences Act*.

[10] The Defendants also challenge most of the certification criteria for most of the Plaintiffs' claims. The Defendants do not oppose the negligence claim as a reasonable cause of action, but

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they resist its certification on other grounds. In particular, the Defendants submit that the various claims advanced in the Plaintiffs' proposed class action fail the preferable procedure criteria.

[11] For the reasons that are detailed below, I grant the Plaintiffs' certification motion. As I will explain below, the Class Members' claims for negligence, conspiracy, inducing breach of contract, and for an oppression remedy are free-standing claims not before the OLRB and these claims are suitable for a class action. The Section 97 Groups' claims before the OLRB do preclude their wrongful dismissal claims being advanced in a class action but, in my opinion, the exclusion of this group's wrongful dismissal claims does not preclude the Section 97 Group from participating in the class action for the other claims shared by all former employees.

[12] I conclude that the Plaintiffs' proposed class action should be certified: (a) for the 521 dismissed employees to advance claims of negligence, conspiracy, inducing breach of contract, and for an oppression remedy; and (b) for the Assessed Group and the No DOTP Group to advance wrongful dismissal claims. The Plaintiffs' claims for breach of fiduciary duty and aiding or abetting a breach of fiduciary duty should not be certified, and those claims should be dismissed.

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B. EVIDENTIARY BACKGROUND

[13] The Plaintiffs supported their motion for certification with an affidavit from Ms. Rupert and from Andrew Eckart, who is a lawyer with Falconer Charney LLP, lawyer of record and proposed Class Counsel. Mr. Eckart was cross-examined on his affidavit.

[14] The Defendants supported their Rule 21 motion and resisted the motion for certification with the affidavit of Mitchell R. Smith, who is a lawyer with Hicks Morley Hamilton Stewart Storie LLP, which is the lawyer of record for the Defendants.

C. FACTUAL AND PROCEDURAL BACKGROUND

1. Introduction

[15] The Defendants deny any wrongdoing, but for the exclusive purposes of the certification motion and the cross-motion, there is some basis in fact for the following findings of fact about the factual and procedural background to the Plaintiffs' claims.

2. The Claim Against the Defendants

[16] In September 2008, IQT, Inc. was incorporated in the State of Delaware. Its majority shareholders are John Fellows, Alex Mortman, and David Mortman.

[17] IQT, Inc. maintains a policy of insurance issued by Chubb, effective from October 10, 2010 to October 10, 2011, with an aggregate limit of liability of $5 million USD for Directors and Officers Liability and Employment Practices Liability. Under the Employment Practices Liability coverage, IQT, Inc. and its directors and officers are insured for claims for wrongful dismissal and negligence.

[18] JDA Partners LLC is a limited liability company organized in the State of New York. Its managing directors are the Mortmans. JDA Partners LLC shared the same head office as IQT, Inc.

[19] Within a few weeks, in Ontario, IQT, Inc. incorporated a wholly-owned subsidiary, IQT Canada, Ltd. Mr. Fellows and the Mortmans were appointed as directors of IQT Canada, Ltd.

[20] The next month, IQT Canada, Ltd. acquired 100% of the shares of Durham Contact Centre Limited and changed its name to IQT, Ltd., whose directors included Mr. Fellows and the Mortmans. IQT, Ltd. operated a call centre in Oshawa, Ontario.

[21] One of the employees of IQT, Ltd. was Mr. Brigaitis, who had been employed by Durham Contract since August 2002 in supervisory positions. As an employee of IQT, Ltd., he eventually assumed managerial responsibilities.

[22] Another employee was Ms. Rupert, who had been employed by IQT, Ltd.'s predecessor company from April, 2007 in a supervisory role. Ms. Rupert eventually assumed a managerial role at IQT, Ltd.

[23] Bell Canada was IQT, Ltd.'s only major contract for its call centre. The viability of IQT, Ltd.'s business was dependent on its contract with Bell Canada, and to finance its operations, IQT, Ltd. entered into an Accounts Purchase Agreement with Wells Fargo Business Credit Canada ULC. Under this agreement, Wells Fargo provided accounts receivable financing. Wells Fargo would pay a percentage of the face amount of the Bell Canada receivables and then Wells Fargo would collect the receivable directly from Bell Canada.

[24] Since at least December 31, 2009, IQT, Ltd. has been insolvent, but notwithstanding the insolvency, the Defendants used IQT, Ltd.'s assets and funds for their own purposes. Money was transferred into IQT, Inc.'s bank account in New York and then transferred into a bank account administered by JDA Partners. The funds were used for personal expenses and travel, including monthly golf and country club dues, cars, and quarterly dividend payments to the Mortmans' family and friends.

[25] In late 2010, Wells Fargo received the 2009 consolidated audited financial statements for the IQT corporations. The audited statements revealed that the unaudited 2009 financial statements were materially false and inaccurate. The audited statements showed a loss of income of over $3 million. After reviewing the statements, Wells Fargo retained and appointed a Chief Restructuring Officer, Barrie Kassoff, to operate IQT, Canada Ltd. On review of the finances of the IQT corporations, Mr. Kassoff found significant shortcomings in IQT, Inc. and its subsidiaries' financial reporting and in the day-to-day operations. Mr. Kassoff discovered major adverse changes to IQT, Ltd.'s contract with Bell.

[26] In July, 2011, IQT, Ltd. employed 521 employees, including Mr. Brigaitis and Ms. Rupert. Significantly, the employees were paid on their July 1, 2011 payday. This fact could prove legally significant because at this juncture, technically speaking, the employees were not unpaid creditors of IQT, Ltd. (This fact is significant to the arguments later about whether the employees are qualified to be complainants to advance an oppression remedy.)

[27] On July 15, 2011, IQT, Ltd. dismissed all its employees effective immediately. IQT, Ltd. told the employees that that they would not be receiving any outstanding pay, vacation pay, termination pay, severance pay, or pay in lieu of notice. The employees were told that their benefits were discontinued as of that date.

[28] On July 16, 2011, the employees established the "IQT Action Facebook Group" to "fight for and obtain wages, severance and vacation pay." There are 410 members of the Group including proposed Class Counsel, Charney Lawyers.

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[29] On August 2, 2011, Charney Lawyers (which is proposed as Class Counsel) posted a document on its webpage called "Important Note – Ministry of Labour v. Class Action." The document outlined various limitations of the Ministry of Labour process compared to the potential class action proceeding, including the potential difficulty of collecting money from IQT, Ltd. The employees were told that under the *Employment Standards Act, 2000*, the directors of IQT, Ltd. could be ordered to pay back wages but no other amounts and that termination and severance pay under the *Act* is less money than what a court would award for a wrongful dismissal claim. The note also stated:

> If you file a claim with the Ministry of Labour against IQT Ltd., you may be precluded from participating in the class action. Section 97(1) of the *Employment Standards Act, 2000* ("the Act") prohibits an employee from participating in a lawsuit to recover wages if the employee also files a complaint with the Ministry. If you have filed a complaint, you have two weeks from the day you file your complaint to withdraw it under section 97(4) of the Act. To withdraw your complaint, you must send a letter within the two weeks to the Ministry stating your intention to withdraw the complaint.

3. The Statutory Proceedings and the Proposed Class Action

[30] Following the closure of IQT, Ltd., 242 employees filed complaints with the Ministry of Labour pursuant to the *Employment Standards Act, 2000*. The Ministry of Labour's "Claim Guide" advises complainants that:

> In most cases, if you have already started a court action against the employer, you cannot file a claim about the same matter. If, after you file a claim, you wish to start a court action against the employer about the same matter, you must withdraw your claim within 2 weeks from the date of filing your claim in order to proceed with the court action.

[31] Between July 27 and August 4, 2011, thirty-four of the former IQT, Ltd. employees who had filed Ministry of Labour claims withdrew those claims.

[32] On August 5, 2011, the Ministry of Labour issued an order against IQT, Ltd. for outstanding wages, vacation pay, termination pay, and severance pay.

[33] On August 16, 2011, Mr. Brigaitis and Ms. Rupert commenced this proposed class action. In their Amended Statement of Claim, they plead claims for wrongful dismissal, negligence, conspiracy, intentional interference with economic relations, and for an oppression remedy under the Ontario *Business Corporations Act*. They also claim breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. The Plaintiffs claim aggravated and punitive damages. The Amended Statement of Claim claims damages in the amount of $20 million.

[34] In the proposed class action, the Plaintiffs allege that the call centre's closure and non-payment of monies owed to employees was caused by the Defendants' diverting monies for personal purposes before the closure. The negligence claim is that the Defendants breached a duty of care to ensure that if IQT, Ltd. ceased operations, it could pay termination entitlements to the employees. The conspiracy claim is that the Defendants conspired to wrongfully dismiss the employees and conspired to divert assets away from IQT, Ltd. that should have been available to the employees. The inducing breach of contract claim is that the Defendants stripped IQT, Ltd. of assets disabling it from paying the employees upon termination. The oppression claim is that the employees had a reasonable expectation of receiving termination compensation and the Defendants breached the duty of ensuring funds were available. The breach of fiduciary duty

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claim, which relies on New York State law, alleges that the Mortmans stripped IQT, Ltd. of assets and prevented IQT, Ltd. from paying employees their termination entitlements.

[35] The Plaintiffs also claim that IQT, Ltd. made a transfer of property or made a payment in favour of a creditor while insolvent contrary to s. 95 of the *Bankruptcy and Insolvency Act*, s. 2 of the *Fraudulent Conveyances Act*, or s. 4 of the *Assignment and Preferences Act*. The allegation is that Defendants directed payments to themselves or others improperly when IQT, Ltd. was insolvent. However, in their Reply Factum, the Plaintiffs state that these insolvency statutes are not pleaded as independent causes of action but rather as wrongful acts informing the tort claims that have been pleaded.

[36] In September 2012, Wells Fargo commenced an action in New York State with respect to IQT, Ltd.'s closure. In the New York action, Wells Fargo alleged that under New York State law Alex Mortman had breached a fiduciary duty to IQT, Ltd.'s creditors and aided and abetted others' breach of fiduciary duty. Alex Mortman, however, challenged the pleading that he owed fiduciary duties to IQT, Ltd.'s creditors, and Justice Shirley Werner struck out the breach of fiduciary duty and aiding and abetting fiduciary duty claims. She did so on the basis that Canadian law applied and that under Canadian law, directors do not have fiduciary duties to creditors of the corporation.

[37] On September 6, 2011, the Ministry of Labour issued a second order to pay against IQT, Ltd. for outstanding wages, vacation pay, termination pay, and severance pay, calculated pursuant to the provisions of the *Employment Standards Act, 2000*. The orders of August 5, 2011 and September 6, 2011, indicate that 242 employees had filed complaints under the *Act*. These employees are the so-called Section 97 Group.

[38] The Orders to Pay issued to IQT, Ltd. remained unsatisfied, and on September 28, 2011, the Ministry of Labour issued Directors Orders to Pay in the amount of $503,794.97 against IQT, Ltd.'s directors, including the Mortmans. The orders were for amounts owing to the 242 former IQT, Ltd. employees. The Orders to Pay describe each employee's claim and the amount of unpaid wages, vacation pay, termination pay, and severance pay owing to each employee.

[39] The Mortmans filed Applications for Review of the Ministry's orders with the OLRB.

[40] On October 12, 2011, Charney Lawyers again communicated to potential Class Members about withdrawing their complaints under the *Act* in order to participate in the class action. However, following this communication, no employees asked to withdraw their *Employment Standards Act, 2000* claims.

[41] On December 20, 2011, on an application by Revenu Québec and by order of the Superior Court of Quebec, IQT, Ltd. was assigned into bankruptcy.

[42] The Ministry of Labour filed a proof of claim with IQT, Ltd.'s trustee in bankruptcy for amounts owing to employees under the *Employment Standards Act, 2000*.

[43] Many former IQT, Ltd. employees applied for and received payments under the federal government's *Wage Earner Protection Program Act*, S.C. 2005, c. 47. Recently, the Federal Government was granted standing by the OLRB to advance subrogated claims for the payments it made to the employees.

[44] On April 20, 2012, the Ministry of Labour issued another pay order against the Mortmans. The Mortmans were ordered to pay $124,584.67 in unpaid wages and vacation pay to

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140 employees, 136 of whom had not filed a complaint with the Ministry of Labour. The beneficiaries of this order are the employees of the so-called Assessed Group. Mr. Brigaitis is an involuntary member of the Assessed Group. Although the members of the Assessed Group did not actually file complaints; i.e. make claims under the *Employment Standards Act, 2000*, the Assessed Group were, nevertheless, assessed by the Ministry of Labour as being owed unpaid wages and vacation pay.

[45] The assessment process for the Assessed Group took place pursuant to s. 81 (1)(a) of the *Employment Standards Act, 2000*, which is a provision that authorizes the Ministry to issue a Director's Order to Pay where the employer is insolvent, proof of claim has been filed with the bankruptcy trustee, and the claim has not been paid. Section 81 (1)(a) states:

> *Directors' liability for wages*
>
> 81. (1) The directors of an employer are jointly and severally liable for wages as provided in this Part if,
>
> > (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;

[46] The Mortmans again filed Applications for Review to the OLRB. The Section 97 Group and the Assessed Group are parties to the OLRB proceedings along with the Mortmans and the Ministry of Labour. As noted above, the Federal Government is also a party with respect to the *Wage Earner Protection Program Act* payments to the employees, for which it asserts a subrogated claim.

[47] In the OLRB proceedings, the Mortmans made an offer to settle and 19 of the 375 employees have accepted the offer.

[48] If the outcome of the OLRB proceedings is that the orders to pay are upheld in whole or in part, the Director of Employment Standards can file those orders with a court of competent jurisdiction and enforce them in the same manner as judgments or orders of the court. The Ministry of Labour treats enforcement of orders against non-resident directors on a case-by-case basis.

[49] There remains 149 employees who did not file complaints under the *Employment Standards Act, 2000* and who are not included in the various orders for payment. This is the so-called "No DOTP Group." Ms. Rupert is a member of the No DOTP Group.

D. DISCUSSION AND ANALYSIS

1. Introduction and Methodology

[50] As described at the outset of these Reasons for Decision, Mr. Brigaitis' and Ms. Rupert's certification motion is met by a cross motion under Rule 21 of the *Rules of Civil Procedure*. The outcome of the cross-motion will very much shape the proposed class action, because the various challenges to the various causes of action will determine what claims are certifiable and who should be members of the class.

[51] In a certification motion, defendants typically just rely on s. 5 (1)(a) of the *Class Proceedings Act, 1992* to put the burden on the Plaintiff to show a reasonable cause of action and

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defendants do not often bring a cross-motion like the one in the case at bar where the burden is on them to satisfy the elements of the various branches of Rule 21.

[52] The Defendants' cross-motion goes beyond the issue of whether the Plaintiffs' pleadings discloses a cause of action, which issue is resolved by determining whether it is plain and obvious that the Plaintiffs have not pleaded a tenable cause of action. The cause of action determination, which is governed by rule 21.01 (1), overlaps with the cause of action criterion found in s. 5 (1)(a) of the *Class Proceedings Act, 1992*. The Defendants' motion, however, goes farther and also challenges several causes of action on what may be described as jurisdictional grounds; for example, the Defendants submit that the jurisdiction to resolve the claims of the Section 97 Group and of the Assessed Group rests with the OLRB and not the Superior Court.

[53] Thus, in the case at bar, it is necessary to analyze the numerous causes of action alleged first through the lens of rule 21.01 (1) and 21.01 (3) and then to consider the certification criteria of class definition, common issues, preferable procedure, and suitable representative plaintiff.

[54] Therefore, in the case at bar, I will defer consideration of the certification criteria and first analyse the Defendants' cross motion to determine what causes of action emerge as candidates for certification. The analysis of some of the various causes of action will also influence the definition of the class. After the analysis of the causes of action, I will consider the criteria for certification.

[55] As a matter of methodology for this discussion and analysis section, I will consider the various issues in the case at bar in the following order and under the following headings:

- Introduction and Methodology
- Section 5 (1)(a) of the *Class Proceedings Act, 1992* and Rule 21 of the *Rules of Civil Procedure*
- The *Bankruptcy and Insolvency Act*, the *Fraudulent Conveyances Act*, and the *Assignment and Preferences Act* Claims
- The Breach of Fiduciary Duty Claims
- The Negligence Claim
- The Inducing Breach of Contract Claim
- The Conspiracy Claim
- The Oppression Remedy Claim
- The Statutory Bar to Concurrent Civil and *Employment Standards Act, 2000* Claims
- Certification – General Principles
- The Cause of Action Criterion
- The Class Definition Criterion
- The Common Issues Criterion
- The Preferable Procedure Criterion
- The Representative Plaintiff Criterion
- Conclusion about Certification

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2. Section 5 (1)(a) of the Class Proceedings Act, 1992 and Rule 21 of the Rules of Civil Procedure

[56] Before, getting underway with the discussion and analysis, it is necessary to say something about s. 5 (1) (a) of the *Class Proceedings Act, 1992* and the differences between rule 21.01 (1)(b) and rule 21.01 (3).

[57] Section 5 (1)(a) of the *Class Proceedings Act, 1992* requires that the pleadings of a proposed class action disclose a cause of action. The "plain and obvious" test derived from rule 21.01 (1)(b) for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5 (1)(a) of the *Class Proceedings Act, 1992*: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[58] Typically, the s. 5 (1)(a) (cause of action) criterion is not difficult for a Plaintiff to satisfy because the law about the plain and obvious test under rule 21.01 (1)(b) is very tolerant to allowing claims to proceed.

[59] Rule 21.01 (1)(b) states:

> 21.01(1) A party may move before a judge, …
>
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

[60] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc., supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[61] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9.

[62] 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 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n. 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 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

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[63] Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

[64] In the case at bar, however, in attacking the various cause of action advanced by the Plaintiffs, the Defendants rely on both rule 21.01 (1)(b) and also rule 21.01 (3), which sets a different standard than that for the rule 21.01 (1)(b) and for the s. 5 (1)(a) of the *Class Proceedings Act, 1992* analysis.

[65] Rule 21.01 (3) states:

> *To Defendant*
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> *Jurisdiction*
>
> (a) the court has no jurisdiction over the subject matter of the action; …
>
> *Another Proceeding Pending*
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
>
> *Action Frivolous, Vexatious or Abuse of Process*
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.

[66] When a motion is brought under rule 21.01(3)(a), the court must decide whether it has the authority or jurisdiction to decide the subject matter of the dispute. Unlike a rule 21.01(1)(b) motion to strike a claim, there is no forgiving "plain and obvious" standard; under rule 21.01 (3)(a), either the court has jurisdiction or it does not: *McCracken v. Canadian National Railway Co.*, [2010] O.J. No. 3466 at paras. 113-141 (S.C.J.).

[67] The test for dismissing or staying an action is also different for rule 21.01 (3)(c), where the crucial element is whether another proceeding is pending between the same parties in respect of the same subject matter, and for rule 21.01 (3)(d), where the crucial element is the law about *res judicata* and abuse of process.

[68] If there is another proceeding in Ontario or another jurisdiction between the same parties in respect of the same subject matter, the test for determining whether the action should be dismissed or stayed is that a stay or dismissal should only be ordered in the clearest of cases where: (a) the continuation of the action would cause the defendant prejudice or injustice, not merely inconvenience or additional expense; and (b) the stay or dismissal would not be unjust to the plaintiff: *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221 (Ont. Gen. Div.); *TDL Group Ltd v. 1060284 Ontario Ltd.*, [2000] O.J. No. 4582 (S.C.J.); *Grover v. Canada (Attorney General)* (2005), 78 O.R. (3d) 126 (Ont. S.C.J.); *Sun Life Assurance Co of Canada v. Yellow Pages Group Inc.*, 2010 ONSC 2780 (Ont. S.C.J.); *B.L. Armstrong Co. v. Cove-Craft Indust. Inc.* (1980), 27 O.R. (2d) 490 (Ont. Dist. Ct.); *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34 at p. 36 (F.C.T.D.).

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3. *The Bankruptcy and Insolvency Act, the Fraudulent Conveyances Act, and the Assignment and Preferences Act Claims*

[69] As noted above, the Plaintiffs claim that IQT, Ltd. made a transfer of property or made a payment in favour of a creditor while insolvent contrary to s. 95 of the *Bankruptcy and Insolvency Act*, s. 2 of the *Fraudulent Conveyances Act*, or s. 4 of the *Assignment and Preferences Act*. The fundamental allegation is that Defendants directed payments to themselves or others improperly when IQT, Ltd. was insolvent.

[70] The Defendants submit that these allegations do not disclose a reasonable cause of action and that the Plaintiffs have failed to show any basis in fact for these causes of action, and, therefore, these claims should not be certified.

[71] I do not have to decide, however, whether these insolvency related claims show a reasonable cause of action, because, as noted above, in their Reply Factum, the Plaintiffs state that these insolvency statutes are not pleaded as independent causes of action but rather as wrongful acts informing the tort claims that have been pleaded.

[72] Thus, the Plaintiffs are not relying on the *Bankruptcy and Insolvency Act*, the *Fraudulent Conveyances Act*, and the *Assignment and Preferences Act* claims to satisfy the s. 5 (1)(a) (cause of action) criterion for certification.

[73] Therefore, I will not be certifying these insolvency claims, and I will only address them as necessary in the context of the other claims and the various criteria for certification.

4. The Breach of Fiduciary Duty Claims

[74] The Defendants submit that the Plaintiffs' claim for breach of fiduciary duty and aiding and abetting breach of fiduciary duty as set out in paragraphs 96 to 106 of the Amended Statement of Claim should be struck for failing to disclose a reasonable cause of action or for being an abuse of process.

[75] I agree with the Defendants that these claims should be struck.

[76] It was not disputed that under Ontario law, employers, and the directors and owners of a corporate employer do not have a fiduciary relationship with the employees of their corporation. However, New York law is apparently different, and the Plaintiffs plead in paragraph 96 of the Amended Statement of Claim that the misconduct of the Mortmans and Mr. Fellows occurred in the State of New York and, therefore, New York State law applies.

[77] The pleaded application of New York State law, however, has to be placed in the context that the Plaintiffs have also pleaded that the Ontario Plaintiffs and their Ontario proposed Class Members were all employees of an Ontario corporation with employment relationships governed by Ontario law. Further, the pleading of New York law has to be placed in the context that the Ontario employees are advancing employment law claims and tort claims based on Ontario common law and Ontario Statures and they are advancing an oppression remedy under an Ontario corporate law statute with allegations that the directors have breached Canadian insolvency statutes by taking assets out of an Ontario corporation.

[78] In these circumstances, independent of anything Justice Werner may have decided and accepting the facts set out in the Amended Statement of Claim as true, it is plain and obvious that

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the former employee's rights will be governed by Ontario law and this action will be governed by Ontario law and not by New York State law, and it is plain and obvious that there is no tenable claim for breach of fiduciary duty or for aiding and abetting a breach of fiduciary duty under New York State law.

[79] In *Yordanes v. The Bank of Nova Scotia* (2006), 78 O.R. (3d) 590 (S.C.J.), which was an extraordinarily complex proposed class action involving Canadian law and the law from three foreign jurisdictions, Justice Cullity struck out the totality of the statement of claim with leave to amend for the plaintiff's failure to properly plead foreign law. Justice Cullity discussed the difficulty of applying the law associated with rule 21.01 (1)(b) to a plea of foreign law because of the principle that the court must accept that the pleaded facts are true and capable of proof. For present purposes, it is not necessary to set out Justice Cullity's treatment of the problem, and it is sufficient to note that at paragraph 15 of his judgment, he said that if the plaintiff pleaded a cause of action under a foreign law and it was plain and obvious that the facts pleaded would not justify the application of the foreign law, the pleading must be struck. That is the circumstance of the case at bar.

[80] I, therefore, strike the claims under New York State law for breach of fiduciary duty and for aiding and abetting a breach of fiduciary duty from the Amended Statement of Claim.

5. The Negligence Claim.

[81] In light of the Plaintiffs' stated intension to amend the negligence pleading to add an allegation that the Mortmans failed to properly supervise Fellows, the Defendants do not oppose negligence as a reasonable cause of action, and the Defendants do not oppose certification of the common issues set about the negligence claim.

[82] I conclude that the Plaintiffs' negligence plea satisfies the cause of action criterion.

6. The Inducing Breach of Contract Claim

[83] In paragraph 71 of the Amended Statement of Claim, the Plaintiffs plead that the manner in which the employment contracts were terminated was unlawful and constitutes an intentional interference with economic relations. However, in paragraph 100 of their factum for the certification motion, the Plaintiffs state that paragraph 71 contains some errors in drafting and that they actually intended to allege the tort of inducing breach of contract.

[84] While the Defendants in their factum picked up on the problems of the Plaintiffs' not having pleaded the constituent elements of the tort of intentional interference with economic relationships, the Defendants accept that there could be a common issue about the tort of inducing breach of contract if the Amended Statement of Claim is further amended to allege the tort of inducing breach of contract and not the tort of intentional interference with economic relationships.

[85] I, therefore, grant leave to the Plaintiffs to amend their pleading to allege the tort of inducing breach of contract.

[86] Given the position taken by the Defendants, I also conclude that the inducing breach of contract claim would satisfy the cause of action criterion for certification.

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[87] In these circumstances, it is not necessary for me to comment about the Defendants' argument about the tenability of the original plea of the tort of interference with economic relations.

7. The Conspiracy Claim

[88] The Defendants did not challenge the legal tenability of the Plaintiffs' conspiracy claim or the associated proposed common issues, save with respect to those common issues that appeared to rely on the insolvency statutes as causes of action.

[89] Therefore, I conclude that the conspiracy claim satisfies the cause of action criterion for certification

8. The Oppression Remedy Claim

[90] The Plaintiffs seek an oppression remedy under sections 245 and 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, which state:

> *Definitions*
>
> 245. In this Part, …
>
> "complainant" means,
>
> > (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
> >
> > (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
> >
> > (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.
>
> *Oppression remedy*
>
> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> *Idem*
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

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> *Court order*
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, ….

[91] The Plaintiffs advance the oppression remedy claim as in their capacity as wrongfully dismissed employees of the Defendant corporations. The Plaintiffs and the Class Members are not security holders, directors, or officers of the corporation, i.e., the Plaintiffs are not persons expressly within the definition of a complainant capable of advancing an oppression remedy claim. The Plaintiffs and the Class Members' status to advance an oppression remedy claim thus depends upon the court exercising its discretion under the definition of a complainant under. 245 (c) to decide that the Plaintiffs and the Class Members are a proper person to make an application for an oppression remedy. In the case at bar, the Defendants argue, however, that based on the decided case law about the court's discretion to qualify a person as a complainant, the Plaintiffs and the Class Members would not qualify to advance an oppression remedy.

[92] The Defendants argue that while in rare cases, a creditor might qualify as a complainant, the Plaintiffs and the Class Members were not creditors during the time of the alleged stripping of the assets of their employer by the Mortmans and they were not creditors at the time of their dismissal by the employer. The Defendants rely on the principles from *Royal Trust v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. S.C.J.) that debt actions should not be routinely turned into oppression remedies and that a creditor who has no particular or legitimate interest in the manner in which the affairs of the company are managed does not qualify as complainant.

[93] The Defendants argue that employees *simpliciter* been not been granted the status of a complainant and they rely on a line of cases that have held that the oppression remedy was not meant to provide a mechanism for employees to pursue a claim for wrongful dismissal: *Mohan v. Philmar Lumber (Markham) Ltd*. (1991), 50 C.P.C. (2d) 164 at para. 2 (Ont. Gen. Div.); *Daniels v. Fielder* (1988), 65 O.R. (2d) 629 (H.C.J.); *Flatley v. Algy Corp. (c.o.b. Mezzrow's)*, [2000] O.J. No. 3787 at para. 21 (S.C.J.).

[94] A review of the case law does indicate that simply being an employee adversely affected by the activities of a corporate employer will not qualify an employee as a complainant, and rather employees have been only granted status as complainants when: (a) the employee is also a director or officer or owner of the corporation and the dismissal is part of an overall pattern of oppression: *Naneff v. Con-Crete Holdings Ltd.*, (1993), 11 B.L.R. (2d) 218 (Ont. Gen. Div.), varied (1994), 19 O.R. (3d) 691 (Div. Ct.), varied (1995), 23 O.R. (3d) 481 (C.A.), *Benedetti v. North Park Electronics (1980) Ltd*., [1997] O.J. No. 597 (Gen. Div.), aff'd. [1997] O.J. No. 5244 (Div. Ct.), *Clitheroe v. Hydro One Inc*., [2002] O.J. No. 4383 (S.C.J.); (b) the employee is a creditor at the time of the oppressive conduct; or (c) the employee is dismissed and the oppressive conduct is then initiated to disappoint the reasonable expectations of the employee who has become or will become a creditor of the corporation: *Fortnum v. Royal City Plymouth Crysler (1999) Ltd.*, [2006] O.J. No. 5154 (S.C.J.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), leave to appeal to the S.C.C. refused [2001] S.C.C.A. No. 397.

[95] The Defendants' argument is thus strong that the proposed Class Members do not qualify as complainants, and this argument may ultimately succeed, but the argument is not strong enough to show that it is plain and obvious that the Plaintiffs and the Class Members will not be granted the status of a complainant. As noted by Justice Leitch in *Fortnum v. Royal City Plymouth Crysler (1999) Ltd., supra* at para. 14 critical to the finding that a party is a

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complainant is the requirement that the person has a reasonable expectation that a company's affairs will be conducted with a view to protecting his or her interests. In my opinion, it is not plain and obvious that a former employee of IQT, Ltd. did not have a reasonable expectation that his or her employers' assets would not be removed in anticipation of dismissing the employees.

[96] In *Downtown Eatery (1993) Ltd. v. Ontario, supra*, in June 1993, the plaintiff Mr. Alouche was dismissed from his position as a manager of a nightclub known as For Your Eyes Only, and he commenced a wrongful dismissal action against Best Beaver Management Inc., which was the corporation that issued his pay cheque, although his employment contract identified For Your Eyes Only as the employer. Best Beaver Management was controlled by the defendants Messrs. Grad and Grosman. It took three years for the wrongful dismissal action to come on for trial in the summer of 1996, and a few months before the trial, Messrs. Grad and Grosman reorganized their companies and Best Beaver Management ceased to do business and became judgment proof. Mr. Alouche was successful in his wrongful dismissal action (which is the leading Ontario case about the common employer doctrine) and when his judgment went unpaid, he sued Messrs. Grad and Grosman for an oppression remedy. Reversing the trial judge, the Ontario Court of Appeal granted an oppression remedy to Mr. Alouche.

[97] In *Downtown Eatery (1993) Ltd. v. Ontario,* the Court of Appeal drew the inference that it was the reasonable expectation of Mr. Alouche that Messrs. Grad and Grosman, in terminating the operations of Best Beaver Management and leaving it without assets to respond to a possible judgment in his wrongful dismissal action, should have retained a reserve to meet the possible judgment. In *Downtown Eatery (1993) Ltd.*, there is no discussion about how it is that Mr. Alouche qualified himself to be a complainant, but the Court of Appeal had no difficulty in deciding that he was qualified for an oppression remedy as an employee with only a potential claim as a judgment creditor at the time when the oppressive conduct occurred. It seems that the key element to this holding was that as an employee, Mr. Alouche had a reasonable expectation that the corporation would respect his inchoate wrongful dismissal claim.

[98] I appreciate that it is arguable that the position of the Plaintiffs and the Class Members is more remote than that of Mr. Alouche but, in my opinion, it is not plain and obvious that their relationship is so much more remote that it could not be inferred that they had a reasonable expectation that the Defendants would not strip their employer of all its remaining assets before dismissing its employees without notice or any severance pay or payment of unpaid wages.

[99] I conclude that it is not plain and obvious that the former employees of IQT, Ltd. do not have an oppression remedy claim.

9. The Statutory Bar to Concurrent Civil and Employment Standards Act Claims

[100] So far, the discussion establishes that the Plaintiffs and the Class Members have causes of action for the torts of negligence, conspiracy, inducing breach of contract, and for an oppression remedy. It was not disputed that subject to s. 97 of the *Employment Standards Act*, 2000, the Plaintiffs and the Class Members also have wrongful dismissal claims and claims under the *Act*.

[101] Such being the available claims, the Defendants submit, as noted at the outset of these Reasons for Decision, that the Class Members comprise three groups and of these, the Defendants submit further that only the No DOTP Group should be Class Members. For a variety of reasons, essentially jurisdictional in nature, the Defendants submit that the Section 97

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Group and the Assessed Group should not be Class Members and they should be left to advance their claims exclusively under the *Employment Standards Act, 2000* or outside of a class action by Small Claims Court actions or individual actions in the Superior Court.

[102] I do not agree, however, with the Defendants that the Section 97 Group and the Assessed Group should not be Class Members.

[103] Section 97 and 98 of *Employment Standards Act, 2000* are designed to provide employees with a mutually exclusive choice of a wrongful dismissal claim or a claim for wages, termination pay, or severance pay under the *Act*. The Legislature intended to put an aggrieved employee or former employee to an election as to whether to proceed with a civil suit for wrongful dismissal or to use the summary procedure contemplated under the Act: *Allen v. Vali Orchard Pharmacy Inc.*, 2013 ONSC 895 at para. 24 (S.C.J.).

[104] Sections 97 and 98 of the *Act* state:

> *When civil proceeding not permitted*
>
> 97. (1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.
>
> *Same, wrongful dismissal*
>
> (2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.
>
> *Amount in excess of order*
>
> (3) Subsections (1) and (2) apply even if,
>
> > (a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or
> >
> > (b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this.
>
> *Withdrawal of complaint*
>
> (4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.
>
> *When complaint not permitted*
>
> 98. (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.
>
> *Same, wrongful dismissal*
>
> (2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment.

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[105] In *Aston v. Casino Windsor Limited*, [2005] O.J. No. 2879 at para. 2 (S.C.J), Justice Patterson considered the effect of s. 97 of the *Employments Standards Act, 2000* on an employee's ability to participate in a class action relating to their termination of employment and he stated:

> In my opinion Ms. Murawski should not be included in the class or a subclass as she filed a complaint under the *Employment Standards Act* alleging an entitlement to termination pay or severance pay. As a result she may not commence a civil proceeding for wrongful dismissal as the complaint in the class action relates to the same termination or severance of employment as in her complaint. See s. 97(2) of the *Employment Standards Act*.

[106] The effect of s. 97 of the *Act* is that a person who files a complaint under the *Employment Standards Act, 2000* alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal for the the same termination or severance of employment. The effect of s.97 is to preclude the Section 97 Group from advancing a claim for wrongful dismissal in the proposed class action.

[107] Relying on *General Motors of Canada Ltd. v. Calder*, [2004] O.J. No. 5553 (Div. Ct), which considered a predecessor version of s. 97, the Plaintiffs, however, submit that s. 97 would not preclude the Section 97 Group from advancing a wrongful dismissal claim against Defendants who were not in jeopardy under a complaint filed with the Ministry of Labour. The Plaintiffs submit that since in the case at bar, the complaints of the Section 97 Group were made only against IQT, Ltd., therefore, the Defendants were not vulnerable under the *Act* but are vulnerable to a wrongful dismissal claim in a class proceeding.

[108] In my opinion, however, this submission fails because it ignores the common employment doctrine codified by s. 4 of the *Employment Standards Act, 2000*, which did put the Defendants in jeopardy, and it ignores that the reality that the Defendants are already in jeopardy by the orders which are being reviewed by the OLRB.

[109] Section 4 states:

> *Separate persons treated as one employer*
>
> 4. (1) Subsection (2) applies if,
>
> (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
>
> (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> *Same*
>
> (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.
>
> *Businesses need not be carried on at same time*
>
> (3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

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> *Exception, individuals*
>
> (4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.
>
> *Joint and several liability*
>
> (5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

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[110] The predecessor of s. 4 and the common employer doctrine was not considered or mentioned in *General Motors of Canada Ltd. v. Calder*, *supra*, which rather involved a case where the plaintiff first lodged a complaint under the *Employment Standards Act* against her employment agency as if it was her employer and then brought an action against her actual employer. In those circumstances, which are different than the circumstances of the case at bar, it made sense for the Divisional Court to rule that the predecessor of s. 97 did not bar the claim against the genuine employer.

[111] That all said, the effects of sections 97 and 98 of the *Act* should not be taken beyond their intended scope, which is associated with wrongful dismissal claims and no other civil claims. The limited scope of section 97 is made clear by s. 8 (1) of the *Employment Standards Act, 2000*, which states:

> *Civil proceedings not affected*
>
> 8. (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

[112] In *Allen v. Vali Orchard Pharmacy Inc.*, *supra*, an employee of drug store was dismissed allegedly for stealing drugs. She brought proceedings under the *Employment Standards Act, 2000* for severance and termination pay, and her claims were dismissed. She then brought a civil action for wrongful dismissal, and she added claims for negligent misrepresentation, conspiracy, and intentional interference with economic relations. Arguing that the employee's action was statute-barred by s. 97 of the *Employment Standards Act, 2000*, the employer moved for a summary judgement. Justice Pierce dismissed the motion for summary judgment. She held that s.97 was not meant to preclude claims independent of the wrongful dismissal claim. At para. 27 of her judgment, she stated:

> 27. In my view, the scheme of adjudication contemplated by the Employment Standards Act was never intended to be a substitute court with jurisdiction to entertain cases involving intentional torts or other relief not sanctioned by its enabling statute. The relief contemplated in the Act is narrow: limited to awarding termination pay or severance pay. The intentional torts pleaded are independent claims arising from but independent of the plaintiff's dismissal. The fact of the dismissal is not in dispute. It is the circumstances leading up to the plaintiff's dismissal and during the investigative phase following it that call into question whether the defendants, or either of them, committed the intentional torts pleaded. These claims must be evaluated against a full evidentiary record that is only available at trial.

[113] As I view the matter, although the quantum of the claims of the Section 97 Group and the Assessed Group may be no more than or equal to their wrongful dismissal claim, the claims of all the former employees of IQT, Ltd. against the Defendants for negligence, conspiracy,

inducing breach of contract, and for an oppression remedy are suitable claims for a class action and, in my opinion, these claims not precluded by any provision in the *Employment Standards Act, 2000*.

[114] As I view the matter, in the class action, the Class Members of the NO DOTP Group and of the Assessed Group will require individual issue trials to quantify their wrongful dismissal losses, and in those individual issues trials, the Assessed Group will have to give credit for what they recover in the proceedings before the OLRB for unpaid wages and vacation pay. In my opinion, the Assessed Group are not caught by s. 97 of the *Employment Standards Act, 2000* from advancing a wrongful dismissal claim because, by its express wording, s. 97 applies only to employees who file a complaint under the Act and that is not how the members of Assessed Group happen to find themselves involved in proceedings under the *Act*. Their participation has been involuntary as they did not file complaints under the *Act*.

[115] As I view the matter, the Class Members of the Section 97 will not have individual issues trials because their wrongful dismissal claims are precluded by s. 97 of the *Employment Standards Act*, and they will be left with the quantum awarded in the OLRB proceeding. Nevertheless, the Section 97 Group should be able to benefit by the determinations in the common issues trial of the free-standing claims for negligence, conspiracy, inducing breach of contract, and an oppression remedy. These claims are shared by all the former employees of IQT, Ltd., regardless of whether they are advancing a wrongful dismissal claim or seeking the statutory awards available under the *Employment Standards Act, 2000*.

[116] In other words, all the former employees of IQT, Ltd. had the mutually exclusive choice of: (1) a wrongful dismissal claim in the Superior Court; or (2) a claim under the *Employment Standards Act, 2000* for statutorily prescribed awards, but all the former IQT, Ltd. employees have the right to prosecute the Defendants for the free-standing claims of negligence, conspiracy, inducing breach of contract, and for an oppression remedy.

[117] Given these choices, the Section 97 Group may be taken to have chosen not to advance a wrongful dismissal claim, but that is not a reason to preclude them from advancing claims against the Defendants in negligence, conspiracy, inducing breach of contract, or for an oppression remedy. Further, given these choices, there is no basis for taking the Assessed Group or especially the No DOTP Group to have elected against a wrongful dismissal claim, although the Assessed Group will have to give credit for their unpaid wage and vacation pay entitlements from the proceedings under the *Employment Standards Act, 2000*.

[118] The No DOTP Group has elected to advance a wrongful dismissal claim and also the claims for negligence, conspiracy, inducing breach of contract, and an oppression remedy and the Superior Court has the jurisdiction to determine all these claims.

[119] A defect in the Defendants' argument under rule 21.01 (3) of the *Rules of Civil Procedure* is that the substantive jurisdiction of the Superior Court over negligence, conspiracy, inducing breach of contract, and for an oppression remedy remains intact and is never ousted by the *Employment Standards Act, 2000* proceedings. Notwithstanding the Defendants' arguments to the contrary, these claims are not a disguised wrongful dismissal claim that would be precluded by s. 97 of the Act.

[120] This point can be quickly demonstrated by *Downtown Eatery (1993) Ltd. v. Ontario, supra*, where it may be recalled that Mr. Alouche first obtained a judgment for wrongful

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dismissal and then successful sought an oppression remedy in order to enforce his wrongful dismissal judgment.

[121] Another defect in the Defendants' argument under rule 21.01 (3) is that once the action moves into the territory of the tort claims and the oppression remedy, for which the OLRB genuinely does not have jurisdiction, it cannot be said that the proceedings before the OLRB are in respect of the same subject matter as the proceedings before the Superior Court.

[122] The case at bar is thus not like *Snopko v. Union Gas Ltd.*, 2010 ONCA 248 or *Curactive Organic Skin Care Ltd. v. Ontario*, 2011 ONSC 2041, affd. 2012 ONCA 81, which cases were relied on by the Defendants to support their argument that the Superior Court should not adjudicate the claims of the Section 97 Group or the Assessed Group. In *Snopko* and *Curactive Organic Skin Care*, the jurisdiction of the Superior Court was genuinely ousted by the jurisdiction of another tribunal, and the common law claims purportedly being advanced in the Superior Court were in substance claims for which the jurisdiction of the Superior Court had been ousted.

[123] In the case at bar, although the quantum of damages for the various claims may overlap or even be commensurate with the wrongful dismissal claim, the claims are not disguised wrongful dismissal claims but free-standing claims for wrongdoing that actually arose before the wrongful dismissal.

10. *Certification – General Principles*

[124] Having resolved the Defendants' Rule 21 cross-motion, I can now turn to the Plaintiffs' certification motion.

[125] 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.

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

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

[128] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26 to 29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 15 and 16.

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

11. *The Cause of Action Criterion*

[130] The first criterion for certification is the cause of action criterion.

[131] The discussion above establishes that the Plaintiffs have satisfied the cause of action criterion for claims of wrongful dismissal, negligence, conspiracy, inducing breach of contract, and for an oppression remedy.

12. The Class Definition Criterion

[132] The second criterion for certification is that there be an identifiable class.

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

[134] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[135] The proposed class definition, which replaced the class definition set out in the Amended Statement of Claim, is as follows:

> All persons who were employees of IQT, Ltd. whose employment in Oshawa, Ontario was terminated on July 15, 2011, exclusive of its directors and officers and with respect to the claims under section 81 of the *Employment Standards Act, 2000* (ESA) against John Fellows, David and Alex Mortman, only, those employees who voluntarily filed complaints pursuant to section 96 of the ESA and who did not withdraw those complaints within two weeks of filing them.

[136] In my opinion, this class definition does not accurately articulate the relationship between the class, the causes of action, and the common issues, and it does not adequately serve the three purposes of a class definition. The flaws, however, are not fatal flaws.

[137] As I have explained above, all persons who were employees of IQT, LTD. whose employment was terminated on July 15, 2011 (exclusive of its directors and officers) have causes of action against the Defendants for negligence, conspiracy, inducing breach of contract, and for an oppression remedy and of the former employees, the Assessed Group and the No DOTP Group also have wrongful dismissal claims, which will have to be quantified at individual issues trials.

[138] In these circumstances, the appropriate class definition is the straightforward definition originally set out in the Amended Statement of Claim; namely:

> All persons who were employees of IQT, Ltd. whose employment in Oshawa, Ontario, was terminated on July 15, 2011, exclusive of its officers and directors.

[139] I conclude that the class definition criterion is satisfied.

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13. The Common Issues Criterion

[140] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each Class Member's claim and its resolution must be necessary to the resolution of each Class Member's claim: *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158 at para. 18. The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39; *McCracken v. Canadian National Railway Co*.2012 ONCA 445 at para. 183.

[141] With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160; *McCracken v. Canadian National Railway Co*., *supra,* at para. 183.

[142] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member: *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).

[143] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), O.R. (3d) 401 (C.A.) at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General) supra,* at para. 53.

[144] Mr. Brigaitis and Ms. Rupert propose 26 common issues, which are set out below. My discussion of each of these proposed common issues can be relatively brief, because subject to the outcome of its Rule 21 cross-motion and certain specific objections, the Defendants conceded that many of the questions satisfied the s. 5 (1)(c) criterion.

[145] Questions 1 to 8, which concern the employment law (wrongful dismissal) claims, are:

> 1. Was there a common contractual term of employment between IQT, Ltd. and the Class Members which required IQT, Ltd to provide reasonable notice to the class prior to termination of employment, or in the alternative, damages for pay-in-lieu of notice?
>
> 2. If the answer to question (1) is yes, did IQT, Ltd. breach the contract? If so, how?
>
> 3. Do sections 61 and 64 of the *ESA* require IQT, Ltd. to pay pay-in-lieu of notice and/or severance pay to the Class Members?

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> 4. If the answer to question (3) is yes, did IQT, Ltd. breach sections 61 and 64 of the ESA? If so, how
>
> 5. Do sections 11 and 38 of the *ESA* require IQT, Ltd. to pay outstanding wages and vacation pay to the Class Members?
>
> 6. If the answer to question (5) is yes, did IQT, Ltd. breach sections 11 and 38 of the ESA? If so, how?
>
> 7. If the answers to questions (1) to (6) are "yes", are any of IQT, Canada, Ltd., IQT, Inc., and/or JDA Partners LLC, Alex, David, and/or Fellows jointly and severally liable for IQT, Ltd.'s breaches of the terms of the contracts and/or sections of the ESA? If so, how and why?
>
> 8. Pursuant to section 81 of the *ESA*, are any or all of Alex Mortman, David Mortman (the "Mortmans"), and/or John Fellows ("Fellows") liable to pay outstanding wages, including vacation pay, owing to the Class up to the date of termination?

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[146] The Defendants conceded that questions 1 to 8 satisfy the common issues criterion.

[147] Question 9, which concerns the effect of s. 97 of the *Employment Standards Act, 2000*, is:

> 9. What impact, if any, does section 97 of the *ESA* have on the Class Members ability to pursue a claim in damages against any or all of the defendants for outstanding wages, vacation pay, termination pay and/or severance pay?

[148] As a result of the cross-motion, Question 9 has been answered, and it should not be certified as a common issue. The effect of s. 97 of the *Employment Standards Act* is to exclude the Section 97 Group from common issues trials to quantify their wrongful dismissal claims, which they no longer have, having instead elected the statutory claims under the *Act*.

[149] Questions 10 to 13, which concern the conspiracy claim and the inducing breach of contract claim, are:

> 10. Did any or all of the defendants conspire to wrongfully dismiss the Class Members from IQT, Ltd.? If so, when and how?
>
> 11. Did any or all of the defendants conspire to transfer, divert, convey, assign, and/or strip IQT, Ltd.'s revenues and assets by paying its executives exorbitant salaries and expense accounts so that there were no assets available to pay Class Members compensation for pay-in-lieu of notice, severance, outstanding wages and vacation pay? If so, when and how?
>
> 12. Did any or all of Fellows and/or the Mortmans intentionally interfere with the contractual relationships [induce breach of contract] between IQT, Ltd. and its employees?
>
> 13. Did IQT, Ltd. make a one or more transfers of property or make a payment in favour of a creditor while insolvent contrary to s. s. 95(1)(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F29, and/or section 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33? If so, to whom, how much and how?

[150] The Defendants did not challenge questions 10 to 13 on the grounds of an absence of commonality. Rather, they submitted that all these questions did not satisfy the preferable procedure criterion and that some of these claims were claims to be made in the bankruptcy proceeding and not in a class action. Thus, with one qualification, for the purposes of the third

criterion, the commonality of these questions was not challenged, and I shall certify questions 10 to 13 as common issues subject to the determination of the preferable procedure criterion.

[151] The qualification is that I would strike the words: "If so, to whom, how much and how?" from Question 13. Since the Class Members individual claims are calculated by what they lost not by what the Defendants may have gained by their wrongdoing, no purpose is served by the exercise of quantifying the value of the assets allegedly stripped from IQT, Ltd.

[152] Questions 14 and 15, which concern the oppression remedy claim, are:

> 14. Did Fellows and the Mortmans, or any of them, exercise their powers as directors of IQT, Ltd. in a manner that is oppressive or unfairly prejudicial or in disregard of the interests of the Class within the meaning of section 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA")?
>
> 15. Were the acts or omissions of IQT, Inc. and/or IQT Canada, Ltd. oppressive or unfairly prejudicial or in disregard of the interests of the Class for the purposes of section 248 of the OBCA?

[153] The Defendants did not challenge questions 14 and 15 on the grounds of an absence of commonality. Rather, as discussed above, they disputed that an oppression remedy claim was available for the proposed Class Members. Since, I have decided that point against the Defendants, I conclude that questions 14 and 15 are certifiable as common issues.

[154] Questions 16 and 17, which concern the negligence claim, are:

> 16. Did Fellows and/or the Mortmans owe a duty of care to the Class to take steps to ensure that on the cessation of IQT, Ltd.'s business, the Class Members would be terminated in accordance with the implied and actual employment contracts and/or under the ESA?
>
> 17. Did Fellows and/or the Mortmans breach the standard of care expected of them to taking steps to ensure that on the cessation of IQT, Ltd.'s business, the Class Members would be terminated in accordance with the implied and actual employment contracts and/or under the ESA? If yes, when and how?

[155] The Defendants did not challenge the commonality of the negligence claim, and thus they conceded that these questions satisfy the common issues criterion.

[156] Questions 18 to 20, which concern, the breach of fiduciary duty claim, are:

> 18. In the alternative, did Fellows and/or the Mortmans owe a fiduciary duty to the Class under the laws of the State of New York?
>
> 19. If the answer to (18) is "yes", did Fellows and/or the Mortmans breach that fiduciary duty? If so, when and how?
>
> 20. In the further alternative, did Fellows and/or the Mortmans aid and abet each other in breaching a fiduciary duty owed to the Class under the laws of the State of New York? If so, when and how?

[157] As discussed above, there is no tenable breach of fiduciary duty claim, and therefore questions 18 to 20 are not certifiable as common issues.

[158] Question 21 was withdrawn during the certification motion.

[159] Questions 22 to 28 concern what remedies are available to Class Members and the calculation of damages. Questions 22 to 28 are:

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> 22. Can the damages of the Class with respect to the ESA (i.e. damages for outstanding wages, vacation pay, pay-in-lieu of notice and/or severance pay) be determined by using a generalized formula or some other measure that is not dependent on individual assessments? If yes, what amount should the defendants pay, to whom and why?
>
> 23. Should the defendants pay punitive damages to the Class, and if yes, who, why and in what amount?
>
> 24. Should the defendants pay prejudgment and postjudgment interest, and at what annual interest rate?
>
> 25. Should the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?
>
> 26. Is this an appropriate case for the defendants to provide an accounting of all proceeds received directly or indirectly from IQT, Ltd.?
>
> 27. Is this an appropriate case for the court to appoint a receiver-manager of IQT, Inc.?
>
> 28. Is this an appropriate case for the Class Members to follow the funds that were transferred, conveyed, gifted and/or assigned from IQT, Ltd to any or all of the defendants and to identify assets that could be traced to those funds in the hands of parties other than bona fides purchasers for value without notice?

[160] In my opinion, questions 22, 23, 24, and 25 depend upon the determination of individual issues trials and want for the commonality necessary to be certified as common issues.

[161] With the striking of the fiduciary duty claims, there is no legal underpinning or utility for questions 26 and 28.

[162] As for question 27 given that IQT, Inc. is an American Delaware corporation, I have some doubts about the availability, utility, and enforceability of an order appointing a receiver, but technically speaking, the question is a common issue and I, therefore, will give the Plaintiffs the benefit of the doubt and certify the question.

[163] To summarize, I conclude that questions 1-8, 10-17, and 27 satisfy the common issues criterion.

14. The Preferable Procedure Criterion

[164] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *AIC Limited v. Fischer*, 2013 SCC 69.

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

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

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

[168] The following actions about the mass termination of employees have been certified as class proceedings: *Webb v. K-Mart Canada Ltd*., (1999), 45 O.R. (3d) 389 (S.C.J.), leave to appeal to Div. Ct. refused (1999), 45 O.R. (3d) 638 (S.C.J.); *Scott v. Ontario Business College (1997) Ltd.*, [1997] O.J. No. 3441 (S.C.J.); *Gregg v. Freightliner Ltd (c.o.b. Western Star)*, 2003 BCSC 241; *Downey v. Mitel Networks Corp.*, [2004] O.J. No. 5981 (S.C.J.).

[169] The Defendants submit that the Plaintiffs have failed to establish that a class proceeding would be the preferable procedure for resolving the claims of the proposed class members. The Defendants submit that if the action were certified, the resulting proceeding would involve a vast number of individual trials on a myriad of individual issues that would undermine the interests of access to justice and judicial economy and impose a hopelessly unmanageable, inefficient and unfair process on the parties and on the Court.

[170] I disagree. In the case at bar, a class proceeding is the appropriate method of advancing the claims of the Class Members

[171] While it is true that the common issues trial will not necessarily be dispositive of all issues between the Class Members and some of the Class Members (but not the Section 97 Group members) will have to go on to individual issues trials, the common issues trial will make a substantial advance in the litigation and will determine whether it is worthwhile for the Assessed Group and the No DOTP Group to proceed to individual issues trials for a quantification of their losses.

[172] There is no preferable procedure or meaningful alternative to the Superior Court adjudicating the Class Members claims' for negligence, conspiracy, inducing breach of contract, and for an oppression remedy. If the Defendants are successful in defending these claims, there will be very few individual issues trials. Conversely, assuming that the Plaintiffs are successful at the common issues trial, there is also the prospect that some members of the Assessed Group may not need to proceed to individual issues trials. The Assessed Group may be satisfied with the quantum of the award made by the OLRB and the outcome that the Defendants are liable to pay that award as the damages for their negligence, conspiracy, inducing breach of contract, or oppression remedy claim.

[173] In my opinion, the proposed class action satisfies the preferable procedure criterion.

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15. The Representative Plaintiff Criterion

[174] The Defendants accept that Mr. Brigaitis or Ms. Rupert satisfy the representative plaintiff criterion, but noting that neither are members of the Section 97 Group, the Defendants submit that this means that neither represents the Section 97 Group or is aligned with its interests. Thus, the Defendants submit that if the Section 97 Group's claims are permitted to proceed, an additional representative plaintiff should be added.

[175] I disagree. For the purposes of the common issues trial, the interests of all Class Members are aligned and Mr. Brigaitis or Ms. Rupert are suitable representative plaintiffs.

[176] The Defendants, however, submit that the representative plaintiffs' proposed litigation plan is deficient.

[177] For present purposes, it is not necessary to review the Defendants' criticism of the litigation plan because many of the points of criticism concern the treatment of common issues that have not been certified and because there is nothing in the Defendants' criticism that suggests that any problems with the plan cannot be addressed when the litigation plan is revised, as it must be revised, in light of the dismissal of the fiduciary duty claims, the interpretation of the effect of s. 97 of the *Employment Standards Act, 2000*, and the culling of the common issues.

[178] I conclude that the proposed class action satisfies the representative plaintiff criterion but direct that the litigation plan be settled as a part of the case management of the class action.

16. Conclusion about Certification

[179] Subject to the qualifications or modest refinements required to the class definition or to the Plaintiffs' statement of claim, and with the revision of the litigation plan to follow certification so that the plan accords with the claims and common issues that have been certified, I conclude that the Plaintiffs have satisfied all of the criteria for certification and, accordingly. this action should be certified as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*.

E. CONCLUSION

[180] The Defendants have been partially successful on their Rule 21 cross-motion but their success does not go so far to defeat the Plaintiffs' certification motion. Orders should be made accordingly.

[181] If the parties cannot agree about the matter of costs they may make submissions in writing beginning with the Plaintiffs' submissions within 20 days of the release of these Reasons for Decision followed by the Defendants' submissions within a further 20 days.

[182] If the parties require more time to negotiate costs, they may extend the above schedule provided that failing agreement, all the costs submissions are received within 60 days of the release of these Reasons for Decision.

_____

Perell, J.

Released: January 2, 2014

2014 ONSC 7 (CanLII)

CITATION: *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7
COURT FILE NO.: 11-CV-432919CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BOB BRIGAITIS and CINDY RUPERT

Plaintiffs

- and -

IQT, LTD., c.o.b. as IQT SOLUTIONS, IQT CANADA, LTD., JDA PARTNERS LLC, IQT, INC., ALEX MORTMAN, DAVID MORTMAN, JOHN FELLOWS and RENAE MARSHALL

Defendants

REASONS FOR DECISION

Perell, J.

Released: January 2, 2014

2014 ONSC 7 (CanLII)

Tab 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Oblats de Marie Immaculee du Manitoba, Re | 2004 MBQB 71, 2004 CarswellMan 104, 129 A.C.W.S. (3d) 1064, [2004] M.J. No. 112, [2004] 10 W.W.R. 164, 182 Man. R. (2d) 201, 1 C.B.R. (5th) 279 | (Man. Q.B., Mar 17, 2004)

2000 CarswellOnt 3269
Ontario Superior Court of Justice

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re

2000 CarswellOnt 3269, [2000] O.J. No. 3421, 19 C.B.R. (4th) 158, 99 A.C.W.S. (3d) 732

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36

In the Matter of a Plan of Compromise or Arrangement of the Canadian Red Cross Society/La Société Canadienne de la Croix Rouge, Applicant

Blair J.

Heard: September 12, 2000
Judgment: September 14, 2000
Docket: 98-CL-002970

Counsel: *Benjamin Zarnett*, *Brian Empey* and *Jessica Kimmel*, for Canadian Red Cross.
James H. Grout and *Scott Bomhof*, for Monitor, Ernest & Young.
David Harvey and *Aubrey Kauffman*, Representative Counsel for pre-1986/post 1990 Hepatitis C Claimants (non-B.C. and non-Quebec).
David Klein and *Gary Smith*, Representative Counsel for B.C. pre-1986/post 1990 Hepatitis C Claimants.
Dawna Ring, Representative Counsel for Secondarily Infected Spouses and Children.
Kenneth Arenson, for various HIV Directly Infected Claimants.
Michel Bélanger, for Quebec Class Action Claimants.
Paul Vickery, for Government of Canada.
William V. Sasso, for Provincial and Territorial Governments except Ontario.
Richard Horak, for Government of Ontario.
S. John Page, for Canadian Blood Services.
Michael Kainer, for Service Employees Union.
Neil Saxe, for Dominion of Canada General Insurance Company.
Michael Babcock, for Defendant, Hospitals.
Mary M. Thomson, for Certain Physicians.
Alex MacFarlane, for Connaught Laboratories Limited.

Subject: Corporate and Commercial; Insolvency
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Thousands of persons contracted disease from transfusions of contaminated blood supplied by Red Cross — Society's potential liabilities to claimants far exceeded its assets — Society transferred control of Canadian blood supply to new agencies — Fund of about $79 million established to compensate claimants — Interested parties conducted intense and lengthy negotiations to reach plan of compromise — Society applied for approval of plan — Application granted — Plan equitably balanced various competing interests — Plan overwhelmingly approved by all classes of creditors, including

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claimants — Parties all represented by legal and professional advisors — Creditors would not receive better distribution on liquidation of Society's assets — Approval strongly recommended by court-appointed monitor — Important that Society be allowed to continue its other humanitarian activities.

Table of Authorities

Cases considered by *Blair J.*:

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — considered

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Wandlyn Inns Ltd., Re (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) — considered

Statutes considered:

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

s. 6 — pursuant to

APPLICATION by Canadian Red Cross Society for approval of plan of compromise and arrangement pursuant to *Companies' Creditors Arrangement Act*.

***Blair J.*:**

1 After two years of intense and complex negotiations, the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge applies for approval and sanction of its Plan of Compromise and Arrangement, as amended ("the Plan"). The application is made pursuant to section 6 of the *Companies' Creditors Arrangement Act* (the "CCAA"). The Plan was approved by an overwhelming majority of all classes of creditors on August 30, 2000.

Background

2 All insolvency re-organizations involve unfortunate situations, both from personal and monetary perspectives. Many which make their way through the courts have implications beyond simply the resolution of the debt structure between corporate debtor and creditors. They touch the lives of employees. They have an impact on the continued success of others who do business with the debtor company. Occasionally, they affect the fabric of a community itself. None, however, has been characterized by the deep human and, indeed, institutional tragedy which has given rise to the restructuring of the Canadian Red Cross (the "Red Cross" or the "Society").

3 The Canadian Red Cross has been an institutional icon in the lives of Canadians for many years. As the Court noted in its endorsement at the time of the original Order granting the Society the protection of the CCAA:

> Until recent years it would have been difficult to imagine a not-for-profit charitable organisation with a more highly regarded profile than the Canadian Red Cross Society. Who among us has not benefited in some way, does not know someone who has benefited in some way, or is at least unaware of the wide-ranging humanitarian services it provides, nationally and internationally? It aids victims of conflicts or disasters — providing assistance to refugees from the conflict in Rwanda, or programs for relief and health care and emergency training in places like Angola, Haiti, and Russia, and working with communities in Quebec and Manitoba in recent years as a result of flood disasters and ice storms, as but some examples. It furnishes water safety programs and first aid services, homemaker services and other community initiatives across Canada. And it has been responsible for the national blood program in Canada for the past 50 years, recruiting donors and collecting, testing, processing, storing and distributing blood products for the collective Canadian need.

4 Regrettably, however, that honourable tradition and the reputation which has accompanied it, have been badly sullied in recent years. Thousands of innocent Canadians have found themselves inflicted with devastating disease —

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Hepatitis C, HIV, and Creutzfeld Jakob disease, principally — arising from the transfusion of contaminated blood or blood products, for the supply of which the Red Cross was responsible. I shall refer to these affected people, globally, as "the Transfusion Claimants. Many have died. Others are dying. The rest live in the shadow of death. As Ms. Dawna Ring, Representative Counsel for one group of Transfusion Claimants put it in argument, the well-known Red Cross symbol, for many unfortunately, has become "a symbol of death". Nothing that the Court can do will take away these diseases or bring back to life those who have died.

5 The tragedy of these events has been well chronicled in the Report of the Krever Commission Inquiry into problems with the Canadian Blood Supply, and in the numerous law suits which have proceeded through the courts. Measured from the perspective of that stark background, the legal regime which governs the disposition of these proceedings must seem quite inadequate to many. However, it has provided at least a mechanism whereby some order, some closure, and some measure of compensatory relief are offered to the Transfusion Claimants and to others in respect of the blood supply problems, while at the same time offering to the Red Cross the possibility of continuing to provide its other humanitarian services to the community.

6 Recognizing that its potential liabilities far outstripped its assets and abilities to meet those liabilities, and hoping as well to save the important non-blood related aspects of its operations, the Red Cross applied to this Court for protection under the CCAA in July, 1998. The Federal, Provincial and Territorial Governments (the "FPT Governments") — which also faced, and continue to face, liability in connection with these claims — had decided that it was imperative for the control and management of the Canadian Blood Supply to be transferred into new hands, Canadian Blood Services and Héma Québec. It was a condition of the Acquisition Agreement respecting that transfer that the Red Cross seek and obtain CCAA protection. The concept put forward by the Red Cross at the time was that the sale proceeds would be used to establish a fund to compensate the Transfusion Claimants (after payment of secured and other creditors) and the Society would be permitted to continue to carry on its other non-blood related humanitarian activities.

The CCAA Process

7 CCAA protection was granted, and a stay of proceedings against the Red Cross imposed, on July 20, 1998. The stay of proceedings has been extended by subsequent Orders of this Court — most recently to October 31 st of this year — as the participants in the process have negotiated toward a mutually acceptable resolution of the particularly complex issues involved.

8 The negotiations have been intense and lengthy. They have of necessity encompassed other outstanding proceedings involving the Red Cross and the FPT Governments, including a number of class actions in Ontario, Quebec and British Columbia, and the negotiation of a broader settlement between the Governments and Transfusion Claimants infected between 1986 and 1990. As a result of this latter settlement, the funds made available by the transfer of the Canadian Blood Supply to Canadian Blood Services and Héma Québec are primarily directed by the Red Cross Plan to meet the claims of the pre-1986/post 1990 Transfusion Claimants, who were not entitled to participate in the Government Settlement.

9 The CCAA process itself involved numerous attendances before the Court in the exercise of the Court's supervisory role in cases of this nature. Orders were made — amongst others — appointing a Monitor, appointing Representative Counsel to advise each of the Transfusion Claimant groups and to assist the Court, dealing with funding for such counsel, establishing a Claims process (including notice, a disallowance/approval mechanism and the appointment of a Claims Officer), granting or refusing the lifting of the stay in certain individual cases, approving a mediation/arbitration process respecting certain pension issues, determining issues respecting appropriate classes of creditors for voting purposes, and providing for the holding of creditors' meetings to vote on approval of the Plan and for the mailing of notice of those meetings and the materials relating to the Plan to be considered. Over 7,000 copies of the Plan and related materials were mailed.

A Summary of the Plan

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10 I draw upon the Applicant's factum for a summary of the basics of the Plan. Under the Plan,

a) Ordinary Creditors with proven claims not exceeding $10,000 will receive 100% of their proven claim;

b) Ordinary Creditors with proven claims of more than $10,000 will receive 67% of their proven claim;

c) A Trust is established for Transfusion Claimants, on specific terms described in the Plan, funded with $79 million plus interest already accrued under the Plan, as follows:

(i) $600,000 for CJD claimants;

(ii) $1 million for claimants in a class action alleging infection with Hepatitis C from blood obtained from prisons in the United States;

(iii) $500,000 for claimants with other transfusion claims that are otherwise not provided for;

(iv) approximately $63 million for claimants in class actions alleging Hepatitis C infection before 1986 and after June 1990; and,

(v) approximately $13.7 million for settlement of HIV claims.

11 The source of these funds are those which the Red Cross has been holding from the sale of the Blood Assets, and negotiated contributions from co-defendants in various actions, and insurers. The Plan establishes procedures whereby claimants may apply to a Referee (the Honourable R.E. Holland, in the case of the HIV Claimants, and the Honourable Peter Cory, in the case of the other Transfusion Claimants) for determination of the amount of their damages.

12 Several other aspects of the Plan bear mention as well. They relate to implementation and to the effect of the Plan upon implementation. Included, of course, is the fact that once the compromises and arrangements to be effected by the Plan are approved, they will bind all creditors affected by the Plan. As well, provided the Red Cross carries out its part of the Plan, all obligations and agreements to which the Society is a party as at the Plan Implementation Date are to remain in force and are not subject to acceleration or termination by any other parties as a result of anything which occurred prior to that Date, including the fact that the society has sought CCAA protection and made the compromises and arrangements in question. In addition, the Courts of each Province are to be asked to give recognition and assistance to the sanction order and to the implementation of the Plan. And the Red Cross is to be authorized to make payment in accordance with a specific settlement entered into with Service Employees' International Union with respect to a collective agreement and other issues involving the Society's homemaker employees. Finally, there are provisions respecting the discharge of the Monitor and the Claims Officers upon implementation.

13 The Red Cross has now put forward its Plan, as most recently amended in the negotiation process. On August 30, 2000, all classes of creditors — including the classes of Transfusion claimants — voted overwhelmingly in favour of accepting the Plan. The society now applies for the Court's sanction and approval of it.

The Test

14 Where a majority in number representing two-thirds in value of the creditors present and voting in person or by proxy approve a plan of arrangement, the plan may be sanctioned by the Court and, if sanctioned, will bind all the creditors (or classes of creditors, where there is more than one class) and the company: CCAA, s. 6.

15 The principles to be applied in the exercise of the Court's discretion upon such an application are well established:

(1) There must be strict compliance with all statutory requirements;

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(2) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and,

(3) The Plan must be fair and reasonable.

See: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506.

16 Applying those principles to the circumstances of this case, I have no hesitation in concluding — as I do — that the Plan should be sanctioned and approved.

Compliance with Orders and Statutory Requirements

17 The Court has already ruled that the Red Cross is a debtor corporation entitled to the protection of the CCAA, and I am satisfied that all of the statutory requirements of the Act have been complied with.

18 I am also satisfied that the Applicant has complied with the substance of all Orders made in the course of these proceedings. To the extent that there has been a variance from the terms of the Orders, they have been the result of understandable logistical hurdles for the most part, and there has been no prejudice to anyone as a result. I am content to make the necessary corrective orders requested in that regard. Nothing has been done or purported to be done which is not authorized by the provisions of the CCAA.

19 There was apparently some confusion at the time of voting which resulted in 8 members of the group of Secondarily Infected Spouses and Children with HIV not voting. The claims of 6 of those people have been disallowed for voting purposes. Ms. Ring, who is Representative Counsel for this group, advises, however, that even if all 8 claimants had voted, and opposed approval — which she believes is quite unlikely — her clients' group would still have strongly favoured sanctioning and approval of the Plan. I observe for the record, that what was at issue here related only to the right to vote at the Special Meeting held. It does not affect the rights of anyone to claim compensation from the Plan.

The Plan is Fair and Reasonable

20 I conclude as well that the Plan is fair to all affected by it, and reasonable in the circumstances. It balances the various competing interests in an equitable fashion.

21 The recitation of the background and process above confirms the complexity and difficult nature of these proceedings, and the scope of the negotiations involved. It is not necessary to repeat those facts here.

22 To be "fair and reasonable" a proposed Plan does not have to be perfect. No Plan can be. They are by nature and definition "plans of compromise and arrangement". The Plan should be approved if it is inherently fair, inherently reasonable and inherently equitable: see, *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) at p. 321; *Re Central Guaranty Trustco Ltd.* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) at p. 142. The Red Cross Plan meets those criteria, in my view.

23 In the first place, the Plan has been overwhelmingly approved by each of the four classes of creditors — who turned out in significant numbers to vote at the Special Meetings held. I note that 99.3% of the votes cast by Ordinary Creditors, representing 99.9% of the value of those claims, approved. The FPT Governments — which cast their own votes as well as the assigned votes of the 1986-1990 Transfusion Claimants who have the benefit of the Government Settlement — voted 100% in favour. Of the remaining Transfusion Claimants, 91.0% of the votes cast by the pre-1986/ post 1990 Hepatitis C class, representing 91.0% of the value of those claims support approval; the figures are 91.2% for the other Transfusion Claimants.

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24 Counsel filed with the Court letters from three individuals (of thousands) who dispute the sanctioning of the Plan. I read these letters carefully. They are poignant in the extreme and raise many points pertaining to the claims made and the process followed. There is no doubt something to be said for all of them. I am advised, however, that most of the issues raised were raised as well at the Special Meetings on August 30th and debated fully at that time. Ranked in opposition to those issues are all of the factors which militate in favour of acceptance of the Red Cross Plan. The huge majority of Transfusion Claimants opted to support the Plan, concluding that it represents the best possible outcome for them in the circumstances.

25 Although the Transfusion Claimants are not the type of "business" creditors normally affected by a CCAA arrangement, they are the ones most touched by the events leading up to these proceedings and by the elements of the Plan. I see no reason why their voting support of the Plan should not receive the same — or more — deference as that normally granted to creditors by the Court in these cases. The fact that the Plan has received such a high level of support weighs very heavily in my consideration of approval. The Plan is the result of negotiations amongst all interested parties — leading to changes and amendments which were made and approved as late as the August 30th meetings. The various groups were all represented by legal and professional advisors, including the Transfusion Claimants who were advised and represented by Representative Counsel.

26 I accept the submission that the Plan equitably balances the various competing interests and the available resources of the Red Cross. In regard to the latter, the evidence is that creditors — including the Transfusion Claimants — would not receive a better distribution in the event of a liquidation of all of the assets of the Society.

27 Moreover, with the exception of the three letters I have referred to, no one opposes the sanctioning of the Plan. Indeed, most strenuously support its approval. In addition, the Monitor has advised that it strongly recommends the Plan and its approval.

28 Finally, it is significant, in my view, that the Plan if implemented will permit the Canadian Red Cross to continue to carry on its non-blood related humanitarian activities. There is a deep-seated anger and bitterness towards the Society amongst many of the victims of these terrible blood diseases. To them, it is not right that thousands of people have been poisoned by tainted blood yet the Society is able to continue on with the other facets of its business. These feelings are understandable. However, the Red Cross currently continues to employ approximately 7,000 Canadians in the other aspects of its work, and it makes valuable contributions to society through these humanitarian efforts. That it will be able to continue those works, if the Plan is implemented, is important.

Disposition

29 For all of the foregoing reasons the Plan is sanctioned and approved. Two Orders are requested, one relating to the sanction and approval of the Plan, and the second making the logistical and minor corrections I referred to earlier in these Reasons. Orders will issue in terms of the draft Orders filed, on which I have placed my fiat.

30 Before concluding, I would like to acknowledge the excellent work done by all counsel in this matter, and to thank them for their assistance to the Court and to their clients throughout. They have conducted themselves in the best tradition of the Bar in a difficult and sensitive case, and I commend them for their efforts.

Application granted.

End of Document

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Tab 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Denis v. Bertrand & Frère Construction Co. | 2006 CarswellOnt 7573, 58 C.L.R. (3d) 233, 38 C.P.C. (6th) 360, 153 A.C.W.S. (3d) 526 | (Ont. S.C.J., Nov 6, 2006)

1998 CarswellOnt 5823
Ontario Court of Justice (General Division)

Dabbs v. Sun Life Assurance Co. of Canada

1998 CarswellOnt 5823, [1998] O.J. No. 1598

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Sharpe J.

Judgment: February 24, 1998
Heard: February 5, 1998
Docket: Toronto 96-CT-022862

Counsel: *Michael A. Eizenga* and *Charles M. Wright*, for Plaintiff.
H. Lorne Morphy and *Patricia D.S. Jackson*, for Defendant.
Michael Deverett, for 3 Objectors.
Gary R. Will and *J. Douglas Barnett*, for 11 Objectors.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iv Appeals
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.c Enforcement of terms
Headnote
Practice --- Disposition without trial — Settlement — Enforcement of terms
Plaintiff brought action for breach of contract and negligent misrepresentation against insurer — Action was settled subject to court approval — Motion was brought for certification as class action and court approval of settlement — Fourteen members of proposed class filed objections — Hearing was directed to determine procedural issues — Parties proposing settlement bore onus of satisfying court that approval should be granted — Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole — Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement — Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary

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discovery — Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions — Case did not justify interim costs to ensure objectors could continue participation.

Practice --- Parties — Representative or class actions — Procedural requirements

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer — Action was settled subject to court approval — Motion was brought for certification as class action and court approval of settlement — Fourteen members of proposed class filed objections — Hearing was directed to determine procedural issues — Parties proposing settlement bore onus of satisfying court that approval should be granted — Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole — Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement — Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery — Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions — Case did not justify interim costs to ensure objectors could continue participation.

Table of Authorities

Cases considered by *Sharpe J.*:

Bowling v. Pfizer (1992), 143 F.R.D. 141 (U.S. Ohio) — referred to

Kevork v. R., [1984] 2 F.C. 753, 17 C.C.C. (3d) 426 (Fed. T.D.) — referred to

Mahar v. Rogers Cablesystems Ltd. (1995), 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690 (Ont. Gen. Div.) — referred to

Newman v. Stein (1972), 464 F.2d 689, Fed. Sec. L. Rep. P 93, 547 (U.S. 2nd Cir. N.Y.) — considered

Organ v. Barnett (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) — applied

Poulin v. Nadon, [1950] O.R. 219, [1950] O.W.N. 163, [1950] 2 D.L.R. 303 (Ont. C.A.) — referred to

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) — applied

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 242(2) — referred to

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

Generally — pursuant to

s. 12 — considered

s. 14 — considered

s. 14(2) — considered

s. 29 — considered

s. 32(1) — considered

Rules considered:

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

Generally — referred to

R. 7.08(1) — referred to

RULING on hearingto determine procedure for court approval of settlement and class action certification.

***Sharpe J.*:**

1. Nature of Proceedings

1 In this action, commenced pursuant to the *Class Proceedings Act 1992*, the plaintiff asserts claims for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. Similar actions were commenced in Quebec and in British Columbia. Before the defendant filed a statement of defence and before certification as a class proceeding, this action, together with the

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Quebec and British Columbia actions, was settled by written agreement, dated June 16, 1997, setting out detailed and complex terms. The settlement is subject to and conditional upon court approval in all three provinces.

2 Winkler J. approved a form of notice of motion for a certification/authorization and agreement approval to be sent to members of the proposed Ontario class. Similar orders were made in Quebec and British Columbia. The notice stated that members of the class who wished to participate in the hearing for approval of the settlement were required to file a written statement of objection and notice of appearance by a specified date. Fourteen members of the proposed Ontario class filed objections. Three are represented by Mr. Deverett and eleven by Messrs. Will and Barnett. At the opening of this hearing, Mr. Deverett indicated that one of the objectors he represents wished to withdraw from further participation.

3 On August 28, 1997 Winkler J. directed that there be a hearing to determine certain procedural issues, namely:

(a) Standing to object;

(b) Procedures for and scope of objection;

(c) The role of the court in approval of the agreement;

(d) Onus for approval of the agreement;

(e) Factors to be considered by the court for approval of the agreement;

(f) Cost consequences.

4 The issue of standing was determined by Winkler J. and it was contemplated that the motion to determine the remaining procedural issues would be heard on September 4, 1997. It did not proceed on that date as the Deverett objectors requested an adjournment. The Deverett objectors then brought a motion to set aside Winkler J.'s earlier order regarding the notice of motion for certification/authorization, to declare the plaintiff's counsel to be in a conflict of interest, and for other relief, including an order that those objectors be given immunity from costs and be awarded interim costs. While the costs issue remains outstanding, other aspects of the motion were dismissed by Winkler J. An application for leave to appeal from that order was dismissed by O'Driscoll J. on January 22, 1998.

5 I have now heard full argument on the outstanding procedural issues specified by Winkler J.'s August 29, 1997 direction. For convenience of analysis, I propose to deal with them in the following order:

(a) Onus for approval of the agreement

(b) The role of the court in approval of the agreement

(c) Factors to be considered by the court for approval of the agreement

(d) Procedures for and scope of objection

(e) Cost consequences.

6 I wish to emphasize at the outset that what follows is intended only to provide a procedural framework for the hearing of this motion. It would be entirely inappropriate to attempt to determine in the context of one case a process appropriate for all cases. My ruling has been determined on the basis of the submissions I have heard and is intended to do no more than provide guidance to the parties and objectors in the present case.

2. Analysis

(a) Onus for approval of the agreement

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7 It is common ground that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved.

(b) The role of the court in approval of the agreement

8 There are two matters to be determined by the court: (1) should the action be certified as a class proceeding and, if the answer is yes, (2) should the settlement be approved. While the role of the court with respect to certification is well defined by the *Class Proceedings Act, 1992*, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the *Act* provides no statutory guidelines that are to be followed.

9 Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: *the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it*.

10 It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms: *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.), at 222-3. As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement: see eg *Bowling v. Pfizer*, 143 F.R.D. 141 (U.S. Ohio 1992). I would observe, however, that the fact that the settlement has already been approved in Quebec and British Columbia would have to be considered as a factor making changes unlikely in this case.

11 With respect to specific objections raised by the objectors, there is an additional factor to be kept in mind. The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. As approval is sought at the same time as certification, even if the settlement is approved, class members will be afforded the right to opt out. There is, accordingly an element control that may be exercised to alleviate matters of particular concern to individual class members.

12 Various definitions of "reasonableness" were offered in argument. The word suggests that there is a range within which the settlement must fall that makes some allowance for differences of view, as an American court put it "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". (*Newman v. Stein*, 464 F.2d 689, (U.S. 2nd Cir. N.Y. 1972) at 693).

(c) Factors to be considered by the court for approval of the agreement

13 A leading American text, *Newberg on Class Actions*, (3rd ed), para 11.43 offers the following useful list of criteria:

1. Likelihood of recovery, or likelihood of success

2. Amount and nature of discovery evidence

3. Settlement terms and conditions

4. Recommendation and experience of counsel

5. Future expense and likely duration of litigation

6. Recommendation of neutral parties if any

7. Number of objectors and nature of objections

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8. The presence of good faith and the absence of collusion

14 I also find the following passage from the judgment of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230-1 to be most helpful. Callaghan A.C.J.H.C.was considering approval of a settlement in a derivative action, but his comments are equally applicable to the approval of settlements of class actions:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
>
> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.
>
> The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.
>
> . . . . .
>
> The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in *Yonge v. Katz*, 447 F.2d 431 (1971), it is stated:
>
> > It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.
>
> In another case cited by all parties in these proceedings, *Greenspun v. Bogan*, 492 F.2d 375 at p. 381 (1974), it is stated:
>
> > ... any settlement is the result of a compromise — each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See *United Founders Life Ins. Co. v. Consumer's National Lifel Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Florida Trailer & Equipment co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). *It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise to the extent of the settlement, that to approve the settlement would be an abuse of discretion.* (Emphasis added)

15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the

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settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.

(d) Procedures for and scope of objection

17 The *Class Proceedings Act, 1992*, s. 12 confers a general discretion on the court with respect to the conduct of class proceedings:

> 12. The court, on the motion or a party or class member, may make an 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.

Section 14 provides for the participation of class members in the following terms:

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

18 As already noted, the order of Winkler J. required class members who wished to object to the settlement to file written objections. It remains to determine the procedural and other rights objectors have in relation to the approval process.

19 In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

20 In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

(i) Objectors' right to adduce evidence

21 I can see no reason why the objectors should not have the right to adduce evidence. However, given the interests of the objectors and the nature of the process, the right to adduce evidence is not at large. Any evidence adduced by the objectors must be relevant to the points they have raised by way of objection. It must also be adduced in a timely fashion. I direct that any evidence be adduced by way of affidavit filed at least 30 days prior to the date set for the hearing of this motion.

(ii) Objectors' right to discovery

22 Under the Rules of Court, the right to oral discovery and production of documents is restricted to parties to an action. The objectors are not parties to the action, and accordingly have no right to oral discovery or production of documents.

23 On the other hand, s. 14(2) of the Act does provide that participation "shall be in whatever manner and on whatever terms ... the court considers appropriate". On behalf of the objectors he represents, Mr. Deverett sought the right to

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conduct essentially a "no holds barred" discovery of the parties to the action. He submitted that as no discovery had been conducted, it was impossible to assess the merits of the case and the settlement without one. In my view, this submission misses the whole point of the settlement approval exercise. The very purpose of the settlement at an early stage of the proceedings is to avoid the cost and delay involved in discovery and other pre-trial procedures. If Mr. Deverett is right, then a class action could almost never be settled without discovery, for if the parties did not conduct one, an objector could insist upon doing so as a precondition of settlement. This would create a powerful disincentive to early settlements by the parties and would run counter to the general policy of the law which strongly favours early resolution of disputes. On the other hand, the lack of discovery is a factor the court may take into account in assessing the fairness of the settlement. However, the remedy in a case where the court concludes that the settlement cannot be approved without a discovery is to refuse to approve the settlement and not to have one conducted by an objector. Given the very different in approach to discovery in the United States, I do not find the American authorities cited by the objectors on this point to be persuasive.

24 The objectors represented by Mr. Will seek production of certain specific documents relevant to their claims. This request has to be assessed in the light of the settlement agreement itself. An important element of the settlement agreement is a process to resolve individual claims. One aspect of that process will entitled these objectors to production of documents. The process will also permit them to opt out of the settlement after they receive production. In my view, in light of the process contemplated by the settlement agreement, these objectors are not entitled to insist upon production of documents at this stage. The point of the approval process is to determine whether the settlement is fair, reasonable and in the best interests of those affected by it. The issue for the court, then, is to assess whether the process contemplated by the settlement agreement is a fair one. I fail to see what relevance documents pertaining to the claims of these objectors have at this stage or how they would assist the court in determining whether the settlement and the process it specifies is a fair one.

25 Accordingly, in the circumstances of this case, I find that it is not appropriate to grant the objectors the right to oral or documentary discovery.

(iii) Right to cross-examine

26 The objectors also seek a general right to cross-examine on the affidavits filed in support of approval of the settlement. There is not inherent right to cross-examine: see eg. *Kevork v. R.*, [1984] 2 F.C. 753 (Fed. T.D.) On the other hand, it is important that there be some way for the court to ensure that evidence on contentious points can be probed and tested. As I have already stated, I view the approval process as one which the court must control and in which the court must take an active role. In keeping with that principle, and in view of the extremely open-ended request made by the Deverett objectors, I direct as follows:

(1) that any cross-examination of deponents shall take place *viva voce* before the court on the dates set for the hearing of the certification/approval motion;

(2) that any party or objector who wishes to cross-examine a deponent serve and file at least 10 days prior to the motion a written outline of the matters upon which cross-examination is requested;

(3) that the nature and extent of cross-examination shall, subject to the discretion of the court, only be in an area indicated by the written outline and shall be subject to the discretion of the court to exclude such cross-examination which may be exercised either before or during the hearing of the motion;

(4) that any deponent for which cross-examination is requested shall be available to attend court on the days the motion is to be heard as if under summons;

(5) that in any event, Mr Ritchie be in attendance for the motion;

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(6) that the right of the court to question witnesses shall remain within the sole discretion of the court and shall not be in any way affected by para (2).

(e) Costs consequences

27 The Deverett objectors seek an order that they not be subject to any order as to costs and that they be awarded interim costs. It was suggested, in the alternative, by Mr. Will that I specify in advance the circumstances which would or would not lead to an adverse costs order.

28 In my view, no such orders or directives should be made. Nothing has been shown that would bring this case within the category of "very exceptional cases" contemplated by *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) as justifying an award of interim costs to ensure that the objectors are able to continue their participation. Section 32(1) of the Act, which provides that class members are not liable for costs except with respect to the determination of their own claims, does not apply. That provision contemplates the usual situation where a class member takes no active step in the proceedings. The objectors are subject to the discretion conferred by s. 14(2), which expressly preserves the right of the court to impose appropriate terms as to costs.

29 It is important that, as one means of controlling the process, the court retain its discretion with respect to the costs of this process. I hardly need add that my discretion is to be exercised in accordance with an established body of law dealing with cost orders. That body of law recognizes the right of the court to award costs to compensate for or sanction inappropriate behaviour by a litigant. It also recognizes that in certain cases, departure from the ordinary rule that an unsuccessful pay the costs of the winner may be appropriate: see eg. *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.).

Conclusion

30 If there are further procedural issues which arise prior to the hearing of the motion, I may be spoken to.

Order accordingly.

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Tab 4

Ontario Supreme Court
Devry v. Atwood's Furniture Showrooms Ltd.,
Date: 2000-11-07

Barbara Devry, Formerly Known as Barbara Scott, Applicant

and

Atwood's Furniture Showrooms Limited, Joseph Lorne Braithwaite, Park Avenue Ventures Ltd. and Park Avenue Interiors Inc., Respondents

Ontario Superior Court of Justice [Commercial List] Swinton J.

Heard: October 30, 2000

Judgment: November 7, 2000

Docket: 99-CL-3406

Richard D. Howell, for Applicant.

Daniel Chitiz, for Respondents, Atwood's, Braithwaite, Park Avenue Ventures.

Mark W. Stewart, for Respondent, Park Avenue Interiors.

***Swinton J.*:**

1 The applicant, Barbara Devry, has brought an application seeking relief under the *Bulk Sales Act,* R.S.O. 1990, c. B.14 and the oppression remedy found in s. 248 of the *Business Corporations Act,* R.S.O. 1990, c. B.16.

The Facts

2 The applicant is a former employee of Atwood's Furniture Showrooms Limited, a retailer of furniture which operated stores in the Greater Toronto area. She was dismissed in January, 1989, and subsequently commenced an action for damages for wrongful dismissal. Judgment was obtained in her favour in April, 1994.

3 By the spring of 1990, Atwood's was in serious financial trouble. The president of Ethan Allen Inc., the American company which supplied most of Atwood's product, sought assistance from the respondent, Lorne Braithwaite. At that time, Braithwaite was already a shareholder of and an investor in an Alberta company which sold Ethan Allen furniture, Alberta Heirlooms Ltd. The principal of that company was Bill Cook.

4 Braithwaite met with Ken and Dorothy Atwood in May, 1990, and agreed to loan Atwood's $168,000.00 in July. This sum was needed immediately to pay moneys owing to the landlord

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of one Atwood's store. In August, 1990, Braithwaite entered into an agreement with the Atwoods, whereby he purchased 50% of the shares of Atwood's for $832,000.00. The promissory note given in return for the earlier loan was cancelled, and he received preference shares to reflect the amount of the loan. He also advanced $300,000.00 as a shareholders loan.

5 Day to day operations remained under the control of the Atwoods. Although the financial problems continued, with the consent of Atwood's banker, Braithwaite was paid a dividend in 1991, 1992, 1993, and 1994 in the amount of $31,589.00; $49,000.00; $49,000.00; and $24,000.00, for a total of $154,089.00.

6 On April 12, 1994, after a trial, Mr. Justice Lane determined that the applicant had been unjustly dismissed, and ordered Atwood's to pay damages of $58,729.00 plus pre-judgment interest of $31,648.50, plus costs on a party and party basis to be assessed. That judgment was appealed, but the appeal was abandoned in June, 1997.

7 On May 27, 1994, Braithwaite purchased all the common shares of Atwood's, and thus became sole owner of the company's shares. In the same month, Atwood's received a demand from its bank to repay its loans. On July 4, 1994, the bank advised that it was withdrawing the company's line of credit, and full repayment had to be made by August 31, 1994.

8 From April through October, 1994, Braithwaite advanced a further $250,000.00 and obtained the services of consultants to help restructure the business. Nevertheless, problems continued, and Ethan Allen refused to ship merchandise other than on a c.o.d. basis.

9 From June 1995 to March 1996, Braithwaite loaned a further $300,000.00 to Atwood's. All of his advances, except the initial loan, were secured by a General Security Agreement and PPSA registrations.

10 He obtained a forebearance agreement from Ethan Allen in June, 1995, provided that he make further investment personally and provide a personal guarantee of the $400,000.00 US owing to Ethan Allen, which Ethan Allen was converting into a five year loan to Atwood's. This led to a formal loan agreement between Ethan Allen and Atwood's, with Braithwaite as guarantor.

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11 Subsequently, following discussions between Braithwaite, Cook from Alberta Heirlooms, and Ethen Allen, the services of Pricewaterhouse Coopers were retained to give advice on a survival and restructuring plan. This led to a decision to sell Atwood's assets to the respondent Park Avenue Ventures, a company owned by Braithwaite, in November, 1996. Pricewaterhouse recommended a sale of assets under the *Bulk Sales Act* and a change in the operating name of the company because of the negative goodwill associated with the name of Atwood's.

12 The bulk sale was completed on November 22, 1996, effective September 30, 1996. Braithwaite signed the affidavit required under the *Bulk Sales Act* on November 21, 1996, which was filed with the court two days later. The applicant, Devry, was not named in the list of unsecured trade creditors. According to Braithwaite, the reason for the omission was the advice of his solicitors that she was not a trade creditor. The purchase price for the sale was $1,638,192.00. At the time of the sale, the secured creditors were Ethan Allen ($464,704.00); Canadian Imperial Bank of Commerce ($385,827.00); Kenneth Atwood ($380,000.00) and J. Lorne Braithwaite ($1,050,000.00).

13 On March 31, 1997, a further reorganization occurred, when Ethan Allen purchased a 25% interest in a new company called Park Avenue Interiors for $1.1 million US, and Bill Cook from Alberta Heirlooms purchased 12%, leaving Braithwaite and other members of his family with a 63% interest. That company now carries on business as Ethan Allen Home Interiors.

Bulk Sales Act Claim

14 Devry claims that she was an unsecured trade creditor of Atwood's. Because she was not included in the list of unsecured trade creditors by Braithwaite when he filed his affidavit under the *Bulk Sales Act,* she seeks to have the sale in November, 1996 declared void, pursuant to SS.16(1) and 17(1) of the Act.

15 Section 19 of the Act contains a limitation period. It reads:

> No action shall be brought or proceeding taken to set aside or have declared void a sale in bulk for failure to comply with this Act unless the action is brought or the proceeding is taken either before the documents are filed under section 11 or within six months after the date on which the documents were filed under section 11.

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16 The proceeding here was commenced in May, 1999, well after the expiry of the six month period prescribed in s.19. Counsel for the applicant submitted that the limitation period does not run if a false affidavit was filed, but he was unable to provide any authority for this proposition. Nothing in the evidence indicates bad faith on the part of Braithwaite in filing his affidavit, as he acted on the advice of counsel that Devry was not an unsecured trade creditor.

17 The Ontario Court of Appeal in *Allen* v. *Patterson* (1925), 57 O.L.R. 287 (Ont. C.A.) held that the only sanction for failure to comply with the *Bulk Sales Act* is the remedy conferred on the creditors to have the sale declared void. If the attack on the sale is not made within the limitation period, the transaction stands.

18 Applying that principle here, this claim is barred by s. 19 of the *Bulk Sales Act.* This is not a case where Devry was unaware of the sale of the assets until 1999. At least by July, 1997, her then counsel, Norman White, was in contact with counsel for the corporation to investigate the details of the bulk sale, and relevant documents were made available to him. Yet no action was taken until this application was issued on May 21, 1999. Therefore, the application was out of time.

19 In the alternative, it is my view that Devry was not an unsecured trade creditor whose name should have been included on the list of unsecured and secured trade creditors which the seller was required to provide to the buyer pursuant to s. 4(1) of the Act. An “unsecured trade creditor” is defined by s. 1 of the Act as

> a person to whom a seller is indebted for stock, money or services *furnished for the purpose of enabling the seller to carry on a business,* whether or not the payment is due, and who holds no security or who is entitled to no preference in respect of a claim, (emphasis added)

20 In *Crabtree (Succession de) c. Barrette,* [1993] 1 S.C.R. 1027, 101 D.L.R. (4th) 66 (S.C.C.), L’Heureux-Dubé J. determined the scope of directors’ liability for wages pursuant to s. 114(1) of the *Canada Business Corporations Act.* She held that the directors were not liable for damages for wrongful dismissal, since the damages did not constitute “debts not exceeding six months wages” payable

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to an employee “for services performed for the corporation while they are such directors respectively.” In her view,

> According to the language used by Parliament, the debts must result from “services performed for the corporation”. An amount payable in lieu of notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice. (at 83 D.L.R.)

21 A similar line of reasoning is appropriate in interpreting the *Bulk Sales Act* here. At the time of the bulk sale, Devry was a judgment creditor of Atwood’s because of the judgment in her wrongful dismissal action. As in *Barrette,* the applicant’s debt arose from the breach of her employment contract and the failure to provide reasonable notice. It did not arise as a result of services provided to the seller to enable the seller to carry on its business within s. 1 of the *Bulk Sales Act.* Therefore, for this reason as well, the claim to set aside the sale of assets must fail.

Oppression Remedy

22 There are two aspects to the oppression remedy claim, which the applicant argues are linked. She claims that she is a creditor of Atwood’s, and her interests were unfairly disregarded or unfairly prejudiced by the payment of dividends to Braithwaite in the years ending 1991 through 1994 contrary to s. 38(3) of the *OBCA,* and in the valuation of the assets and business of Atwood’s at the time of the sale to Park Avenue Ventures, which she alleges was below fair market value.

23 The oppression remedy in s. 248 of the Act allows the court to give relief when the affairs of a corporation have been carried on in a manner that is “oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation”. Section 245 defines a “complainant” to mean holders of securities, officers and directors and, in paragraph (c) “any other person who, in the discretion of the court, is a proper person to make an application under this Part.” Thus, the court has a discretion whether to hold that a creditor is a complainant.

24 This is a determination that must be made having regard to the circumstances of the particular case. Generally, the courts have asked whether the person is in a position analogous to a minority shareholder or whether he has a legitimate interest in the manner in

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which the corporation is managed *(Jacobs Farms Ltd. v. Jacobs* (April 23, 1992), Doc. 92-CQ-17714 (Ont. Gen. Div.) at p.6; *Downtown Eatery (1993) Ltd. v. Ontario* (2000), 2 C.C.E.L. (3d) 66 (Ont. S.C.J.) at paragraph 37).

25 While counsel for the applicant sought to characterize the payment of the dividends between 1991 and 1994 and the valuation of Atwood's assets in 1996 as a course of oppressive conduct, it is not appropriate to look at these two events together, because Ms. Devry's status was very different in 1996 from what it was in the period in which the dividends were paid. In that earlier period, she was not yet a creditor.

The Dividends

26 The applicant argues that the payment of the dividends was contrary to s. 38(3) of the *OBCA,* which provides that a corporation shall not pay a dividend if there are reasonable grounds to believe that the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

27 Even if the dividends were improperly paid here, the payments were made at a time when the applicant was not a creditor of Atwood's. At most, she was a contingent creditor, as judgment in her action was not given until after the final dividend payment on March 31, 1994. In the words of Farley J. in *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]),

> …it is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained. (at paragraph 13)

In my view, as the applicant was not a creditor at the time the dividends were paid, it is not appropriate to grant her standing as a complainant with respect to the payments. Moreover, there is nothing to indicate that the dividends were paid in an attempt to avoid payment of her claim, should she later obtain judgment, nor that these payments impaired the company's ability to do so. Indeed, the evidence is clear that Braithwaite invested significant funds in Atwood's, both before and after the dividends were paid, in an amount that greatly exceeded the dividends he received.

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The Sale of the Assets

28 The second claim of oppression arises from the valuation of Atwood's assets at the time of sale to Park Avenue Ventures. This occurred after the applicant obtained her judgment for wrongful dismissal, and so she was a judgment creditor at the time. Nevertheless, I do not find this an appropriate case in which to exercise my discretion to permit her to pursue an oppression remedy.

29 In *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 25 B.L.R. (2d) 179 (Ont. Gen. Div. [Commercial List]), Blair J. held that the oppression remedy was applicable in a case where a creditor had been deprived of the security provided for a consent judgment, because the respondent corporation failed to renew the letter of credit which provided the security. As a result of the failure to renew the letter of credit, the sole officer, shareholder and director of the company had been released from a personal guarantee, and all other creditors had been satisfied. Therefore, the principal of the company was held liable to compensate the creditor of the corporation. This aspect of Blair J.'s decision was upheld by the Court of Appeal ((1998), 40 O.R. (3d) 563 (Ont. C.A.)).

30 In *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 36 B.L.R. (2d) 192 (Ont. Gen. Div.), Epstein J. found the directors of the respondent company personally liable to compensate the plaintiff, a creditor of the respondent company, because of their conduct in the period a few months before a promissory note signed in favour of SCI Systems Inc. came due. The oppressive conduct included the payment of dividends when the company could not meet the solvency test in s. 38(3) of the *OBCA,* as well as repayment of shareholders' loans and other conduct. Indeed, the payment of the dividends rendered the corporation insolvent. In upholding her decision, the Divisional Court described the conduct of the directors as "self dealing" conduct outside the ordinary course of business and beyond reasonable expectations, since it frustrated any chance to repay a soon-to-be-due debt (June 5, 1998), Doc. 474/97 (Ont. Gen. Div.)) at paragraph 2).

31 The facts in the present case are very different. There is no evidence that the sale of Atwood's assets was done in order to strip the company of value and leave the company unable to pay its debts, as in *SCI Systems Inc.* The evidence is clear that Atwood's was in serious financial difficulties for a considerable period of time, and that Braithwaite had injected a significant amount of his personal funds into the company prior to the sale in an effort to

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save it. The evidence is also clear that the sale to Park Avenue Ventures and the subsequent creation of Park Avenue Interiors was part of a restructuring that was driven, to a significant degree, by the demands of Ethan Allen and Bill Cook, who would invest only in a new corporate vehicle separate from Atwood's. As well, since the sale, Braithwaite has injected a further $276,000.00 into Ethan Allen Interiors and has received no moneys from that business.

32 Moreover, the valuation of the assets in the manner chosen did not unfairly prejudice or unfairly disregard the interests of the applicant. The evidence does not support the conclusion that the sale was for less than fair market value. Indeed, it indicates that the inventory was overvalued for purposes of the sale, since it was valued at purchase price without taking into account depreciation. Moreover, the attribution of central overhead charges to the stores in Thornhill and Mississauga was reasonable, given the overall operations of Atwood's. Furthermore, the evidence does not support the claim that there was a transferable value in an Ethan Allen dealership; that the leases should have been valued, or that the tax losses of Atwood's were of value, given the demands of Ethan Allen and Cook with respect to the way in which restructuring must occur.

33 However, even if Atwood's business was undervalued, the applicant has not brought forward evidence to show that she would have been in the position that her judgment would have been satisfied had a different value been determined. At the time of the asset sale, Park Avenue Ventures paid moneys owing as trade payables and loans to CIBC and Ethan Allen in an amount of $1,018,674.00. Following the sale, Braithwaite remained a secured creditor of Atwood's in the amount of $1,050,000.00. Nothing in the evidence indicates that the Atwood's assets were undervalued by an amount in excess of the amount owing to him. Devry, as an unsecured creditor, has an interest subordinate to his, and she is in no worse a position following the sale than she would have been in had the sale not occurred.

34 All this leads me to the conclusion that the valuation of the Atwood's assets and their sale can not be seen as beyond the reasonable expectations of a creditor like the applicant. Therefore, the claim for an oppression remedy fails.

Conclusion

2000 CanLII 22684 (ON SC)

35 For these reasons, the application is dismissed. If the parties are unable to agree with respect to costs, they may make written submissions or make an appointment with me.

Application dismissed.

2000 CanLII 22684 (ON SC)

Tab 5

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Jordan v. CIBC Mortgages Inc. | 2019 ONSC 1178, 2019 CarswellOnt 3258 | (Ont. S.C.J., Feb 21, 2019)

2005 CarswellOnt 4544
Ontario Superior Court of Justice

Dumoulin v. Ontario

2005 CarswellOnt 4544, [2005] O.J. No. 3961, 142 A.C.W.S. (3d) 554, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72

PAUL DUMOULIN (Plaintiff) and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ONTARIO REALTY CORPORATION, ELLARD-WILLSON ENGINEERING LIMITED, BOIGON ARMSTRONG, PROFAC FACILITY MANAGEMENT SERVICES INC., ELLIS DON CORPORATION AND CLIFFORD RESTORATION LIMITED (Defendants)

Cullity J.

Heard: June 13-16, 20, 2005
Judgment: September 20, 2005
Docket: 02-CV-223772 CP

Counsel: Gary R. Will, Christopher Morrison, Lesley Van Wynsberghe for Moving Party / Plaintiff, Paul Dumoulin
Michael Fleishman, Lee Favreau for Respondent / Defendant, Her Majesty the Queen in Right of Ontario
Paul J. Martin, Laura F. Cooper for Respondent / Defendant, Ontario Realty Corporation
Kathleen Urdahl for Respondent / Defendant, Ellard-Willson Engineering Limited
Bernie McGarva for Respondent / Defendant, Boigon Armstrong
Krista Springstead for Respondent / Defendant, ProFac Facility Management Services Inc.
Don Rasmussen, Heather Acton for Respondent / Defendant, Ellis Don Corporation
Lawrence M. Foy, Michael W. Kerr for Respondent / Defendant, Clifford Restoration Limited

Subject: Occupational Health and Safety; Civil Practice and Procedure; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.B Identifiable class
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.C Common issue or interest
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation

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V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.D Preferable procedure
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.F Litigation plan

Headnote

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

Plaintiff, who worked in courthouse, brought action alleging that his respiratory problems were attributable to presence of toxic moulds and other noxious substances in courthouse air resulting from negligent design, construction, control, possession and ongoing maintenance of building by one or more of defendants — Plaintiff brought motion to certify action pursuant to Class Proceedings Act, 1992 ("CPA") — Motion adjourned — Proposed class consisted of all persons who were, by reason of their employment, vocation or compulsion of law, in courthouse for cumulative period of 50 hours between January 1995 and June 2000 — It was not part of plaintiff's case that every member of class suffered compensatory harm as result of alleged exposure to toxic moulds — However, it is not requirement of acceptable class definition that each member of class will ultimately be successful in establishing claim — No justification existed for proposition that class proceeding cannot be certified unless it includes all persons with similar claims — Notion that certification must be denied because manageable, rather than possibly unmanageable, class has been chosen is untenable — There was nothing irrational or arbitrary in assumption that persons most likely to be affected by exposure to toxic mould in courthouse, and to share interest in resolution of common issues, were those who spent at least 50 hours there in period after moulds were detected — Since some proposed class members were Crown employees, certification should be refused pursuant to s. 5(2) of CPA unless member of putative class who was Crown employee was proposed to represent subclass consisting only of such employees — Plaintiff allowed 30 days to propose representative plaintiff for subclass of Crown employees and to file revised litigation plan that addressed procedure for resolving complex individual issues issues.

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

Plaintiff, who worked in courthouse, brought action alleging that his respiratory problems were attributable to presence of toxic moulds and other noxious substances in courthouse air between January 1995 and June 2000 resulting from negligent design, construction, control, possession and ongoing maintenance of building by one or more of defendants — Plaintiff brought motion to certify action pursuant to Class Proceedings Act, 1992 ("CPA") — Motion adjourned — For proposed common issues to be acceptable for purpose of certification, all class members must share interest in their resolution, resolution must significantly advance proceeding, and there must be basis in evidence for existence of common issues — It is sufficient for purpose of commonality of interest, and rational connection with class definition, that favourable resolution of proposed common issues will be prerequisite to existence of any claim of class member — Possibility existed that apportionment of fault among defendants would not be uniform in respect of all class members — If negligence of particular defendants exposed localised risks to class members, apportionment might have to be determined individually — Sufficient evidential basis for existence of common issues had been provided in this case — Resolution of common issues would be important step in litigation, resolving questions relating to duty of care, breaches by each of defendants, existence of dangerous levels of toxic mould in building, and causal connection between this and any breach of duty of care owed by each of defendants — Fact that these issues might be difficult and require lengthy trial underlined advantage for all parties of having them dealt with only once — Plaintiff allowed 30 days to file revised litigation plan that addressed procedure for resolving complex individual issues issues.

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

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Plaintiff, who worked in courthouse, brought action alleging that his respiratory problems were attributable to presence of toxic moulds and other noxious substances in courthouse air between January 1995 and June 2000 resulting from negligent design, construction, control, possession and ongoing maintenance of building by one or more of defendants — Plaintiff brought motion to certify action pursuant to Class Proceedings Act, 1992 ("CPA") — Motion adjourned — Class proceeding will not be preferable procedure unless there is realistic possibility that it will result in resolution of claims of class members in reasonably efficient manner — Common issues trial could not reasonably determine whether substantially same levels of mould were present in each part of courthouse at all material times — Expert evidence would be required to resolve individual issues in each case and task of determining whether, and to what extent, mould was present at particular times and places would be more difficult and complex than common issue relating generally to its presence in courthouse in class period — Weight of evidence underlined difficulty and complexity of individual issues of causation that arose from ubiquitous nature of mould, and fact that health consequences of exposure were matters of scientific and medical controversy — If expense of common issues trial and resolution of individual issues would likely be prohibitive, proceedings would not be efficient or manageable and access to justice would not be achieved — Neither plaintiff's proposed litigation plan nor evidence addressed his ability to carry financial burden of common issues trial, or procedure by which complex individual issues would be determined — Plaintiff allowed 30 days to file revised litigation plan that addressed procedure for resolving individual issues.

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

Plaintiff, who worked in courthouse, brought action alleging that his respiratory problems were attributable to presence of toxic moulds and other noxious substances in courthouse air between January 1995 and June 2000 resulting from negligent design, construction, control, possession and ongoing maintenance of building by one or more of defendants — Plaintiff brought motion to certify action pursuant to Class Proceedings Act, 1992 ("CPA") — Motion adjourned — Much of evidence was directed at demonstrating individuality, rather than commonality, of claims of class members and overwhelming effect that existence of such individual issues would have on question of whether litigation could be managed efficiently — Neither plaintiff's proposed litigation plan nor evidence addressed his ability to carry financial burden of common issues trial, or procedure by which complex individual issues would be determined — Due to likely length and expense of common issues trial involving difficult and complex issues of fact, multiple defendants, expert witnesses, and possible third party claims, assurance was required that plaintiff had necessary financial resources to carry prosecution through to completion of trial — In this case, absence of evidence and plan that satisfactorily addressed difficulties involved in dealing with individual issues was fatal to attempt to have proceedings certified based only on material in record — Plaintiff had not yet discharged burden of demonstrating, on balance of probabilities, that common-issues trial would advance proceeding, much less that certification would result in efficient, fair and manageable method of resolving claims of class members consistently with objectives of CPA — Plaintiff allowed 30 days to file revised litigation plan that addressed procedure for resolving individual issues.

Table of Authorities

Cases considered by *Cullity J.*:

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

Carom v. Bre-X Minerals Ltd. (1999), 1999 CarswellOnt 1456, 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43 (Ont. S.C.J.) — followed

Dumoulin v. Ontario (2004), 71 O.R. (3d) 556, 38 C.L.R. (3d) 55, 50 C.P.C. (5th) 392, 2004 CarswellOnt 2736 (Ont. S.C.J.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158 (S.C.C.)

Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.)

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MacDonald (Litigation Guardian of) v. Dufferin-Peel Catholic District School Board (2000), 2000 CarswellOnt 5048, 20 C.P.C. (5th) 345 (Ont. S.C.J.) — considered
Pearson v. Inco Ltd. (2002), 2002 CarswellOnt 2446, 33 C.P.C. (5th) 264 (Ont. S.C.J.) — considered
Pearson v. Inco Ltd. (2004), 2004 CarswellOnt 557, 44 C.P.C. (5th) 276, 183 O.A.C. 168, 6 C.E.L.R. (3d) 117 (Ont. Div. Ct.) — referred to
Wilson v. Servier Canada Inc. (2000), 2000 CarswellOnt 3257, 50 O.R. (3d) 219, 49 C.P.C. (4th) 233 (Ont. S.C.J.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to
s. 5(1) — considered
s. 5(1)(a) — referred to
s. 5(1)(b) — considered
s. 5(1)(b)-5(1)(e) — referred to
s. 5(1)(c) — considered
s. 5(1)(d) — considered
s. 5(1)(e) — considered
s. 5(2) — referred to
s. 5(3) — referred to
s. 5(4) — referred to

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27
s. 2(2)(b) — referred to

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A
Generally — referred to
s. 28(2) — referred to
s. 31(2) — referred to

MOTION by plaintiff to certify action as class proceeding.

***Cullity J.*:**

1 The plaintiff moved to certify this action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. C. 6 ("CPA"). It arises out of the alleged presence of toxic mould in the courthouse at 50 Eagle Street West in the Town of Newmarket between January 1, 1995 and June 30, 2000. The plaintiff was an employee of York Regional Police who was assigned to the courthouse from 1997. He alleges that, after approximately one year, he began to suffer from respiratory problems. These he attributes to the presence of toxic moulds and other noxious substances in the air inside the courthouse that resulted from the negligent design, construction, control, possession and ongoing maintenance of the building by one or more of the defendants.

2 The involvement of each of the defendants is alleged to have been as follows:

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(a) Her Majesty the Queen in Right of Ontario (the "Crown"), by virtue of its ownership, possession and control of the building;

(b) Ontario Realty Corporation ("ORC"), as having responsibility for the management of the courthouse on behalf of the Crown;

(c) Ellard-Willson Engineering Limited ("Ellard-Willson"), as mechanical and electrical engineers retained to provide mechanical engineering services when the courthouse was constructed or in 1979 and 1980;

(d) Boigon Armstrong, as the architects retained for the construction of the courthouse;

(e) Ellis Don Corporation, as a construction company retained as general contractors at the time of the construction of the courthouse;

(f) ProFac Facility Management Services Inc. ("ProFac"), as a company retained by ORC for the purpose of maintaining the courthouse; and

(g) Clifford Restoration Limited ("Clifford"), as a general contractor who did some renovation work on the courthouse during the period.

3 The plaintiff seeks to have the action certified on behalf of a class consisting of:

all persons whom were, by reason of their employment, vocation or compulsion of law, remained within the court house for a cumulative period of 50 hours between the period January 1, 1995 and June 30, 2000

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

4 With the exception of counsel for the Crown, defendants' counsel placed little emphasis on the requirement that the pleading discloses a cause of action. Mr Fleishman reiterated the submissions made on an earlier motion ((2004), 71 O.R. (3d) 556 (Ont. S.C.J.)) that section 28 (2) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16 ("WSIA") excludes claims against the Crown by its employees. On the previous occasion, I held that the jurisdiction of the court to decide that question was removed by section 31 (2) of the Act. Since that finding, an unsuccessful attempt has been made to obtain a ruling from the Appeals Tribunal established for the purpose of the Act. I will return to this question later in these reasons. Mr Fleishman's acknowledgement that the claims of other class members had been sufficiently pleaded to satisfy the "plain and obvious" test associated with the decision of the Supreme Court of Canada in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) was expressly limited to the purposes of the motion. I understand that to indicate that the Crown was reserving its right at a trial to rely on section 2 (2) (b) of the *Proceedings Against the Crown Act*, R.S.O. 1990. c. C. 27 as an absolute defence. That question was not resolved at the earlier hearing and it will remain open for decision if a trial of common issues is ordered.

5 Mr Rasmussen also limited his client's acceptance that section 5(1) (a) had been satisfied to the purposes of this motion. Whatever effect that was intended to achieve, I believe, and find, that the necessary elements of a cause of action in negligence have been pleaded against Ellis Don.

6 As the negligence of Clifford is alleged to have occurred in 1996, it is obvious enough that no cause of action has been pleaded on behalf of class members whose presence in the courthouse occurred only before that year. I do not believe, however, that is plain and obvious from the pleading that Clifford's alleged work in renovating the exterior walls of the courthouse in 1996 could have had no bearing on the alleged infiltration and proliferation of toxic mould inside the building.

7 Counsel for ProFac submitted that the claim against his client was "legally untenable" to the extent that it is based on any facts that occurred prior to June, 1999 when its contract at the courthouse commenced. This submission, however,

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is based on evidence that is not admissible for the purpose of section 5(1)(a) — rather than on the pleading which states that ProFac was retained during "the relevant period" and was negligent "at the relevant times".

8 The three other defendants did not challenge the submission of plaintiff's counsel that causes of action had been sufficiently pleaded against their clients and I am satisfied that they were correct in not doing so.

9 Defendants' counsel were unanimous in their vigorous opposition to Mr Will's submissions on each of the other four requirements in section 5(1) of the CPA. In their submission, none of them was satisfied. Evidence is admissible for these purposes and was provided. While much of it — and of the submissions of defendants' counsel — addressed the merits of the plaintiff's case and the difficulties class members would have in proving causation in particular, it was ostensibly directed at demonstrating the individuality, rather than the commonality, of the claims of the class members and the overwhelming effect that the existence of such individual issues would have on the question whether the litigation could be managed efficiently.

10 Recurring themes in counsels' submissions in relation to the proposed common issues (section 5(1)(c)) and the preferable procedure (section 5(1) (d)) and, to some extent, the class definition (section 5(1)(b)) included the following:

> (a) it is no part of the plaintiff's case that every member of the proposed class suffered harm from exposure to toxic moulds, or even that they were so exposed. The question whether this occurred will be an individual issue;
>
> (b) whether exposure to dangerous levels occurred would have varied from place to place in the courthouse, and from time to time;
>
> (c) whether those who were exposed may have suffered harm will depend on the degree of exposure and their sensitivity to it;
>
> (d) in consequence, in order to determine whether class members have claims, it would be necessary to decide where, and when they were, in the courthouse and the level of toxic mould present at such times and places;
>
> (e) after findings had been made with respect to each of the above matters, the question whether harm resulted from exposure to toxic moulds or was caused by other airborne contaminants, or personal or environmental factors, would need to be considered. The difficulty of these questions is affected by the nature of the symptoms that the plaintiff alleges can result from exposure to toxic mould; and
>
> (f) the difficulties are compounded by the uncertain state of the relevant scientific, and medical, knowledge as exemplified by the conflicting expert opinions filed on this motion, and by the fact that extensive remedial work has been performed at the courthouse since the expiration of the class period.

11 Defendants' expert witnesses — and counsel — also stressed the ubiquity of mould in the atmosphere and inside buildings and the difficulties of attributing its presence at any particular time to one, or more, of the number of possible different contributing causal factors.

Section 5(1) (b) — an ascertainable class

12 With the recurring themes in the background, defendants' counsel challenged the adequacy of the proposed class definition as both over — inclusive and under-inclusive. As counsel for ORC stated in their factum:

> 73. The class definition should not be overly broad and should not include persons who have no claim against the defendants. The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of class members [citations omitted]

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> 74. At the same time, the class definition is improper if it is too narrow and arbitrarily excludes persons who have claims similar to those of the class members. Specifically, the class definition should not exclude persons with potential claims simply to make the proceeding more manageable and amenable to certification.
>
> 75 ... The common issues are only "common" in the relevant sense if the class definition identifies all — and not more or less than all — individuals who have a shared interest in the determination of those issues.

13 While the second sentence of paragraph 73 is supported by the reasoning of McLachlin C.J. in *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), the statement in the first sentence is I believe itself too broad and general if it means that an acceptable class must be confined to persons who have valid claims. That would beg the question of the merits of the litigation and it is established that a merits-based definition is not permissible. It is not a requirement of an acceptable class definition that each member of the class will ultimately be successful in establishing a claim for one or more remedies. The often-quoted statement of the Chief Justice that success for one must mean success for all referred to success on common issues and not to success in the litigation. If, however, it is clear on the evidence presented on the motion that some members of the class have no possible claims, it will, *prima facie*, be too broad. Even then it would not, I think, follow necessarily that it would be unacceptable if it could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of class members. The requirement that there must be a rational connection between the class definition and the common issues will often — but, I think, not always — be sufficient to exclude persons with no possible claims.

14 Unnecessary over-inclusiveness must obviously be avoided because it can affect the likely expense and manageability of the litigation as a class proceeding and have a bearing on the question of preferability.

15 Depending on the nature of the claims and the remedy sought, the sizes and dispersal of the proposed class will be of more relevance in some cases than in others. Decisions such as *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Ont. Div. Ct.), aff'd., [2004] O.J. No. 317 (Ont. Div. Ct.), *Hollick* and *MacDonald (Litigation Guardian of) v. Dufferin-Peel Catholic District School Board* (2000), 20 C.P.C. (5th) 345 (Ont. S.C.J.) — on which defendants' counsel relied heavily — are examples where the courts found that large widely-dispersed classes militated against certification. The possibility that this may be the case is reflected in section 5 (3) which, on a motion for certification, requires each party to provide in affidavits their best information on the number of members of the class. The information provided on behalf of the plaintiff in this case is contained in paragraph 4 of an affidavit sworn by an associate of one of the firms representing the proposed representative plaintiff:

> Based on my review of the file, it appears that the Newmarket Court House has approximately 300 court workers and police staff working in the building on a regular basis. Additionally, there are Justices of the Peace, Judges of the Ontario Court of Justice and Justices of the Superior Court of Justice, who habitually occupy the Newmarket Court House. Further, there are an undetermined number of paralegals, lawyers, process servers, service, maintenance and other workers who, on a regular basis, have occupied the Newmarket Court House.

16 In the statement of claim, the proposed class was defined broadly to comprise all persons who, during the period 1979 to the present, were exposed to toxic moulds, harmful gases and noxious substances while on the premises of the courthouse and suffered adverse health consequences as a result. This class description was open to objection on the ground that it begged the question whether exposure occurred — a question that, unless conceded, would be in issue. The revised definition is intended to meet this objection.

17 It is not part of the plaintiff's case that every member of the redefined class suffered compensatory harm as a result of the alleged exposure to toxic moulds. It was the opinion of Dr Ritchie D. Shoemaker who swore an affidavit contained in the motion record that susceptibility to illness caused by moulds varies among individuals and is affected by genetic factors. As I have indicated, the possibility, and even the likelihood, that some members of the class will not be able to prove that they suffered harm and, thereby, establish a claim is not, by itself, a reason for refusing to certify the

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proceedings on behalf of the class. The questions to be asked are, first, whether the class could be defined more narrowly without arbitrarily excluding persons who may have claims and whom the plaintiff seeks to represent; and, second, whether there is a required rational connection to the common issues. The class period in the revised definition runs from the time of the first documented concerns regarding air quality at the courthouse to the time when the courthouse was closed in the year 2000 to permit remedial measures to be taken.

18 Defendants' counsel did not suggest that the class definition could be defined more narrowly. In their submission, no adequate definition can be formulated. In my judgment, it is not a valid objection that the class is over-inclusive. The plaintiff has, in effect, pleaded that the defendants breached duties of care owed to the class members by creating a risk that they would be exposed to potentially harmful toxic moulds. Whether such breaches occurred is one of the proposed common issues. In consequence, the required rational connection exists and it is neither suggested, nor apparent to me, that the class definition could be framed more narrowly without excluding persons to whom the duty of care was allegedly owed.

19 The main thrust of the criticism of the proposed class advanced on behalf of the defendants was that it was under-inclusive. Defendants' counsel speculated that selection of the class period had been affected by limitations issues. On that basis, it was submitted that the class definition infringes a principle that it is not permissible to exclude persons with potential claims simply to make the proceeding more manageable and amenable to certification.

20 The principle supported by counsel is, again, in my opinion, far too broadly framed. I see no justification for the proposition that no class proceeding can be certified unless it includes all persons with similar claims against the defendants. I know no provision of the CPA, or policy, that would suggest that plaintiffs, in consultation with their counsel, are not entitled to choose the members of the class to be represented in the proceedings by reference, for example, to the geographical area, city or province in which the plaintiffs reside. In my view, the notion that certification must be denied because a manageable, rather than a possibly unmanageable, class has been chosen — or because an attempt has been made to exclude persons exposed to limitations defences — is similarly untenable. Persons excluded from the class will simply be unaffected by the litigation. It would I believe be an even greater distortion of the words of McLachlin C.J. in *Hollick* to interpret them in the manner supported by defendant's counsel. The Chief Justice's reference to an arbitrary exclusion of persons who share the same interest in the resolution of the common issues was provided to explain when a class definition would be "unnecessarily broad" — namely, when it could be defined more narrowly without resulting in such exclusion. It was, in other words, intended to indicate when a class would be unacceptably over-inclusive — and not to state a requirement that a class must not be under-inclusive. I do not believe the passage is authority that class proceedings are available only when a plaintiff is prepared to sue on behalf of all persons who have the same interest in the common issues.

21 On this part of their submission, defendant's counsel relied heavily on the reasoning of Nordheimer J. in *Pearson*. In dismissing the appeal from that decision, the Divisional Court accepted a defendant's submission that the class definition was irrational and arbitrary in that it was based upon an assumption, unsupported by evidence, with respect to causation. I find nothing irrational, or arbitrary, in the assumption in this class definition that the persons most likely to be affected by exposure to toxic mould in the courthouse, and to share an interest in the resolution of the common issues to which I shall refer, were those who spent at least 50 hours there in the period after moulds were detected. Obviously, the limitation is intended to exclude from the class only those persons who are likely to have had a substantial exposure. The related limitation to those whose presence was due to their employment, vocation or compulsion of law is, in my opinion, likewise unobjectionable. It would, in my opinion, be curious to say the least if courts should simultaneously require that class proceedings be manageable and reject class definitions designed to identify a discrete group in order to ensure that this will be the case.

22 Finally, in connection with the class definition, there is the issue relating to class members who are employees of the Crown. I was informed by Mr Fleishman that the attempt to obtain a ruling on the possible exclusive jurisdiction of the Appeals Tribunal over claims by Crown servants against the Crown had been unsuccessful in the absence of a Crown servant who could respond to the application. In these circumstances, I believe the appropriate order to make

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would be to refuse certification pursuant to section 5 (2) of CPA unless a member of the putative class who was a Crown employee is proposed to represent a subclass consisting only of such employees. The claims of such employees can be said to a "raise common issues not shared by all class members" within the meaning of the section in the sense that, depending on the decision of the Appeals Tribunal on the jurisdictional question, the common issues that affect them may be limited to their claims against the other defendants. If the tribunal decided that the representative plaintiff who is a Crown servant is not barred from commencing proceedings against the Crown in this court on behalf of the subclass, the certification order could be amended to delete the references to the subclass and to rescind the appointment of its representative plaintiff.

23 In the event that the tribunal decided that a plaintiff appointed to represent the subclass was not entitled to commence proceedings in this court, there might be a potential conflict of interest between the subclass and the other class members with respect to the apportionment of responsibility among the defendants. There might then be a question whether the subclass could continue to participate in the proceedings with separate legal representation, or whether its members must be excluded from the class. I incline to the former view but would receive any submissions counsel might wish to make on the question if it were to arise. It will not arise unless I find that the requirements for certification are otherwise satisfied.

Section 5(1)(c) — common issues

24 The plaintiff put forward a list of 10 proposed common issues that I believe, with some modifications, can be reduced to the following:

> 1. Did the defendants (or any of them) owe a duty to take care that class members were not harmed by the infiltration of toxic mould?
>
> 2. Did the defendants (or any of them) breach such a duty?
>
> 3. If the answer to 2. is Yes, did any such breach result in the presence in the courthouse of dangerous levels of toxic moulds — namely, levels that would give rise to reasonable foresight of harm to class members?
>
> 4. If the answer to 3. is Yes, what were the potential adverse health consequences to class members?
>
> 5. If the answer to 3. is Yes, can the degree of fault or negligence be apportioned among the defendants and, if so, in what relative proportions?

25 It was common ground between counsel that, for these issues to be acceptable for the purpose of certification, all class members must share an interest in their resolution and such resolution must significantly advance the proceeding. There must also be a basis in the evidence for the existence of the common issues. Although not all members of the class may be able to establish claims, this will often be the case in class proceedings. It is sufficient for the purpose of the requirements of commonality of interest, and a rational connection with the class definition, that a favourable resolution of the proposed common issues will be a prerequisite to the existence of any claim of a class member or, in the case of the last of the issues, a determination of the relative degrees in which defendants will be liable as among themselves.

26 The last of the issues leaves open the possibility that, depending on the findings made in resolving the other common issues, it might be found that the apportionment of fault among the defendants would not be uniform in respect of all class members. On the basis of the uncontradicted evidence, no fault could be attributed to Clifford or ProFac for harm caused before 1996 or June, 1999 respectively. By itself, that should not prevent an apportionment at a trial of the common issues although the question when harm occurred and, in consequence, the apportionment of fault could give rise to individual issues relating to the claims of members who were in the courthouse both before, and after, those dates. If, however, the court were to find that the negligence of particular defendants exposed localised risks to class members, apportionment might need to be determined individually.

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27 The opinions expressed in the affidavits of medical and scientific witnesses diverge on a number of relevant matters. The resolution of the medical and scientific issues raised by the inconsistent expert opinions may ultimately determine the outcome of the litigation but it is not my function on this motion to choose between the competing views unless this is necessary for the purpose of determining whether one, or more, of the requirements in section 5(1)(b) through 5(1)(e) is satisfied. 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. In my opinion, a sufficient evidential basis for the existence of the common issues has been provided in this case.

28 A large part of the defendants' submissions in opposition to certification was directed at the requirement that a trial of the common issues must significantly advance the proceedings. For this purpose, certification is not dependent on a finding that the common issues predominate over the individual issues. However, it will be denied if the determination of the former should, realistically, be considered to mark only the commencement of the litigation process.

29 Although defendants' counsels' reliance on the recurring themes I have referred to was not confined to their submissions on the common issues, it was in this context, and the related question of a preferable procedure, that it had most relevance and force. In their submission, individual trials on the question whether class members suffered harm from breaches of duty found at a common issues trial will be required in which the uncertainties, complexities and disagreements relating to the present state of scientific and medical knowledge will be at the forefront. In order to prove causation, each class member would be required to prove (a) his or her exposure to toxic moulds in the courthouse; and (b) whether injury or illness resulted from such exposure or from other personal or environmental factors.

30 I do not believe there is any doubt that a resolution of the common issues would represent an important step in the litigation. It would resolve questions relating to the duty of care, breaches by each of the defendants, the existence of dangerous levels of toxic mould in the building and a causal connection between this and any breach of a duty of care owed by each of the defendants. These are major issues in the litigation to be decided at trial according to the civil test of a balance of probabilities. The fact that they may be difficult and may require a lengthy trial underlines the advantage for all parties of having them dealt with only once. There is still, however, the question whether a determination of these important issues will sufficiently advance the resolution of the claims of class members to justify the use of the procedure under the CPA. To the extent that this may depend upon the manageability and efficiency of the procedure for resolving the individual issues, it will be convenient to consider it in connection with the remaining requirements of section 5(1).

Section 5(1)(d) and 5(1)(e) — the preferable procedure, the representative plaintiff and the litigation plan

31 A class proceeding will not be the preferable procedure unless certification would be consistent with the objectives, or goals, of the CPA. The main thrust of the defendant's submissions with respect to the requirement was that the nature, complexity and difficulty of the individual issues are such that a resolution of the common issues in favour of the plaintiff would not advance the litigation sufficiently to contribute materially either to access to justice, or judicial economy. In particular, it was submitted that a finding that one or more of the defendants breached duties of care by creating a risk of harm to occupants of the court house would leave unresolved the question whether each class member was exposed to mould and whether this could, and did, cause harm. The expert evidence filed on behalf of the defendants was that findings would be required with respect to the particular parts of the courthouse where — and the particular times when — such exposure occurred, its level and its duration.

32 The experts whose opinions were filed on behalf of the plaintiff disagreed that findings of the kind just mentioned would be required. In their view, exposure to any dangerous levels of mould in the courthouse would be uniform throughout it — apparently, at all times during the class period. I am satisfied that this question — and the others to which I have referred — could only be addressed satisfactorily as an individual issue. In particular, the court on a

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common issues trial could not reasonably be asked to determine whether substantially the same levels of mould were present in each part of the courthouse at all times between January 1, 1995 and June 30, 2000.

33 Expert evidence would be required for the purpose of resolving the individual issues in each case and the task of now determining whether, and to what extent, mould was present at particular times and places would be far more difficult and complex than the common issue relating generally to its presence in the courthouse in the class period. If a class member's exposure to a particular level was found to have occurred, the question whether such exposure caused the symptoms of which the class member complains may require an exclusion of possible causes for such exposure that are not attributable to a defendant's breach of a duty of care — including an enquiry into the presence, and level, of other airborne contaminants in the courthouse at such places and times. The difficulty of these questions is exacerbated by the uncertainty of the present state of related scientific and medical knowledge, and the fact that, if the remedial work performed in the courthouse was successful, the conditions that gave rise to the claims of class members are no longer in existence. Possible causes for the symptoms in the member's personal environment would also need to be considered. Expert evidence on these matters also is likely to be required in connection with each member's claim. In the absence of any other suggested procedure for resolving these individual issues, trials would be required and these, in the submission of defendants' counsel, would inevitably be protracted and expensive.

34 An inquiry into uniquely personal health and environmental factors when deciding issues of causation is, of course, not uncommon in personal injury cases. Class actions have been certified despite the existence of numerous such issues; see, for example, *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.) where certification was granted notwithstanding the defendant's identification of more than 20 individual issues of this kind. The bearing that their existence should have on the question whether the resolution of the common issues in favour of a class will sufficiently advance the proceeding will necessarily vary according to the facts of each case. Expert opinion evidence will often assist in answering the question. Here, the weight of the evidence underlines the peculiar difficulty and complexity of the individual issues of causation that arise from the ubiquitous nature of mould, and the fact that the health consequences of exposure to it are matters of considerable scientific and medical controversy.

35 The expert witnesses whose affidavits were filed on behalf of the defendants were in agreement with respect to the multitude of individual issues relevant to causation. These are reflected in the conclusions of Dr Ronald E. Gots of the International Centre for Toxicology and Medicine, in the State of Maryland:

> There is no possible scientifically-justified basis for treating the proposed class members in this litigation as having a common disorder or set of disorders with a common, uniform cause. While users of the courthouse may believe that mold has caused numerous symptoms, such a belief is neither uncommon, nor commonly accurate. There are innumerable potential causes of symptoms. There are numerous alternative causal agents for each individual. As far as mold is concerned, individual susceptibilities to mold will vary and relatively few, statistically, will have such susceptibilities; exposure, if any, will be quite variable; other sources of mold (i.e., home) exposure and exposures to other allergens is ubiquitous; alternate causes of symptoms must be investigated individually; and, the fact of numerous complaints by no means establishes a common indoor air cause of symptoms.
>
> To summarize:
>
> > (a) causes of each individual's symptoms are variable and require individual assessments. They may or may not be related to mold. The probability is that most are not.
> >
> > (b) the sources of potential causal agents: indoor, outdoor, courthouse-related, home-related or other, must be individually assessed.
> >
> > (c) symptom timing is variable among proposed class members and must be correlated with individual activities and locations at those specific times.

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> (d) even if mold it turns out to be a potential factor in some cases, the origin and source of the mold will have to be assessed individually.

36 While the expert evidence filed on behalf of the plaintiff disagreed strongly with opinions expressed by Dr Gots, the disagreement, for the main part, related to the common issues rather than to those identified in the passages I have quoted.

37 I note that the individual issues arising out of the variable personal factors to which Dr Gots referred are in addition to those relating to the threshold question of the extent to which each class member was, in fact, exposed to toxic mould at particular times and places in the courthouse. The importance of the threshold question was strongly affirmed by Dr Gots and by a certified toxicologist — Dr Mark Goldberg — who stated:

> The erroneous opinion that exposure to "toxic chemicals" at any dose produces deleterious effects abounds in the lay public. The fact that dose defines toxicity for chemicals has been recognized for centuries. It is critically relevant to an assessment and understanding of any claim that might be advanced by any potential class member in these proceedings.

38 Dr Tang Gim Lee — whose affidavit was filed on behalf of the plaintiff — was of the same opinion:

> While a person will be exposed to mould from different places, the concentration of specific species of mould and the length of expos[ure] are significant in causing health symptoms.

An assumption that the length of exposure is relevant is, moreover, reflected in the class definition.

39 The views of these expert witnesses contrast with that of Dr Shoemaker — a physician whose private practice and research for the past eight years has centred on the diagnosis and treatment of patients suffering from adverse health effects after exposure to water-damaged buildings. In his opinion, "mould illness" is not dose related.

40 On the basis of all the evidence, I do not consider Dr Shoemaker's opinion on the threshold issue to be sufficient to justify a finding that it will be unnecessary to confront each of the individual issues relating to causation that have been identified by the defendants. The existence, complexity and difficulty of these issues have not, in my opinion, been challenged effectively by the plaintiff. To the extent that Dr Shoemaker's preferred procedure for resolving these issues would require class members to be subjected again to the conditions prevailing in the courthouse during the class period, his evidence reinforces the persuasiveness of the defendants' submissions with respect to the complex nature of the fact-finding process that would need to be conducted in respect of each class member. It would also raise further issues with respect to the effectiveness of the remedial measures taken after the expiration of the period. If it was found that such measures were successful and that, in consequence, the preferred procedure could not be followed, it was Dr Shoemaker's opinion that:

> ... we can still obtain confirmation of causation to a reasonable degree of medical certainty by evaluating the building cohort as a whole, comparing their symptoms and biomarkers to established control groups.

41 Dr Shoemaker did not elaborate on that assertion and explain precisely what would be involved in his suggested alternate procedure. To the extent that the effectiveness of the procedure may be premised on his belief that the risk of adverse health consequences from mould exposure was not dose related and was, therefore, unaffected by the existence of different levels of mould throughout the building, his opinion is, as I have indicated, inconsistent with that of the other expert witnesses and I am not prepared to certify the proceedings on the basis that it is correct. In addition, unless a substantial uniformity of dangerous levels of mould exposure existed throughout the building and throughout the period, a comparison of the symptoms exhibited by all class members with those of occupants of buildings that have not suffered water damage could not establish a necessary causal connection with the conduct of the defendants. The

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symptoms of mould illness are not unique and the question whether a particular member was exposed to dangerous levels of mould attributable to the conduct of defendants might still be very much in issue.

42 The important question is whether, despite the existence of the individual issues, the plaintiff has discharged the burden of demonstrating that a resolution of the common issues will sufficiently advance the proceeding to justify certification.

43 A class proceeding will not be the preferable procedure unless there is a realistic possibility that it will result in a resolution of the claims of class members in a reasonably efficient manner. It must be a "fair, efficient and manageable method of advancing the claim": *Hollick*, at para 28. A relevant factor in this case is the expense that is likely to be involved both in a common issues trial and in the resolution of the individual issues. If, in either case, it is likely to be prohibitive, the proceedings will not be efficient or manageable in the required sense, and access to justice will not have been achieved. While I accept the submission of plaintiff's counsel that the complexity of the common issues may militate in favour of certification, the reverse can be true when it affects the resolution of individual issues.

44 On the question of manageability, the court is entitled to look for assistance in the contents of the plaintiff's proposed litigation plan that, pursuant to section 5(1) (e), is to set out a "workable method of advancing the proceeding". On the facts of this case, the following passages in the reasons of Winkler J. in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.) and *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) are particularly apposite:

> The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.
>
> A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification. (*Bre-X*, at page 203)
>
> ... the plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. (*Caputo*, at para 78)

45 Here, neither the plan nor the evidence addresses the ability of the plaintiff to carry the financial burden of a common issues trial, or the procedure by which the complex individual issues would be determined.

46 The likely length and expense of a common issues trial involving difficult and complex issues of fact, multiple defendants, expert witnesses, and possible third party claims, persuades me that this is a case in which the court should be provided with an assurance that the plaintiff has the necessary financial resources, or backing, to carry the prosecution of the litigation through to the completion of the trial. As Nordheimer J. stated in *Pearson*:

> An important consideration, in determining whether the representative plaintiff would "adequately" represent the interests of the class, is the ability of that representative plaintiff to bear the costs that will be necessary for the proper prosecution of the class action. Certifying a class proceeding without demonstrating that such a capacity exists could represent a real risk to class members who will be bound, and whose rights will be finally adjudicated, by the outcome of the proceedings. (at para 140)

47 I would add that I believe that proceedings should not be certified unless the court is satisfied that there is a realistic possibility that a common issues trial will be held if the matter is not settled beforehand.

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48 Equally as important is the complete absence in the litigation plan of any reference to the procedure by which the individual issues of causation and damages would be resolved. The lack of attention given in the plan — and in the evidence filed on behalf of the plaintiff — to the resolution of the individual issues suggests that it was considered that certification would remove the only significant barrier to recovery by class members. On the evidence, this would not be the case.

49 The amount of detail required in a litigation plan will vary from case to case. In view of the nature, difficulty and complexity of the issues in this case, a workable plan was essential if the court was to be satisfied that access to justice will be achieved by certification or, indeed, that any purpose would be served other than an enhanced ability of the plaintiff to negotiate a settlement. Class proceedings create special burdens, expenses and potential financial risks for defendants. It is a truism that, because of the amounts at stake, certification is very commonly followed by a settlement. However, nothing in the CPA permits the possibility that a settlement may be negotiated in the future to enter into the preferability analysis. Fairness to defendants opposing certification requires that this should not be done.

50 If it is contemplated that individual trials would be conducted before a judge, the evidence indicates that each such trial may be protracted and expensive. The record contains no information that would permit even the most cursory costs/benefits analysis to be attempted in respect of the class. There is no evidence that suggests that any class members, other than the plaintiff — and one person who has commenced an individual action and has indicated her intention to opt out of this proceeding if it is certified — would be willing to accept the financial risk inherent in such trials.

51 I am satisfied that, in the circumstances of this case, the absence of evidence, and a plan, that would satisfactorily address — and resolve or minimize — the difficulties that would be involved in dealing with the individual issues is fatal to the attempt to have these proceedings certified on the basis only of the material in the record. In my judgment, the plaintiff has not, as yet, discharged the burden of demonstrating, on a balance of probabilities, that a common-issues trial would advance the proceeding at all — much less that certification would result in an efficient, fair and manageable method of resolving the claims of class members consistently with the objectives of the CPA.

52 Section 5 (4) of the CPA contemplates that it may be appropriate for a motion for certification to be adjourned to permit further materials or evidence to be filed. I believe this is such a case. The plaintiff will be allowed 30 days to propose a representative plaintiff for the subclass of Crown employees and to file a revised litigation plan that addresses the procedure for resolving the individual issues. In addition, a reasoned estimate of the number of class members who are likely to participate in that procedure — or, at least, whose participation is likely to be economically viable — is to be provided. I wish also to have an estimate of the costs that will be incurred by the plaintiff in proceeding with a trial of the common issues, and an indication of how these costs are to be borne. The defendants will have another 30 days in which to file any further responding materials.

Motion adjourned.

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Tab 6

COURT OF APPEAL FOR ONTARIO

CITATION: Gaur v. Datta, 2015 ONCA 151
DATE: 20150312
DOCKET: C59142

2015 ONCA 151 (CanLII)

Rouleau, van Rensburg and Pardu JJ.A.

BETWEEN

Pradeep Gaur, Apt Flow Technologies Inc.
and 2081706 Ontario Inc.

Plaintiffs (Appellants)

and

Dipti Datta, Utpal Datta, Inge Datta
and M&I Power Technology Inc.

Defendants (Respondents)

J. David Keith and Evan Moore, for the appellants

Constance Olsheski, for the respondents

Heard: February 6, 2015

On appeal from the order of Justice Michael G. Emery of the Superior Court of Justice, dated June 26, 2014.

van Rensburg J.A.:

[1] This is an appeal from an order dismissing an action against the respondents under rule 21.01(1)(b) of the *Rules of Civil Procedure*. For the reasons that follow I would allow the appeal. In my view, the motion judge erred in dismissing the action against the respondents. I would permit the appellants to proceed with their action against the respondents, claiming both defamation and

intentional interference with economic relations, with leave to amend their pleadings as set out below.

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A. BACKGROUND

[2] The appellants – Pradeep Gaur and two companies of which he is a principal – are defendants to an action in the Superior Court commenced by M&I Power Technology Inc. ("M&I Power") in 2012 (the "First Action"). That action, alleging breach of contract and breach of fiduciary duty, was commenced after the termination of Pradeep Gaur's employment with M&I Power.

[3] In 2013, the appellants commenced Action No. CV-13-1230-00 in the Superior Court against Dipti Datta and the respondents (the "Second Action"). The respondent M&I Power is the plaintiff in the First Action. The respondents Utpal Datta and Inge Datta are current directors of M&I Power. Dipti Datta (who did not move to dismiss the action, and is therefore not a respondent to this appeal) is a former director and officer of M&I Power.

[4] In the Second Action the appellants claim damages for defamation and intentional interference with economic relations. Central to the action are three emails. The first two (dated July 5, 2012 and July 11, 2012) were authored by Dipti Datta. The third (dated March 22, 2013) was authored by Utpal Datta. It is the motion judge's dismissal of the Second Action against the respondents under rule 21.01(1)(b) that forms the subject of this appeal.

[5] The motion judge correctly identified the legal principles applicable to a motion to strike under rule 21.01(1)(b). No evidence is admissible, and the facts pleaded are assumed to be true unless patently ridiculous or incapable of proof: *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.), 79 O.R. (3d) 721, at para. 3; *McCreight v. Canada*, 2013 ONCA 483, 116 O.R. (3d) 42, at para. 29. In determining whether a cause of action is disclosed, particulars can be considered as part of the pleading. In assessing the substantive adequacy of the claims, the court is entitled to review the documents referred to in the pleadings: *McCreight*, at para. 32.

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[6] The appellants contend that the motion judge erred by dismissing the claim against the respondents after making findings of fact. They assert that the amended statement of claim, when read with the particulars and the emails (which are incorporated by reference in the pleadings), discloses proper claims against the respondents sounding in defamation and intentional interference with economic relations.

[7] I consider the appellants' submissions regarding each cause of action in turn.

B. THE DEFAMATION CLAIMS

[8] The tort of defamation requires the plaintiff to prove three elements: (1) the defendant made a defamatory statement, in the sense that the impugned words

would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) the words in fact refer to the plaintiff; and (3) the words were communicated to at least one person other than the plaintiff: *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at para. 39; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28; see also *Lysko*, at para. 91.

[9] In *Lysko*, at para. 90, this court noted that "publication by the defendant is an essential element of a defamation action and any person who participates in the publication of the defamatory expression in furtherance of a common design will be liable to the plaintiff". As Raymond E. Brown stated in *The Law of Defamation in Canada,* loose-leaf (2012-Rel. 3), 2nd ed. (Scarborough: Carswell, 1999), at pp. 7-30 – 7-31:

> The defamatory material may be published indirectly through the action of some intermediary for whose publication a defendant may be held to share responsibility. This may be because the defendant authorized, incited or encouraged another to publish it…A defendant may be responsible for the acts of others by encouraging, instructing or authorizing them to publish defamatory information, or providing them with information intending or knowing that it will be published.

[10] Pleadings in defamation cases are more important than in any other class of action, and require a concise statement of the material facts: *Lysko*, at para. 91.

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[11] In this case, the alleged defamation occurred in the three emails referred to above: two authored by Dipti Datta and a third by Utpal Datta. The amended statement of claim pleads the following:

- all of the defendants (including the respondents) falsely and maliciously published the words set out in the paragraph (defined as the "Defamatory Words") (para. 7);
- the Defamatory Words were published by email correspondence to certain named third parties (para. 8). It is acknowledged that this pleading refers to the two emails authored by Dipti Datta;
- Utpal Datta published additional Defamatory Words in a third email and sent the email to certain named third parties, associated with potential clients of the plaintiffs (paras. 8a and 8b);
- the meaning of the Defamatory Words (para. 10);
- the defendants published the Defamatory Words knowing they were false or with careless disregard for their truth (para. 11); and
- "the plaintiff" (presumably, Pradeep Gaur) has been injured and suffered damages for which the defendants are liable (paras. 12-14).

[12] Paragraph 15 of the amended statement of claim asserts that the respondents acted in concert with Dipti Datta to publish the Defamatory Words, and that Utpal Datta published some of the Defamatory Words directly. Paragraph 17 pleads, in the alternative, that Dipti Datta, when he published the

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Defamatory Words, was acting as Utpal and Inge Datta's agent. Paragraph 18 pleads, in the further alternative, that Dipti Datta acted on behalf of M&I Power when he published the Defamatory Words.

[13] Although these paragraphs appear in the pleading under the heading "Intentional Interference with Economic Relations", the respondents acknowledge that, reading the amended claim broadly, the pleadings of agency and "acting in concert" also apply to the defamation claims.

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(1) Dipti Datta's Emails

[14] The respondents accept that the pleading is sufficient to disclose a defamation claim against Dipti Datta. The principal issue is whether the action regarding Dipti Datta's emails can proceed against the respondents. This depends on whether the pleading is sufficient with respect to their participation, authorization or otherwise, to make them liable for the publication of the emails.

[15] The allegations that the respondents acted in concert with Dipti Datta and that he was their agent, are bald. These are conclusions of law, not supported by material facts: *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049, at paras. 217-220, aff'd 2012 ONSC 4692, [2012] O.J. No. 3120 (Div. Ct.); *Durling v. Sunrise Propane Energy Group Inc*., 2012 ONSC 4196, [2012] O.J. No. 3408, at para. 75.

[16] However, this is not the end of the analysis. One must turn to the particulars to see whether material facts have been pleaded. The respondents' counsel made a number of demands for particulars over the course of several months, which included increasingly more pointed requests for particulars as to how the respondents acted in concert. Eventually, in particulars provided on July 26, 2013, the appellants stated as follows:

> Dipti Datta wrote the words in an email in or around July 2012. In addition, Utpal Datta told a contractor (Ilia) that Mr. Gaur was incompetent. Mr. Utpal Datta, at an M&I Power Technology Inc. meeting with Inge Datta present, told Mr. Gaur that should he leave the company, they would do what they could to blacklist him in the industry. Utpal Datta and Inge Datta requested the involvement of Dipti Datta who uttered the Defamatory Words. Utpal Datta also provided Dipti Datta with the contact information of business associates in order that Dipti Datta might contact them to undermine Mr. Gaur's reputation.
>
> The threats to litigate were made by Dipti Datta in or around July 2012 via email to Triton Synergies. M&I Power and Utpal Datta provided the information to Dipti Datta in order that he act on behalf of them in respect to Mr. Gaur.

[17] These particulars provide additional material facts relevant to the respondents' participation in the publication of the Dipti Datta emails: Utpal Datta, at an M&I Power meeting with Inge Datta present, told Pradeep Gaur that should he leave the company, they would do what they could to blacklist him in the industry; Utpal and Inge Datta requested the involvement of Dipti Datta, who uttered the Defamatory Words; Utpal Datta provided Dipti Datta with the contact

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information of business associates in order that Dipti Datta might contact them to undermine Pradeep Gaur's reputation; and M&I Power and Utpal Datta provided Dipti Datta information in order for him to threaten litigation in an email to Triton Synergies on their behalf.

[18] Further, paragraphs 8a and 8b of the amended claim plead that Utpal Datta sent his own, similarly defamatory email and that the consistency in words used in the emails "indicate[s] a concerted and collective effort by the defendants". I disagree with the motion judge's observation that the third email, written by Utpal Datta, must be considered in isolation from the emails written by Dipti Datta. Reading the pleading generously, the inclusion of consistent Defamatory Words in Utpal Datta's email is a material fact supporting the allegation that the respondents acted in concert with respect to the Dipti Datta emails.

[19] The motion judge was entitled to review the emails to determine whether what was pleaded (as enhanced by the particulars) was "patently ridiculous or incapable of proof". Instead, he appears to have examined the emails as evidence, weighing the inferences that could be drawn from their contents and then concluding there was no allegation or fact to support the pleadings that the respondents acted "in concert" with Dipti Datta (para. 29) and that the respondents could not be held accountable for the Defamatory Words in the Dipti Datta emails (para. 32).

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[20] In my view, the allegations in the particulars, which are based on the words contained in the emails, are capable of an interpretation that the respondents acted in concert with Dipti Datta. The facts pleaded are neither patently ridiculous nor incapable of proof. This of course does not mean that they will necessarily be proven, only that on a Rule 21 motion sufficient material facts have been pleaded to support an action in defamation against the respondents in relation to the Dipti Datta emails.

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(2) Utpal Datta's Email

[21] The appellants allege that Utpal Datta sent a similarly defamatory email on March 22, 2013. The motion judge concluded that since only Utpal Datta sent the email, it gives rise to no claim against Inge Datta or M&I Power. He also concluded that the amended statement of claim did not contain sufficient material facts to support this pleading. He dismissed the claim, but without prejudice to its being asserted against Utpal Datta by way of counterclaim in the First Action. I disagree with the motion judge. In my view, the pleading is sufficient.

[22] Paragraphs 8a and 8b of the amended statement of claim plead all of the necessary elements of the tort of defamation. The paragraphs plead the words that are alleged to have been defamatory, their publication in an email by Utpal Datta, and specifically identify two recipients of the email. It is alleged that the consistent use of the Defamatory Words indicates a concerted and collective

effort by the respondents. With respect to the claim against M&I Power and Inge Datta, the pleading is sufficient, when considered in the context of the entire pleading as well as the particulars provided.

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C. THE INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS CLAIM

[23] The motion judge's reasons suggest he struck the appellants' claim against the respondents for intentional interference with economic relations under rule 21.01(1)(b), and that he did so for two reasons. First, the amended statement of claim failed to disclose material facts addressing the tort's requisite elements. Second, as with the defamation claims, the pleading disclosed insufficient material facts to assert a claim premised on concerted action between the respondents and Dipti Datta.

[24] For the reasons already discussed, I do not agree with the second conclusion. I turn to consider whether all of the required elements of the tort have been pleaded.

[25] In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12, [2014] 1 S.C.R. 177, a recent decision of the Supreme Court of Canada, Cromwell J. clarified the elements of unlawful interference with economic relations, which he indicated is also referred to as intentional interference with economic relations: at para. 2. The tort requires the defendant to have committed an actionable wrong against a third party that intentionally caused the plaintiff economic harm.

Conduct is unlawful if it is actionable by the third party, or would be actionable if the third party had suffered a resulting loss: *A.I. Enterprises Ltd.*, at para. 5.

[26] The amended statement of claim asserts the following with respect to the tort of intentional interference with economic relations. It alleges that, by undermining Pradeep Gaur's professional reputation, the defendants sought to, and did, interfere with the plaintiffs' ability to maintain existing contracts, secure additional contracts and develop business opportunities (para. 20). The claim also alleges that this interference was unlawful and induced a breach of contract (para. 21). Finally, the claim alleges that the defendants' conduct aggravated the damages caused to the plaintiffs by, among other things, "sending the plaintiffs' third party business associates threats to send 'quasi legal letters' to potential customers implicating the third party business associates and threatening legal action" (para. 22d), and "attempting to induce potential third-party business associates of the plaintiffs to either break their contracts with the plaintiff or not enter into contracts with the plaintiff" (para. 22e).

[27] This pleading alone does not address each of the essential elements of the tort of intentional interference with economic relations. In particular, there is no allegation that would amount to "unlawful means". The reference to third parties here is confusing and there is no clear allegation of an actionable wrong against any third party.

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[28] However, the appellants urge the court to consider, together with the amended statement of claim, the particulars and what is stated in the July 5, 2012 email.

[29] With respect to the unlawful means element, the particulars assert that the respondents, through Dipti Datta, offered to pay Triton (a third party) a portion of an acknowledged debt owed by M&I Power if Triton would cease doing business with Pradeep Gaur. The appellants contend that, when considered with reference to the July 5, 2012 email, the allegation is that Dipti Datta (on behalf of himself and the respondents) threatened that Triton would not receive payment of a debt owed by M&I Power unless it provided its "full cooperation" in the respondents' campaign against Pradeep Gaur by ending its business relationship with Gaur. In *A.I. Enterprises Inc.*, at para. 80, Cromwell J. acknowledges that threatening to breach a contract with a third party can satisfy the unlawful means element of the tort of intentional interference with economic relations.

[30] Regarding the intention element, the amended statement of claim only alleges that the respondents, by undermining Pradeep Gaur's reputation, sought to interfere with the appellants' ability to maintain existing contracts, secure additional contracts and develop business opportunities (para. 20). This allegation is not explicitly pleaded as the respondents' reason for inducing third parties to either break or not enter into contracts with the appellants (para. 22e). However, on a generous reading of the pleading together with the particulars and

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the July 5, 2012 email, it appears that the appellants are alleging that the respondents' threats to withhold monies from Triton was targeted at inflicting economic harm on the appellants, as the condition for receiving payment was for Triton to cease its business relationship with Gaur.

[31] Regarding the requirement that the unlawful means caused the plaintiffs economic harm, the particulars assert that the appellants have lost $1.5 million as a result of third party business associates – who pursued contracts on their behalf and provided them access to contract opportunities – discontinuing their relationship with the appellants. The particulars also attribute $32 million in losses to the withdrawal of third parties from proposed contracts and joint venture opportunities. Although Triton is not explicitly named in these particulars, given the similarity between the relationship between the appellants and Triton and the intermediary relationship described, on a generous reading this element of the tort is disclosed.

[32] In my view, when the particulars and the July 5 email are considered, intentional interference with economic relations is raised in this action against the respondents. The appellants allege an actionable wrong by the respondents (a threat to continue an ongoing breach of contract) against a third party (Triton Synergies) that was aimed at causing, and did in fact cause, the appellants economic harm: *A.I. Enterprises Inc.*, at paras. 5, 23. These allegations are neither incapable of proof nor patently ridiculous. Taking them as true, and

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adopting a broad and generous reading of the pleading together with the particulars and the July 5, 2012 email, it is not "plain and obvious" that the pleading discloses no reasonable cause of action for intentional interference with economic relations: *Hunt v. T & N plc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at paras. 33, 36; *Knight v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17. Accordingly, I would set aside the motion judge's order under rule 21.01(1)(b) striking the appellants' claim for intentional interference with economic relations, subject to what I say below respecting the need to amend the pleading.

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D. ALTERNATIVE BASES FOR RELIEF

[33] The motion judge indicated that, while it was unnecessary to address the other bases for the relief sought by the respondents under rules 25.11, 25.06(1) and 21.01(3)(d), he would have struck certain paragraphs of the amended statement of claim as frivolous, vexatious or an abuse of process.

[34] The motion judge referred to authority that "in the absence of material fact, an action can be dismissed as frivolous, vexatious or an abuse of process of the court": see, for example, *George v. Harris*, [2000] O.J. No. 1762 (S.C.), at para. 20. Given his finding that the pleading was bald and lacked sufficient material facts to establish concerted action between the respondents and Dipti Datta, the motion judge would have struck any claims for defamation and intentional

interference with economic relations premised on such allegations as frivolous, vexatious or an abuse of process.

[35] As already explained, I disagree with this characterization. Accordingly, I also disagree with the conclusion that the pleadings should be struck on this alternative basis.

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E. LEAVE TO AMEND

[36] While not strictly necessary for the survival of the action in defamation against the respondents at the pleadings stage, I would grant the appellants leave to amend the amended statement of claim to incorporate the material facts set out in the particulars in relation to agency and acting in concert.

[37] With respect to the elements of intentional interference with economic relations, as I have indicated, the pleading is deficient, but the particulars provide the necessary elements of the cause of action. It is therefore necessary for the appellants to amend the claim for intentional interference with economic relations so that the various facts contained in the particulars are brought into the pleading and the elements of the tort are clearly set out. An amended pleading shall be delivered within 30 days, and the respondents shall have 30 days thereafter to deliver their statement of defence.

F. CONCLUSION

[38] For these reasons I would allow the appeal, set aside the order dismissing the action against the respondents, and grant leave to amend the amended statement of claim.

[39] Since the appellants were successful in the appeal, I would set aside the motion judge's order for costs and award the appellants costs of the motion in the sum of $10,000, as well as costs of the appeal in the further sum of $10,000, with both amounts inclusive of disbursements and applicable taxes.

Released: (KMvR) MARCH 12, 2015

"K. van Rensburg J.A."
"I agree Paul Rouleau J.A."
"I agree G. Pardu J.A."

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Tab 7

CITATION: Kalra v. Mercedes Benz, 2017 ONSC 3795
COURT FILE NO.: CV-16-550271-CP
DATE: 20170629

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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **YOGESH KALRA,** Plaintiff / Moving Party

AND:

MERCEDES BENZ CANADA INC., DAIMLER AG, MERCEDES BENZ USA LLC and MERCEDES BENZ FINANCIAL SERVICES CANADA CORPORATION, Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Peter Griffin, Kirk Baert, James Sayce and Andrew Skodyn* for the Plaintiff

Steven Rosenhek, Robin Roddey, Caroline Youdan and Allison Worone for the Defendants

HEARD: June 13, 2017

CERTIFICATION DECISION

[1] The emission control systems in diesel automobiles manufactured in Europe and imported into the U.S. and Canada continue to generate class action litigation. In the wake of the Volkswagen "dieselgate" scandal and the multi-billion dollar settlements that followed,[1] governmental authorities in the U.S. and Europe began scrutinizing the

[1] In the U.S. Volkswagen paid $4.2 billion in fines and entered into a settlement worth just over $10 billion: *In re Volkswagen "Clean Diesel" Marketing Sales Practices and Products Liability Litigation*, MDL, No. 2672 (CRB)(JSC) (U.S. District Court, Northern District of California, October 25, 2016). In Canada, VW paid a $15 million fine and entered into a $2.1 billion settlement: *Quenneville v. Volkswagen*, 2016 ONSC 7959 (December 20, 2016).

emission control systems of other diesel vehicle manufacturers. The news that a particular manufacturer was being investigated was often enough for the commencement of a class action. As happened here.

Background

[2] The focus of this proposed class action is the Mercedes-Benz line of BlueTEC diesel automobiles[2]. Just under 80,000 were sold in Canada from 2006 to 2016. The plaintiff says that all of these BlueTEC vehicles contain a defect or a "defeat device" that turns off the emission control system when the ambient air temperature drops below 10 degrees Celsius (50 degrees Fahrenheit). If this is true, this means that the defendants' BlueTEC vehicles are emitting high (and illegal) levels of nitrogen oxide pollution for most of the time that they are being driven on Canadian roads.

[3] The plaintiff, Yogesh Kalra, resides in Toronto. In November 2012 he purchased a used 2009 Mercedes-Benz BlueTEC R320 for $33,029 exclusive of tax, from JP Motors in Burlington, Ontario. He brings this proposed class action on behalf of all persons and corporations in Canada (except for "excluded persons"[3]) who own, owned, lease or leased a BlueTEC vehicle (as defined in the statement of claim) over the eleven-year time period, from 2006 to 2016.

[4] There are four defendants. Daimler AG, the parent company is based in Stuttgart, Germany and designs and manufactures Mercedes-Benz brand vehicles, including the BlueTEC vehicles; Mercedes-Benz Canada Inc., is the sole importer, distributor and warrantor of Mercedes-Benz vehicles in Canada; Mercedes-Benz USA LLC is the sole importer and distributor of Mercedes-Benz vehicles in the United States; and Mercedes-Benz Financial Services Canada Corporation is an indirect finance company that competes with other financial institutions to purchase lease agreements and sales finance contracts from automotive dealers in Canada.

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[2] The BlueTEC vehicle models at issue in this case are the following: the ML320, ML350, GL320, E320, E250, E250, S350, R320, R350, E Class, GL Class, ML Class, R Class, S Class, GLK Class, GLE Class and Sprinter - all years.

[3] Excluded persons are defined as: (i) the defendants and their officers and directors; (ii) the authorized motor vehicle dealers of the defendants and the officers and directors of those dealers; and, (iii) the heirs, successors and assigns of the persons described in subparagraphs (i) and (ii).

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[5] Mercedes-Benz notes that to date there have been no product recall orders or court decisions relating to the impugned BlueTEC emission control system. However, it acknowledges that investigations into its diesel emission control system are proceeding in both the US and Europe.

The alleged misrepresentations

[6] This is primarily an action for negligent misrepresentation. The core representation, says the plaintiff, is that BlueTEC vehicles provide a "clean and green" diesel option that has low fuel consumption and low emissions. The actual representations (referred to hereafter and in the proposed common issues as the Representations) fall into three categories:

- *Advertising to the public*: A repeated refrain in the advertising of the BlueTEC vehicles is: "Clean. Efficient. Powerful. Diesel?" Other substantively similar representations include: "BlueTEC for a greener world"; "BlueTEC, the Cleanest Diesel Engine in the World"; "Here's why we call our green diesel technology 'Blue'"; and, "Finally, a luxury SUV that's fuel and cost efficient".

- *Warranty representation*: The warranty document provided to every class member, as required by Environment Canada, contains the same representation: that the BlueTEC vehicle conforms to Environment Canada's emission standards. The warranty document goes on to provide a time and distance warranty on material and workmanship relating to the emission control system.

- *Chrome lettering on BlueTEC vehicles*: The name "BlueTEC" is affixed in readable chrome lettering on the rear of every BlueTEC vehicle. By printing the word BlueTEC on the vehicle, says the plaintiff, Mercedes represented that there was a working BlueTEC system in that vehicle and that it would function properly and achieve its intended purpose - to clean the emissions of the vehicle under ordinary, on-road usage, regardless of the outside temperature.

[7] The plaintiff notes that at no time did the defendants tell prospective purchasers that the benefits and functionality associated with the BlueTEC system would be reduced or rendered inoperative when the air temperature dropped below 10 degrees Celsius.

Primarily a claim for economic loss

[8] As one can see from the 17 proposed common issues attached in the Appendix, the plaintiff is pursuing a wide range of statutory and common law claims. But the core claim is a claim for economic loss. There are no health or safety claims. There are no claims that noxious diesel emissions impacted on the plaintiff's or any class member's overall

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health or caused any physical harm or property damage. The core common law claim is for the damages sustained by the class members because of an alleged overpayment for a diesel automobile that failed to deliver on its emission control promise.

[9] I will return to this point shortly when I consider the causes of action and the proposed common issues.

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Analysis

[10] The five requirements for the certification of a class action under s. 5(1) of the *Class Proceedings Act*,[4] ("CPA") are well known to counsel: a cause of action, an identifiable class, one or more common issues that will advance the litigation, a showing that a class action is the preferable procedure, and a suitable representative plaintiff with a workable litigation plan. The last four requirements only need a small amount of evidence – just "some basis in fact" – in order to be satisfied.

[11] The Supreme Court's decision in *Pro-Sys Consultants*[5] figures prominently in the analysis that follows, not because it also dealt with a product overcharge situation, but because of what the Court said about the following: (i) that the "some basis in fact" test under s. 5(1)(c) is really a one-step test that focuses only on the commonality of the proposed common issues; (ii) before a loss-related common issue can be certified the plaintiff must provide some plausible evidence of a workable methodology to measure actual class-wide loss and (iii) that aggregate damages are about the quantum of loss and not the fact of loss and cannot be used to establish liability. I will say more about these points in due course.

[12] I now turn to the five requirements.

(1) Cause of action – section 5(1)(a)

[13] The test under s. 5(1)(a) of the CPA is the same as the test on a motion to strike for no reasonable cause of action: assuming the facts pleaded to be true, is it plain and obvious that the claim has no reasonable prospect of success.[6]

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[4] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[5] *Pro-Sys Consulting Ltd. v. Microsoft Corp.*, 2013 SCC 57.

[6] *Ibid.*, at para. 63; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17.

[14] The plaintiff has pleaded eight causes of action. Three are statutory claims - under the *Canadian Environmental Protection Act (*"CEPA"), the federal *Competition Act*, and applicable provincial consumer protection legislation (the Ontario *Consumer Protection Act, 2002* and six other equivalent provincial statutes). Five are common law causes of action: negligent misrepresentation, negligence, unjust enrichment, breach of express and implied warranties and waiver of tort. The core claim, as I have already noted, is negligent misrepresentation but it is typical for class counsel to add as many other claims as the kitchen sink can hold.

[15] The defendants appear to take issue with five of the causes of action – the CEPA claim, the consumer protection claim, negligence, unjust enrichment and the breach of warranties claim.

[16] In my view, on the facts as pleaded, seven of the eight causes of action are supported by a generous reading of the pleadings and can remain in place. I hasten to add that some of them will be *de facto* altered or eliminated when I consider the proposed common issues under s. 5(1)(c). But at the s. 5(1)(a) stage, the only cause of action that plainly and obviously has no chance of success and must be struck is the breach of express and implied warranties claim. I cannot find that any of the seven other causes of action being advanced - viewed strictly as a cause of action on the facts as pleaded - has no chance of success and is certain to fail. I will first consider the five common law causes of action and then the three statutory claims.

[17] ***Negligent misrepresentation.*** As already noted, the plaintiff's principal claim is that the defendants misrepresented the emission control attributes of the BlueTEC vehicles causing the class members to purchase the vehicles at an inflated price. I am satisfied that the elements of negligent misrepresentation have been properly pleaded. It is not plain and obvious that this cause of action has no reasonable prospect of success.

[18] ***Negligence.*** It is certainly arguable that the negligence cause of action, as pleaded, has no chance of success and must be struck. There is no claim that the alleged defect (that is, the purported "shut off" of the emission control system at 10 degrees Celsius) has a propensity to cause personal injury or death to the putative class members. There is no health and safety claim. There is only the claim for out-of-pocket economic loss – that the vehicles are worth less than they otherwise would be. I am therefore very sympathetic to the defendants' submission that on the facts as pleaded this is not a "dangerous product"

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case but a "safe but shoddy goods" case. And if only the latter, then generally speaking, no duty of care arises on the part of the supplier.[7]

[19] Nonetheless, I am reluctant to strike the negligence claim. The pleadings do make reference (albeit in passing) to the dangers and health-related hazards of nitrogen oxide emissions and as the Court of Appeal noted in *Arora*,[8] the Supreme Court in *Winnipeg Condominium*[9] "carefully left the issue of whether there should be no recovery for pure economic loss where goods are shoddy, but not dangerous, for another day."[10] In other words, although Canadian courts have almost uniformly limited tort recovery for economic loss absent physical harm or damage to property, the recovery in negligence for pure economic loss involving a non-dangerous but shoddy product has not been determined definitively. The cause of action still has a slight pulse. It cannot be struck under s. 5(1)(a).

[20] This being said, when I consider the "negligence" common issue below under s. 5(1)(c), I conclude that the negligence/duty of care common issue will not advance the litigation and should not be certified.

[21] ***Unjust enrichment***. The defendants say it is plain and obvious that the unjust enrichment claim is doomed to fail because: (1) unjust enrichment is not available in cases where the alleged transfer of value from plaintiff to defendant is indirect (i.e. from plaintiff to seller to defendant manufacturer); and (2) there is a valid juristic reason for any enrichment, namely the contract of sale between the buyers and sellers.

[22] In *Pro-Sys*,[11] however, the Supreme Court commented on both of these points. First, the Court concluded that it was not plain and obvious that a claim in unjust enrichment can only be made out where the relationship between the plaintiff and the defendant is direct.[12] Second, it held that if the contracts at issue are illegal and void

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[7] See the discussion in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, *Martel Building Ltd. v. R.*, 2000 SCC 60 and *Arora v. Whirlpool Canada LP*, 2013 ONCA 657.

[8] *Arora, supra*, note 7.

[9] *Winnipeg Condominium, supra*, note 7.

[10] *Arora, supra*, note 7, at para. 83.

[11] *Pro-Sys, supra*, note 5.

[12] *Ibid.*, at para. 87.

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because they violate the CEPA or Part VI of the *Competition Act*, (as alleged here) then they may not amount to a juristic reason for the enrichment. The Court also noted that "[t]he question whether the contracts are illegal and void should not be resolved at [the certification] stage of the proceedings."[13]

[23] I therefore cannot conclude that it is plain and obvious that the unjust enrichment claim has no reasonable prospect of success.

[24] ***Breach of express and implied warranties.*** The defendants are able to critique the breach of express and implied warranties claim because the relevant warranty documents are referenced in the statement of claim. It is well established that documents referenced in a pleading form part of the pleading, and may be considered and interpreted to determine whether the plaintiff has pleaded a viable cause of action.[14]

[25] As already noted, Mercedes-Benz expressly warranted to all BlueTEC purchasers and lessees that the vehicle complied with Environment Canada's emission standards. The warranty goes on to explicitly exclude all other express and implied warranties and provide limited remedies if the emission control system fails in any way – namely, repair or replace at Mercedes' expense. The warranty makes clear that claims for diminution in value are prohibited by the warranty.

[26] The plaintiff alleges that Mercedes-Benz breached the express warranty. However, he has not pleaded any facts that constitute a breach of the obligations assumed under this warranty document. Nor has the plaintiff pleaded facts establishing the breach of the implied warranty claim. In any event, implied warranties are not only expressly excluded by the language of the warranty here in question. The case law is clear that a term will not be implied if it is inconsistent or otherwise conflicts with an express provision in the agreement.[15]

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[13] *Ibid*., at para. 88.

[14] *Graham v. Imperial Parking Canada Corp.*, 2010 ONSC 4982 at paras. 97-98; *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196 at para. 55; and *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (C.A.) at para. 26.

[15] *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, at para. 182 referring to the decisions in *G. Ford Homes Ltd.* v. *Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (C.A.); *Fort Frances (Town)* v. *Boise Cascade Can. Ltd.*; *Boise Cascade Can. Ltd.* v. *Ontario*, [1983] 1 S.C.R. 171; *Catre Industries Ltd.* v. *Alberta* (1989), 63 D.L.R. (4th) 74 (Alta. C.A.), leave to appeal to the S.C.C. refused, [1989] S.C.C.A. No. 447, 65 D.L.R. (4th) vii; and *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

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[27] In short, even on a generous reading of the statement of claim, the breach of an express and implied warranty cause of action has no reasonable prospect of success. To the extent that a sub-class of buyers or lessees, namely consumers, can argue otherwise, that argument is best made under the rubric of the consumer protection cause of action that will be discussed shortly.

[28] ***Waiver of tort***. In the alternative to damages in tort, the plaintiff has pleaded that the class members are entitled to claim "waiver of tort" and an accounting, or some other restitutionary remedy, for the disgorgement by the defendants of the revenues generated as a result of the class members' sale or lease of the BlueTEC vehicles. I am satisfied that the waiver of tort claim is properly pleaded and is not doomed to fail.

[29] ***Canadian Environmental Protection Act.*** Pursuant to section 40 of the CEPA, the plaintiff pleads that the class members have suffered loss and damage as a result of the defendants' contravention of this federal environmental protection statute, for which the defendants are liable. Contrary to the defendants' submission, damage to property is not necessary for a sustainable claim under the private right of action set out in s. 40 of the CEPA. This cause of action is properly pleaded and is not doomed to fail.

[30] ***Part VI of the Competition Act***. The focus here is on the private cause of action for breach of section 52 of the *Competition Act* which, in essence, prohibits false and misleading representations to the public in the supply or sale of products. This cause of action is also properly pleaded and is not doomed to fail.

[31] ***Provincial consumer protection legislation.*** The rights and remedies available to consumer purchasers or lessees (as opposed to business purchasers) under provincial consumer protection legislation are significant. For example, in Ontario, any agreement entered into by a consumer after "a person" has engaged in an unfair practice can be rescinded or result in a damages claim.[16] Note that the word "person" is used rather than "contracting party." In several western provinces, consumer remedies are available even in the absence of privity of contract.[17] And in all provinces, as a minimum, a consumer cannot contract out of the implied warranties of fitness for purpose and merchantability.[18]

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[16] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 18(1) and (2).

[17] British Columbia, Saskatchewan and Manitoba.

[18] See, for example, the Ontario Act, *supra*, note 16, ss. 9(2) and (3).

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[32] The proposed class definition encompasses a range of transactional permutations involving: (i) consumers or corporations (ii) buying or leasing (iii) new or used BlueTEC vehicles (iv) in "privity" and "non-privity" provinces (iv) from at least four different types of vendors: company-owned Mercedes-Benz dealerships, independently-owned Mercedes-Benz dealerships, non-Mercedes-Benz dealerships and private sales.

[33] The availability of remedies under the pleaded consumer protection statutes will obviously depend on who bought or leased what from whom in which particular province. Sub-classes will no doubt be needed as this litigation proceeds. But at this stage, I cannot conclude that the consumer protection cause of action for eligible class members has no reasonable prospect of success.

(2) Identifiable class – section 5(1)(b)

[34] The next hurdle, section 5(1)(b) of the CPA, requires an identifiable class of two or more persons. Here the proposed class is defined as "all persons and corporations in Canada (except for Excluded Persons) who own, owned, lease or leased one of the BlueTEC vehicles (as defined in the statement of claim)." The class period stretches over 11 years from 2006 to 2016.

[35] The class appears to be objectively defined, reasonably identifiable and rationally connected to the proposed common issues. However, as I have just noted, the scope and content of available remedies - particularly for consumer purchasers or lessees - will depend on who purchased the BlueTEC vehicle for what reason (consumer or business) from what vendor in what province. At some point soon, if this action is certified, sub-classes will be needed.

[36] The class is not overly broad. The fact that not every class member will be successful does not matter. It is enough that every class member shares a common interest in having the common issues determined.[19]

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[19] *Ontario v. Mayotte*, [2010] O.J. No. 2831 (S.C.J.), at para. 66, leave to appeal ref'd [2010] O.J. No. 4299 (Div. Ct.); and see *Crisante v. DePuy Orthopaedics Inc*., 2013 ONSC 5186, at para. 37: "[t]he requirement that the class be objectively defined may sometimes result in a class that includes individuals who may ultimately not have a claim against the defendants. This is not fatal to certification …." Also see *Frohlinger v. Nortel Networks Corp*., [2007] O.J. No. 148 (S.C.J.), para. 28, where Justice Winkler (as he was then) said this: "[i]t must be remembered that the CPA is a procedural statute meant to provide a mechanism for the resolution of mass claims. As such, certification is a procedural step in the litigation and not a substantive determination. The statute must be interpreted liberally and a rigid approach to class definition based on concerns about over-inclusiveness may well defeat its purposes."

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[37] In sum, there is some basis in fact for the "identifiable class" requirement.

(3) Common issues – section 5(1)(c)

[38] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. For an issue to be a common issue, it need only be a substantial ingredient of every class member's claim and its resolution must be a necessary component to the resolution of every class member's claim. A common issue does not mean that an identical answer is necessary for all of the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the class members.

[39] Mr. Kalra and the other putative class members may not all have the exact same claims and remedies available to them, but this is not a bar to certification. Even a significant level of difference among the class members does not preclude a finding of commonality. If material differences do emerge, the court can deal with them at that time.[20] The underlying commonality question is whether allowing a proceeding to continue as a class proceeding will avoid duplication of fact-finding or legal analysis.[21]

The impact of *Pro-Sys*

[40] Three important observations were made by the Supreme Court in *Pro-Sys*[22] that are directly relevant to the analysis of the proposed common issues. The first deals with the some basis in fact test, the second with proof of loss on a class-wide basis, and the third with aggregate damages.

[41] ***The "some basis in fact" test.*** I have long believed that the "some basis in fact" test was a two-step test: that the plaintiff must show some evidence of the existence of the proposed common issue *and* some evidence that the proposed common issue has class-wide commonality.[23]

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[20] The well-developed law on common issues is summarized in Winkler, Perell et al, *The Law of Class Actions in Canada*, (2014) at 107 *et seq*.

[21] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 39; *Pro-Sys, supra*, note 5, at para. 108.

[22] *Pro-Sys, supra*, note 5.

[23] See the discussion in *Dine v. Biomet*, 2015 ONSC 7050, at paras. 15-19 and at note 9.

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[42] Here, for example, the first proposed common issue (as set out in the Appendix) is whether some or all of the BlueTEC vehicles contain a defeat device. Under the two-step approach, the plaintiff would be required to provide some evidence (probably by way of a personal affidavit) that the alleged defect or defeat device actually exists. The second step, some evidence of class-wide commonality, would typically be satisfied by expert evidence that the alleged defect or defeat device can be found class-wide in every BlueTEC vehicle.

[43] But how does the plaintiff here provide some evidence that the defeat device actually exists? Unless he is an experienced automotive engineer with access to his own personal automobile hoist and emission testing technology, the existence of an alleged defeat device buried as it is in the complexities of a modern automobile engine is probably not something about which the plaintiff could ever provide meaningful evidence. The most the plaintiff can say, as he does here, is "the vehicle failed the emissions test" (not really evidence about a defeat device that stops working below 10 degrees Celsius) and "[i]f I had been aware of the defeat device, I would not have purchased the vehicle" (again not really evidence that such a defeat device actually exists).

[44] My concern in trying to preserve the two-step approach in the context of the common issues was rooted in the need to screen out the busy-body plaintiff who was not directly affected by the class action and to make sure that every proposed class action was grounded in reality. I now realize that a class actions judge can screen out the busy-body in at least two ways: one, by using s. 5(1)(e) and making sure that the proposed representative plaintiff can "fairly and adequately represent the interests of the class" (i.e. has some measure of direct involvement); or two, by applying the well-developed law of private interest standing that requires the plaintiff to show that she is indeed "directly affected" by the action that she has commenced.[24]

[45] In other words, I have come to understand that the Supreme Court's reminder, set out below, that the "some basis in fact" test in the context of the common issues is only a one-step process is a reminder that should be taken literally:

> In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this

[24] As discussed most recently in *Campisi v. Ontario*, 2017 ONSC 2884 at paras. 7-11.

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> stage goes only to establishing whether [the common issues] are common to all the class members.[25]

[46] I am persuaded that it is time to retire the two-step approach and focus only on class-wide commonality. The plaintiff only has to show some evidence of commonality – that is some evidence that the proposed common issue applies class-wide. The plaintiff's personal evidence about the existence of the alleged defect is not needed. Busy-body plaintiffs who are not directly affected by their proposed class action can be weeded out under s. 5(1)(e) or via a firm-handed application of the law of private interest standing.

[47] I note that the Court of Appeal in a recent decision, *Hodge v. Neinstein*,[26] had no difficulty with the one-step approach, making clear that "[a]t the certification stage, the factual evidence goes only to establishing whether the questions are common to all the class members."[27] I will return to this point shortly.

[48] ***Proof of loss on a class-wide basis.*** If the plaintiff wants the court to certify a common issue that is loss-related or has a loss-related component (rather than just leaving the proof of loss to individual determination), the plaintiff must provide a plausible expert methodology that is capable of measuring the actual loss sustained by the class members on a class-wide basis. It is not necessary that the methodology establish the actual loss sustained, just that a sufficiently credible or plausible methodology is capable of doing so.[28] The expert methodology must offer a realistic prospect of establishing loss on a class-wide basis.[29]

[49] The plaintiff's obligation to provide a plausible methodology will often prompt a rebuttal from the defendant's expert. However, as the Supreme Court noted in *Pro-Sys*, "resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification."[30]

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[25] *Pro-Sys, supra*, note 5, at para. 110.

[26] *Hodge v Neinstein*, 2017 ONCA 494.

[27] *Ibid*., at para. 113, citing *Pro-Sys, supra*, note 5 at para. 110.

[28] *Pro-Sys, supra*, note 5 at para. 115.

[29] *Ibid*., at para. 118.

[30] *Ibid*., at para. 126.

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[50] ***Aggregate damages.*** *Pro-Sys* has also made clear that the aggregate damages provision in s. 24(1) of the CPA focuses on "the assessment of damages and not proof of loss."[31] That is, the focus is on the quantum and not the fact of damage.[32] Aggregate damages cannot be used to establish proof of loss where proof of loss is an essential element of proving liability.[33] That is, aggregate damages cannot be used to establish liability.[34] And if liability has not been established, aggregate damages cannot be certified as a common issue.

[51] Each of the three observations as discussed above are directly relevant to my analysis of the proposed common issues ("PCIs"). I note again that the PCIs are set out in the Appendix.

Eleven of the PCI's are certified exactly as proposed

[52] Eleven of the seventeen PCIs are certified exactly as proposed: PCI (i), (ii), (iii), (iv), (v), (vi), (vii), (xi), (xii), (xiii) and (xv).

[53] PCI (i) asks whether some or all of the BlueTEC vehicles contain a defeat device (as defined in the statement of claim). I am satisfied that there is some basis in fact for the allegation that all BlueTEC vehicles contain the same defeat device and that PCI (i) can be answered on a class-wide basis. I refer to the following:

- Daimler's statement in its Interim Report (1Q17) that in numerous jurisdictions worldwide, including the United States (where BlueTEC vehicles are certified for sale into Canada), governments are investigating BlueTEC vehicles for defeat devices:

> Several federal and state authorities, including in Europe and the United States, have inquired about and are investigating test results, the emissions control systems used in Mercedes-Benz diesel vehicles and Daimler's interaction with the relevant federal and state authorities…In light of the notices of violation that were issued by US environmental authorities to another vehicle

[31] *Ibid.*, at para. 128.

[32] *Ibid.*, at para. 132.

[33] *Ibid.*, at paras. 128 and 135.

[34] *Ibid.*, at para. 131-32: "[A]n antecedent finding of liability is required before resorting to the aggregate damages provision of the CPA. This includes where required by the cause of action ... a finding of proof of loss."

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> manufacturer in January of 2017, identifying functionalities, apparently including functionalities that are common in diesel vehicles, as undisclosed Auxiliary Emission Control Devices (AECDs) and potentially impermissible…it cannot be ruled out that the authorities might reach the conclusion that Mercedes-Benz diesel vehicles have similar functionalities.

- The evidence of Mr. Sherrard, the defendants' fact witness, that at one point the defendants stopped selling the BlueTEC model year 2017 in the U.S and Canada.

- The evidence of Dr. Jacobs, the defendants' expert that "very low ambient air temperature is one of the conditions under which a vehicle may need to reduce the operation of the emission system to protect it from damage".

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[54] I therefore conclude that there is some basis in fact that PCI (i) can be answered on a class-wide basis.

[55] I reach the same conclusion with PCIs (ii), (iii), (iv), (v), (vi), (vii), (xi), (xii), (xiii) and (xv). In each case – whether the question relates to the making of the Representations, what was said by the defendants to the Canadian government about the emission standards, the contravention of the CEPA and the federal *Competition Act*, the level of knowledge or recklessness on the part of the defendants, the applicability of the provincial consumer protection statutes and the remedies available thereunder, or the remedies available to class members who financed or leased their vehicles – it is evident from the form of the question or the fact that the PCI focuses on the conduct of the defendants that the question can indeed be answered in common on a class-wide basis.

[56] As already noted, sub-classes will be needed to differentiate amongst the various transactional permutations – who bought or leased what from whom in which province – but the class-wide commonality of these eleven PCIs cannot be disputed. Each of them is certified as a common issue.

Three of the PCIs need to be revised

[57] PCIs (viii), (xiv) and (xvii) will be certified if they are revised as follows.

[58] PCI (viii) begins by asking whether the Representations were negligently made and then goes on to ask "more specifically" about duty, breach and inferred reliance. I assume that class counsel wants the focus of this common issue to be the duty, breach and inferred reliance sub-parts and not the over-arching negligent misrepresentation question. The over-arching negligent misrepresentation question would require proof of loss and as a common issue, proof of loss on a class-wide basis. However, as already noted, this would require the plaintiff to present the *Pro-Sys* type of "actual loss"

methodology discussed above. No such methodology has been presented. PCI (viii) must therefore be revised as shown in the Appendix to make clear that the question is limited only to the three sub-questions, duty, breach and inferred reliance.

[59] The duty and breach sub-questions can obviously be answered on a class-wide basis. So can the inferred reliance sub-question. It cannot be disputed that every BlueTEC purchaser reasonably expected, at a minimum, that the vehicle complied with federal emission standards and could lawfully be driven on Canadian roads regardless of the air temperature. There is therefore some basis in fact for inferring reliance on a class-wide basis even without having evidence that the very same representation in the Express Warranty was seen and read by every class member.

[60] PCI (viii) if revised as suggested above can be certified as a common issue.

[61] PCI (xiv) begins by asking about unjust enrichment but then goes on to ask whether the defendants are constructive trustees and about the amount that is being held by the defendants in the constructive trust. The first part of PCI (xiv) asking about unjust enrichment focuses on the defendants conduct and can be answered on a class-wide basis. The second part of this PCI that asks about the constructive trust must be deleted as shown in the Appendix. As the Supreme Court noted in *Pro-Sys,* where the plaintiff makes a purely monetary claim (as here) and cannot show any "link or causal connection between his contribution and the acquisition of specific property" then the constructive trust claim must be struck.[35]

[62] PCI (xvii) asks about waiver of tort. Here again, the first part of the question can be answered on a class-wide basis. However, the balance of the question asking about the "amount" of the loss and the imposition of a constructive trust must be deleted as shown in the Appendix. The plaintiff has not presented a *Pro-Sys* methodology to support the class-wide "amount of loss" question and there is no basis for the "constructive trust" question for the reasons just stated.

Three of the PCIs are not certified

[63] PCIs (ix), (x) and (xvi) are not certified.

[64] PCI (ix) is the negligence question that also asks "more specifically" about duty and standard of care. The negligence question suffers from the same deficiency as the

[35] *Pro-Sys, supra,* note 5, at paras. 91-92.

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negligent misrepresentation question in PCI (viii). Proof of loss is an essential element of the negligence claim. And the plaintiff has presented no methodology for measuring actual loss on a class-wide basis.[36]

[65] But there is a more pressing problem. When I dealt with the negligence claim as a cause of action under s. 5(1)(a), I found that it still had a (slight) pulse and should not be struck. But here, where the negligence claim is presented as a proposed common issue, I must pay greater heed to the fact that the plaintiff is claiming for economic loss only and not for any health-related injury and to the fact that today the overwhelming body of law would not impose a tort duty of care on the defendants for manufacturing and marketing a vehicle that on the facts as pleaded is a safe but shoddy product.[37] In my view, it is beyond dispute - given that the claim herein is for economic loss only - that under the applicable law the answer to the duty of care question must be "no". Because this answer is self-evident and will not advance the litigation, PCI (ix) should not be certified.

[66] PCI (x) asks about express or implied conditions or warranties. Recall that under the s. 5(1)(a) analysis I found that this cause of action had no reasonable prospect of success and was doomed to fail. Absent a viable cause of action, it must follow that the proposed common issue be struck as well. However, the plaintiff should find comfort in the fact that this warranty claim only has viability in the consumer context and the PCIs dealing with the availability of consumer protection remedies, namely PCIs (xi), (xii) and (xiii), have all been certified.

[67] PCI (xvi) asks about aggregate damages. An aggregate damages common issue can be certified under s. 24(1) of the CPA only if liability has been established and there is some evidence that all or part of the defendant's monetary liability can reasonably be determined without proof by individual class members. Recall again the admonition of the Supreme Court in *Pro-Sys* that liability, including proof of loss if that is an essential element of proving liability, must first be established before aggregate damages can be considered. If liability has not been established, then the aggregate damages common issue cannot be certified.

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[36] The aggregate damages methodologies presented by the plaintiff and discussed below use an "average loss" approach and do not address "actual loss". In any event, aggregated damages cannot be used to establish the fact of loss, only the quantum of loss: see the discussion below.

[37] Recall the discussion above at paras. 18 to 20.

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[68] The plaintiff presents an expert methodology to show how aggregate damages can reasonably be determined by using comparator vehicles to measure average loss and average resale value on a class-wide basis.

[69] The difficulty is this. The primary claim, as I have already noted, is for negligent misrepresentation. Proof of loss is an element of this tort and is needed to establish liability. The negligent misrepresentation issue, PCI (viii), asks only about duty of care, breach and inferred reliance. Proof of loss has been left, perhaps wisely, to individual determinations. Thus, PCI (viii), even when answered in its entirety, will still not establish liability. This being so, as both s. 24(1) of the CPA and *Pro-Sys* make clear, aggregate damages cannot be certified – at least not with regard to the negligent misrepresentation claim.

[70] There is no indication by the plaintiff that his aggregate damages methodology is intended to apply to the other PCIs, some of which also require proof of loss to establish liability such as the CEPA issue and the *Competition Act* issue.[38]

[71] Because aggregate damages cannot be certified for the negligent misrepresentation, CEPA and *Competition Act* issues, and the plaintiff has not explained how aggregate damages can apply to the consumer protection or unjust enrichment issues, I believe it makes sense to leave the aggregate damages issue to the trial or summary judgment motion judge. At the hearing on the merits, the presiding judge can easily add the aggregate damages if this is deemed appropriate. As the Supreme Court noted in *Pro-Sys*, "[t]he failure to propose or certify aggregate damages ... as a common issue does not preclude a trial judge from invoking the provision if considered appropriate once liability is found."[39]

[72] Given my decision not to certify the aggregate damages issue, I do not need to address the extensive dispute between the parties about whether the plaintiff's expert's "average loss" or "resale value" approach to aggregate damages is workable in a product purchase context where the individual's loss will depend on the interplay of a wide range of idiosyncratic factors.

[73] This concludes my analysis of the PCIs. As the Court of Appeal noted in *Cloud*,[40] I am obliged to consider the importance of the common issues in relation to the claim as a

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[38] *Pro-Sys*, *supra*, note 5, at para. 131.

[39] *Ibid*., at para. 134.

[40] *Cloud v. Canada (Attorney General)* [2004] O.J. No. 4924 (C.A.).

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whole. The critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.[41]

[74] I am satisfied that the fourteen common issues as affirmed or revised will significantly advance the litigation. At the completion of the common issues trial or summary judgment motion, the parties will have answers to questions relating to statutory breaches, the availability of consumer protection remedies, and several key elements of the common law claims for negligent misrepresentation, unjust enrichment and waiver of tort. If the answers favour the plaintiff, the efficient class-wide determination of the common issues will certainly assist in the adjudication of the individualized damage assessments.

(4) Preferable procedure – section 5(1)(d)

[75] Section 5(1)(d) of the CPA requires the plaintiff to provide some basis in fact that a class proceeding is the "preferable procedure for the resolution of the common issues". The plaintiff must provide some evidence that: (1) a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims. The preferability analysis must be conducted through the lens of the three principal goals of class actions, namely judicial economy, behavior modification, and access to justice.[42]

[76] I agree with the plaintiff that there is no other preferable manner in which the claims of the class members can be resolved. The only alternative to a class action would be tens of thousands of duplicative individual actions. Litigating the common issues relating to the duties owed, the scientific evidence about the impugned vehicles, and the defendant's knowledge and conduct would be prohibitively expensive for the vast majority of the putative class members.

[77] I also agree with the plaintiff that the certification of a class proceeding in this case would further the goals of access to justice, judicial economy and behaviour modification. The preferability requirement is satisfied.

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[41] *Ibid*., at para. 74.

[42] *Hodge, supra*, note 26, at para. 148; *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 27.

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(5) Suitable representative plaintiff – section 5(1)(e)

[78] The final requirement for certification is a representative plaintiff who would adequately and fairly represent the interests of the class, and who does not have a conflict of interest with respect to the common issues.

[79] Yogesh Kalra, the proposed representative plaintiff, owned one of the BlueTEC vehicles and has sworn to vigorously prosecute the action in favour of the class. He has no conflicts of interest with any of the other class members and has produced a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class. Some changes will have to be made as sub-classes are added but at this stage the litigation plan is adequate.

[80] The defendants' suggestion that Mr. Kalra is in a conflict of interest because he does not share the exact same claims and potential for recovery as many of the other class members ignores the case law on point. Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert causes of action against a defendant on behalf of other class members that are not being asserted by him personally, provided that the causes of action all share a common issue of law or of fact. A proposed representative plaintiff need not be "typical" of the class, but must be "adequate" in the sense that he or she shares a common interest with the other class members and would "vigorously prosecute" the claim.[43]

[81] In sum, the s. 5(1)(e) requirement is satisfied.

The defendants' motion to strike

[82] The defendants brought a preliminary motion to strike four categories of material filed by the plaintiff: (1) the portion of Mr. Stockton's expert report proposing new aggregate damages methodologies; (2) the two expert reports filed by Dr. Checkel; (3) various newspaper articles and European studies appended to Mr. Rosenfeld's affidavit; and (4) two exhibits entered at the cross-examination of Dr. Jacobs consisting of two additional European studies conducted in 2016.

[83] Given my approach and analysis herein, I did not have to consider any of this material. The motion to strike is moot and need not be decided.

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[43] *Campbell v. Flexwatt Corp*., [1997] B.C.J. No. 2477 (B.C.C.A.) at paras. 75-76. And see generally Winkler, Perell et al, *supra*, note 20, at 107-14.

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Disposition

[84] The motion for certification is granted. Fourteen of the seventeen proposed common issues, as affirmed or revised, can be certified. Three of the proposed common issues, PCIs (ix), (x) and (xvi) cannot be certified.

[85] Counsel shall prepare a draft Order in the form contemplated by s. 8 of the CPA.

[86] If the parties are unable to agree on the costs, I would be pleased to receive brief written submissions from the plaintiff within 14 days and from the defendants within 14 days thereafter. I caution both sides that this may well be a case for no costs given the extent to which success (as measured by overall results and related work effort) was divided.

[87] My thanks to counsel for their assistance.

Justice Edward P. Belobaba

Date: June 29, 2017

Appendix attached.

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APPENDIX: PROPOSED COMMON ISSUES

[As explained in the Reasons above, eleven of the seventeen PCI's are certified exactly as proposed: PCIs (i), (ii), (iii), (iv), (v), (vi), (vii), (xi), (xii), (xiii) and (xv). Three of the PCIs require some revision: PCIs (viii), (xiv) and (xvii) [the deleted portion is in *italics*; the revised portion is underlined]. Three of the PCIs are not certified: PCIs (ix), (x) and (xvi).]

(i) Do some or all of the Vehicles (as defined in the Statement of Claim) contain a Defeat Device (as defined in the Statement of Claim)?

(ii) Did the Defendants make some or all of the Representations (as defined in the Statement of Claim)? If so, which Representations, when and how?

(iii) Did the Defendants misrepresent to the Canadian government that the Vehicles met Emissions Standards (as defined in the Statement of Claim)?

(iv) Was the importation of the Vehicles into Canada unlawful and in contravention of the Canadian Environmental Protection Act, 1999, S.C. 1999, c 33?

(v) Did the Defendants contravene Part VI of the Competition Act, R.S.C. 1985, c. C-34?

(vi) Did the Defendants know that the Representations were false when they were made to the Plaintiff and other Class Members?

(vii) Were the Defendants reckless as to whether the Representations were false when they were made to the Plaintiff and other Class members?

(viii) *Were the Representations negligently made by the Defendants to the Plaintiff and other Class Members*? When making the Representations to the Plaintiff and other Class Members *More specifically:*

(1) Did the Defendants owe a duty of care to the Plaintiff and other Class Members?

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(2) If so, did the Defendants breach their duty? How?

(3) In the circumstances of this case, can the reliance of the Plaintiff and other Class Members on the Representations be inferred?

(ix) *Were the Defendants negligent in the engineering, design, development, testing and manufacture of the diesel engines and emissions systems in the Vehicles? More specifically:*

(1) Did the Defendants owe a duty of care to the Plaintiff and other Class Members?

(2) What is the standard of care applicable to the Defendants?

(3) Did the Defendants breach the applicable standard of care? How?

(x) *Did the defendants breach any express or implied conditions or warranties of fitness, merchantability and quality of the Vehicles?*

(xi) Does the Consumer Protection Act 2002, S.O. 2002, c. 30 or the Equivalent Consumer Protection Statutes (as defined in the Statement of Claim) (collectively the "CP Legislation") apply to the Defendants? If so, which Defendants?

(xii) Does the CP Legislation apply to the claims of the Plaintiff and all other Class members?

(xiii) Did the Defendants, or any of them, make any false, misleading or deceptive representations within the meaning of the CP Legislation? If so:

(1) Were any such representations unfair practices?

(2) Are the Class Members, or any of them, entitled to damages?

(xiv) If one or more of the above common issues are answered affirmatively, has the conduct of the Defendants resulted in an unjust enrichment to the Defendants? *If so, are the Defendants constructive trustees holding ill-gotten gains for the benefit of the Plaintiff and Class Members? What amount is held by the Defendants in the constructive trust?*

(xv) If one or more of the common issues are answered affirmatively, can and/or should a remedy be granted with respect to the financing, lease or other agreements related to the Vehicles?

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(xvi) *If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the Defendants be determined on an aggregate basis? If so, in what amount and who should pay such damages to the Class?*

(xvii) By virtue of waiver of tort, are the Defendants:

(1) Liable to account to any of the Plaintiff and Class Members on a restitutionary basis, for any part of the proceeds of the sale of the Vehicles? *If so, in what amount and for whose benefit is such an accounting to be made?*

(2) Alternatively, should a constructive trust be imposed on any part of the proceeds of the sale of the Vehicles for the benefit of the Plaintiff and Class members, and, if so, in what amount, and for whom are such proceeds held?

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Tab 8

Ontario Superior Court of Justice
Levy-Russell Ltd. v. Shieldings Inc.
Date: 2004-10-22
Docket: 97-BK-000004

Chris G. Palaire, John K. Phillips for Plaintiffs

Pete F.C. Howard, Christopher J. Cosgriffe, Timothy M. Banks for Defendants, The Bank of Nova Scotia, Coopers & Lybrand Limited, Stanley Dennis Norman Belcher

Cumming J.:

Background

[1] The plaintiffs, Levy-Russell Limited ("LRL") and Levy Industries Limited ("LIL") (collectively referred to as "Levy") commenced action no. 29272/88 June 10, 1988 in this Court against, *inter alia,* Shieldings Incorporated ("Shieldings"). Shieldings had purchased the assets of a corporation, Tecmotiv Inc. ("Tecmotiv"), owned by Levy.

[2] That action (which can be called the "Tecmotiv action"), alleging a civil conspiracy, resulted in a 71 day trial which concluded April 29, 1993. Reasons for Decision of Mr. Justice G. Dennis Lane, comprising 405 pages, were released April 5, 1994. See *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161 (Ont. Gen. Div.). Judgment in the amount of $5,261,000.00 plus costs was given in favour of Levy against the defendants Tecmotiv Inc., Kenneth Foreht, Ronald Bradshaw, Morton Krestell, Terrence Godsall ("Godsall") and Shieldings. The formal judgment was signed May 30, 1994 and entered June 21, 1994.

[3] The appeal period for Levy's judgment expired. The judgment remains unpaid in its entirety and, with interest, now amounts to more than $12,400,000.00. Therefore, Levy has been a judgment creditor of Shieldings since 1994.

[4] Levy can be referred to as having had the status of a 'contingent judgment creditor' of Shieldings from the inception of the litigation it commenced in 1988 against Shieldings until Levy obtained judgment in 1994. Levy then became an actual judgment creditor of Shieldings.

[5] Mr. Justice Lane held that three of Levy's own directors, Messrs. Foreht, Bradshaw and Krestall, conspired with Mr. Godsall, an officer of Shieldings, to breach their fiduciary duties to Levy and to arrange matters so that, in concert with Shieldings, the Levy business could be purchased from the receiver of Levy at less than fair value.

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(Parenthetically, it is noted that evidence in the case at hand indicates Shieldings ultimately lost an estimated $10.95 million on the Tecmotiv acquisition.)

[6] Levy's business has been inactive since at least 1992. There is common ground that Levy has no assets of any value other than the alleged claim brought in the action at hand.

2004 CanLII 66297 (ON SC)

Introduction to the Action at hand

[7] Levy's 58 page claim in the action at hand, Amended Fresh As Amended Statement of Claim, Court file no. 97-BK-000004 ref. B299/94 includes as defendants, Shieldings, The Bank of Nova Scotia ("BNS" or "the Bank"), Coopers & Lybrand Limited ("Coopers") and Stanley Dennis Norman Belcher ("Belcher"), a director of Shieldings and a Vice President of BNS. The action is now pursued against only the above-named four of the original 17 defendants. Extensive allegations are made.

[8] Shieldings made no appearance in this action and was noted in default. There is common ground between the parties that if Levy is successful against BNS and/or Mr. Belcher that judgment is also to be entered against Shieldings. The Receiver of Shieldings, Coopers, has been added as a party because of consequential relief that would follow if Levy is successful against the other parties.

[9] The action at hand is an oppression action brought under ss. 245 and 248 of the Ontario *Business Corporations Act,* R.S.O. 1990, c. B.16 *("OBCA").* In brief, Levy brings this action as a complainant alleging that the business and affairs of Shieldings were carried on in a manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of Levy. The claim alleges that the evidence supports the inference that BNS had *de facto* control of Shieldings such that the Bank caused Shieldings to embark upon a course of action whereby BNS gained a preferential and unfair position over Levy as an unsecured creditor.

[10] BNS has worn two hats in its relationship with Shieldings: BNS has been a major (but not controlling) shareholder and BNS has been the major lender to Shieldings.

The Issues

[11] This case raises a contest between the asserted rights of a *contingent* unsecured judgment creditor (Levy) vis-à-vis Shieldings and the rights of another, pre-existing creditor of Shieldings, being BNS. Levy seeks to utilize the oppression remedy against the pre-

existing creditor Bank because Levy, the *contingent* judgment creditor, successfully obtained a final judgment but has been unable to realize upon that judgment. There are only two major creditors of Shieldings, being BNS and Levy.

[12] Levy claims that BNS and Shieldings purportedly converted unsecured debt to secured debt to the advantage of BNS and to the corresponding disadvantage of Levy. Levy says that at worst it ranks *pari passu* with BNS as unsecured creditors. Indeed, Levy submits that given the Bank's oppression the BNS claim against Shieldings should be subordinated to the unsecured claim of Levy. The main allegation of the claim is that about September 13, 1993 BNS achieved its asserted favourable position through a $35.5 million bridge loan which was repaid within four days. At that time, BNS required Shieldings to provide security in respect of other, existing unsecured loans.

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History of Shieldings

[13] In 1986 Mr. Beverly G. "Bud" Willis, then a Vice President of investment dealer Richardson Greenshields, left that company, together with Mr. Godsall, to acquire and operate Shieldings, as a venture capital corporation.

[14] By about mid-1986 Shieldings had raised some $15 million in equity capital from six institutional investors, including $5 million from BNS.

[15] Shieldings would proceed over time to provide venture capital by way of debt and equity financing to some 30 start-up companies in various geographic and industrial segments. Shieldings invested in companies considered by management to represent under-valued situations in view of their asset base or earnings potential. Shieldings sought to provide long-term planning, financial and management assistance to the companies so as to add value to the businesses.

[16] BNS was the banker for Shieldings, being a substantial lender. At the same time, BNS was also a substantial equity investor. BNS has been both a creditor and shareholder of Shieldings at all relevant times.

[17] BNS (with 9.1% of the voting shares and 31.7% of the equity), along with six institutional investors, being Dofasco Employees Savings Fund, Canada Life Assurance Co., CP Pension Plan, Ontario Hydro Pension Plan, Claridge (Pentrust Holdings) and Ontario Hydro Pension Fund (together with individuals comprising management) were the shareholders of Shieldings upon its organization in 1986. A seventh institutional investor, Dofasco Profit Sharing Fund, would later become a shareholder. By September, 1993

BNS had invested some $22.1 million, or 38.1% of the total of $58.8 million comprising the then five classes of shares.

[18] Management at the inception of Shieldings included Mr. Bud Willis as the 'driving force,' who was President, and Mr. Godsall as Vice-president.

[19] There were initially six, and later seven, directors of Shieldings. Each of the institutional investors (except for Dofasco), together with management, nominated a director. Mr. Belcher, Senior Vice President of BNS, was appointed as the single BNS nominee to the Shieldings' board of directors. Although a quorum required the Bank's nominee and management's nominee to be present, the Bank had only one vote.

[20] A resolution of five members of the Board (less any members declaring a conflict of intent) was required for certain actions, including the encumbering of an asset by Shieldings, except in respect of providing funds for its acquisition.

[21] After the death of Mr. Willis in 1991, Messrs. Gil Bennett, David R. G. Tanner and Michael Trites became part of the management of Shieldings. Mr. Bennett became Chairman and Chief Executive Officer and Mr. Godsall became President.

Shieldings' Venture Capital Investments

[22] Three major venture capital investments of Shieldings included an interest in each of Comcor Waste Systems Ltd. ("Comcor"), Versatile Pacific Shipyards Inc. ("Versatile") and Brenda Bay Timber Company Limited ("Brenda Bay").

Comcor Waste Systems Ltd. ("Comcor")

[23] Comcor, through a subsidiary, Comcor Waste Systems Ltd., purchased a substantial interest in a corporation, Reclamation Systems Inc., which owned a one-third interest in a quarry acquired in March, 1987, in Acton, Ontario. Comcor sought to convert this quarry into a landfill site. The objective was to provide a very significant destination for treated garbage from the Toronto area.

[24] The Comcor venture required a licence from government regulatory authorities after an extensive environmental review process. The operating capital required by Shieldings for this intended development was obtained in March, 1990, through some $19.5 million in Comcor convertible debentures acquired by the institutional investors of Shieldings, including BNS who advanced $7,200,000.00. Shieldings provided an unsecured guarantee to the debenture holders in respect of Comcor's indebtedness to them.

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[25] Thus, BNS came to have four separate interests in respect of Shieldings; it was a secured creditor of Shieldings as a direct lender; it was an unsecured creditor as a direct lender to Shieldings; it was an unsecured creditor of Shieldings as a lender to Comcor because of the unsecured guarantee provided in respect of the Comcor debentures; and it was an equity investor as a minority shareholder of Shieldings.

[26] On June 23, 1994 a private members' bill moved by the member for the electoral riding where the Comcor quarry was located was enacted in the Legislature, becoming the *Environmental Protection Amendment Act (Niagara Escarpment), 1994,* S.O. 1994, c. 5 (*"Comcor Act"*). This legislation was specifically targeted at the Comcor project. It effectively prevented the quarry being converted to a garbage disposal landfill site as intended. The Comcor project was then at an end. The Comcor investment was rendered valueless to Shieldings.

[27] The business plan of Shieldings Incorporated was not achieved. With the passage of the *Comcor Act,* there was no prospect of a return to shareholders. The liabilities of Shieldings exceeded management's estimation of the value of its assets.

[28] Shieldings' management may have been naïve in assessing the risk of political intervention in respect of the Comcor venture. However, Shieldings' management understood that the Government of then Premier Bob Rae would allow the environmental review process to proceed to completion and the merits of the project determined by the pertinent regulatory agencies. Shieldings was unsuccessful in litigation against the provincial Government. See *Reclamation Systems Inc. v. Ontario* (1996), 27 O.R. (3d) 419 (Ont. Gen. Div.). If the project had received the regulatory approvals and proceeded forward to fruition, Shieldings would have had a major financial success.

[29] There is no credible basis to suggest that Shieldings was approaching insolvency until the point in time of the passage of the legislation relating to Comcor. See generally *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (Ont. S.C.J. [Commercial List]), at 667. As a memo dated February 1, 1993 of Mr. Belcher to a Bank officer stated, Shieldings' shareholders (including the Bank) were prepared to continue funding Shielding's operating expenses, including the interest on its secured debt, being confident at the time of Shieldings' ability to realize a significant profit upon its Comcor investment.

[30] As stated above, the Levy judgment in the Tecmotiv action against Shieldings was delivered by Lane J. April 5, 1994. Shieldings attempted to negotiate a settlement of the judgment but was unsuccessful. Given the collapse of the Comcor venture in late June,

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1994, Shieldings became insolvent. BNS appointed Coopers as Receiver of Shieldings September 13, 1994. The assets of Shieldings were subsequently realized, the asset dispositions being approved by several Court Orders. Levy challenged some of the asset sales as being improvident, without success.

[31] The loss of BNS as a *lender* to Shieldings is at a minimum $22.5 million and may ultimately be as much as $48 million (depending upon the ultimate realization of distress preferred shares the Bank received in respect of a disposition of the so-called "North Vancouver Lands" of Shieldings, discussed below). BNS has also lost its entire equity contribution of more than $26 million.

[32] At the time of Shielding's insolvency, being June 23, 1994, with the demise of the Comcor project, Levy was a *contingent* unsecured creditor of Shieldings (given that the judgment in the Tecmotiv action was entered only June 21, 1994 and the right to appeal to appeal the decision of Lane J. was then alive) and later became an unsecured judgment creditor.

Versatile Pacific Shipyards Inc. ("Versatile")

[33] Until 1989, Shieldings had entered into a number of relatively small investments with no investment in excess of about $7 million. Management of Shieldings then identified what it considered to be a major opportunity, the acquisition of Versatile Pacific Shipyards in British Columbia. This transaction in June, 1989 resulted in a subsidiary of Shieldings, 379186 B.C. Limited ("#379"), purchasing the shares of Versatile Pacific Shipyards Inc. ("Versatile") (later known as "Yarrows Limited"), which engaged in shipyard operations on Vancouver Island at Esquimault with ship-building and ship-repairing, and purchasing through a second subsidiary, 366466 B.C. Ltd. ("#366"), a property consisting of 18.6 acres, referred to as the "North Vancouver lands."

[34] To fund Shieldings' acquisition of Versatile, BNS had made a loan of some $32 million. This intended short-term loan was to be repaid within four months, that is, by October 29, 1989. Management had advised the board of Shieldings at the time of the acquisition that there was a commitment by a third party to purchase the Esquimault property for $9 million and by a second third party to purchase 75% of the North Vancouver lands for some $24 million.

[35] The Versatile transaction included a loan to #366 to enable it to purchase the North Vancouver lands as part of the overall acquisition of Versatile. The #366 loan was secured

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by the land owned by #366, by a demand debenture of #366 and unlimited guarantees provided by #379, and by Shieldings itself. The unlimited guarantee of Shieldings in respect of its subsidiaries indebtedness, (supported by the hypothecation of various shares and notes of investee companies), initially unsecured in 1989, later became secured by a continuing $85 million demand debenture dated September 10, 1993 in connection with the Brenda Bay transaction, discussed below. There was no cross-collateralization of security until the 1993 demand debenture.

[36] As part of the consideration for the loan from BNS, Shieldings also provided an undertaking, *inter alia,* that it would not dispose of any assets in excess of $250,000.00 unless the entire proceeds of any such sale were paid to BNS to reduce its loan in support of the Versatile acquisition.

[37] Shieldings' management was never successful in realizing a sale in respect of either the North Vancouver lands or the Esquimault property. No sale of these assets was realized before the Receivership of Shieldings created in September, 1994.

[38] The objective of Shieldings' management to sell and realize a profit on the Versatile acquisition failed. The shipbuilding corporation ultimately filed under the *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C-36 in March, 1991 and emerged in a new company known as Yarrows Limited ("Yarrows"). The Versatile acquisition loan of $32 million from BNS resulted in substantial ongoing interest obligations and carrying costs for Shieldings.

[39] The Versatile investment in June, 1989, was the last major new acquisition by Shieldings. Thereafter, management focused upon seeking to realize upon the existing assets in its portfolio. However, asset sales were difficult given the economic recession of the early 1990s. As Shieldings needed more money, a $22 million equity infusion was made in December, 1990 with BNS contributing $8.5 million of this amount. With the death of Mr. Willis, the driving force of Shieldings, in December, 1991, the problems of Shieldings were compounded.

[40] Mr. Gil Bennett became CEO and Mr. Michael Trites became Vice-President Finance. A 30 month business plan was presented to the board of directors at its meeting February 27, 1992. In the meanwhile, further funds were required to protect and maintain Shieldings' operations. By the end of 1993 a further $14.3 million in equity was contributed by the shareholders.

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Brenda Bay Timber Company Limited ("Brenda Bay")

[41] Brenda Bay was owned 50% by a subsidiary of Shieldings, being Shieldings Forest Products Inc. ("SFPI"), and 50% by a subsidiary (Eacom Timber Sales Ltd.) of Doman Industries Inc. ("Doman"), subject to a unanimous shareholders agreement dated May 12, 1988, with a buy-sell 'shotgun' provision. The main asset of Brenda Bay was a 13,000 hectares tree farm with a secondary asset being development lands, called the "Lake Cowichan lands."

[42] In 1993 Shieldings wanted to sell off the tree farm of Brenda Bay. Shieldings' management hoped that the net proceeds from a sale of the tree farm would be more than $15 million and would be utilized to pay off the then existing revolving credit line ("RTC") extended by BNS and leave a residual of some $2.5 million as operating capital. The Lake Cowichan lands would remain as an asset, directly or indirectly owned by Shieldings.

[43] Shieldings' board of directors met August 3, 1993. Shieldings' management hoped that its partner, Doman, in Brenda Bay would elect to buy if Shieldings triggered the buy-sell shotgun through an offer to sell to Doman.

[44] The board determined at its meeting August 3, 1993 to trigger the buy-sell clause with a strike price of $56 million for Brenda Bay. While the expectation had been that Doman would elect to purchase Shieldings' interest, Shieldings had a 'backstop agreement' whereby John Hancock Mutual Life Insurance Co. ("John Hancock") would purchase the entirety of the tree farm of Brenda Bay from Shieldings in the event that Shieldings was required to purchase the interest of Doman.

[45] Mr. Tanner had prepared a memo which mentioned that bridge financing might be required in the event that Doman elected to sell its interest in Brenda Bay rather than purchase Shieldings' interest. Bridge financing would be necessary for a four day period between a purchase by Shieldings of Doman's 50% interest and the closing of the follow-on purchase by John Hancock (through the back-stop agreement) from Shieldings of what would then be its 100% interest in the tree farm of Brenda Bay.

[46] Shieldings exercised its rights under the buy-sell provision by putting Doman to its election. Shieldings hoped and anticipated Doman would elect to buy Shieldings' 50% interest in Brenda Bay held through SFPI. However, Doman elected to sell its 50% interest in Brenda Bay. Accordingly, utilization of the bridge financing by BNS was necessary.

The Bridge Financing Extended by BNS

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[47] In January, 1991, Shieldings' debt to BNS in respect of an unsecured operating line of credit ("UOC") was about $16 million. Unsecured debt of BNS would, of course, rank *pari passu* with other unsecured creditors in the event of the bankruptcy of Shieldings.

[48] In December, 1990 the Shieldings' shareholders had subscribed for their *pro rata* shares of a $22 million rights offering. The proceeds were used to pay down the UOC's outstanding balance of some $16 million. The UOC was reduced to zero at that time. As well, some of the proceeds, together with the sale proceeds of Air Nova, another Shieldings' investment, were used to pay interest arrears and some principal on the Versatile loan.

[49] Shieldings executed on March 13, 1991, a "Secured Revolving Term Credit Agreement" ("RTC") dated January 31, 1991. The plaintiffs submit the RTC agreement was not properly authorized by Shieldings, the purported security was ineffective, and that unsecured advances were made on the RTC to September 1993 and the time of the Brenda Bay transaction.

[50] The evidence does not support the plaintiffs' position in respect of the RTC. The RTC and security agreement were signed by Messrs. Willis and Godsall on behalf of Shieldings. The directors of Shieldings were well aware of the RTC and the advances made to Shieldings thereunder.

[51] A request by a customer-borrower for any credit facility from the BNS, depending upon the borrower, the amount and the terms, could proceed through as many as four levels of scrutiny by the Bank after a recommendation by the branch dealing with the customer. The approval process could extend through Corporate Banking East to Corporate Credit East, to the Senior Credit Committee and perhaps to the Loan Policy Committee. Mr. Belcher was a member of the Loan Policy Committee from 1991 through September, 1994.

[52] Messrs. Tanner and Trites had first met with the BNS branch handling the Shieldings' account on July 29, 2003 to consider the bridge financing which might be necessary in respect of the intended and anticipated disposition of Brenda Bay should Doman elect to sell upon the buy-sell provision being triggered.

[53] BNS was informed August 11, 1993 of this request for approval of bridge financing in the event it should become necessary. Messrs. Tanner and Trites understood from the branch contacts that the Bank was favourable and inferred that the only security

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contemplated was in respect of the asset (the tree farm) being sold with the security expiring upon repayment to the Bank of the bridge loan. BNS ultimately provided the bridge financing, but subject to certain significant conditions, discussed below.

[54] At that time the Shieldings' revolving line of credit, or RTC, with BNS was at its limit with $15,700,000.00 owing and payment past due. Messrs. Tanner and Trites requested that the expiry of this credit facility be extended by BNS to September 30, 1993.

[55] On August 11, 1993, Corporate Banking East advised Corporate Credit East that the bridge loan was approved should it become necessary, provided the sale proceeds from the John Hancock transaction, after repayment of the bridge loan, would be used to effect a "permanent reduction in Facility #1" [i.e. the revolving line of credit or RTC, with the amount then outstanding of about $15,700,000.00]. Corporate Credit East determined that this credit line would be reduced to only $3 million in on-going availability to Shieldings.

[56] If there were still net proceeds from the Brenda Bay sale after this reduction to Facility #1 then such balance would be used to pay down Facility #3, being the $32 million loan in respect of the 1989 Versatile transaction. As of August 6, 1993 there was still some $29,941,000.00 outstanding in respect of this borrowing. (Facility #2 was a non-revolving loan of some $1,950.00 involving an investee company of Shieldings, Yukon Pacific Forest Productions Limited. This loan remained unsecured at the Shieldings level). Mr. Bennett later outlined these conditions in a September 15, 1993 memo to Shieldings' directors.

[57] However, it is to be noted that the net proceeds available to Shieldings in the event that Doman elected to sell (as Doman did) would be only about $15.1 million (as the Royal Bank was a secured creditor as a direct lender to Brenda Bay for a substantial amount in respect of the Brenda Bay tree farm).

[58] Shieldings learned August 27, 1993 that Doman had elected to be a seller of its Brenda Bay interest. The closing for the transaction was projected for September 10, 1993. BNS was advised August 30, 1993 of the necessity of finalizing the bridge loan. To that point, there was no term sheet or draft documentation exchanged between Shieldings and BNS in respect of the bridge loan.

[59] Messrs. Trites and Tanner met with BNS branch officials September 7, 1993. The closing in respect of the Brenda Bay transaction was three days off. Shieldings provided a new cash flow forecast and, for the first time, proposed that not all of the proceeds be paid

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to reduce bank debt. Specifically, the Bank was asked to not apply proceeds to reduce the 1989 Versatile loan.

[60] Put simply, BNS chose not to agree to this request. BNS was entirely free to make this decision and it was understandable, given the history of events to date and the repeated failed promises of Shieldings' management. The existing RTC facility was at its limit and past due. The continuing undertaking by Shieldings at the time of the Versatile acquisition in June, 1989 was that the proceeds of any asset sales in excess of $250,000.00 would be used to reduce the $32 million loan in support of the Versatile acquisition. As well, the contemplated structuring of the Brenda Bay transaction suggested that for tax reasons there might be a shift of assets with a wind-up of the Shieldings' subsidiary, SFPI, with its indirectly held Lake Cowichan lands moving up to Shieldings. Thus, there was an additional reason for the Bank to want to track the assets and obtain real security in respect of those assets from Shieldings itself to avoid any possible prejudice.

[61] A letter agreement was signed September 9, 1993 between the Bank and Mr. Godsall on behalf of Shieldings as to the terms of the bridge loan. The directors of Shieldings have never disputed this letter agreement. Mr. Bennett approved and signed the minutes of the August 3, 1993 board authorization in respect of the Brenda Bay transaction which included the recognition of the need for bridge financing, after reading the memo of Mr. Trites of September 9, 1993 as to the final position of BNS in respect of the terms of the requested bridge loan.

[62] The evidence establishes that Messrs. Trites and Tanner had the authority to cause Shieldings to enter into the September 9, 1993 letter agreement and to grant three $85 million demand debentures in favour of BNS as security. One was in respect of Brenda Bay's assets, a second was in respect of SFPI's assets, and a third provided for "first ranking fixed (non-specific) and floating charges over all of the present and future undertaking, property and assets" of the borrower, Shieldings. (At this point, the total existing outstanding debt of Shieldings to BNS was about $50 million and the bridge loan would add a further approximate $35 million.)

[63] The evidence establishes the board of directors authorized the arrangements contemplated by the September 9, letter agreement. Legal counsel to Shieldings provided an opinion that Shieldings had the ability to proceed and that the September 9, 1993 letter agreement and the $85 million demand debentures were valid and binding.

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[64] Mr. Bennett reported to the directors in writing September 15, 1993 following upon the completion of the Brenda Bay transaction and did not raise any concern in respect of the bridge loan and attendant conditions and security given by Shieldings.

[65] Mr. Bennett, an experienced corporate lawyer, was not called as a witness by the plaintiffs. Nor was Mr. Godsall. Nor were any of the directors.

[66] The September 9, 1993 letter agreement references two separate loan facilities and the security required. One was the bridge facility of about $35,500,000.00. The other is the second amended RTC facility which was to expire very shortly. BNS agreed to provide $3 million through a new RTC facility.

[67] The Bank imposed conditions that all of the proceeds from the sale of the Brenda Bay tree farm to John Hancock would be applied to repay the $35,500,000.00 bridge loan, pay down the outstanding balance on the RTC (the authorized amount of the RTC being permanently reduced to $3,000,000.00) and third, to reduce the balance owing on the then outstanding $29,941,000.00 loan extended to #366 in connection with the Versatile transaction and guaranteed by Shieldings.

[68] BNS advanced some $35.5 million to Shieldings September 10, 1993 to enable the purchase of Doman's 50% interest in the tree farm to be completed. The RTC was continued to September 30, 1993 with a limit of $3 million. The $85 million demand debentures *inter alia,* were given to BNS, by Shieldings and its subsidiaries, as security.

[69] On September 14, 1993 the tree farm was sold to John Hancock. The amount paid by John Hancock to Shieldings for the tree farm, US$40,500,000.00, was paid to BNS by the direction of Shieldings. This money was sufficient to repay BNS the $35.5 million bridge loan, to pay down the RTC from $15.7 million and to pay down the outstanding Versatile loan by $2,619,901.17.

[70] The $85 million demand debentures given by Shieldings as security continued to apply to those residual lands beneficially owned by Shieldings as a result of the purchase from Doman, being in the main the Lake Cowichan lands which were estimated to have a value of some $5 million (and as well to some "environmental carve out" from the tree farm property which was not purchased by John Hancock).

[71] Levy seeks to delete or set aside the security that the Bank required as a condition of advancing funds to Shieldings. Levy claims to either rank ahead of BNS's claim or, at

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least, *pari passu.* Also, Levy attacks the payment of interest on the amended RTC for the funds advanced.

The Oppression Remedy

[72] Trade creditors and contingent judgment creditors are not complainants of right under s. 245 of the *OBCA.* A court has the discretion to provide standing as a complainant: s. 245 (c). The defendants did not oppose Levy's assertion that it had standing as a complainant; however, the defendants vigorously oppose the plaintiffs' submission that there was oppression.

[73] Assuming the plaintiffs are proper complainants, the oppression remedy is available to protect the plaintiffs' "reasonable expectations": *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 191.

[74] In considering the oppression section of the *OBCA,* and other comparable statutes, the issue as to whether there has been oppression is fact specific: see *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (Ont. C.A.), at 137, leave to appeal refused, (1983), 2 O.A.C. 158 (note) (S.C.C.); *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2004), 41 B.L.R. (3d) 74, 2004 CarswellOnt 208 (Ont. S.C.J. [Commercial List]) at para. 215; and *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1998), 110 O.A.C. 160 (Ont. Div. Ct.), at 163.

[75] Recognizing that some parameters are necessary, courts have developed general principles in approaching claims for an oppression remedy.

[76] The starting point is for the complainant to establish the complainant's reasonable expectations in the relationship between the complainant, the corporation and the other stakeholders. See *Buttarazzi Estate v. Bertolo* (2004), 40 B.L.R. (3d) 287, 2004 CarswellOnt 17 (Ont. S.C.J.) at para. 12; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at 177, leave to appeal refused (2002), 163 O.A.C. 397 (note) (S.C.C.); *Renegade Capital Corp. v. Schmalz* (2003), 36 B.L.R. (3d) 294 (Ont. S.C.J. [Commercial List]), at 300.

[77] Although a finding of bad faith or want of probity is not required for a finding of oppression, its presence may indicate oppression. See *Ford Motor Co. of Canada, supra* at para. 224.

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[78] The Court will be reluctant to interfere with business decisions that have been made in good faith and on reasonable grounds. The affairs of a corporation are to be managed under the direction of its board of directors. Directors and officers must be given considerable latitude in exercising their business judgment in the handling of a corporation's affairs.

[79] The courts recognize and respect the autonomy of the corporation and the expertise of its management. Directors and officers must act in the best interests of the corporation. Absent bad faith, or some other improper motive, business judgment exercised in the perceived best interests of the corporation that, with the benefit of hindsight, has proven to be mistaken, misguided or imperfect, will not give rise to liability through the oppression remedy. See *Ford Motor Co. of Canada, supra* at para. 215; *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Gen. Div. [Commercial List]), at 777 cited with approval in *Renegade Capital Corp, supra* at 301.

Was There Oppression by BNS?

[80] The objectively determined reasonable expectations of a person in the position of the complainant are to be considered in addressing the issue as to whether there has been oppression. Insofar as a contingent creditor in the position of Levy is concerned, the exercise is to identify what those reasonable expectations were, or could be as a matter of law, and whether Shieldings complied with them.

[81] Shieldings funded its operations by a combination of debt and equity. The loans made by BNS were made at arms length on market terms to Shieldings while it was solvent. The security given to BNS was granted when Shieldings was solvent. The evidentiary record establishes that Shieldings used the proceeds from these loans for its own business purposes, including the preserving of its investments.

[82] In my view, the security interests given in respect of such loans are valid and enforceable. My reasons follow.

[83] Accusations have been made as to Mr. Belcher's conduct as a director of Shieldings, claiming that he somehow dominated its other directors. The complaint is that, in effect, BNS controlled *de facto* Shieldings. There is no evidence to support such accusations. Indeed, the record establishes the contrary.

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[84] I find Mr. Belcher to be credible and accept his evidence. In my view, he acted honestly and properly as a director of Shieldings at all times and with a view to acting in the best interests of that corporation.

[85] Mr. Belcher had prepared for his testimony through a review of the extensive documents available. He had the most detailed involvement of any of the witnesses. He readily acknowledged his participation in various events and acknowledged events in which he was not involved. He had sworn a lengthy affidavit in 1995 after reviewing the files and undergone some 11 days of discovery over 1997 to 2001. His evidence was informed and straightforward.

[86] This is not a case of asset stripping through non-market value transactions. Mr. Willis had an extraordinary relationship with the senior management of BNS such that Shieldings was afforded favourable treatment from the Bank.

[87] Mr. Tanner was the person who arranged the John Hancock back-up for the Brenda Bay transaction. Mr. Tanner and Mr. Trites dealt with the Bank in arranging the bridge financing. Neither Mr. Tanner nor Mr. Trites had any contact with Mr. Belcher in the August-September 15, 2003 time period when the negotiations with the Bank took place.

[88] There is no impediment in law or principle to a shareholder advancing loans to the corporation in which the shares are held and receiving security therefore. It is not uncommon that this is done. Public policy in a free market economy supports this flexibility in the movement and formation of capital.

[89] The evidentiary record does not raise any issue in respect of Shieldings having failed to comply with its corporate constitutional documents in terms of the loans and security given. Nor is there any evidence that the price of any loan varied from what the market would require.

[90] The UOC was outstanding from about June 1987 to February 1991 when it was repaid. The plaintiffs do not assert that it was improper for Shieldings to enter into the loan nor do they complain as to its terms. Rather, the plaintiffs say that it was oppressive to pay interest after July 1988 and to repay the loan notwithstanding Shieldings would be in breach of contract if Shieldings did not pay.

[91] Levy does not criticize the June 1989 loan to purchase Versatile or the terms of that loan. Levy attacks the repayment of principal of $2.6 million made in September, 1993 (from the proceeds of the Brenda Bay sale). Levy also claims to rank ahead of BNS, or at

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worst *pari passu* for any payment that may ultimately be realized through the receivership with respect to the sale of the Versatile assets.

[92] The RTC, with security, was agreed to in February 1991 and repaid in full in September 1993. It was replaced at that time by an amended RTC in the amount of $3 million which was fully drawn by fresh advances as at the date of the receivership. The RTC has now been repaid in full by the proceeds of asset dispositions.

[93] Levy argues that BNS should rank behind Levy's claim, or at best *pari passu,* in respect of the RTC and amended RTC. Levy asserts it was oppressive to enter into, grant security for, pay interest and to repay the RTC and amended RTC.

[94] In my view, the approach to dealing with all of the plaintiffs' claims is as follows.

Is a given loan valid and enforceable?

[95] First, is a given loan and any security granted valid and enforceable as between BNS and Shieldings?

[96] The power to borrow is *intra vires* a modern corporation: *OBCA* s. 19. A lender is entitled to rely upon the indoor management rule when dealing with a corporation seeking to borrow funds: *OBCA* s.19. That is, the lender is entitled to assume that the affairs of the corporation have been conducted in accordance with its internal constitution. In any event, the record establishes that Shieldings complied with its internal constitution in respect of its borrowings from BNS.

[97] The ability of a corporation to raise funds through secured debt is a collateral aspect of the power to borrow. The right of a debtor to grant security is inherent to the debtor's right to carry on business and to deal with its property in the ordinary course of that business. See Kevin Patrick McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1999) at para. 6.18.

[98] Provided that the security given is not a fraudulent preference and complies with the registration requirements of the *Personal Property Security Act,* R.S.O. 1990, c. P.10 or other applicable registration statutes, the registered security given gains priority over all unsecured creditors and all subsequent secured creditors.

[99] The fact of fresh credit being extended to a debtor in return for security will generally mean that the transaction cannot be considered to be a fraudulent preference. See *Aboud, Re* (1940), 22 C.B.R. 121 (Ont. S.C.), at 127.

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[100] A solvent corporation is free to carry on its affairs as it sees fit, subject to its contractual obligations with respect to those debts. A debtor can choose to pay one creditor over another unless it is insolvent or has in its contemplation an event of bankruptcy. See *Hudson v. Benallack* (1975), [1976] 2 S.C.R. 168 (S.C.C.), at 175-76.

[101] The power to borrow and to provide guarantees and undertakings clearly implies the power to make payments in accordance with the terms on which a loan has been provided.

[102] Moreover, equitable doctrine provides that if a corporation borrows money and uses the borrowing to pay its debts or uses the monies otherwise in the normal course of its business, the loan is repayable, and applicable security is enforceable, even though the lender may know of the want of power of the corporation to borrow. See *Guaranteed Hardware Co., Re,* [1972] 3 O.R. 138 (Ont. S.C.), at 141; *Bank of Montreal v. Petrobuild Ltd.* (1981), 94 A.P.R. 375 (N.B. Q.B.), at 381-82.

[103] A corporation can cure a defect in authority in entering any contract by ratifying the contract, assuming that the contract is otherwise *intra vires* the corporation. A court will determine whether substantive ratification has occurred by the circumstances. If a corporation learns of an unauthorized contract but does not give back any benefits received pursuant to that contract the corporation will be taken to have ratified the contract. See *Great Northern Grain Terminals Ltd. v. Axley Agricultural Installations Ltd.* (1990), 76 Alta. L.R. (2d) 156 (Alta. C.A.), at 159. As stated above, in my view the evidentiary record establishes that Shieldings complied with its internal constitution in respect of its borrowings from BNS. However, if there was any defect in authority in any instance of borrowing the evidentiary record establishes that there was substantive ratification by Shieldings in respect of its obligations under such contract(s) to borrow monies from BNS.

[104] As has been stated above, the evidentiary record establishes that the corporation was solvent until June 23, 1994 with the passage of the *Comcor Act.*

[105] On December 13, 1990 the Loan Policy Committee of BNS had approved the new RTC facility with security by a first charge on all of Shieldings' assets. The evidence establishes that Mr. Willis bargained aggressively in respect of the rate of interest to be charged, meeting with very senior bank officers. The rate was reduced from the initial proposal of prime plus two percent to prime plus one-half percent.

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[106] Messrs. Willis and Godsall had executed the RTC Agreement by March 13, 1991. The evidence establishes the likelihood that this was done with prior board approval. Mr. Godsall on September 23, 1991 confirmed the approval by a certified resolution of the board of directors. It was known at the February 15, 1991 board meeting that Shieldings needed to borrow the money to be made available by the RTC. At that point, as stated above, BNS was asking for interest at the rate of prime plus two percent. The Shieldings board of directors often held meetings by telephone. The evidence indicates approval of the RTC was given after Mr. Willis successfully negotiated the reduced rate of interest. Counsel to Shieldings had provided an opinion that Shieldings was authorized to enter into the RTC agreement.

[107] If Messrs. Willis and Godsall had not been authorized to execute the RTC, then Mr. Godsall could have so testified. He reportedly had agreed to cooperate with the plaintiffs in exchange for being released from the judgment against him in the Tecmotiv action. The plaintiffs did not call him as a witness. Indeed, the plaintiffs did not call any of the directors to testify.

[108] In my view, and I so find, the RTC was validly entered into and the advances made thereunder were validly secured.

[109] In the fall of 1992 Shieldings was in breach of the covenants of the RTC Agreement. Shieldings sought an extension of the term of the RTC from December 31, 1992 to February 28, 1993. Shieldings also sought an increase in the RTC limit from $8.5 million to $15.7 million.

[110] An RTC Extension Agreement was executed by Mr. Tanner on behalf of Shieldings September 22, 1992, incorporating by reference the terms of the RTC.

[111] The plaintiffs do not dispute that all amounts drawn on the RTC were used by Shieldings for corporate purposes, including for costs associated with Brenda Bay and with the Comcor project.

[112] The financial statements of Shieldings for each fiscal year of the RTC existence were approved by Shieldings' board of directors. The statements disclose the existence of the RTC, the security given, and the fact of Shieldings being generally in default of its covenants.

[113] There is no evidence that either Mr. Belcher or BNS had any belief that the RTC loan was not properly authorized. Indeed, all of the evidence suggests that everyone

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involved with Shieldings believed that the RTC was valid and that the security given in connection therewith was enforceable.

[114] Levy submits that the payment of the net proceeds from the sale of Brenda Bay to BNS to pay down the RTC and the Versatile loan was a "preference."

[115] There is no support in the evidence for this contention. All the evidence is to the contrary.

[116] BNS had good, enforceable security in respect of the RTC loan which Shieldings' management agreed would be repaid from the proceeds of the Brenda Bay sale. BNS had security over the Brenda Bay assets. Since June 1989 Shieldings had contractually promised BNS that any proceeds of sale of assets in excess of $250,000.00 would be used to reduce the Versatile loan. The memoranda internal to Shieldings relating to Brenda Bay from 1989 to the sale in September, 1993 indicate that Shieldings intended to use the net proceeds to reduce bank debt. For example, the 30 month plan presented to Shieldings' directors in February, 1992 indicated that Shieldings expected to sell its interest in Brenda Bay by August, 1992 with the anticipated net proceeds to be used to reduce bank debt. For example, a cash flow forecast prepared for the board of directors by Mr. Bennett in March, 1993 indicated that the entire net proceeds from the sale of Brenda Bay would be used to reduce bank debt.

[117] A rights offering had been agreed upon by the board in March, 1993. $7.2 million was raised in April 1993 by a share issuance for the purpose of reducing bank debt. BNS subscribed for its *pro rata* share, thus in effect converting $2,890,000.00 of its secured debt to equity (and thereby subordinating its position to this extent to any unsecured creditors of Shieldings) some six months before the closing of the Brenda Bay transaction. This fact alone belies any assertion that the Bank's economic interest was being preferred.

[118] The First RTC Extension Agreement had expired February 28, 1993. By a Second RTC Extension Agreement dated June 4, 1993, executed by Messrs. Tanner and Trites, BNS agreed to extend the RTC to June 30, 1993. Again, Shieldings agreed on June 9, 1993, through Messrs. Trites and Tanner, that the net proceeds from the Brenda Bay sale would be used to retire the RTC and reduce bank debt. Mr. Trites wrote to BNS June 21, 1993 requesting a further extension of the RTC term to September 30, 1993, which was authorized June 29, 1993, it being again indicated that all proceeds of realization would be used to reduce bank debt.

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[119] At the August 3, 1993 board meeting to consider triggering the shotgun provision in respect of Brenda Bay, it was known that the proceeds of the contemplated Brenda Bay transaction would go to reduce bank debt, that the RTC was to expire September 30, 1993, that the Bank had made no promise for future bank lines of credit and that BNS preferred Shieldings to finance itself forward by equity. Finally, it was known that the Bank would expect additional security in respect of any future funding.

[120] The plaintiffs submit that the proceeds of the Brenda Bay transaction should not have been applied in respect of the loan to #366 to fund the Versatile transaction. The plaintiffs say that in August, 2003, the Bank knew that the Tecmotiv trial had concluded and there was already a pending decision then under reserve for more than three months.

[121] However, in granting the bridge loan, BNS had made it a condition that the entirety of the Brenda Bay proceeds was to go to retire bank debt. The Versatile loan had been intended as only a four month loan back in June, 1989. The loan was secured in part against the North Vancouver lands owned by #366. As well, Shieldings had given an undertaking at the time that any disposition of assets in excess of $250,000.00 would be applied to reduce debt to BNS.

[122] All Bank debt had to be retired, of course, before there could be any return on the shareholders' investments in Shieldings. It was a business decision by Shieldings' management to take the bridge financing on the terms offered. None of Shieldings' directors, each of whom was sophisticated and represented major shareholders, objected to the Brenda Bay bridge loan arrangements involving BNS and the granting of the $85 million demand debentures as security.

[123] When the Comcor debentures, (held by the institutional investors of Shieldings) secured only by a pledge of Comcor shares by Shieldings, ultimately turned out to be worthless in June, 1994 those debentures were left as unsecured obligations of Shieldings through the Shieldings' guarantee. If the plaintiffs' arguments as to the invalidity of the $85 million debentures had any force then it would mean that the Comcor debentures should properly rank *pari passu* with the RTC and Versatile loans at the Shieldings level. Yet no director or institutional shareholder of Shieldings has challenged or called into question the Bank's position on its $85 million demand debentures as security. This suggests that all the directors knew that the Shielding's board accepted and approved the use of the Brenda Bay proceeds and the grant of security on the terms seen, that is, with the $85 million demand debentures.

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[124] The resolution of the board of directors certified by Mr. Tanner as corporate secretary September 10, 1993 authorizing completion of the Brenda Bay transaction included, *inter alia,* the undertaking "to give such security as the Bank may require".

[125] Shieldings was not insolvent in September, 1993. It was not until April, 1994 that the Levy judgment in the Tecmotiv action was given that there was a significant creditor apart from BNS. It was not until the Comcor project collapsed in late June, 1994 that Shieldings was rendered insolvent.

[126] When Shieldings was made a defendant in the Tecmotiv lawsuit the corporation was faced with two considerations in respect of its financial statements, given that the lawsuit represented a possible contingent liability. See *Canadian Institute of Chartered Accountants Handbook,* looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981), at s. 3290.

[127] First, a decision as to whether disclosure is required had to be made. Second, if there is to be disclosure, a decision was required as to whether the corporation should take an accrual or reserve with respect to the contingent liability.

[128] Disclosure is meant to alert all users of the financial statements to the potential liability of the corporation but does not necessarily result in an adjustment to the balance sheet or income statement.

[129] In my view, Shieldings treated the Tecmotiv lawsuit, commenced in July, 1988, appropriately. It disclosed its existence in notes on the financial statements commencing with the February 29, 1988 financial statements. Management made an assessment at that time and in each fiscal year thereafter that the lawsuit had no merit and was without significant risk to Shieldings. This assessment was made each year after the auditor received a written opinion from Shiledings' legal counsel. The auditor followed applicable Generally Accepted Accounting Principles ("GAAP") and Generally Accepted Auditing Standards ("GAAS").

[130] Management reasonably anticipated that Shieldings would be successful in its defence of the Tecmotiv action. The objective proof of the state of mind of the board of directors is seen in the contribution by all the institutional investors of substantial equity *after* the commencement of the Tecmotiv action which claimed some $25 million plus punitive damages against Shieldings.

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[131] A corporation is obliged to assess a claim made against it using reasonable judgment and to act accordingly with respect to the financial and operational implications.

[132] Where, as in the case of Shieldings, a corporation believes with the assistance of its legal counsel that it has substantive defences to the lawsuit such that it is unlikely the contingent liability will become an actual liability, the proper treatment is disclosure in the notes to the financial statements but to not include the contingent liability as a reserve or as an accrued liability.

[133] This approach of GAAP and GAAS provides a fair picture of the business to persons dealing with it. To require that an unlikely contingent liability be treated in the financial statements as an actual liability could have serious practical ramifications. It could unfairly and severely hinder the business in its business operations, in the raising of money, and in its dealings with creditors.

[134] It follows then that there is no reason to be critical of a corporation when the reasonable judgments made turn out in hindsight to be incorrect. It would be unfair to retroactively adjust the priority of the claims of third parties who advanced funds or changed their positions on the basis of those judgments as reflected in the financial statements.

[135] Actions on debts are not generally the subject of oppression applications. See *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]), at 92. Rather, the common law governing creditor-debtor relationships, together with statutory law such as the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, the *Assignments and Preferences Act,* R.S.O. 1990, c. A.33, and the *Personal Property Security Act* will apply.

[136] There is no real factual evidence in the case at hand as to the plaintiffs' reasonable expectations in respect of its interests being protected by Shieldings. The reasonable expectations for someone in the position of the plaintiffs measured by an objective standard would be twofold: first, that Shieldings would conduct itself in accordance with GAAP and GAAS with respect to the assessment and treatment of the contingent judgment claim on Shieldings' financial statements; and second, that the management of Shieldings would not engage in 'asset stripping' or a reduction in the capitalization of the corporation to the disadvantage of creditors.

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[137] The term 'asset stripping' covers transactions (in the face of a contingent claim against the corporation) for which the corporation does not receive fair value and which are commonly structured with non-arms length parties to the directors/shareholders. The stripping of the assets results in the corporation being unable to pay its debts. See for example *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp.* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.), at 196-97, aff'd (2003), 40 B.L.R. (3d) 88 (Ont. C.A.).

[138] It is not oppression for the shareholders to put in new equity or where a lender, like BNS, has made new funds available on the basis of a grant of security through commercially reasonable loans granted on market terms.

[139] The plaintiffs do not attack *shareholder transactions* in the case at hand. BNS has not received any monies as a shareholder. Rather, it has lost its entire equity investment, being some $26 million. Nor has any other shareholder received any return of equity.

[140] The plaintiffs allege that Mr. Belcher abused his position as the nominee director of Shieldings on behalf of the so-called dominant shareholder, BNS, to its advantage. The plaintiffs seek to have the BNS loans subordinated to their unsecured claim against Shieldings or, at least, to gain a *pari passu* position with the Bank.

[141] The other five corporate shareholders are independent, major corporations with sophisticated financial and legal advisors. It is extremely unlikely that the nominee directors of any of them would be puppets of BNS. There is no evidence to suggest they were. None of these other shareholders or their nominee directors for Shieldings testified. There is no evidence that any have ever raised accusations against BNS or Mr. Belcher.

[142] Mr. Belcher was only one of six (later seven) directors. He did not have the numerical ability to impose his will. BNS did not have a majority voting interest in Shieldings and could not override the other shareholders. The evidence establishes that the Bank did not always prevail in its preferred position with respect to management and shareholder decisions. It is apparent that there was very little conflict at the board level of Shieldings. Votes were generally unanimous.

[143] Neither Messrs. Trites nor Tanner gave any evidence to assist the plaintiffs in their contention as to Mr. Belcher abusing his position. Mr. Tanner had no reason to be surprised that the Bank required Shieldings to provide the $85 million demand debentures in respect of the Brenda Bay bridge loan. Mr. Tanner knew that there was verbal approval only of the bridge loan by the line officers of the Bank at the branch level. Shieldings was

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requesting the bridge loan from the Bank on very short notice. The loan terms and security documentation remained to be determined with finality by the Bank's internal hierarchical credit approval process.

[144] The management of Shieldings did not question or complain about the Bank's requirement for additional security through the $85 million demand debentures. As well, given all the circumstances, Messrs. Tanner and Trites were unrealistic in their expressed desire that the Bank would not require a pay down of the RTC and other debts with the Brenda Bay proceeds. The plaintiffs did not call as witnesses any directors nor did they call either of Messrs. Bennett and Godsall, the two main officers of Shieldings.

[145] The plaintiffs claim that Mr. Belcher was in breach of his duties as a director of Shieldings. They allege he acted with other senior bank officials in imposing the debentures as security in the Brenda Bay transaction such as to constitute "a preference of the BNS as creditor."

[146] The Bank had two interests in Shieldings: as a shareholder and a distinct, separate interest as a lender. There is no inherent conflict between Mr. Belcher's duty as a director of Shieldings and the Bank's interest as a *shareholder.*

[147] There was a potential for conflict between the Bank's interest as *lender* and hence, Mr. Belcher's duties as an employee of the Bank and Mr. Belcher's duties as a director of Shieldings. This was recognized from the beginning of Shieldings' dealings with the Bank. This potential for conflict was dealt with by disclosure and by Mr. Belcher not making decisions with respect to lending by BNS to Shieldings. Rather, the evidentiary record shows he assisted Shieldings in his role as a director on occasion by ensuring the Bank's lending side understood the nature and importance of requests of Shieldings for credit.

[148] It is to be noted incidentally that Mr. Belcher was generally of the view that Shieldings should be funded by equity infusions by the shareholders rather than by borrowings from BNS. That is, he personally was not in favour of new borrowing by Shieldings after 1989.

[149] In particular, Mr. Belcher was not involved in the two transactions that are the primary subject of the plaintiffs' allegations, being the negotiations in 1990 and 1991 leading to the RTC and the September 9, 1993 letter agreement relating to the Brenda Bay transaction. Mr. Belcher was not present at the Loan Policy Committee meetings with

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respect to either the 1991 RTC loan or the 1993 Brenda Bay transaction. Mr. Belcher also testified he had no involvement in the UOC negotiations in 1987.

[150] Mr. Belcher did not manage the Bank's loan portfolio. He stated that he had no communication with Messrs. Tanner or Trites in the time period in August-September, 1993, relating to proceeding with the Brenda Bay transaction. Messrs. Trites and Tanner did not testify as to any contact with Mr. Belcher over the relevant time frame. Mr. Belcher says he was not aware as to how the Bank intended to take security in respect of the bridge financing. There is no documentary or viva voce evidence to suggest that the lending side of the Bank had any contact with Mr. Belcher as to the terms and conditions of the Brenda Bay loan. The internal Bank documents, read fairly, tend to confirm that Mr. Belcher had nothing to do with the Bank's terms and conditions with respect to the Brenda Bay bridge financing.

[151] There is no evidence that Shieldings had alternative sources of credit available at better rates or on more favourable terms than those extended by BNS, or that Shieldings would not have had to provide like security to another lender. In my view, and I so find, considered by an objective standard, the conduct of the Bank as lender at all times, and specifically, in August-September, 1993, was commercially reasonable and fair to Shieldings. Indeed, Shieldings itself, arms-length to the Bank, has never complained about the Bank's conduct.

[152] The evidence establishes that Mr. Belcher at all times understood full well his duties as a director of Shieldings. I find that at all times he acted reasonably, conscientiously and properly as a director of Shieldings. He never purported to act as Shieldings itself. Shieldings acted through its management. Mr. Belcher had no personal interest in conflict with the interests of Shieldings nor did he have any actual conflict of interest as a nominee director of BNS. I find Mr. Belcher acted honestly and in good faith with a view to the best interests of Shieldings. He exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. He met his common law and ss. 132 and 134 *OBCA* obligations and duties as a director.

[153] In my view, and I so find, the plaintiffs' allegations are not substantiated. Indeed, the evidence is all to the contrary. Mr. Belcher and BNS acted properly and reasonably throughout in their dealings with Shieldings.

[154] The crux of the plaintiffs' alleged oppression is that the challenged loans, security and repayments constituted a preference in favour of the Bank. The plaintiffs claim in their

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submissions, if not in their pleading, that the Bank caused Shieldings to prefer the existing debts of the Bank as creditor, by securing them against the contingent unsecured judgment of the plaintiffs.

[155] However, "until a debtor is insolvent or has an act of bankruptcy in contemplation" the debtor is "free to deal with his property as he wills and he may prefer one creditor over another": *Hudson v. Benallack, supra* at 175 per Dickson J. See also *Van der Liek, Re* (1970), 14 C.B.R. (N.S.) 229 (Ont. S.C.), at 232.

[156] Put otherwise, the plaintiffs must establish first, that Shieldings was insolvent at the date of the impugned transaction and second, that at that date the transaction constituted a preference, that is, all creditors were not treated equally. The plaintiffs' claim fails on several bases.

[157] First, there was no evidence led to establish that Shieldings was insolvent in August-September, 1993 or at any time prior to passage of the legislation June 23, 1994, that effectively ended the Comcor project. Indeed, the evidence indicates, applying the accepted tests for insolvency, that Shieldings was solvent until late June, 1994.

[158] Second, the evidence indicates the Bank was the only significant creditor of Shieldings until the failure of the Comcor project. The only other persons visibly claiming to be creditors are the plaintiffs. But the plaintiffs were contingent creditors with an unliquidated claim for damages until April 1994 when they successfully gained a judgment in the Tecmotiv action and the right of appeal was later exhausted.

[159] The common law definition of "debt" is a specified sum of money owing by one person to another which includes not only the obligation of the debtor to pay but also the right of the creditor to receive and to enforce payment by legal process. See *Central Capital Corp., Re* (1995), 29 C.B.R. (3d) 33 (Ont. Gen. Div. [Commercial List]), at 44, aff'd (1996), 27 O.R. (3d) 494 (Ont. C.A.), at 531; *207053 Alberta Ltd., Re* (1998), 7 C.B.R. (4th) 32 (Alta. Q.B.), at 35.

[160] However, a contingent creditor might arguably claim oppression because of a preference in a situation when there is not yet insolvency and where the creditor's claim at the time of the impugned transaction is for an unliquidated sum. See *Downtown Eatery, supra; Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.* (2001), 20 B.L.R. (3d) 156 (Ont. S.C.J.), at 163-64.

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[161] Such a situation is most readily seen where two elements are present: first, when it seems probable that the contingent creditor is going to successfully gain a judgment such that the contingent liability is recognized by GAAP and GAAS as requiring an accrual or reserve relating to the contingency; and second, it is established that the impugned action of the debtor in dealing with another creditor is *intended* to confer a preference and defeat the contingent judgment creditor in the later event of an insolvency. One would expect to see indicia of collusion in such a situation such as a non arms-length relationship involving the impugned transaction.

[162] That is not the situation here. The evidence establishes the Bank and Shieldings were acting at arms-length at all times. The evidence establishes the Bank was not seeking a preferred position vis-à-vis the plaintiffs, nor was Shieldings seeking to give the Bank a preferred position. The insolvency and bankruptcy of Shieldings were not in the contemplation of either the Bank or Shieldings until the Comcor project collapsed in June, 1994. The financial statements provided full disclosure of the Tecmotiv action. Accounting principles and auditing standards did not require a reserve to be taken, given that it was reasonable to regard the contingent liability as improbable because of Shieldings' asserted defence.

[163] The oppressive conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. See *Downtown Eatery, supra.* However, it must be established that a complainant has a reasonable expectation that a corporation's affairs will be conducted with a view to protecting his interests.

[164] Until the judgment of Lane J. in the Tecmotiv action, the status of Levy was merely that of a contingent claimant, or potential judgment creditor, asserting an unliquidated demand against Shieldings, a potential judgment debtor who might have exigible assets.

[165] Levy had a reasonable expectation that the affairs of Levy's potential debtor, Shieldings, would be conducted honestly and in good faith, based on the reasonable business judgment of its directing mind, and in a manner that did not *unfairly* prejudice or affect Levy's interests. Levy did not have a reasonable expectation that Shieldings would be managed and operated in such a way as to ensure Levy was paid the debt of Shieldings if and when there was a judgment favourable to Levy following upon the trial in the Tecmotiv action. See the judgment of Blair J.A. in *Stabile v. Milani Estate,* [2004] O.J. No. 2804 (Ont. C.A.) at para. 46.

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[166] Not all conduct that has a harmful effect to a complainant gives rise to recovery under the oppression remedy of s. 248 (2) of the *OBCA.* Not only must the reasonable expectations of the complainant Levy be defeated by the impugned conduct, but the conduct involved must be such as to effect a result that is "oppressive," or that "unfairly prejudices" the complainant, or that "unfairly disregards the interests of the complainant." See *Stabile v. Milani Estate, supra* at paras. 35 and 47 per Blair J.A.

[167] The evidentiary record establishes that the affairs of Shieldings relevant to the issues in the case at hand (and in particular, the affairs of Shieldings in its dealings with the Bank) were conducted honestly and in good faith, based on the reasonable business judgment of Shieldings' directing mind, and in a manner that did not unfairly prejudice or unfairly affect Levy's interests.

[168] As I also find, the Bank acted honestly and in good faith, and with reasonable business judgment, as a creditor/lender to Shieldings. As well, I find that Mr. Belcher acted honestly and in good faith and in the best interests of Shieldings at all times in his capacity as a director of Shieldings.

[169] The Bank was an arms-length creditor of Shieldings. The Bank did not control Shieldings. The Bank was independent of Shieldings. The Bank determined the terms of its loans to Shieldings and the security required. Levy did not have any reasonable expectation that the Bank would, or should, compromise its loan terms in September, 1993 on the basis that a contingent judgment creditor might obtain judgment and thereby become a competing creditor of Shieldings. When new funds are advanced by a creditor the creditor can demand new and greater security. The new security can reach back and add security to funds that were loaned at an earlier time.

[170] Levy arguably has a reasonable expectation that Shielding's affairs will be conducted by the management of Shieldings with a view to fairness in protecting the interests of Shieldings' creditors, including the interest of a contingent judgment creditor. But Shieldings' borrowings from BNS, and in particular, the bridge loan in September, 1993, were clearly seen by Shieldings' management and based upon the directors' judgment to be in the best interests of Shieldings and hence, in the best interests of any unsecured *contingent* judgment creditor of Shieldings.

[171] Shieldings (and its shareholders) needed, and wished, to sell its assets. The Brenda Bay transaction was a favourable sale at a fair price. Shieldings could only

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complete the sale with the bridge loan in place. The Bank had the right and power to state the terms on which it would make the bridge loan.

[172] The Bank did not control Shieldings or act unfairly in its arms-length relationship to Shieldings. Shieldings was free to accept or reject the terms offered. Shieldings accepted the terms of the bridge loan.

[173] There is no evidence to suggest Shieldings would have received more favourable terms from another lender. The evidence suggests the contrary. In any event, if Shieldings could have somehow obtained better terms from another lender so as to not disadvantage a contingent creditor, any oppressive conduct was simply the conduct of Shieldings and not BNS. (Levy has, of course, an existing judgment against Shieldings in its Tecmotiv action. It would be of no practical purpose to seek a new judgment against Shieldings for oppressive conduct in failing to satisfy that existing judgment.)

[174] There is no basis for the plaintiffs to assert a successful claim of equitable subordination, a doctrine seen in American case law. The Bank did not engage in inequitable conduct. The actions of the Bank did not confer any unfair advantage on the Bank. See *Canada Deposit Insurance Corp. v. Canadian Commercial Bank,* [1992] 3 S.C.R. 558, 7 B.L.R. (2d) 113 (S.C.C.), at 151-52 per Iacobucci J.

[175] The directors and officers Bennett and Godsall undoubtedly had knowledge of the relevant facts and material evidence to offer. As already stated, the plaintiffs reportedly had the cooperation of Messrs. Bennett and Godsall in advising the plaintiffs as to their knowledge of the relevant facts. Levy entered into a settlement with Mr. Godsall and some of the Shieldings directors in respect of the action at hand. This oppression action, which at its inception included them as defendants, was dismissed with the individual defendants agreeing to make themselves available for interviews with Levy's counsel, attend examinations under oath and as witnesses at trial if requested, and produce for review all relevant, non-privileged documents within their power, possession or control.

[176] It seems certain that if there was any such evidence which would have supported the position the plaintiffs advance that one or more of the directors and officers would have been called as witnesses by the plaintiffs. No explanation is offered by the plaintiffs for not calling any of these potential witnesses. The only reasonable inference is the adverse inference that the evidence of these material witnesses would be contrary to the plaintiffs' case. See generally John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 297, s. 6.321. Plaintiffs' counsel

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impress as very conscientious in having exhausted every conceivable evidentiary path. I have no doubt they have thoroughly reviewed all possibly relevant documents. I have no doubt they have interviewed every potential witness.

Disposition

[177] For the reasons given, the action is dismissed. I may be spoken to as to costs.

[178] The Court recognizes and appreciates the co-operative approach of all counsel in presenting the voluminous documentary evidence through a well-organized, electronic medium via computer screens. This approach saved considerable time and money for all concerned. All issues in this complex action were thoroughly and exhaustively canvassed by counsel for all parties.

Action dismissed.

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Tab 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Gould Leasing Ltd. v. Return on Innovation Fund Inc. | 2006 CarswellOnt 3606, [2006] O.J. No. 2414 | (Ont. S.C.J., Jan 25, 2006)

1995 CarswellOnt 1207
Ontario Court of Appeal

Naneff v. Con-Crete Holdings Ltd.

1995 CarswellOnt 1207, [1995] O.J. No. 1377, 23 B.L.R. (2d) 286, 23 O.R. (3d) 481, 55 A.C.W.S. (3d) 86, 85 O.A.C. 29

ALEXANDER NANEFF v. CON-CRETE HOLDINGS LIMITED, SKEAD TRANSPORT LIMITED, SKEAD TRANSPORT INCORPORATED, RAINBOW CONCRETE INDUSTRIES LIMITED, GRANITE PRESTRESSED CONCRETE LIMITED, ALBONA INVESTMENTS INC., NATSCHO NANEFF a.k.a. NICK NANEFF, BORIS NANEFF and INGEBORG GINA NANEFF

Carthy, Galligan and Austin, JJ.A.

Heard: March 27-28, 1995
Judgment: May 16, 1995
Docket: Doc. CA C20548

Counsel: *J. Edgar Sexton, Q.C.* and *Larry P. Lowenstein*, for appellants.
Brian P. Bellmore and *Roger W. Proctor*, for respondent.

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.C Oppressive conduct
III.3.e.ii.C.3 Corporate governance
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.E Miscellaneous
Headnote
Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief
Practice and procedure in actions involving corporations — On appeal — Powers and duties of appellate court — Powers being limited in reviewing remedy ordered after finding of oppression — Interference by appellate court only appropriate where trial judge making error in principle or if remedy being unjust.

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Shareholders — Shareholders' remedies — Relief from oppression — Broad discretion can only be exercised to rectify oppressive conduct in relation to status of applicant as shareholder and not to advance applicant's interest as family member — Remedy must reflect reasonable expectations of parties and should rectify oppression but not punish it.
Shareholders — Shareholders' remedies — Relief from oppression — Relationships in family business being very different from those between principals in normal commercial business — Following estate freeze, two sons of founder receiving 50 per cent ownership interest in family business — One son estranged from family, removed from office and management and his income cut off — Son's share to be purchased by father and other son.
The appellant, N, founded his own business producing concrete blocks in Sudbury over forty years ago. Through N's keen business sense and hard work over the years, he developed a diversified business which grew and expanded. Most of this growth and expansion took place well before his two sons, the appellant B and the respondent A, became active in the business.
In 1977, by means of an estate freeze, N made B and A equal owners of all of the equity in the business. However, N retained complete control of the business through redeemable voting special or preference shares.
In 1989 and 1990, problems arose between N, B and their family, on the one hand, and A on the other hand. N and his family had serious concerns about A's relationship with a particular woman. A year of threats and promises, of estrangements and reconciliations, culminated in a family rupture on Christmas Day 1990. The family threw A out of the family home and removed him as an officer of the companies which comprised the family business and excluded him from management of the business. As well, A was virtually cut off from the income from the business.
This and other conduct by N, B and the family toward A was found by the trial judge to be oppressive to A within the meaning of s. 248 of the *Business Corporations Act* (Ont.) The trial judge had ordered that the business be sold publicly as a going concern with each of or any combination of N, B and A being entitled to purchase it. The Divisional Court upheld that judgment, with one variation. N and his family appealed the Divisional Court's decision with respect to the remedy ordered.
Held:
The appeal was allowed.
An appellate court's power of review of an oppression remedy ordered under s. 248(3) of the Act is quite limited. The appellate court can only interfere with the remedy if it concludes that there was an error in principle on the part of the trial judge or if the remedy in all of the circumstances was an unjust one. The fact that this was a family business could not oust the provisions of s. 248. However, the family context of the dispute had to be kept in mind when fashioning a remedy under s. 248(3), as it bore directly upon the reasonable expectations of the principals. Any remedy granted here under s. 248(3) had to be fashioned such that it was just, having regard to the considerations of a personal character which existed among the family members.
Section 248(3) gives the court a very broad discretion in the manner in which it can fashion a remedy but it can only be exercised for a very specific purpose — to rectify the oppression. The court has the power, if it finds oppression or certain other unfair conduct, to "make an order to rectify the matters complained of". As such, if a given remedy has some result other than rectifying the matter complained of, then such a remedy is not authorized by law. Another limit imposed by s. 248(2) upon the discretionary power contained in s. 248(3) is that relief can be granted only if made with respect to the person's interest as a shareholder, creditor, director or officer of the corporation. The provisions of s. 248 cannot be used to protect or to advance directly or indirectly any personal interest which the shareholder, officer or director may have. In deciding whether there has been an oppression of a minority shareholder, the court must determine what were the reasonable expectations of that person according to the arrangements which existed between the principals. This will also have an important bearing upon the decision as to what was a just remedy in a particular case. The trial judge's finding that A ultimately expected to be an equal co-owner of the business with his brother had to be interpreted in light of two other important and intertwined considerations. First, A fully understood that until the death or voluntary retirement of N, N retained ultimate control over the business even to the extent of deciding what dividends would be paid and what would be done with any of those dividends. Second, this was a family business which had been built by N. As such, A could not reasonably have expected to control the family business while N was alive and active, nor could A have reasonably expected N's paternal bounty to continue, if N no longer considered A to be a dutiful son. It would

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have been quite unrealistic of A to expect that N would continue to be bountiful to him if his family ties were severed. For these reasons, A's reasonable expectations must be looked at in the light of the family relationship.

The remedy granted by the trial judge gave A something which he could never aspire to while N was alive and active — the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy which gives a shareholder something that even he never could have reasonably expected. Moreover, the remedy was punitive in nature as against N insofar as it put at risk the very condition upon which N exercised his bounty in favour of his sons — his total control of the business during his active life. The Act authorizes the court to rectify oppression; it does not authorize the court to punish for it. The second error in this remedy was that it attempted to protect A's interest in the family business as a son and family member, in addition to protecting his interest as a shareholder. The remedy of public sale, which gave A the opportunity to buy the company, enabled him to obtain that control while out of N's favour. This appeared to protect much more than A's interest as a shareholder as such; it protected and advanced, A's interest as a son. Therefore, the trial judge's remedy constituted an error in principle in that it did more than rectify oppression, and it did more than protect A's interest as a shareholder in the companies.

Beyond this, the remedy was also unjust to N. While no one could disparage the productive and devoted work which A put into the business, A's contribution paled when compared with that of N's contribution over forty years. The effect of the relief granted to A was to put N in the position where he was just another person, equal to A, who was entitled to buy the business which he had himself founded and built from nothing. The remedy jeopardized something which A knew was always to be his father's, the right to ultimate control of the business. The remedy gave to A the possibility of taking control of the business, something he knew he could never have during N's lifetime. As such, the remedy was unjust.

The just remedy in this case was that N and B would acquire A's shares of the companies at fair market value, without minority discount. This remedy, together with certain of the other remedies ordered by the trial judge, would have the effect of fully compensating A for the value of the equity given to him by N and for his own contributions to the business. The value of his shares would reflect the success of the business and A's contribution toward that success, as well as the value of the gift of equity which he had received from N. This remedy would put A, insofar as money can, in the position which he would have been in had he not been ejected. It would not give A an opportunity to which he had no reasonable expectation, nor would it put at risk N's right to ultimate control which A knew was a condition of N's gift of equity. The remedy would protect A's interest as a shareholder.

The trial judge awarded A his costs of the trial on a solicitor and client basis. A very large part of the trial involved an attempt by the appellants to defeat A's claim of oppression and to prove that A's job performance and personal life justified his expulsion from the family business. That position greatly prolonged the trial and must have been calculated to humiliate A. Notwithstanding the disagreement with the trial judge upon the appropriate remedy in this case, the trial judge's order of costs at trial should not be interfered with because of that stance by the appellants on the issue of oppression at trial. However, the appellants were entitled to their costs of the appeal because they succeeded on the remedy issue and they did not maintain their untenable defence to the claim of oppression.

Annotation

One usually reads of unfortunate family break-ups in family law cases. This appeal demonstrates that they can also occur in commercial cases.

Thus does Justice Galligan of the Ontario Court of Appeal began his reasons for judgment. The *Naneff* case on appeal is noteworthy for at least four reasons:

(i) it is illustrative of the growing number of family enterprise disputes that are the subject of reported litigation;

(ii) it demonstrates one of the outer boundaries of the oppression remedy: with due allowance to reflect the reasonable expectations of parties in the context of a family business, the remedy is to be granted only in accordance with the same principles as apply in a non-family enterprise setting;

(iii) it confirms the convergence of the "just and equitable" winding up jurisprudence with the statutory oppression remedy cases; and

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(iv) it contains a restatement of the applicable standard of appellate review and shows the deference which the Ontario Court of Appeal accords to the decisions of one of its commercial judges.

1. *Family Enterprise Disputes: Is There an Alternative?*

Increasingly, family enterprise disputes have achieved notoriety, perhaps none greater in the Canadian setting than the McCain family dispute. However, family acrimony that results in litigation is not restricted to dynasties of the highly rich and famous. The recent case of *Kowal v. Bubna* [1] involved an action for the repayment of a $5,000 family loan which was to be conditional on the borrower's becoming financially able to make the repayment. The case of *Borsook v. Broder* [2] involved an inability of a brother and sister to agree on expansion of the family business. The *Safarik v. Ocean Fisheries Ltd.* [3] case, like *Naneff* itself, involved a complainant who was shut out from the enterprise, after a falling out amongst family members.

Apart from the interesting questions of substantive law that these disputes bring forward, they raise in a way that almost no other class of disputes can the question why these families are in court at all. Why did their advisors not put in place from the outset of the business arrangements a comprehensive ADR clause that would permit facilitation, mediation and, only if necessary, binding arbitration? With the possible exception of technology disputes involving valuable confidential information, there can be no other class of business arrangement that cries out so strongly for the settlement of disputes outside the glare of publicity of the courtroom. The good news is that it is never too late to make ADR a part of the family enterprise.

2. *Oppression Remedy in the Family Setting: Business as Usual*

The family business in corporate form is clearly subject to the oppression provisions of the corporation statutes. Oppression is still oppression, even within the confines of the family enterprise. However, *Naneff* is also a useful reminder that these statutory remedial provisions are directed to rectifying oppression, not to punishing it, and that the relief granted must relate to a complainant's status as shareholder, for example, as opposed to his or her interest as a family member. Families being what they are, circumstances change. Today's favourite may be tomorrow's black sheep. It ought not to be the function of corporate law to disturb this dynamic; rather, its function is to reflect what was the reasonable expectation of the parties, in their particular circumstances, when they put the arrangements into effect.

3. *The Convergence of "Just and Equitable" and the Oppression Remedy*

In fashioning what it considers to be the precisely appropriate result, the Ontario Court of Appeal bases its key finding on what were the reasonable expectations of the principals, taken in the context of a family enterprise. As justification for this approach, the Court cites the seminal "just and equitable" case from England, *Ebrahimi v. Westbourne Galleries Ltd.* [4] In this way, the Court is then free to narrow its remedy, in effect, to put the complainant in the position he would have been in, if the oppressive conduct had not taken place, but still leaving open the possibility that the father later might decide to change his plans for dividing his estate.

4. *Standard of Appellate Review and Deference to Trial Judgment*

It is not surprising that an appellate court would restate the standard of review that it considers to be applicable, namely a limited scope of review invoked only when it detects an error in principle or if the remedy ordered below is unjust. However, it is interesting that in invoking this right of review an appellate court would be as highly solicitous as it was of the findings of the trial judge. The "excellent" reasons for judgment of the trial judge were noted by the Court of Appeal, as well as the fact that they "show great sensitivity for the feelings of all of the [Naneff] family members". Further, the Court of Appeal noted its "great deference" to Justice Blair, "who is a distinguished jurist with extensive commercial experience". Presumably these accolades reflect well on the Commercial List as an institution, of which Justice Blair was a sitting member at trial.

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Richard B. Potter, Q.C.

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Mason v. Intercity Properties Ltd. (1987), 37 B.L.R. 6, 59 O.R. (2d) 631, 38 D.L.R. (4th) 681, 22 O.A.C. 161 (C.A.) [leave to appeal to S.C.C. refused (1987), 62 O.R. (2d) ix (note), 28 O.A.C. 320 (note), 87 N.R. 73 (note) (S.C.C.)]*applied*

Mathers v. Mathers (1992), 113 N.S.R. (2d) 284, 309 A.P.R. 284 (T.D.), additional reasons at (1992), 113 N.S.R. (2d) 284 at 310, 309 A.P.R. 284 at 310 (T.D.), reversed (1993), 16 C.P.C. (3d) 16, 123 N.S.R. (2d) 14, 340 A.P.R. 14 (C.A.) — *referred to*

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Statutes considered:

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s. 248 [am. S.O. 1994, c. 27, s. 71(33)]

s. 248(2)

s. 248(3)

s. 248(3)(*j*)

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Appeal from judgment reported at (1994), 16 B.L.R. (2d) 169, 19 O.R. (3d) 691, 73 O.A.C. 334 (Ont. Div. Ct.) allowing in part appeal from judgment reported at (1993), 11 B.L.R. (2d) 218 (Ont. Gen. Div. [Commercial List]), additional reasons at (1993), 11 B.L.R. (2d) 218 at 260 (Ont. Gen. Div. [Commercial List]), further additional reasons at (1993), 11 B.L.R. (2d) 218n (Ont. Gen. Div. [Commercial List]), allowing action under oppression remedy provisions of *Business Corporations Act* (Ont.).

The judgment of the court was delivered by *Galligan J.A.*:

1 One usually reads of unfortunate family break-ups in family law cases. This appeal demonstrates that they can also occur in commercial cases.

2 The appellants appeal, with leave, from a judgment of the Divisional Court ((1994), 19 O.R. (3d) 691) upholding, with one variation, a judgment in the respondent's favour given at trial by Blair J. ((1993), 11 B.L.R. (2d) 218). The respondent's application was for relief under the oppression provisions contained in s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"). The text of s. 248 is set out as a Schedule to these reasons. Blair J. found oppression by the appellants and granted remedies to the respondent. The appellants did not contest the findings of oppression before the Divisional Court and they do not do so before this court.

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A. The Circumstances

3 The facts and the evidence upon which they were found are set out in great detail in the very full reasons for judgment delivered by Blair J. The reasons for judgment show great sensitivity for the feelings of all of the family members. It will do a disservice to those excellent reasons when I briefly summarize the facts. But it is necessary to do so in order to put the issues in the appeal in their factual context.

4 This case involves a family business operated through a number of different companies. For the purposes of my decision, it is not necessary to outline the details of how the companies are owned and controlled nor the way in which they are inter-related. Except where it becomes necessary to refer to specific details of the companies and their holdings, I will refer to them comprehensively as the business, or the family business.

5 Natscho Naneff is the father of the family. In these reasons, I will refer to him as Mr. Naneff. Ingeborg Gina Naneff is the other and I will refer to her as Mrs. Naneff. Alexander Naneff, the respondent in the appeal, is the elder of Mr. and Mrs. Naneff's two children. He is 36 years of age. In the factums filed, he has been referred to as Alex. I will also refer to him by that shortened name. Boris Naneff is now 33 years of age and is the second Naneff son.

6 Mr. Naneff came to Canada from Bulgaria in 1951. He was a graduate civil engineer but because his European degree was not recognized here and because of his limited English, he could not work in his chosen profession. He found work at Inco and settled in Sudbury. He saved his money and after a short time started his own business producing concrete blocks in Sudbury. Through his keen business sense and hard work, Mr. Naneff's enterprise thrived. His business expanded both geographically and in terms of product. It now includes a number of concrete block plants and ready-mix plants in Dowling, Espanola, Elliott Lake, Blind River, Sturgeon Falls and South River. The original plant in Sudbury has been modernized and expanded to include a precast concrete plant. The business either owns or has rights to extract aggregates from gravel pits and quarries in Sudbury, Elliott Lake and North Bay. In North Bay, the business has two concrete block plants, a precast plant and a ready-mix plant. In addition to the original plant in Sudbury, it has a concrete pipe plant and manufactures prestressed hollow core building slabs. It also has a second ready-mix plant and a Kwik-Mix manufacturing plant. Most of this growth and expansion took place well before Alex and Boris became active in the business. In the last year in which Alex was involved in the business, the gross revenues of only some of its companies were well in excess of $23 million.

7 Mr. Naneff has demonstrated a business acumen that is rare in the business world of the 1980s and 1990s. Throughout the history of the business, he has refused to borrow from outside sources and has financed all of the expansion by retaining profits in the business. At the time of the trial, the family business was debt free. Blair J. said (at p. 227):

> Mr. Naneff can be justifiably proud of the thriving business which he has created and fashioned into such a successful enterprise.

8 It was Mr. Naneff's passionate desire that his sons come into the business with him and succeed him in it when he died or chose to retire. To that end, he had both of his sons work in the business, particularly after school, on weekends and during school vacations. He showered his bounty upon them in the form of educational opportunities, flying lessons, vacations, powerful cars, snowmobiles and boats.

9 In 1977, when Alex and Boris were still in high school, Mr. Naneff took the step which is at the root of these unhappy proceedings under the OBCA. By means of an estate freeze with respect to one of his companies, he made his two sons equal owners of all of the common shares of the company through which the business was then being operated. Reorganization took place in 1987 but did not change the effect of the estate freeze.

10 While he gave the equity in his business to his sons, he did not give them control. In fact he retained complete control of the business through redeemable voting special or preference shares. Those shares gave him the right, which he has never ceased to exercise, of complete and final operating control and the right to declare what dividends will be

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paid, when they will be paid, and to whom they will be paid. He has always directed what the recipients of the dividends would do with them. The arrangement ensured that he would have that control for as long as he lived. It is not necessary to set out the details of the estate freeze; what is important, however, is that the effect of it was that Mr. Naneff gave the equity of his business to his sons but retained full, final and ultimate control over it until he died.

11 Alex entered the business fulltime in 1981 and Boris followed him into the business in 1985. They both undertook and executed important responsibilities. There is no doubt that both sons worked hard and effectively. Blair J. found that the business became "a team effort" between father and sons and that it prospered during the years that the three of them worked together. Blair J. also found that Mr. Naneff "remained — and still remains — the ultimate decision maker in these operations" (at p. 229).

12 In 1989 and 1990, dark clouds appeared over this happy family and its prosperous business. Alex's parents began to have legitimate parental concerns about his lifestyle when he was not at work. Coupled with that concern was what the parents considered a far more serious development. Alex began to keep company with a woman of whom Mr. and Mrs. Naneff ardently disapproved. It is unnecessary to recount the details of the parents' attempts to have Alex change his ways nor of Alex's reaction to them. A year of threats and promises, of estrangements and reconciliations, culminated in a family rupture on Christmas Day 1990 which Blair J. described as immediate, traumatic, and unfortunately, lasting (at p. 238):

> Alex was thrown out of the family home. Boris physically threw some of Alex's belongs after him. He was told that he was out of Rainbow [the family business], and that the family was going to teach him a lesson.

The other family members followed through on the threat. As soon as the necessary directors' meetings could be held and the paperwork completed, Alex was removed as an officer of all of the companies comprising the family business and ordered to stay off the business premises. He was excluded from all participation in and management of the business. He was virtually cut off from income from it. Until this litigation was started and an interim order was made in November 1992, all Alex received from the business was $35,000.00.

13 This conduct, and other conduct by Mr. and Mrs. Naneff and Boris toward Alex after December 25, 1990, was found by Blair J. to be oppressive to Alex within the meaning of s. 248 of the OBCA. No appeal is taken, nor could it successfully be taken, from that finding.

14 Before turning to a consideration of the remedies granted to Alex I think this review of the background should be completed by the following extract from the reasons for judgment given by Blair J. (at p. 251):

> The desire — understandable and genuine as it may be — to chastise and correct the actual and perceived failing of a son or brother in his personal life, is not a basis for ignoring the duties and obligations which the parent and sibling owe in their corporate capacities to the son and brother in his corporate capacity. In circumstances such as these, the strictures of the OBCA and of corporate law override the family desires. In their corporate capacity as directors they are required to act in good faith and in the best interests of the company, and not for some extraneous purpose ... [references omitted].
>
> Here, the Naneffs may have felt that their interests as a family in dealing with Alex's perceived failings and the interests of the Rainbow Group in this respect were one and the same. They are not. Alex's personal life had no adverse effect on his business/company life ...

15 I agree that family differences can never justify oppression under s. 248 of the OBCA.

B. The Remedies Ordered by Blair J.

16 The judgment at trial contained a number of specific remedies. The fundamental and most important remedy, contained in paragraph 9, was that the business, i.e. those corporations which comprise it, be sold publicly as a going

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concern with each of or any combination of Mr. Naneff, Alex and Boris being entitled to purchase it. There were remedies contained in paragraphs 4 to 7 inclusive of the judgment which set aside certain changes in corporate structure and other corporate arrangements which were made after Alex was ejected. Those remedies were ordered in an effort to restore the corporate arrangements to the state which they were in at the time of Alex's ejection. One remedy ordered the payment to Alex of his outstanding shareholder's loans to two of the corporations together with interest. There were two other ancillary remedies which I will mention later. I propose to discuss those remedies and give my opinion with respect to their validity.

1. Public Sale of the Companies Forming the Business as a Going Concern

17 Before discussing the merits of the challenge to this remedy, I wish to make brief reference to the principles which guide an appellate court in its review of a remedy ordered under s. 248(3) of the OBCA. Section 248(3) empowers a court upon a finding of oppression to make any order "it thinks fit". When that broad discretion is given to a court of first instance, the law is clear that an appellate court's power of review is quite limited. In *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (C.A.), Blair J.A. set out the governing principle at p. 636:

> The governing principle is that such a discretion must be exercised judicially and that an appellate court is only entitled to interfere where it has been established that the lower court has erred in principle or its decision is otherwise unjust.

18 I approach this issue, therefore, keeping in mind that this court can only interfere with the remedy if it concludes that there was an error in principle on the part of Blair J. or if the remedy in all of the circumstances is an unjust one. It cannot be interfered with, as Carruthers J. said (at p. 701) when giving the judgment of the Divisional Court, "simply because someone else might prefer a different way of going about things". With great deference to Blair J., who is a distinguished jurist with extensive commercial law experience, I regret to say that I have concluded, in the circumstances of this case, that the remedy of public sale of this business amounts to an error in principle and is unjust to Mr. Naneff.

19 At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held, the fact that this is a family business cannot oust the provisions of s. 248 of the OBCA. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals.

20 I have come to that conclusion after considering certain observations made by Lord Wilburforce during the course of his speech in *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.). The statute under consideration, the *Companies Act*, 1948 s. 222, authorized the court to wind-up a company if it was "just and equitable" to do so. In my opinion, the words "just and equitable" convey the same meaning as the word "fit" in s. 248(3) of the OBCA. Lord Wilburforce explained that when this jurisdiction is being exercised, the relationship between the principals should not be looked at from a technical legal point of view; rather the court should examine and act upon the real rights, expectations and obligations which actually exist between the principals. He said at p. 379:

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that *there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure*. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. *It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations;*

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> *considerations, that is, of a personal character arising between one individual and another*, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. [Emphasis added.]

21 Thus, I think any remedy granted under s. 248(3) in this case had to be fashioned so that it was just, having regard to the considerations of a personal character which existed among Mr. Naneff, Alex and Boris.

22 The provisions of s. 248(3) give the court a very broad discretion in the manner in which it can fashion a remedy. Broad as that discretion is, however, it can only be exercised for a very specific purpose; that is, to *rectify* the oppression. This qualification is found in the wording of s. 248(2) which gives the court the power, if it finds oppression or certain other unfair conduct, to "make an order to rectify the matters complained of". Therefore, the result of the exercise of the discretion contained in s. 248(3) must be the rectification of the oppressive conduct. If it has some other result the remedy would be one which is not authorized by law. I agree with the opinion expressed by Professor J.G. MacIntosh in his paper "The Retrospectivity of the Oppression Remedy" (1987-88), 13 Can. Bus. L.J. 219 at 225:

> The private law character of the enactment strengthens the argument, for in seeking to redress equity between private parties the provision *does not seek to punish but to apply a measure of corrective justice*. [Emphasis added.]

23 That opinion was referred to with approval by Glube C.J. in *Mathers v. Mathers* (1992), 113 N.S.R. (2d) 284 (T.D.) at 304, rev'd on other grounds (1993), 123 N.S.R. (2d) 14 (N.S.C.A.).

24 My analysis of s. 248(2) indicates that there is another limit imposed by law upon the apparently unlimited discretionary powers contained in s. 248(3). Section 248(2) provides that when the court is satisfied that in respect of a corporation there is certain specified conduct "that is oppressive, or unfairly prejudicial to or that unfairly disregards the interest of *any security holder*, creditor, *director*, or *officer* of the corporation, the court may make an order to rectify the matters complained of." [Emphasis added.] The expression "security holder" includes a shareholder. Thus, the provision only deals with the interest of a shareholder, creditor, director or officer. It follows from a plain reading of the provision that any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer.

25 In *Stone v. Stonehurst Enterprises Ltd.* (1987), 80 N.B.R. (2d) 290 (Q.B.) Landry J. was called upon to interpret s. 166(2) of the New Brunswick *Business Corporations Act*, whose provisions are the same as s. 248(2) of the OBCA. The company in question was a family company run as a family business. The company decided to sell its assets. A minority shareholder in his personal capacity wanted to buy the assets and bid for them. When the majority shareholder exercised her controlling interest and sold the assets to someone else, the minority shareholder attacked the transaction as being oppressive to him as a shareholder. Landry J. held that the Act protected a person's interest as a shareholder "as such". Basing his opinion on the judgment of Jenkins L.J. in *H.R. Harmer Ltd., Re*, [1958] 3 All E.R. 689 at 698 (C.A.), Landry J. said at p. 305:

> [34] It must be remembered, and it is very important in this case, that it is only the interest of a shareholder *as such*, or of a director or officer *as such* that is protected by this section.
>
> [35] The applicant must establish that his interest *as a shareholder* has been affected. He may of course have other interests, such as being a prospective purchaser of the assets of the company. But it is only the applicant's interest as a shareholder which we must be concerned with in applying s. 166. [Emphasis in original.]

26 I agree with, and adopt Landry J.'s analysis as a correct statement of the law. Persons who are shareholders, officers and directors of companies may have other personal interests which are intimately connected to a transaction. However, it is only their interests as shareholder, officer or director *as such* which are protected by s. 248 of the OBCA. The provisions of that section cannot be used to protect or to advance directly or indirectly their other personal interests.

27 I conclude, therefore, that the discretionary powers in s. 248(3) OBCA must be exercised within two important limitations:

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i) they must only *rectify* oppressive conduct

ii) they may protect only the person's interest as a shareholder, director or officer *as such*.

28 The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals. The cases on this issue are collected and analyzed by Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.) aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.). I agree with his comment at pp. 185-86:

> Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

29 The determination of reasonable expectations will also, in my view, have an important bearing upon the decision as to what is a just remedy in a particular case.

30 The finding made by Blair J. that Alex expected ultimately to be an equal co-owner of the business with his brother cannot be challenged. However, it must be interpreted in the light of two other important and intertwined considerations. The first consideration is that Alex fully understood that until death or voluntary retirement his father retained ultimate control over the business even to the extent of deciding what dividends would be paid and what would be done with any of those dividends. The second consideration is that this was a family business which had been built by his father.

31 The importance of the first of those considerations is that Alex knew that until his father died or retired he could under no circumstances have any right to have or even to share absolute control of the business. Therefore, under no circumstances could Alex's reasonable expectations include the right to control the family business while his father was alive and active. The second consideration is important because, while Alex expected that his father would give him an equal share in the control of the business upon his death or retirement, that expectation was based upon his belief that his father would continue to be bountiful to him in the future. It should have been apparent to Alex that he could not expect that paternal bounty to continue if his father for good reason or bad no longer considered him to be a dutiful son. It would have been quite unrealistic of Alex to expect that his father would continue to be bountiful to him if his family ties were severed. Alex knew that the reason for his father giving him one-half of the equity in the family business was his father's desire for his sons to work with him in his business. He must also have known that it would be impossible for him, Mr. Naneff and Boris to work together in the business as a family if the family bonds ceased to exist. It is for those reasons that Alex's reasonable expectation must be looked at in the light of the family relationship.

32 It is my view that the first error in principle in this remedy is that it did more than simply rectify oppression. As I noted above, the OBCA authorizes a court to rectify oppressive conduct. I think the words of Farley J. in *Ballard*, supra, at p. 197 are very appropriate in this respect:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. *The job for the court is to even up the balance, not tip it in favour of the hurt party*. I note that in *Explo [Explo Syndicate v. Explo Inc.*, a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
> > In approaching a remedy the court, in my view, should interfere as little as possible and *only to the extent necessary to redress the unfairness*.
>
> [Emphasis added.]

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33 The order of Blair J. gave Alex something which he knew he could never have while his father was alive and active — the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy which gives a shareholder something that even he never could have reasonably expected.

34 Moreover, I am unable to view the remedy as anything other than a punitive one towards Mr. Naneff. There was never any doubt among the three men that Mr. Naneff would exercise ultimate control of the family business until he died or retired. Mr. Naneff solidified his right of complete control by the corporate arrangements he put in place at the time of the estate freeze and which he kept in place to the knowledge of his sons throughout the time that the three of them worked together. It is not the task of any court of law to judge the family dispute or to rule upon the justice of the explusion of Alex from the family. However, I am unable to accept as anything other than punitive, a remedy which puts at risk the very condition upon which Mr. Naneff exercised his bounty in favour of his sons — his total control of the business during his active life. The OBCA authorizes a court to rectify oppression; it does not authorize the court to punish for it.

35 The second error in this remedy is that it attempts to protect Alex's interest in the family business as a son and family member, in addition to protecting his interest as shareholder *as such*. As I mentioned above, it is my view that Alex's expectation of ultimately obtaining an equal share of the control of the business with Boris was based upon his expectation of being the continuing object of his father's bounty. That in turn depended upon him remaining in his father's favour and remaining in his father's eyes a member of the family. The remedy of public sale, which gives Alex the opportunity to buy the company, enables him to obtain that control while out of his father's favour. This appears to protect much more than his interest as a shareholder as such; it protects, indeed it advances, his interest as a son.

36 It is my view, therefore, that the remedy imposed in this case constituted an error in principle in that it did more than rectify oppression, and it did more than protect Alex's interest as a shareholder as such in the companies.

37 As well as concluding that the remedy granted to Alex was wrong in principle, it is my view that the remedy was unjust to Mr. Naneff. By the time of Alex's ouster from the business, Mr. Naneff had devoted almost 40 years of his life to creating, nurturing and building the business into a very significant enterprise. Instead of using profits from the business to acquire other personal assets, he used them to finance the growth and expansion of the business. There was never any doubt in the minds of his sons that their father gave them their equity positions upon the understanding that he would retain ultimate control as long as he wanted to exercise it. No one can disparage the productive and devoted work which Alex put into the business. But his nine years of contribution pales to almost insignificance when compared with that of his father's contribution.

38 The effect of the relief granted to Alex is to put Mr. Naneff in the position where he is just another person, equal to Alex, who is entitled to buy the business which he had himself founded and built from nothing. The remedy jeopardizes something which Alex knew was always to be his father's, the right to ultimate control of the business. The remedy gives to Alex the possibility of taking control of the business, something he knew he could never have during his father's lifetime. Having regard to the circumstances of this case this remedy, which jeopardizes the right which everyone knew belonged to Mr. Naneff and which gives Alex the opportunity to take away that right, strikes me as unjust.

39 At trial there were three possible fundamental remedies suggested to the trial judge. One of them was properly rejected out of hand. No more need be said about it. The alternative remedy to public sale of the business as a going concern was that Mr. Naneff and Boris acquire Alex's shares of the companies at fair market value, without minority discount. In my view that was the just remedy in this case. While I find that Mr. Naneff's oppressive conduct should not endanger his right to control the business, neither should he be able to take away what he had given to Alex, or to take away what Alex had contributed to the business. This remedy, together with certain of the other remedies ordered by Blair J., would have had the effect of fully compensating Alex for the value of the equity given to him by his father and for his own contributions to the business. The value of his shares would reflect the success of the business and Alex's contribution toward that success, as well as the value of the gift of equity which he had received from his father. When

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I discuss the remedy respecting the shareholders' loans, it will be seen that when the business was ordered to repay Alex the amounts of his loans, in fact he was receiving his share of the operating profits of the business over previous years.

40 This remedy would be just because it will put Alex, in so far as money can, in the position which he would have been in had he not been ejected. It would not give him an opportunity to which he had no reasonable expectation. It would not put at risk Mr. Naneff's right to ultimate control which Alex knew was a condition of his father's gift of equity. The remedy would protect Alex's interest as a shareholder as such.

41 It is my opinion that paragraph 9 of the trial judgment, which provides for the sale of the appellant companies on the open market as a going concern, cannot be sustained. In its place, I would order that the appellants acquire Alex's shares of the companies at fair market value fixed as of the date of his ouster, December 25, 1990. It is conceded on behalf of the appellants that it would not be fair to apply a minority discount to the market value of Alex's shares. I agree and would order that there be no minority discount when fixing the fair market value of his shares. Alex is also entitled to pre-judgment interest on the value of his shares as provided in the *Courts of Justice Act* from December 25, 1990.

42 In the event that the parties cannot agree upon the value of the shares or to having the value of them fixed in some other way, I would direct a new trial restricted to fixing the value of Alex's shares in the appellant companies as of December 25, 1990. In my view the costs of such a new trial ought to be in the discretion of the judge presiding at it.

2. The Remedies Contained in Paragraphs 4 to 7 Inclusive of the Trial Judgment

43 These remedies all relate to steps taken after December 25, 1990. They are directed to returning the companies to their status as of that date. Because I would set aside the remedy of public sale and direct that the appellants acquire Alex's shares as of December 25, 1990, those remedies are no longer relevant. I would, therefore, set them aside.

3. Lansing Avenue

44 Blair J. directed that Mr. Naneff convey to Alex a certain property on Lansing Avenue in Sudbury. That remedy was varied by the Divisional Court. No appeal was taken from that remedy as varied. It is, therefore, unnecessary to say anything more about it except that I would uphold the judgment of the Divisional Court in so far as it maintained that remedy in its varied form.

4. Repayment of Alex's Outstanding Shareholder's Loans to Rainbow Concrete Industries Limited and to Skead Transport Inc.

45 The only issue now outstanding about this remedy is the date upon which interest on the loans ought to be begin to run. Blair J. held that interest ought to be paid upon them from April 1, 1992. The argument that a later date ought to have been chosen is not persuasive. I would not interfere with the date chosen by Blair J.

46 Strictly speaking, while this is all that need be said about this issue, I think I should outline the way in those loans were created. When Mr. Naneff was of the opinion that sufficient profits had been earned from the business, he would direct that dividends be paid equally to his sons who would then pay the income tax upon them. After the taxes were paid, the amount of the dividends remaining were required to be loaned back by Alex and Boris to one of the companies making up the business. It was out of those transactions that the substantial loan balances were generated in Alex's account. Alex's loan to Rainbow Concrete Industries Limited amounted to just under $835,000 on December 25, 1990 and his loan to Skead Transport Inc. was just under $100,000. Both Alex and Boris had all of their personal expenses of every kind paid by the business and those payments were charged against their loan accounts. In addition, each drew a very modest salary from the business. Thus, it can be seen that the loan balances were Alex's share of profits earned by the business over a number of years. When the appellants were ordered to pay Alex's outstanding shareholders' loans he was being paid his share of profits accumulated in the business.

5. Compensation Akin to Damages for Wrongful Dismissal

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47 Blair J. found that when dismissal is part of an overall pattern of oppression the provisions of s. 248(3)(*j*) of the OBCA authorize payment of compensation to the aggrieved person. He ordered monetary compensation in the amount of $200,000.00. While no challenge is taken to the making of an award, the amount of it is in dispute.

48 It is my view that the evidence justified an award of compensation in the amount of $200,000.00 in this case. I would not interfere with that assessment.

C. Costs

1. Costs of the Trial

49 Blair J. awarded the respondent his costs of the trial on a solicitor and client basis. It is apparent that a very large part of this trial involved an attempt by the appellants to defeat the claim of oppression and to prove that Alex's job performance and personal life justified his expulsion from the family business. Without a doubt, that stance must have greatly prolonged the trial and must have been calculated to humiliate Alex. While I respectfully disagree with Blair J. upon the appropriate remedy in this case, the stance of the appellants on the issue of oppression convinces me that his order of costs at trial should not be interfered with.

2. Costs of the Appeals

50 Because I think the appellants should succeed on the remedy issue and because they have not maintained their untenable defence to the claim of oppression, they are entitled to their costs of the appeals. I would therefore allow them their costs of the appeal to the Divisional Court and to this court, including the costs of the motion for leave to appeal.

3. Costs of the New Trial

51 As indicated above I think that the costs of a new trial, if one is held, should be in the discretion of the judge presiding at it.

D. Disposition

52 For the reasons set out above I would dispose of this appeal on the following basis:

1. I would allow the appeal from the Divisional Court and set aside its judgment except in so far as it upholds with a variation the order of Blair J. relating to the Lansing Avenue property.

2. I would strike out paragraphs 4 to 7 inclusive and paragraph 9 of the judgment of Blair J. and in their place I would order that the respondents acquire all of the shares which the respondent owns in any of the companies making up the family business at fair market value as of December 25, 1990 without minority discount together with pre-judgment interest as provided in the *Courts of Justice Act* from that date.

3. That a new trial be ordered to fix the value of the respondent's shares as provided for in paragraph 2. above. The costs of the new trial to be in the discretion of the judge presiding at it.

4. That in all other respects the judgment of Blair J. be affirmed.

5. That the appellants should have their costs of the appeal to the Divisional Court and to this court including the motion for leave to appeal.

. . . . .

Appeal allowed.

APPENDIX

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Excerpt from the Ontario Business Corporations Act, R.S.O. 1990, c. B.16

248. — (1) A complainant, the Director and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(*a*) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(*b*) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(*c*) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

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

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(*a*) an order restraining the conduct complained of;

(*b*) an order appointing a receiver or receiver-manager;

(*c*) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(*d*) an order directing an issue or exchange of securities;

(*e*) an order appointing directors in place of or in addition to all or any of the directors then in office;

(*f*) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(*g*) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(*h*) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(*i*) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(*j*) an order compensating an aggrieved person;

(*k*) an order directing rectification of the registers or other records of a corporation under section 250;

(*l*) an order winding up the corporation under section 207;

(*m*) an order directing an investigation under Part XIII be made; and

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(*n*) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(*a*) the directors shall forthwith comply with subsection 186(4); and

(*b*) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3)(f) or (g) if there are reasonable grounds for believing that,

(*a*) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(*b*) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Footnotes

1 (1994), 16 B.L.R. (2d) 255, 29 C.P.C. (3d) 92 (Ont. Gen. Div.).

2 (1994), 16 B.L.R. (2d) 265 (Ont. Gen. Div. [Commercial List]).

3 (1995), 22 B.L.R. (2d) 1, 12 B.C.L.R. (3d) 342, 64 B.C.A.C. 14, 105 W.A.C. 14 (C.A.) additional reasons at (1996), 00 B.C.L.R. (3d) 000 (C.A.).

4 [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.).

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Tab 10

CITATION: Pardhan v. Bank of Montreal, 2012 ONSC 2229
COURT FILE NO.: 08-CV-350772CP
DATE: 20120412

2012 ONSC 2229 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
	)	
ALNASIR PARDHAN	)	*Maurice J. Neirinck* and *Michael G. McQuade*, for the plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
BANK OF MONTREAL	)	*Irving Marks* and *Barbara Green*, for the defendant
Defendant	)	
	)	
	)	**HEARD:** January 18, 19, and 20, 2012

C. HORKINS J.

INTRODUCTION

[1] This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*"). The motion was heard together with a motion to certify the companion action of Inayet Kherani v Bank of Montreal ("Kherani action"). Both actions arise out of the same fraud.

[2] Salim Damji ("Damji") committed the fraud ("the Damji fraud"). He represented to prospective investors that he had developed a new teeth whitening product called STS Instant White ("STS"). Thousands of investors gave money to Damji in trust in exchange for shares in STS Inc., pending the sale of STS Inc. to Colgate-Palmolive ("Colgate"). A significant return on the investment was promised. In fact, there was no teeth whitening product, there were no shares in STS Inc., there was no STS Inc. and there was no pending sale to Colgate.

[3] Thousands of investors lost money. In total, Damji defrauded investors of approximately $77 million. On April 26, 2002, Damji was arrested and charged. He pleaded guilty and was

sentenced to 7½ years in jail. Despite the efforts of A. Farber and Partners Inc., a court appointed receiver ("Receiver"), the bulk of the money has not been recovered.

[4] Damji deposited the investors' money into various accounts at the Bank of Montreal ("BMO"). It is alleged that BMO knowingly assisted Damji in his breach of trust, knowingly received the fraudulent funds and/or was negligent in its receipt of these funds.

[5] The plaintiff seeks to certify this action on behalf of the following proposed class:

> All persons (i) who reside in Canada, (ii) who gave monies to or for Salim Damji ("Damji") on account of a fraudulent Damji tooth whitening process promotion variously known as STS Instant White and other STS related names, (iii) whose monies were directly or indirectly deposited into bank accounts of Cash Plus at the Bank of Montreal's Brown's Line and Evans bank branch in the City of Toronto between January 1, 2000, and March 31, 2002, and (iv) who have not recovered all of their said monies.

[6] There are four other proposed class actions arising out of the Damji fraud. Motions to certify these actions are being held in abeyance pending the outcome of the certification motions in the Pardhan and Kherani actions.

[7] These reasons cover two motions: the plaintiff's motion seeking leave to bring this certification motion and the motion to certify this proceeding as a class action.

[8] BMO has two motions that are being held in abeyance: a summary judgment motion and a motion to dismiss the Pardhan action as an abuse of process. BMO served these motions with its responding material for the certification motion. In the case conferences leading up to the scheduling of the certification motions, BMO's intention to bring these motions was not mentioned. It is the practice in class action case conferences that counsel will identify the proposed motions that the parties wish to bring. It is the role of the case management judge under s. 12 of the *Class Proceedings Act* to make orders and directions "respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Given that the scheduled court time was set aside to hear the certification and leave motions in the Pardhan and Kherani actions, it was unrealistic to expect that BMO's motions could be heard on short notice. To the extent the issues in the summary judgment and abuse of process motions are relevant to the s. 5 test, I directed that the matters could be raised, otherwise the motions would proceed on a later date to be fixed by the court.

THE PLAINTIFF'S MOTION FOR LEAVE

[9] It is BMO's position that the plaintiff must seek leave to bring this certification motion because he failed to bring the motion within the time required under s. 2(3)(a) of the *Class Proceedings Act*. Section 2(3) of the Act states:

> A motion under subsection (2) shall be made,

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(a) within ninety days 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.

[10] BMO argues that leave should not be granted for two reasons. First, the plaintiff caused a delay from August 2010 to December 2010 that he has not explained and second, BMO states that the Pardhan action is an abuse of process. For the reasons that follow I grant leave.

The Delay

[11] Courts have noted that the 90 day limit is more frequently honoured in the breach than in the observance. It is an unfortunate reality that certification motions generally do not proceed until long after the statement of claim is issued: see *Lambert v Guidant Corp*., [2009] O.J. No. 1910 (S.C.J.) ("Lambert"); *Turner v York University*, 2011 ONSC 6151; *Turon v Abbott Laboratories Ltd.*, 2011 ONSC 4343. Rarely does a defendant take the position, as in this case, that the plaintiff must obtain leave to bring the certification motion. It is usually agreed that the motion can proceed.

[12] The statement of claim was issued in March 2008 and BMO's statement of defence was delivered on July 4, 2008. Plaintiffs' counsel promptly wrote to the court to request the appointment of a class proceedings judge to manage the actions arising from the fraud. The action was then held in abeyance for about two years while BMO served numerous third parties. BMO completed service of third parties and advised the plaintiffs' lawyers in August 2010 that it was ready to proceed.

[13] However, during the fall of 2010, plaintiff's' counsel was involved in a lengthy trial that ended in late November 2010. As soon as the trial was over, plaintiffs' counsel wrote to request a case conference in this action. From that point forward, the action moved ahead promptly to a certification hearing.

[14] Given that BMO's third party claims caused a two year delay, it is absurd for BMO to suggest that leave should not be granted because of the short delay in the fall of 2010. Further, plaintiffs' counsel has provided a valid explanation for this very short delay (he was involved in a long trial). This is not a case like *Defazio v. Ontario (Ministry of Labour)*, [2005] O.J. No. 5829 (S.C.J.) where the court did not grant leave because the plaintiff's delay was egregious. The delay in this case is insignificant and justified and is not a reason for denying leave.

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Abuse of Process

[15] BMO advances a second reason why leave should not be granted. It argues that the Pardhan action is an abuse of process because an earlier action (the "Mussa action") that sought relief on behalf of plaintiffs who were Damji investors, was dismissed for delay. The abuse of process argument is not made in the Kherani action because that action deals with investor deposits in Damji's personal BMO accounts. The Pardhan and Mussa actions deal with investor monies that were deposited into the BMO Cash Plus account. A review of the history of the Mussa action is set out below.

[16] On August 25, 2005, Ikbal Mussa and Tazim Mussa (the "Mussas") issued a statement of claim against BMO. It was not a proposed class action. The Mussas gave cheques to Damji in trust that were deposited into the BMO Cash Plus account. They alleged negligence, breach of trust and knowing assistance against BMO.

[17] The Mussas were represented by Faskens who at the time also represented the Receiver and a group called the Investor Recovery Group ("IRG"). The Mussas, like Mr. Pardhan, alleged that BMO was responsible for their lost investment.

[18] According to the Receiver's fourth report, if the Mussa action was successful, the IRG "intended to commence negotiations with BMO with respect to claims against BMO by numerous other investors." There is no evidence that BMO agreed that Mussa would serve as a test case. Further, there is no evidence that the thousands of investors that the Pardhan action seeks to protect agreed to abeyance commencement of their own claims and use the Mussa action as a test case.

[19] BMO informed Faskens that it would bring a Rule 21 motion to strike the Mussa action. BMO's lawyers repeatedly attempted to co-ordinate an agreeable motion date, but Faskens did not respond. The motion was not scheduled and BMO did not defend the action pending the Rule 21 motion. After a Status Notice in the Mussa action was issued on December 6, 2007, the Mussas served BMO with a Notice of Change of Solicitors appointing Maurice J. Neirinck & Associates as the Mussas' lawyers in place of Faskens. A Status Hearing was set for January 4, 2008.

[20] On January 2, 2008, Mr. Neirinck delivered a "Fresh Statement of Claim," seeking to amend the Mussa action and convert it from a personal action to a proposed class action on behalf of the following:

> [T]hose persons (i) who reside in Canada, (ii) who issued and gave cheques payable to Damji 'in trust' for the purchase of shares in an alleged corporate entity represented as STS Inc. with an alleged revolutionary teeth whitening product ('the STS Product'), (iii) whose cheques were subsequently endorsed by Damji in favour of and for deposit into the bank account or bank accounts of Cash Plus with [BMO]'s branch at Brown's Line and Evans in the City of Toronto and (v) who suffered losses equal to the amounts of and proceeds from those cheques after the cheques were so negotiated.

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[21] On February 19, 2008, Master Hawkins dismissed the Mussa action and ordered the Mussas to pay the costs of the action fixed in the sum of $7,000 to BMO within 30 days of the order. In his endorsement Master Hawkins stated:

> Amendments which involve the substitution of a party may not be made without leave on the basis of rule 26.02(a). I have therefore disposed of this status hearing on the basis that the amendment of the Statement of Claim on January 2, 2008 over the counter and without leave or notice was ineffective and made without authority. I regard this action as one which is not a class proceeding and which continues to be a Practice Direction Rule 78 action.

[22] The Mussas appealed this order. On March 18, 2008, while the appeal was pending, the Mussas' lawyers served BMO with the Pardhan Statement of Claim. The description of the proposed class in the Pardhan Statement of Claim is identical to the description of the proposed class in the Mussas' proposed Fresh Statement of Claim.

[23] The Mussas did not perfect the appeal and on May 16, 2008, the appeal was dismissed. The Mussas were ordered to pay the costs of the appeal to BMO, fixed in the sum of $750.

[24] The two costs awards were paid to BMO by one cheque, dated July 4, 2008, in the sum of $7,750, drawn on the account of "Mr. Nyaz Jethwani in Trust for IRG/DVG."

[25] BMO argues that the Pardhan action is an abuse of process because it is a second action seeking "identical relief on behalf of the same plaintiffs" as the Mussa action. As a result, leave to bring this certification motion should not be granted.

[26] BMO's position is not accurate. The relief claimed in the Mussa action is not "identical" to the relief claimed in the Pardhan action and the plaintiffs are obviously not the same. In Pardhan, the plaintiff has three causes of action: knowing assistance, knowing receipt and negligence. In the Pardhan action, $50,000,000 in damages is sought for these causes of action and $5,000,000 is sought by way of punitive damages. In Mussa, the same causes of action were alleged but the relief sought was specific to the Mussas' alleged losses. The Mussas claimed damages in the amount of $335,000 as well as punitive damages in an unspecified amount. The sum of $335,000 was the total amount of all payments made by the Mussas to Damji by cheque between February 2000 and December 2001.

[27] The Mussa action was never a class proceeding. Therefore, it did not advance claims on behalf of Mr. Pardhan or the putative class members in the Pardhan action. Mr. Pardhan denies having had any knowledge of the Mussa action when it was proceeding. Since the Mussa action was commenced as a regular action, it does not follow that the Mussas or the IRG were seeking to protect Damji's other victims.

[28] It would be unfair to say that Mr. Pardhan and the putative class cannot pursue this class action when they were not included in or protected by the Mussa action and had no knowledge of the Mussa action while it was proceeding.

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[29] The cases that BMO relies on are distinguishable because they involved the same plaintiff attempting to start a second action seeking the same relief. That is not the situation here.

[30] In summary, I do not accept that the Pardhan action is an abuse of process. Further, there was no unreasonable delay in moving this action forward that would warrant leave being denied. Leave to bring this motion is granted.

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THE CERTIFICATION MOTION

THE EVIDENCE

[31] Before reviewing the evidence, it is important to note the purpose of evidence on a certification motion. Evidence explains the background to the action. A certification motion is not the time to resolve conflicts in the evidence: see *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 at para. 50 (C.A.) ("*Cloud*").

[32] A plaintiff's evidentiary burden on a certification motion is low and 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: see *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 16-26 ("*Hollick*"); *Lambert* at paras. 56-74 (S.C.J.); *Cloud* at paras. 49 -52; *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 at para. 21 (S.C.J.); *Lefrancois v. Guidant Corp*., [2009] O.J. No. 2481 at paras. 13-14 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 4129 (Div. Ct.); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (Nfld. C.A.).

[33] With the exception of the affidavits of Mr. Pardhan and Mr. Kherani, all other evidence was filed for use in the Pardhan and Kherani actions. The following is a review of some of the evidence. As required, further evidence will be reviewed when the certification criteria are considered.

Overview of the Damji Fraud

[34] The Damji fraud started in 1999 and continued until April 26, 2002 when Damji was arrested. During this period Damji collected almost $78 million from thousands of investors (reference to the investors in this judgment means the putative class members). Damji used most of this money for offshore internet gambling.

[35] On May 7, 2002, an action was commenced under the *Class Proceedings Act* by Nyaz Jethwani (the "Jethwani action"). The Jethwani action was commenced against Damji, his various companies and family members to try and recover the monies that Damji took from the victims. The court appointed A. Farber and Partners Inc. as the Interim Receiver ("Receiver") over the assets and property of Damji, STS and others.

[36] The Jethwani action was certified for the purpose of approving a settlement in July 2005. At this time Olympic Sports Data Services Limited and its owner were added as defendants. The Receiver determined that Damji had transferred approximately $11,400,000 of the investors' monies to Olympic Sports, an internet gambling business in Jamaica. Without any admission of

liability, Olympic Sports agreed to pay $1,200,000. The court approved this settlement. No other monies were paid as part of the final settlement of the Jethwani action. Damji's existing assets had already been recovered by the Receiver. It appears that the value of this recovery was applied primarily to the Receiver's costs.

[37] The evidence from the Receiver is relevant to this action. The Receiver retained Intelysis to assist in the investigation of the fraud and specifically focus on the money flowing in and out of the BMO accounts described below. The Receiver and Intelysis gathered significant information about the Damji fraud and the activity in the BMO bank accounts. As the Receiver noted, Damji moved the investors' money around and through the various bank accounts.

[38] The Receiver provided five reports to the court. Intelysis prepared a report dated November 28, 2002 ("Intelysis report"). Either the full report or excerpts from the reports were filed as evidence on the certification motions in the Pardhan and Kherani actions. These reports document the extensive work that has been done to record the investments and track what happened to the money after it was deposited into a BMO account. The evidence from the Receiver and Intelysis is important because it is evidence that thousands of claims can be managed in common.

[39] The Receiver's reports explain that the fraud started in October 1999. Damji opened a bank account at TD Canada Trust and used this account to deposit money that he was collecting from the investors. This continued until August 2000 when Damji ended his banking relationship with TD. Money deposited at this bank is not part of this action.

[40] The Receiver identified 23 bank accounts across Canada into which the investors' money flowed. Most of the stolen money was deposited into the BMO accounts that are the subject of the Pardhan and Kherani actions.

[41] Damji either personally collected money from investors or relied on brokers (also called collectors) to gather the investors' money for him. Investors used cheques, bank drafts and cash to make their investments. The evidence is that cheques were used most frequently. Reference in the class definition to "monies" is intended to capture each mode of payment. Reference in this judgment to cheques includes bank drafts. Either way the monies in issue were deposited into one of the BMO accounts.

[42] The Receiver explained the investors' methods of payment at para. 62 of its second report as follows:

> Investors typically paid by cheques payable to "Dr. Salim Damji", "Salim Damji" or "Salim Damji, in trust". However, some paid by cheques payable to brokers directly. Some brokers who received certified cheques payable to them then presented the certified cheques at a bank and in return secured bank drafts payable to Damji. At least two brokers initially deposited cheques payable to them or corporations they controlled in separate bank accounts and then wrote Damji cheques or purchased bank drafts from funds in their account.

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[43] Some investors paid cash. The Receiver notes that for these investors difficulties may arise in tracking their investments. However, the Receiver reported that many brokers involved "appear to have relatively good contemporaneous records of investments, including cash investments."

[44] The Pardhan and Kherani actions involve different BMO accounts. In the Kherani action the investors' money was deposited into one of Damji's personal accounts at BMO. In August 2000, Damji opened a personal account with BMO at the Ellesmere Road branch (the "Ellesmere account"). He deposited a $297,766 bank draft from the TD account. In late October, Damji opened a second account at BMO at the Lakeshore/Parklawn branch (the "Lakeshore account"). The Lakeshore account became Damji's main bank account. It was close to his home. The Kherani action seeks to protect a putative class of investors whose money was deposited into the Damji BMO accounts. In the Pardhan action, the investors' money was deposited into the BMO account of 1096166 Ontario Ltd., a numbered company that operated as Cash Plus (the Cash Plus account). This BMO account was at the Brown's Line Etobicoke branch. Cash Plus was a company operated by Edward Reeves. The Pardhan action seeks to protect a putative class of investors whose money was deposited into the Cash Plus account.

[45] As will be apparent in this review, the evidence of activity in the BMO accounts is relevant to both actions. Damji used all of the BMO accounts to facilitate his fraud and he transferred money between the Cash Plus account and his personal BMO accounts.

[46] The Receiver and/or Intelysis requested and gained access to voluminous records. This included bank account statements, thousands of cancelled cheques and bank drafts, wire transfers and spreadsheets relating to the investors' money. The Receiver's second report also refers to information received from approximately 400 investors relating to their invested money. Damji's brokers/collectors are described as having kept "relatively good contemporaneous records of investments (including cash investments)". Intelysis also reviewed the books and records of Cash Plus, spreadsheets that the Cash Plus owner prepared detailing Damji's use of the Cash Plus account and transcripts of the Cash Plus owner's examination under oath.

[47] The Receiver's investigation records the source and amount of the deposits into the various BMO accounts and explains where it went. A review of this evidence follows.

Activity in the BMO Cash Plus Account

[48] The following evidence is available from reports of the Receiver and Intelysis.

[49] From January 2000 to March 2002, $54,507,000 was deposited into the Cash Plus account. The evidence refers to one Cash Plus account. On occasion the plaintiff refers to Cash Plus accounts (for example in proposed common issue 5). This appears to be an error. During the above time frame, the Damji deposits constituted the majority of the Cash Plus business. Cash Plus earned $593,869 in fees and interest as a result of Damji's business.

[50] The Receiver tracked the source of the $54,507,000 that was deposited into the BMO Cash Plus account. This money came from the following sources:

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- $46,636,000 from Investors
- $677,000 from collectors that Damji used to collect money from Investors
- $3,773,000 that Damji transferred from his BMO account
- $ 3,122,000 that Damji transferred from a TD account
- $300,000 that Damji transferred from a CIBC account

[51] As noted above, the total value of all investor bank drafts and cheques that Cash Plus accepted for deposit into its BMO account was $46,636,000. This consisted primarily of cheques. More than 90% of these cheques were made payable to Damji "In Trust". Damji endorsed the investor cheques and drafts to Cash Plus. The BMO Cash Plus account was not a trust account.

[52] Investor cheques that were made out to Damji personally and not marked "in trust" were usually deposited into Damji's personal BMO account (primarily the Lakeshore account). These cheques are the subject of the Kherani action.

[53] The Receiver prepared a chart that tracks what happened to the $54,507,000 that Damji deposited into the BMO Cash Plus account. The following is an overview of what happened to most of the money. Damji used $1,631,000 to buy cars and homes, pay for family expenses and pay fees to Cash Plus. He used $2,803,000 to return money to investors who asked for a refund. A total of $18,005,000 was transferred out of the BMO Cash Plus account via Western Union to place bets primarily with Olympic Sports. Damji engaged in a high volume of betting with Olympic Sports. The volume of bets grew with the rapid increase of investor funds in 2000. During a two year period, Damji placed over a thousand bets totaling $78,000,000. The Receiver documented one other significant type of transfer out of the Cash Plus account. Damji transferred a total of $29,658,000 from the Cash Plus account to his personal account at BMO.

Evidence about Damji's Personal Accounts at BMO

[54] While Damji had a personal account at the BMO Ellesmere branch, the bulk of the relevant banking activity occurred in his personal accounts at the Lakeshore branch. At Lakeshore he opened a Canadian dollar account and a US dollar account. As well, he had Mutual Fund accounts in both currencies.

[55] The Receiver documented a "huge volume of deposits" in the Ellesmere and Lakeshore accounts. As stated in the Receiver's second report, BMO records indicate that "Damji cashed and deposited to his account many hundreds (if not thousands) of investor cheques."

[56] A chart that the Receiver prepared confirms that from August 24, 2000 to March 13, 2002, Damji deposited $58,475,000 into his BMO personal accounts. Where did this money come from?

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[57] The receiver identified $12,708,000 of "unknown deposits" and $3,526,000 that came from investors. The report notes that "despite repeated requests, [BMO] has failed to provide supporting documents in order to allow the Interim Receiver to identify the source of a substantial number of deposits" and that the unknown amount likely includes amounts that would be attributable to "Investor Monies".

[58] In addition, the chart shows that $29,658,000 was transferred to Damji's personal BMO accounts from the Cash Plus account, $1,000,000 came from one of Damji's collectors, $3,550,000 came from Olympic Sports and lesser deposits came from other sources.

[59] Where did this money go? The Receiver's chart provides a detailed analysis and I highlight the following. Damji transferred $45,908,000 of the $58,475,000 to Costa Rica into the account of Montanas Magicas (an internet gambling company), he transferred $3,773,000 to Cash Plus and $1,412,000 was returned to investors who asked for a refund.

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BMO's Evidence

[60] Evidence about the Damji and Cash Plus BMO accounts and what BMO did or did not do, comes primarily from the following sources:

- the Receiver/ Intelysis reports (reviewed above)
- The Receiver's examination of Rose Macchione, the Financial Services Manager at the BMO Lakeshore branch
- The affidavit and cross-examination of Murray Dowey, a senior manager at BMO

1. Evidence of Ms. Macchione

[61] The Receiver examined Rose Macchione under oath. The transcript of this examination was filed as evidence on the certification motions in the Pardhan and Kherani actions.

[62] Ms. Macchione has worked in the banking industry for over 25 years. She is the employee at the Lakeshore branch that had the most contact with Damji. Shortly after Ms. Macchione was assigned to the Lakeshore branch she recalls that Damji came in to pay some bills. This was in mid 2000. At the time his account was located at the Ellesmere branch but he lived near the Lakeshore branch.

[63] Ms. Macchione noticed that Damji had approximately $3,000,000 in his Ellesmere account. She asked him if he realized that it was a non-interest bearing account and inquired about whether he wanted to invest the money. As a result of this discussion, Damji opened a Canadian dollar account at the Lakeshore branch and transferred $2,800,000 into it from the Ellesmere account. He opened up a money market account and invested some of this money. At some later point Damji opened a US dollar account because he had US dollar drafts and cheques that he wanted to deposit.

[64] Ms. Macchione recalls that Damji told her he was a dentist or a reconstructive surgeon. She also recalls that Damji told her, Winnie (the Investment Specialist at the branch) and a BMO employee at Private Client Services that he had some teeth whitening products that would be purchased by Colgate.

[65] A week after Damji opened his BMO Lakeshore account, Ms. Macchione reported "large money dealings" (i.e. deposits) in the Damji account to Corporate Security at BMO. She explained that it is standard practice at the bank to make this report because "we have to make sure it's not money laundering, fraud."

[66] During the life of the Damji accounts, it was bank practice to verify bank drafts received for deposit. Ms. Macchione noticed a number of bank drafts being deposited into Damji's account that were related to shares and STS. Damji told Ms. Macchione that these drafts had to do with his teeth whitening product. He also said that he was going to sell the product to Colgate and earn a phenomenal amount of money. Ms. Macchione did not believe Damji because the amount of money was simply too big. As she stated it was "off the wall…too many zeros".

[67] Ms. Macchione faxed copies of all cheques that Damji was depositing to Corporate Security. At some point, Ms. Macchione asked Corporate Security if she had to continue sending the cheques to them. The answer was yes and so she continued to do so.

[68] Ms. Macchione knew that Damji was wiring money out of his BMO Lakeshore accounts to Costa Rica. This started around January 2001 and continued until February 2002. The beneficiary of the wire transfers was Nigel Roberts. For every wire transfer that Damji sent to Nigel Roberts, he gave Ms. Macchione instructions by telephone or fax and asked her to fax confirmation to Nigel Roberts. If she did not send the fax, Nigel would call her to ask why the wire had not been sent. Nigel told Ms. Macchione that he ran an investment firm, that he lived in Los Angeles and travelled to and from Costa Rica. At some point in this time frame, Damji instructed Ms. Macchione to wire the money to Montanas Magicas. She did not know what the wired money was being used for. During the same period of time Ms. Macchione also knew that Damji was wiring funds to Olympic Sports in Jamaica. Damji told her that he was using the money for offshore sports betting.

[69] Ms. Macchione was questioned about her correspondence and discussions with Paul Hitchcock, the head of Corporate Security at BMO. On June 6, 2001, Ms. Macchione wrote to Mr. Hitchcock to bring to his attention an increase in the amount of Damji's wire transfers. She explained that Damji started out with a $100,000 wire transfer and all of a sudden the amount of the wires increased. Mr. Hitchcock had told her to report anything unusual or changes in the account and so she did. Ms. Macchione was also told that if at any time the money was wired to a different location she had to report this to Corporate Security. She did not ask Damji why the wire amounts had increased.

[70] Later in June 2001, Ms. Macchione noticed that Damji was starting to cash in his money market funds and was transferring the money to Costa Rica. Ms. Macchione explained that this

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was “something different” and so she reported it to Mr. Hitchcock and told him that everything else in the Damji account remained the same.

[71] On November 5, 2001, Ms. Macchione reported to Mr. Hitchcock that $1,300,000 was being wired to a new location, the National Westminster Bank in London. The money had come into Damji’s BMO account and there had been a problem with the rate of exchange. The money was recalled and sent back. Damji told Ms. Macchione that the money was being returned because they could not agree on a rate of exchange.

[72] At some point in the fall of 2001, Ms. Macchione called Mr. Hitchcock because she had not heard from Corporate Security. During this telephone call, Mr. Hitchcock told her that she no longer had to send Corporate Security copies of the deposits in the Damji account. However, she was told if “anything unusual comes up” she still had to report it. At Ms. Macchione’s request, Mr. Hitchcock confirmed this instruction in writing.

[73] Ms. Macchione recalled one occasion when Damji presented a cheque for deposit that was marked payable to him in trust dated April 23, 2001. Ms. Macchione explained that BMO stopped payment on this cheque. It was payable to Damji in trust and Damji’s account was not a trust account. Ms. Macchione stated that if a cheque is marked “in trust” then it must go into a trust account. The funds cannot be deposited into a non-trust account. Ms. Macchione was not aware of any other “in trust” cheques that Damji tried to deposit in his personal accounts. When she asked Damji about this cheque, he told her that the reference to “in trust” on the cheque was an error.

[74] At some point in 2002, Rick in Corporate Security asked Ms. Macchione if she knew the name Edward Reeves. She did not but pulled the name up on her computer and saw that he was the signing officer or owner of Cash Plus. Ms. Macchione knew that Cash Plus dealt with another BMO branch and she was aware that Damji had a relationship with Cash Plus. She knew this because Cash Plus had a BMO account at the Browns Line branch. Further, while Damji's accounts were open, Ms. Macchione had put his accounts on referral. This meant that she received a copy of any cheque that Damji wrote on his accounts. As a result, she saw the cheques that he wrote to Cash Plus. She never asked Damji why he was writing cheques to Cash Plus or inquired about his relationship with that company and/or Mr. Reeves. During Ms. Macchione’s examination, she was referred to several cheques that Damji made payable to Cash Plus. Not all cheques were identified on the record. Those that were ranged in value from $50,000 to $100,005.

[75] In January 2002, there was a conference call between Ms. Macchione, her supervisor Steve Bang and Murray Dowey (the Senior Manager in the area). Mr. Dowey told them that he did not feel comfortable with the Damji account and how Damji was dealing with the bank. Dowey said it was a good opportunity for BMO to tell Damji that the account would be closed. Shortly after this call, Damji was notified that his accounts would be closed in 30 days. BMO notified Cash Plus that it was closing the Cash Plus account around the same time.

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[76] Around this time Damji called Ms. Macchione on a Friday and told her that he needed $20,000,000 right away. Ms Macchione was busy so the call was given to her colleague Winnie to handle. Ms. Macchione is not sure what happened except that on Monday Damji did not need the money anymore.

2. Evidence of Mr. Dowey

[77] Mr. Dowey's affidavit provides no evidence about what BMO did or did not do while the fraud was ongoing and the Damji and Cash Plus BMO accounts were open. Instead, this affidavit provides evidence about the various actions that have been commenced as a result of the Damji fraud and the variety of representations that investors heard about the investment opportunity. BMO relies on this evidence to support its position that the Pardhan action is an abuse of process, that the Pardhan and Kherani actions are statute barred and the alleged individuality of the claims (BMO's position is considered in these reasons).

[78] When Mr. Dowey was cross-examined the following minimal evidence was gathered about what BMO did or did not do while the fraud was ongoing and the Damji and Cash Plus BMO accounts were open.

[79] During the relevant time, Mr. Dowey was a senior manager for customer service. He was responsible for a group of BMO branches that included the Lakeshore branch where Damji had his personal accounts and the Browns Line branch where the Cash Plus account was located.

[80] Mr. Dowey recalls that in November 2000, Damji came to his attention as a result of a concern with his accounts at the Lakeshore branch. There was a concern about where the money in the accounts was going. Mr. Dowey did not characterize it as an ongoing problem.

[81] Prior to April 26, 2002 (the date of Damji's arrest), Mr. Dowey did not have any contact with any of the investors who wrote the cheques that were ultimately deposited into the BMO accounts. He is unaware of any such contact occurring between the investors and anyone else at BMO. Further, Mr. Dowey confirmed that before Damji's arrest, BMO did not notify any of the investors whose money was deposited into the Damji or Cash Plus accounts that some wrongdoing had occurred or may have occurred.

[82] Prior to Damji's arrest, there was no contact between BMO and Colgate or the Ontario Securities Commission. There was some contact between BMO and the police but Mr. Dowey was not involved. As Mr. Dowey explained, "We reported something to corporate security. Corporate Security then takes it from there."

[83] Mr. Dowey "thinks" that he was part of the decision to close the Damji accounts. He states that "there was some sort of a pow-wow and we made a decision." Around the same time BMO made a decision to close the Cash Plus account. Mr. Dowey was involved in this decision as well.

[84] Mr. Dowey confirmed that BMO has not done an analysis of the moneys flowing in and out of Damji's personal accounts or the Cash Plus account. As well, there has been no analysis of

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how many cheques payable to and endorsed by Damji or Damji in trust were deposited into the Cash Plus account.

[85] Mr. Dowey's affidavit attaches sample investor cheques payable to Damji in trust that were accepted for deposit in the BMO Cash Plus account. On the back of these cheques is a stamp that reads "Credit only to the account of 1096166 Ontario Limited, Bank of Montreal, Browns Line." The actual BMO account number is included in the stamp. The stamp does not reference Cash Plus.

Mr. Pardhan's Evidence

[86] On August 14, 2001, Mr. Pardhan invested $200,000 to buy what he believed were shares in Damji's company, STS. He heard about the investment opportunity through his uncle who told him that Damji had developed a tooth whitening product that he was going to market with Colgate. As soon as there was a deal between Damji and Colgate, Mr. Pardhan understood that he could expect a return of $20 for each dollar invested. The money would be held in trust by Damji until the deal closed and if the deal did not close Mr. Pardhan's money would be returned to him. Mr. Pardhan decided he would invest on this basis.

[87] Mr. Pardhan met Damji once. On this occasion, Damji told Mr. Pardhan that the bank draft would be his receipt for the investment until Mr. Pardhan received his shares in STS. Mr. Pardhan followed his uncle's instructions and delivered the bank draft made payable to "Salim Damji in Trust" to Damji's condominium. When he arrived Damji was not home. He met Mr. Ladak (one of many collectors that Damji used to gather investors' money). Mr. Ladak did not make any representations to Mr. Pardhan. He simply collected the bank draft. Mr. Pardhan left the bank draft with Mr. Ladak and was not given a receipt.

[88] Between August 2001 and December 2001, Mr. Pardhan checked with his uncle several times to find out what was happening with the STS deal. Each time his uncle told him the deal was pending. He did not discuss his investment with anyone other than his uncle. While Mr. Pardhan remained concerned that nothing was happening with his investment, he did not discuss the matter further with his uncle before Damji's arrest.

[89] After Damji's arrest, Mr. Pardhan heard that a group (the "Investor Recovery Group" or "IRG") was organizing to try and manage the recovery of the stolen money. Mr. Pardhan obtained a copy of his canceled bank draft and gave it to the people that were dealing with "the mess". He heard that there were meetings taking place to discuss what had happened, but he did not attend any of the meetings and did not know who attended.

[90] Prior to starting this action, Mr. Pardhan did not take any steps to recover his lost money because he believed that the IRG was attempting to recover the money back on behalf of all investors.

[91] In mid-to-late 2007, Mr. Pardhan was contacted out of the blue by Mr. Jethwani, a person he did not know. Mr. Jethwani asked him if he would be interested in looking at potential

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problems with a lawsuit. At the request of Mr. Jethwani, Mr. Pardhan contacted Mr. Neirinck, class counsel. This led to Mr. Pardhan agreeing to act as the representative plaintiff in this action.

The Ontario Securities Commission

[92] Documents from the Ontario Securities Commission (OSC) file were obtained through a Freedom of Information request and produced as evidence on the certification motion. The redacted file reveals the following evidence.

[93] In May 2001, two people contacted Colgate and expressed concerns about an investment opportunity that STS had presented to them. The people were told that the investment involved a teeth whitening product that Damji had developed. These people were being induced to invest on the basis that Colgate was in the process of acquiring the teeth whitening product. Of course this was false.

[94] Colgate was concerned about the false representation that was being made about Colgate's connection to this product and the possible ongoing harm to the public. As a result, Colgate wrote to the OSC on May 23, 2001 to bring the "potential regulatory concern" to its attention.

[95] The OSC file contains copies of two letters from Colgate addressed "To All Concerned". The first letter is dated June 5, 2001 and the second June 19, 2001. The letters are the same except that the second letter directs the reader to the OSC investigator to have any questions answered. The letter states:

> The Instant White investment issue was recently brought to our attention since Colgate's name was being used without our knowledge or approval. We have never had any relationship with this company or this product and have subsequently requested the Ontario Securities Commission to look into this matter.

[96] There is no evidence in the OSC file or elsewhere on this motion explaining who this letter was sent to or how it was distributed. Mr. Pardhan never saw the letter and never heard anyone talking about it. Further, none of the investors that Mr. Pardhan knows of received a copy of this letter or ever contacted Colgate.

[97] The OSC file also includes copies of messages posted on the Yahoo message board in 2001. People posting messages talked about the teeth whitening invention and frequently described it as a scam. On September 26, 2001, Damji posted a message to investors and asked that it be passed on to all investors. Mr. Pardhan did not see Damji's posting until it was made available in this action. The message states as follows:

> Due to unforeseen circumstances, I wish to advise at this time that I am unable to provide a definite date for the return of respective investments. As such, please be advised, that I am in a position to return investment funds for those investors who wish to have their initial investment refunded. Should you wish to have your

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> investment refunded, please advise the person you invested through within four days of receipt of this correspondence. After this date there are no guarantees.
>
> I will be more than happy to continue to work with those investors who share my long-term vision of the project and who are able to, financially or otherwise, live without a return on their investment for an indefinite period of time. The concerns expressed to me by some of you over the last few months with regard to the length of the transaction are valid and hence the present to refund funds is being made. For the project to continue successfully however, we cannot have investors who are concerned about timelines. The amount of times my lawyers and I spend in responding to queries and concerns leaves little room for the rest of work at hand. These queries has left me to take a passenger seat until there is a cooperation.
>
> I will not send another e-mail until there is something positive for me to pass on to all investors. Thank you for your consideration in the above matter.

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[98] The OSC commenced an investigation. It had received calls from concerned investors. Several investors were interviewed by telephone. After these interviews, the OSC referred the matter to the RCMP and the Toronto Police and closed their file on September 14, 2001.

THE LEGAL FRAMEWORK

[99] Subsection 5(1) of the *Class Proceedings Act* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

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

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

[100] These requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.) (“*Sauer*”))

[101] Winkler J. pointed out in *Frohlinger* at para. 25 , that the core of a class proceeding is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

[102] The decision to certify is not merits-based. The test must 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 and encouraging them to modify their behaviour: see *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 at paras. 26-29 (“*Western Canadian Shopping”)*; *Hollick* at para. 15.

[103] In *Hollick* at para. 25, the “some basis in fact” test was introduced when the court stated that “the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.”

[104] Since it is not the role of the court on a certification motion to “find facts”, I conclude that *Hollick* directs the court to confirm that there is some evidence to support the s. 5 (b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the “some basis in fact” test: see, for example, *Fresco* at para. 61.

5(1)(a) - Cause of Action

[105] The first criterion for certification is the disclosure of a cause of action. In *Cloud* the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 (“*Hunt*”) that is used for Rule 21 motions is also used to determine whether the proposed class proceeding discloses a cause of action.

[106] Unless the claim has a radical defect or it is plain and obvious that it could not succeed, the requirement in s. 5(1)(a) will be satisfied. This determination is to be made without evidence and claims that are unsettled in the jurisprudence should be allowed to proceed.

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[107] 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: see *Hunt* at 980; *Anderson et al. v. Wilson et al.* (1999), 44 O.R. (3d) 673 at 679 (C.A.).

[108] The plaintiff pleads three causes of action against BMO: knowing receipt, knowing assistance and negligence. Before reviewing these causes of action, I will address BMO's position that the action is statute barred.

Is the Action Statute Barred?

[109] BMO served a summary judgment notice of motion seeking to dismiss this action on the basis that the claim is statute barred. This motion is being held in abeyance because I directed that the certification motions proceed first. However, BMO nevertheless raised the limitations issue in its factum to support its position that the s. 5(1)(a) criterion has not been satisfied.

[110] During the hearing of the certification motion, BMO acknowledged that it is not possible to decide the limitations issue under s. 5(1)(a) because the plaintiff relies on the principle of discoverability. This in my view is the correct approach. Where the resolution of the limitations issue depends on a factual inquiry, such as when a plaintiff knew or ought to have known of the facts constituting the action, the issue should not be resolved at certification: see *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at paras. 140-145. In these circumstances, it is not plain and obvious that the action will fail because of an expired limitation period.

[111] Given this concession, I will briefly outline the limitation issue as it is raised in the pleadings. I agree with BMO's concession that it is not plain and obvious that the claim is statute barred.

[112] The statement of claim was issued on March 13, 2008. BMO filed a statement of defence and in paragraphs 22-23 it pleads the limitation defence as follows:

> 22. The Plaintiff's cause of action, if any, first arose on August 14, 2001, the date of his bank draft to Damji referred to at paragraph 29 of the Statement of Claim (the "Bank Draft"). Accordingly, the applicable limitation period expired on August 14, 2007. As the Statement of Claim was issued on March 13, 2008, the Plaintiff's action is barred by section 45 of the Limitations Act, R.S.O. 1990, c. L.15.
>
> 23. The Plaintiff and the other investors knew or ought to have known of Damji's fraud prior to March 13, 2002.

[113] Mr. Pardhan filed a reply. His lengthy reply to the limitation defence can be summarized as follows. Mr. Pardhan and the putative class did not know about the fraud until after Damji's arrest on April 26, 2002. There is no basis for alleging that they ought to have discovered the fraud before the arrest. Mr. Pardhan and the putative class trusted and believed in the legitimacy of the Damji investment. This is the basis on which they gave money to Damji. Prior to the arrest they had no reason to investigate Damji let alone discover the fraud. Money continued to be

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invested up until the arrest and Mr. Pardhan and the putative class never asked for their money back before the arrest. Damji, Mr. Pardhan and the putative class all belong to the Ismaili community. Their trust and belief in Damji was reinforced by the common community bond.

[114] Mr. Pardhan argues that since the police with all their powers did not charge Damji until April 26, 2002, there is no basis for the defence to say that Mr. Pardhan and the putative class ought to have investigated Damji and discovered his fraud before April 26, 2002. It follows that Mr. Pardhan and the putative class had no basis to believe that they had a claim against BMO. Mr. Pardhan did not discover the basis for the claim against BMO until in or around the fall of 2007. The same applies to the putative class. I note that neither the statement of claim nor the reply provide particulars of why the basis for the claim against BMO was discovered in the fall of 2007.

[115] I will now turn to consider the three causes of action and whether the plaintiff has satisfied s. 5(1)(a). Subject to some minor deficiencies in the statement of claim that I will address, I conclude that criterion 5(1)(a) is satisfied.

Knowing Assistance in Breach of Trust

[116] During the certification motion, the plaintiff's knowing assistance claim was narrowed to knowing assistance in breach of trust. This will require an amendment to the pleading.

[117] Knowing assistance is a cause of action that can result in a stranger to a trust being found liable for a breach of that trust. In order to succeed, the plaintiff must prove that there was a trust, that the trustee (in this case Damji) perpetrated a dishonest and fraudulent breach of trust and that the third party (BMO) participated in and had actual knowledge of the dishonest and fraudulent breach of trust: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 at para. 34 (S.C.C.) ("*Gold*").

[118] The knowledge requirement for "knowing assistance" is actual knowledge, which includes recklessness or willful blindness: *Air Canada v. M&L Travel Ltd*., [1993] 3 S.C.R. 787 at paras. 39-41("*Air Canada*"). Constructive knowledge is not sufficient to establish liability on the basis of knowing assistance.

[119] BMO states it is plain and obvious that the knowing assistance claim will fail for three reasons. First, BMO says that the statement of claim does not allege that a "genuine trust" was established. Second, the knowledge that the statement of claim alleges is either constructive knowledge or the pleading blurs the line between constructive and actual knowledge. Third, BMO states that s. 437 of the *Bank Act*, S.C. 1991, c.46 precludes a claim of knowing assistance of breach of a trust by a non-customer against a bank. For the reasons that follow, I reject BMO's arguments.

1. The Genuine Trust Issue

[120] BMO states that a knowing assistance claim requires that a genuine trust between the settlor of the trust and the trustee exist. If a genuine trust is set up and the trustee then goes on to

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breach the trust in a fraudulent and dishonest way, a knowing assistance claim may be made where the stranger to the trust is alleged to have actual knowledge.

[121] In this case, Mr. Pardhan is the settlor of the trust and he genuinely intended that the investment money would be held in trust. He pleads that he and the class members gave their money to Damji in trust. The money was to be held in trust pending their receipt of shares in STS Inc. However, since the statement of claim pleads that Damji's investment scheme was fraudulent from the start, BMO argues that there never was a genuine trust.

[122] I reject BMO's argument that what they call a genuine trust is necessary to ground a knowing assistance claim. This would unfairly shield a third party who participates in and has actual knowledge of the dishonest and fraudulent breach of trust. Further, case law does not support this restriction on a knowing assistance claim.

[123] In *Eaton v. HMS Financial Inc.*, 2008 ABQB 631 ("*Eaton* "certification motion) and *Eaton v HMS Financial Inc.*, 2010 ABQB 635 ("*Eaton*" summary judgment motion), a knowing assistance claim against a bank was considered in similar circumstances. Investors gave money to a company in trust. From the start the investment was a fraud but of course the investors did not know this. The company was running a ponzi scheme. The plaintiffs alleged that the bank knowingly assisted in the fraudulent breach of trust. The court certified the proceeding as a class action. The bank then moved to dismiss the claim on a summary judgment motion. The motion to dismiss the knowing assistance claim was denied because the Bank failed to establish "beyond doubt that it did not have knowledge of the Ponzi scheme." The fact that a ponzi scheme existed from the start did not preclude the knowing assistance claim. This is apparent from the certification and summary judgment decisions.

[124] It is correct to say that a knowing assistance claim requires that a trust exist. However, the focus is not on whether Damji ever intended there to be a genuine trust. It is the intention of the settlor of a trust that determines its creation.

[125] D. Waters, in *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) discusses the "intention" requirement for the creation of a trust in the following way at p.132-133:

> There is no need for any technical words or expressions for the creation of a trust. Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention, a trust is set up.
>
> [Emphasis added]

[126] Waters cites *Minister of National Revenue v. Ablan Leon (1964) Ltd*., [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.) in support of this statement. In *Ablan Leon*, Heald J. writing for the majority, cites *Kingsdale Securities Co. Ltd. v. M.N.R*, (1975) C.T.C. 10 (Fed. C.A.), where Ryan J. explains that only the settlor can demonstrate the necessary intention to create a trust:

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> 38 In this connection it is instructive to consider the comments of my brother Ryan J. at page 22 of the Kingsdale case (supra) relative to a settled trust. Mr. Justice Ryan said:
>
> > The role of the settlor is, of course, vital in the creation of a settled trust. It is the settlor who transfers to the trustee the property which constitutes the trust fund or res; it is the settlor who vests powers in the trustee. Only the settlor can do these things. Once the trust is established, the participation of the settlor may come to an end, as was contemplated in this case, but only he can bring the trust into existence.
>
> [Emphasis added.]

[127] More recently in *Canada (Attorney General) v. Ristimaki*, [2000] O.J. No. 47 at para. 13 (S.C.J.), the court confirmed that it is the intention of the settlor that is relevant when deciding whether there is certainty of intention:

> An express trust is created only at the will of the settlor and only if he outwardly manifests the intention to create a trust by words written or spoken or by his conduct, (see *Bosse's Estate v. Leck* (1979), 26 N.B.R. (2d) 1 (Q.B.) at p. 13).

[128] In summary, the statement of claim alleges that Mr. Pardhan and the putative class gave the money to Damji in trust. The statement of claim goes on to allege that Damji fraudulently breached the trust by misappropriating and misusing the trust monies for his own purpose. This is sufficient to satisfy the first and second elements of the knowing assistance claim.

2. Constructive v Actual Knowledge

[129] The statement of claim includes a detailed pleading of BMO's participation in and alleged actual knowledge of the fraud. In some instances, the statement of claim pleads actual knowledge, willful blindness and recklessness. This satisfies the third element of this cause of action.

[130] The statement of claim also includes an allegation of constructive knowledge when for example the pleading states that BMO "should have been aware" of the fraud. For the purpose of the knowing assistance claim, reference to what BMO should have been aware of is irrelevant since this reflects constructive knowledge. This, however, is a drafting deficiency that should be corrected and does not alter the conclusion that the claim is otherwise properly plead.

3. Section 437 of the Bank Act

[131] BMO argues that s. 437 of the *Bank Act* precludes a claim of knowing assistance of breach of trust by a non-customer against a bank. The same argument is made for the knowing receipt and negligence causes of action. The following analysis applies to all of the causes of action.

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[132] Subsections 437(3) and (4) state as follows:

> (3) A bank is not bound to see to the execution of any trust to which any deposit made under the authority of this Act is subject.
>
> (4) Subsection (3) applies regardless of whether the trust is express or arises by the operation of law, and it applies even when the bank has notice of the trust if it acts on the order of or under the authority of the holder or holders of the account into which the deposit is made.

[133] The above sections of the *Bank Act* confirm that a bank has no general obligation to monitor its customers' accounts. However this general limitation on a bank's duty does not extend to preclude actions against a bank for knowing assistance, knowing receipt or negligence. BMO relies on several cases that consider the current s. 437 or the predecessor versions of this section. These cases do not support BMO's position as the following review confirms.

[134] BMO relies on the following passage in *Arthur Andersen Inc. v. Toronto Dominion Bank* [1994] O.J. No. 427 at para. 40 where the court discussed ss. 206 (1) and (2), the predecessor to s. 437:

> No one would suggest that a bank has a duty to monitor, on a daily basis, the operation of its clients (even construction clients) merely because it knows that those clients have funds on deposit which may be impressed with a trust – statutory or otherwise. Indeed, ss. 206(1) and (2) of the Bank Act, R.S.C. 1991, c.B-1, specifically state that a bank is not bound to see to the execution of any trust, whether express, implied or constructive, to which any deposit is subject, and that, where a bank has notice of a trust, a receipt or cheque signed by the person in whose name the account stands is a sufficient discharge to all concerned.

[135] However, BMO fails to note that at para. 41, the court went on to state that the section does not offer protection in all circumstances:

> It is not contended in this action that s. 206 represents protection to banks in all circumstances. The real question is: at what stage in its dealings with a customer with trust funds on deposit does a bank's knowledge of its customer's affairs impose a duty on the bank to inquire as to the possible misapplication of trust funds?

[136] I add that in *Citadel General Insurance Co. v. Lloyds Bank Canada,* [1997] 3 S.C.R. 85 at para. 52 ("*Citadel*") this point was repeated. Speaking of s. 206, the court stated as follows:

> …Nonetheless, this provision does not render a bank immune from liability as a constructive trustee or prevent the recognition of a duty of inquiry on the part of a bank. Indeed, in certain circumstances, a bank's knowledge of its customer's

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> affairs will require the bank to make inquiries as to possible misapplication of trust funds.

[137] In *Fonthill Lumber Ltd. v. Anger (c.o.b. Anger Construction Co.) (Trustee of),* [1959] O.J. No.17 (C.A.), s. 96(1) (another predecessor section) was considered. The court specifically recognized that this section did not immunize a bank from liability in the case of knowing assistance. The court explained this point in the following passage:

> The wording of s. 96 (1) of the *Bank Act* is the same as that of s. 56 (1) relating to any trust to which any share of the bank's stock is subject. That provision, of course, is applicable to trusts of which the bank has notice, for there is no responsibility in law for not seeing to the execution of a trust unless the existence of the trust has in some way been brought to the bank's knowledge. In my view, however, the section does not release a bank from liability if it knows not merely of the existence of the trust, but also of the commission of a breach thereof, or of circumstances which should put it on inquiry.

[138] BMO relies on three additional cases to support its position that claims alleging negligence by assisting in a breach of trust are precluded by s. 437 of the *Bank Act*. However these cases do not support BMO's position. In *Keeton v. Bank of Nova Scotia,* 2009 ONCA 662, s. 437 of the *Bank Act* is not even referenced. In *Toronto Dominion Bank v. Mapleleaf Furniture Manufacturing Ltd.,* [2003] O.J. No. 4719 (S.C.J.) claims for knowing assistance and knowing receipt were dismissed because there was no evidence of a trust between the parties. Once again there was no consideration of s. 437 of the *Bank Act*. Lastly, in *Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce,* [1975] B.C.J. No. 1173 (B.C.C.A.) at para. 142, the Court held that there is no duty on a bank to monitor whether a cheque is signed by the proper signing authority for a company. The Court held that it would be onerous and unreasonable to expect a bank to inquire into whether the signature of the payee matches the signature of a corporation's signing officer. Once again, the court did not consider the relevant section of the *Bank Act*.

[139] It is notable that in the various key decisions that discuss the knowing assistance, knowing receipt and negligence causes of action against a bank, s. 437 of the *Bank Act* (or the predecessor) is not described as shielding a bank from these causes of action. If s. 437 of the *Bank Act* shielded a bank from liability as BMO argues, one would expect this to be acknowledged by the numerous courts that have considered these causes of action (i.e. *Air Canada*; *Gold*; *Citadel*; *Dynasty Furniture Manufacturing Ltd. v. Toronto Dominion Bank* 2010 ONSC 436, aff'd 2010 ONCA 514 ("*Dynasty*")).

[140] Lastly, I turn to *Waters' Law of Trusts in Canada* to support my conclusion that s. 437 of the *Bank Act* does not shield BMO from the causes of action in this case. At p. 499 of this text, the learned author discusses the knowing receipt and knowing assistance causes of action. Waters explains that despite the provisions of the *Bank Act*, namely s. 437, a bank still has an "independent obligation, like any other person, not to join in any dishonest and fraudulent design of an express trustee or of a fiduciary." The author explains that pursuant to s. 437 of the *Bank*

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Act, a bank is not liable in contract, or in negligence, to a non-customer upon whom a cheque is drawn in favour of a customer, nor is a bank liable for permitting the withdrawal of money held in a trust account even though the bank knows that the money is held in trust. That said, Waters states clearly that "despite these provisions, a bank is still subject to the general law of knowing receipt and knowing assistance."

[141] In summary, the knowing assistance cause of action is properly pleaded and it is not plain and obvious that this cause of action will fail.

Knowing Receipt

[142] The next cause of action is knowing receipt. Knowing receipt arises in circumstances where the third party has received trust monies for his or her personal benefit. A series of Supreme Court of Canada cases have confirmed the essential elements of a knowing receipt cause of action. To succeed, the plaintiff must prove the following:

(1) That the property received was subject to a trust in favour of the plaintiff (*Gold* at para. 53).

(2) That the property was taken from the plaintiff in breach of the trust. It does not matter if the breach of the trust was fraudulent (*Citadel* at para. 24; *Gold* at para. 48).

(3) That the defendant had knowledge of facts sufficient to put a reasonable person on notice or inquiry of the breach of trust (constructive knowledge) (*Citadel* at paras. 48-49).

(4) That the defendant received the trust property and applied the property for its own use and benefit (*Air Canada at para. 37*).

[143] Mr. Pardhan alleges that he and the putative class members gave money in trust to Damji and Damji breached that trust through his fraudulent scheme. Damji appropriated the trust money to pay for his gambling and personal expenses. To access the trust money, Damji endorsed the investors' cheques to Cash Plus and deposited millions of dollars of trust monies into the Cash Plus BMO non-trust account. From the BMO Cash Plus account, large sums of trust monies were transferred to Damji's personal BMO account and to gambling organizations. Mr. Pardhan alleges that BMO had constructive knowledge of the breach of trust.

[144] It is alleged that BMO used the trust money to enrich itself. In paragraph 41(b) of the statement of claim, the plaintiff alleges that BMO was profiting from the deposits in the accounts as follows:

> BMO did not question the aforementioned endorsing, depositing and disbursing of the Subject Cheques and proceeds therefrom because it was not in BMO's best interests to do so. Cash Plus was suddenly one of, if not the, most important depositor with the BMO Lakeshore Road Branch. BMO was profiting from the

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> deposits of the Subject Cheques into the said Cash Plus BMO account or accounts and the resulting transactions therefrom.

[145] Particulars of the alleged profit are provided at paragraph 44(d) of the statement of claim as follows:

> BMO wrongfully sanctioned, permitted, abetted and even enabled Damji's fraud and breach of trust, thereby took possession of all of the proceeds from the Subject Cheques and disbursed the said proceeds although BMO had no right, title or interest permitting it to do so because the proceeds were beneficially held by the Plaintiff Class, chose to deal with the Subject Cheques and the proceeds therefrom when it had no right to do so, profited from the proceeds from the Subject Cheques and from the uses and transactions which subsequently took place relating thereto including, inter alia, from fees, interest and charges to Damji and Cash Plus and, in return for and in the course of profiting therefrom, wrongfully allowed the proceeds from the Subject Cheques to be totally misappropriated and used to the detriment of the Plaintiff and of the Plaintiff Class

[146] Based on counsel's submissions, I understand the reference to fees and charges to cover typical bank services charges that an account holder is obliged to pay. In other words, Damji and Cash Plus were charged service fees for their accounts and BMO used the trust money in the account to pay for the fees. There is also the broad allegation in paragraph 41(b) that BMO was profiting from the deposit of the trust cheques. The pleading does not explain the circumstances of the interest charge. Nevertheless it is alleged that BMO profited by charging interest.

[147] There are two reasons why BMO states this cause of action should be struck. First, it says that there never was a genuine trust because Damji intended to defraud the investors from the start. As a result, BMO argues that the first element of the cause of action is missing. I have already considered and rejected the "genuine trust" argument.

[148] The second reason focuses on BMO's alleged use of the trust money (the fourth element of this cause of action). BMO states that the pleading does not allege that BMO received any of the funds in its personal capacity and the plaintiff cannot ground a cause of action for knowing receipt by relying on bank service fees.

[149] The statement of claim alleges that Damji and Cash Plus were charged these service fees. Damji of course would not be charged service fees on the Cash Plus account but he would be charged service fees on his personal BMO accounts at the BMO Lakeshore branch. The pleading alleges a connection between the Cash Plus and Damji accounts. It is alleged that "$26,000,000 or so" of the trust money deposited into the Cash Plus account was transferred to Damji's Lakeshore account. This forms the basis for alleging that BMO used the trust money from the Cash Plus account for its own use and benefit when it charged services fees on Damji's personal account.

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[150] The parties disagree on whether bank service fees can ground a knowing receipt claim. BMO argues that they cannot and therefore say it is plain and obvious that this claim will fail and should be struck.

[151] A knowing receipt claim requires the plaintiff to prove that the bank took the trust property and applied the property for its own use and benefit. As the court stated in *Gold* at para. 41, "[t]he essence of a knowing receipt claim is that, by receiving the trust property, the defendant has been enriched" and because the property is "subject to a trust in favour of the plaintiff the defendant's enrichment [i]s at the plaintiff's expense."

[152] It is clear that simply receiving the trust money into the BMO Cash Plus or Damji accounts does not satisfy this fourth element of the cause of action. In *Citadel* at para. 25, the court stated that the bank must apply the money for its own use and benefit, such as using the money to reduce or discharge the customers overdraft:

> In the banking context, which is directly applicable to the present case, the definition of receipt has been applied as follows:
>
> > The essential characteristic of a recipient . . . is that he should have received the property for his own use and benefit. That is why neither the paying nor the collecting bank can normally be made liable as recipient. In paying or collecting money for a customer the bank acts only as his agent. It sets up no title of its own. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit .... [Footnotes omitted.]

[153] If the bank charges the account holder a service fee and takes this fee out of the account, is the bank using the trust property for its own use and benefit? While the enrichment to the bank in this situation seems obvious, the court in *Eaton* came to a different conclusion on the summary judgment motion. At paras. 33-34, the court found that banking service charges are insufficient to ground a knowing assistance claim. The court explained as follows:

> 33 Both at the hearing and in HSBC's subsequent written submissions, the Court was advised that there are no known Canadian authorities that address whether bank service charges are sufficient benefit to ground a claim for knowing receipt. Nevertheless, consideration of this issue must be informed by the character of knowing receipt as a kind of unjust enrichment and by the nature of unjust enrichment as a creature of equity. Iacobucci J.'s comments at para. 49 of Gold are instructive in this regard:
>
> > ... the cause of action in knowing receipt arises simply because the defendant has improperly received property which belongs to the plaintiff. The plaintiff's claim amounts to nothing more than, "You unjustly have my property. Give it back." Unlike knowing assistance, there is no finding of fault, no legal wrong done by the

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> defendant and no claim for damages. It is, at base, simply a question of who has a better claim to the disputed property.
>
> [Emphasis added.]

> 34 Approaching the question from this perspective, it would be inequitable to allow a bank to reduce a defendant's debts to it using misappropriated funds belonging to another party. Thus, for the purposes of knowing receipt claims, such applications of funds have been found to constitute receipt by the bank for its own benefit. By contrast, the amounts charged by CIBC in this case were fees charged for the provision of banking services. There is, in my view, nothing "unjust" about these charges and I find that they are insufficient to ground the claim for knowing receipt.

[154] As the court noted in *Eaton* there are no other decisions that have considered whether bank service fees can ground a knowing receipt claim. With respect to the court in *Eaton*, I do not agree with the result that was reached. The issue is not whether the charge *per se* was "unjust" as stated in *Eaton*. Whether one looks at a debt owing on an overdraft or a service fee that an account holder owes the bank, both are legitimate fees that a bank is entitled to charge the account holder. In each case, the account holder is contractually obliged to pay the debt in the case of an overdraft and pay service fees for the account. The wrong occurs when the bank has constructive knowledge of the breach of trust and uses the trust money to enrich itself.

[155] I see no rational distinction between using the trust money to reduce an overdraft and using the trust money to pay service fees. If the bank is enriched by reducing an overdraft, then clearly it is enriched when it uses trust money in the account to pay the service fee. In fact, the enrichment from a service fee is more apparent than the enrichment that results from the reduction of an overdraft. For example, banks earn interest from customers who have overdrafts. If trust money in the account is used to discharge an overdraft, this may be a disadvantage since the bank will lose the benefit of interest and charges that would have been payable on the overdrawn account. Viewed through this lens, a more compelling case is made for using the service fees to ground the knowing receipt claim. The enrichment that the bank enjoys when it uses the trust money to pay service fees is not subject to this diminishing enrichment problem.

[156] While this point has never been considered in the Canadian cases that discuss knowing receipt, it was discussed by Michael Bryan in his article titled "The Receipt-based Constructive Trust: A Case Study" (1999) 37 Alta. L. Rev. 73-94 as follows:

> 14 The case law on beneficial receipt assumes the application of trust money to reduce an overdraft is financially advantageous to a bank. This will certainly be the case if the customer is doubtfully solvent. But, if the customer is clearly solvent and the overdraft has been arranged for sound commercial reasons, the discharge or reduction of the overdraft may well be disadvantageous to the bank, and it thereby loses the benefit of interest and charges payable on the overdrawn account. This point has been noted by the Australian High Court:

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> [T]he proposition that a financial institution which makes profits by lending money at interest is better off whenever a corporate customer, which is not known to be insolvent, reduces its use of an overdraft facility which has been made available on commercial terms sounds somewhat strangely in modern ears.

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[157] In summary, there is no principled basis for concluding that service fees cannot be used to ground a knowing receipt claim. It is, however, an unsettled area of the law. Matters of law not fully settled in the jurisprudence must be permitted to proceed.

[158] I conclude that this cause of action is properly pleaded. Further, it is not plain and obvious that the knowing receipt claim will fail.

Negligence – Actual and Constructive Knowledge

[159] The third cause of action is negligence. The statement of claim alleges that BMO owed a duty of care to Mr. Pardhan and the class members not to allow the bank's operations to be used for fraudulent purposes. It is alleged that BMO breached the duty when it accepted for deposit the cheques into the Cash Plus non-trust account, failed to make inquires about these monies that were moved to other BMO accounts, transferred elsewhere and/or withdrawn for Damji's use (the allegations are set out in detail in the pleading). As a result, Mr. Pardhan and the class members lost their money.

[160] The statement of claim alleges that BMO had actual knowledge of the fraud, was willfully blind or reckless. As well, it is alleged that BMO had constructive knowledge of the fraud. Constructive knowledge refers to knowledge of facts that would put an honest person on inquiry.

[161] BMO agrees that to the extent the negligence cause of action depends on actual knowledge (that includes willful blindness or recklessness) it is a valid cause of action. This was determined in *Dynasty*. As a result, it is not plain and obvious that this cause of action will fail if the cause of action depends on actual knowledge.

[162] The issue on this motion is whether it is plain and obvious that a negligence cause of action that depends on constructive knowledge will fail. BMO argues that this issue was decided in *Dynasty* and therefore this part of the negligence cause of action will fail and it should be struck.

[163] In *Dynasty*, the plaintiffs invested in high yield certificates of deposit offered by Stanford International Bank ("SIB"), a private bank domiciled in Antigua. It turned out that this was part of a Ponzi scheme and the investors lost their money. TD acted as the correspondent bank for SIB globally with 14 accounts. TD accepted deposits into these accounts from investors dealing with SIB.

[164] The plaintiff in *Dynasty* alleged two categories of negligent activity on the part of the bank: "(1) a failure of TD to verify the legitimacy of SIB's business activities at the time of

opening new accounts for SIB and thereafter to ensure that SIB was not using the bank's facilities to further fraudulent activities; and (2) a failure to conduct a reasonable inquiry after being put on notice of facts suggesting the possibility of a fraudulent scheme." (See para. 65)

[165] A careful consideration of *Dynasty* does not support BMO's position. While the court in *Dynasty* struck the negligence cause of action that was tied to constructive knowledge, it did so on the facts of that case. *Dynasty* does not stand for the proposition that such a cause of action can never proceed.

[166] *Dynasty* was appealed and the decision was upheld. The Court of Appeal expressly stated at para. 9 that it did not "find it necessary to decide whether a bank may ever be found to have a duty to a non-customer in circumstances where it does not have actual knowledge (willful blindness or recklessness) of the fraudulent activities being conducted through an account of its customer." The court left the question of whether such a duty exists to another day. As a result, *Dynasty* does not provide a final answer to the question of whether a bank can be found liable in negligence to a non-customer in the absence of actual knowledge. This is consistent with the court's interpretation of *Dynasty* in *Javitz v. BMO Nesbitt Burns Inc*., 2011 ONSC 1332, 105 O.R. (3d) 279.

[167] If the law does not recognize a duty of care as pleaded in the statement of claim, then it is necessary to determine if a new duty of care should be recognized. This requires the application of the test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 ("*Cooper*") (the "*Anns* analysis") to the facts alleged in the statement of claim.

[168] The plaintiff states that the *Anns* analysis is not required because there are three decisions where the court has recognized a duty in negligence that relies on constructive knowledge: *Semac Industries Ltd. v. 1131426 Ontario Ltd*., [2001] O.J. No. 3443 (S.C.J.) ("*Semec"*), *Vitalaire General Partnership v. Bank of Nova Scotia*, [2002] O.J. No. 4902 ("*Vitalaire*"), and *Dupont Heating & Air Conditioning Ltd. v. Bank of Montreal*, [2009] O.J. No. 386 ("*Dupont*"). Since the facts pleaded in these three cases were less compelling than those in the Pardhan statement of claim, the plaintiff says that it is not plain and obvious that a duty of care does not exist in this case

[169] In my view, it is clear from *Semac*, *Vitalaire*, *Dupont* and *Dynasty* that as between a non-customer and a bank, the law does not categorically recognize that a duty of care is owed when negligence is grounded in constructive knowledge. However, it does not follow that *Semac*, *Vitalaire*, *Dupont* and *Dynasty* can be ignored. The nature of the duty alleged in those cases and the allegations of breach are relevant examples of when a duty may or may not be recognized.

[170] As a result, it is necessary to apply the *Anns* analysis to determine if a duty should be recognized in the circumstances of the case in question. This is the approach the court took in *Semac*, *Vitalaire*, and *Dynasty*. The same approach must be followed in this case to decide if it is plain and obvious that a negligence claim grounded in constructive knowledge will fail. To put it another way, is it plain and obvious that there is no duty owed in this situation?

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[171] The starting point of my analysis is the Pardhan statement of claim and identifying what duty BMO allegedly owed Mr. Pardhan and the putative class. The duty is described three times in the pleading.

[172] In paragraph 41(c) of statement of claim it is alleged that "In the circumstances, BMO had a duty and obligation not to allow Damji to use Cash Plus and its BMO bank account as a vehicle within which to dump the Subject Cheques, launder and cleanse the proceeds from the said Cheques and get his hands on the proceeds from the Subject Cheques."

[173] In paragraph 47(c) it is alleged that "by reason of the allegations already set out above as well as the additional ones set out below (i) BMO owed the Plaintiff and the Plaintiff Class a duty not to harm them or allow them to suffer harm in relation to the Subject Cheques and proceeds therefrom."

[174] In paragraph 47(a) of the statement of claim, it is alleged that "banks such as BMO owe duties to the plaintiff and the Plaintiff Class as drawers of the Subject Cheques to inter alia not allow themselves and their operations to be used for fraudulent illegal or other wrongful purposes."

[175] The alleged duty is grounded in the allegations or "circumstances" set out in the previous paragraphs of the pleading which are set out as follows:

- By October 2000, Damji had deposited $4,000,000 from the investors into his personal account at the BMO Ellesmere branch.

- BMO had concerns about Damji's account at the Ellesmere branch: the reason for the cheques that he deposited, the source, volume and amount of the cheques, the reference marked on the cheques and Damji's use of the monies he deposited.

- The Customer Service Manager at the Ellesmere branch confronted Damji about concerns regarding his banking activity and reported the concerns to Corporate Security. BMO was put on notice by October 25, 2000 that something was wrong with Damji's deposits and related banking activity.

- In late October 2000, Damji opened a personal account at BMO's Lakeshore branch and deposited about $55,000,000 into this account. He began to use it as his primary account.

- Damji was forced to start using the Cash Plus account to deposit cheques and bank drafts marked "in trust" because BMO had refused to accept them for deposit in Damji's personal accounts.

- BMO knew that before Damji started to use the Cash Plus account to deposit the investors' monies, activity in the Cash Plus account generally consisted of modest amounts. BMO was aware that the business of Cash Plus consisted primarily of

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cheque cashing for and payday loans to customers who had little or no financial worth and who lived from pay cheque to pay cheque.

- BMO knew that the deposits from the investors were “completely and totally inconsistent” with prior historical activity in the Cash Plus account.

- BMO was presented with cheques payable to Damji in trust that were endorsed to Cash Plus.

- BMO did not deposit the trust cheques into a Damji trust account but deposited them into the Cash Plus non-trust account. Doing so was contrary to banking industry standards and BMO policies and procedures

- Millions of dollars of trust cheques that were deposited into the Cash Plus account were withdrawn and transferred to gambling organizations. BMO permitted millions of dollars of trust cheques to be transferred from the Cash Plus account to Damji’s personal BMO account. BMO facilitated what they had refused to allow Damji to do: deposit trust monies into his personal account.

- BMO allowed this practice to continue despite “concerns and suspicions” regarding Damji’s BMO personal bank accounts.

- Ms. Macchione confronted Damji regarding her concerns and suspicions about his banking activity and reported this to BMO Corporate Security.

- Ms. Macchione and other BMO Managers at the Ellesmere and Lakeshore branches repeatedly discussed and reported their suspicions and concerns about Damji to more senior BMO employees in BMO Corporate Security. Their suspicions and concerns arose from Damji’s use of the BMO accounts, the source of significant deposits without any apparent source of income or assets, the contradictory explanations that Damji gave BMO and that BMO employees did not believe him. This began as early as October 2000. They never received any assistance or direction from Corporate Security.

- BMO knew there was a connection between Cash Plus and Damji and that significant amounts of monies were withdrawn or transferred out of the Cash Plus account for Damji’s use, including into his personal BMO account, where it was then withdrawn or transferred elsewhere to pay for Damji’s personal and gambling expenses.

- The reference line on many of the cheques that Damji deposited in the BMO accounts described the purpose of the cheque as relating to the purchase of shares in STS.

- BMO never contacted any of the people who issued the cheques to Damji.

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- BMO gave Damji and Cash Plus notice that their accounts would be closed. This allowed Damji to clean out and misappropriate the balance of the monies in these accounts.

[176] The duty that is alleged in the Pardhan statement of claim is specifically grounded in the unique circumstances summarized above. This is not a case like *Dynasty* where the plaintiff asserted a general duty of care described in *Dynasty* at para.35:

> 35 Second, the plaintiffs allege in paragraph 26 that, after the opening of any such accounts, T-D had a duty to ensure that the accounts were not being used for unlawful purposes. This duty is not pleaded as being conditional upon the bank first becoming aware of suspicious circumstances or unusual transactions. Instead, this pleading implies a continuing general duty in favour of third parties dealing with customers of the bank to make inquiries of their customers to ensure the legitimacy of their operations and, in particular, to ensure that the bank's facilities are not used to further fraudulent business activities.
>
> [Emphasis added]

[177] In *Dynasty*, the plaintiff alleged that suspicious circumstances gave rise to a duty of care. It is important to note that the suspicious circumstances in *Dynasty* are far less compelling than those in the Pardhan pleading. Further the pleading in *Dynasty* left unanswered how TD obtained knowledge of the alleged suspicious circumstances. At para. 28 in *Dynasty*, the court described the suspicious circumstances in question:

1. that the TD received deposits on behalf of SIB investors across the world;

2. that SIB accounts were used to move investor funds out of Canada and across the world;

3. that hundreds of millions of dollars were received from investors and transferred to accounts outside of Canada;

4. the large number of such transfers;

5. that funds collected from investors were to be invested in certificates of deposit bearing interest rates in excess of the rates offered by traditional banks, including the TD; and

6. that complaints had been filed by 2003 with the National Association of Securities Dealers in the United States alleging the operation of a Ponzi scheme (although there is no pleading that TD was aware of these complaints).

[178] Mr. Pardhan and the putative class are similar to the investors in *Dynasty*. They did not have an account at BMO just as the *Dynasty* investors did not have accounts at TD. However,

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there is a significant difference between the pleadings in the two cases and the suspicious circumstances that ground the constructive knowledge claim. Unlike the general nature of the alleged duty in *Dynasty*, the duty alleged in the Pardhan statement of claim depends on the unique allegations in that pleading. In particular, Mr. Pardhan and the putative class gave Damji cheques in trust, Damji endorsed the trust cheques to Cash Plus and BMO accepted these cheques for deposit into the Cash Plus account that was not a trust account.

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[179] The duty alleged in *Semac* as in Pardhan, was anchored in specific alleged circumstances. These circumstances warranted the cause of action being sent to trial in *Semac*. In contrast, the lack of such circumstances in *Dynasty* led the court to strike the cause of action. This was noted by the Court of Appeal in *Dynasty* at paras. 7 and 8 as follows:

> 7 The appellants rely on *Semac Industries Ltd. v. 1131426 Ontario Ltd*. (2001), 16 B.L.R. (3d) 88 (Ont. S.C.) to support the position that the struck portions of this claim should proceed to trial so that the question as to whether the court should recognize a duty be decided with the benefit of a full evidentiary record. In Semac the motion judge identified particular circumstances of the claim that, in his view, ought to be dealt with at a trial. These included allegations that the bank had already raised concerns internally about suspicious conduct on the part of its customer, and that the non-customer had subsequently alerted the bank to its allegation of fraud.
>
> 8 No such allegations were pleaded in the appellants' statement of claim and in our view, there are no circumstances disclosed in the claim that warrant the issue going to trial. We would, therefore, not give effect to this submission.
>
> [Emphasis added.]

[180] There are similarities between the allegations in *Semec* and the Pardhan statement of claim. Both allege that bank employees had concerns about the account. The Pardhan statement of claim alleges that from the time Damji opened his accounts, BMO employees repeatedly identified and reported suspicions and concerns to various superiors at BMO. Specific concerns are pleaded about the operation of Damji's personal bank accounts, the sources of the deposits into those accounts, what Damji used the money for, Damji's contradictory explanations, the fact the bank did not believe Damji's explanations, the connection between Damji's use of the Cash Plus account and his personal accounts, the transfer of monies between these accounts, and the transfer of significant amounts of money to gambling organizations.

[181] In *Semac*, the defendant company, Bancroft, had been using a stop payment scheme to defraud the plaintiff suppliers. The plaintiffs sued the bank where Bancroft had its business account for negligent management of Bancroft's account. The plaintiffs pleaded that the bank knew or ought to have known that the plaintiffs would rely on the cheques to their detriment. The bank moved for summary judgment to have the claim against them dismissed.

[182] In *Semec*, there was evidence on the summary judgment motion concerning the fraud (the stop payment scheme). A customer service representative at the bank alerted the branch manager

to the excessive number of stop payment orders that Bancroft had issued on its cheques. There were about 40 such orders. An investigator hired by the plaintiff met with the bank manager to ask about the stop payment orders and advise her that the plaintiff was alleging fraud against Bancroft. Shortly after this meeting, the bank gave Bancroft 30 days notice that its account would be closed.

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[183] In *Dynasty*, the court distinguished *Semac* at para.51, stating that the case was decided on a very specific issue and was actually based on actual knowledge of fraud, not constructive knowledge. I do not agree with this interpretation of *Semec*. The motion to dismiss the negligence claim was denied and the plaintiffs' claims in negligence were directed to proceed to trial. The reasons do not limit this direction to negligence grounded in actual knowledge. While it is true that descriptions of constructive and actual knowledge seem to be spoken of interchangeably in *Semac*, liability for "failing to inquire" when there are "reasonable grounds for doing so" is included in Cameron J.'s definition of the duty. It is clear from the following passage that Cameron J. was dealing with actual and constructive knowledge:

> [66] I am satisfied that the test in Barclays Bank and Silverman Jewellers Consultants Canada Inc. is an appropriate standard to raise the liability. If a bank knows of the customer's fraud in the use of its facilities or has reasonable grounds for believing or is put on its inquiry and fails to make reasonable inquiry, the bank will be liable to those suffering a loss from the fraud. The bank should not be liable unless it is aware of the clear probability of fraud that is the civil standard for finding fraud. A lesser standard would be unfair to the bank and possibly unfair to the customer.
>
> ....
>
> [71] In this case the liability would be limited to the amount of the cheques issued and countermanded between: a) learning of the fraud or, being put on inquiry, failing to make the inquiry ("Constructive Knowledge"); and b) closing the account and terminating the relationship. The Bank would not be liable for N.S.F. cheques if funds are not in the account and is not liable once the account is closed.
>
> [72] The class to whom the duty is owed is not so wide as those contemplated in Hercules and Forsythe. It is limited to suppliers of the customer who present cheques for payment which have been countermanded after the bank acquired Constructive Knowledge of the fraud and prior to the closing of the account and termination of the relationship.
>
> [Emphasis added.]

[184] In *Vitalaire*, the defendant Bank of Montreal ("BMO") brought a motion for an order striking the statement of claim. The plaintiff ("Vitalaire") maintained a bank account ("the BNS account") with the defendant BNS at a branch in Edmonton. The defendant Universal Bancorp Ltd. maintained a bank account ("the BMO account") with BMO at a branch in Toronto.

[185] On March 22, 2000, persons unknown to the plaintiff faxed a document to the defendant BNS at its branch in Edmonton, requesting ostensibly on behalf of the plaintiff that the BNS debit the BNS account and transfer via wire the sum of $452,000 to the BMO account. BNS reacted to the request by debiting the BNS account in the amount of $452,000 and by transferring these funds to the BMO account.

[186] In total there were three faxed requests to wire money. All were fraudulent and were not sent by or on behalf of the plaintiff. The plaintiff had never dealt with Universal and at no time did the plaintiff owe any debts to Universal. As a result of the fraudulent requests and the resulting wire transfers, the plaintiff suffered a loss.

[187] It was alleged that BMO owed a duty to the plaintiff to exercise due care and attention when opening business accounts so as to minimize the likelihood that such accounts could be used for fraudulent purposes, and that in opening the account of the defendant Universal, BMO breached its duty, causing the plaintiff's loss.

[188] The plaintiff alleged that suspicious circumstances existed during the opening of the BMO account and during the wire transactions. It was alleged that BMO as a reasonable banker was, or ought to have been put on its enquiry. It ought to have made additional inquiries not only into the nature of the BMO account, but also into the March 22, 2000 wire transfer. If BMO had made these inquiries, the plaintiff alleged that BMO would have discovered and prevented the fraud.

[189] The reasons in *Vitalaire* do not provide assistance. It is not clear from the decision what was suspicious about the opening of the BMO account. The plaintiff alleged that the size of the wire transfer was unusual when compared to the normal transactions in the account and this ought to have put BMO on its enquiry. The court noted at paras. 21 and 22 that there was "real difficulty with the pleadings" and "no hard facts to ground the claim." Nevertheless, the court found that a bank may owe a duty of care to non-customers in two situations: generally in opening accounts for their own customers and specifically when confronted with circumstances "so unusual or strange as to put a reasonable banker on his or her guard". Since it was not plain and obvious that Vitalaire's case disclosed no reasonable cause of action, the motion to strike the pleading was dismissed.

[190] First, if *Vitalaire* stands for the proposition that a general duty of care is owed to non-customers on the opening of a customer account and that a claim can be advanced absent actual knowledge, this is no longer good law given *Dynasty*. Second, to say that a duty arises from circumstances "so unusual or strange as to put a reasonable banker on his or her guard" is of no assistance because the decision does not reveal what was unusual and strange.

[191] The last decision that the plaintiff relies on is *Dupont*. This was not a Rule 21 motion but rather a summary judgment motion by defendant Bank of Nova Scotia ("BNS") to dismiss the plaintiff's claim against it. The plaintiff employer sued BNS, the bank of its former bookkeeper, who had defrauded the plaintiff of $385,000 by forging cheques to himself to support his gambling habit over a three and one-half year period. The plaintiff forged the signature of the

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employer's president, Muraca, and the cancelled cheques were returned to the employee who shredded them on receipt.

[192] The plaintiff employer alleged that BNS breached its own "Know Your Customer" policy and its obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000 c. 17. It submitted that the frequency of deposits made during the period of the fraud, the apparently random use of multiple ABM machines to make the deposits and the inevitable cash withdrawal following each deposit ought to have alerted BNS that the employee's activity did not meet the profile that it had or ought to have had for its customer, or otherwise should have signaled suspicious activity in the account. The bank argued there was no genuine issue for trial.

[193] The court cited *Semec* and *Vitalaire* as support for the proposition that a bank may in certain circumstances owe a duty of care to detect “indications of fraud in its own customers account.” However, the court concluded that whether a duty of care existed on the facts of that case should be determined on a full evidentiary record. As a result the motion was dismissed.

[194] In summary, while these cases do not eliminate the need to conduct the *Anns* analysis in this case, they do offer some guidance. It is apparent that when general and sweeping allegations of a duty are made, a duty will not likely be recognized. Focused allegations of duty that are anchored in specific conduct are less likely to be struck from a pleading.

The Anns Analysis

[195] It is important to remember that the *Anns* analysis on this motion is being considered under s. 5(1)(a) of the *Class Proceedings Act*. The objective is not to determine if the plaintiff and putative class have a cause of action against the bank for negligence alleging constructive knowledge. The question is whether it is plain and obvious that such a claim will fail. Like a Rule 21 motion, the s. 5(1)(a) assessment is done on the pleadings and no evidence is allowed. The material facts as pleaded are assumed to be true and the pleading is to be read generously.

[196] The first branch of the *Anns* test, requires a consideration of the following questions:

(1) Was it reasonably foreseeable that BMO’s alleged negligence might result in financial loss to the plaintiff/investors?

(2) Was BMO in a close and direct relationship with the plaintiff and putative class making it just to impose a duty of care on BMO to them? (see *Cooper* at para. 42) This is known as the proximity requirement.

[197] The answer to each question is yes. I start with the observation that the alleged circumstances in the statement of claim are unique. The statement of claim alleges a web of suspicious activity that involved Damji at three different BMO branches over almost 2 years. From the outset, BMO employees had concerns about Damji’s banking activity that were reported to Corporate Security. These concerns continued. BMO did not allow Damji to deposit the trust cheques in his personal non trust accounts. This effectively forced Damji to use the

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Cash Plus account to deposit the trust cheques. BMO allowed millions of dollars of trust cheques to be deposited in the Cash Plus account that was not a trust account. Millions of dollars of this trust money was then disbursed as noted above. BMO facilitated what they had refused to allow Damji to do: deposit trust monies into his personal account. In these circumstances, where BMO allegedly failed to investigate and identify the fraud, it was a reasonably foreseeable consequence that investors whose monies were deposited into the Cash Plus account would suffer a loss.

[198] It is reasonably foreseeable that when you allow numerous trust cheques payable to Damji in trust to be deposited into a non-trust account that does not belong to Damji, and then allow these monies to be transferred into Damji's personal non-trust account and/or dispersed directly to gambling organizations that the investors would, in these circumstances, never see their money again and therefore suffer a loss. This is particularly so, when due to concerns about Damji and the cheques, BMO allegedly refused to allow Damji to deposit the trust cheques into his personal BMO accounts which forced Damji to start using the BMO Cash Plus account for deposits.

[199] In *Dynasty*, the court accepted that in the circumstances of that case "the plaintiffs may be able to establish that financial loss was a reasonably foreseeable consequence of a failure of the part of T-D to identify the fraudulent scheme". I find that foreseeability is satisfied since the circumstances in the Pardhan action are more compelling than those in *Dynasty*.

[200] Proximity is the term used to describe the type of relationship that is necessary to ground a duty of care. As stated in *Cooper* at para. 35, "the factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case." At para. 32 of *Cooper* the court stated:

> "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in Donoghue v. Stevenson, supra, at pp. 580-81:
>
> > Who then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[201] The proximity analysis involves a consideration of factors such as expectations, representations, reliance, and property or other interests involved: see *Cooper* at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2003] 3 S.C.R. 129 at para. 23; *Odhavji Estate v. Woodhouse,* 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 50.

[202] As the Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24, per La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering

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> between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]

[203] In *Cooper* at para. 34, provided the following direction when assessing proximity:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[204] In *Dynasty*, the court found that the proximity requirement was not met. At para. 68, the court explained this conclusion:

> Similarly, there is no relationship of proximity to support the alleged duty of T-D to monitor SIB's use of the bank's facilities and/or SIB's business activities in order to ensure the legitimacy of its customer's activities. The only relationship between the plaintiffs and T-D that could be asserted is the very indirect one of a drawer of a cheque that is deposited by the payee SIB in its account at T-D. However, as a correspondent bank, T-D could not know the identities of the parties with whom SIB was doing business nor could it know the purpose of any cheque deposited into SIB's account unless, in either case, it actually conducted an investigation. The proximity requirement of the Anns test requires a much more direct relationship to justify the imposition of a duty of care involving an obligation to investigate the business of a customer of a bank.

[205] As in *Dynasty*, there is no direct relationship between BMO and Mr. Pardhan and the putative class (the investors). The investors in SIB were the drawers of the cheques just as they are in this case. The court in *Dynasty* described this as an indirect relationship in the sense that the cheques were deposited into SIB’s account at the bank.

[206] In *Dynasty*, the court stated that the bank could not be expected to have the plaintiffs in contemplation on the opening of the account, except as members of an “indeterminate class” of persons who “might have business dealings” with the bank’s customer. The court concluded that this was “far too distant and indeterminate a relationship to establish proximity in respect of a claim for financial loss resulting from a failure to make inquiries as to the legitimacy of a new customer’s business.” The court also concluded that a duty to investigate a new customer would expose a bank to guarantor liability for all parties having future dealings with the new customer. The same concerns were identified regarding the alleged duty to monitor the legitimacy of a customer's activities once the account is open.

[207] The allegations in the Pardhan pleading go well beyond what was alleged in *Dynasty*. This is not a case of an indeterminate class of people that might have business dealings with BMO’s customer (Damji). The class of people is restricted to those who were investing with Damji in what they thought was a legitimate business.

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[208] The unique web of banking activity among the BMO accounts distinguishes this case from *Dynasty*. In particular, the statement of claim pleads that BMO became concerned as early as October 25, 2000 about the references on the cheques (many described the purpose or reason for the cheque as relating to the purchase of shares in STS). Further, BMO refused to allow Damji to deposit trust cheques in his personal account at the Ellesmere branch. Damji then opened another personal account at the Lakeshore branch and also started to use the BMO Cash Plus account to deposit the investor trust cheques. It is alleged that Damji was forced to use the Cash Plus BMO account to deposit the investor cheques because BMO had refused to accept the "in trust" cheques for deposit into Damji's personal non trust accounts at the Ellesmere and Lakeshore branches. Damji proceeded to deposit about $46,000,000 of trust cheques in the Cash Plus account.

[209] BMO had ongoing suspicions about Damji's banking activity. BMO knew that there was a connection between Damji's use of the Cash Plus account and his personal BMO accounts. BMO was suspicious about the source of the deposited cheques, the amounts of the deposited cheques, the references on the cheques, the uses Damji was making of the proceeds from the cheques and the volume of the deposits both in terms of number of deposited cheques as well as the totals of the cheques. Management at the branch confronted Damji and reported the concerns to Corporate Security at BMO. BMO did not believe the reason for the cheques being deposited into his personal accounts and yet allowed Damji to use all of the BMO accounts for almost two years to facilitate his fraud and gain access to the funds.

[210] The investor who writes a cheque to Damji in trust expects that it will be deposited into a trust account. That investor has an expectation that a bank in the circumstances of this case will act on the alleged suspicions. It is fair and just to impose a duty of care in these unique circumstances.

[211] In summary, the duty that is alleged is grounded in ongoing suspicious circumstances and the unusual allegations of this case. The investors made their cheques payable to Damji in trust. Since the cheque was presented to BMO for deposit, BMO knew that the person who wrote the cheque intended the money to be held in trust by Damji. It is fair to say that a person who issues a cheque to someone in trust expects that the money will be protected by the trust. The statement of claim pleads that the investors gave their money to Damji in trust for purchase of the shares in STS.

[212] In the unique circumstances set out in the Pardhan claim, the investors are "persons who are so closely and directly affected by [BMO's decisions] that [BMO] ought reasonably to have them in contemplation" when they accepted the trust cheques for deposit in the Cash Plus account and allowed the money to be dispersed back into Damji's personal account and to gambling organizations. This is particularly so given the allegation that BMO had already refused to allow Damji to deposit the trust cheques into his personal BMO accounts, the concerns and suspicions reported by BMO employees at these branches, the large volume of trust cheques that BMO received, the amount of money involved and the transfer of monies from the Cash Plus account to Damji's personal BMO accounts. In these circumstances proximity is satisfied.

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[213] In summary, I conclude it is not plain and obvious that the requirements of foreseeability and proximity are not met.

[214] If foreseeability and proximity are satisfied then a *prima facie* duty of care arises. This, however, is subject to stage two of the *Anns* analysis that requires the court to determine if this duty is "negated by other broader policy considerations." (*Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 12 ("*Childs*")).

[215] Moving to the second part of the *Anns* analysis poses a problem within the context of a s. 5(1)(a) test, because as noted, no evidence is allowed. Once foreseeability and proximity are found based on the pleadings, the burden shifts to the defendant to prove that countervailing policy considerations dictate against a duty of care being found. (See *Childs* at para. 13.)

[216] BMO offered several policy considerations for the second part of the *Anns* analysis but did so in its written argument as follows:

> (a) The proposed duties of care would create the possibility of a bank's indeterminate liability to an undetermined class. In other words, any individual or entity who had transactions with Damji could potentially hold BMO liable for their losses;
>
> (b) The proposed duties of care ignore the specialization of roles in the financial industry. Regulatory authorities are charged with the responsibility for establishing rules to protect against fraudulent participants in the financial system and for supervising the system's use. The investigation and prosecution of such fraudulent activity is conducted by governmental regulatory authorities. The proposed duties of care would impose a significant responsibility on banks that does not currently exist, and is unnecessary in view of the existing regulatory and statutory regime, specifically in light of the *Bills of Exchange Act*, *Proceeds of Crime* legislation and the *Bank Act*;
>
> (c) In *Dynasty* the Court recognized that: "If such duties of care were imposed, banks would be required to establish policies and procedures to identify circumstances suggestive of fraudulent activities and to investigate into such circumstances… To protect themselves, banks would be required to establish policies and procedures to identify circumstances suggestive of fraudulent activities, including possible widespread systematic fraud, and to conduct investigations into such circumstances: an enterprise in which banks have little experience or competence. It is also trite to observe that the cost of compliance would be onerous given the volume and complexity of transactions handled daily by Canadian banks. Ultimately, such cost would be borne by customers and shareholders of the bank";

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(d) The proposed duties of care would effectively transform banks into the "insurer" of parties who invested with bank customers; and

(e) It is unfair and punitive to impose "guarantor liability" on a bank when it was only one of many parties, including governmental bodies, to receive information regarding the alleged fraudulent activities of Damji and Cash Plus, many of whom were charged with the responsibility of protecting the public against fraudulent activities.

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[217] As the court stated in *Williams v Toronto (City)*, 2011 ONSC 6987 (Div. Ct.) ("*Williams*")at para. 47, "a court should be reluctant to dismiss a claim for policy reasons without a full record (see, for example, *Haskett v. Equifax Canada Inc*. (2003), 63 O.R. (3d) 577 (C.A.) at para. 52)." In *Williams*, the motions judge conducted the *Anns* analysis on a certification motion. He found that there was no proximity and went on to assess the policy considerations under part two of *Anns* without the benefit of an evidentiary record. He denied certification because the court concluded that no cause of action existed. This was overturned on appeal because the second part of the *Anns* analysis was conducted without the benefit of an evidentiary record. The case raised a novel issue of law and it was not plain and obvious that the claim would fail. As a result, certification was granted on appeal.

[218] I agree with the result in *Williams*. I have concluded based on the pleadings that foreseeabilty and proximity are established. The parties must be afforded an opportunity to provide evidence as to whether policy concerns should dictate against imposing a duty of care against BMO for negligence based on constructive knowledge.

[219] As a result, all that can be said at this point is that it is not plain and obvious that the cause of action as pleaded will fail. I reach this conclusion based on the above analysis.

[220] In summary the plaintiff has satisfied the s. 5(1)(a) criterion.

5(1)(b)- Identifiable Class

[221] The plaintiffs propose the following class definition:

> All persons (i) who reside in Canada, (ii) who gave monies to or for Salim Damji ("Damji") on account of a fraudulent Damji tooth whitening process promotion variously known as STS Instant White and other STS related names, (iii) whose monies were directly or indirectly deposited into bank accounts of Cash Plus at the Bank of Montreal's Brown's Line and Evans bank branch in the City of Toronto between January 1, 2000, and March 31, 2002, and (iv) who have not recovered all of their said monies.

[222] Subsection 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: see *Bywater v. Toronto Transit Commission,*

[1998] O.J. No. 4913 at para. 10 (Gen. Div.). To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad.

[223] Class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. There simply must be a rational connection between the class member and the common issues: see *Sauer* at para. 32.

[224] In *Hollick*, the Supreme Court of Canada confirmed the test for determining if there is an "identifiable class." The plaintiff must define the class by reference to objective criteria, so that a given person can be determined to be a member of the class without reference to the merits of the action.

[225] During the hearing BMO withdrew its objection to this proposed class definition. I am satisfied that the class definition meets the requirements and objectives set out in the case law above. The some evidence requirement is met. There is an identifiable class of two or more persons. The Receiver's evidence provides evidence that cheques from investors totaling $46,636,000 for investment in STS Inc. were deposited into the Cash Plus account and 90% of these cheques were made out to Damji in trust.

[226] The class definition includes investors whose "monies were directly or indirectly deposited into bank accounts of Cash Plus." The evidence explains the distinction between direct and indirect. Most investors gave their money directly to Damji and he deposited the money into the Cash Plus account. Other investors gave money to Damji indirectly by giving money to a collector who then issued a cheque to Damji that was deposited into the BMO account.

[227] There is a rational connection between the class and the causes of action since each class member whose money was accepted for deposit into the Cash Plus account seeks to hold BMO liable. It is not unduly narrow or broad. A specific time frame is set out to define the scope of the class. Lastly, the class is defined without reference to the merits of the action.

[228] I conclude that the s. 5(1)(b) criterion is satisfied

5(1)(c) - Common Issues

[229] Subsection 5(1) of the *Class Proceedings Act* requires that "the claims or defences of the class members raise common issues." Section 1 of the *Class Proceedings Act* defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts ….

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[230] 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: see *Hollick* at para. 18.

[231] 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: see *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.), aff'd, [2003] O.J. No. 3918 (Div. Ct.).

[232] The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: see *Western Canadian Shopping Centres Inc.* at para. 39.

[233] 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: see *Frohlinger* at para. 25; *Fresco* at para. 21.

[234] 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: see *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.

[235] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that issues are common: see *Hollick* at para. 25. As Lax J. stated in *Fresco* at para. 61 "[w]hile only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one." [Emphasis added.]

[236] Finally, a plaintiff is not required to produce evidence on each element of a cause of action pleaded. As Lax J. stated in *Glover v. Toronto (City)*, [2009] O.J. No. 1523 ("*Glover*") at para. 56: "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."

Proposed Common Issues

[237] The plaintiff asks the court to certify the following common issues:

(1) Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing assistance of Damji with respect to a breach of trust owed to the Class Members?

(2) Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing receipt of monies being defrauded by Damji from the Class Members including trust monies?

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(3) With respect to issues (1) and (2) above, did BMO:

(i) have actual knowledge of Damji's fraudulent conduct?

(ii) did BMO willfully shut its eyes with respect to obvious conduct on the part of Damji?

(iii) did BMO willfully and recklessly fail to make inquiries that an honest and reasonable person would make with respect to Damji and his conduct?

(4) With respect to issues (1) and (2) above, were the monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002, subject to a constructive trust? If yes, should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002?

(5) Did BMO owe a duty of care to the Class Members with respect to (i) monies deposited into the bank accounts of Cash Plus at BMO's bank branch located at Brown's Line and Evans in the City of Toronto, between January 1, 2000, and March 31, 2002, and (ii) BMO's dealings with those bank accounts and/or Damji?

(6) If the answer to issue (5) above is yes, did BMO breach the said duty of care owed to the Class Members?

(7) Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues (1), (2), (3), (4), (5) and (6) above? If so, what is the appropriate measure or amount of such loss or damages?

(8) Were the monies deposited into the bank accounts of Cash Plus at BMO's Brown's Line and Evans bank branch between January 1, 2000, and March 31, 2002, monies which were defrauded from the Class Members and, if yes, is BMO obliged to repay those monies to the Class Members?

(9) Should BMO pay punitive damages to the Class Members? If so, what is the amount of such damages?

[238] Common issues 1, 2, 5 and 6 cover the three causes of action. Common issue 1 covers the knowing assistance cause of action, common issue 2 covers the knowing receipt cause of action and common issues 5 and 6 cover the negligence cause of action. These are stand alone questions that encompass the entire cause of action.

[239] Common issue 3 deals with actual knowledge. The plaintiff links common issue 3 back to the knowing assistance and knowing receipt common issues. First, since the knowing receipt claim only requires constructive knowledge, it is incorrect to link common issue 3 to common issue 2. Second, I question the need for common issue 3. To succeed on common issue 1, the

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plaintiff will have to prove each element of this cause of action. It is unclear why a separate common issue is required for the knowledge element of this cause of action and yet the other elements of the cause of action are not assigned separate questions.

[240] Common issues provide the common issues trial judge with a road map. Clarity is important. There is no apparent reason why a common issue should be assigned to deal with the knowledge issue when each element is a necessary component of the cause of action and must be proven to succeed. There are two solutions: common issue 3 is removed or common issues 1 and 2 are broken down into a set of questions that address each element of the cause of action. I have set out the elements of each cause of action in this decision and this decision will be available to the common issues trial judge. As a result, there is no need to assign a separate question for each element of each cause of action. Common issue 3 is not required.

[241] I will start with common issue 1 and review it on the basis that common issue 3 is unnecessary.

Common Issue 1 –Knowing Assistance

Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing assistance of Damji with respect to a breach of trust owed to the Class Members?

[242] As noted, this cause of action requires that there be a trust and a dishonest and fraudulent breach of that trust. Knowing assistance requires actual knowledge (which includes willful blindness and recklessness) of the breach of trust.

[243] There is some evidence of the first two elements of this cause of action: that a trust between the investor and Damji existed and that Damji breached the trust in a dishonest and fraudulent way. Some evidence of a trust between Damji and the investors is obvious. Numerous investors gave cheques payable to Damji in trust to be held pending their receipt of shares in STS Inc. This is what investors intended. In particular, the Receiver's report states that 90% of the investor cheques given to Damji were made payable to Damji in trust.

[244] BMO argues that, whether a trust existed between Damji and any individual investor and the terms of that trust, is an individual issue that cannot be assessed in common. Specifically, BMO says that not all investors had the same information when they decided to invest in STS Inc. BMO relies on evidence in the OSC file. The OSC investigator spoke to about 10 investors. Her notes of these discussions record that what these investors were told varied on the following points:

- Whether funds would be held in trust
- The timing of the return of the investment
- The quantum of the return on the investment

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- Whether or not the investor was told that Colgate was involved
- The extent of any paperwork received or signed by the investor
- Whether Damji communicated directly with the investor or used a collector
- Whether the investor paid the money directly to Damji in trust or wrote the cheque to the collector who in turn wrote a cheque to Damji

[245] This evidence is a sample of an exceedingly small number of investors. It does not lead me to conclude that common issue # 1 will require an individual inquiry. Whether or not a trust was created depends on three certainties: intention, subject matter and object. There is evidence that 90% of the investor cheques were made payable to Damji in trust (intention), that the subject matter of the investments was STS and that the investors' object was to secure shares in STS Inc. and earn money. It does not matter if, for example, various investors had different expectations about the investment, or whether the investor communicated with Damji or a collector.

[246] There is overwhelming evidence that Damji breached the trust. The STS product and the pending deal with Colgate was a scam. There is evidence that Damji defrauded numerous investors. He was charged with fraud, he pleaded guilty and he was sentenced to jail.

[247] BMO argues that there is no evidence of the knowledge component for the knowing assistance claim. Further, BMO argues that the knowledge component of this cause of action cannot be assessed in common because of the variations in the evidence as noted above. This incorrectly assumes that the plaintiff must prove that BMO knew what each investor was told, the specific variations in this evidence and the specific terms of the trust to the extent such terms varied. In my view, such variations are irrelevant to the knowing assistance cause of action. It does not matter, for example, if some investors believed that they would get a return on their investment sooner than others or earn a higher rate of return. It does not matter if some saw promotional material for STS and others did not. Either way, Damji created a fraudulent scheme that he used to collect money from numerous investors.

[248] The issue in the knowing assistance cause of action is not whether BMO knew about these variations, but rather did BMO have "actual knowledge of the trust's existence and actual knowledge that what [was] being done [was] improperly in breach of that trust" (*Air Canada* at para 39).

[249] There is some evidence that BMO knew of the trust's existence because numerous cheques all marked "in trust" payable to Damji were deposited into the BMO Cash Plus account. There is no evidence of the exact number of cheques made payable to Damji that were deposited into the Cash Plus account. However, BMO conceded during the motion that there were numerous cheques. The Receiver reported that the total value of the investor cheques deposited into the Cash Plus account was $46,636,000. Further, 90% of the cheques were made out to Damji in trust. On each occasion a BMO employee accepted a cheque payable to Damji in trust and deposited it into a non-trust account belonging to Cash Plus.

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[250] Further, there is some evidence that is relevant to whether BMO was willfully blind or reckless. For example, there is evidence from Ms. Macchione that it is bank policy to deposit a trust cheque in a trust account and yet BMO accepted for deposit numerous trust cheques into a non-trust account. There is some evidence that BMO knew what the trust monies were being used for. For example, money was transferred out of the Cash Plus account to offshore gambling organizations and a large amount of the trust money was transferred from the Cash Plus account into Damji's personal BMO account.

[251] There is evidence from Ms. Macchione that she noticed a number of bank drafts being deposited into Damji's account that were related to shares and STS. Damji told Ms. Macchione that these drafts had to do with his teeth whitening product. He also said that he was going to sell the product to Colgate and earn a phenomenal amount of money. Ms. Macchione did not believe Damji because the amount of money was simply too big. As she stated it was "off the wall…too many zeros."

[252] A week after Damji opened the Lakeshore account, Ms. Macchione reported him to Corporate Security at the bank because she had to make sure what he was doing was not money laundering or fraud. Ms. Macchione put Damji's accounts on referral. This meant that she received a copy of any cheque that Damji wrote on his accounts. As a result, she saw the cheques that he wrote to Cash Plus and she knew there was a connection between Damji and Cash Plus.

[253] Whatever the bank did at the Corporate Security level to address this concern was not revealed on this certification motion. What is known is that BMO never contacted any of the investors whose cheques were deposited into the BMO accounts in question.

[254] While the above evidence may not satisfy proof of the knowledge element, it is nevertheless some evidence of BMO's knowledge. However, if I am wrong and this is not some evidence of BMO's actual knowledge, willful blindness or recklessness, it is not fatal to this common issue. BMO agrees that the "some evidence" rule does not require the plaintiff to provide some evidence of each element of the cause of action. Nevertheless, BMO argues that because the knowledge requirement goes to the heart of the action, there is an obligation on the plaintiff to provide some evidence of this knowledge.

[255] BMO's position misconstrues the some evidence test. The plaintiff does not have to provide some evidence of every element of the cause of action: see *Glover*. Further, there is absolutely no authority to support the proposition that one must assess each element of a cause of action, decide which element goes to the heart of the action and then mandate that there must be some evidence to support that element. Frankly this makes no sense. A cause of action has certain elements. To succeed at trial a plaintiff must prove each element of a cause of action, otherwise the claim fails. The court does not weigh the importance of one element over the others. One might be easier to prove, but in the end all must be proven or the claim will fail.

[256] There is also some evidence to support the time frame noted in this common issue. The common issue deals with BMO's conduct between January 1, 2001 and March 31, 2002.

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January 1, 2000 is when Damji started to use the Cash Plus account to deposit the investors' money. March 2002 is when the BMO Cash Plus account was closed.

[257] There is evidence that this common issue can be assessed in common. Damji carried out the fraud in a "common" way as described in the above evidence. For 90% of the investors, the same procedure was followed: the investor issued a cheque payable to Damji in trust, Damji endorsed the cheque to Cash Plus and BMO accepted the cheque for deposit into the Cash Plus BMO account. For those who gave their investment to a collector, that person issued a cheque to Damji and he deposited the cheque into the Cash Plus account. For the few who paid cash, the Receiver notes that there are records documenting cash payments.

[258] Once the trust money was deposited into the BMO account, BMO treated it all the same. It accepted the deposit, never contacted any of the investors whose monies were deposited, asked Cash Plus no questions and allowed the money to be transferred out of the Cash Plus account.

[259] Finally the receiver's reports are further evidence that the common issue can be managed in common. The receiver's detailed analysis tracks the bulk of the money that came into the BMO accounts and records where it went.

[260] In summary, there is some evidence to support common issue # 1 and some evidence that it can be decided in common. I accept common issue #1.

Common Issue 2 –Knowing Receipt

Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing receipt of monies being defrauded by Damji from the Class Members including trust monies?

[261] I refer to my analysis of common issue 1. There is some evidence of the trust and Damji's breach of the trust. As well, there is some evidence of BMO's knowledge of the breach of the trust. Knowledge for this common issue is constructive knowledge (knowledge of facts sufficient to put a reasonable person on notice or inquiry of the breach of trust). The same evidence referred to for common issue 1 applies.

[262] BMO argues that there is no evidence that it applied the trust money for its own use and benefit. However, BMO admits in its statement of defence that it charged "nominal banking fees." While there may not be any other evidence of "fees interests or charges" the admission in the pleading is sufficient to satisfy the some evidence test. In any event, lack of further evidence is not fatal to certification of this common issue because the plaintiff is not required to provide some evidence of every element of the cause of action. The "some basis in fact" test or what is called the some evidence rule is not a requirement to show that the cause of action will probably or possibly succeed: see *Glover* at para 15.

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[263] There is ample evidence that this issue exists as noted above. I have determined that there is some evidence that common issue 1 can be assessed in common. The same evidence applies to support the commonality of common issue 2.

[264] To be clear, I rely on the reasons articulated for common issue 1. I accept common issue 2.

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Common Issue 4 – Constructive Trust

With respect to issues (1) and (2) above, were the monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002, subject to a constructive trust? If yes, should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002?

[265] There are two parts to this common issue: Were the monies subject to a constructive trust and if yes, should BMO be declared a constructive trustee.

[266] The first part of this common issue should be struck. Knowing assistance and knowing receipt require proof that the monies were held in trust. This element of the cause of action speaks to the relationship between Damji, the investor and the money. The case law does not specify the type of trust.

[267] A constructive trust results when a stranger (i.e. BMO, not Damji) to a trust is found liable based on knowing receipt or knowing assistance. It is correct in law to ask if BMO, a stranger to the trust, should be declared a constructive trustee. The constructive trust becomes the remedy or vehicle by which the plaintiff can seek recovery from BMO.

[268] There is some evidence to support this common issue as revised and to show that it can be decided in common. I refer to my analysis for common issues 1 and 2.

[269] I accept this common issue revised as follows: Should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002?

Common Issues 5 and 6 - Negligence

5 Did BMO owe a duty of care to the Class Members with respect to (i) monies deposited into the bank accounts of Cash Plus at BMO's bank branches located at Brown's Line and Evans in the City of Toronto, between January 1, 2000, and March 31, 2002, and (ii) BMO's dealings with those bank accounts and/or Damji?

6 If the answer to issue 5 above is yes, did BMO breach the said duty of care owed to the Class Members?

[270] These common issues focus on the conduct of BMO. The investors are similarly situated in their relationship with BMO: they are not BMO customers and all came to have contact with BMO because their monies were deposited into the BMO account.

[271] The statement of claim pleads negligence and alleges actual and constructive knowledge. Common issues 5 and 6 do not distinguish between actual and constructive knowledge. The common issues trial judge will have to be alert to this distinction and consider the negligence cause of action in two stages: actual knowledge and constructive knowledge.

[272] The negligence cause of action grounded in actual knowledge is a valid cause of action. However, if it is grounded in constructive knowledge the court must conduct the *Anns* analysis to decide if on the facts of this case a duty of care in law should be recognized. Unlike the *Anns* analysis conducted for the purpose of s. 5(1)(a), the trial judge will have the benefit of an evidentiary record.

[273] There is some evidence that this common issue exists and that it can be decided in common. The Receiver's reports and the report from Intelysis offer evidence that the investors' monies were deposited into the Cash Plus account during the time frame in question.

[274] There is evidence that the investors provided their cheques, bank drafts and/or monies for investment in the same fraudulent scheme. The Intelysis report states that in addition to marking their cheques in trust, investors noted on their cheques that they were purchasing shares of STS.

[275] For all of the investors, Damji used BMO's banking facilities to effect his fraud. He used the Cash Plus BMO account to deposit the money and then arranged to have the money disbursed out of the Cash Plus account for his benefit to the detriment of the investors.

[276] BMO's response when the cheques, bank drafts and/or monies were presented for deposit into the Cash Plus account was the same. The deposits were accepted, put in the BMO Cash Plus non-trust account and then disbursed primarily to Damji's personal BMO accounts or to feed his personal needs such as gambling. BMO never contacted any of the investors whose money was deposited into the BMO accounts.

[277] There is evidence from Ms. Macchione that it is bank policy that a trust cheque must be deposited into a trust account. The Receiver provides evidence that 90% of the cheques were marked "in trust" and each was deposited into this Cash Plus account. Further, Ms. Macchione was aware of the connection between Damji and Cash Plus. She noticed a number of bank drafts being deposited into Damji's account that were related to shares and STS.

[278] Ms. Macchione monitored Mr. Damji's account and frequently reported her concerns to Corporate Security. I refer to the evidence detailed above regarding the concerns of Ms. Macchione and others at BMO about Mr. Damji.

[279] In summary, there is some evidence to support these common issues and show that they can be decided in common. I accept common issues 5 and 6.

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Common issue 7 - Damages

Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues (1), (2), (3), (4), (5) and (6) above? If so, what is the appropriate measure or amount of such loss or damages?

[280] This common issue focuses on whether a loss occurred and, if so, how to measure the loss. BMO did not dispute this common issue. Reference to common issue 3 should be deleted.

[281] There is ample evidence to show that this common issue exists and can be decided in common. The Receiver's reports provide evidence that the investors suffered a loss. The class invested millions of dollars. The Receiver's reports trace the flow of the money from the investors into the Cash Plus account. The money is then traced out of the Cash Plus account to a variety of sources that benefited Damji (primarily into his personal BMO account and to gambling organizations). The Receiver documents the inability to recover the bulk of the money.

[282] Mr. Pardhan describes his loss and states that he has been contacted by many other investors who lost their money. As well, investors who were interviewed by the Toronto Police and the OSC state that they did not get their money back after giving it to Damji.

[283] If BMO is found liable, the appropriate measure of damages can be identified on a class basis. In the statement of claim Mr. Pardhan seeks return of the investors' monies that were deposited into the BMO Cash Plus account. The extensive banking records and the Receiver's review and investigation of these records are evidence that this issue can be decided in common.

[284] In summary, there is some evidence to support this common issue and show that it can be decided in common. I accept common issue # 7

Common Issue 8

Were the monies deposited into the bank accounts of Cash Plus at BMO's Brown's Line and Evans bank branch between January 1, 2000, and March 31, 2002, monies which were defrauded from the Class Members and, if yes, is BMO obliged to repay those monies to the Class Members?

[285] This common issue asks two questions. While BMO did not dispute this common issue, it is problematic and unnecessary. The first question seeks to classify or trace the monies deposited into the Cash Plus account as money that was defrauded from the class members. If the answer to the first question is yes, then the second question asks if BMO is liable to repay the monies to the class.

[286] Dealing with the first question, the trial of common issues 1, 2, 5 and 6 will require the plaintiff to prove that monies deposited into the Cash Plus account originated from the class and that Damji defrauded the investors of this money. There is already a significant amount of evidence from the Receiver tracking the money. The plaintiff did not explain why this common issue is required. I appreciate that this is a factual question that must be asked at trial. It would

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have to be answered in the affirmative for the plaintiffs to succeed. I would expect that such a finding of fact would be part of the trial judge's analysis of the liability common issues.

[287] Turning to the second question, BMO's liability to the class is the subject of specific common issues dealing with knowing assistance, knowing receipt and negligence. There is no purpose served in asking generally if BMO is liable to repay the monies.

[288] I reject this common issue.

Common issue 9 – Punitive Damages

Should BMO pay punitive damages to the Class Members? If so, what is the amount of such damages?

[289] BMO did not dispute this common issue. This question focuses on whether punitive damages should be awarded and, if so, how much. Evidence of the underlying loss is available. Investors lost millions of dollars. Assuming the plaintiffs succeed and recover damages, this will ground the punitive damage claim. Since the entitlement to punitive damages will focus on BMO's systemic behaviour, this issue is quite capable of being managed on a common basis.

[290] I accept this as a common issue.

5(1)(d) - Preferable Procedure

[291] Subsection 5(1)(d) of the *Class Proceedings Act* requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[292] The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues: see *Cloud* at para. 73; *Hollick* at paras. 27-28; and *Markson* at para. 69.

[293] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: see *Hollick* at para. 29.

[294] The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

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[295] BMO argues that a class proceeding is not the preferable procedure for three reasons: there are too many significant individual issues, access to justice is not met because Mr. Pardhan has a claim that is worth a lot of money and behaviour modification is not met because certification in this case will "turn the banks into police." For the reasons explained below, I reject BMO's position.

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Too Many Individual Issues

[296] BMO states there are three individual issues that support the position that a class action is not the preferable procedure: proof that there was a trust, contributory negligence and the limitation period defence/discoverability.

1. Was there a Trust?

[297] I have already rejected BMO's argument that the determination of a trust in this case is an individual issue. Further, the existence of a trust is not required for the negligence cause of action.

2. Contributory Negligence

[298] BMO argues that particulars of the contributory negligence in this case include:

(i) Was there was a lack of due diligence in making the investment?

(ii) What was the investor's investment experience?

(iii) Did the investor have an investment advisor?

(iv) Was there was a lack of due diligence in monitoring the investment?

(iv) Was the investor's response reasonable having regard to whether the investor had notice of the Colgate Letter?

(v) Was the investor's response reasonable having regard to whether the investor had notice of Damji's Email?

(vi) Was the investor's failure to demand a refund in the circumstances reasonable?

[299] BMO offered no authority to support the argument that a claim of contributory negligence is an individual issue that makes this case unsuitable for certification. In fact, there are authorities that support the principle that contributory negligence is not a defence to intentional torts and arguably negligence as pleaded in this action. These authorities are briefly set out below not for the purpose of deciding the issue on this motion, but to explain why I reject BMO's position.

[300] Waters asserts in his text, *Waters' Law of Trusts in Canada*, that contributory negligence cannot be raised as a defence to a claim based on a breach of trust or fiduciary duty: see *Waters*, at p. 500. Turning to the case law, in *Eaton* at para. 104 of the reasons for certification, the court stated that contributory negligence is not a defence to intentional torts:

> ...for intentional torts, such as fraudulent misrepresentation (or knowing assistance and knowing participation), contributory negligence cannot be asserted as a defence: Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2), [2003] 1 A.C. 9 59, at para. 18; Wilson v. Bobbie, [2006] A.J. No. 19, at paras. 20-1 (Slatter J.); and Keleman v. El-Homeira, [1999] A.J. No. 1279 (C.A.), at para. 26, leave to appeal dismissed, [2000] S.C.C.A. No. 4015;

[301] In a footnote to this decision, the court noted that the above cases cited in support of the conclusion did not explicitly refer to knowing assistance and knowing receipt. The court concluded, however, that even if it is possible that contributory negligence is an issue that requires determination, it did not change the decision to certify the action.

[302] Lastly, I refer to *Toronto Dominion Bank v. Mapleleaf Furniture Manufacturing Ltd*., [2003] O.J. No. 4719 at para.38, where the Court noted that contributory negligence could not be alleged when the plaintiff bank had acted based on fraudulent misrepresentations made to it:

> The assertion in (a) above that the bank was negligent with respect to the making or monitoring of the loan is, at law, clearly without merit where, as here, fraudulent material misrepresentations were made to the bank. In such circumstances the entitlement of the victim would not be reduced by contributory negligence, even if the latter were proved.

[303] It is apparent from these authorities that BMO cannot assume contributory negligence is relevant. Even if the defence of contributory negligence is available, it does not lead me to conclude that a class proceeding is not the preferable procedure. The liability common issues can be determined without reference to contributory negligence. If the class succeeds on one or more of the liability common issues and if BMO is still pursuing contributory negligence against the class members, the common issues trial judge will have to decide if contributory negligence applies or not. If the class does not succeed on any of the liability common issues, then the contributory negligence issue is moot. Managing the contributory negligence issue in this way will allow significant common issues to go forward and be decided in a fair, efficient and manageable way.

3. Limitation Period/Discoverability

[304] As already noted, BMO pleads that the claims are statute barred. The principle of discoverability is triggered and for this reason, BMO argues that the issue becomes individual and militates against finding that a class proceeding is a preferable procedure. To determine discoverability BMO says that each class member must be asked the following:

(1) Did the investor know of the Colgate Letter? If so, when?

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(2) Does knowledge of the Colgate Letter constitute the investor's discoverability?

(3) Did the investor know of the Email? If so, when?

(4) Does knowledge of the Email constitute the investor's discoverability?

(5) What other information, if any, was provided to the investor?

(6) What was the investor's expected date for receipt of payment?

(7) What inquiries did this investor make once the date passed with no payment received?

(8) What other inquiries did the investor make?

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[305] There is limited information on this certification motion about the Colgate letter and Damji's email. The representative plaintiff did not learn about them until he started this action. None of the putative class members that he has spoken to knew about this letter. Copies of the Colgate letters (June 5 and 19, 2001) simply appear in the OSC file. How the Colgate letter was circulated (assuming it was) and to whom is unknown. Damji's email dated September 26, 2001 appears to have been posted on the Yahoo message board. There is no evidence on this motion about whom this email reached. There is evidence from the Receiver's reports that money continued to flow into the BMO accounts after the dates of the Colgate letters and Damji's emails.

[306] Based on the scant evidence that is available, it is not clear that the discoverability issue will become individual. The possibility that discoverability may require an individual inquiry is not a reason to deny certification. The Ontario Court of Appeal addressed this issue in *Pearson v. Inco*, [2005] O.J. No. 4918 at para.63 as follows:

> [I]t is now clear as a result of this court's decision in Cloud, supra, at paras. 61, 81-82 and 95, that the possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

[307] Recently, the Court of Appeal again addressed this issue in *Smith v. Inco*, 2011 ONCA 628, 107 O.R. (3d) 321 at para.165:

> 165 Other certification decisions have recognized that discoverability is often an individual issue that will require individual adjudication after the common issues are determined. Indeed, when this court certified this action, Rosenberg J.A. referred to the possibility of individual limitation defences: see Pearson v. Inco Limited (2005), 78 O.R. (3d) 641, at para. 63. On the trial judge's findings, the applicability of the Limitations Act as he characterized its applicability was not a common issue.

[Emphasis added.]

[308] A class action is a fair, efficient and manageable way to manage the claims of thousands of investors. The three goals of a class action are met. The goal of judicial economy will be achieved if this action is certified as a class proceeding. This is a case where the resolution of the common issues will materially advance each class members' claim. The issues that are common to all class members should be decided in one action. The class will share the costs of gathering evidence and retaining experts. It would be uneconomical, inefficient and prohibitively expensive for individual investors to pursue BMO on their own. No useful purpose is served by requiring a multiplicity of thousands of individual proceedings. This would result in excessive and unnecessary expense for the class members and the judicial system.

[309] BMO argues that access to justice is not achieved with a class action because the value of Mr. Pardhan's investment was significant ($200,000). As a result, BMO says that it would have been worthwhile for him to have pursued an individual action. I reject this argument. First, there are many class actions where the value of the class members' claims have been similar (the tainted blood class actions and the residential school class action) and yet access to justice is still achieved by the class action. BMO's position completely ignores the real cost of litigating. The cost of litigating an individual action would quickly exceed the value of Mr. Pardhan's loss.

[310] Further, many investors have claims less than $5,000. Of the 3,700 investors identified to date, 2,000 of them gave Damji less than $5,000. It is fair to say that most, if not all of these 2,000 investors, would not bother advancing individual actions. The class action gives thousands of investors the opportunity to share the daunting expense of litigation. In my view, access to justice is achieved.

[311] A class proceeding will also achieve the goal of behavior modification. If BMO is found liable, it will motivate banks to change their behaviour and undertake reasonable inquiries and/or take protective measures in circumstances such as this case.

[312] I conclude that criterion 5(1)(d) is satisfied.

5(1)(e) – A Representative Plaintiff with a Workable Litigation Plan

[313] The final requirement for certification is that there be a representative plaintiff who will fairly and adequately represent the interests of the class, has produced a suitable litigation plan and does not have a conflict of interest on the common issues, with other class members. The capability of the proposed representative to provide fair and adequate representation is an important consideration. The standard is not perfection, but the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interest of the class ..." (*Western Canadian Shopping Centres* at para. 41).

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The Representative Plaintiff

[314] BMO argues that Mr. Pardhan is not a suitable representative plaintiff for three reasons: he is merely a nominee of the IRG, there is no evidence that Mr. Pardhan is able to bear the costs of this litigation and his health interferes with his ability to properly instruct counsel.

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1. The IRG

[315] The IRG was created shortly after Damji's arrest. It acted as a liaison between the investors and the Receiver. The IRG was run by Nyaz Jethwani.

[316] In 2007, Mr. Jethwani contacted Mr. Pardhan "out of the blue" and asked him to contact Mr. Neirinck about the possibility of obtaining recovery of his stolen monies. Mr. Pardhan had no prior relationship with Mr. Jethwani. BMO argues that Mr. Pardhan has little independent knowledge about the matters set out in his affidavits, other than knowledge of his own personal investment. He was recruited by the IRG and is simply their nominee.

[317] The role of the IRG in directing this action was addressed in an email to BMO from class counsel. Speaking about the six proposed class actions, counsel stated as follows:

> While there are six representative plaintiffs … they are not the only people with whom we are dealing in this matter. The 'class' so to speak is represented by what we call the Investor's Recovery Group ('IRG'), and they are the people with whom I have the most dealings/receive most of my instructions… .

[318] The recruitment of a representative plaintiff is a factor to consider in determining whether the plaintiff has the necessary interest, independence and incentive to fulfill his duties to the class. It is also a factor to be considered in assessing whether there is indeed an underlying class with an actual grievance, as opposed to an issue identified by the industry of counsel.

[319] The fact that the class representative is recruited is not fatal. As Strathy J. stated in *Singer v. Schering-Plough Inc*., 2010 ONSC 42, 87 C.P.C. (6th) 276 at para. 221, "not many people wake up in the morning and decide that they want to start a class action. They may well need the encouragement of experienced counsel to take up the cudgels and put their name to a worthy cause."

[320] I see no problem with the fact that the IRG recruited the representative plaintiff. There is a real underlying class with an actual grievance. The IRG itself is not a person. It cannot act as a representative plaintiff. Clearly, it had to find someone to act in this role. Mr. Pardhan is a genuine plaintiff with a real loss. He accepted the request to act as the representative plaintiff and is motivated to prosecute the claim. It is clear from his affidavit that he appreciates the responsibility. Mr. Pardhan has famiarlized himself with the issues in the claim and the steps that will be taken in this class action. His claim is the same as those in the class: they all lost money in the Damji fraud and their monies were all deposited in the BMO account. He is motivated to pursue the claim on his own behalf and on the behalf of the class.

2. Bearing the Costs of the Litigation

[321] BMO argues that Mr. Pardhan is not a suitable representative plaintiff because there is no evidence that he can bear the cost of his own lawyers' fees which are estimated to exceed $500,000.

[322] BMO relies on the following passage in *Western Canadian Shopping Centres* at para. 41 where Chief Justice McLachlin suggested that the capacity of the proposed representative to bear costs is a relevant consideration:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
>
> [Emphasis added.]

[323] Cullity J. considered the above paragraph from *Western Canadian Shopping Centres* in *Mortson v. Ontario Municipal Employees Retirement Board* (2004), 4 C.P.C. (6th) 115 (S.C.J.) He decided that at the certification stage, a proposed plaintiff is not required to show that he or she has the ability to satisfy a costs award. Cullity J. stated, at paras. 90 - 94:

> The statements in Dutton and [of Nordheimer J. in Pearson v. Inco] are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA.
>
> ...
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[324] In *Pearson v. Inco Ltd*., at para. 95, the Court of Appeal agreed with Cullity J. and went on to state at para. 96:

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> If there are large costs orders outstanding when the certification motion is heard they can be taken into account by the motion judge. However, in this case the outstanding orders had been paid. I agree with Cullity J. that there is no requirement under our legislation for the plaintiffs to demonstrate that they have concrete and specific funding arrangements.

[325] I accept the law as stated in *Mortson v. Ontario Municipal Employees Retirement Board* and *Pearson v. Inco Ltd*. and conclude that Mr. Pardhan's ability to bear the costs of the litigation is not a relevant consideration.

3. Mr. Pardhan's Health

[326] Mr. Pardhan suffered a stroke in May 2011, just prior to swearing his first affidavit in support of the certification motion. He had a second stroke in October 2011, which delayed his cross-examination. During the cross-examination, Mr. Pardhan said that his doctor told him that he was well enough to pursue this litigation. When asked if he has experienced any problems with his memory since the strokes, Mr. Pardhan said that it takes time for him to recall "certain kinds of information" and explained that the strokes seem to have affected his short and long term memory. These answers raised concerns about Mr. Pardhan's ability to act as the representative plaintiff.

[327] After the cross-examination, Mr. Pardhan produced a letter from Dr. Homuth, dated November 18, 2011, which states: "In my Medical Opinion [Pardhan] is medically stable to continue with the court case in question. His recent medical history should [sic] no problems to proceeding". The letter from Dr. Homuth was written on the letterhead of Dr. Rita Chuang.

[328] It is the position of BMO that Mr. Pardhan is not an appropriate representative plaintiff because he admits that the strokes have impaired his long-term and short-term memory. As a result, BMO says he is not capable of properly instructing counsel.

[329] Mr. Pardhan's admission that his memory is affected is a serious concern. Unfortunately, the letter from Dr. Homuth does not address the specific nature of this concern. It is not known if Dr. Homuth is Mr. Pardhan's treating physician for the strokes. This is in doubt given that the letterhead belongs to a different doctor, Dr. Rita Chuang. Mr. Pardhan did not produce Dr. Homuth's curriculum vitae so his expertise that would allow him to comment on the problem is unknown.

[330] The role of the representative plaintiff is demanding. For example, the representative plaintiff must be able to comprehend the issues in this case, attend meetings, instruct counsel, swear affidavits and attend an examination for discovery and answer questions based on his information and belief. It is not a task that one takes on lightly.

[331] The representative plaintiff must be capable of asserting the claim on behalf of all class members. Thousands of investors who are part of this class will rely on Mr. Pardhan. They must be able count on him to perform this role without limitations in his short and long term memory.

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[332] Based on the scant available evidence, it is difficult to appreciate to what extent the "memory" problems might interfere with Mr. Pardhan's ability to act as the representative plaintiff. However, since Mr. Pardhan has identified memory problems, I cannot ignore the issue. Dr. Homuth's letter does not explain the extent of the memory loss and whether Mr. Pardhan's strokes and memory loss will affect his ability to instruct counsel and carry the litigation through to its conclusion. In the absence of better evidence, there is reason to doubt Pardhan's ability to fulfill the role of representative plaintiff.

[333] I am not prepared to accept Mr. Pardhan as a suitable representative plaintiff given this health issue. I do not doubt his interest in this litigation and his commitment to the role of representative plaintiff. He attended each day of the certification hearing. However, the court must have the interests of the class in mind when considering the suitability of a representative plaintiff. Since Mr. Pardhan is otherwise an acceptable representative plaintiff, I will give class counsel an opportunity to provide a better medical report addressing the concerns outlined above. The doctor who provides the report must have sufficient expertise and familiarity with Mr. Pardhan's health and must be fully informed about the nature of the role of the representative plaintiff. The doctor must be able to explain the nature and extent of the memory limitations and provide an opinion as to whether or not such limitations will interfere with Mr. Pardhan's ability to fulfill the role of the representative plaintiff. If the court is not satisfied with the opinion and Mr. Pardhan's ability to perform the role of representative plaintiff, an alternative representative plaintiff will have to be proposed.

The Litigation Plan

[334] The production of a workable litigation plan serves two purposes. First, it assists the court in determining whether the class proceeding is the preferable procedure and second it allows the court to determine if the litigation is manageable: see *Carom v. Bre-X Minerals Ltd*., (1999), 44 O.R. (3d) 173 (S.C.J.), aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.).

[335] The amount of detail in a litigation plan will vary according to the circumstances and complexity of each case. However, a plan that simply sets out the usual steps that occur in any litigation is not acceptable: see *Bellaire v. Independent Order of Foresters,* [2004] O.J. No. 2242 at para.52 (S.C.J.).

[336] The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed: see *Caputo v. Imperial Tobacco Ltd*., (2004), 236 D.L.R. (4th) 348 (S.C.J.) at para. 76 ("*Caputo*").

[337] As stated in *Caputo* at para. 78, the plan should contain, "details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined."

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[338] BMO argues that the Pardhan Litigation Plan is deficient because it fails to address three points: the presence of a jury notice, the individual issues and the related actions and third party claims. I will deal with each separately.

[339] The plaintiff filed a jury notice. The Pardhan Litigation Plan does not consider how the common issues trial can be managed when many of the proposed liability common issues (knowing assistance, knowing receipt and constructive trust) deal with equitable claims that cannot be decided by a jury pursuant to s .108(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Only the common issue dealing with negligence can be tried by a jury.

[340] Class counsel recognized this problem but did not address it in the Pardhan Litigation Plan because he wanted to first see which common issues were certified. Based on the common issues that I have accepted, it is clear that the jury notice presents a problem. Class Counsel should recognize this in the Pardhan Litigation Plan and propose how this issue will be managed. The court will need to be satisfied that the proposal is workable.

[341] BMO argues that significant individual issues exist and the Pardhan Litigation Plan offers no plan for how they will be managed. I have rejected BMO's position that the determination of whether a trust exists is an individual issue. The only other individual issue that BMO raised is the discoverability issue that is relevant to the limitation period defence. The Pardhan Litigation Plan is silent about how the limitation period will be addressed. Based on what I have said above about the limitation period, it is fair to say that it should be dealt with after the trial of the common issues.

[342] Lastly, BMO states that there are multiple actions and third party claims arising out of the Damji fraud and no plan for determining the "overlapping liability issues." BMO does not articulate the nature of the "overlapping liability issues" in any way. It simply states that they exist.

[343] Dealing with the third party claims BMO says that there is no plan to address the allocation of liability between the plaintiffs and BMO and as between BMO and the third parties pursuant to ss. 1 and 3 of the *Negligence Act*, R.S.O. 1990, c. N-1. These sections state:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

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[344] The “multiple” actions that BMO refers to are the 4 other proposed class actions. In total there are six proposed class actions that have been commenced against various defendants. All arise out of the Damji fraud. The defendants and issues in the actions vary. It was the intention of all counsel in these actions to have joint certification hearings proceed at the same time. The complexity of hearing six different certification motions together, each with subtle differences and varying defendants, led me to direct counsel to choose one or two actions to go forward to certification first. As a result, it was agreed that the two actions against BMO (Pardhan and Kherani) would proceed first.

[345] The two actions against BMO are very similar. Most of the evidence that the parties filed was applicable to both the Pardhan and Kherani actions. These two actions should be managed together. Common documentary and oral discovery must be considered. The possibility of joint management of the two actions should be included in the Pardhan Litigation Plan along with a proposal as to how this would be done. The Pardhan Litigation Plan does not address how the two class actions against BMO might be managed together. I appreciate that class counsel was waiting for the outcome of the certification motions before considering these management issues. He is now able to address this in the Litigation Plan.

[346] I am not prepared to say at this point that the Pardhan Litigation Plan is deficient for not addressing the other four actions that have not even been certified. There is no order consolidating all six actions nor any order directing that they be tried together one after the other. The fact of these other proposed pending actions should not interfere with the ability of the Pardhan and Kherani actions to go forward.

[347] Litigation plans are amended as needed. Depending on what transpires with the other four actions, it may become necessary to amend the Pardhan Litigation Plan in this action to deal with the other four actions. At this point, it is premature to suggest that the Litigation Plan in Pardhan or Kherani should be amended to deal with the four other actions

[348] I have the same concern about the third party claims. Once again BMO makes a general statement that the Pardhan Litigation Plan does not address “overlapping liability” issues. All of the third party claims are being held in abeyance. The parties have yet to decide if they will continue to be held in abeyance. The issue of lifting the informal stay or not has not been considered in a case conference nor has there been any discussion of how this might be managed.

[349] Aside from the reference to the *Negligence Act*, BMO does not explain the basis for the concern. I note that in the plaintiff’s reply, he pleads that since the plaintiff and class members were victims of fraud, there is no basis in law for alleging contributory negligent against the plaintiff and class members. I have already reviewed the authorities that support this position.

[350] As a class action moves forward, the issues and evidence will develop. Possible issues relating to the other actions, third party claims and the applicability of contributory negligence are matters to be dealt with as this case unfolds. While a litigation plan requires a level of specificity, a plaintiff is not expected to map out a plan to address issues that are uncertain at best.

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[351] I now turn to deal with other problems with the Pardhan Litigation Plan that BMO did not identify.

[352] The Pardhan Litigation Plan does not address how damages will be managed and assessed. Presumably, the plaintiff will rely on the extensive records that have already been reviewed by the Receiver and the BMO records as well. Nothing is said about how a punitive damage award will be shared among the class. Will recovery be shared *pro rata*?

[353] There is no detail to assess how Maurice J Neirinck & Associates as class counsel proposes to manage this litigation. It is not apparent if this firm has the resources to manage the class actions. It is not known if Mr. Neirinick has a team assembled to assist with the Pardhan and Kherani class actions.

[354] The Pardhan Litigation Plan proposes various ways to communicate with the class members and collect their information. What is proposed raises several questions and gives the appearance of being disorganized.

[355] The Pardhan Litigation Plan proposes that a website at dvgnews.com be used to communicate with the class members. The name of the website is Damji Victims Group News. There is no information about who created this website and who is responsible for keeping it current. It is not a website dedicated to this class action. Does class counsel have control and access to use of this website? The content of this site confirms that it was created some time ago, since it refers to the efforts of the Receiver. It is proposed that this website will be updated regularly. While a copy of the statement of claim in this action is posted, the website offers no further information about the status of this action.

[356] On this website, Damji victims are requested to fill out and submit a form identifying themselves and the amount of their loss. The Pardhan Litigation Plan states that the names and addresses of over 3,700 class members have been identified. It is not clear if this was gathered from the above website or some other source such as the Receiver. It is not known who has this list of names and whether class counsel has a copy or access to this list. It is not known to what extent 3,700 represents all of the potential class members in this action.

[357] Identifying class members is covered in paras. 33-35 of the Pardhan Litigation Plan. It is proposed that a “Program be set up and implemented for the purpose of compiling a list of names and addresses” of all class members. The compilation will initially be undertaken using the records of BMO and then completed using the records of the Receiver. There is no mention of using the existing database of 3,700 names and addresses. The Pardhan Litigation Plan proposes that BMO pay the cost of the Program used to compile the names. The nature of the program is not identified.

[358] Paragraph 18 of the Pardhan Litigation Plan proposes that class counsel “will be seeing to the set-up of a database for all persons who contact the website”. It is unclear if this is the Program referred to above.

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[359] Someone has already gathered 3,700 names. Is this information already organized? Clearly, the names of the class members need to be recorded and their information organized. To simply state that a program is needed and that BMO must pay is vague. The court first needs to know the status and details of the information that has been collected concerning the 3700 names.

[360] Paragraph 18 of the Pardhan Litigation Plan also states that class members will be notified of all relevant developments by email. Why is email communication required when it is proposed that the class be kept up to date through dvgnews.com? Are both methods of communication being proposed?

[361] The Pardhan Litigation Plan proposes that notice of certification and the right to opt out be given through a direct mailing, publication in the Globe and Mail three times, posting notice on the dvgnews.com website and by direct delivery to anyone that contacts class counsel and asks for a copy of the notice. It is then proposed that the court will appoint a chartered accountant to receive the written elections from anyone who opts out and that the accountant will compile a list and deliver it to the court. It is not clear why a chartered accountant or any third party is required to perform what should be a simple task of recording opt outs.

[362] While a litigation plan is a work in progress, the plan in this action has too many deficiencies and fails to satisfy s. 5(1)(e)(ii) of the *Class Proceedings Act*. I am confident that this plan can be improved to address the problems listed above.

[363] Criterion 5(1)(e) is not satisfied.

CONCLUSION

[364] I grant leave to bring this certification motion.

[365] The plaintiff has satisfied the criteria under s. 5(1) (a) to (d) of the *Class Proceedings Act*. Criterion 5(1)(e) is not satisfied. This will not result in the dismissal of the motion. Since the plaintiff has met the other requirements for certification, the fair approach is to give the plaintiff an opportunity to resolve Mr. Pardhan's health issue or alternatively propose another representative plaintiff and to produce an acceptable litigation plan.

[366] Pursuant to s. 5(4) of the *Class Proceedings Act* I adjourn this certification motion on the following terms. The plaintiff has 30 days from release of these reasons to provide some evidence to satisfy s. 5(1) (e). This must be served on the defendant and a copy provided to the court within the 30 day time period.

[367] BMO may cross-examine on whatever affidavit evidence is filed and/or file responding evidence. The plaintiff may cross-examine on any evidence that BMO serves. Counsel may exchange brief written submissions on the new evidence and s. 5(1) (e) and will deliver submissions to the court. Counsel will have 30 days after the plaintiff serves its evidence to complete these additional steps. If counsel require an opportunity to make brief oral submissions this may be arranged on request.

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C. Horkins J.

Released: April 12, 2012

2012 ONSC 2229 (CanLII)

CITATION: Pardhan v. Bank of Montreal, 2012 ONSC 2229
COURT FILE NO.: 08-CV-350772CP
DATE: 20120412

2012 ONSC 2229 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALNASIR PARDHAN

Plaintiff

– and –

BANK OF MONTREAL

Defendant

REASONS FOR JUDGMENT

C. Horkins J.

Released: April 12, 2012

Tab 11

CITATION: Rebuck v. Ford Motor Company, 2018 ONSC 7405
COURT FILE NO. CV-16-544545-00CP
DATE: 20181220

SUPERIOR COURT OF JUSTICE - ONTARIO

2018 ONSC 7405 (CanLII)

RE: BARRY REBUCK, Plaintiff

– AND –

FORD MOTOR COMPANY and FORD MOTOR COMPANY OF CANADA, LIMITED and YONGE-STEELES FORD LINCOLN SALES LIMITED, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Irving Marks, David Taub, Michael Peerless, and Matthew Baer*, for the Plaintiff

Hugh DesBrisay and Jill Lawrie, for the Defendants

HEARD: September 26, 2018

CERTIFICATION – REASONS FOR DECISION

I. The certification motion

[1] In this action, the Plaintiff, Barry Rebuck, claims damages on behalf of all persons in Canada who purchased or leased new 2013 and 2014 model year Ford vehicles (the "Vehicles"). The claim is for $1.5 billion against the Defendants, Ford Motor Company ("Ford USA"), Ford Motor Company of Canada, Limited ("Ford Canada") (together, "Ford") and Yonge Steeles Ford Lincoln Sales Limited ("Yonge-Steeles Ford").

[2] The Statement of Claim alleges false, misleading or deceptive representations made by the Defendants which understated the fuel consumption of the Vehicles in violation of the *Competition Act*, RSC 1985, c. C-34 and the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sch. A. Evidence in the record establishes that 277,637 of the Vehicles were sold in 2013 and 285,004 were sold in 2014.

[3] The Plaintiff moves for certification of the action and appointment of himself as class representative under s. 2(2) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("*CPA*").

II. The alleged misrepresentations

[4] Natural Resources Canada ("NRC") annually releases a consumer guide to fuel efficiency that provides prospective buyers and others in the automobile market with fuel consumption information about specific new models of passenger cars, vans, pickup trucks, and SUVs. In publishing the guide, NRC depends on automobile manufacturers such as Ford to employ standardized testing procedures on their own vehicles and to report the fuel consumption results. Those results then appear not only in the NRC annual guide, but on the government of Canada's "EnerGuide" label for rating energy consumption and fuel efficiency which is affixed to new vehicles.

[5] EnerGuide labels are mandatory for certain consumer products as specified in the *Energy Efficiency Regulations*, SOR/94-651. That said, there does not exist any statutory authority in Canada for affixing EnerGuide labels on vehicles in Canada. The labelling of new vehicles for retail sale or lease in Canada is done on a voluntary basis as between vehicle manufacturers and the government of Canada. Ford is a participant in this voluntary labelling. The EnerGuide label announces a fuel consumption rating for every vehicle to which it is affixed, which rating is based on the ratings published in the annual NRC guides.

[6] The methodology for testing fuel consumption has changed over time. Prior to 2015, fuel consumption ratings were based on two test cycles; that is, they were based on a city test simulating urban driving, and a highway test simulating open highway and rural road driving (the "2-Cycle Test").

[7] NRC's 2013 Fuel Consumption Guide indicated that commencing two years hence, in 2015, there would be a new test methodology for determining fuel consumption ratings. The stated purpose of the new test was to more accurately simulate "real world driving conditions and behaviours".

[8] The new version of the test was designed to include three additional test cycles. These were meant to account for the use of air conditioning, the operation of the vehicle in cold temperatures, and the operation of the vehicle at higher speeds and with rapid acceleration and braking (the "5-Cycle Testing"). The 5-Cycle Test was new to Canada but was not an altogether new test; in fact, since 2008 it had been the test that was in use in the United States by the Environmental Protection Agency.

[9] According to NRC's 2013 Guide, the 5-Cycle Test would predictably result in higher fuel consumption ratings in comparison with the 2-Cycle Test. As a result of this change in testing methodology, NRC indicated that fuel consumption ratings for most vehicles would show an approximately 15% increase over the previous year's ratings.

[10] NRC's 2014 Guide reiterated that the change in testing was being implemented the following year. It referred to the 5-Cycle Test as an "improved testing procedure" and made the claim that this new testing method would be "more representative of typical driving conditions and styles". The 2014 Guide also reconfirmed the increase in fuel consumption ratings that would accompany the newly implemented testing method. It stated that the 5-Cycle Test would produce ratings that were "10 to 20% higher" than under the 2-Cycle Test. NRC touted the new

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methodology in the 2014 Guide, stating that the 5-Cycle Test took into account "additional factors that better approximate everyday driving".

[11] In 2015, for the first time in Canada, vehicle manufacturers such as Ford employed the 5-Cycle Test to determine the fuel consumption ratings of their new automobiles and other vehicles. Those ratings were published by NRC in the 2015 Guide. The 2015 Guide states that the 5-Cycle Test has been adopted because it is "more representative of typical driving conditions and styles". These representations played to consumers' desire for fuel efficiency, which translated for the consumer into value and convenience.

[12] For 2013 and 2014, the Defendants used fuel consumption ratings for the Vehicles based on the 2-Cycle Test in their multimedia advertisements and sales brochures. The ratings also appeared on the Ford website and, since they were reported to NRC by Ford, on the EnerGuide labels affixed to the Vehicles sold and leased in Canada.

[13] The Plaintiff has pleaded that he and all potential class members were given the 2-Cycle Test ratings even though the Defendants knew that there were significant discrepancies between the fuel consumption ratings produced by the 2-Cycle and 5-Cycle Tests. Specifically, the Plaintiff alleges that the Defendants were fully aware and recklessly disregarded the fact that the 2-Cycle Test results did not accurately reflect the Vehicles' actual, expected fuel consumption. Thus, the Plaintiff states that the Defendants knowingly or recklessly failed to disclose that the Vehicles could not achieve the represented fuel consumption ratings under normal, real world driving conditions.

[14] The Statement of Claim goes on to allege that such representations were specifically made to sell Ford vehicles, and that Ford was aware that the faulty information would be disseminated to consumers deciding to purchase or lease the Vehicles. It likewise states that the representations of fuel consumption published in the 2015 Guide were false, misleading, or deceptive. The wrongfulness of these representations as published in Ford's promotional materials, in NRC guides, and reproduced on the EnerGuide labels, are particularized in the Plaintiff's pleading:

> The Defendants promoted understated fuel consumption ratings that were far better than what the public would actually experience using the Vehicles under normal, real world driving usage;
>
> The Defendants failed to disclose material facts regarding the nature of the represented fuel consumption ratings, omitting that such ratings were based upon the 2-Cycle Testing Method; an outmoded testing method that fails to provide actual, expected fuel consumption levels under normal, real world driving conditions and, as a result, produces fuel consumption ratings that are misleading and lower than the fuel consumption ratings under the 5-Cycle Testing Method; and
>
> The Defendants failed to disclose the Vehicles' 5-Cycle Testing Method ratings, the existence or availability thereof, or the imminent transition to the more

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> representative 5-Cycle Testing Method for determining fuel consumption ratings in Canada.

[15] In Ford's promotional materials for the Vehicles, a footnote to the fuel consumption ratings stated: "Fuel consumption ratings based on Government of Canada approved test methods. Actual fuel consumption will vary". In addition, the Vehicles' EnerGuide labels stated, "These estimates are based on the Government of Canada's approved criteria and testing methods. The actual fuel consumption of this vehicle may vary. Refer to the Fuel Consumption Guide". The Vehicles' EnerGuide labels also stated, "Ask your dealer for the FUEL CONSUMPTION GUIDE or call 1-800-387-2000."

[16] The Plaintiff contends that in promoting the Vehicles in this way, the Defendants gave the impression to the consuming public that the represented fuel consumption ratings were certified by the government of Canada and that they met regulatory standards. This effectively lent credibility to ratings that in fact were produced in a voluntary reporting arrangement between vehicle manufacturers and the government of Canada. The Plaintiff also alleges that the Vehicles' actual fuel consumption was not expected to be less than the reported 2-Cycle Test results, but that, in fact, it was expected to be higher based on the results that the 5-Cycle Test would have produced.

[17] The Statement of Claim therefore asserts that the Defendants' statements of qualification were inadequate, and that they did not sufficiently bring the misleading nature of the fuel consumption ratings to the attention of prospective buyers and lessees. Furthermore, the Plaintiff claims that it was not a sufficient response to the dissemination of false information for the Defendants to rely on the EnerGuide labels to refer consumers to NRC's Guide for more accurate information about the Vehicles. The Plaintiff contends that the consumer public ought not be required to reference some outside explanatory materials in order to correct patently incorrect representations on promotional materials disseminated by the Defendants and affixed to the Vehicles themselves.

[18] The Plaintiff pleads that the price that potential class members paid in purchasing or leasing the Vehicles was in excess of the value that they received due to the discrepancy between the fuel consumption levels of the Vehicles as represented by the Defendants and the actual, expected fuel consumption levels under real world driving conditions. Accordingly, the Plaintiff claims damages on behalf of the class based on the excess annual fuel costs incurred, and to be incurred, by class members as a result of this discrepancy.

[19] Ford's records apparently show that it sold or leased in Canada somewhere in the range of 269,800 of the 2013 model year Vehicles and 276,700 of the 2014 model year Vehicles. The Plaintiff contends that the Vehicles' fuel consumption ratings under the 5-Cycle Test exceeded the Vehicles' fuel consumption ratings under the 2-Cycle Test by an average of roughly 15%. Plaintiffs' counsel submits that as a result, all potential class members have experienced, and will continue to experience, 15% higher average annual fuel consumption than was represented at the time they acquired the vehicles, leading to a commensurate 15% average increase in annual fuel costs throughout the term of ownership or lease of the Vehicles.

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[20] The Plaintiff proposes producing an expert report on damages by Farley Cohen, a Toronto-based chartered accountant specializing in business valuation, damages quantification, and forensic accounting. For this motion, Mr. Cohen has provided an opinion as to the methodology to be employed in assessing damages on behalf of the class. He concludes that the alleged losses can be calculated on an aggregate basis using an "additional fuel expense" methodology. He indicates that he would approach this by taking: (a) the additional fuel costs the proposed class has incurred to a current date based on actual fuel prices, and (b) the discounted present value of estimated future costs expected to be incurred over the remaining term of ownership or lease.

[21] Mr. Cohen's approach is, of course, designed to facilitate the calculation of damages on a class-wide basis. Plaintiff's counsel submit that Mr. Cohen's methodology would also facilitate a distribution of damages on a model-by-model basis to individual class members based on the model Vehicle that individual purchased or leased.

[22] The Defendants have produced an affidavit by a damages expert of their own, Mark Berkman. He takes issue with Mr. Cohen's methodology. According to Mr. Berkman, the approach advocated by Mr. Cohen is flawed in that it incorrectly assumes a direct correspondence between increased costs in fuel consumption and the purchase or lease price of the Vehicles.

[23] Mr. Berkman also contends that Mr. Cohen overlooks a number of other variables that factor into purchase and leasing decisions for new automobiles. While Mr. Cohen emphasizes the fuel consumption concerns of automobile shoppers, Mr. Berkman downplays these concerns and characterizes them as playing a far smaller role in the average consumer's automobile acquisition decision.

III. Requirements for certification

[24] The by now well-known requirements for certifying an action as a class action are set out in section 5(1) of the *CPA*, as follows:

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,

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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.

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[25] It is worth reiterating that certification cannot be analyzed in a vacuum. As Winkler CJO observed in *McCracken v. Canadian National Railway* (2012), 111 OR (3d) 745, at para 75 (Ont. CA), "[t]here is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order."

[26] Having said that, the record need not be one that actually proves the Plaintiff's case. The existence of conflicting evidence is not a bar to certification, as the 'some basis in fact' standard applicable at certification "does not require that the court resolve conflicting facts and evidence at the certification stage": *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 SCR 477, at para 102. This includes conflicts over the methodology pursued by prospective expert witnesses and differences in perspective on the impact of promotional materials, etc. "The certification motion is not the place for resolving that [evidentiary] controversy": *Pearson v Inco Ltd*. (2005), 78 OR (3d) 641, at para 76 (Ont CA).

a) Viable cause of action

[27] The Supreme Court of Canada has indicated that the test for a viable cause of action is a low one at the certification stage. In essence, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is "plain and obvious that the plaintiff's claim cannot succeed": *Pro-Sys*, at para 63.

[28] The Plaintiff has pleaded that the Defendants' inaccurate representations about fuel consumption for the Vehicles were made to the public through the advertisements, sales brochures, the Ford website, NRC's annual Guide, and on the EnerGuide Labels. The Statement of Claim brings these alleged misrepresentations under two statutory causes of action: sections 14 and 17 of the *Consumer Protection Act* (and equivalent consumer protection legislation in other provinces) and sections 36 and 52(1) of the *Competition Act*.

[29] Turning first to the *Consumer Protection Act*, the Statement of Claim indicates that the Defendants' impugned representations were made by the Defendants regarding the understated fuel consumption of the Vehicles. The claim likewise alleges that class members suffered damages as a result of those unfair practices and representations. Unlike at common law, reliance is not a necessary factor to plead or to establish liability or damages under the relevant sections of the *Consumer Protection Act*: *Ramdath v George Brown College of Applied Arts and Technology*, 2015 ONCA 921, at para 39.

[30] This court has previously certified class actions under provincial consumer protection legislation: see, e.g. *Kalra v. Mercedes Benz*, 2017 ONSC 3795, at paras 31-32. Furthermore, this court and Divisional Court have on numerous occasions certified national class actions where there is a parallel cause of action in other provinces: see, e.g. *Corless v Bell Mobility Inc.*, 2015 ONSC 7682 at paras. 65 and 70 (Div Ct); *Barwin v IKO Industries Ltd*, 2013 ONSC 3054, at para. 52 (Div Ct). The availability of remedies will potentially turn on who bought or leased a Vehicle in which province. Belobaba J. has observed that to this end, "[s]ub-classes will no doubt be needed as this litigation proceeds. But at this stage, I cannot conclude that the consumer protection cause of action for eligible class members has no reasonable prospect of success": *Kalra*, at para 33.

[31] Strathy J. (as he then was) noted at first instance in *Ramdath*, 2012 ONSC 6173, at para 69, aff'd 2013 ONCA 468, that, "[a] determination of whether a representation was untrue, inaccurate or misleading must be made on an objective basis." While counsel for the Defendants takes issue with this, I have little difficulty on the basis of the record before me in concluding that the impugned representations were, objectively speaking, inaccurate and misleading. Anyone who saw them would reasonably conclude that the predicted fuel consumption was as represented on the basis of the 2-Cycle Test rather than on the more accurate 5-Cycle Test.

[32] The Statement of Claim also alleges that the Defendants knowingly or recklessly made false or misleading representations regarding the fuel consumption of the Vehicles for the purpose of promoting their supply or use contrary to s. 52(1) of the *Competition Act*. As Defendants' counsel point out, a civil claim under s. 36 of the *Competition Act* requires that the Plaintiff must show both that the Defendants breached s. 52 and that he suffered damages as a result of that breach. This double-barreled requirement "can only be done if there is a causal connection between the breach…and the damages suffered by the plaintiff": *Singer v Schering-Plough*, 2010 ONSC 42, at para 107.

[33] Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the *Competition Act* for breach of s. 52: *Magill v Expedia Canada Corp*, 2010 ONSC 5247, at para 107. For example, in *Pro-Sys*, at paras 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-as-inducement rule: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. [1964] AC 465, 502-4.

[34] This approach suggests that the causal connection between the Defendants' alleged misrepresentations and the Plaintiff's alleged loss is sufficiently pleaded here. That is, the Plaintiff claims that misrepresenting the fuel consumption of the Vehicles has caused buyers and lessees of the Vehicles to spend more on fuel consumption than they were expecting.

[35] The Plaintiff need not plead that the misrepresentations induced him to buy his car; that type of detrimental reliance would be a necessary ingredient for a claim based on the common law of negligent misrepresentation. Rather, under s. 36 of the *Competition Act* what the Plaintiff

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must plead is that the misrepresentations caused him to acquire less value than he expected to acquire – i.e. to spend more on gas than he thought he would spend when he purchased the Vehicle.

[36] Framed in this way, causation is an issue that is common to all purchasers and lessees of the Vehicles. The facts as pleaded match the requirements of the statutory causes of action that are pleaded.

[37] The record before me satisfies the requirements of section 5(1)(a) of the *CPA*.

(b) Identifiable class

[38] Counsel for the Plaintiff proposes a class definition composed of all persons who purchased or leased a new 2013 or 2014 model year Ford vehicle in Canada.

[39] This definition of the class is objectively defined, readily identifiable, and rationally connected to each of the proposed Common Issues. Ford has access to the names and addresses of the original purchasers and lessees of the Vehicles. This will ensure that class members can be contacted for notice purposes. In addition, sales volumes of the Vehicles by province and across the country are available, as are the details and any terms of lease.

[40] The record before me satisfies the requirements of section 5(1)(b) of the *CPA*.

(c) Common issues

[41] Counsel for the Plaintiff has set out the proposed common issues as follows (collectively, the "Common Issues"):

Consumer Protection Act

(1) Did the Defendants, or any one of them, contravene sections 14 and 17 of the *Consumer Protection Act*, and parallel provisions of the provincial Consumer Protection Legislation by making any false, misleading or deceptive representations?

(2) If so, can the Plaintiff rely on the waiver of notice provisions of section 101 of the *Consumer Protection Act* (and parallel provisions of the consumer protection legislation in other provinces)?

(3) If a consumer must demonstrate contractual privity to avail themselves of Part III of the *Consumer Protection Act*, are dealers, and/or third party sellers designated by the Defendants to sell the Vehicles, agents of the Defendants? If so, can privity be established through such agency?

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Competition Act

(4) Did the Defendants contravene section 52 of the *Competition Act*?

Damages

(5) Should exemplary, punitive, and/or aggravated damages be awarded against the Defendants?

(6) Are the Class members entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Consumer Protection Act*, and the parallel provisions of the consumer protection legislation in other provinces, and, if so, can the amount of damages payable by the Defendants be determined on an aggregate basis and in what amount?

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[42] The Supreme Court of Canada observed in *Pro-Sys*, at para 106, that, "In order to establish commonality…the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all the class members." According to the Court of Appeal, this "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high": *Carom v Bre-X Minerals Ltd*., [2000] OJ No. 4014, at para 40.

[43] Commonality of issues lies at the very heart of the class proceeding certification analysis and so, of course, the Common Issues must be established on the record as having "some basis in fact": *Hollick v Metropolitan Toronto*, [2001] 3 SCR 158, at para 25. That said, the commonality requirement must not become an excessively strenuous hurdle for plaintiffs to overcome:

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.
>
> *Campbell v Flexwatt Corp.* (1997), 15 CPC (4th) 1, 18 (BC CA).

[44] Accordingly, commonality is all about judicial economy. The question to be asked in addressing the commonality requirement is whether the case going forward as a class action will allow the court to do away with duplication in either the fact-finding process or in its legal analysis: *Western Canadian Shopping Centres Inc. v Dutton*, [2001] 2 SCR 534, at para. 39.

[45] Unlike claims in which the cause of action is framed in common law negligent misrepresentation, the causes of action here raise statutory breaches that do not require proof of individual reliance. The impugned representations by the Defendants were made to the public at large on a nationwide basis, and are therefore obviously common to a class composed of

purchasers and lessees. The factual evidence establishing the dissemination of these representations in multimedia advertisements, sales brochures, the Ford website, and on the EnerGuide Labels is certainly common to all members of the proposed class.

[46] I am conscious of the submission by Defendants' counsel that the evidence brought forward by the Plaintiff at this stage must support the specific allegation being made, and that it is not sufficient that the allegations be based on a form of more generalized evidence: *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, at para 263. Counsel for the Defendants submits that in the present case the evidence does not establish truly common issues because each consumer in the automobile market comes at the promotional and other impugned materials from their own individual point of view.

[47] To say this is to seek a level of detailed commonality that is not called for under s. 5(1)(c) of the *CPA*. As my colleague Belobaba J. has stated, "putative class members may not all have the exact same claims and remedies available to them, but this is not a bar to certification. Even a significant level of difference among the class members does not preclude a finding of commonality": *Kalra*, at para 39. The test "'does not require that the court resolve conflicting facts and evidence at the certification stage', which the court is ill equipped to do at that stage": *Hodge v Neinstein*, 2017 ONCA 494, at para 113, quoting *Pro-Sys*, at para 102. The Supreme Court of Canada has held that where purchasers "raise essentially the same claims requiring resolution of the same facts" the possibility that there are detailed differences between them "does not necessarily defeat the [purchasers'] right to proceed as a class. If material differences emerge, the court can deal with them when the time comes": *Western Canadian Shopping Centres*, at para 54.

[48] Counsel for the Defendants also emphasize case law from British Columbia indicating that allegations of misrepresentation against a manufacturer and retailer of a product may lack commonality in that they depend on evidence of how the representations were conveyed to each consumer: see *Marshall v United furniture Warehouse Limited Partnership*, 2013 BCSC 2050, aff'd 2015 BCCA 252, leave to appeal denied [2015] SCC No 326. That, however, is not an issue of significance here. Plaintiff's counsel point out that the British Columbia Court of Appeal has recently confirmed that this kind of individualized evidence is not required where the representations at issue are in written form and are not oral representations made to individual purchasers: *N&C Transportation Ltd. v Navistar International Corporation*, 2018 BCCA 312, at para 140.

[49] The record before me shows that the representations that form the heart of the Plaintiff's claim were made in Ford's nationally disseminated promotional materials, NRC guides, and EnerGuide labels. In the absence of allegations of oral misrepresentations, or of specific oral communications to consumers at the point of sale, no substantial question of individualized evidence arises in terms of whether and how the impugned information was conveyed.

[50] I am also cognizant of the Defendants' position that the impugned representations were not truly misrepresentations, or were not actionable as such, but rather arose from an industry-wide fuel consumption rating system promoted by the federal government. This point, although

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interesting, is out of place in the current motion. It goes to the merits, not to the commonality, of the case among the potential class members. Numerous courts have said on numerous occasions that a certification motion is neither a trial nor a request for summary judgment. Rather, "[c]lass certification is a procedural motion which concerns the form of an action, not its merits. Contentious factual and legal issues between the parties cannot be resolved on a class certification motion": *Wheadon v. Bayer Inc.*, [2004] NJ No 147 (NLSC) at paras. 91-92, aff'd sub nom. *Bayer Inc. v Pardy)* [2005] NJ No 122 (NL CA), leave to appeal refused [2005] SCC No 211.

[51] Proposed Common Issues #1 and #4 relate to alleged breaches of consumer protection and competition statutes. These issues need to be established for all purchasers and lessees of the Vehicles. They are central to the litigation and do not require any individualized evidence from class members. The proposed Common Issues focus on the Defendants' knowledge and conduct and appropriately advance the litigation. They are the statutory equivalents to issues of standard of care and are routinely certified in class actions: *Bouchanskaia v Bayer Inc.*, [2003] BCJ No 1969, at paras 113 (BCSC); *Wilson v Servier Canada Inc.* (2000), 50 OR (3d) 219, at paras 53-56 (SCJ), leave to appeal refused (2000), 52 OR (3d) 20 (Div Ct), leave to appeal refused [2001] SCC No 28380.

[52] Proposed Common Issues #2 and #3 are essentially legal issues. Question #2 is directed at interpreting and applying section 18(3) of the *Consumer Protection Act*, which requires that notice be given within one year after entering into the relevant agreement if the consumer seeks recovery, and provides courts with the ability to waive this notice requirement. Question #3 is directed at determining whether privity is required to establish liability under the statutory provisions relied upon by the Plaintiff and, if so, how Ford's agents and dealers fit into the privity analysis. It is also directed at determining whether the Defendants are liable for misrepresentations by their agents or dealers in disseminating advertisements and websites.

[53] I am satisfied that resolution of these issues will advance the action on behalf of all class members. They are common to all purchasers and lessees of the Vehicles and there is nothing individualized about the analysis that they demand.

[54] Proposed Common Issue #5 seeks to determine whether the Defendants are liable for exemplary, punitive, or aggravated damages. Again, this issue focuses on the conduct of the Defendants alone. It does not demand any individualized evidence relating to particular class members, and can be decided on behalf of the entire proposed class.

[55] Proposed Common Issue #6 seeks a determination of the availability of damages and, more specifically, whether aggregate damages are applicable under the circumstances of this case. Generally speaking, determination of the entitlement to damages is a common, not individual, issue. In terms of an aggregate assessment of damages, in order for this to be certified as a common issue I need only find that there is, on the basis of facts in the record, a reasonable possibility that an aggregate assessment may be made with respect to "at least part of the compensatory damages" claimed: *Good v Toronto Police Services Board*, 2016 ONCA 250, at paras 81-82.

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[56] The Plaintiff has put forward the expert evidence of Mr. Cohen demonstrating that there is a methodology for calculating damages on an aggregate basis. Plaintiff's counsel submits that, in fact, the methodology proposed by Mr. Cohen was the basis on which class actions have been settled and approved by the court in previous cases: see *Grieve v Hyundai*, 2014 ONSC 1731, at para 6. In addition, Plaintiff's counsel points out that Mr. Cohen's proposed methodology is the very same method used by NRC to produce the estimated annual fuel costs that appear on the Vehicles' EnerGuide Labels.

[57] As indicated earlier in these reasons, I am aware that the Defendants have produced an expert that takes issue with the Plaintiff's expert's approach. That response convinces me that there may be a debate among experts, but it does not counter the fact that the Plaintiff has produced evidence, which I accept, that there is an approach to damages that can be worked out as a common issue. Needless to say, the fact that I accept Mr. Cohen's methodology for the purposes of this certification motion does not pre-judge any determination regarding the merits of that approach that may have to be made down the road.

[58] The Supreme Court has made it clear to motion courts hearing certification requests that "resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification": *Pro-Sys*, at para 118. In fact, it is safe to say that, "The plaintiff's obligation to provide a plausible methodology will often prompt a rebuttal from the defendant's expert": *Kalra*, at para 49.

[59] The methodology proposed by Mr. Cohen is reasonable on its face and meets the standard demanded at the certification stage. I see no grounds for disputing or second-guessing it here, and would leave the Defendants' challenge to the merits of Plaintiff's expert's methodology to be advanced at trial.

[60] The record before me satisfies the requirements of section 5(1)(c) of the *CPA*.

(d) Preferable procedure

[61] In *Carom v Bre-X Ltd*, [1999] OJ No 1662, at para 257, Winkler J. (as he then was) outlined the analysis in which courts engage in determining whether a class action is the preferable procedure under section 5(1)(d) of the *CPA*:

> A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of behaviour of wrongdoers.

[62] It is by now well established that a class action can be certified even where the common issues do not predominate over issues requiring individualized evidence and analysis: *Cloud v Canada (Attorney General),* [2004] OJ No 4924, at paras 69, 75 (Ont CA); *Hollick*, at para. 30. Accordingly, once it is determined that there are common issues whose resolution will appropriately advance the litigation, a class proceeding is likely to be the preferable procedure.

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[63] A common issues trial often addresses only part of a claim. It does not run counter to certification for there to be individual issues that may have to be resolved as a subsequent step. As the Court of Appeal has noted, "…the court has the means to conduct cost-effective and timely determinations of individual issues following the common issues trial. As a result, the fact that damages may not be amenable to aggregate assessment at the conclusion of a common issues trial is not fatal to certification of a class proceeding… Absent this possibility, the purposes of the *CPA* would be seriously eroded": *Cassano v The Toronto-Dominion Bank*, [2007] OJ No 4406, at paras 62-3 (Ont CA).

[64] Although the claim is for $1.5 billion, the Plaintiff's own loss, like that of most of the individual class members, appears to be somewhere in the order of $2,000. It is obvious that there are serious issues of access to justice and judicial economy that make a class proceeding preferable over thousands of individual proceedings. In these circumstances, it would be for the Defendants to "support the contention that another procedure is to be preferred with an evidentiary foundation": *1176560 Ontario Ltd. v Great Atlantic & Pacific Co. of Canada Ltd.*, 2002 CarswellOnt 4272, at para 27 (SCJ). I see no such support here, nor do I see any reason for saying that a class proceeding is not the preferable way to go.

[65] The record before me satisfies the requirements of section 5(1)(d) of the *CPA*.

(e) Representative plaintiff

[66] I see no serious challenge here to the Plaintiff's ability to fairly and adequately represent the class or to fulfill the role demanded of him in instructing counsel and pursuing the action diligently. He fits squarely within the definition of the class, has no conflict of interest, appears to fully understand the issues and the responsibility he is taking on, and has retained experienced counsel to represent the class.

[67] Counsel for the Plaintiff have provided a litigation plan for the action. This is required to provide "a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them": *Fakhri v Alfalfa's Canada Inc.*, [2003] BCJ No 2618, at para 77 (BCSC).

[68] A litigation plan is not, of course, writ in stone and does not bind the trial judge or any subsequent court that might wish that it be varied or deviated from: *Healey v Lakeridge*, [2006] OJ No 5621, at paras 2-4 (SCJ). It cannot perfectly predict every turn that the litigation process will take in the future, and needs to be treated as a flexible instrument.

[69] Having said that, the litigation plan contained in the Plaintiff's motion record proposes an efficient procedure for the balance of the litigation. I find that it assists me in determining that the action is manageable and that the goals of the *CPA* will be served by certification of the action as a class proceeding: *Andersen v St. Jude Medical Inc.*, [2003] OJ No 3556, at paras 71-75 (SCJ).

[70] The record before me satisfies the requirements of section 5(1)(e) of the *CPA*.

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IV. Disposition

[71] The action is hereby certified as a class proceeding with Mr. Rebuck as representative Plaintiff. Counsel for the Plaintiff shall act as class counsel.

[72] The class members are defined as all persons who purchased or leased a new 2013 or 2014 model year Ford vehicle in Canada. The Common Issues are as set out in paragraph 41 above.

[73] The Plaintiff's litigation plan is a workable method of advancing the proceeding on behalf of the class members. Class members shall be notified of the certification Order in accordance with the provisions of the litigation plan.

[74] Counsel should be in touch with my assistant to schedule a follow-up case conference. At that point counsel can discuss with me the schedule for the balance of the proceedings and any other administrative issues regarding notice, opt-out dates for class members, etc.

V. Costs

[75] Costs of this motion may be addressed in written submissions by counsel.

[76] I would ask counsel for the Plaintiff to provide me with brief (3 pages maximum) submissions, together with a Costs Outline, within three weeks of today's date. I would ask counsel for the Defendants to provide me with equally brief responding submissions within two weeks thereafter. These submissions may be sent by email to my assistant.

Date: December 20, 2018 Morgan J.

2018 ONSC 7405 (CanLII)

Tab 12

DATE: 20040630
DOCKET: C39376

COURT OF APPEAL FOR ONTARIO

WEILER, SHARPE and BLAIR JJ.A.

2004 CanLII 867 (ON CA)

B E T W E E N:

SAM STABILE Plaintiff (Respondent)	)	Ronald Carr, for the respondent
- and -	)	
LUCIA MILANI, RIZMI HOLDINGS LIMITED, MUCCAPINE INVESTMENTS LTD., L.C.T. HOLDINGS INC. and HIGHLAND BEACH ESTATE HODINGS INC. and MILANI & MILANI HOLDINGS LIMITED Defendants (Appellants)	)	Charles Campbell, for the appellants
	)	Heard: February 26, 2004

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice dated December 10, 2002.

R. A. BLAIR J.A.:

Overview

[1] In 1985 Sam Stabile sued Cam Milani, and two of Mr. Milani's companies, for $75,000 on a written acknowledgement of debt. That debt – which, with interest, now stands at more than $300,000 – has yet to be paid.

[2] Mr. Milani died in February 1986. His estate is comprised of the shares of Milani & Milani Holdings Ltd. ("MMHL"), one of the two companies sued by Mr. Stabile.

[3] Prior to Mr. Milani's death, Mr. Stabile had obtained default judgment. That judgment was subsequently set aside by Master Donkin, on motion brought by Mr.

Milani's widow, Lucia Milani, the Estate Trustee and person who controls MMHL. The action then proceeded as a defended action until the eve of trial in May 1992. Neither Mrs. Milani nor the corporate defendants appeared to defend at trial, however, and on May 11, 1992, Lissaman J. granted judgment against the estate of Mr. Milani, MMHL, and another company, 473915 Ontario Inc., a subsidiary of MMHL. With accumulated interest plus costs, the judgment totalled $153,719.55. There was no appeal. Mr. Stabile attempted to collect, but discovered the defendants were judgment proof.

[4] In 1997, on the basis of information subsequently learned, Mr. Stabile commenced the action in which this appeal is taken against Mrs. Milani personally, and against her companies, claiming relief – amongst other things – pursuant to the "oppression remedy" provisions of the *Ontario Business Corporations Act* R.S.O. 1990, c. B.16 (the "OBCA"). He succeeded. In 2002, Wright J. required the defendants pay him $153,719.55 which with interest amounts to $300,203.05

[5] Mrs. Milani and her corporations appeal that judgment. For the reasons that follow, I would allow the appeal.

Background and History

[6] Mr. Milani was a real estate developer. Generally, he bought raw land and sold developed lots, usually through his company, MMHL.

[7] In 1985, Mr. Milani agreed to pay Mr. Stabile the sum of $75,000 if Mr. Stabile found him a purchaser for certain property at Keele Street and Rutherford Road in the Town of Vaughan. Mr. Stabile alleges that he did so, and that he obtained a written acknowledgement from Mr. Milani that he would be paid the $75,000. When payment was not forthcoming he sued.

The Debt Action

[8] Shortly before Mr. Milani's death in February 1986, Mr. Stabile obtained default judgment. Mrs. Milani succeeded in having that default judgment set aside, however, and the action proceeded as a defended action to the date of trial. In refusing to impose terms as a condition of setting aside the default judgment, Master Donkin made the following remarks, upon which the respondents place considerable emphasis since Mrs. Milani took the position before Wright J. that the Milani Estate and MMHL were insolvent at the time of the default proceedings as a result of outstanding tax liabilities:

> In this case I have given considerable thought to whether I should impose terms. It is not long since the judgment was signed in comparison with some of the other cases. There is

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> no evidence that the moving defendant is without assets, or attempting to get rid of its assets, although there is certainly the acknowledged fact that a sale is to go through next week and in that sale the moving defendant is the vendor. There appears to be some evidence that the defendant has some other assets and I take that from the reference to certain terms in an agreement made between the defendant and another firm of solicitors who acted as agent. . . .

[9] Mrs. Milani was not closely involved with her husband's business affairs prior to his death. Although others connected with the business were aware of Mr. Milani's substantial tax liabilities, Mrs. Milani only became aware of them after his death. She continued to retain Mr. Milani's managing director, May Ann Jenkin, to look after the business, and hired a new chartered accountant, Joe Lanno, and a tax specialist, to help her in straightening out the affairs of Mr. Milani and MMHL. Although the parties cannot agree on the amount of the outstanding tax liabilities, the evidence is that they were substantial.

[10] In 1991, the tax issues were settled with the federal and provincial authorities. On July 10, 1991, two of Mrs. Milani's companies, Rizmi Holdings Limited ("Rizmi") and Highland Beach Real Estate Holdings Inc. ("Highland Beach"), purchased the assets of MMHL. Rizmi acquired MMHL's Canadian properties. Highland Beach acquired lands that MMHL held in the state of Florida. These transactions were at prices approved by Revenue Canada, and it is not disputed that they were for fair market value (although the assumption of a mortgage against the Florida lands in favour of another of Mrs. Milani's companies, Muccapine Investments Ltd. ("Muccapine") as part of the purchase price, is hotly contested). All of the proceeds from the July 10, 1991 transaction were paid directly to Revenue Canada to cover tax liabilities. In spite of this the tax liabilities were not paid in full.

[11] When the action was called for trial, on May 11, 1992, no one appeared for the defendants/appellants. Although she continued to maintain at the oppression remedy trial that Mr. Stabile's claim was not justified, Mrs. Milani felt in 1992 that there was no money in the Milani Estate or in MMHL to pay his claim even if he was successful. She therefore decided not to go through with the trial because MMHL had no funds even to continue the litigation. After hearing Mr. Stabile's evidence, Lissaman J. granted judgment as indicated above.

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The Oppression Remedy Action

[12] In the course of examining Mrs. Milani in judgment debtor proceedings, Mr. Stabile discovered that all of the assets of MMHL had been sold in the July 10, 1991 transaction in order to satisfy tax liabilities. It was not until some years later, however, that he learned the MMHL assets had been sold to companies owned by Mrs. Milani. He then commenced this action, seeking initially to set aside the July 1991 transactions under the *Fraudulent Conveyances Act* R.S.O. 1990, c. F.29 and the *Assignment and Preferences Act* R.S.O. 1990, c. A.33, as well as claiming relief under the oppression remedy sections of the OBCA. Only the oppression remedy claim went to trial.

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[13] To understand the allegations underlying the oppression remedy claim, it is necessary to understand the history of certain Milani landholdings in the state of Florida.

The Florida Lands

[14] Beginning in 1974, Mr. Milani acquired a number of adjoining Florida properties "in trust". The properties were shown as assets, and the development costs relating to them as liabilities, on the books of MMHL. In 1982, two of these properties were transferred from C.D. Milani "in trust" to two persons who were trustees for the Milani Family Irrevocable Trust ("MFIT"). Mr. Milani had established the trust for the benefit of Mrs. Milani and their three children. A trust deed transferring the lands was signed at that time but was not registered until several years later, when the lands were sold. I shall refer to these properties as the Trust Lands.

[15] In spite of this transfer, however, the lands continued to be shown as assets on the MMHL books, and the related development costs as liabilities.

[16] In 1984, the trustees of MFIT granted to a Mr. Whitely a $2.9 million option to purchase the Trust Lands. Mr. Whitely paid a deposit of $1 million, which was secured by a mortgage against the Trust Lands. This deposit, however, was paid to MMHL. When Mrs. Milani learned of this she protested. Mr. Milani assured her the $1 million would be paid over to MFIT. But it never was. The obligation was recorded on the MMHL books as an obligation to repay Mr. Whitely (or his company).

[17] For reasons having to do with the inability to obtain building permits as desired, Mr. Whitely declined to proceed with his purchase of the Trust Lands. He demanded the return of his deposit, with interest, from the owner of the Trust Lands, MFIT, as under his agreement he was entitled to do. This happened prior to Mr. Milani's death in February

1986, but the situation was not resolved by that time. MFIT had no funds to pay – its only assets were the Trust Lands – and Mr. Whitely took foreclosure proceedings.

[18] At this point the trustees of MFIT resigned and Mrs. Milani became the successor trustee. She took legal advice. She was also aware that the county of Palm Beach was interested in purchasing both the Trust Lands and some lots owned by MMHL across the road from the Trust Lands. The county wanted to buy both or none. To preserve this opportunity, and to buy some time to raise financing and clear title to the Trust Lands, Mrs. Milani caused MFIT to be "put into Chapter 11". She needed $1,261,078.34 to pay off the Whitely loan, plus $451,022.00 to retire the first mortgage to the Florida National Bank, plus additional expenses relating to the transaction and the default, for a total of $1,934,237.00 (U.S.).

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[19] Mrs. Milani raised $1.4 million of these required funds through a loan from the Flagler National Bank on the security of the Trust Lands. The balance of $534,237 she advanced from her own company, the defendant Muccapine. The Muccapine advance was secured by way of a mortgage on both the Trust Lands and the assets of MMHL. The mortgage bore a high late-1980's interest rate for subsequent encumbrances of 20% per annum (24% after maturity), but the rate and terms were similar to other subsequent encumbrances registered against other MMHL lands. Mrs. Milani testified that Muccapine took a mortgage against the MMHL lands as well as the Trust Lands because it was MMHL that had received the $1 million deposit monies in the first place.

[20] The next year, 1987, Mrs. Milani successfully negotiated the sale of the Trust Lands plus the MMHL lots across the road to the county of Palm Beach. MMHL earned a profit from the sale of its lots. The Flagler National Bank mortgage on the Trust Lands was discharged from the sale proceeds, and $600,000 (U.S.) was paid to Muccapine. This left a balance of $73,399 owing to Muccapine. The Muccapine mortgage on the Trust Lands was discharged – those lands had been sold to the county – but it remained against the MMHL assets.

The Taxation Problem and Resolution

[21] Mr. Milani and MMHL were subject to significant tax liabilities in the period prior to his death. Indeed, Revenue Canada had a substantial lien registered against the MMHL lands at Keele St. and Rutherford Rd. that were the subject matter of the transaction giving rise to Mr. Stabile's $75,000 claim. It is acknowledged, however, that Mr. Milani was a private individual when it came to his business affairs, and Mrs. Milani did not become aware of the tax difficulties until she began to attempt to unravel those affairs following her husband's death.

[22] The July 10, 1991 transaction was the result of a settlement with the taxing authorities. In substance the transaction involved the purchase by Rizmi of MMHL's Canadian properties and the purchase by Highland Beach of MMHL's Florida properties, for fair market value, and the payment by MMHL of the proceeds of those purchases to the taxing authorities. Releases executed by both the Crown in right of Canada and the Crown in right of Ontario specifically accept that the prices paid for the MMHL properties "are equal to the respective fair market values of each of the Properties." This followed the preparation of appraisals of the properties, the amounts of which are not in dispute. The Crown agreed to make no claims to the properties conveyed and released and discharged Mrs. Milani, the various companies and others from any claims arising in connection with the liability of the Milani Estate and of MMHL for taxes, interest and penalties.

[23] Mr. Stabile does not dispute that the properties were sold for fair market value. However, he takes issue with the fact that part of the purchase price of two of the Florida properties acquired by Highland Beach was satisfied by way of assumption of the Muccapine mortgage. One property was purchased for $675,000, of which $389,752.41 was accounted for by the Muccapine mortgage. The other was purchased for $253,000, of which $146,084.99 was attributable to assumption of the Muccapine mortgage.

[24] The parties do not agree on the amount of the outstanding tax liabilities of the Milani Estate and MMHL. The trial judge accepted a letter from Revenue Canada dated November 7, 1986 indicating the tax liability of MMHL at $532,085.80 and that of the Estate at $1,556,469.52, for a total of $2,088,55.32. The appellants' accountant, Joe Lanno, testified that these amounts did not include taxes owing to provincial authorities and that there were errors in the calculations of MMHL's previous accountants concerning the company's net tax liability. He stated that MMHL's total tax liability at the end of 1986 was $2,384,129.00, bringing the total taxes owed by the Estate and MMHL to $3,940,598.52. He was not cross-examined on this. The trial judge acknowledged the appellants' assertions in this regard, but observed that they made the allegations "without confirmation from the tax authorities". In any event, Mr. Carr concedes there were tax liabilities remaining that exceeded the amounts paid by Rizmi and Highland Beach for the MMHL assets in the July 10, 1991 transaction. At that time, the taxing authorities would have had priority over Mr. Stabile and other creditors with respect to any additional amounts paid even if the transactions had yielded a higher purchase price.

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Other Advances by Mrs. Milani's Companies to MMHL

[25] The evidence is that between 1987 and 1991 the expenses of MMHL were paid out of an account in the name of "Lucia Milani in trust" which was funded entirely by monies received primarily from Mrs. Milani's companies, the defendants Rizmi, L.C.T. Holdings Inc., and Muccapine. The advances were evidenced by promissory notes.

[26] Mr. Lanno testified that in addition to the advances forming the subject of the Muccapine mortgage, Muccapine paid additional funds to MMHL. The Muccapine ledgers show further advances of $250,887 plus accumulated interest of $254,948. As a result, the total amounts owing by MMHL to Muccapine on all outstanding loans and mortgages in 1991 was $741,347. From this amount Mr. Lanno deducted the credits given to Rizmi and Highland Beach when they purchased the MMHL properties on July 10, 1991, by way of assumption of the Muccapine mortgage. MMHL was still indebted to Muccapine in the amount of $34,132.

[27] After examining the books and records of MMHL, Mr. Lanno decided that the books and records and financial statements needed to be restated to reflect the fact that the Trust Lands were MFIT assets. He did this by making a number of entries in the books and records of MMHL and MFIT, and by preparing a set of statements for MFIT. No statements had previously been prepared for MFIT, as none were required. This work was completed in 1989. As a result, the reconstituted financial records of MMHL and MFIT show the Trust Lands as assets of MFIT, and the obligation to repay the Whitely deposit as an obligation of MFIT. In addition, the development costs respecting the Trust Lands, which had been charged against MMHL, were transferred to MFIT and shown as a liability of MFIT to MMHL.

[28] Mr. Lanno did not alter the financial statements to show a liability on the part of MMHL to repay the $1 million Whitley deposit to MFIT or a receivable in favour of MFIT from MMHL. He testified that he was not told by Mrs. Milani or Ms. Jenkin that the $1 million had been paid to MMHL when it was received from Mr. Whitley.

The Trial Judge's Decision

[29] The trial judge concluded that Mr. Stabile "had a reasonable expectation that the affairs of MMHL would be conducted with a view to protecting his interests", referencing this court's decision in *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario et al*., 54 O.R. (3d) 161, at p. 177. This conclusion was based primarily on the fact that Master Donkin had refused to impose terms when setting aside the default judgment obtained by Mr. Stabile prior to Mr. Milani's death on the basis that

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"[t]here [was] no evidence that [MMHL] is without assets, or attempting to get rid of assets" and that "[t]here appears to be …evidence that [it] has some other assets." He observed that if MMHL was insolvent at the time of the default proceedings, as Mrs. Milani now claimed, that information was withheld from the master. The trial judge felt that MMHL must have had sufficient assets at the time to satisfy Mr. Milani's claim, otherwise, it would not have gone to the expense of setting aside the default judgment.

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[30] The trial judge also decided that the July 10, 1991 transaction had the result of transferring all of MMHL's assets to companies controlled by Mrs. Milani and that the price for those properties was inappropriately reduced by the assumption of the Muccapine mortgage as part of the purchase. He found that the Muccapine mortgage should not have been registered against the MMHL lands "because the MFIT was solely responsible for the repayment of the Whitley mortgage and the loan from Florida National", and that MMHL should not have been charged with the interest on the Muccapine mortgage. The registration of the Muccapine mortgage benefited Mrs. Milani and her companies to the detriment of other creditors of MMHL, including Mr. Stabile. The charge of interest on the Muccapine mortgage to MMHL rather than to MFIT (of which Mrs. Milani and her children are beneficiaries) diminished the assets of MMHL available to other creditors, as did the artificial reduction of the purchase price of the properties by the assumption of that mortgage. As a result, the trial judge found "that the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor". This constituted oppression, he concluded, and the proper relief was to grant Mr. Stabile judgment against all defendants for the amount of his judgment ($153,719.55) plus interest, which he fixed at 9% from the date of judgment, plus costs.

The Standard of Review

[31] The standard of review from the decision of a trial judge on a question of law is correctness. The standard of review on a question of fact, or of mixed fact and law, is that of palpable or overriding error. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at 256; *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.).

The Statutory Framework

[32] Although the action was originally framed as a claim for relief under the *Fraudulent Conveyances Act* and the *Assignment and Preferences Act*, as well as for relief under the OBCA, only the oppression remedy claim proceeded to trial.

[33] Section 248 of the OBCA provides:

> (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

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Analysis

[34] In my view, respectfully, the trial judge erred in three significant respects in arriving at his decision.

[35] First, his conclusion that the Muccapine meeting should not have been registered against the MMHL lands and that MMHL should not have been charged with the interest due on it is wrong, and flows from a misapprehension of the evidence. Secondly, this conclusion was central to the trial judge's finding that the July 10, 1991 transaction benefited Mrs. Milani's companies to the detriment of creditors, including Stabile, and was therefore oppressive. That finding is therefore flawed. Thirdly, the finding is flawed in law because it (a) is based on a "reasonable expectation" of Mr. Stabile that is cast too broadly, and (b) fails to recognize that a simple benefit/detriment analysis is not sufficient to establish "oppression" pursuant to s. 248 of the OBCA, which requires that the impugned conduct must be conduct that is "oppressive, or unfairly prejudicial to or that unfairly disregards the interests of" the claimant. That was not the case here.

[36] There was every justification for the Muccapine mortgage being placed against the assets of MMHL, in my view. The Muccapine monies were advanced as part of a refinancing package that led to the repayment of the Whitley deposit of $1 million. MMHL alone had received those monies and had the use of them. Although secured by the Trust Lands – which should have been carried as an asset of MFIT, but were not – those monies were never properly a debt of MFIT. Rather, they were a debt of MMHL and their repayment was at all times an obligation of MMHL. The respondent's own accounting expert, Ronald Smith, agreed that there was nothing wrong with Muccapine obtaining security against the MMHL assets, on the assumption that MMHL got the $1 million and given that the monies were advanced as part of a pot of money to pay off that debt and other expenses. These assumptions were established on the evidence. Mr. Smith agreed as well that it was not improper for MMHL to pay interest on the mortgage, given those assumptions.

[37] The trial judge made no reference to Mr. Smith's evidence. His conclusion that "the Muccapine mortgage should not have been registered against the MMHL lands and MMHL should not have been charged with the interest on the Muccapine mortgage" was based on his view that the $1.9 million raised from the Flagler National Bank and Muccapine "went to and for the benefit of the MFIT *because the MFIT was solely responsible for the repayment of the Whitley mortgage* and the loan from Florida National" [emphasis added]. With respect, this view was contrary to the evidence. MMHL was responsible for the repayment of the Whitley mortgage because MMHL had received and used the monies.

[38] Consequently, the assets of MMHL were appropriately charged with the Muccapine mortgage, and with the payment of interest on that mortgage, representing, as it did, monies raised to defray at least a portion of the Whitley debt.

[39] I observe as well that MMHL was only charged with an amount equal to less than half the amount of the Whitley loan plus interest. MMHL therefore benefited significantly from the Whitley loan and its repayment – as did its creditors, such as Mr. Stabile, therefore – by only assuming responsibility for one-half of the monies it received and for one-half of the interest payable on those monies.

[40] The fact that the Muccapine mortgage was left on the MMHL assets but discharged as against the MFIT Trust Lands at the time of the conveyance to the county of Palm Beach is explained in this context as well. First, the Trust Lands had been sold to the county. Title to them therefore had to be cleared and the Muccapine mortgage could not remain. All the sale proceeds were expended to pay outstanding encumbrances and other expenses, and on the evidence MFIT does not appear to have had any other

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assets than the Trust Lands. Secondly, to the extent that the Muccapine mortgage provided security for repayment of the Whitley loan – in reality the sole obligation of MMHL – and a balance remained outstanding on the payment of principal and interest on that mortgage after distribution of the sale proceeds, the mortgage properly remained registered against the MMHL assets.

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[41] The foregoing misconception regarding the placement of the Muccapine mortgage against the MMHL assets undermines the trial judge's ultimate finding that "the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor", and was therefore oppressive. In making that finding the trial judge stated (reasons, para. 37):

> The registration of the Muccapine mortgage benefited Lucia or companies controlled by her to the detriment of the creditors of MMHL including the plaintiff. Lucia was a beneficiary of the MFIT and to the extent a party other than the MFIT was charged with the interest on the Muccapine mortgage, the trust and, indirectly, its beneficiaries were better off. The charge of interest on the Muccapine mortgage of $602,945 diminished the assets available to the creditors of MMHL by like amount. In addition, when Highland Beach bought the Florida East and Florida West properties from MMHL in July 1991, the balance due on closing was artificially reduced by the balance of the Muccapine mortgage against those lands, $389,752.41 and $146,084.99. *Lucia and her companies paid MMHL less for these lands because these lands should not have been burdened by the Muccapine mortgage. Lucia arranged to have MMHL incur a liability that should only have been incurred by the MFIT* [emphasis added].

[42] The evidence, in fact, is to the contrary. MFIT was made to incur a liability *that should only have been incurred by MMHL*. Thus, the interest was properly chargeable to MMHL and did not represent an inappropriate diversion of obligations from MFIT to MMHL. Moreover, since the Muccapine mortgage constituted a legitimate charge against the assets of MMHL, and a real debt, its assumption by Highland Beach, as part of the purchase price in the July 10, 1991 transaction, amounted to the assumption of a real obligation and not a reduction in the purchase price, as the trial judge held. There has been no suggestion that Muccapine is willing to waive its rights to payment under the mortgage; nor is their any explanation as to how – if that were so – the abandonment of such a valuable asset is a benefit to Mrs. Milani and Muccapine. There was therefore no "benefit" to Highland Beach in this regard as the trial judge concluded.

[43] In applying the oppression remedy provisions of the OBCA the trial judge relied upon the following passage from the decision of this court in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 at 177:

> In our view, the trial judge failed to appreciate that the "oppressive" conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the plaintiff. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

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[44] It is not contended here that the impugned conduct on the part of Mrs. Milani and her companies was done with the intention of harming the respondent. Nor is it argued that the lack of such intention precludes a finding of oppression. Drawing upon the foregoing passage, however, the trial judge held that Mr. Stabile had a reasonable expectation, following the setting aside of his default judgment in July 1986, "that the affairs of [MMHL] would be conducted with a view to protecting his interests." Given his conclusion that the obligations of the Muccapine mortgage had been improperly shifted from MFIT to MMHL, and that the effect of the July 10, 1991 transaction was therefore to denude MMHL of assets that would otherwise have been available to the company's creditors, including Mr. Stabile, this reasonable expectation had been breached. Application of the oppression remedy followed.

[45] Mr. Carr conceded in argument that but for the facts surrounding the default judgment, Mr. Stabile would not have had a reasonable expectation that he would be paid. The trial judge placed some emphasis on this point as well. In my view, however, the trial judge's characterization casts the "reasonable expectations" component of oppression under s. 248 of the OBCA too broadly in the circumstances of this case. Moreover, Mr. Stabile's reliance, and that of the trial judge, on the assumption that the master might have imposed conditions upon the setting aside of the default judgment in the form of some form of "security" for the payment of an eventual judgment, had he known about the alleged insolvency of MMHL at the time, is misplaced.

[46] Once the default had been set aside, Mr. Stabile was not a judgment creditor. His status was that of a contingent claimant asserting a claim for a liquidated demand against MMHL and the Milani Estate. His position was not analogous to that of a minority

shareholder, or of a major lender who might be said to have "some particular legitimate interest in the manner in which the affairs of the company are managed": see *Re Daon Development Corporation* (1984), 54 B.C.L.R. 235 at 243 (B.C.S.C.). His interest and concern were simply those of any remote potential judgment creditor whose potential debtor has exigible assets. He had a reasonable expectation that the affairs of the potential debtor corporation would be conducted honestly and in good faith, based on the reasonable business judgment of its directing minds, and in a manner that did not *unfairly* prejudice or affect his interests. He had no reasonable expectation that MMHL would be managed and operated in a way that would ensure he was paid for his debt (assuming it was established at trial) in priority to others, including the Crown for tax liabilities.

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[47] The above-cited quotation from *Downtown Eatery* must be considered in the context of the remarks that follow it. Not every conduct that has *the effect* of harming a complainant gives rise to recovery under s. 248(2). The conduct must of course fall foul of the reasonable expectations of the complainant according to the arrangements existing between the principals: *Naneff v. Con-Crete Holdings Ltd*. (1995), 23 O.R. (3d) 481 (C.A.). Moreover, s. 248(2) makes it clear that the oppression remedy involves conduct that effects a result that is "oppressive", or that "*unfairly* prejudices" the complainant, or that "*unfairly* disregards the interests of" the complainant. See *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div.), varied on other grounds (1998), 40 O.R. (3d) 563 (C.A.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.).

[48] In *First Edmonton Place*, McDonald J. reviewed the authorities that have considered the meaning of these words. At p. 143 he said:

> Three cases merit discussion for their attempts to define the key terms of the legislation. In Scottish Co-operative Wholesale Society v. Mayer [1959] A.C. 324, at p. 342, Viscount Simmonds defined "oppressive" as "burdensome, harsh and wrongful". Numerous cases have subsequently quoted and adopted this definition (see Re National Building Maintenance [1971] 1 W.W.R. 9 (B.C.S.C.), at 21; Re Cucci's Restaurant (1985) 29 B.L.R. 3 (Alta. Q.B.) at 202). In Diligenti v. R.W.M.D. Operations Kelowna (1976) 1 B.C.L.R. 36 S.C., at 45, the court considered the meaning of "unfairly prejudicial". Fulton J. ruled that in adding the words "unfairly prejudicial" to the statute, the legislature must have intended that the courts would give those words "an effect different from and going beyond that given to the word oppressive". Turning to the Oxford Dictionary, he found that "prejudicial" meant detrimental or damaging to the

> applicant's right or interest and "unfair" meant inequitable or unjust. He concluded that "the dictionary's definition supported the instinctive reactions that what is unjust and inequitable is obviously unfairly prejudicial" (at 46). Finally, in Stech v. Davies, supra, at p. 379, Egbert J. defined "unfairly disregard" as "to unjustly or without cause, in the context of s. 234(2), pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation.

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[49] The trial judge asked himself the proper question. At para. 16 of his reasons he said: "[t]he issue to be decided is whether the July 10, 1991 transaction had the effect of unfairly prejudicing or unfairly disregarding the interests of the plaintiff creditor". The question he answered, however – see para. 38 of his reasons – was whether the effect of that transaction in transferring the assets of MMHL to Lucia and her companies benefited the appellants to the detriment of the respondent creditor. As demonstrated above, more than a simple benefits/detriment analysis is required under s. 248(2) of the OBCA. The impugned conduct may effect a result that is "harmful" to the complainant, in the sense that he is unable to collect on his judgment debt. More is required, however. The conduct must effect a result that is "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards" the interests of the complainant.

[50] Once the misconception regarding the Muccapine mortgage is corrected, there is nothing in the circumstances of this case to justify a finding that the July 10, 1991 transaction effected a result that was "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards" the interests of the complainant. There is no suggestion that Mrs. Milani or any of her companies acted dishonestly or in bad faith. The trial judge wondered why MMHL was kept operating between 1986 and 1991, given its "grim financial picture". Mrs. Milani apparently exercised her best business judgment in that regard, however. She kept it operating – through funding from her own companies – in order to preserve the assets from foreclosure, maximize their value where possible, honour mortgage and development obligations, and attempt to resolve the overriding tax exposure of the Milani Estate and Mr. Milani's companies. None of this constituted oppressive conduct in relation to Mr. Stabile.

[51] Finally, even if the master had ordered the Milani group to pay monies into court as a term of lifting the earlier default judgment, Mr. Stabile could not have had a reasonable expectation that his judgment – if he obtained one – would be secured in the event that MMHL became insolvent. Monies paid into court in such circumstances do not place a plaintiff in the same position as a secured creditor; rather, in the event of bankruptcy, they are payable to the trustee to be distributed to creditors in accordance

with their claims to priority. As Carruthers J. noted in *Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.* (1995), 33 C.B.R. (3d) 244, at para. 19, "it would be an anomaly if the plaintiff, prior to judgment, was given a greater right to the money in court than it would have following the judgment". This decision was upheld on appeal: (1997), 43 C.B.R. (3d) 135 (C.A.).

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[52] I do not understand, therefore, how Mr. Stabile would have been in a better position on the theory that the master would have imposed conditions upon setting aside the default judgment had MMHL been insolvent at that time and had the master been made aware of that state of affairs. If he would not have been in a better position at the time his judgment was obtained, in 1992, then I fail to comprehend how the failure of the master to impose terms could have created a "reasonable expectation" that the affairs of MMHL would be conducted in such a way that he would be assured such would be the case.

Conclusion

[53] While the palpable and overriding standard demands strong appellate deference to findings of fact and to inferences drawn from those facts (see *Waxman*, *supra*, paras. 292 and 300), I am satisfied the standard has been met on this appeal. Once the trial judge's misconception of the evidence is rectified, his determinations regarding (i) the wrongful placement of the Muccapine mortgage against the assets of MMHL, (ii) the effect of the July 10 1991 transaction, and (iii) the reasonable expectations of Mr. Stabile, are "palpably" in error, in the sense they are "obvious, plain to see or clear" (*Waxman*, para 296; *Housen*, p. 246). In addition they constitute an "overriding" error because they go to the root of the trial judge's determination and are thus "sufficiently significant to vitiate the challenged finding[s]" (*Waxman*, para 297). The conclusion respecting the reasonable expectations of Mr. Stabile was also flawed in law, for the reasons explained above.

[54] For these reasons, the finding of oppression cannot be sustained in the circumstances of this case and the appeal must be allowed.

Disposition

[55] The appeal is allowed, the judgment of Wright J. dated December 10, 2002 is set aside, and judgment is granted dismissing the action.

[56] The appellant is entitled to the costs of the appeal, fixed in the amount of $15,000, inclusive of fees, disbursements and GST. This cost award reflects the fact that the appellant has been successful on this appeal, but was unsuccessful on a less time-

consuming but companion appeal respecting the order of Molloy J. The appellant is also entitled to the costs of the trial, on a partial indemnity basis, to be assessed.

"R.A. Blair J.A."
"I agree K.M. Weiler J.A."
"I agree R.J. Sharpe J.A."

Released: June 30, 2004

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Tab 13

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

ONTARIO

SUPERIOR COURT OF JUSTICE

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

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G.R. STRATHY J.

I. Introduction

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

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

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

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

II. Background Facts

A. The E18 Error Message

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

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

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

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

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

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

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B. The Plaintiffs' Evidence

1. The Representative Plaintiffs

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

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

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

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

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

2. The Plaintiffs' Experts

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

Christopher Atkins

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

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

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

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

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

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Josh Joffe

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

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

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

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

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

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

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

Paul Mandel

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

C. The Defendants' Evidence

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

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

1. The Defendants' Fact Witnesses

Henrique Teixeira

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

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

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

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

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

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

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

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

Hideo Nagumo

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

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

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

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

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

2. The Defendants' Experts

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

Richard Hieber

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

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

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

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- Ms. Schatz's camera had a similar problem, with the lens barrel failing to extend and an E18 Error message appearing. He observed a "dent" on the camera, which he attributed to a "strong impact." He also found some grains of sand inside the camera body and concluded that these could adversely affect lens movement, thereby causing the E18 Error message. It was his conclusion that "the alleged malfunction of Ms. Schatz's camera was caused by customer abuse or misuse, specifically impact damage to the front cover and/or the presence of sand inside the camera."

- Mr. Williams' camera did not display an "E-18" message, but it had an entirely unrelated problem, related to the shutter button, which in his opinion was due to "customer abuse."

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

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

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

> I wouldn't know.

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

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

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> 490. Q. So we've talked about the sand resistance test and the drop test at the production confirmation stage for Canon PowerShot cameras, would you agree that the Canon PowerShot cameras are then designed to resist the amount of sand and the type of drops indicated in these tests?
>
> A. I wouldn't, no.

[43] The questioning then continued:

> Q. Would you agree that a certain degree of sand and impacts due to drops are thereby typical of normal usage in the hands of a consumer?
>
> A. Based on my experience, what I have seen, impact and sand damage are very common issues with consumer products.

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

> A. I wouldn't know.

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

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

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

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

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

R. David Etchells

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

- Canon digital cameras have enjoyed outstanding, and growing, sales success in the market place and since 2005 Canon has been the world leading digital camera manufacturer, based on sales – its cameras routinely dominated the most popular models on his website;

- Canon cameras are, in general, well-designed and well-constructed products that have a reputation in the industry for consistent quality and consumer satisfaction;

- Consumer publications such as *Consumer Reports* and *PC Magazine* have consistently rated Canon digital cameras, including PowerShot cameras, at or near the top of the industry in terms of quality, reliability and customer satisfaction;

- Canon cameras routinely win positions on his web site's assessment of the best cameras on the market;

- Canon's written one-year warranty is quite standard in the digital camera industry;

- The manner in which digital camera owners care for their cameras varies greatly;

- Consumer postings on the internet are heavily skewed to the negative and are not an accurate reflection of consumer experience with a particular brand or model of digital camera.

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

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

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

[52] He continues:

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

David L. Trumper

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

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

III. Preliminary Motions and Objections

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

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A. Motion to Amend Statement of Claim

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

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

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

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

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

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

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

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

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

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C. Motion to Strike Plaintiffs' Expert Evidence

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

1. Applicable Legal Principles

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

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

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

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

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

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

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

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

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

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

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

[71] The starting point for considering the reception of expert evidence is to determine whether it is relevant. The next question is whether the subject is one in which the trier of fact needs the assistance of an expert. If so, and if there is no other applicable exclusionary rule, it must then be shown that the expert is duly qualified to give the evidence in question – as stated in *Mohan* at para. 27, "the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." In *R. v. K. (A)*, Charron J.A., as she then was, stated at para. 103:

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

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

> How the witness acquired that "special" or "peculiar" knowledge is not the central issue at this point. Rather the issue is whether the witness does, in fact, have the "special" or "peculiar" knowledge. Thus one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter. […]
>
> When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness's professional qualifications, actual experience, participation or membership in professional associations, the nature and extent of his or her publications, involvement in teaching, involvement in

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

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

> Dr. John D. Lawson, in "*The Law of Expert and Opinion Evidence*", 2nd ed., p. 74, lays dawn as rule 22: "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible;" citing numerous authorities and illustrations.
>
> "The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith:" *State v. Davis* (1899), 33 S.E. Repr. 449, 55 So. Car. 339, cited in *Words and Phrases Judicially Defined*, vol. 3, p. 2595.

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

> […] expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

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

> Novel Scientific Theory or Technique
>
> *Mohan* kept the door open to novel science, rejecting the "general acceptance" test formulated in the United States in *Frye v. United*

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> *States*, 293 F. 1013 (D.C. Cir. 1923), and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). While *Daubert* must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):
>
> (1) whether the theory or technique can be and has been tested…
>
> (2) whether the theory or technique has been subjected to peer review and publication …
>
> (3) the known or potential rate of error or the existence of standards; and
>
> (4) whether the theory or technique has been generally accepted.

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

2. Application of the Principles in this Case

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

Evidence of Mr. Joffe

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

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

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

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

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

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

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

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

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

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

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

> A. I think it is… there is analytics in there, which implies statistics, so I don't really agree with the question. It is pretty implicit that I have strong analytical skills which one could very easily interpret as statistics. I am not a PhD statistician, as I have outlined in the report. Two of my academic advisors, who I maintain relationships with, have both published statistics … applied statistics book for engineering.
>
> Q. Well, good for them sir, but …
>
> A. I have done published research with them, sir, with my name on it.
>
> Q. But you don't have, as you say, an advanced degree in statistics, do you.
>
> A. No, but neither do they. My degrees are in engineering. You cannot, you know, get a degree in everything and live one life. It is hard. I have tried. It doesn't work.
>
> …
>
> Q. But you are aware, though, that there are people who consider themselves almost a professional calling in statistics?
>
> A. Absolutely, but as I indicated to you, two of my advisors who are the top of their fields are not … again, they don't have degrees

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> in statistics, they have degrees in engineering and sciences, yet they have published statistics… applied statistics textbooks.
>
> Q. I heard you say that, sir. They don't work for Tranztek [Mr. Joffe's company], do they?
>
> A. No, they don't. Tranztek is me.
>
> Q. They didn't review your report, did they?
>
> A. No, they did not. That doesn't mean it cannot be done though.

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

> Q. Well, you make some reference to this concept known as web analytics.
>
> A. Yes.
>
> Q. You don't have any diploma in web analytics, do you sir?
>
> A. There hardly exists such a diploma.
>
> Q. There does not exist such a diploma, does there?
>
> A. There actually might be some colleges that actually do offer an SCO track, a web analytics track.
>
> Q. Not one you took?
>
> A. No, I only done my own. I am answering you very directly. Google ... as I have always been doing. Google, the company which rules the internet, as you know, does offer a certification process, just like Microsoft and Oracle have certification for their products. Google does offer some sort of certification for some of their products. I do ... I am, you know, more of an entrepreneur. I learn these things on my own. I did not receive such certification on web analytics, however, Google does … grants for their products some type of certification.
>
> Q. But you don't have that.

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

Q. I search Google, too.

A. No, no, much more than that.

Q. Is there …

A. Can I …

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

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

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

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

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

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

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

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

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

(a) there is a lower evidentiary threshold on a certification motion;

(b) the so-called "Rule in *Thorpe v. Honda*";

(c) Rule 39.01(4);

(d) the principled approach to exceptions to the hearsay rule.

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

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

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

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

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

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

> With regard to the reliability of the Internet, I accept that in general, official web sites, which are developed and maintained by the organization itself, will provide more reliable information than unofficial web sites, which contain information about the organization but which are maintained by private persons or businesses.
>
> In my opinion, official web sites of well-known organisations can provide reliable information that would be admissible as evidence, the same way the Court can rely on Carswell or C.C.C. for the publication of Court decisions without asking for a certified copy of what is published by the editor. For example, it is evident that the official web site of the Supreme Court of Canada will provide an accurate version of the decisions of the Court.
>
> As for unofficial web sites, I accept Mr. Carroll's opinion that the reliability of the information obtained from an unofficial web site will depend on various factors which include careful assessment of its sources, independent corroboration, consideration as to whether it might have been modified from what was originally available and assessment of the objectivity of the person placing the information on-line. When these factors cannot be ascertained,

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

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

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

> The internet is an abundant source of information. Some of the information available is impeccably accurate, while other information is pure garbage. It does not make sense, on the one hand, to conclude that any and all information pulled from the world-wide web is inherently unreliable and ought to be given zero weight; on the other hand, it makes equally little sense to open the door to admitting into court absolutely anything placed on the internet by anybody.
>
> The approach taken by the Federal Court Trial Division has logical appeal. Even though the appellate court declined to endorse the analysis and conclusion, I agree with the essence of the ruling: internet information may be admissible in court proceedings depending upon a variety of circumstances relating to reliability which include, but are not limited to:
>
> - whether the information comes from an official website from a well known organization;
>
> - whether the information is capable of being verified;
>
> - whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.
>
> Where the threshold of "admissibility" is met, it is still up to the triers of fact to weigh and assess the information to determine what significance, if any, such information would have on the issues to be decided.
>
> If the internet-based evidence tendered does not contain sufficient badges of reliability, it ought be rejected as worthless and, hence, inadmissible.
>
> In the case before me, Ms. Thorpe has pulled information from the internet complaints about Honda automobiles posted to various web pages by unknown and anonymous persons. As pointed out by

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> Honda Canada, who, when and under what circumstances, these postings have been made is not apparent. Although Ms. Thorpe swears that she believes the postings to be true in the generic opening paragraph of her affidavit, she provides no basis for such belief. How can she "know", for example, that "Kim R." is telling the truth about his/her 2006 Honda Civic? While it may be true that Ms. Thorpe has no reason to believe the information is not true, she likewise has disclosed nothing in her affidavits that would tend to suggest that such information is true, accurate, reliable and/or unaltered.
>
> Likewise, the information retrieved from Ms. Thorpe's law firm's web page is similarly unreliable. Anonymous complaint submissions received in this fashion have little or no probative value.
>
> Accordingly, I find that affidavit evidence, "on information and belief", including information taken from the internet, is potentially admissible in interlocutory applications, such as a class action certification application, and may be admitted "under special circumstances" where the "grounds for such information and belief" are adequately disclosed and the information is reliable. Here, the subjective basis for the reliability of the information has not been disclosed and, furthermore, there is no objective basis to believe that the various postings have any degree of reliability.

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

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

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

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

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

Evidence of Mr. Atkins

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

[106] Turning to Mr. Atkins' qualifications:

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

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- he has no relevant practical experience or training in the field of cameras in general or digital cameras in particular;

- he has never testified as an expert witness on any subject, let alone camera design, construction or repair.

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

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

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

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

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

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

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

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

D. Objection to Defendants' Expert Evidence

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

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

- Rule 53 must be read in the context of other rules, including the duty of an expert, set out in rule 4.1.01(1), to provide evidence that is "fair, objective and non-partisan";

- Rule 4.06(2) provides that an affidavit must be confined to "statements of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court …";

- Rule 53.03(1) provides that a party who intends to call an expert witness [at trial] must follow the requirements of rule 53.03(2.1).7, including the delivery of Form 53;

- thus, for an expert to provide an affidavit in a motion, the affidavit must only contain evidence that the expert would be permitted to give in court, because an expert must execute Form 53 before being allowed to give evidence in court, an expert must execute Form 53 before giving evidence on a motion.

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

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

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> (2) a party who intends to call an expert witness at trial to respond to the expert witness of another party, shall [serve a report signed by the expert not less than 60 days before the pre-trial conference …];
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information.
>
> …
>
> 7. An acknowledgement of expert's duty (Form 53) signed by the expert.
>
> [emphasis added].

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

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

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

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

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

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

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IV. The Test for Certification

A. Introduction

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

> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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

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

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

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

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

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

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

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> [1999] O.J. No. 2494, (C.A.), leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. No. 476, 185 D.L.R. (4th) vii.
>
> (f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical: *Hollick v. Toronto (City)*, above, at paras. 29 and 30; *Bendall v. McGhan Medical Corp.*, above, at para. 48; *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 at para. 48 (S.C.J.).
>
> (g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order". It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick v. Toronto (City)*, above, at paras. 22 and 25.
>
> (h) *"Some basis in fact"* is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial: *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 at para. 15 (S.C.J.).

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

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

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

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

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

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

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

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Comparative Cases

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

Certification Granted

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Certification Not Granted

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Rather, the only evidence is that of the defendants' expert, Mr. Sinke, to the effect that because the C/K pick-ups between 1973 and 1991 incorporated "a number of unique fuel system designs", one cannot "generalize on how such vehicles will perform in particular crashes beyond stating that all the designs are reasonably safe and meet all applicable federal safety standards." The ability to generalize, or extrapolate, from one plaintiff's vehicle to another, is crucial to the existence of a common issue. As Huddart J.A. stated for the majority in Harrington v. Dow Corning Corp., supra:
>
> > More important to a determination of common issues is the requirement that they be "common" but not necessarily "identical." In the context of the Act, "common" means that the resolution of the point in question must be applicable to all who are to be bound by it. I agree with the appellants that to be applicable to all parties, the answer to the question must, at least, be capable of extrapolation to each member of the class or subclass on whose behalf the trial of the common issue is certified for trial by a class proceeding. As the appellants note, this requirement will, of necessity, require that the answer be capable of

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> extrapolation to all defendants who will be bound by it. [para. 24; emphasis added.]
>
> Having provided no "evidentiary basis", the plaintiffs did not meet this requirement in this case.

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

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

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

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

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

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

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

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

Conclusions on Comparative Cases

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

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

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

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

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

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

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

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

[177] The plaintiffs plead:

(a) breach of contract;

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(b) breach of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;

(c) breach of section 52 of the *Competition Act*, R.S.C. 1985, c. C-34;

(d) unjust enrichment; and

(e) waiver of tort.

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

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

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

1. Breach of Contract

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

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

[183] The warranty states:

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

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

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

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

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

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

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

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

2. Breach of *Consumer Protection Act, 2002*

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

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

The Pleading

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

> "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;
>
> "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;
>
> "consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;
>
> "goods" means any type of property;
>
> "payment" means consideration of any kind, including an initiation fee;
>
> "services" means anything other than goods, including any service, right, entitlement or benefit;
>
> "supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier.

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

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

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

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

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

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

> 1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
>
> …
>
> 2. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not …
>
> 14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

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

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

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

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

[213] Section 9 provides:

> (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.
>
> (2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.
>
> (3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.
>
> (4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing an intent that the

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

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

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

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

The Pleading of Agency

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

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

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

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

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

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

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

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

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

[223] Section 52(1) provides:

> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.

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

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

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

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

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

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

4. Unjust Enrichment

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

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

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

> Third, the appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery. In *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, [1992] 3 S.C.R. 762, McLachlin J. said this at para. 58:
>
> > To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. [Citations omitted.] It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. *The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant,* such as the services rendered for the defendant or money paid to the defendant [emphasis added in original quotation].

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

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

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

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

5. Waiver of Tort

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

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

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

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

6. Summary on cause of action

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

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

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

[239] The plaintiffs propose the following class definition:

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

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

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

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

> ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues

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> asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria ...
>
> ...[W]ith regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

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

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

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

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

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

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

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

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

1. General Principles regarding Common Issues

[249] Section 5(1)(c) of the *C.P.A.* requires that "the claims or defences of the class members raise common issues." These are defined in s. 1 as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

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

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

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

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

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

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

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

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

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

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

> That the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters. In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law, and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.

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

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

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

2. Common Issues Proposed by the Plaintiffs

[259] The plaintiffs propose the following common issues:

> (a) Did the Canon cameras ("Cameras"), listed in the Claim (Schedule A of the Notice of Motion), contain a defect in design that renders the Cameras prone to manifesting the E18 Error? If so, were Defendants aware of this defect? If not, should Canon have been aware of such a defect?
>
> (b) Does the warranty in respect of the Cameras constitute a contract as between the Defendants and the Class Members?
>
> > (i) Do the Defendants have duty of good faith and fair dealing in the performance of their Warranty Contract?
> >
> > (ii) Does the doctrine of fundamental breach apply?
> >
> > (iii) Are the Defendants barred from relying on the Warranty Contract's exculpatory clauses as the Class Members could not review same prior to the purchase of the Cameras in sealed boxes?
> >
> > (iv) If yes to i, ii, or iii, should the court strike the following terms of the Warranty Contract: A) one year time limitation, B) the exculpatory clause (as referred to in the Claim), and C) the waiver of the implied warranties?
>
> (c) Were the Defendants' representations, listed in paragraph 54 of the Claim (Schedule A of the Notice of Motion), false, misleading, deceiving or did they tend to deceive?
>
> (d) If yes to question c, did the Defendants make materially false and misleading representations to the public in violation of Section 52 of the Competition Act, in respect of the Cameras?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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

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

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

> (a) the representative plaintiff must demonstrate that he or she has a general understanding of the class action procedure and the nature of the lawsuit, in order that he can properly instruct counsel;
>
> (b) the evidence must demonstrate that the plaintiff will be able to discharge these responsibilities and capably and vigorously prosecute the action to advance the interests of the class: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.) at para. 41; *Poulin v. Ford Motor Company of Canada Ltd*., [2008] O.J. No. 4153 (Div. Ct.) at para. 62;
>
> (c) the representative plaintiff is not a mere placeholder, but rather must serve as a genuine client actively engaged in instructing counsel and directing the action on behalf of other persons with a direct interest in the common issues: *Chartrand v. General Motors Corporation*, 2008 BCSC 1781 at para. 99; *Singer v. Schering-Plough Canada Inc*., [2010] O.J. No. 113 (S.C.J.) at para. 219.

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

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

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V. Conclusion

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

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

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

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

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

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

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

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

_____

G.R. Strathy J.

Released: November 8, 2011

2011 ONSC 6571 (CanLII)

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

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES WILLIAMS, KATHLEEN SCHATZ and RAFAEL LIPNER

Plaintiffs/Moving Parties

- and -

CANON CANADA INC. and CANON INC.

Defendants/Respondents

REASONS ON MOTION FOR CERTIFICATION

G.R. Strathy J.

Released: November 8, 2011

Tab 14

DATE: 20030408
DOCKET: C37858

COURT OF APPEAL FOR ONTARIO

McMURTRY, C.J.O., CATZMAN and ROSENBERG JJ.A.

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B E T W E E N :	)	
	)	
SEHDEV KUMAR	)	Paul J. Pape
	)	for the appellant
	)	
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	
THE MUTUAL LIFE ASSURANCE COMPANY OF CANADA, and PRUDENTIAL ASSURANCE COMPANY LIMITED	)	F. Paul Morrison and Dana M. Peebles for the respondents
	)	
Respondents	)	**Heard:** November 5 & 6, 2002

On appeal from the Order of the Divisional Court (McRae, Then and Day JJ.) dated December 14, 2001, dismissing the appeal of the appellant from the Order of Cumming J. dated October 18, 2000.

ROSENBERG J.A.:

[1] This is one of two appeals heard together by this court concerning the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. Both are appeals from refusals by motions judges to certify, as class actions under the CPA, claims originating from the sale of so-called “premium offset” or “vanishing premiums” participating whole life insurance policies.

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

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

THE FACTS

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

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

[6] The appellant's policy was a participating permanent whole life policy. As a participating policy holder the appellant was entitled to dividends in any year in which the company declared them. The size of the dividends depended upon the performance of the company's investments. The theory behind a premium offset or vanishing premium policy is that at a certain point in time the accumulated dividends would be sufficient to pay or "offset" future premiums as they came due. Whole life policies with vanishing premiums pay dividends to policyholders that purportedly cover the cost of premiums within a number of years, upon a specified "cross-over" date. These policies apparently accomplish their objectives so long as interest rates are high. If rates decline,

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the dividends fail to produce sufficient income to pay the remaining premiums, and insurers move back the "cross-over" dates by several years. Using the premiums to offset future premiums was not the only way that participating policies were sold. For example, the policyholder could use the dividends to buy additional term insurance.

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

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

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

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

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

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

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Prudential's use of vanishing premium policies

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

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

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

[15] Prudential's first dividend scale decrease occurred in 1992 as a result of declining interest rates. In 1993, Prudential began advising its agents to present multiple scale illustrations to customers showing future values based on three projections: dividends higher than, equal to and lower than the current rate. Prudential maintains that these were

not a guarantee or a prediction by Prudential of future developments regarding dividend scales or interest rates. Rather, the illustrations merely set out the current dividend scales and interest rates.

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[16] The motions judge described some of the potential problems with the premium offset feature:

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

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

THE DEFINITION OF THE CLASS AND COMMON ISSUES BEFORE THE MOTIONS JUDGE

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

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

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

[19] The appellant proposed the following common question:

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

THE REASONS OF CUMMING J.

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

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

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[21] The motions judge had the greatest concern with elements (2) to (5). In summary, he found that an individual determination would have to be made with respect to each policyholder for each of those elements. For example, as to element (2) there would have to be evidence as to whether any representation as to premium offset was made and then, if so, whether or not it was accurate. In summary, he concluded that, "While the theories of liability can be phrased commonly the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy". Accordingly, he found that the claims of the class members do not raise common issues.

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

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

THE REASONS OF THE DIVISIONAL COURT

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

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

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

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

THE ISSUES

[27] The appellant raises three issues:

> (1) Did the Divisional Court err in principle in finding that the appeal must be approached solely on the basis of the issues as presented to the motions judge?
>
> (2) Did the courts err in principle in their use of the evidentiary record to determine there were no common issues?

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

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

THE LEGISLATION

[29] The relevant parts of the CPA are ss. 5 and 6, which provide as follows:

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

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

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

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

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

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

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

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

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5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

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ANALYSIS

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

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

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

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

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

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

(2) Use of the evidentiary record

[35] The appellant submits that the motions judge erred in using the evidentiary record provided by the respondents to determine the merits of the proposed claim. In *Hollick*, the court dealt with the use of evidence on the certification motion. The court held at para. 16 that "the certification stage is decidedly not meant to be a test of the merits of the action". Thus, the "question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action".

[36] The Supreme Court then considered the proper use of the evidentiary record. McLachlin C.J.C. held at para. 25 that the class representative "must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action". Section 5(1)(a) requires that the pleadings disclose a cause of action. This requirement is governed by the rule that pleadings should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists.

[37] The motions judge made a number of findings of fact based upon the material submitted by the respondents. For example, he stated that the "documentation produced

does not support the plaintiffs' allegation that Prudential engaged in any organized and systemic marketing of premium offset insurance policies" (at para. 17). He also stated that the "evidentiary record establishes that Prudential … did not require or encourage its agents to use the concept, did not train its agents to use the concept in any specific or common way and provided cautions and warnings about premium offsets in its directions to its agents and in the illustrations they employed" (at para. 18). Further, he stated that the "evidence establishes that agents gave unique and individually targeted presentations to each different prospective policy purchaser" (at para. 19).

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

[39] In my view, the motions judge did not err. He accurately summarized the respondents' evidence and the appellant did not contradict that evidence. The legal consequences flowing from that evidence are another matter and involves consideration of the finding by the motions judge that there was no common issue and that, in any event, the class proceeding would not be the preferable procedure for the resolution of the common issue.

(3) The common issues

[40] Relying on *Dabbs*, the appellant proposed the following common issue before the motions judge:

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

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

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

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

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

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

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

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

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

> In *Rumley* at para. 29:
>
> It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.
>
> And in *Western Canadian* at para. 39 (adopted in *Hollick* at para. 18):
>
> [T]he class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.

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

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

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

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

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

> I could understand an order certifying, or refusing to certify, both claims. I do not, however, understand why opposite orders were considered appropriate for the two claims.

[50] He went on to point out that several of the common issues related directly to the negligent misrepresentation claim and that the two core issues in the litigation—whether there was gold in the Busang mine and, if not, what was the various defendants' knowledge of that fact—were common to the claims of misrepresentation whether made fraudulently or negligently. Moreover, *Bre-X* is factually a different case. The foundations of the plaintiffs' case are the public statements made by the Bre-X insiders to sell a single product, Bre-X shares, and the insiders' knowledge that those claims were untrue. This case, on the other hand, will always come down to individual representations made by hundreds of different agents selling a variety of whole life insurance products in widely different circumstances. It has not been suggested that the premium offset feature is per se illegal or misleading. Only if the feature is not properly used does it become misleading.

(4) Preferable procedure

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

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

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

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

[55] I acknowledge that the class action could serve the interests of behaviour modification by exposing the vanishing premium/premium offset sales technique to public scrutiny through a class action, assuming that a court were to find that the technique amounted to negligent misrepresentation. However, the other considerations

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relating to judicial economy and access to justice so far outweigh this consideration that a class action should not be considered a preferable procedure.

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[56] It is apparent that the appellant has reformulated the common issue in an attempt to bring his case within the holding of the Supreme Court of Canada in *Rumley*. The *Rumley* plaintiffs brought an action against the government of British Columbia for compensatory and punitive damages based upon abuse at a residential school for children with disabilities. The Supreme Court found that the commonality and preferability requirements under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50 were met. Fundamental issues in that case were the duty of care and whether the government's conduct fell below an acceptable standard. Resolving those issues was necessary to the resolution of each class member's claim. As Nordheimer J. observed in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.J.) at para. 73:

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

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

[58] It may be that a common issue could be framed to assist in litigation of the first element from *Cognos*, "a duty of care based on a 'special relationship' between the representor and the representee". In other words, a common issue might be framed to address the question of whether Prudential owed a duty of care to the individual policyholders. However, given that life insurance policies are sold by individual agents having regard to the particular circumstances of the client, resolving that issue would not

sufficiently advance the policyholders' cases to make class proceeding the preferable procedure. The centrality of the relationship between the agent and the client dictates that there would have to be an individual inquiry as to whether the premium offset representation was made, how it was made and whether it had any impact in the particular case.

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

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

> I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. *While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition.* On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. *As the Divisional Court noted: "[E]ven if one considers only the 150 persons who made complaints -- those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class*

> *members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action* [emphasis added].

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

DISPOSITION

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

Signed: **"M. Rosenberg J.A."**
"I agree R.Roy McMurtry C.J.O."
"I agree M. A. Catzman J.A."

RELEASED: APRIL 8, 2003

Tab 15

Andrus Wilson *Appellant*

v.

Ramzi Mahmoud Alharayeri *Respondent*

Indexed as: Wilson *v.* Alharayeri

2017 SCC 39

File No.: 36689.

2016: November 29; 2017: July 13.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Remedy — Criteria governing imposition of personal liability on corporate directors — Corporation's board refusing conversion of preferred shares held by former director before issuing private placement of convertible secured notes, thereby diluting former director's portfolio — Discussions resulting in refusal being led at board level by director who subsequently had his preferred shares converted so as to benefit from private placement by increasing his control over corporation — Whether trial judge appropriately exercised statutory remedial powers by holding corporate directors personally liable for oppression — Whether pleadings sufficient to ground imposition of personal liability — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241(3).

From 2005 to 2007, A was the President, the Chief Executive Officer, a significant minority shareholder and a director of Wi2Wi Corporation ("Wi2Wi"). In March 2007, in negotiating the merger of Wi2Wi with another corporation, A also agreed to sell it some of his common shares and signed a share purchase agreement to that effect without notifying Wi2Wi's Board. When the Board found out about the existence of the agreement, A was censured for concealing the deal and failing to disclose the potential conflict of interest. Consequently, A resigned from his functions. W, a member of Wi2Wi's Board and audit

Andrus Wilson *Appelant*

c.

Ramzi Mahmoud Alharayeri *Intimé*

Répertorié : Wilson *c.* Alharayeri

2017 CSC 39

N° du greffe : 36689.

2016 : 29 novembre; 2017 : 13 juillet.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Réparation — Critères régissant l'imposition d'une responsabilité personnelle à des administrateurs d'une société — Refus du conseil d'administration de la société de permettre la conversion des actions privilégiées détenues par un ancien administrateur avant de procéder à un placement privé de billets garantis convertibles, diluant ainsi le portefeuille de l'ancien administrateur — Discussions au conseil d'administration ayant donné lieu au refus dirigées par un administrateur dont les actions privilégiées ont par la suite été converties de sorte qu'il puisse retirer un bénéfice personnel du placement privé en augmentant son contrôle sur la société — Le juge du procès a-t-il correctement exercé les pouvoirs de réparation prévus dans la loi en concluant que les administrateurs de la société étaient personnellement responsables de l'abus? — Les actes de procédure étaient-ils suffisants pour justifier l'imposition d'une responsabilité personnelle? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44, art. 241(3).

De 2005 à 2007, A était président, chef de la direction, actionnaire minoritaire important et administrateur de Wi2Wi Corporation (« Wi2Wi »). En mars 2007, tout en négociant la fusion de Wi2Wi avec une autre entreprise, A a également convenu de vendre à cette dernière certaines de ses actions ordinaires et a signé une convention d'achat d'actions à cet égard sans en aviser le conseil d'administration de Wi2Wi. Lorsqu'il a eu vent de l'existence de cette convention, le conseil d'administration de la société a reproché à A d'avoir caché l'entente et omis de divulguer le conflit d'intérêts potentiel.

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committee, became its President and CEO. Neither the merger nor the share purchase occurred.

In September 2007, in response to Wi2Wi's continuing financial difficulties, the Board decided to issue a private placement of convertible secured notes ("Private Placement") to its existing common shareholders. Prior to the Private Placement, the Board accelerated the conversion of Class C Convertible Preferred Shares, beneficially held by an investment company for W, into common shares. It did so despite doubts as to whether or not the financial test for C Share conversion had been met. However, A's Class A and B Convertible Preferred Shares were never converted into common shares, notwithstanding that they met the relevant conversion tests. In Board meetings, W and another director, B, advocated against converting A's A and B Shares on the basis of A's conduct and involvement in the parallel share purchase negotiation when he was President. Consequently, A did not participate in the Private Placement and the value of his A and B Shares and the proportion of his common shares in Wi2Wi were substantially reduced. A then filed an application under s. 241 of the *Canada Business Corporations Act* for oppression against four of Wi2Wi's directors, including W.

The trial judge granted the application in part. He held W and B solidarily liable for the oppression and ordered them to pay A compensation. The Court of Appeal dismissed W and B's appeal. It held that the imposition of personal liability was justified and that the pleadings did not preclude it. W now appeals to the Court, challenging the trial judge's conclusion that it was fit to hold him personally liable for the oppressive conduct.

Held: The appeal should be dismissed.

Section 241(3) of the *Canada Business Corporations Act* gives a trial court broad discretion to "make any interim or final order it thinks fit", before enumerating specific examples of permissible orders. Some of the examples show that the oppression remedy contemplates liability not only for the corporation, but also for other parties. However, the Act's wording goes no further to specify when it is fit to hold directors personally liable under this section. As stated in the leading decision, *Budd v. Gentra*

En conséquence, A a démissionné de ses fonctions. W, qui était membre du conseil d'administration et du comité de vérification de Wi2Wi, est devenu président et chef de la direction de la société. Ni la fusion ni l'achat d'actions n'ont eu lieu.

En septembre 2007, en raison des difficultés financières persistantes de Wi2Wi, son conseil d'administration a décidé d'offrir à ses détenteurs d'actions ordinaires des billets garantis convertibles dans le cadre d'un placement privé (« Placement privé »). Avant le Placement privé, le conseil d'administration a accéléré la conversion en actions ordinaires des actions privilégiées de catégorie C convertibles dont une société d'investissement était détentrice au bénéfice de W, et ce, malgré les doutes quant au respect du test financier relatif à la conversion de ces actions de catégories C. Cependant, les actions privilégiées de catégorie A et B convertibles n'ont quant à elles jamais été converties en actions ordinaires, même si les tests relatifs à la conversion étaient respectés. Lors des réunions du conseil d'administration, W et un autre administrateur, B, ont exprimé des doutes sur l'opportunité de permettre la conversion des actions A et B de A, étant donné sa conduite et les négociations parallèles d'achat d'actions qu'il avait menées alors qu'il était président. En conséquence, A n'a pas participé au Placement privé et la valeur de ses actions A et B et la proportion des actions ordinaires qu'il possédait dans Wi2Wi ont considérablement diminué. A a ensuite déposé une demande de redressement pour abus en vertu de l'art. 241 de la *Loi canadienne sur les sociétés par actions*, et ce, contre quatre des administrateurs de la société, dont W.

Le juge du procès a accueilli la demande en partie. Il a conclu que W et B étaient solidairement responsables de l'abus et les a condamnés à payer à A une indemnité. La Cour d'appel a rejeté l'appel interjeté par W et B. Elle a conclu que l'imposition d'une responsabilité personnelle était justifiée et que les actes de procédure ne l'empêchaient pas. W se pourvoit maintenant devant la Cour et conteste la conclusion du juge du procès qu'il était pertinent de le tenir personnellement responsable de l'abus.

Arrêt : Le pourvoi est rejeté.

Le paragraphe 241(3) de la *Loi canadienne sur les sociétés par actions* confère au juge du procès un large pouvoir discrétionnaire pour « rendre les ordonnances provisoires ou définitives qu'il estime pertinentes », puis énumère des exemples précis d'ordonnances possibles. Certains des exemples montrent que le redressement pour abus vise non seulement la responsabilité de la société en cause, mais aussi celle d'autres parties. Cependant, le libellé de la Loi ne précise pas dans quelles

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Inc. (1998), 43 B.L.R. (2d) 27 (Ont. C.A.), determining the personal liability of director requires a two-pronged approach. First, the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression. Second, the imposition of personal liability must be fit in all the circumstances.

At least four general principles should guide courts in fashioning a fit remedy under s. 241(3). First, the oppression remedy request must in itself be a fair way of dealing with the situation. It may be fair to hold a director personally liable where he or she has derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, breached a personal duty or misused corporate power, or where a remedy against the corporation would unduly prejudice other security holders. These factors merely represent indicia of fairness. The presence of a personal benefit and bad faith remain hallmarks of conduct attracting personal liability, but like the other indicia, they do not constitute necessary conditions. The fairness principle is ultimately unamenable to formulaic exposition and must be assessed in light of all the circumstances of a particular case. Second, any order should go no further than necessary to rectify the oppression. Third, any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders. And fourth, a court should consider the general corporate law context in exercising its remedial discretion. Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances.

In this case, the trial judge appropriately exercised the remedial powers provided in s. 241(3) of the *Canada Business Corporations Act* by holding W personally liable for the oppression. W and B, the only members of the audit committee, played the lead roles in Board discussions resulting in the non-conversion of A's A and B Shares, and

circonstances il est justifié que les administrateurs soient tenus personnellement responsables en application de cette disposition. Comme il est indiqué dans l'arrêt de principe, *Budd c. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (C.A. Ont.), il faut appliquer un test à deux volets pour déterminer s'il y a responsabilité personnelle d'un administrateur. D'abord, la conduite abusive doit être véritablement attribuable à l'administrateur en raison de son implication dans l'abus. Ensuite, l'imposition d'une responsabilité personnelle doit être pertinente compte tenu de toutes les circonstances.

Au moins quatre principes généraux devraient guider les cours lorsqu'elles sont appelées à façonner une ordonnance pertinente en application du par. 241(3). Premièrement, la demande de redressement en cas d'abus doit en soi constituer une façon équitable de régler la situation. Il peut être équitable de tenir un administrateur personnellement responsable lorsque celui-ci a retiré un bénéfice personnel, que ce soit sous la forme d'un avantage financier immédiat ou d'un contrôle accru de la société, a manqué à une obligation personnelle ou a abusé d'un pouvoir de la société, ou lorsqu'une condamnation de la société porterait indûment préjudice à d'autres détenteurs de valeurs mobilières. Ces facteurs constituent simplement des indices de ce que l'équité requière. L'existence d'un bénéfice personnel et la présence de mauvaise foi demeurent des signes révélateurs d'une conduite susceptible d'engager une responsabilité personnelle, mais à l'instar des autres indices, ce ne sont pas des conditions nécessaires. Le principe de l'équité est en fait réfractaire aux formules et doit être évalué cas par cas en tenant compte de l'ensemble des circonstances. Deuxièmement, l'ordonnance rendue ne devrait pas accorder plus que ce qui est nécessaire pour réparer l'abus. Troisièmement, l'ordonnance rendue peut uniquement servir à répondre aux attentes raisonnables des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants en leur qualité de parties intéressées de la société. Et quatrièmement, dans l'exercice de leur pouvoir discrétionnaire en matière de réparation, les tribunaux devraient tenir compte du contexte général du droit des sociétés. La condamnation d'un administrateur ne peut constituer un substitut pour d'autres formes de réparations prévues par la loi ou la common law, particulièrement lorsque ces autres réparations seraient plus pertinentes eu égard aux circonstances.

En l'espèce, le juge du procès a correctement exercé les pouvoirs de réparation prévus au par. 241(3) de la *Loi canadienne sur les sociétés par actions* en concluant que W était personnellement responsable de l'abus. W et B, les seuls membres du comité de vérification, ont joué un rôle prépondérant dans les discussions du conseil

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were therefore implicated in the oppressive conduct. In addition, W accrued a personal benefit as a result of the oppressive conduct: he increased his control over Wi2Wi through the conversion of his C Shares (which was not the case for the C Shares held by others) into common shares, which allowed him to participate in the Private Placement despite issues as to whether the test for conversion had been met. This was done to the detriment of A, whose own stake in the company was diluted due to his inability to participate in the Private Placement. The remedy went no further than necessary to rectify A's loss. The quantum of the order was fit as it corresponded to the value of the common shares prior to the Private Placement. Finally, the remedy was appropriately fashioned to vindicate A's reasonable expectations that (1) his A and B Shares would be converted if Wi2Wi met the applicable financial tests laid out in the corporation's articles and (2) the Board would consider his rights in any transaction impacting the A and B shares.

A's pleadings were also adequate to ground the imposition of personal liability. They alleged the four named directors had acted in their personal interest to the detriment of Wi2Wi and A. Specific allegations were made against the directors and accordingly, damages were sought against them personally. The appropriate response to A's bare pleadings was a motion for particulars or discovery prior to trial, not a plea before the appellate courts.

Cases Cited

Applied: *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; **referred to:** *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481; *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113; *Estate of John Wood v. Arius3D Corp.*, 2014 ONSC 3322; *GC Capital Inc. v. Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1; *Moon v. Golden Bear Mining Ltd.*, 2012 BCSC 829; *Belliveau v. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87; *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467; *Cox v. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1; *Danylchuk v. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2; *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp.*, 2008 MBQB 296, 244 Man. R. (2d) 127; *Adecco Canada Inc.*

d'administration ayant mené à la non-conversion des actions A et B de A et ont donc été impliqués dans la conduite abusive. De plus, l'abus a procuré un avantage personnel à W, soit son contrôle accru sur Wi2Wi grâce à la conversion de ses actions C (mais pas des actions C détenues par d'autres) en actions ordinaires, ce qui lui a permis de participer au Placement privé, et ce, malgré l'existence de doutes quant au respect du test relatif à la conversion. Cela s'est fait au détriment de A, dont les propres intérêts dans l'entreprise ont été dilués en raison de son incapacité à participer au Placement privé. La réparation n'a pas accordé plus que ce qui était nécessaire pour remédier à la perte de A. Le montant de l'ordonnance était approprié, puisqu'il correspondait à la valeur des actions ordinaires avant le Placement privé. Enfin, la réparation a été adéquatement élaborée eu égard aux attentes raisonnables de A selon lesquelles (1) ses actions A et B seront converties si la société satisfaisait aux tests financiers applicables établis dans les statuts de la société, et (2) le conseil d'administration tiendra compte de ses droits lors de toute opération ayant une incidence sur les actions A et B.

Les actes de procédure de A étaient par ailleurs suffisants pour fonder l'imposition d'une responsabilité personnelle. A a allégué que les quatre administrateurs désignés ont agi dans leur intérêt personnel et au détriment de Wi2Wi et de A. Ce dernier a fait des allégations précises contre les administrateurs et, en conséquence, il a demandé qu'ils soient condamnés personnellement à verser des dommages-intérêts. La réponse la plus appropriée aux actes de procédure minimaux produits par A était une requête pour précisions ou un interrogatoire au préalable, et non un plaidoyer devant les cours d'appel.

Jurisprudence

Arrêts appliqués : *Budd c. Gentra Inc.* (1998), 43 B.L.R. (2d) 27; *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560; **arrêts mentionnés :** *Naneff c. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481; *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113; *Estate of John Wood c. Arius3D Corp.*, 2014 ONSC 3322; *GC Capital Inc. c. Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1; *Moon c. Golden Bear Mining Ltd.*, 2012 BCSC 829; *Belliveau c. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87; *2082825 Ontario Inc. c. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467; *Cox c. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1; *Danylchuk c. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2; *Incorporated Broadcasters Ltd. c. CanWest Global Communications Corp.*, 2008 MBQB 296, 244

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v. J. Ward Broome Ltd. (2001), 12 B.L.R. (3d) 275; *Walls v. Lewis* (2009), 97 O.R. (3d) 16; *Waiser v. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317; *Levenzon (Demetriou) v. Spanos Korres*, 2014 QCCS 258; *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481, leave to appeal refused, [1996] 3 S.C.R. viii; *Segal v. Blatt*, 2007 QCCS 1488, aff'd 2008 QCCA 1094; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161; *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563; *Gottlieb v. Adam* (1994), 21 O.R. (3d) 248; *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749; *Smith v. Ritchie*, 2009 ABCA 373; *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74.

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APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Dufresne and Gagnon JJ.A.), 2015 QCCA 1350, 53 B.L.R. (5th) 43, [2015] AZ-51207607, [2015] Q.J. No. 7670 (QL), 2015 CarswellQue 13380 (WL Can.), affirming a decision of Hamilton J., 2014 QCCS 180, [2014] AZ-51037940, [2014] Q.J. No. 401 (QL), 2014 CarswellQue 419 (WL Can.). Appeal dismissed.

Terrence J. O'Sullivan, *Paul Michell* and *Zain Naqi*, for the appellant.

Douglas C. Mitchell and *Emma Lambert*, for the respondent.

Man. R. (2d) 127; *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275; *Walls c. Lewis* (2009), 97 O.R. (3d) 16; *Waiser c. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317; *Levenzon (Demetriou) c. Spanos Korres*, 2014 QCCS 258; *ScotiaMcLeod Inc. c. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481, autorisation de pourvoi refusée, [1996] 3 R.C.S. viii; *Segal c. Blatt*, 2007 QCCS 1488, conf. par 2008 QCCA 1094; *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 54 O.R. (3d) 161; *Sidaplex-Plastic Suppliers Inc. c. Elta Group Inc.* (1998), 40 O.R. (3d) 563; *Gottlieb c. Adam* (1994), 21 O.R. (3d) 248; *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360; *Themadel Foundation c. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749; *Smith c. Ritchie*, 2009 ABCA 373; *Stern c. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352; *Trackcom Systems International Inc. c. Trackcom Systems Inc.*, 2014 QCCA 1136; *Rodaro c. Royal Bank of Canada* (2002), 59 O.R. (3d) 74.

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Terrence J. O'Sullivan, *Paul Michell* et *Zain Naqi*, pour l'appelant.

Douglas C. Mitchell et *Emma Lambert*, pour l'intimé.

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The judgment of the Court was delivered by

CÔTÉ J. —

I. Introduction

[1] Section 241(3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), allows a court to "make any interim or final order it thinks fit" to rectify the matters complained of in an action for corporate oppression. The principal question raised by this appeal is when an order for compensation under this section may properly lie against the directors of a corporation personally, as opposed to the corporation itself.

[2] For almost 20 years, the leading authority on this question has been the Ontario Court of Appeal's decision in *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 ("*Budd*"), and in my view, there is no reason to depart from the guidance provided in *Budd* now.

[3] In this case, the trial judge did not err in his application of *Budd* or the principles governing orders under s. 241(3) when he found the appellant director personally liable for the oppressive conduct. Appellate intervention is therefore unwarranted, and I would accordingly dismiss the appeal.

II. Background

A. *Context and the Corporation's Capital Structure*

[4] From 2005 to 2007, the respondent, Mr. Alharayeri, was the President, the Chief Executive Officer ("CEO"), a significant minority shareholder and a director of Wi2Wi Corporation ("Corporation"), a technology company incorporated under the *CBCA*. Prior to the events leading to the instant litigation, he held 2 million common shares, 1 million Class A Convertible Preferred Shares ("A Shares")

Version française du jugement de la Cour rendu par

LA JUGE CÔTÉ —

I. Introduction

[1] Le paragraphe 241(3) de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), permet à un tribunal de « rendre les ordonnances provisoires ou définitives qu'il estime pertinentes » pour redresser la situation dénoncée dans une action en redressement pour abus par une société. La question principale soulevée dans le présent pourvoi vise à déterminer dans quelles circonstances une ordonnance d'indemnisation rendue en vertu de cette disposition peut à bon droit être dirigée personnellement contre les administrateurs de la société, plutôt que contre la société elle-même.

[2] Pendant près de 20 ans, *Budd c. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (« *Budd* »), de la Cour d'appel de l'Ontario a constitué l'arrêt de principe sur cette question, et je ne vois aucune raison de nous en écarter présentement.

[3] En l'espèce, le juge du procès n'a pas commis d'erreur dans son application de *Budd* ou des principes qui régissent les ordonnances visées au par. 241(3) en concluant que l'administrateur appelant est personnellement responsable de l'abus reproché. Une intervention en appel n'est donc pas justifiée, et je suis en conséquence d'avis de rejeter le pourvoi.

II. Les faits

A. *Contexte et structure financière de la société*

[4] De 2005 à 2007, l'intimé, M. Alharayeri était président, chef de la direction, actionnaire minoritaire important et administrateur de Wi2Wi Corporation (« société »), une entreprise spécialisée en technologie, constituée sous le régime de la *LCSA*. Avant les événements ayant mené au litige dont nous sommes saisis, M. Alharayeri détenait 2 millions d'actions ordinaires de la société, 1 million

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and 1.5 million Class B Convertible Preferred Shares ("B Shares") in the Corporation. The respondent was the sole holder of the A and B Shares, which were issued to him as performance-linked incentives. The A Shares were convertible into common shares if the Corporation met certain financial targets in the 2006 fiscal year, and the B Shares were convertible into common shares if certain financial targets were met in the 2007 fiscal year. If the targets were not met, the shares were to be converted into a reduced number of common shares prorated according to the shortfall.

[5] The Corporation also issued Class C Convertible Preferred Shares ("C Shares") as an incentive to those involved in finding financing for it. Like the A and B Shares, the C Shares were convertible into common shares if the Corporation met a financial target laid out in its articles of incorporation. The appellant, Mr. Wilson, was one of the C shareholders and beneficially owned or controlled 100,000 C Shares through YTW Growth Capital Management Corp. ("YTW Corp."). Like the A and B Shares, the C Shares were non-participating, non-voting, non-transferable and non-assignable.

B. *Origins of the Dispute*

[6] In March 2007, as a result of recurring cash flow issues, the Corporation began to seriously consider merging its operations with those of another business, Mitec Telecom Inc. ("Mitec"). While negotiating the merger, the respondent was also separately negotiating with Mitec the sale of his own shares in the Corporation in order to alleviate personal financial difficulties. Without notifying the Corporation's Board, the respondent agreed to sell some of his common shares to Mitec, and he signed a share purchase agreement to that effect on April 2, 2007. On May 31, 2007, when the Corporation's Board finally learned of the respondent's personal share purchase agreement, he was censured for concealing the deal and failing to disclose the potential

d'actions privilégiées de catégorie A convertibles (« actions A ») et 1,5 million d'actions privilégiées de catégorie B convertibles (« actions B »). L'intimé était le seul détenteur d'actions A et B, lesquelles lui avaient été émises comme incitatifs liés au rendement. Les actions A étaient convertibles en actions ordinaires à la condition que la société atteigne certains objectifs financiers durant l'exercice financier 2006. Dans le cas des actions B, la conversion en actions ordinaires était également liée au respect d'objectifs financiers, mais pour l'exercice financier 2007. Si les objectifs financiers n'étaient pas atteints, les actions devaient être converties en un nombre réduit d'actions ordinaires établi au prorata du manque à gagner.

[5] La société avait aussi émis des actions privilégiées de catégorie C convertibles (« actions C ») comme incitatifs pour les personnes chargées d'obtenir du financement pour l'entreprise. À l'instar des actions A et B, les actions C pouvaient être converties en actions ordinaires si la société atteignait un objectif financier établi dans ses statuts constitutifs. L'appelant, M. Wilson, un des détenteurs d'actions C, détenait ou contrôlait à titre bénéficiaire 100 000 actions C par l'entremise de YTW Growth Capital Management Corp. (« YTW Corp. »). Comme les actions A et B, les actions C étaient non participantes, non votantes, non transférables et non cessibles.

B. *Origines du différend*

[6] En mars 2007, en raison de problèmes de liquidité récurrents, la société a commencé à envisager sérieusement de fusionner ses activités avec celles d'une autre entreprise, Mitec Telecom Inc. (« Mitec »). Tout en négociant la fusion, l'intimé négociait aussi séparément avec Mitec la vente de ses propres actions dans la société afin d'alléger ses difficultés financières personnelles. Sans en aviser le conseil d'administration de la société, l'intimé a convenu de vendre à Mitec certaines de ses actions ordinaires et a signé une convention d'achat d'actions à cet égard le 2 avril 2007. Le 31 mai 2007, ayant finalement eu vent de la convention d'achat d'actions conclue par l'intimé à titre personnel, le conseil d'administration de la société a reproché

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conflict of interest. This triggered his resignation as President, CEO and director of the company on June 1, 2007.

[7] After the respondent's resignation, the appellant became Wi2Wi's President and CEO. The Corporation's Board consisted of seven remaining directors. However, its audit committee comprised only two directors: the appellant and Dr. Hans Black — the chairperson of the audit committee.

[8] During the months following the respondent's resignation, further negotiations were conducted by the respondent, the Corporation, and Mitec, but none materialized into a merger or a share purchase agreement.

[9] In September 2007, the Corporation's Board decided to issue a private placement of convertible secured notes ("Private Placement") to its existing common shareholders in response to its continuing financial difficulties. Under the terms of the issuance, each shareholder was entitled to subscribe for $1.00 of notes for every two common shares the shareholder had in the Corporation. The notes were convertible into common shares at the rate of 50,000 common shares per $1,000 principal amount of notes. The Private Placement would therefore substantially dilute the proportion of common shares held by any shareholder who did not participate in it.

[10] Prior to the Private Placement, the Board accelerated the conversion of 100,000 C Shares, beneficially held by YTW Corp. for the appellant, into common shares. It did so despite doubts expressed by the auditors as to whether or not the test for the C Share conversion had been met. The other two holders of C Shares did not benefit from their expedited conversion.

[11] On the other hand, the respondent's A Shares were never converted into common shares. The Board never approved the 2006 audited financial statements, which contained a note stipulating that,

à ce dernier d'avoir caché l'entente et omis de divulguer le conflit d'intérêts potentiel. Cela a provoqué la démission de l'intimé, le 1er juin 2007, de ses fonctions de président, de chef de la direction et d'administrateur de l'entreprise.

[7] Après la démission de l'intimé, l'appelant est devenu président et chef de la direction de Wi2Wi. Le conseil d'administration de la société était composé des sept autres administrateurs. Son comité de vérification ne comptait que deux administrateurs, l'appelant et le Dr Hans Black — lequel était président du comité de vérification.

[8] Au cours des mois ayant suivi la démission de l'intimé, d'autres négociations ont eu cours entre ce dernier, la société et Mitec, mais elles n'ont donné lieu ni à une fusion ni à une convention d'achat d'actions.

[9] En septembre 2007, afin de résoudre les difficultés financières persistantes de la société, son conseil d'administration a décidé d'offrir à ses détenteurs d'actions ordinaires des billets garantis convertibles dans le cadre d'un placement privé (« Placement privé »). Celui-ci donnait à chaque actionnaire le droit de souscrire à ces billets à hauteur de 1,00 $ pour chaque groupe de deux actions ordinaires de la société qu'il détenait. Les billets étaient convertibles en actions ordinaires, à raison de 50 000 actions ordinaires par tranche de billets de 1000 $ en capital. Le Placement privé avait donc pour effet de diminuer considérablement la proportion d'actions ordinaires détenues par les actionnaires qui ne participaient pas à cette opération.

[10] Avant le Placement privé, le conseil d'administration avait accéléré la conversion en actions ordinaires des 100 000 actions C dont YTW Corp. était détentrice au bénéfice de l'appelant, et ce, malgré les doutes exprimés par les vérificateurs quant au respect du test relatif à la conversion de ces actions. Les deux autres détenteurs d'actions C n'ont pas bénéficié de la conversion accélérée de ces actions.

[11] Les actions A de l'intimé n'ont quant à elles jamais été converties en actions ordinaires. Le conseil d'administration n'a jamais approuvé les états financiers vérifiés de 2006, qui contenaient une note

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on the basis of the financial test laid out in the articles of incorporation, the A Shares were convertible into 1 million common shares at the option of the holder. In Board meetings, both the appellant and Dr. Black expressed doubts as to whether it was appropriate to permit the conversion of the A Shares in light of the respondent's conduct, particularly his involvement in parallel share purchase negotiations with Mitec. Consequently, the Board never sent the respondent a formal notice of his crystallized conversion rights, and his A Shares were never converted into common shares, despite his requests for conversion at Board meetings, in emails, and otherwise.

indiquant que, sur le fondement du test financier établi dans les statuts constitutifs, les actions A pouvaient, au gré du détenteur, être converties en un million d'actions ordinaires. Lors des réunions du conseil d'administration, tant l'appelant que le D[r] Black ont exprimé des doutes sur l'opportunité de permettre la conversion des actions A de l'intimé, étant donné sa conduite, et plus particulièrement en raison des négociations parallèles d'achat d'actions qu'il avait menées avec Mitec. Par conséquent, le conseil d'administration n'a jamais envoyé un avis formel à l'intimé pour l'informer que les conditions requises pour l'exercice de ses droits de conversion étaient réunies. Ses actions A n'ont donc jamais été converties en actions ordinaires, malgré les demandes formulées en ce sens par l'intimé lors des réunions du conseil d'administration, mais aussi dans des courriels et autrement.

[12] Similarly, the respondent's B Shares were never converted into common shares, notwithstanding that, based on the approved 2007 financial statements, the respondent's B Shares were convertible into 223,227 common shares.

[12] Les actions B de l'intimé n'ont jamais non plus été converties en actions ordinaires, même si, selon les états financiers approuvés de 2007, elles pouvaient être converties en 223 227 actions ordinaires.

[13] As a result of the Private Placement, the respondent's proportion of common shares, and the value thereof, were significantly reduced. Consequently, the value of the respondent's A and B Shares — convertible as they were into common shares — was also greatly reduced. This prompted the respondent to file an application for oppression under s. 241 of the *CBCA* against four of the Corporation's directors, including the two members of the audit committee: the appellant and Dr. Black.

[13] En raison du Placement privé, la proportion et la valeur des actions ordinaires que possédait l'intimé ont considérablement diminué. Par conséquent, la valeur des actions A et B de l'intimé — qui pouvaient auparavant être converties en actions ordinaires — a aussi grandement diminué. Cela a poussé l'intimé à déposer une demande de redressement pour abus en vertu de l'art. 241 de la *LCSA*, et ce, contre quatre des administrateurs de la société, dont les deux membres du comité de vérification, l'appelant et le D[r] Black.

III. Judicial History

III. Historique judiciaire

A. *Quebec Superior Court, 2014 QCCS 180*

A. *Cour supérieure du Québec, 2014 QCCS 180*

[14] At trial, the respondent alleged seven specific acts of oppression against the four defendant directors. The Corporation was joined as an impleaded party. Hamilton J. addressed all seven of the respondent's allegations using the framework laid out by this Court in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 ("*BCE*"). He found that the respondent had a reasonable expectation that his

[14] Au procès, l'intimé a allégué sept actes spécifiques d'abus contre les quatre administrateurs défendeurs. La société a été mise en cause. Le juge Hamilton a examiné les sept allégations de l'intimé en recourant au cadre exposé par la Cour dans *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560 (« *BCE* »). Il a conclu que l'intimé s'attendait raisonnablement à ce que, si elles

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A and B Shares would be converted if they met the applicable financial tests laid out in the Corporation's articles and that the Board would consider his rights as an A and B shareholder in any transaction impacting the A and B Shares. He concluded that two of the four defendants, the appellant and Dr. Black, were personally liable for the Board's refusal to convert the respondent's A and B Shares into common stock and the failure to ensure that the respondent's rights as an A and B shareholder were not prejudiced by the Private Placement.

[15] Hamilton J. adopted the test for a director's personal liability in an oppression case from *Budd*. Applying *Budd*, he held that it was "fit" to order the appellant personally to pay damages to the respondent because (1) along with Dr. Black, the appellant had personally benefitted from the Private Placement and the dilution of the respondent's shares, and (2) the appellant alone had benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the conversion test had been met (para. 167 (CanLII)).

[16] In the result, Hamilton J. held the appellant and Dr. Black solidarily liable for the oppression and ordered them to pay the respondent compensation in the amount of $648,310.

B. *Quebec Court of Appeal, 2015 QCCA 1350, 53 B.L.R. (5th) 43*

[17] On appeal, Mr. Wilson and Dr. Black argued, among other things, that the trial judge had erred by holding them personally liable on the basis of the lead roles they had played in the oppression, especially in the discussion at the Board level, and that the trial judge had violated the *audi alteram partem* rule by relying on facts that had not been alleged and arguments that had not been raised (para. 30).

[18] The Court of Appeal rejected both of these grounds and dismissed the appeal.

satisfaisaient aux tests financiers applicables énoncés dans les statuts de la société, ses actions A et B soient converties, et à ce que le conseil d'administration tienne compte de ses droits en tant que détenteur de ces actions lors de toute opération ayant une incidence sur elles. Le juge Hamilton a conclu que deux des quatre défendeurs, soit l'appelant et le D[r] Black, étaient personnellement responsables du refus du conseil d'administration de convertir les actions A et B de l'intimé en actions ordinaires et de l'omission de faire en sorte que le Placement privé ne porte pas atteinte aux droits de ce dernier à titre de détenteur d'actions A et B.

[15] Le juge Hamilton a adopté le test énoncé dans *Budd* quant à la responsabilité personnelle des administrateurs dans les affaires de redressement pour abus. Appliquant *Budd*, il a jugé qu'il était « pertinent » de condamner l'appelant personnellement à payer des dommages-intérêts à l'intimé parce que, (1) tout comme le D[r] Black, l'appelant a personnellement bénéficié du Placement privé et de la dilution des actions de l'intimé et que (2) seul l'appelant a profité de la conversion de ses actions C en un nombre maximal d'actions ordinaires, malgré des doutes quant à savoir si le test relatif à cette conversion avait été respecté : par. 167 (CanLII).

[16] Par conséquent, le juge Hamilton a conclu que l'appelant et le D[r] Black étaient solidairement responsables de l'abus et les a condamnés à payer à l'intimé une indemnité au montant de 648 310 $.

B. *Cour d'appel du Québec, 2015 QCCA 1350, 53 B.L.R. (5th) 43*

[17] En appel, M. Wilson et le D[r] Black ont entre autres fait valoir que le juge du procès avait commis une erreur en concluant à leur responsabilité personnelle en raison de leur rôle prépondérant dans la commission de l'abus, tout particulièrement pendant la discussion au conseil d'administration, et qu'il avait contrevenu à la règle *audi alteram partem* en se fondant sur des faits qui n'avaient pas été allégués et sur des arguments qui n'avaient pas été plaidés : par. 30.

[18] La Cour d'appel a rejeté ces deux moyens et a par conséquent rejeté l'appel.

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[19] On its review of the facts, the Court of Appeal held that the imposition of personal liability was justified, noting that both Mr. Wilson and Dr. Black must have known that Mr. Alharayeri's A Share conversion rights had crystallized because of their positions on the audit committee (para. 41). As the only audit committee members, Mr. Wilson and Dr. Black wielded significant influence over the conversion decision and used this influence to advocate against conversion of Mr. Alharayeri's shares while also advocating for the Private Placement (paras. 43-47). Further, Mr. Wilson admitted at trial that the issue concerning Mr. Alharayeri had "disappeared because he was no longer a shareholder in a position to block and be a big influence on all of the stuff that the company was doing" (para. 47). In light of these facts, the Court of Appeal held that the trial judge's conclusions — that Mr. Wilson and Dr. Black had played a lead role in the oppression and that the circumstances justified the imposition of personal liability — contained no errors warranting their reversal (paras. 33 and 48).

[20] Regarding the *audi alteram partem* issue, the Court of Appeal held that the pleadings did not preclude the trial judge's imposition of personal liability. In doing so, it reasoned that the matter of the appellant's personal advantage could not have surprised him, because multiple pleadings — including amended versions of the Motion to Institute Proceedings, the parties' Joint Declaration That a File Is Complete, and the Defence and Amended Defence — had specifically identified this to be at issue. The Court of Appeal also distinguished *Budd* — in which the pleadings were held to disclose no reasonable cause of action and the plaintiff's claim was against, *inter alia*, 30 directors, 9 officers, and 5 portfolio companies — as involving a different situation altogether. The Court of Appeal therefore refused to give effect to this ground of appeal, before going on to uphold the trial judge's decision.

[19] Après examen des faits, la Cour d'appel a conclu qu'une responsabilité personnelle était justifiée, car tant M. Wilson que le D[r] Black devaient savoir, en raison de leur rôle au comité de vérification, que les conditions requises pour l'exercice des droits de conversion des actions A de M. Alharayeri étaient réunies : par. 41. En tant que seuls membres de ce comité, M. Wilson et le D[r] Black avaient le pouvoir d'influencer considérablement la décision concernant la conversion des actions; ils ont utilisé cette influence pour s'opposer à la conversion des actions de M. Alharayeri, tout en prônant le Placement privé : par. 43-47. De plus, M. Wilson a admis au procès que les préoccupations par rapport à M. Alharayeri avaient [TRADUCTION] « disparu parce qu'il n'était plus un actionnaire en mesure de faire obstruction ou d'avoir une influence importante sur les affaires de l'entreprise » : par. 47. À la lumière de ces faits, la Cour d'appel a jugé que les conclusions du juge du procès — selon lesquelles, d'une part, M. Wilson et le D[r] Black avaient joué un rôle prépondérant dans la commission de l'abus et, d'autre part, l'imposition d'une responsabilité personnelle était légitime vu les circonstances — ne contenaient aucune erreur justifiant leur infirmation : par. 33 et 48.

[20] Concernant la question de la règle *audi alteram partem*, la Cour d'appel a affirmé que les actes de procédure n'empêchaient pas le juge du procès de conclure à la responsabilité personnelle de l'appelant. En effet, à son avis, la question relative à l'avantage personnel dont a joui l'appelant ne pouvait le surprendre, puisque de nombreux actes de procédure — notamment des versions amendées de la requête introductive d'instance, la déclaration commune de dossier complet ainsi que la défense et la défense amendée — indiquaient expressément que cette question était en litige. À cet égard, la Cour d'appel a aussi distingué *Budd* — affaire dans laquelle il a été conclu que les actes de procédure ne révélaient aucune cause d'action valable et où l'action du demandeur visait notamment 30 administrateurs, 9 dirigeants et 5 sociétés de portefeuille —, estimant que la situation en cause dans la présente affaire était complètement différente. La Cour d'appel a donc refusé de retenir ce moyen d'appel et a confirmé la décision du juge du procès.

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IV. Issues

[21] The trial judge's conclusions regarding the oppressive conduct are not at issue before this Court. Rather, Mr. Wilson challenges the conclusion that it is "fit" to hold him personally liable for that oppressive conduct. In particular, this appeal raises two issues relating to the imposition of personal liability in an oppression action:

(1) When may personal liability for oppression be imposed on corporate directors?

(2) Were the pleadings sufficient to ground the imposition of personal liability in this case?

V. Analysis

A. *When May Personal Liability for Oppression Be Imposed on Corporate Directors?*

[22] It is helpful to begin by situating the analysis within the context of an oppression action under the *CBCA*. Sections 241(1) and 241(2) of the *CBCA* provide:

241 (1) A complainant may apply to a court for an order under this section.

. . .

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

IV. Questions en litige

[21] Les conclusions du juge du procès concernant l'abus ne sont pas en litige devant notre Cour. M. Wilson conteste plutôt la conclusion qu'il est « pertinent » de le tenir personnellement responsable de cet abus. Le présent pourvoi soulève plus particulièrement deux questions en ce qui concerne l'imposition d'une responsabilité personnelle dans le cadre d'une action en redressement pour abus :

(1) Dans quelles circonstances la responsabilité personnelle des administrateurs d'une société peut-elle être engagée au regard d'un abus?

(2) En l'espèce, les actes de procédure étaient-ils suffisants pour justifier l'imposition d'une responsabilité personnelle?

V. Analyse

A. *Dans quelles circonstances la responsabilité personnelle des administrateurs d'une société peut-elle être engagée au regard d'un abus?*

[22] Il est utile de commencer par situer l'analyse dans le contexte des actions en redressement pour abus visées aux par. 241(1) et 241(2) de la *LCSA*, lesquels énoncent ce qui suit :

241 (1) Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

. . .

(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

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(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

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

[23] The nature of the oppression remedy is well recognized in our jurisprudence. Section 241 creates an equitable remedy that "seeks to ensure fairness — what is 'just and equitable'" (*BCE*, at para. 58). It gives "a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (*ibid.*). Courts considering claims for oppression are therefore instructed to engage in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities" (*ibid.*).

[24] The two requirements of an oppression claim are equally well known. First, the complainant must "identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held" (*BCE*, at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of "any security holder, creditor, director or officer," pursuant to s. 241(2). As stated above, the presence of these two elements is not at issue in this appeal.

[25] What is at issue is whether the trial judge appropriately exercised the remedial powers provided in s. 241(3) by holding Mr. Wilson personally liable for the oppression. Section 241(3) reads as follows:

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[23] La nature du redressement pour abus est bien établie par notre jurisprudence. L'article 241 crée un recours en equity qui « vise à rétablir la justice — ce qui est "juste et équitable" » : *BCE*, par. 58. Il confère « au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité » : *ibid.* Les tribunaux saisis d'une demande de redressement pour abus doivent donc examiner les faits particuliers de l'affaire et le contexte pour tenir compte « de la réalité commerciale, et pas seulement de considérations strictement juridiques » : *ibid.*

[24] Les deux éléments constitutifs d'une demande de redressement pour abus sont également bien connus. Premièrement, le plaignant doit « préciser quelles attentes ont censément été frustrées par le comportement en cause et en établir le caractère raisonnable » : *BCE*, par. 70. Deuxièmement, le plaignant doit démontrer que ces attentes raisonnables ont été frustrées en raison d'un comportement abusif de la société, d'un préjudice injuste ou d'une omission injuste de tenir compte des droits « des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants » comme le prévoit le par. 241(2). Tel qu'il est indiqué précédemment, la présence de ces deux éléments n'est pas en litige dans le présent pourvoi.

[25] La question qui nous occupe est plutôt celle de savoir si le juge du procès a correctement exercé les pouvoirs de réparation prévus au par. 241(3) en concluant que M. Wilson était personnellement responsable de l'abus. Le paragraphe 241(3) est rédigé comme suit :

(3) Le tribunal peut, en donnant suite aux demandes visées au présent article, rendre les ordonnances provisoires ou définitives qu'il estime pertinentes pour, notamment :

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(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

(n) an order requiring the trial of any issue.

[26] Section 241(3) thus gives a trial court broad discretion to "make any interim or final order it thinks fit," before enumerating specific examples of permissible orders. But this discretion is not limitless. It

a) empêcher le comportement contesté;

b) nommer un séquestre ou un séquestre-gérant;

c) réglementer les affaires internes de la société en modifiant les statuts ou les règlements administratifs ou en établissant ou en modifiant une convention unanime des actionnaires;

d) prescrire l'émission ou l'échange de valeurs mobilières;

e) faire des nominations au conseil d'administration, soit pour remplacer tous les administrateurs en fonctions ou certains d'entre eux, soit pour en augmenter le nombre;

f) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, d'acheter des valeurs mobilières d'un détenteur;

g) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, de rembourser aux détenteurs une partie des fonds qu'ils ont versés pour leurs valeurs mobilières;

h) modifier les clauses d'une opération ou d'un contrat auxquels la société est partie ou de les résilier, avec indemnisation de la société ou des autres parties;

i) enjoindre à la société de lui fournir, ainsi qu'à tout intéressé, dans le délai prescrit, ses états financiers en la forme exigée à l'article 155, ou de rendre compte en telle autre forme qu'il peut fixer;

j) indemniser les personnes qui ont subi un préjudice;

k) prescrire la rectification des registres ou autres livres de la société, conformément à l'article 243;

l) prononcer la liquidation et la dissolution de la société;

m) prescrire la tenue d'une enquête conformément à la partie XIX;

n) soumettre en justice toute question litigieuse.

[26] Le paragraphe 241(3) confère donc au juge du procès un large pouvoir discrétionnaire pour « rendre les ordonnances provisoires ou définitives qu'il estime pertinentes », puis énumère des exemples précis

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must be exercised within legal bounds, and, as a starting point, it must be exercised within the bounds expressly delineated by the *CBCA*.

[27] Any order made under s. 241(3) exists solely to "rectify the matters complained of", as provided by s. 241(2). The purpose of the oppression remedy is therefore corrective: ". . . in seeking to redress inequities between private parties", the oppression remedy seeks to "apply a measure of corrective justice" (J. G. MacIntosh, "The Retrospectivity of the Oppression Remedy" (1987), 13 *Can. Bus. L.J.* 219, at p. 225; see also *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.) ("*Naneff*"); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. C.J. (Gen. Div.)) ("*Ballard*"), at p. 197). In other words, an order made under s. 241(3) should go no further than necessary to correct the injustice or unfairness between the parties.

[28] However, where, as in this case, the trial judge has determined that a monetary order is fit, applying the principle that the oppression remedy is corrective tells us only about the proper extent of a party's liability. It does not help us decide whether the monetary order should have been made against the corporation or the director personally.

[29] Some of the examples enumerated in s. 241(3) show that the oppression remedy contemplates liability not only for the corporation, but also for other parties. For instance, ss. 241(3)(f) and 241(3)(g) allow for orders against "any . . . person," requiring them to purchase securities, or pay to the security holder monies paid by him for securities, respectively. Section 241(3)(j) considers an "order compensating an aggrieved person", but does not identify against whom such an order may lie. The *CBCA*'s wording goes no further to specify when it is fit to hold

d'ordonnances possibles. Ce pouvoir discrétionnaire n'est cependant pas illimité; il doit être exercé dans des limites légales en commençant par celles expressément énoncées par la *LCSA*.

[27] Les ordonnances prononcées en vertu du par. 241(3) visent uniquement, comme l'indique le par. 241(2), à « redresser la situation » dénoncée par le plaignant. Le redressement pour abus est par conséquent de nature réparatrice : [TRADUCTION] « . . . en cherchant à corriger des iniquités entre des parties privées », le redressement pour abus consiste « en l'application d'une mesure de justice réparatrice » : J. G. MacIntosh, « The Retrospectivity of the Oppression Remedy » (1987), 13 *Rev. can. dr. comm.* 219, p. 225; voir aussi *Naneff c. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.) (« *Naneff* »); *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (C.J. Ont. (Div. gén.)) (« *Ballard* »), p. 197. Autrement dit, les ordonnances prononcées en vertu du par. 241(3) ne devraient pas aller plus loin que nécessaire pour corriger une injustice ou iniquité entre les parties.

[28] Toutefois, lorsque le juge du procès conclut, comme en l'espèce, qu'une ordonnance accordant une réparation pécuniaire est « pertinente », le principe selon lequel le redressement pour abus est de nature réparatrice nous éclaire uniquement sur la portée appropriée de la responsabilité de la partie visée. Il ne nous aide pas à décider si l'ordonnance accordant une réparation pécuniaire devrait être dirigée contre la société ou contre l'administrateur personnellement.

[29] Certains des exemples énumérés au par. 241(3) montrent que le redressement pour abus vise non seulement la responsabilité de la société en cause, mais aussi celle d'autres parties. Par exemple, les al. 241(3)f) et 241(3)g) permettent l'imposition d'ordonnances contre « toute [. . .] personne » pour enjoindre à celle-ci d'acheter des valeurs mobilières (al. f)) ou de rembourser aux détenteurs les fonds qu'ils ont versés pour leurs valeurs mobilières (al. g)). L'alinéa 241(3)j) prévoit la possibilité que le tribunal rende une ordonnance pour « indemniser les

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directors personally liable under this section. We must therefore turn to the case law for illustrations.

(1) *Budd v. Gentra Inc.*

[30] In *Budd*, Doherty J.A. considered the personal liability of directors under the oppression remedy. Doherty J.A. rejected the proposition that common law principles as to when directors will bear personal liability applied equally in an oppression case (*Budd*, at paras. 31, 34-36 and 40). In particular, he rejected the view that a director's conduct must reveal a separate identity or interest from that of the corporation by falling outside the normal scope of his or her duties in order to attract personal liability (paras. 26, 32 and 35-36). In doing so, Doherty J.A. held that

> [a] director or officer may be personally liable for a monetary order . . . if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties. [Emphasis added; para. 46.]

[31] Two requirements emerge from this passage. The first is that the director or officer must be implicated in the oppressive conduct. In other words, the oppressive conduct must be attributable to the individual director because of his or her action or inaction. The second is that the order must be fit in all of the circumstances. These two criteria comprise the *Budd* "test".

[32] However, *Budd* also featured a survey of the case law illustrating when personal orders against directors may be appropriate. In an oft-cited passage,

personnes qui ont subi un préjudice », mais ne précise pas contre qui une telle ordonnance peut être rendue. Le libellé de la *LCSA* ne précise pas dans quelles circonstances il est justifié que les administrateurs soient tenus personnellement responsables en application de cette disposition. Nous devons donc consulter la jurisprudence pour avoir des exemples.

(1) *Budd c. Gentra Inc.*

[30] Dans *Budd*, le juge Doherty de la Cour d'appel s'est penché sur la responsabilité personnelle d'administrateurs dans le cadre d'un recours en redressement pour abus. Le juge Doherty a rejeté la proposition selon laquelle les principes de common law quant aux circonstances dans lesquelles la responsabilité personnelle des administrateurs peut être engagée s'appliquaient également aux affaires d'abus : *Budd*, par. 31, 34-36 et 40. Il a en particulier rejeté l'opinion voulant que, pour que la responsabilité personnelle d'un administrateur soit engagée, les actes qu'il a posés doivent révéler une identité distincte ou des intérêts différents de ceux de la personne morale, en ce sens qu'ils vont au-delà des fonctions habituelles de l'administrateur : par. 26, 32 et 35-36. À cet égard, le juge Doherty a expliqué que :

> [TRADUCTION] . . . [u]n administrateur ou un dirigeant peut être personnellement condamné à verser une réparation pécuniaire [. . .] si cet administrateur ou ce dirigeant est impliqué dans la conduite qui, selon les allégations, constitue l'abus et si, compte tenu de toutes les circonstances, la réparation adéquate du préjudice causé en raison de l'abus peut être atteinte par une ordonnance enjoignant à l'administrateur ou au dirigeant d'indemniser personnellement les parties lésées. [Je souligne; par. 46.]

[31] Deux conditions se dégagent de cet extrait. Tout d'abord, l'administrateur ou le dirigeant doit être impliqué dans l'abus, c'est-à-dire que cet abus doit être attribuable à cette personne du fait de son action ou de son inaction. Ensuite, l'ordonnance doit, compte tenu de toutes les circonstances, être « pertinente ». Ces deux critères constituent le « test » énoncé dans *Budd*.

[32] Cela dit, dans *Budd*, la Cour a aussi procédé à un survol de la jurisprudence illustrant les circonstances dans lesquelles les ordonnances personnelles

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author Markus Koehnen suggests that this survey revealed five situations in which personal orders against directors might be appropriate:

1. Where directors obtain a personal benefit from their conduct.
2. Where directors have increased their control of the corporation by the oppressive conduct.
3. Where directors have breached a personal duty they have as directors.
4. Where directors have misused a corporate power.
5. Where a remedy against the corporation would prejudice other security holders. [Footnotes omitted.]

(M. Koehnen, *Oppression and Related Remedies* (2004), at p. 201)

[33] According to Koehnen, *Budd* may have also referred to a sixth category of cases: those "involving closely held corporations where a director or officer has virtually total control over the corporation" (p. 202; *Budd*, at para. 44).

[34] *Budd* has since been applied and endorsed by courts across the country (see, e.g., *Estate of John Wood v. Arius3D Corp.*, 2014 ONSC 3322 ("*Wood Estate*"), at paras. 133-34 (CanLII); *GC Capital Inc. v. Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1, at para. 41; *Moon v. Golden Bear Mining Ltd.*, 2012 BCSC 829 ("*Moon*"), at para. 315 (CanLII); *Belliveau v. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87, at para. 85; *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467 (S.C.J. (Div. Ct.)), at para. 54; *Cox v. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1, at para. 158; *Danylchuk v. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2, at para. 59).

contre des administrateurs peuvent être justifiées. Dans un passage souvent cité, l'auteur Markus Koehnen écrit que le survol révèle cinq situations dans lesquelles ce type d'ordonnance pouvait être justifié :

[TRADUCTION]

1. lorsque les administrateurs retirent un bénéfice personnel de leur conduite;
2. lorsque les administrateurs ont augmenté leur contrôle sur la société en raison de l'abus;
3. lorsque les administrateurs manquent à une obligation personnelle qui leur incombe à titre d'administrateurs;
4. lorsque les administrateurs détournent un pouvoir de la société;
5. lorsqu'une réparation à l'encontre de la société porterait préjudice à d'autres détenteurs de valeurs mobilières. [Notes en bas de page omises.]

(M. Koehnen, *Oppression and Related Remedies* (2004), p. 201)

[33] Selon Koehnen, *Budd* pourrait aussi viser une sixième catégorie de situations : celles [TRADUCTION] « impliquant des sociétés fermées où un administrateur ou un dirigeant exerce un contrôle quasi total sur la société » : p. 202; *Budd*, par. 44.

[34] Depuis sa publication, *Budd* a été appliquée et approuvée par les cours de partout au pays : voir, p. ex., *Estate of John Wood c. Arius3D Corp.*, 2014 ONSC 3322 (« *Wood Estate* »), par. 133-134 (CanLII); *GC Capital Inc. c. Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1, par. 41; *Moon c. Golden Bear Mining Ltd.*, 2012 BCSC 829 (« *Moon* »), par. 315 (CanLII); *Belliveau c. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87, par. 85; *2082825 Ontario Inc. c. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467 (C.S.J. (C. div.)), par. 54; *Cox c. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1, par. 158; *Danylchuk c. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2, par. 59.

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[35] However, courts have also diverged in their understanding of the case law examples identified in *Budd*. Some courts appear to treat the examples as discrete categories in which a personal order may be appropriate or as factors to be considered in fashioning a remedy (see, e.g., *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp.*, 2008 MBQB 296, 244 Man. R. (2d) 127, at para. 46; *Moon*, at para. 315). Others appear to treat either the "personal benefit" category or the "closely held" category, or both, as giving rise to necessary conditions for the imposition of personal liability (see, e.g., *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.), at para. 30; *Walls v. Lewis* (2009), 97 O.R. (3d) 16 (S.C.J.), at para. 48; *Waiser v. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317 (Ont. S.C.J.), at paras. 57-58). Still others appear not to apply *Budd* at all (see, e.g., *Levenzon (Demetriou) v. Spanos Korres*, 2014 QCCS 258, at para. 69 (CanLII)).

[35] Les cours n'ont toutefois pas la même compréhension de la jurisprudence recensée dans *Budd*. Certaines d'entre elles semblent considérer les exemples cités comme des catégories distinctes de situations dans lesquelles une condamnation personnelle peut être justifiée ou comme des facteurs dont il faut tenir compte pour déterminer la réparation : voir, p. ex., *Incorporated Broadcasters Ltd. c. CanWest Global Communications Corp.*, 2008 MBQB 296, 244 Man. R. (2d) 127, par. 46; *Moon*, par. 315. D'autres semblent considérer que la catégorie du « bénéfice personnel » ou la catégorie de la « société fermée », ou ces deux catégories, réunissent les conditions nécessaires pour l'imposition d'une responsabilité personnelle : voir, p. ex., *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (C.S.J. Ont.), par. 30; *Walls c. Lewis* (2009), 97 O.R. (3d) 16 (C.S.J.), par. 48; *Waiser c. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317 (C.S.J. Ont.), par. 57-58. D'autres encore semblent ne pas suivre du tout *Budd* : voir, p. ex., *Levenzon (Demetriou) c. Spanos Korres*, 2014 QCCS 258, par. 69 (CanLII).

[36] It is apparent that Canadian courts are unsettled as to when the guidance in *Budd* should lead to the imposition of personal liability. Unsurprisingly, then, the jurisprudential debate in this appeal centred on the content of the personal liability "test". The appellant does not submit that *Budd* was wrongly decided, but rather that it put forth no stringent "test" at all. He urges the Court to adopt necessary criteria governing the imposition of personal liability in every case.

[36] Force est de constater que les tribunaux canadiens ne s'entendent pas sur les circonstances dans lesquelles les principes énoncés dans *Budd* devraient mener à l'imposition d'une responsabilité personnelle. Il n'est donc pas surprenant que les débats ayant eu cours dans le cadre du présent pourvoi au sujet de l'état de la jurisprudence aient été axés sur le contenu du « test » relatif à la responsabilité personnelle. L'appelant ne soutient pas que *Budd* ait été erronément décidé, mais plutôt que cet arrêt n'a nullement élaboré un « test » strict. Il exhorte la Cour à définir les critères essentiels régissant l'imposition d'une responsabilité personnelle applicables dans tous les cas.

(2) The Appellant's Proposed Criteria

(2) Les critères proposés par l'appelant

[37] According to the appellant, oppressive conduct should be attributable to a director only where the director has control of the corporation and acts in bad faith by using the corporation to advance his or her own personal interest, or where the corporation functions as the director's alter ego. Overall, the appellant says, "the oppressive conduct must take

[37] Selon l'appelant, on ne devrait pouvoir conclure à l'abus d'un administrateur que si celui-ci a le contrôle de la personne morale et a agi de mauvaise foi en utilisant celle-ci pour servir ses intérêts personnels ou si la personne morale fonctionne comme si elle était son *alter ego*. De façon générale, aux dires de l'appelant, [TRADUCTION] « l'abus doit

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on the character of personal conduct of the director" (emphasis deleted). On this theory, the trial judge would have erred in holding the appellant personally liable because the Corporation had some 50 shareholders, none of whom was independently controlling, so he alone was not "pulling the strings." The appellant therefore invites the Court to narrow the remedial scope of s. 241(3) by reference to principles traditionally limiting director liability at common law. In my view, this invitation should be declined.

[38] In *Budd*, Doherty J.A. warned against "overlaying restrictive common law principles on the broad statutory language of s. 241" (para. 40). The appellant's proposed reading of the attribution prong of the *Budd* test boils down to integrating the same common law rule rejected in *Budd*:

> . . . officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. [Emphasis added.]

(*Budd*, at para. 25, citing *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), at p. 491, leave to appeal refused, [1996] 3 S.C.R. viii.)

[39] While this proposition may remain true at common law, s. 241's remedial purpose lies in applying general standards of commercial fairness given that the sometimes "clumsy tools" of the common law failed to promote such standards (Koehnen, at p. 2). Realizing this purpose may require imposing personal liability on a director where the director is not a controlling shareholder but is nevertheless implicated in the oppression. For example, where otherwise fit, it may be open to a court to impose liability on a director who strongly advocates for an oppressive decision motivated by a personal gain unique to

incarner la conduite personnelle de l'administrateur » (soulignement omis). Selon cette théorie, le juge du procès aurait commis une erreur en tenant l'appelant personnellement responsable de l'abus parce que la société comptait quelque 50 actionnaires, dont aucun ne la contrôlait de façon indépendante, de sorte qu'il « ne tirait pas les ficelles » à lui seul. L'appelant invite par conséquent la Cour à restreindre la portée des réparations possibles en application du par. 241(3), en se référant aux principes traditionnels de common law qui limitent la responsabilité des administrateurs. À mon avis, il convient de décliner cette invitation.

[38] Dans *Budd*, le juge Doherty a mis en garde contre le fait de [TRADUCTION] « superposer des principes restrictifs de common law au libellé large de l'art. 241 » : par. 40. L'interprétation que propose l'appelant pour le volet du test de *Budd* portant sur l'imposition de responsabilité personnelle reviendrait à retenir la règle même de common law que la cour a rejetée dans *Budd* :

> [TRADUCTION] . . . les dirigeants ou employés de sociétés à responsabilité limitée sont exonérés de toute responsabilité personnelle à moins qu'on ne puisse démontrer qu'ils ont commis un acte qui est délictueux en soi ou qui témoigne d'une identité distincte ou d'intérêts différents de ceux de la personne morale de telle manière que les actes ou les agissements reprochés peuvent leur être attribués. [Je souligne.]

(*Budd*, par. 25, citant *ScotiaMcLeod Inc. c. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), p. 491, autorisation de pourvoi refusée, [1996] 3 R.C.S. viii.)

[39] Si, certes, cette proposition peut demeurer vraie en common law, l'objet réparateur de l'art. 241 découle pour sa part de l'application de normes générales d'équité en matière commerciale parce que les [TRADUCTION] « outils [parfois] maladroits » de la common law n'ont pas réussi à promouvoir de telles normes : Koehnen, p. 2. La réalisation de cet objet réparateur pourrait nécessiter de tenir personnellement responsable un administrateur qui n'est pas actionnaire de contrôle, mais qui est néanmoins impliqué dans l'abus. Par exemple, lorsque cela est par ailleurs justifié, il peut être loisible à une cour de

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that director, despite lacking control. But adopting the appellant's proposed control criterion would preclude this.

[40] Additionally, adopting this criterion would effectively give the directors of public companies (including small public companies and new ventures) an additional layer of protection against liability unavailable to the directors of private companies. However, neither the *CBCA* nor the case law support such a distinction. To the extent that some cases emphasize control, they do so not to provide "a more lax standard for public company directors", but rather to recognize "that personal benefit and increased personal control" — two hallmarks of conduct attracting personal liability — "are more likely to arise in private companies than in public companies" (Koehnen, at p. 202). Therefore, although the presence or absence of control may be considered as a factor in determining whether it is fit to impose personal liability, it is not a necessary criterion for personal liability.

[41] Further, while a director's bad faith may militate strongly in favour of holding him or her personally liable, bad faith is not a necessary condition to imposing personal liability. Conduct may run afoul of s. 241 even when it is driven by lesser states of mental culpability:

> "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations . . . .
>
> (*BCE*, at para. 67)

conclure à la responsabilité d'un administrateur qui favorise fortement une décision abusive motivée par un gain personnel dont il a l'apanage, malgré son absence de contrôle. Adopter le critère du contrôle proposé par l'appelant empêcherait une telle conclusion.

[40] Par ailleurs, l'adoption de ce critère aurait pour effet de procurer aux administrateurs de sociétés publiques (y compris celles de petite taille et les nouvelles entreprises) une couche de protection supplémentaire contre les poursuites, une protection dont ne bénéficieraient pas les administrateurs d'entreprises privées. Or, ni la *LCSA* ni la jurisprudence n'appuient une telle distinction. Dans la mesure où l'accent est mis sur le contrôle dans certaines affaires, ce n'est pas pour assujettir [TRADUCTION] « les administrateurs de sociétés publiques à une norme moins rigoureuse », mais plutôt pour reconnaître « que le profit personnel et un contrôle personnel accru » — deux symptômes d'une conduite pouvant engager une responsabilité personnelle — « sont plus susceptibles de survenir au sein d'entreprises privées que de sociétés faisant appel public à l'épargne » : Koehnen, p. 202. Par conséquent, bien que la présence ou l'absence de contrôle puisse être considérée comme un facteur pour décider s'il est « pertinent » d'imposer une responsabilité personnelle, il ne s'agit pas d'un critère nécessaire pour qu'un tribunal puisse conclure à une telle responsabilité.

[41] De plus, si la mauvaise foi d'un administrateur peut militer fortement pour qu'il soit tenu responsable personnellement, sa présence n'est pas une condition nécessaire pour lui imposer une responsabilité personnelle. La conduite peut être contraire aux principes de l'art. 241 même lorsqu'elle résulte d'un état d'esprit moins coupable :

> Le terme « abus » désigne un comportement coercitif et excessif et évoque la mauvaise foi. Le « préjudice injuste » peut impliquer un état d'esprit moins coupable, mais dont les conséquences sont néanmoins injustes. Enfin, l'« omission injuste de tenir compte » d'intérêts donnés étend l'application de ce recours à une situation où un intérêt n'est pas pris en compte parce qu'il est perçu comme sans importance, contrairement aux attentes raisonnables des parties intéressées . . .
>
> (*BCE*, par. 67)

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[42] As Gascon J. (as he then was) recognized, the oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor:

> In oppression matters, it is the effect of the acts and omissions of directors and officers of a company, rather than their intentions, that determines whether the conduct complained of is unfairly prejudicial. The rights conferred by Section 241 *CBCA* turn on effect, not intent. What is important is the result. Effect is key.

(*Segal v. Blatt*, 2007 QCCS 1488, at para. 43 (CanLII), aff'd 2008 QCCA 1094, at paras. 16-17 (CanLII); see also *Wood Estate*, at para. 127, per D. M. Brown J. (as he then was).)

[43] Emphasizing the motivation of the defendant director, to the exclusion of other considerations, would inappropriately shift the focus of the analysis away from the effects of the oppression, and the director's role therein. Courts have accordingly recognized the possibility of director liability for oppression in the absence of bad faith conduct (*Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), at paras. 55-57; *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (C.A.) ("*Sidaplex*")). However, while bad faith is not a necessary condition, it is an important consideration. A director who acts out of malice or with an eye to personal benefit is more likely to attract personal liability than one who acts in good faith.

[44] The appellant also submits that a personal order against a director can be "fit" only where the director has obtained a personal benefit at the expense of the oppressed party and where there is a direct connection between the impugned conduct and that benefit. On this view, a personal order against the appellant was inappropriate because there was no correlation between the Board's failure to convert the A and B Shares and the benefits accruing to the appellant in the form of increased control of the Corporation and the expedited conversion of his C Shares.

[42] Comme le juge Gascon (siégeant alors à la Cour supérieure du Québec) l'a reconnu, le redressement pour abus s'intéresse aux effets de l'abus, et non à l'intention de son auteur :

> [TRADUCTION] Dans les cas d'abus, ce sont les effets des actes et omissions des administrateurs et des dirigeants d'une entreprise, plutôt que leur intention, qui déterminent si le comportement reproché est injustement préjudiciable. Les droits garantis par l'art. 241 de la *LCSA* dépendent de l'effet, et non de l'intention. C'est le résultat qui importe.

(*Segal c. Blatt*, 2007 QCCS 1488, par. 43 (CanLII), conf. par 2008 QCCA 1094, par. 16 et 17 (CanLII); voir aussi *Wood Estate*, par. 127, le juge D. M. Brown (qui siégeait alors à la Cour supérieure de justice).)

[43] Mettre l'accent sur la motivation de l'administrateur défendeur au détriment d'autres considérations éloignerait de façon inappropriée le point de mire de l'analyse des effets de l'abus et du rôle de l'administrateur à cet égard. Les tribunaux ont par conséquent reconnu la possibilité de tenir un administrateur responsable d'un abus en l'absence de mauvaise foi : *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), par. 55-57; *Sidaplex-Plastic Suppliers Inc. c. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (C.A.) (« *Sidaplex* »). Si la mauvaise foi n'est pas une condition nécessaire, il s'agit toutefois d'une considération importante. L'administrateur qui agit par malveillance ou dans le but de retirer un avantage personnel est plus susceptible de voir sa responsabilité personnelle retenue que celui qui a agi de bonne foi.

[44] L'appelant soutient aussi qu'une condamnation personnelle d'un administrateur ne peut être « pertinente » que si celui-ci a retiré un bénéfice personnel de l'abus, au détriment de la partie qui en est victime, et s'il existe un lien direct entre la conduite reprochée et ce bénéfice. Selon ce point de vue, la condamnation personnelle de l'appelant serait en l'occurrence inappropriée ou injustifiée parce qu'il n'y a aucune corrélation entre l'omission du conseil d'administration de convertir les actions A et B et les avantages retirés par l'appelant en raison d'un contrôle accru de la société et de la conversion accélérée de ses actions C.

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[45] In my view, this argument is unavailing. As explained above, the oppression remedy exists to rectify harm to the complainant. It is not a gain-based remedy. Gain-based remedies "are, in any context, a striking form of redress insofar as they represent a departure from the norm of loss-based or compensatory relief" (P. B. Miller, "Justifying Fiduciary Remedies" (2013), 63 *U.T.L.J.* 570, at pp. 570-71). Treating a personal benefit as a necessary condition to a director's personal liability inappropriately emphasizes the gain to the director, at the expense of considering the oppressive conduct leading to the complainant's loss. For example, oppressive conduct that does not yield a personal benefit may trigger personal liability where the director acts in bad faith or in a Machiavellian fashion (for instance, where the director seeks to punish a shareholder for interpersonal reasons regardless of whether that punishment brings the director any personal benefit). But treating a personal benefit as a necessary condition would preclude personal liability in such a case, where it may otherwise be a fit and fair remedy. Further, demanding a strict correlation between the complainant's loss and the director's benefit would imbue an otherwise discretionary, equitable remedy that looks to commercial realities with a legal formalism inimical to its remedial purpose.

[45] À mon avis, cet argument doit être rejeté. Comme je l'ai expliqué précédemment, le redressement pour abus existe pour réparer le préjudice causé au plaignant. Cette réparation n'est pas liée aux gains réalisés. Les réparations qui sont fondées sur les gains réalisés [TRADUCTION] « sont, peu importe la situation, une forme radicale de réparation en ce sens qu'elles dérogent à la norme, à savoir l'octroi d'une indemnisation compensatoire ou fondée sur une perte » : P. B. Miller, « Justifying Fiduciary Remedies » (2013), 63 *U.T.L.J.* 570, p. 570-571. Considérer l'existence de bénéfices personnels comme une condition nécessaire à la responsabilité personnelle d'un administrateur mettrait l'accent, de façon inappropriée, sur le gain qu'il a retiré aux dépens de l'examen de l'abus qui a mené à la perte subie par le plaignant. Ainsi, à titre d'exemple, l'abus qui ne donne pas lieu à un bénéfice personnel peut entraîner une responsabilité personnelle lorsque l'administrateur agit de mauvaise foi ou de façon machiavélique (par exemple, lorsque l'administrateur veut punir un actionnaire pour des raisons interpersonnelles, que cette punition lui apporte un bénéfice personnel ou non). Or, le fait de considérer un bénéfice personnel comme une condition nécessaire empêcherait de conclure à la responsabilité personnelle dans un tel cas, alors qu'il pourrait par ailleurs s'agir d'un redressement « pertinent » et équitable. De plus, exiger qu'il y ait une stricte corrélation entre la perte subie par le plaignant et le bénéfice retiré par l'administrateur conférerait un formalisme juridique incompatible avec l'objet d'une réparation, par ailleurs discrétionnaire et équitable, qui tient compte des réalités commerciales.

[46] Like the appellant's tendered criteria of control and bad faith, personal benefit should not be treated as a necessary criterion for personal liability. That said, an archetypal case of personal liability will often feature a personal benefit. And courts have regularly looked — and should continue to look — to the presence or absence of a personal benefit in determining whether an order may properly lie against a director personally.

[46] À l'instar des critères de contrôle et de mauvaise foi proposés par l'appelant, l'existence d'un bénéfice personnel ne devrait pas être considérée comme un critère nécessaire pour imposer la responsabilité personnelle. Cela dit, un cas typique de responsabilité personnelle comportera souvent un bénéfice personnel. Les tribunaux ont régulièrement cherché à déceler — et devraient continuer de le faire — la présence ou l'absence d'un bénéfice personnel pour déterminer si on peut à bon droit condamner personnellement un administrateur.

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(3) The Principles Governing Orders Under Section 241(3) and the Application of the Personal Liability Test Going Forward

[47] To reiterate, *Budd* provides for a two-pronged approach to personal liability. The first prong requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression (see *Budd*, at para. 47). In other words, the director must have exercised — or failed to have exercised — his or her powers so as to effect the oppressive conduct (*Sidaplex*, at p. 567; see also *Budd*, at paras. 41-44, citing *Gottlieb v. Adam* (1994), 21 O.R. (3d) 248 (Gen. Div.), at pp. 260-61).

[48] But this first requirement alone is an inadequate basis for holding a director personally liable. The second prong therefore requires that the imposition of personal liability be fit in all the circumstances. Fitness is necessarily an amorphous concept. But the case law has distilled at least four general principles that should guide courts in fashioning a fit order under s. 241(3). The question of director liability cannot be considered in isolation from these general principles.

[49] First, "the oppression remedy request must in itself be a fair way of dealing with the situation" (*Ballard*, at para. 142). The five situations identified by Koehnen relating to director liability are best understood as providing indicia of fairness. Where directors have derived a personal benefit, in the form of either an immediate financial advantage or increased control of the corporation, a personal order will tend to be a fair one. Similarly, where directors have breached a personal duty they owe as directors or misused a corporate power, it may be fair to impose personal liability. Where a remedy against the corporation would unduly prejudice other security holders,

(3) Les principes régissant les ordonnances rendues en vertu du par. 241(3) et l'application future du test relatif à la responsabilité personnelle

[47] Rappelons que *Budd* établit un test à deux volets pour déterminer s'il y a responsabilité personnelle. Le premier volet exige un abus qu'on peut à juste titre imposer à l'administrateur en raison de son implication dans l'abus : voir *Budd*, par. 47. Autrement dit, le directeur doit avoir exercé — ou omis d'exercer — ses pouvoirs de façon à provoquer l'abus : *Sidaplex*, p. 567; voir aussi *Budd*, par. 42-44, citant *Gottlieb c. Adam* (1994), 21 O.R. (3d) 248 (Div. gén.), p. 260-261.

[48] Cette première exigence à elle seule ne constitue néanmoins pas un fondement suffisant pour conclure à la responsabilité personnelle d'un administrateur. Le second volet exige par conséquent que l'imposition d'une responsabilité personnelle soit « pertinente » compte tenu de toutes les circonstances. La notion de pertinence est intrinsèquement nébuleuse, mais la jurisprudence a dégagé au moins quatre principes généraux qui devraient guider les cours lorsqu'elles sont appelées à façonner une ordonnance « pertinente » en application du par. 241(3). La question de la responsabilité de l'administrateur ne peut être considérée isolément de ces principes généraux.

[49] Premièrement, [TRADUCTION] « la demande de redressement en cas d'abus doit en soi constituer une façon équitable de régler la situation » : *Ballard*, par. 142. Les cinq situations relevées par Koehnen quant à la responsabilité des administrateurs doivent être vues comme des indices de ce que l'équité requière. Lorsque des administrateurs ont retiré un bénéfice personnel, que ce soit sous la forme d'un avantage financier immédiat ou d'un contrôle accru de la société, la condamnation personnelle tend à être équitable. Dans le même ordre d'idée, lorsque les administrateurs ont manqué à une obligation personnelle qui leur incombait à titre d'administrateurs,

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this too may militate in favour of personal liability (see Koehnen, at p. 201).

[50] To be clear, this is not a closed list of factors or a set of criteria to be slavishly applied. And as explained above, neither a personal benefit nor bad faith is a necessary condition in the personal liability equation. The appropriateness of an order under s. 241(3) turns on equitable considerations, and in the context of an oppression claim, "[i]t would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise" (*Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 ("*Ebrahimi*"), at p. 379). But personal benefit and bad faith remain hallmarks of conduct properly attracting personal liability, and although the possibility of personal liability in the absence of both of these elements is not foreclosed, one of them will typically be present in cases in which it is fair and fit to hold a director personally liable for oppressive corporate conduct. With respect to these two elements, four potential scenarios can arise:

(i) The director acted in bad faith and obtained a personal benefit;

(ii) The director acted in bad faith but did not obtain a personal benefit;

(iii) The director acted in good faith and obtained a personal benefit; and

(iv) The director acted in good faith and did not obtain a personal benefit.

[51] In general, the first and fourth scenarios will tend to be clear-cut. If the director has acted in bad faith and obtained a personal benefit, it is likely fit

ou ont abusé d'un pouvoir de la société, il peut être équitable d'imposer une responsabilité personnelle. Quand une condamnation de la société porterait indûment préjudice à d'autres détenteurs de valeurs mobilières, on est en présence d'une situation qui pourrait aussi militer en faveur de l'imposition d'une responsabilité personnelle : voir Koehnen, p. 201.

[50] Par souci de clarté, je précise qu'il ne s'agit pas d'une liste exhaustive de facteurs ou d'une série de critères à suivre servilement. En outre, comme nous l'avons vu, ni un bénéfice personnel ni la mauvaise fois ne sont des conditions nécessaires à l'imposition d'une responsabilité personnelle. Le caractère approprié ou justifié d'une ordonnance rendue en vertu du par. 241(3) dépend de considérations d'équité et, dans le contexte d'une demande de redressement pour abus, [TRADUCTION] « [i]l serait impossible, et totalement inopportun, de définir les circonstances dans lesquelles ces considérations pourraient survenir » : *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360 (« *Ebrahimi* »), p. 379. L'existence d'un bénéfice personnel et la présence de mauvaise foi demeurent toutefois des signes révélateurs d'une conduite susceptible d'engager à juste titre une responsabilité personnelle. En effet, bien qu'il soit possible de conclure à une telle responsabilité en l'absence de ces deux éléments, on retrouve habituellement soit l'un soit l'autre dans les affaires où il est équitable et « pertinent » de tenir un administrateur personnellement responsable d'un abus d'une société. Quatre scénarios peuvent se présenter au regard de ces deux éléments :

(i) l'administrateur a agi de mauvaise foi et a retiré un bénéfice personnel;

(ii) l'administrateur a agi de mauvaise foi, mais n'a pas retiré de bénéfice personnel;

(iii) l'administrateur a agi de bonne foi et a retiré un bénéfice personnel;

(iv) l'administrateur a agi de bonne foi et n'a pas retiré de bénéfice personnel.

[51] En général, la situation dans les premier et quatrième scénarios est claire. Si l'administrateur a agi de mauvaise foi et a retiré un bénéfice personnel,

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to hold the director personally liable for the oppression. On the other hand, where neither element is present, personal liability will generally be less fitting. The less obvious cases will tend to lie in the middle. In all cases, the trial judge must determine whether it is fair to hold the director personally liable, having regard to all the circumstances. Bad faith and personal benefit are but two factors that relate to certain circumstances within a larger factual matrix. They do not operate to the exclusion of other considerations. And they should not overwhelm the analysis.

il est probablement « pertinent » de le tenir personnellement responsable de l'abus. Dans le cas inverse, en l'absence de l'un et de l'autre de ces scénarios, il est généralement moins « pertinent » de conclure à une responsabilité personnelle. Les cas les moins évidents se situent généralement entre ces deux extrémités. Dans tous les cas, le juge du procès doit déterminer s'il est équitable d'imposer une responsabilité personnelle à l'administrateur, compte tenu de l'ensemble des circonstances. La mauvaise foi et le bénéfice personnel ne sont que deux facteurs relatifs à certaines circonstances dans un contexte factuel plus large. Ces éléments n'excluent pas d'autres considérations, et ils ne doivent pas les supplanter dans l'analyse.

[52] Further, even where it is appropriate to impose personal liability, this does not necessarily lead to a binary choice between the directors and the corporation. Fairness requires that, where "relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe" (*Ballard*, at para. 140). Where there is a personal benefit but no finding of bad faith, fairness may require an order to be fashioned by considering the amount of the personal benefit. In some cases, fairness may entail allocating responsibility partially to the corporation and partially to directors personally. For example, in *Wood Estate*, a shareholder made a short-term loan to the corporation with the reasonable expectation that it would be repaid from the proceeds of a specific transaction. Those proceeds were instead applied to corporate purposes, as well as to repayment of the loans made to the corporation by the defendant directors and officer and by another shareholder. D. M. Brown J. held the defendant directors and officer liable for the amounts used to repay their own loans and the shareholder loan, and also ordered the corporation to pay an equal amount towards the balance of the loan. As this last example shows, the fairness principle is ultimately unamenable to formulaic exposition and must be assessed on a case-by-case basis having regard to all of the circumstances.

[52] En outre, même s'il est approprié de conclure à une responsabilité personnelle, une telle conclusion ne mène pas nécessairement à un choix binaire entre les administrateurs et la personne morale. L'équité exige que dans les circonstances où [TRADUCTION] « il est justifié d'accorder une réparation pour corriger une situation d'abus, la chirurgie doit être pratiquée avec un scalpel, et non avec une hache de combat » : *Ballard*, par. 140. Lorsqu'il y a bénéfice personnel, mais aucune mauvaise foi, l'équité peut commander qu'une ordonnance soit formulée en considérant le montant du bénéfice personnel. Dans certaines affaires, l'équité peut nécessiter que l'on attribue partiellement la responsabilité à la société et partiellement aux administrateurs personnellement. Par exemple, dans *Wood Estate*, un actionnaire a consenti un prêt à court terme à la société en s'attendant raisonnablement à être remboursé à même le produit d'une transaction spécifique. Or, ce produit a été affecté à des affaires de la société, ainsi qu'au remboursement des prêts consentis à celle-ci par les administrateurs et dirigeant défendeurs et par un autre actionnaire. Le juge D. M. Brown a tranché que les administrateurs et le dirigeant défendeurs étaient responsables des montants utilisés pour rembourser leurs propres prêts et le prêt de l'actionnaire, et a ordonné à la société de payer un montant équivalent sur le solde du prêt. Comme le démontre ce dernier exemple, le principe de l'équité est en fait réfractaire aux formules et doit être évalué cas par cas en tenant compte de l'ensemble des circonstances.

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[53] Second, as explained above, any order made under s. 241(3) should go no further than necessary to rectify the oppression (*Naneff*, at para. 32; *Ballard*, at para. 140; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (C.A.) ("*Themadel*"), at p. 754). This follows from s. 241's remedial purpose insofar as it aims to correct the injustice between the parties.

[54] Third, any order made under s. 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders (*Naneff*, at para. 27; *Smith v. Ritchie*, 2009 ABCA 373, at para. 20 (CanLII)). The oppression remedy recognizes that, behind a corporation, there are individuals with "rights, expectations and obligations inter se which are not necessarily submerged in the company structure" (*Ebrahimi*, at p. 379; see also *BCE*, at para. 60). But it protects only those expectations derived from an individual's status as a security holder, creditor, director or officer. Accordingly, remedial orders under s. 241(3) may respond only to those expectations. They may not vindicate expectations arising merely by virtue of a familial or other personal relationship. And they may not serve a purely tactical purpose. In particular, a complainant should not be permitted to jump the creditors' queue by seeking relief against a director personally. The scent of tactics may therefore be considered in determining whether or not it is appropriate to impose personal liability on a director under s. 241(3). Overall, the third principle requires that an order under s. 241(3) remain rooted in, informed by, and responsive to the reasonable expectations of the corporate stakeholder.

[55] Fourth — and finally — a court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). As Farley J. put it, statutory oppression "can be a help; it can't be the total law with everything else ignored or completely secondary" (*Ballard*, at para. 124).

[53] Deuxièmement, comme nous l'avons vu, l'ordonnance rendue en vertu du par. 241(3) ne devrait pas accorder plus que ce qui est nécessaire pour réparer l'abus : *Naneff*, par. 32; *Ballard*, par. 140; *Themadel Foundation c. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (C.A.) (« *Themadel* »), p. 754. Cela découle de l'objectif réparateur de l'art. 241 dans la mesure où il vise à corriger une injustice entre les parties.

[54] Troisièmement, l'ordonnance rendue en vertu du par. 241(3) peut uniquement servir à répondre aux attentes raisonnables des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants en leur qualité de parties intéressées de la société : *Naneff*, par. 27; *Smith c. Ritchie*, 2009 ABCA 373, par. 20 (CanLII). Le redressement pour abus reconnaît le fait que, derrière la société, il y a des individus qui ont [TRADUCTION] « des droits, des attentes et des obligations entre eux qui ne se dissolvent pas nécessairement dans la structure de la société » : *Ebrahimi*, p. 379; voir aussi *BCE*, par. 60. La protection accordée ne vise que ces attentes qui découlent de la qualité de l'individu en tant que détenteur de valeurs mobilières, créancier, administrateur ou dirigeant. Par conséquent, les ordonnances réparatrices visées au par. 241(3) peuvent répondre uniquement à ces attentes. Elles ne peuvent combler des attentes découlant simplement d'une relation familiale ou d'une autre relation personnelle. Elles ne peuvent par ailleurs servir un objectif purement tactique. Plus particulièrement, un plaignant ne devrait pas être autorisé à dépasser la file des créanciers en sollicitant une réparation condamnant un administrateur personnellement. Si la Cour soupçonne que la demande constitue en fait une tactique, elle peut en tenir compte pour décider s'il est ou non approprié d'imposer une responsabilité personnelle à un administrateur en vertu du par. 241(3). En somme, selon le troisième principe, l'ordonnance fondée sur le par. 241(3) doit reposer sur les attentes raisonnables de la partie intéressée de la société et y répondre.

[55] Enfin, quatrièmement, dans l'exercice de leur pouvoir discrétionnaire en matière de réparation conféré par le par. 241(3), les tribunaux devraient tenir compte du contexte général du droit des sociétés. Pour reprendre les termes du juge Farley, les dispositions sur l'abus prévues dans la loi [TRADUCTION]

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This means that director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances (see, e.g., *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. S.C.J.)).

[56] Under s. 241(3), fashioning a fit remedy is a fact-dependent exercise. When it comes to the oppression remedy, Carthy J.A. put the matter succinctly:

> The point at which relief is justified and the extent of relief are both so dependent upon the facts of the particular case that little guidance can be obtained from comparing one case to another and I would be hesitant to enunciate any more specific principles of approach than have been set out above.

(*Themadel*, at p. 754)

[57] The four principles articulated above therefore serve as guideposts informing the flexible and discretionary approach the courts have adopted to orders under s. 241(3) of the *CBCA*. Having surveyed these principles, I turn now to their application in the instant case.

(4) Application of the Principles Governing Orders Under Section 241(3) and Director Liability in This Case

[58] The trial judge's decision to hold the appellant personally liable for the oppression does not reflect any errors warranting appellate intervention.

[59] As stated above, s. 241 vests the trial court with broad discretion. Appellate courts should therefore adopt a deferential stance when reviewing judgments rendered on oppression applications. Three

« peuvent être utiles; elles n'énoncent pas tout le droit en la matière, et on ne peut faire abstraction de tous les autres facteurs ou les considérer comme secondaires » : *Ballard*, par. 124. Ainsi, la condamnation d'un administrateur ne peut constituer un substitut pour d'autres formes de réparations prévues par la loi ou la common law, particulièrement lorsque ces autres réparations peuvent être plus « pertinentes » eu égard aux circonstances : voir, p. ex., *Stern c. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (C.S.J. Ont.).

[56] Sous le régime du par. 241(3), l'élaboration d'une réparation « pertinente » est tributaire des faits. Le juge Carthy a expliqué succinctement le redressement pour abus de la façon suivante :

> [TRADUCTION] Les circonstances qui justifient la réparation et l'étendue de la réparation sont deux éléments tellement tributaires des faits de l'affaire examinée qu'on ne peut obtenir que peu de pistes de solution en comparant différentes affaires. J'hésiterais donc à formuler des principes plus précis que ceux qui ont été énoncés précédemment.

(*Themadel*, p. 754)

[57] Les quatre principes expliqués précédemment doivent par conséquent servir de balises pour encadrer l'approche souple et discrétionnaire retenue par les cours au regard des ordonnances visées au par. 241(3) de la *LCSA*. L'examen de ces principes étant terminé, je traite maintenant de leur application à l'affaire qui nous occupe.

(4) Application des principes régissant les ordonnances rendues en vertu du par. 241(3) et responsabilité de l'administrateur dans la présente affaire

[58] La décision du juge du procès de tenir l'appelant personnellement responsable de l'abus ne comporte aucune erreur justifiant une intervention en appel.

[59] Tel qu'il est exposé précédemment, l'art. 241 confère à la cour de première instance un large pouvoir discrétionnaire. Les cours d'appel devraient par conséquent faire preuve de retenue lorsqu'elles

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principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court's findings of fact (see also *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36 and 90). Second, an appellate court may intervene and substitute its own decision for the trial court's if the judgment is based on "errors of law . . . erroneous principles or irrelevant considerations" (*Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII)). Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust (*ibid.*).

révisent des jugements rendus sur des demandes de redressement pour abus. Trois principes régissent la norme de contrôle applicable. Premièrement, en l'absence d'une erreur manifeste et dominante, la cour d'appel doit s'en remettre aux conclusions de fait de la cour de première instance : voir également *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352, par. 36 et 90. Deuxièmement, une cour d'appel peut intervenir et remplacer la décision de la cour de première instance par sa propre décision si le jugement repose sur [TRADUCTION] « des erreurs de droit [. . .] des principes erronés ou des considérations non pertinentes » : *Trackcom Systems International Inc. c. Trackcom Systems Inc.*, 2014 QCCA 1136, par. 36 (CanLII). Troisièmement, même si la décision n'était pas fondée sur de telles assises, une cour d'appel peut intervenir si le jugement rendu en première instance est manifestement injuste : *ibid.*

[60] The first prong of the test for personal liability requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression. In this case, the trial judge found that, although each of the four named defendant directors had been involved in the oppressive conduct, it was the appellant and Dr. Black — the only members of the audit committee — who had played "the lead roles" in Board discussions resulting in the non-conversion of the respondent's A and B Shares (para. 167). In making that finding, the trial judge held that Mr. Wilson and Dr. Black were implicated in the oppressive conduct. It was therefore open to the trial judge to determine that the oppression was properly attributable to these two defendants.

[60] Selon le premier volet du test applicable en matière de responsabilité personnelle, la conduite abusive doit être véritablement attribuable à l'administrateur en raison de son implication dans l'abus. En l'espèce, le juge du procès a conclu que même si les quatre administrateurs défendeurs étaient associés à l'abus, c'était toutefois l'appelant et le D[r] Black — les seuls membres du comité de vérification — qui avaient joué un [TRADUCTION] « rôle prépondérant » dans les discussions du conseil d'administration ayant mené à la non-conversion des actions A et B de l'intimé : par. 167. En concluant ainsi, le juge du procès a jugé que M. Wilson et le D[r] Black étaient impliqués dans la conduite abusive. Il était donc loisible au juge du procès de décider que l'abus était véritablement attribuable à ces deux défendeurs.

[61] As explained above, attribution alone is insufficient to ground a director's personal liability. It follows that merely adopting a "lead role" at Board meetings, without something more, can never suffice to ground a director's personal liability. Here, however, that "something more" consisted of the factors properly considered at the second prong of the personal liability inquiry.

[61] Rappelons que le seul fait que l'abus soit attribuable à l'administrateur est insuffisant pour fonder sa responsabilité personnelle. Il en découle que le simple fait de jouer un « rôle prépondérant » aux réunions du conseil d'administration, sans plus, ne peut jamais suffire à justifier la responsabilité personnelle d'un administrateur. En l'espèce, toutefois, le « quelque chose de plus » requis était les facteurs examinés à bon droit dans le cadre du second volet du test applicable en matière de responsabilité personnelle.

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[62] The second prong requires that the imposition of personal liability be fit in all the circumstances. In this case, the trial judge found that, in addition to the "lead role" he had played, Mr. Wilson had accrued a personal benefit as a result of the oppressive conduct:

> . . . although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of [the respondent's] A and B Shares. Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is "fit" to order the Defendants Black and Wilson personally to pay the damages to [the respondent]. [para. 167]

[63] Notably, the Board accelerated the conversion of the appellant's C Shares into common shares (but not the C Shares held by others) to allow him to participate in the Private Placement, despite issues as to whether the test for conversion had been met. This benefitted him by increasing his control over the Corporation, to the detriment of the respondent, whose own stake in the company was diluted due to his inability to participate in the Private Placement — a consequence of the oppressive conduct.

[64] Nothing about this line of reasoning reflects an incorrect invocation of principle or improper consideration on the part of the trial judge. The trial judge was entitled to consider that the appellant played a "lead role" in advocating for the oppressive conduct and that he ultimately increased his control over the Corporation as a result.

[65] Additionally, the remedy went no further than necessary to rectify the respondent's loss. After adjusting for exchange rates, the trial judge found that the value of the common shares had been Can$0.53 per share prior to the Private Placement. He also found that, but for the oppressive conduct, the respondent's A and B Shares would have been converted into 1,223,227 common shares. This put the

[62] Le second volet exige que l'imposition d'une responsabilité personnelle soit « pertinente » compte tenu de toutes les circonstances. En l'espèce, le juge du procès a conclu que, outre le « rôle prépondérant » de M. Wilson, l'abus lui avait procuré un avantage personnel :

> [TRADUCTION] . . . bien que tous les défendeurs aient bénéficié des changements apportés au régime d'option d'achat d'actions, ce sont les défendeurs Black et Wilson qui ont participé au Placement privé et bénéficié de la dilution des actions A et B [de l'intimé]. M. Wilson a aussi bénéficié de la conversion de ses actions C en un nombre maximal d'actions ordinaires malgré des doutes quant au respect du test relatif à la conversion. Compte tenu des circonstances, j'estime qu'il est « pertinent » de condamner personnellement les défendeurs Black et Wilson à payer des dommages-intérêts à [l'intimé]. [par. 167]

[63] Il convient de souligner que le conseil d'administration a accéléré la conversion des actions C de l'appelant en actions ordinaires (mais pas des actions C détenues par d'autres) pour lui permettre de participer au Placement privé, et ce, malgré l'existence de doutes quant au respect du test relatif à la conversion. Ces agissements lui ont profité en augmentant son contrôle sur la société, au détriment de l'intimé, dont les propres intérêts dans l'entreprise ont été dilués en raison de son incapacité à participer au Placement privé — une conséquence des agissements abusifs.

[64] Rien dans ce raisonnement ne révèle de considérations ou de principes erronés auxquels le juge du procès aurait fait appel. Celui-ci était en droit de considérer que l'appelant a joué un « rôle prépondérant » en favorisant la commission de l'abus et que cela lui avait en définitive permis d'accroître son contrôle sur la société.

[65] De plus, la réparation n'a pas accordé plus que ce qui était nécessaire pour remédier à la perte de l'intimé. Après avoir procédé à un ajustement pour tenir compte des taux de change, le juge du procès a conclu que la valeur des actions ordinaires était de 53 cents canadiens par action avant le Placement privé. Il a aussi conclu que n'eût été l'abus, les actions A et B de l'intimé auraient été converties

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respondent's loss at $648,310 — the extent of the appellant's and Dr. Black's personal liability.

[66] Finally, the remedy was appropriately fashioned to vindicate the respondent's reasonable expectations as a Series A and B shareholder. The respondent reasonably expected that his A and B Shares would be converted if the Corporation met the applicable financial tests laid out in the Corporation's articles and that the Board would consider his rights as a Series A and B shareholder in any transaction impacting the A and B Shares. The appellant concedes that the Board's failure to meet these expectations amounted to oppression. Given the absence of any palpable and overriding errors in the trial judge's calculation, the amount of $648,310 represents the value that would have accrued to the respondent had his reasonable expectations been respected.

[67] Accordingly, the trial judge's order against the appellant represents a fair way of rectifying the oppression that goes no further than necessary to vindicate the respondent's reasonable expectations. In my view, it should be permitted to stand.

B. *Were the Pleadings Sufficient to Ground the Imposition of Personal Liability in This Case?*

[68] The appellant further submits that the respondent's pleadings were inadequate to ground the imposition of personal liability, consequently depriving the appellant of his basic right to know the case against him. This argument may be addressed summarily.

[69] First, the respondent's pleadings named four individual directors, including the appellant, as defendants. As the Court of Appeal recognized, the respondent specifically alleged that these four defendants "acted in their own personal interest" and "to the detriment of Wi2Wi and its shareholder in focusing mainly on their personal financial gains" (paras. 51-52). In turn, the defendants specifically

en 1 223 227 actions ordinaires. Ainsi, l'intimé a subi une perte de 648 310 $, qui constitue l'étendue de la responsabilité personnelle de l'appelant et du D[r] Black.

[66] Enfin, la réparation a été adéquatement élaborée eu égard aux attentes raisonnables de l'intimé en tant que détenteur d'actions de série A et B. L'intimé s'attendait raisonnablement à ce que ses actions A et B soient converties si la société satisfaisait aux tests financiers applicables établis dans les statuts de la société, et à ce que le conseil d'administration tienne compte de ses droits en tant que détenteur d'actions A et B lors de toute opération ayant une incidence sur elles. L'appelant concède que l'omission du conseil d'administration de répondre à ces attentes raisonnables constitue un abus. Étant donné l'absence d'erreur manifeste et déterminante dans le calcul du juge du procès, le montant de 648 310 $ représente ce dont l'intimé aurait bénéficié si ses attentes raisonnables avaient été respectées.

[67] Par conséquent, l'ordonnance du juge du procès condamnant l'appelant constitue une réparation équitable de l'abus qui ne va pas plus loin que nécessaire pour répondre aux attentes raisonnables de l'intimé. À mon avis, il convient de la maintenir.

B. *En l'espèce, les actes de procédure étaient-ils suffisants pour justifier l'imposition d'une responsabilité personnelle?*

[68] L'appelant soutient également que les actes de procédure de l'intimé étaient insuffisants pour fonder de lui imposer une responsabilité personnelle, le privant par conséquent de son droit fondamental de savoir ce qu'on lui reproche. Il peut être disposé de cet argument de façon sommaire.

[69] En premier lieu, les actes de procédure de l'intimé désignaient nommément quatre administrateurs, dont l'appelant, à titre de défendeurs. Comme l'a reconnu la Cour d'appel, l'intimé a expressément allégué que ces quatre défendeurs [TRADUCTION] « ont agi dans leur intérêt personnel » et « au détriment de Wi2Wi et de son actionnaire en recherchant principalement des gains financiers personnels » : par. 51 et

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denied these allegations in their Defence dated January 25, 2011, pleading that "[t]he business decisions at issue were i) made by the Defendants in good faith, ii) not motivated by self-interest, iii) based on informed judgment and on the honest belief that each action was taken in the best interest of Wi2Wi" (A.R., vol. II, at p. 34). I agree with the Court of Appeal that "[i]n such conditions, it may be difficult to argue that the matter of the appellants' personal interest (or the advantage they derived) came as a surprise to them" (para. 52).

52. Les défendeurs ont quant à eux expressément nié ces allégations dans leur défense datée du 25 janvier 2011, faisant valoir que [TRADUCTION] « [l]es décisions d'affaires en cause i) avaient été prises de bonne foi par les défendeurs, ii) n'étaient pas motivées par leur intérêt personnel et iii) reposaient sur un jugement éclairé et la croyance honnête que chaque acte était posé dans l'intérêt supérieur de Wi2Wi » : d.a., vol. II, p. 34. Je souscris à l'opinion de la Cour d'appel selon laquelle « [o]n peut difficilement soutenir, dans ces conditions, que la question de l'intérêt personnel des appelants (ou de l'avantage retiré par eux) était de nature à les surprendre » : par. 52.

[70] Second, in his initial Motion to Institute Proceedings, the respondent specifically sought damages against the four named defendants — not the Corporation — under s. 241(3)(j) of the *CBCA*. Coupled with the fact that the pleadings made specific allegations against the defendant directors, this alone sufficed to put the appellant on notice that his own personal liability was engaged.

[70] En deuxième lieu, dans sa requête introductive d'instance initiale, l'intimé a expressément demandé la condamnation des quatre défendeurs nommément désignés — et non de la société — à des dommages-intérêts en vertu de l'al. 241(3)j) de la *LCSA*. Si l'on tient compte du fait que certaines allégations contenues dans les actes de procédure visaient expressément les administrateurs défendeurs, ces deux considérations suffisaient à notifier l'appelant du fait que sa propre responsabilité était susceptible d'être engagée.

[71] Third, the main authorities invoked by the appellant on this point, namely *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) ("*Rodaro*"), and *Budd*, are distinguishable. In *Rodaro*, the trial judge relied on a theory of liability that had been neither pleaded nor argued by either party over the course of a 92-day trial (paras. 59-63). In *Budd*, the complainant's claim targeted more than forty defendants, including thirty directors, nine officers and five portfolio companies, an accounting firm and Gentra. As a result, Doherty J.A. found that the claims against the individual directors amounted to an abuse of process:

[71] Enfin, les principales décisions invoquées par l'appelant sur cette question, soit *Rodaro c. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) (« *Rodaro* »), et *Budd*, doivent être distinguées. Dans le premier cas, le juge du procès s'est fondé sur une théorie concernant la responsabilité qu'aucune des parties n'a présentée ou invoquée au cours du procès de 92 jours : par. 59-63. Dans *Budd*, la demande du plaignant visait plus de quarante défendeurs, dont trente administrateurs, neuf dirigeants et cinq sociétés de portefeuille, un cabinet d'experts comptables et la société Gentra. Le juge Doherty de la Cour d'appel a donc conclu que les demandes visant les administrateurs à titre personnel équivalaient à un abus de procédure :

> I am left with the uneasy impression that the claim against the directors and officers personally is included in the appellant's statement of claim for purposes other than to ultimately establish their personal liability. If this impression is correct, those claims are properly characterized as an abuse of process. [para. 50]

> [TRADUCTION] J'ai l'impression inconfortable que les demandes visant personnellement les administrateurs et dirigeants figurent dans la déclaration pour des raisons autres que l'établissement ultime de leur responsabilité personnelle. Si cette impression est exacte, ces demandes sont à bon droit qualifiées d'abus de procédure. [par. 50]

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[72] The pleadings here, albeit sparse, specifically alleged that all four defendants had acted in their personal interest to the detriment of the plaintiff. This is worlds apart from both *Rodaro* and *Budd*.

[73] Finally, a right of appeal is not a backstop for procedural choices made prior to trial. In this case, the more appropriate response to the respondent's bare pleadings lay in a motion for particulars or discovery prior to trial, not in a plea before the appellate courts.

VI. Conclusion

[74] For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the respondent: Irving Mitchell Kalichman, Montréal.

[72] Les actes de procédure produits en l'espèce, même s'ils étaient peu étoffés, mentionnaient expressément que chacun des quatre défendeurs avait agi dans son intérêt personnel, au détriment de celui du demandeur. La situation en l'espèce est donc complètement différente, tant de celle dans *Rodaro* que de celle dans *Budd*.

[73] Enfin, un droit d'appel n'est pas un filet de sécurité pour les choix procéduraux faits avant le procès. Dans la présente affaire, la réponse la plus appropriée aux actes de procédure minimaux produits par l'intimé aurait été une requête pour précisions ou un interrogatoire au préalable, et non un plaidoyer devant les cours d'appel.

VI. Conclusion

[74] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Lax O'Sullivan Lisus Gottlieb, Toronto.

Procureurs de l'intimé : Irving Mitchell Kalichman, Montréal.

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1291079 ONTARIO LIMITED
Plaintiff (moving party)

-and-

SEARS CANADA INC. et al.
Defendants (responding parties)

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

RESPONDING PARTY BOOK OF AUTHORITIES OF THE DEFENDANT, ESL INVESTMENTS, INC.

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