Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

BOOK OF AUTHORITIES OF THE RESPONDENT, 0678786 B.C. LTD. (FORMERLY THE MCCANN FAMILY HOLDING CORPORATION)

MOTION FOR THE APPOINTMENT OF REPRESENTATIVE COUNSEL FOR THE CLASS ACTION (returnable June 11, 2014)

Date: June 3, 2014

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (LSUC# 27115J)
Raj Sahni (LSUC #42942U)
Jonathan Bell (LSUC #55457P)

Tel: 416-777-4856
Fax: 416-863-1716

Lawyers for 0678786 B.C. Ltd.

Party/Counsel	Telephone	Facsimile	Party Represented
TO: THE SERVICE LIST **Lax O'Sullivan Scott Lisus LLP** Suite 2750, 145 King Street West Toronto, ON M5H 1J8 Canada Eric R. Hoaken Email: ehoaken@counsel-toronto.com **JJS Barristers** Suite 800, The Lancaster Building 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Canada Robert Hawkes, Q.C. Email: hawkesr@jssbarristers.ca	416.598.1744 416.645.5075 403.571.1544	416.598.3730 403.571.1528	Counsel for DirectCash Bank, DirectCash ATM Processing Partnership, DirectCash ATM Management Partnership, DirectCash Payments Inc., DirectCash Management Inc. and DirectCash Canada Limited Partnership ("DirectCash") who are co-defendants with The Cash Store Financial Services Inc. and The Cash Store Inc. (the "Cash Store") in class action (Court File No. 7908/12CP)
Osler Hoskin & Harcourt LLP P. O. Box 50, 1 First Canadian Place Toronto ON M5X 1B8 Marc Wasserman Email: mwasserman@osler.com Jeremy Dacks Email: jdacks@osler.com Patrick Riesterer Email: priesterer@osler.com Karin Sachar Email: ksachar@osler.com	416.362.2111 416.862.4908 416.862.4923 416.862.5947 416.862.5949	416.862.6666	Counsel to the Chief Restructuring Officer ("CRO")
Rothschild Neil Augustine Email: nycprojectoilers@rothschild.com Bernard Douton Email: nycprojectoilers@rothschild.com	212.403.3500 212.403.5411 212.403.5254	212.403.3501	Financial Advisors to the CRO

Cassels Brock & Blackwell LLP 2100 Scotia Plaza, 40 King Street West Toronto, Ontario M5H 3C2 Wendy Berman Email: wberman@casselsbrock.com Ryan C. Jacobs Email: rjacobs@casselsbrock.com	416.869.5300 416.860.2926 416.860.6465	416.640.3107 416.640.3189	Counsel to the Applicants
FTI Consulting Canada Inc. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto ON M4K 1G8 Greg Watson Email: greg.watson@fticonsulting.com Jeff Rosenberg Email: jeffrey.rosenberg@fticonsulting.com	416.649.8077	416.649.8101	Monitor
McCarthy Tétrault Suite 5300, TD Bank Tower Box 48, 66 Wellington Street West Toronto ON M5K 1E6 James Gage Email: jgage@mccarthy.ca Heather Meredith Email: hmeredith@mccarthy.ca	416.362.1812 416.601.7539 416.601.8342	416. 868.0673	Counsel to the Monitor
Goodmans LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto ON M5H 2S7 Robert J. Chadwick Email: rchadwick@goodmans.ca Brendan O'Neill Email: boneill@goodmans.ca	416. 979.2211 416.597.4285 416.849.6017	416. 979.1234	Counsel to Ad Hoc Noteholders
Norton Rose Fulbright Canada LLP Suite 3800, Royal Bank Plaza, South Tower 200 Bay Street, P.O. Box 84 Toronto, ON M5J 2Z4 Orestes Pasparakis Email: orestes.pasparakis@nortonrosefulbright.com Alan Merskey	416.216.4000 416.216.4815 416.216.4805 416.216.4853 416.216.2419	416.216.3930	Counsel to Coliseum Capital Management

Email: Alan.Merskey@nortonrosefulbright.com Virginie Gauthier Email: virginie.gauthier@nortonrosefulbright.com Alex Schmitt Email: alexander.schmitt@nortonrosefulbright.com			
McMillan LLP Brookfield Place, 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 Adam C. Maerov Email: adam.maerov@mcmillan.ca Brett Harrison Email: brett.harrison@mcmillan.ca	403.531.4700 403.215.2752 416.865.7932	416.865.7048	Counsel to Trimor Annuity Focus LP #5
Computershare Trust Company of Canada and Computershare Trust Company, NA 100 University Avenue, 11th Floor, North Tower Toronto, ON M5J 2Y1 Patricia Wakelin, Corporate Trust Officer Email: patricia.wakelin@computershare.com Shelley Bloomberg, Manager, Corporate Trust Email: Shelley.Bloomberg@computershare.com Mohanie Shivprasad, Associate Trust Officer Email: mohanie.shivprasad@computershare.com Tina Vitale, Senior VP, Corporate Trust Email: tina.vitale@computershare.com John Wahl, Corporate Trust Officer Email: john.wahl@computershare.com	416.263.9317 416.263.9322 212.805.7345 646.334.3350 (C) 303.262.0707	416.981.9777 514.981.7677	Collateral Trustee under the Collateral Trust and Intercreditor Agreement
Dickinson Wright LLP 199 Bay Street, Suite 2200 Commerce Court West Toronto, ON M5L 1G4 Michael A. Weinczok Email: mweinczok@dickinsonwright.com David P. Preger Email: Dpreger@dickinsonwright.com	416.777.4026 416.301.4883 (C) 416-646-4606	416-865-1398	Canadian Counsel to Computershare
Perkins Coie LLP 30 Rockefeller Plaza 22nd Floor New York, New York 10112-0085 United States of America Tina N. Moss Email: TMoss@perkinscoie.com Ronald T. Sarubbi Email: RSarubbi@perkinscoie.com	212.262.6910 212.262.6914	212.977.1648 212.977.1644	US Counsel to Computershare

Borden Ladner Gervais Centennial Place, East Tower 1900 520 – 3rd Ave SW Calgary, AB, T2P 0R3 Josef G.A. Kruger Email: jkruger@blg.com Patrick T. McCarthy Email: PMcCarthy@blg.com	403.232.9500 403.232.9563 403.232.9441	403.266.1395	Counsel to the Trustee in Bankruptcy for Assistive Financial Corp.
Duncan Craig LLP 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta T5J 3V9 Darren R. Bieganek, Q.C. Email: dbieganek@dcllp.com	780.428.6036 780.441.4386	780.428.9683 780.969.6381	Counsel to Mr. Cameron Schiffner
Harrison Pensa LLP 450 Talbot Street London, ON N6A 5J6 Jonathan Foreman Email: jforeman@harrisonpensa.com **Koskie Minsky LLP** Barristers & Solicitors 20 Queen Street West, Suite 900 Toronto, ON M5H 3R3 Andrew J. Hatnay Email: ahatnay@kmlaw.ca	519. 679.9660 519.661.6775 416.595.2083	519.667.3362 416.204.2872	Counsel to the Plaintiff in the class action of Timothy Yeoman v. The Cash Store Financial Services Inc. et al. (Court File No. 7908/12CP) Agent to Plaintiff's Counsel in class action (Court File No. 7908/12CP)
Siskinds LLP 100 Lombard Street, Suite 302 Toronto, ON M5C 1M3 Canada Charles M. Wright Email: charles.wright@siskinds.com Serge Kalloghlian Email: serge.kalloghlian@siskinds.com Alex Dimson Email: alex.dimson@siskinds.com	416.362.8334	416.362.2610	Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiff in the Ontario Class Action against the Applicant

INDEX

Court File No. CV-14-1051800CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

INDEX

Tab 1

Case Name:

Muscletech Research and Development Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36, as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those entities listed on Schedule "A" to the Notice of Appeal

[2006] O.J. No. 4583

Docket: M34242-C46020

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, S.T. Goudge and R.J. Sharpe JJ.A.

Heard: October 24, 2006.
Oral judgment: October 24, 2006.

(12 paras.)

Civil procedure -- Parties -- Class or representative actions -- Representative plaintiff -- Application by proposed representative plaintiffs for leave to appeal from order in proceedings under Companies' Creditors Arrangement Act dismissed -- Forum of future class action, lack of individual claims, and failure to meet claims bar date were relevant considerations for motions judge in coming to decision on order.

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Application by proposed representative plaintiffs for leave to appeal from order in proceedings under Companies' Creditors Arrangement Act dismissed -- Failure to meet claims bar date was a relevant consideration for motions judge in coming to decision on order.

International law and conflict of laws -- Jurisdiction -- Forum conveniens -- Application by proposed representative plaintiffs for leave to appeal from order in proceedings under Companies' Creditors Arrangement Act dismissed -- Forum of future class action valid consideration for motions judge in coming to decision on order.

Application by proposed representative plaintiffs for leave to appeal from a motion judge's order in proceedings under the Companies' Creditors Arrangement Act. The motions judge found it was not an appropriate case to exercise her discretion to certify a proposed class action proceeding. She took into account the fact that any motion to certify the proceedings would have to take place in the United States, not in Canada, in refusing the applicants the relief they requested. The judge also considered the absence of any individual claims from those whom the applicants sought to represent. The judge noted the applicants' failure to apply for the order before the claims bar date.

HELD: Application dismissed. The forum in which any future class certification proceedings might occur was a relevant consideration in the broader assessment of the nature and extent to which the ongoing proceedings under the Act could be delayed or lengthened. The lack of individual claims and the failure to meet the claims bar date were also relevant considerations.

Statutes, Regulations and Rules Cited:

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

Counsel:

Kevin McElcheran for the applicants/appellants

Fred Myers and David Bish for the respondent Muscletech

Alan Mark for the respondent Iovate Companies

Sean Campbell for the respondent Richter (Monitor)

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- This is an application for leave to appeal and if leave is granted, an appeal from an order made by the motion judge in ongoing proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The motion for leave and the appeal itself were ordered heard together by Borins J.A.

2 It is well established that leave to appeal from orders made in ongoing *CCAA* proceedings will be granted "sparingly". This is particularly true where the order under attack is a discretionary order: see *Re Stelco Inc.* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.).

3 Counsel for the applicants/appellants accepts, correctly in our view, that the order under appeal was made in the exercise of the motion judge's discretion under the *CCAA*. Counsel argues that the motion judge erred in the exercise of her discretion by taking into account two irrelevant considerations and by giving undue weight to a relevant consideration.

4 The respondents concede that the relief sought by the applicants/appellants before the motion judge was available under the *CCAA* and that in an appropriate case, the order sought could have been made. They argue that the motion judge found that this was not an appropriate case for the order sought and that there is no reason to doubt the exercise of that discretion.

5 The arguments advanced by counsel demonstrate the very fact-specific nature of the motion judge's exercise of her discretion. Her order is very much a product of her assessment of the fact situation before her. It does not purport to determine any legal issues of significance outside of the factual corners of this proceeding.

6 The applicants/appellants argue that the motion judge should not have taken into consideration the fact that any motion to certify the proposed class action proceedings would have to take place in the United States and not in Canada. Counsel submits that the location of the proceeding is irrelevant. In our view, the forum in which any future class certification proceedings might occur was relevant as one factor in the broader assessment of the nature and extent to which the ongoing *CCAA* proceedings could be delayed or lengthened were the applicants/appellants allowed leave to file a representative claim on behalf of the as yet uncertified classes. The impact of the requested order on the *CCAA* proceedings is clearly a relevant consideration.

7 The applicants/appellants next submit that the motion judge was wrong to take into consideration the absence of any individual claims in the *CCAA* proceedings by those individuals who are part of the groups on whose behalf the applicants/appellants seek to advance a representative claim. Given the nature of the individual claims underlying the proposed class action, we think that it was open to the motion judge to view the absence of any individual claims as suggesting that these claims were neither strong nor financially significant. The nature of the proposed claims is clearly a relevant consideration in the exercise of the motion judge's discretion.

8 Finally, the applicants/appellants submit that the motion judge gave undue weight to the applicant/appellant's failure to apply for the order before the claims bar date set out in the earlier order of Farley J. The essence of the motion judge's reasoning is found at paras. 42-44 of her reasons:

> [H]ere, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.
>
> [43] Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J. when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.
>
> [44] The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

9 These factors were, in our view, properly considered by the motion judge in the exercise of her discretion. The weight to be assigned to these various factors was a matter for the motion judge.

10 Ultimately, we see no realistic possibility of success were we to grant leave to appeal. These proposed representative claims appear individually very modest. They are at a very early stage whereas the claims in the *CCAA* proceeding appear to be nearing final resolution. These factors all tell strongly in favour of the disposition made by the motion judge.

11 Leave to appeal is refused.

12 We think this is an appropriate case for costs. Costs to Mr. Myers' clients in the amount of $10,000. Costs to Mr. Mark's clients in the amount of $5,000. Costs are inclusive of GST and disbursements.

D.H. DOHERTY J.A.
S.T. GOUDGE J.A.
R.J. SHARPE J.A.

Tab 2

Case Name:

Muscletech Research and Development Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those entities listed on Schedule "A" hereto

[2006] O.J. No. 3300

25 C.B.R. (5th) 218

33 C.P.C. (6th) 131

150 A.C.W.S. (3d) 534

[2006] O.T.C. 737

2006 CarswellOnt 4929

2006 CanLII 27997

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List

R.E. Mesbur J.

Heard: July 31, 2006.
Judgment: August 16, 2006.

(45 paras.)

[Editor's note: Supplementary reasons for judgment were released September 13, 2006. See [2006] O.J. No. 5305.]

Counsel:

Fred Myers and David Bish for the applicants

Kevin P. McElcheran for the "Representative Plaintiffs"

James H. Grout and Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated California consumers, (the "California Consumers")

Derrick Tay for Iovate Health & Sciences, the DIP Lender

Jeff Carhart for the Ad Hoc Tort Claimants Committee

Natasha MacParland for the Monitor, RSM Richter Inc.

[Editor's note: A corrected version was released by the Court September 13, 2006; the corrections have been made to the text and the corrigendum is appended to this document.]

ENDORSEMENT

R.E. MESBUR J.:--

Nature of the motions:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

Some history:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone

who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a controlled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

5 For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

6 The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

7 In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

8 In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been extended throughout the proceedings to August 11, 2006.[1] As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

9 Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

10 At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions. The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

11 On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for the Representative Plaintiffs and California Consumers did not. They took no steps, as

did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

12 As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

13 The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.[2] In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

14 The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal,* and *USA Today.* The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

15 All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

16 On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

17 The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

18 After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006, provided, among other things, for a method for the monitor to review proofs of claim, ac-

cept or reject them, and for a claims resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

19 No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

The parties and their positions:

20 On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

21 The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to prohormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

22 The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

23 The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

24 All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class

participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

25 Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

The law and analysis:

26 The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

Does the CCAA permit representative claims?

27 The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*" Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act,* and the definition of debts "provable in bankruptcy".

28 Section 121(1) of the BIA deals with "claims provable", and says:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason on any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

29 The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

> The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

30 A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

31 Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of

the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

32 The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

33 From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriguez and Guzman personally.

34 While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings[3], and even in this case.[4] In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,[5] while in other cases, a motion to lift the stay for that purpose and to file a class claim have been denied.[6] As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.[7]

35 It is noteworthy here, that even though Farley J. made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

36 From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.[8] In the case of *Re Air Canada,* however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

37 While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

Did the CCAA process adequately protect the interests of these potential claimants?

38 When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

39 The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim . They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

Should the court exercise its discretion?

40 While the court clearly has a broad discretion in CCAA matters[9], I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

41 First, representative claims *per se,* have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

42 Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act,* particularly in pension fund disputes.[10] I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

43 Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J. when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

44 The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

Disposition:

45 The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of

Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

R.E. MESBUR J.

* * * * *

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

* * * * *

Corrigendum
Released: September 13, 2006

The Court has issued the following correction:

CORRECTION TO ENDORSEMENT

[1] Ms. MacParland and Ms. Mahar have brought to my attention two inaccuracies in my endorsement dated August 16, 2006. First, the reference in paragraph 13 of the endorsement to counsel for the DIP Lender should be to Mr. Tay, rather than Mr. Carhart.

[2] Second, apparently the California Consumers did not file individual proofs of claim. Their proofs of claim were similar to those filed by the Representative Plaintiffs. Ms. Mahar points out that the California Consumers' claim is a false advertising claim that seeks restitution, rather than damages for personal injury. Their claim is not the same nature as those filed by the Representative Plaintiffs. The statutory scheme in California (namely the Business & Professions Code Section 17203) apparently expressly authorizes Ms. Osborne to act as the representative of other parties, and thus she filed a proof of claim on behalf of herself and other simnilarly situated California consumers. The California Consumers did not file any affidavit material on the motion, and counsel did

not make this clear at the hearing. However, these changes should be incorporated into my earlier endorsement.

cp/e/qw/qlhjk/qlbxs/qlrme/qlgpr/qlmlt

1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.

2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.

3 See, for example, *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (S.C.J. Commercial List). See also the order of Blair J. in *Canadian Red Cross Society* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.

4 see the reasons of Farley J. dated February 6, 2006, at paragraph 8, in which he says: "I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.

5 *Re Air Canada,* Court File # 03-CL-4932. Endorsement of Farley J dated. September 24, 2003.

6 *Re Canadian Red Cross, supra*

7 *Re Canadian Red Cross,* note 2, above, at page 197

8 *Re Air Canada,* note 5, above at paragraph 18.

9 The *CCAA* has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act,* [Carswell, 2006] pp 1163-64, and these cases referred to there.

10 see *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

Tab 3

2006 CarswellOnt 7877
Ontario Superior Court of Justice

Muscletech Research & Development Inc., Re

2006 CarswellOnt 7877

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Ground J.

Heard: November 3, 2006
Judgment: December 11, 2006
Docket: 06-CL-6241

Counsel: Jay A. Carfagnini, Frederick Myers, David Bish for Applicants, Muscletech Research & Development Inc. et al
D.J. Miller, Kyla E.M. Mahar for Krys Osborne & similarly situated California consumers

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Miscellaneous issues

Several product liability actions were filed against applicants in United States pertaining to sale of product that contained ephedra — Applicants sought and obtained relief under Companies' Creditors Arrangement Act as means of achieving global resolution of claims against it — Court issued "Call for Claims" order that provided deadline by which claims must be filed failing which claims were barred — Monitor also commenced ancillary proceedings in United States — Monitor sent proofs of claim to all known creditors of applicants, filed proof of claim package electronically on U.S court dockets, advertised in newspapers and took other steps to inform potential creditors — Only proof of claim filed was that of creditor who sought to represent other creditors as member of class — Applicants brought motion for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons — Motion granted — Creditor brought cross-motion for order permitting claim to be filed on behalf of other persons and for related relief — Cross-motion dismissed — Although court had inherent jurisdiction to permit class proof of claim to be filed in proceedings determination as to whether to do so was to be made based on factual circumstances and equities between parties — "Call for Claims" order specifically permitted representative claims to be brought by legal personal representatives but creditor was not legal personal representative within meaning of order — Creditor did not have documentary evidence that she had authority to file claim on behalf of class or court order permitting her to do so —

Although this did not preclude court from determining that creditor could file claim on behalf of class on facts, other creditors were given notice of proceedings and failed to file claims, applicants had resolved almost all other product liability claims — To permit filing of class proof of claim at this stage would seriously disrupt and extend proceedings as well as increasing costs and decreasing benefits to all stakeholders — There were also substantial doubts as to whether allegedly false and misleading advertising that was basis of class action would be found to be established and as to whether class was certifiable — There was no evidence that claims order or process was unfair or unduly prejudicial to creditors.

Table of Authorities

Cases considered by *Ground J.*:

Alton, Re (2003), 45 C.B.R. (4th) 25, 2003 CarswellOnt 3044 (Ont. S.C.J.) — considered

Air Canada, Re (September 24, 2003), Farley J. (Ont. S.C.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 24, 2000 CarswellAlta 728 (Alta. Q.B.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1999), 12 C.B.R. (4th) 194, 1999 CarswellOnt 3234, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]) — considered

Ephedra Products Liability Litigation, Re (2005), 329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y.) — considered

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 218, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) — considered

Perez v. Metabolife International Inc. (2003), 218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 124(3) — considered

Bankruptcy Code, 11 U.S.C. 1982
Chapter 15 — referred to

Business and Professions Code, California
s. 17200 — referred to

MOTION for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons; CROSS-MOTION for order permitting claim to be filed on behalf of other persons and for related relief.

Ground J.:

1 This motion is brought by the Applicants in the within proceeding (collectively "Muscletech") for an Order that the proof of claim filed by Krys Osborne ("Osborne") in this proceeding is invalid and a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

Background

2 In response to call for claims in this proceeding, Osborne filed a proof of claim in respect of claims against the Applicants Iovate Health Sciences Group Inc., Iovate Health Sciences U.S.A. Inc., General Nutrition Corporation and other entities in a purported class representative capacity (the "Osborne Proof of Claim"). The Osborne Proof of Claim is based on alleged false and/or misleading advertising pertaining to the sale of Hydroxycut containing the ingredient ephedra and asserts a claim in the estimated amount of U.S. $100 million.

3 Muscletech sought and obtained relief under the CCAA pursuant to an order of this court of Justice dated January 18, 2006 (the "Initial CCAA Order"). The Initial CCAA Order granted a stay of proceedings to and including February 18, 2006 in respect of the Applicants and certain non-applicant parties and appointed RSM Richter Inc. as Monitor of the Applicants (the "Monitor"). By subsequent Orders of this court, the Stay of Proceedings has been extended to and including February 1, 2007.

4 On January 18, 2006, the Monitor commenced ancillary proceedings in the United States of America in respect of the Applicants under Chapter 15 of the *U.S. Bankruptcy Code* and those proceedings are now before the United States District Court for the Southern District of New York (the "District Court").

5 The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants (collectively, the "Product Liability Claimants") against Muscletech and others in the United States that related to products formerly sold by Muscletech (collectively, the "Product Liability Actions").

6 In addition to Muscletech, a number of affiliated and non-affiliated parties were also named as defendants or otherwise involved in certain of the Product Liability Actions (collectively, the "Non-Applicant Defendants"). The liability of the Non-Applicant Defendants is derivative of, and inextricably linked to, the liability of the Applicants.

7 On March 3, 2006, this court granted an order (the "Call for Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and the Non-Applicant Defendants. The Call For Claims Order required persons who wished to advance claims to file Proofs of Claim (as defined in the Call For Claims Order) with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which the proposed claims would be barred. The Call For Claims Order was approved by Order of the District Court dated March 22, 2006.

8 In accordance with the Call For Claims Order, the Monitor: (a) sent a package containing the requisite proof of claim forms (the "Proof of Claim Package") to all known creditors of the Applicants; (b) filed electronically on the court dockets of the District Court the Proof of Claim Package and a notice to creditors advising of the call for claims process; (c) caused to be published a notice to creditors in The Globe and Mail (National Edition), The Wall Street Journal, and USA Today; and (d) posted a copy of the notice to creditors and the Proof of Claim Package on the Monitor's website. No Proof of Claim was filed by anyone, other than Osborne, who would be a member of the putative class sought to be represented by Osborne pursuant to the Osborne Proof of Claim.

9 The Call For Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, with the input of various key stakeholders, the Applicants established a claims resolution process (the "Claims Resolution Process") approved by this court and incorporated in a Claims Resolution Order dated June 8, 2006 (the "Claims Resolution Order") and approved by order of the District Court dated June 22, 2006.

10 The Claims Resolution Order provides: (a) a process for the review of all Proofs of Claim filed with the Monitor; (b) a process for the acceptance or dispute, in whole or in part, by the Applicants, with the assistance of the Monitor, of Claims and/or Product Liability Claims for the purpose of voting and/or distribution under a plan of compromise or arrangement in respect of the Applicants (a "Plan"); (c) the appointment of a claims officer to resolve disputed Claims or Product Liability Claims; and (d) an appeal process from the determination of the claims officer to this court.

11 Muscletech has, with the assistance of the Monitor, reviewed the proofs of claim filed with the Monitor with a view to accepting or objecting to them for voting and/or distribution purposes under a Plan and has reviewed the Osborne Proof of Claim and denies that the claim advanced therein can succeed on the merits with respect to the allegations of false or misleading advertising.

12 On August 10, 2006, in accordance with the Claims Resolution Process, the Monitor issued a Notice of Objection to the Osborne Proof of Claim. In response to the Notice of Objection, Osborne filed a Dispute Notice dated August 23, 2006.

13 Paragraph 18 of the Claim Resolution Order authorizes Muscletech to move before this court to resolve or seek directions in respect of the validity, effect and/or quantum of proofs of claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the date of the Initial CCAA Order.

14 The Osborne Proof of Claims pertains to an action that was brought against Muscletech and certain Non-Applicant Defendants in the Superior Court of the State of California on February 16, 2005, prior to the commencement of these CCAA proceedings alleging violations of Section 17200 of the *California Business & Professions Code*, which prohibits "unlawful, unfair or fraudulent" business practices. The case was subsequently transferred to the United States District Court of California (Los Angeles) and a motion to transfer the case to the District Court was heard and granted on June 19, 2006.

15 As stated above, the Applicants' motion now before this court seeks an order that the Osborne Proof of Claim is invalid as a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

16 The class of claimants purported to be represented by Osborne was uncertified as of the date of the filing of the application in this CCAA proceeding and, as a result of the stay of proceedings, remains uncertified as of this date.

17 The cross motion filed by Osborne and now before this court seeks an order for, among other things:

(a) a declaration that the Call for Claims Order permits the filing of a proof of claim by Osborne, on behalf of herself and all other similarly situated California consumers, as the class representative of the putative class;

(b) in the alternative, to vary the Call for Claims Order *nunc pro tunc* to allow for the filing of the Osborne Proof of Claim to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order;

(c) in the further alternative, to lift the stay of proceedings to allow Osborne, as the class representative of the putative class, to take the necessary steps to certify the class action (the "California Class Action") and, contingent upon obtaining certification of the class, allow for the filing of the Osborne Proof of Claim in this proceeding to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order; and

(d) in the further alternative, to lift the stay of proceedings as against (i) Iovate Health Sciences Group, Inc. ("Iovate Group"), (ii) Iovate Health Sciences USA, Inc. ("Iovate USA") and (iii) General Nutrition Corporation ("GNC") (collectively the "Relevant Non-Applicant Defendants") to allow Osborne as the class representative of the California Consumers to continue the California Class Action as against the Relevant Non-Applicant Defendants.

Issues

18 The motions before this court raise the following issues:

(1) Is there any authority for the filing of uncertified class action claims in proceedings under the CCAA?

(2) Is Osborne the legal personal representative of the members of the putative class as referred to in the definition of "person" in the Call for Claims Order and what is the proper law for the determination of whether Osborne is a legal personal representative?

(3) Whether or not there is any such authority, should this court, in considering the equities of the case, exercise its inherent jurisdiction and accept the Osborne Proof of Claim for filing on behalf of the putative class.

Analysis

Class Proofs of Claim in CCAA Cases

19 The CCAA is silent as to whether class proofs of claim may be filed in a CCAA proceeding and it would appear that no Canadian court has definitively held that class proofs of claim may not be filed in a CCAA proceeding.

20 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), the applicant sought an order to lift the CCAA stay to commence a class proceeding on behalf of those who received blood tainted with Creuzfeld-Jakob Disease ("CJD"), and an order to file a class proof of claim. Blair, J.

concluded that the real issue raised by the applicant was the adequacy of the notice of the established CCAA claims filing procedure. He dismissed the application on the basis that there was no evidence of inadequate notice to CJD claimants and the CCAA proceedings having gone on for one year and having had a very high profile, Blair, J. doubted that permitting a class action to proceed would yield different results, and concluded that allowing the class action to proceed would disrupt the CCAA proceedings with only marginal benefit to CJD claimants. Regarding the last point, Blair, J. stated at paras. 9-11:

> In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where ___ as I have indicated ___ I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place ___ with the concurrence of the various groups of Transfusion Claimants ___ is one which is founded upon individual voting by claimants with respect to the Plan.
>
> I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order the Claimants receive what compensation they are entitled to as early as possible.
>
> This is not the case, in my view ___ because it is not necessary to do so ___ to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has ___ as Mr. Wright's factum put it ___ a "lengthier history of class proceedings", class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. III. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 2989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

21 In *Air Canada, Re* (September 24, 2003), Farley J. (Ont. S.C.) (unreported), the applicants sought an order to lift the CCAA stay to commence a class proceeding in Federal Court on behalf of various travel agencies and requested an order permitting them to thereafter file a class proof of claim. Farley J. dismissed the applicants' request that they be permitted to apply as a class of creditors if their class action was certified, and dismissed their request to submit a favourable judgment in the class action as a class proof of claim. Since the applicants' claims under the CCAA would have to be dealt with in the near future, and it was not likely that the Federal Court would be able to dispose of the class action in time, Farley J. concluded that "nothing is gained by their request". Farley, J. therefore did not definitively rule on the appropriateness of class proofs of claim.

22 In *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]), four plaintiffs in yet-uncertified American class actions relating to physical damages alleged to be caused by prohormones in certain products sold by Muscletech and others, applied to submit class proofs of claim and to have the CCAA stay lifted. In her Endorsement, Mesbur, J. noted that the CCAA neither expressly permits nor forbids class proofs of claim and, referring to the BIA and the cases noted above, she concluded that class proofs of claim under the CCAA were possible and the question was whether this was a proper case to permit the representative claims. For the reasons stated in her Endorsement, Mesbur, J. did not allow the class proofs of claim to be filed. It has been agreed between the parties that the Order of Mesbur, J. does not constitute *res judicata* or issue estoppel with respect to the motions now before this court relating to the Osborne claim.

23 In *Alton, Re* (2003), 45 C.B.R. (4th) 25 (Ont. S.C.J.), the bankrupt Alton applied for a discharge. One Claude Millard opposed Alton's application. The issue was whether Millard was a proven creditor. Millard was the representative plaintiff in a certified class action against Alton for losses arising from an allegedly fraudulent investment scheme operated by Alton. A previous Order of Farley J. dated January 31, 2001, stated that Millard,

> may file a proof of claim in the bankruptcy of [Alton] on behalf of himself and all Class Members in the amount of $5,000,000...and such proof of claim shall be accepted by the Trustee for voting purposes only in the place and stead of proofs of claim filed on behalf of each of the Class Members individually.

Lax, J. accordingly found that this Order made Millard a proven creditor for all purposes other than distribution.

24 It would appear from the above authorities that this court has inherent jurisdiction to permit a class proof of claim to be filed in a CCAA proceeding but that the determination of whether it should be permitted in any particular case will depend upon the factual circumstances of the case and the equities between the parties.

Osborne as Legal Personal Representative

25 The Call for Claims Order defines "claim" as a claim of any "person" and "person" is defined as meaning:

> ... any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government, agency, regulatory body or instrumentality thereof, legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted.

26 The Call for Claims Order accordingly contemplates claims being brought in a representative capacity. In addition, paragraph 18 of the Claims Resolution order contemplates a motion before this court with respect to proofs of claim submitted on a representative basis. Paragraph 18 provides as follows:

> 18. THIS COURT ORDERS that, notwithstanding anything herein to the contrary, the Monitor or the Applicants may move before the Court to resolve or seek directions in respect of the validity, effect and/or quantum of Proofs of Claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the Filing Date.

27 In my view, the terms of these Orders clearly contemplate that this court may order the acceptance of a claim filed on a representative basis by a legal personal representative, including a class action claim. The issue then becomes whether Osborne qualifies as a "legal personal representative" for the purposes of this proceeding.

28 Although under the law of California Osborne may owe certain duties to members of the putative class having purported to institute a proceeding on their behalf, I am of the view that the law of Ontario must be applied to determine whether Osborne is a legal personal representative for purposes of orders of this court such that she has authority to file a proof of claim on behalf of such persons in the CCAA proceeding before this court.

29 It is not alleged that Osborne has any specific authority from any member of the putative class to file a proof of claim on his or her behalf. It is to be noted that the reference to "legal personal representative" in the definition of "claim" in the Call for Claims Order is in the context of "legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted". It would seem to me that the definition implies that a legal personal representative must have been designated or constituted or in some way obtained authority from the persons alleged to be represented by way of power of authority, proxy, court order or some other document. In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 24 (Alta. Q.B.) at paragraph 50, Paperny, J. stated:

> A proxy signed by a participant and beneficial owner will be sufficient to authenticate a claim. However, a proxy signed by a participant and a third party claiming to have authority on behalf of a beneficial holder absent something from the beneficial holder itself is insufficient to extend to voting on behalf of the beneficial holders.

30 The definition of "claim" in the Call for Claims Order also makes reference to claims that "would have been claims provable in bankruptcy under the *Bankruptcy and Insolvency Act*". Subsection 124(3) of the *Bankruptcy and Insolvency Act* provides as follows:

> 124. (3) Who may make proof of claims ___ The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

31 This again indicates that for a proof of claim to be made by a legal personal representative such representative must have some authority from the person on whose behalf the claim is being filed.

32 Accordingly, I am of the view that absent some documentary evidence that Osborne has authority from the members of the putative class to file a proof of claim on their behalf or a court order granting such authority, she is not a "legal personal representative" for purposes of Call for Claims Order.

Equities and Inherent Jurisdiction

33 As stated above, in order for the court to determine whether a class proof of claim should be accepted in a particular proceeding, the court must consider the factual circumstances of the case and the equities between the parties. In addition, in my view, the inherent jurisdiction of this court under the CCAA would enable this court to permit the acceptance of the Osborne Proof of Claim even though Osborne does not strictly qualify as a legal personal representative.

34 In making such determination there are, in my view, a number of factual matters which the court should take into account in addition in considering the equities as between the parties. Among the factual matters to be considered are the following. This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech and others, including the Non-Applicant Defendants, relating to products formerly sold by Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other

than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Ephedra Products Liability Litigation, Re* [329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y. 2005)] U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

> Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be $ 30, entitling each claimant to a distribution of about $ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering $ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

35 In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez v. Metabolife International Inc.* [218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla. 2003)] U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file individual claims if they were so inclined and none, other than Osborne, has done so. There is no evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

36 In summary, taking into account the factual circumstances of this case and the equities as between the parties, I am of the view that this court should not exercise its inherent jurisdiction to permit the filing of the Osborne Proof of Claim. An order will issue that the Osborne Proof of Claim is invalid and a nullity to the intent that it purports to advance a representative claim on behalf of other persons. The Cross-Motion is dismissed.

37 Counsel may make brief written submissions to me as to the costs of this proceeding, on or before December 29, 2006.

Schedule A

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted; Cross-motion dismissed.

End of Document

Tab 4

2006 CarswellOnt 7024
Ontario Superior Court of Justice

TRG Services Inc., Re

2006 CarswellOnt 7024, [2006] O.J. No. 4521, 11 P.P.S.A.C. (3d) 139, 26 C.B.R. (5th) 203

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TRG SERVICES INC., FORMERLY KNOWN AS THE RAM GROUP INC./LE GROUPE RAM INC., RAM COMPUTER TECHNOLOGIES, INC., ALSO KNOWN AS THE RAM GROUP USA INC. and CHANNEL PATH MARKETING LTD. (the Applicants)

C. Campbell J.

Heard: October 16, 2006
Judgment: November 3, 2006
Docket: 05-CL-5966

Counsel: Catherine Francis, David T. Ullmann for Applicants
S. Fay Sulley, Jeffrey J. Simpson for BDO Dunwoody Limited, Court-appointed Monitor
Mervyn D. Abramowitz for Tech Data Inc.
David S. Ward for Cisco Systems Canada Co.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Personal property security --- Perfection of security interest — Registration — Application for late registration

C Co. supplied products to RAM Inc. pursuant to agreement — Payment clause in agreement granted C Co. security interest in products supplied — RAM Inc. filed under Companies Creditors' Arrangement Act ("CCAA") in June 2005 — Initial order under CCAA was provided to all known creditors of RAM Inc. in July 2005 — RAM Inc. began negotiations with unsecured creditors on plan of arrangement — C Co. filed formal proof of secured claim in January 2006, relying on payment clause in agreement — Monitor disallowed secured claim and admitted C Co. as unsecured creditor — Proposed plan of arrangement provided that secured creditors whose security was perfected prior to June 29, 2005 were unaffected by plan, and that all other creditors were to be considered as single class — C Co. brought motion appealing monitor's disallowance of its secured claims, and motion to lift stay under CCAA to permit registration of its security interests — Motions granted — Stay was lifted to permit recognition of registration of C Co.'s security interest — Relief was conditional upon C Co. bearing reasonable expenses of RAM Inc. associated with delay in perfection — Payment clause in agreement created security interest under Personal Property Security Act ("PPSA") — C Co. was

entitled to perfect registration under PPSA — Nothing in PPSA allowed for exercise of equitable jurisdiction to deny registration — Monitor was not person representing creditors under PPSA for purpose of deflecting claims — Flexibility under CCAA should not be exercised to defeat legal rights of creditor with security — It was reasonable that C Co. bear additional costs associated with delay in perfection — Relief ordered would necessitate reformulation of proposed plan of arrangement.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

C Co. supplied products to RAM Inc. pursuant to agreement — Payment clause in agreement granted C Co. security interest in products supplied — RAM Inc. filed under Companies Creditors' Arrangement Act ("CCAA") in June 2005 — Initial order under CCAA was provided to all known creditors of RAM Inc. in July 2005 — RAM Inc. began negotiations with unsecured creditors on plan of arrangement — C Co. filed formal proof of secured claim in January 2006, relying on payment clause in agreement — Monitor disallowed secured claim and admitted C Co. as unsecured creditor — Proposed plan of arrangement provided that secured creditors whose security was perfected prior to June 29, 2005 were unaffected by plan, and that all other creditors were to be considered as single class — C Co. brought motion appealing monitor's disallowance of its secured claims, and motion to lift stay under CCAA to permit registration of its security interests — Motions granted — Stay was lifted to permit recognition of registration of C Co.'s security interest — Relief was conditional upon C Co. bearing reasonable expenses of RAM Inc. associated with delay in perfection — Payment clause in agreement created security interest under Personal Property Security Act ("PPSA") — C Co. was entitled to perfect registration under PPSA — Nothing in PPSA allowed for exercise of equitable jurisdiction to deny registration — Monitor was not person representing creditors under PPSA for purpose of deflecting claims — Flexibility under CCAA should not be exercised to defeat legal rights of creditor with security — It was reasonable that C Co. bear additional costs associated with delay in perfection — Relief ordered would necessitate reformulation of proposed plan of arrangement.

Table of Authorities

Cases considered by *C. Campbell J.*:

Amirault Fish Co., Re (1951), [1951] 4 D.L.R. 203, 32 C.B.R. 186, 1951 CarswellNS 6 (N.S. S.C.) — considered

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — referred to

Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of) (2006), 2006 CarswellAlta 1036, 2006 ABQB 572 (Alta. Q.B.) — considered

General Chemical Canada Ltd., Re (2005), 51 C.C.P.B. 297, 2005 CarswellOnt 7306, C.E.B. & P.G.R. 8179 (Ont. S.C.J.) — referred to

Ivaco Inc., Re (2006), 2006 CarswellOnt 6292, 56 C.C.P.B. 1 (Ont. C.A.) — distinguished

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

PSINet Ltd., Re (2002), 2002 CarswellOnt 211, 30 C.B.R. (4th) 226, 3 P.P.S.A.C. (3d) 208 (Ont. S.C.J. [Commercial List]) — considered

PSINet Ltd., Re (2002), 2002 CarswellOnt 619, 32 C.B.R. (4th) 102 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2 "créancier garanti" — referred to

s. 2 "secured creditor" — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

s. 11(1) — referred to

s. 11(2) — referred to

s. 20 — referred to

s. 20(1)(a)(i) — referred to

s. 20(1)(a)(ii) — referred to

s. 20(1)(b) — referred to

s. 30(6) — referred to

MOTIONS by creditor for lifting of stay under *Companies Creditors' Arrangement Act* to permit registration of creditor's security interest.

***C. Campbell J.*:**

1 Four motions in this matter were listed for hearing together. One of the motions, namely the approval of a Plan of Compromise and Arrangement under the *Companies Creditors' Arrangement Act* ("CCAA"), is dependent on the disposition of the other motions and was therefore adjourned with an extension of the Stay of Proceedings granted until it is heard or disposed of.

2 The motions heard involved (a) an appeal by Cisco Systems Canada Co. ("Cisco") from the disallowance of its secured claims by the Monitor and (b) a motion by Cisco to lift the Stay to permit it to register its alleged security interests in certain of the assets of the Applicants (RAM for the purpose of this decision.)

3 The essential issue for determination is whether an unperfected interest, which is alleged by Cisco to be a security, can be asserted in circumstances of a Plan of Arrangement that contemplates a liquidation.

4 The position of RAM, supported by the Monitor, is that Cisco does not hold a valid security interest in RAM's assets in priority to the interests of RAM's other creditors. Moreover, RAM submits it was reasonable in the circumstances for RAM to have classified Cisco's claim as unsecured, and Cisco is now estopped from challenging the classification. The Plan is urged to be fair and is said to be calculated to benefit the general body of RAM's creditors, including Cisco, and should be approved by this Honourable Court.

5 RAM carried on business as a re-seller of branded technology products and a supplier of technology parts and service. The other Applicants are subsidiaries of RAM.

6 Cisco was a substantial supplier to RAM of networking equipment and related technologies. RAM was, until it ceased operations after seeking protection under the CCAA, a systems integrator, meaning it purchased equipment and software from Cisco and other suppliers and provided complete hardware and software solutions for end users.

7 The contract governing sales by Cisco to RAM was the Canadian Systems Integrator Agreement (the "Agreement"), as amended from time to time. The Agreement was initially made with RAM Computer Supply, Inc., a predecessor to RAM. The unpaid shipments by Cisco to RAM were all made pursuant to the Agreement, as amended.

8 Section 7.0 of the Agreement (which was not amended by any of the subsequent amendments) reads as follows:

> **Payment**
>
> Upon and subject to credit approval by Cisco, payment terms shall be net thirty (30) days from shipping date. All payments shall be made in Canadian currency unless otherwise agreed in writing by Cisco. If at any time, Integrator is delinquent in the payment of any invoice, or is otherwise in breach of this Agreement, Cisco may, at its discretion, and without prejudice to its other rights, withhold shipment (including partial shipments) of any order or may, at its option, require Integrator to prepay for further shipments. Any sum not paid by Integrator, when due, shall bear interest until paid at a rate of 1.5% per month (18% per annum) or the maximum rate permitted by law, whichever is less. **Integrator grants Cisco a security interest in Products purchased under this Agreement to secure payment for those Products purchased.** If requested by Cisco, Integrator agrees to execute financing statements to perfect this security interest.
>
> [emphasis added]

9 In mid-June 2005, Cisco was advised by RAM of its financial difficulty; a decision was made by RAM not to order further goods from Cisco, which was also requested to stop shipment of ordered goods.

10 From May 4, 2005 to June 29, 2005, a period of eight weeks, Cisco invoiced $1,725,654.01 to RAM (after the application of two small credit notes), and RAM made no payments to Cisco in respect of these invoices. In the last two and half weeks prior to its CCAA filing, Cisco shipped or delivered to RAM over $680,000 in products and services.

11 Inventory received from Cisco after June 17, 2005 was segregated and the proceeds were paid to and have been held by the Monitor. On the same date as the Initial Order was granted, Ground J. approved the sale of certain assets of the Applicants to Nexinnovations Inc. ("Nex.")

12 In its Fifth Report of July 13, 2006, the Monitor indicated that it then held $288,542.96 as proceeds from the sale of Cisco products shipped to RAM later than June 17, 2005 and $5,759.51 as proceeds from the sale of inventory shipped earlier than June 17, 2005. As well, the Monitor holds $6,421.17 of inventory from other suppliers shipped to RAM later than June 17, 2005. Accordingly, RAM supplied 98% by value of the goods Cisco received after June 17, 2005.

13 RAM asserts as at June 27, 2005 RAM owed approximately $2,700,000 to its bank, Royal Bank of Canada ("RBC"), and $1,300,000 to one of its suppliers, Ingram Micro Inc. ("Ingram"), both of whom held registered security interests under the Ontario Personal Property Security Act ("PPSA"). Notice of the Initial Order under the CCAA was provided to all known creditors of the Applicants on July 7, 2005. Apart from two other small creditors with registered security interests, the Applicants had no other known secured creditors.

14 RAM further asserts and I accept that from the date of the Initial Order, it was involved in negotiations with various unsecured creditors and in particular with Tech Data Canada Inc ("Tech Data"), its largest unsecured creditor with a proposed Plan that was premised on the understanding that RAM's assets (after payment to RBC and Ingram) would be available to fund the Plan. Tech Data supports the position of the Applicants on these matters.

15 RAM relies on paragraph 45 of the Initial Order, which contained a "come-back clause," as follows:

> 45. **THIS COURT ORDERS** that any other interested person may apply to this Court to vary or rescind this Order or seek other relief on seven (7) days' written notice to the Applicants, the Monitor, RBC, Ingram Micro Inc. and to any other person likely to be affected by the order sought, or on such other notice as this Court may order, provided that nothing in this section shall act to extend any applicable appeal period.

and the fact that no creditors of RAM or other interested parties, including Cisco, moved to vary or rescind the Initial Order. Subsequent to the Initial Order, RAM collected sufficient accounts receivable to pay its secured indebtedness to RBC and Ingram in full.

16 Cisco filed formal proof of claim as a secured creditor on January 17, 2006, relying on paragraph 7.0 of the Agreement referred to above.

17 The Monitor issued a Notice of Disallowance of Proof of Claim ("Notice of Disallowance") in respect of Cisco's secured claim on February 13, 2006. The Notice of Disallowance stated that the Monitor had rejected the secured claim of $1,725,654.01 and admitted Cisco as an unsecured creditor with a claim of $1,711,713.55. The difference of $13,940.46 was a result of charges for Provincial Retail Sales Tax, which RAM was apparently exempt from paying. Cisco filed a Notice of Dispute with respect to the disallowance.

18 Cisco objects that as a result of the material filed on the classification motion, it was unaware that unperfected secured creditors were being treated as unsecured creditors for the purpose of the proposed Plan.

19 RAM counters that apart from the reference to the last two sentences contained in the Agreement referred to above, it was entirely unaware that Cisco had advanced a claim as a secured creditor.

20 The Classification Motion was brought on for hearing. By Order of the Honourable Mr. Justice Morawetz dated February 1, 2006, the Stay was extended to April 28, 2006 and RAM was authorized to hold a meeting of creditors to consider the Plan. Paragraph 4 of the Order stated as follows:

> **4. THIS COURT ORDERS** that for the purposes of considering and voting on the Plan, there shall be a single class of creditors as a mass, being unsecured creditors, as provided for in the Plan. (the "Classification Order")

21 The Plan provided that any secured creditors whose security was perfected prior to June 29, 2005 were unaffected by the Plan. All other creditors were to be considered as a single class of creditors. The Applicants' position is that when the Plan of Arrangement was formulated, they were unaware that Cisco would claim status as a secured creditor.

22 The Classification Order and a copy of the Plan were served on all of the Applicants' creditors. Cisco did not appeal the Classification Order has not moved to vary or amend the terms of the Classification Order, which is now part of these motions for decision. After retaining present counsel, Cisco advanced its position at the first meeting of creditors held on April 4, 2006, which meeting was adjourned and reconvened on June 26, 2006.

23 On June 23, 2006, out of an abundance of caution and subject to the later seeking of an order lifting the stay of proceedings *nunc pro tunc*, Cisco registered a financing statement against RAM Computer Supply, Inc. under the *Personal Property Security Act*, R.S.O. 1990 c. P.10 as amended ("PPSA.") As well, on the same day, Cisco registered three subsequent financing change statements reflecting the changes in corporate name and address for RAM from the effective date of the Agreement to the present.

24 Cisco voted against the proposed Plan on June 26, 2006, on the basis that it claimed status as a secured creditor. The original return of motion for approval of the Plan on July 26, 2006 was adjourned to enable the motions now before the Court to be filed and argued.

25 The position of Cisco that it holds a secured claim and that under the Agreement with RAM, Cisco is granted "a security interest in Products purchased under this Agreement to secure payment for those Products purchased." Under the

provisions of the PPSA, Cisco's security interest also is said to extend to the proceeds arising from the sale of these Products.

26 The Agreement further states that, "If requested by Cisco, Integrator agrees to execute financing statements to perfect this security interest." Cisco asserts that under the PPSA, it is not necessary for the debtor to execute a financing statement — a creditor may register a financing statement without any such acknowledgment.

27 Cisco further submits in the United States, it was necessary until Article 9 of the Uniform Commercial Code ("UCC") was revised, in changes that became effective in 2001 in most states, to have the debtor execute a financing statement. The Agreement, initially signed in 2000, is said to reflect this prior U.S. requirement. In any event, it is submitted the Agreement merely confirms that RAM will sign a document which (if governed by U.S. law) would have been necessary to perfect the security interest — it does not delay the attachment of the security interest. Reference is made to G.R. Warner, "Documenting a Transaction Under Revised Article 9" 19-3 *ABIJ* 20.

28 RAM and the Monitor urge that the above assertion amounts to expert evidence without an affidavit and should not be considered by this Court.

29 RAM, on the other hand, requests that the evidence of its affidavit witness be given weight, namely that RAM did not think that it would be subject to a secured interest without notice beforehand from Cisco when the latter would seek the secured interest. In other words, the RAM affidavit urges that the Court accept that Cisco would only register on prior notice to RAM.

30 RAM relies on s. 11 of the PPSA, which provides as follows:

> **Attachment required**
>
> **11.** (1) A security interest is not enforceable against a third party unless it has attached. R.S.O. 1990, c. P.10, s. 11 (1).
>
> **When security interest attaches**
>
> (2) A security interest, including a security interest in the nature of a floating charge, attaches when,
>
> (a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;
>
> (b) value is given; and
>
> (c) the debtor has rights in the collateral,
>
> *unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time.* R.S.O. 1990, c. P.10, s. 11 (2).

31 The CCAA, unlike the PPSA, is skeletal legislation, which gives wide discretion to the Court when interpreting its

terms.

32 Section 2 of the CCAA defines a "secured creditor" as follows:

> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; ("créancier garanti")

33 The CCAA does not explicitly state whether such mortgages, hypothecs, pledges, charges etc. must be properly registered or perfected in order to constitute the holder as a secured creditor under the CCAA.

34 I am of the view that it is not necessary for the purpose of this decision to rely on the evidence of either side, even though both may have some merit. The provision of the Agreement is unambiguous, even though under the PPSA in Ontario, a creditor may register security without notice to the debtor.

35 RAM submits that since Cisco deliberately did not perfect its security prior to the formulation of a Plan under the CCAA, it should not now be recognized as one, as there is no legal authority supporting its position that it should be permitted to do so at this stage.

Law & Analysis

36 The Applicants, supported by the Monitor and Tech Data, submit that a ruling which accorded secured creditor status to the holder of a deliberately unregistered and unperfected security interest would create enormous uncertainty in the CCAA process and would lead to many potential inequities and absurdities, including:

> (a) The debtor and its counsel, the monitor and other parties involved in the CCAA process would not be able to rely upon land title or personal property registry searches to determine the nature and quantum of potential secured claims against the debtor's assets;
>
> (b) This would make it difficult for the parties and their counsel to assess the appropriateness of proceedings under the CCAA as opposed to receivership proceedings, proceedings under the Bankruptcy and Insolvency Act ("BIA") or other proceedings;
>
> (c) Any creditors whose contracts contained title reservation clauses or security provisions could claim as secured creditors under the CCAA and obtain preferential treatment over other creditors, without having taken the steps necessary to give them such priority;
>
> (d) Creditors who would all be treated the same way in receivership, proposal, bankruptcy or other similar proceedings would not be treated the same way under the CCAA;

(e) There would be potential wasted costs, where unregistered secured creditors come forward late in the process, necessitating conversion to other proceedings to ensure fairness and protect the interests of all creditors.

37 The Applicants contend that while Cisco did not perfect its security interest prior to June 29, 2005, this merely results in its rights to the collateral being subordinate to the interests of a secured creditor having a perfected security interest in the same collateral.

38 The PPSA governs the creation, formation, ranking and rights of secured creditors in personal property in the province of Ontario. The position of Cisco is that CCAA does not and cannot deprive a secured creditor of its security interest acquired pursuant to provincial legislation of general application. Under the PPSA, even an unperfected security interest has priority over claims of unsecured creditors. The priority of unperfected secured creditors over the interests of unsecured creditors is, it is submitted, settled and uncontroversial and accordingly receives only brief attention in the leading texts.

39 In this regard reference is made to R.H. McLaren, *Secured Transactions in Personal Property in Canada*, Looseleaf Ed. (Toronto: Carswell, 1989) at §5.04:

> Failure to perfect a security interest no longer results in the interest being considered invalid. Under the Act [PPSA], a security interest is valid according to its terms and will be enforceable against third parties so long as there is compliance with the formalities for attachment. Therefore, lack of perfection does not affect the legal quality of the transaction but results in a lesser bundle of statutory rights under the Act. The absence of perfection means that the additional statutory priority rights which go with perfection were not obtained. Section 20 defines the consequences of being an unperfected security interest as far as certain competing claims are concerned. Outside the ambit of s. 20, the unperfected interest receives the rights and obligations imposed by the general law of the contract. [emphasis added and footnotes removed]

40 Cisco further urges that as noted by Prof. R.C.C. Cuming in his book, the *British Columbia Personal Property Security Act Handbook*, 4th ed. (Toronto: Carswell, 1998) at 31, "A security interest is proprietary in nature in that a secured party who has a valid security interest *is not treated as an unsecured creditor*" [emphasis added]. In a footnote, Prof. Cuming adds:

> Through negative inference, ... the PPSA implies that a holder of a security interest has priority over an unsecured creditor of the debtor. Only if the security interest is unperfected and the competing creditor has seized the collateral is this priority lost.

41 Cisco's position is that perfected security interests in the same collateral have priority over unperfected security interests. The PPSA provides as well that an unperfected security interest is subordinate to the interests of a trustee in bankruptcy or an assignee for the benefit of creditors. Cisco submits that a monitor under the CCAA is *not* an assignee for the benefit of creditors.

42 The leading reported case in Ontario dealing with a claim by the holder of an unperfected security interest in the context of a CCAA proceeding is *PSINet Ltd., Re.*[1] In that case the creditor, PSINET Inc., held a General Security Agreement ("GSA") over all of the debtor's assets, which had previously been registered under the Ontario PPSA. The creditor had inadvertently allowed its registration to lapse prior to the debtor company's CCAA filing. After the filing, PSINET Inc. sought to re-register its security in Ontario, in order to obtain a continuously perfected security in the debtor's assets.

43 In the circumstances of that case, Justice Farley exercised his discretion under the CCAA to lift the stay of proceedings and allow PSINET Inc. to re-register its security interest, as a result of which PSINET Inc.'s GSA was deemed to have been continuously perfected under section 30(6) of the PPSA.

44 The Applicants counter with the assertion that in his decision, Farley J. explicitly dealt with the issue of whether a creditor holding an unregistered security interest can claim secured status under the CCAA. PSINET Inc. had never registered its GSA outside of Ontario. As a result of this failure to register outside Ontario, Farley J. held that PSINET Inc. could *not* claim a security interest in any of the debtor's assets held outside Ontario:

> Inc. only registered its GSA in Ontario. That means that it was unsecured as to assets outside Ontario vis-à-vis other creditors (but not vis-à-vis Ltd.). When questioned today as to the percentage of value of assets in Ontario, the best ballpark estimate was in excess of 80%. ...
>
> ... this [argument by one of the creditors] overlooks that Inc. would remain unsecured as to any assets of Ltd. outside of Ontario

45 The result of the conclusion reached by Farley J., according to counsel for RAM, is that in addition to his explicit finding that PSINET Inc. could not, by re-registering, acquire secured status in jurisdictions where it had not previously registered its GSA, Farley J.'s decision in *PSINet* implicitly recognized that a creditor holding a security agreement *must* perfect its security interest in order to obtain secured creditor status under the CCAA. If this were not the case, RAM argues, then there would have been no need for PSINET Inc. to have brought a motion to lift the stay of proceedings in order to perfect its security interest.

46 The Applicants suggest that the *PSINet Ltd., Re* ruling is on "all fours" with Cisco's claim in the present case. Cisco never registered its alleged security interest — in Ontario or elsewhere. Based upon the *PSINet Ltd., Re* decision, the Applicants posit Cisco is an unsecured creditor in these proceedings — at least *vis a vis* other creditors of RAM, which they submit is the only matter at issue in this case. There is no issue of registration in this case in any jurisdiction other than Ontario.

47 Both sides to this dispute in addition rely on a more recent decision of the Alberta Court of Queen's Bench.

48 In *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)*, [2006] A.J. No. 976 (Alta. Q.B.), the Alberta Court of Queen's Bench granted a comparable order to that in *PSINet* in arguably comparable circumstances. In the case, a creditor had an unperfected security interest in the assets of a debtor, because the financing statement it had previously registered was deficient in several details. It was agreed that the financing statement was insufficient to perfect the security interest. The debtor commenced a CCAA proceeding and, after the CCAA proceeding was commenced, the creditor registered a financing change statement to correct its earlier registration. Subsequently, it sought leave *nunc pro tunc* to lift the stay and authorize its filing. The court granted leave.

49 The Court in *Brookside* reasoned that the creditor plainly had been granted a security interest by the debtor. The creditor was not attempting to gain an advantage after the CCAA proceeding had commenced, but was rather attempting to

hold on to an advantage that it had already negotiated with the debtor. Further, the court found there was no prejudice to the debtor or its other creditors as, but for the filing of the CCAA proceeding, the creditor would have been entitled to amend its financing statement at any time to perfect the security interest which it had already been granted. Accordingly, the prejudice in failing to lift the stay would be greater to the moving creditor than it was to the other creditors of the company.

50 It was also noted in *Brookside* that the lifting of the stay would have no impact on the ability of the debtor to reorganize successfully under the CCAA. It had already been determined that the debtor could not reorganize and would be liquidated under the CCAA; accordingly, policy concerns regarding the preservation of the debtor's ability to reorganize by maintaining the stay had no application in the circumstances.

51 The submission of the Applicants is that it was implicit in *PSINet* and the Court in *Brookside* explicitly noted that if Brookside were unable to perfect its security interest, Brookside's rights would effectively be precluded because after distribution of the sale proceeds there would be nothing left in the debtor company. Hence, RAM urges it was recognized that Brookside could not obtain secured creditor status unless and until it was permitted to re-register and correct its defective security registration.

52 Brookside was permitted to correct the error in its registration. In making this ruling, however, the Alberta Court noted, among other things, that:

> (a) There was no question that the debenture was a secured instrument and that it was intended to be so;
>
> (b) This was not a case of a creditor trying to gain an advantage but rather simply a creditor trying to hold on to an advantage it had already negotiated;
>
> (c) This was not a case of one or more creditors relying upon the fact the Personal Property Registry certificate did not disclose a security interest of Brookside and incurring the cost of enforcing their interests based upon that reliance;
>
> (d) There was no prejudice to the debtor company or other creditors as a result of the amended registration.

53 It is submitted by the Applicants that the situation in *Brookside*, as in *PSINet*, substantially differs from the present situation. In the present case, it is urged there is a serious doubt as to whether RAM intended to provide Cisco with security, and also whether Cisco believed that it held a registrable security interest. Cisco is said not to have made an error in its registration (as in *Brookside*), or inadvertently allow its registration to lapse (as in *PSINet*). Cisco is said not to have inadvertently failed to register its alleged security interest, but deliberately did not do so until June of 2006. Moreover, Cisco did not come forward with its alleged secured claim until more than six months after the CCAA filing, after RAM, in consultation with Tech Data and other creditors, had already formulated the Plan. There is now said to be significant prejudice to RAM's creditors.

54 The position of the Applicant is supported by the Monitor, which claims to represent the creditors of the debtor and has disallowed the claim of Cisco for secured creditor status.

55 Reference in this regard is made by counsel for the Monitor to s. 20 of the PPSA.

Unperfected security interests

20. (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who assumes control of the collateral through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

. . . . .

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy; ...

. . . . .

[Emphasis added]

56 I am not satisfied that in the context now before the Court that the Monitor is "a person who represents the creditors" within the meaning of s.20(1)(b) of the PPSA for the purpose of these motions, even though the Order of Ground J. gave the power to the Monitor to deal with claims resolution.

57 The Monitor did disallow the claim of Cisco as a secured creditor. That decision, the appeal from which is now before the Court, should not elevate the status of the Monitor as a representative of all creditors. In my view, the language "who represents the creditors" does not vest the Monitor with a legal status apart from that which the appointing Order specifically authorizes. The fact that the Initial Order envisaged the Monitor assessing claims as between creditors does not grant it any legal entitlement to or over the assets of the debtor. As a result, in my view the disallowance by the Monitor should not receive any higher legal status than the claims of the Applicants.

58 The major thrust of the position of the Applicants is that with the passage of time between June of 2005 and February 2006, and the action by Cisco claiming for the first time as a secured creditor it would be iniquitous to the position of the debtor and other creditors who have expended time and money on formulating a liquidation Plan based on there being no secured creditors remaining, to now have to face a more expensive bankruptcy process.

59 I have concluded that Cisco is entitled in the circumstances before the Court to the relief it seeks. I do so for the following reasons:

1. Cisco is entitled to perfect its security by registration under the PPSA. There is nothing in that statute that would allow for the exercise of an equitable jurisdiction to deny registration. The Agreement creates a security interest under the statute. The words, "agrees to execute financing statements to perfect..." in 7.0 do not deal with a statutory requirement in Ontario, nor in my view do they amount to a condition precedent to registration.

2. The Monitor is not a person under the PPSA in these circumstances that "represents the creditors" for the purpose of deflecting the claims of one creditor.

> 3. While the CCAA is a statute that permits a wide latitude for the exercise of discretion, I do not think that the discretion should be exercised to defeat the legal rights of a creditor in the position of Cisco. Equity may be applied to redress the cost to other affected parties, including the Applicants, by the delay associated with perfection of the Cisco security.

60 Following the oral submissions by counsel, the Court of Appeal for Ontario delivered its decision in the *Ivaco Inc., Re* [2006 CarswellOnt 6292 (Ont. C.A.)] case. While the case is very much distinguishable on its facts, the Court did offer comment on the role of the CCAA in insolvency proceedings and the nature of the discretion to be exercised. An application for leave to appeal is apparently pending.

61 The Ivaco case, very broadly, dealt with the priority accorded in an insolvency context to Provincial deemed trusts under the *Pension Benefits Act*, R.S.O. 1990, c. P.88 ("PBA.") Recognizing that the lifting of a CCAA stay to permit a bankruptcy would potentially reverse the priority accorded to pension claims outside bankruptcy, the Court of Appeal weighed a number of competing legal and fairness considerations (including a "pension stay order" made within the CCAA), and ultimately concluded that the motions judge exercised his discretion properly in lifting the CCAA stay and permitting certain bankruptcy petitions to proceed.

62 Laskin J.A., speaking for the Court, stated at paragraph 3:

> The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so it may stay in business.

63 At paragraph 64, the Court goes on to note:

> The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

64 RAM submits that if the CCAA were interpreted to recognize the holders of unregistered and unperfected security interests as secured creditors for the purposes of a plan of arrangement, this would create a significant disincentive to proceedings under the CCAA over the BIA. Creditors would indeed be tempted to move immediately for a bankruptcy, to remove the possibility of unperfected "secured creditors" coming out of the woodwork at a later stage of the proceedings and claiming first rights on the debtor's assets.

65 In *Ivaco*, the Superintendent of Financial Services was attempting to obtain a priority for unpaid pension contributions at the end of the CCAA period — even though such claims would not rank as secured claims in a bankruptcy. The Court of Appeal denied the Superintendent's claim, stating:

> The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

66 In my view, there is a distinction to be made between the claim of the Superintendent in *Ivaco* and in this case, Cisco. Cisco has a security interest (albeit unperfected), the Superintendent did not.

67 The response of Cisco is contained in the following paragraphs of its Supplementary Submissions:

> [5] It is submitted that the facts in Ivaco can usefully be contrasted with the facts in RAM. Whereas in Ivaco, there was no claims process and no plan of arrangement, Ram established and engaged all creditors in both processes beginning with its initial filing on June 29, 2005 and continuing with major motions to this point, sixteen months after its initial filing, and beyond. Against this background, neither the debtor, nor any Ram creditors, have ever sought a bankruptcy. The Monitor has not recommended a bankruptcy.
>
> [6] Rather than pursue a bankruptcy, Ram invited creditors to file claims (either secured or unsecured) and follow a CCAA claims determination process. This Honourable Court was told that "the Plan does not propose to deal with secured claims". Secured creditors with valid claims were told that their claims would be addressed by Ram "outside of the Plan". (Please Ref: paragraphs 23 to 29 of the Cisco's factum and accompanying evidentiary references for a complete description of what the Court and creditors were told at the time of the February 1, 2006 classification motion). Cisco properly filed a secured claim, notice of dispute, and appeal, all in accordance with the court-ordered CCAA Claims Determination Process.
>
> [7] Unlike the pension claimants in the Ivaco case, Cisco is not attempting to "jump ahead of all the other creditors" or "upset the ground rules that all stakeholders agreed to". To the contrary, the evidence is that this has been a purely CCAA process and that Cisco, although perhaps late to the game, has diligently pursued rights as a secured claimant under the security agreement signed by RAM. Cisco maintains that it has rights as a consequence of its secured creditor status and that RAM cannot deny that it is subject to those rights and cannot ignore or abrogate them in a fair CCAA Plan, or otherwise.

68 I accept that the regime of the CCAA is not limited to restructuring of an insolvent company to permit it to continue in business on an indefinite basis. There are many Plans approved under the CCAA wherein "continuing in business" is for a short period only; for example, to permit an orderly liquidation that would permit a greater distribution to creditors than would be possible under the BIA.[2]

69 The flexibility and breadth of the CCAA should not in my view be used to defeat a creditor that has security. Had Cisco registered its security under the PPSA before the Initial Order, or arguably even before the filing of the Plan, the Applicants could have little quarrel.

70 I accept that to now lift the stay to permit registration may well have an unfortunate effect on all the creditors. The Applicants and creditors who have expended time and expense (largely in terms of professional fees) in the expectation that Cisco would be an unsecured creditor, should not in my view have to bear that additional expense.

71 Unsecured creditors should not in my view, through the mechanism of the CCAA, displace the security of another creditor simply because that security is unperfected. Cisco urges and I accept that it sought to prove a secured claim when invited to do so. Cisco moved to perfect its unsecured interest in a CCAA context.

72 I do agree with the Applicants that RAM and the creditors have incurred costs as a result of the delay of Cisco and that any cost to it and the other creditors should be redressed in granting the relief requested. The Applicant and the Monitor in consultation with the creditors will have to make a determination as to whether to continue with a Plan that was always intended as a liquidation or proceed with a bankruptcy.

73 In the result and subject to the condition noted below, the relief sought by Cisco is granted. The stay granted under the Order of Ground J. is lifted to permit recognition of the registration of the security interest of Cisco.

74 The condition of the lifting of the stay and recognition of the Cisco security interest is that Cisco bear what may be determined are the reasonable expenses and costs of the Applicants associated with the delay in perfection from the Initial Order to this date. There is in addition an issue that the Court may have to resolve, which concerns the precise amount owing to Cisco as a result of funds held by the Monitor.

75 This decision will, I recognize, necessitate a reformulation of the Plan of Arrangement, if indeed there is to be one. It may be that an assignment under the BIA is a more likely result. If that turns out to be the case, it is likely that the same conclusion would have been reached had Cisco perfected its security any time before or indeed after the Initial Order.

76 In such circumstances, I conclude that it is only reasonable that Cisco bear the additional costs associated with the delay in its security perfection.

77 As noted by counsel for Cisco in its Supplementary Submissions, in its reasons, the Court of Appeal in *Ivaco* did not provide rules or directions as to when and on what terms a CCAA proceeding may be converted to a BIA proceeding, nor does it address the issue of creditors with vested rights in the CCAA process who might be prejudiced by a conversion. Cisco suggests that it has sought and obtained an undertaking from the Company not to make a BIA assignment without first providing Cisco with reasonable advance notice sufficient to allow Cisco to raise these issue at a court hearing, if so instructed. This would make sense in the circumstances.

78 The parties may apply for further directions if required. If it is necessary to deal with the issue of costs associated with these motions, written submissions should be made within two weeks.

Motions granted.

Footnotes

1 *PSINet Ltd., Re* (2002), 30 C.B.R. (4th) 226 (Ont. S.C.J. [Commercial List]); affirmed 2002 CarswellOnt 619, 32 C.B.R. (4th) 102 (Ont. C.A.)

2 See, for example, the following excerpts from Houlden & Morawetz: If the court finds that the plan is fair and reasonable and in the best interests of creditors, there seems no reason why an orderly liquidation could not be carried out under the CCAA See *Amirault Fish Co., Re* (1951), 32 C.B.R. 186 (N.S. S.C.) where a company that was being wound up under provincial legislation proved to be insolvent so that it was not possible to use provincial legislation to make a distribution to creditors, and Ilsley C.J. suggested that, in these circumstances, the CCAA could be used to carry out the distribution. To the same effect, see *Olympia & York Developments Ltd., Re*, 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re*, 25 C.B.R. (4th) 1, 2001 CarswellOnt 1325 (Ont. S.C.J. [Commercial List]); affirmed 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.). See articles "Broadening the 'Range' of CCAA Proceedings: The Ontario Court of Appeal decision in Anvil Range Mining Corporation" by Tiffany Gravina, 15 Comm. Insol. Rep. 8; "Liquidating, CCAA-Style" by Renee B.

Brosseau, 20 Nat. Insol. Rev. 40. To the same effect see *General Chemical Canada Ltd., Re*, [2005] O.J. No. 5436 (Ont. S.C.J.).

End of Document

Tab 5

1992 CarswellOnt 185
Ontario Court of Justice (General Division)

Campeau v. Olympia & York Developments Ltd.

1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 3 W.D.C.P. (2d) 575

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle* , for the plaintiffs.
Peter F. C. Howard , for National Bank of Canada.
Yoine Goldstein , for Olympia & York Development Limited and 857408 Ontario Inc.

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General

Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their

action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Table of Authorities

Cases considered:

Arab Monetary Fund v. Hashim (June 25, 1992), Doc.34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 — *referred to*
Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 244 (C.A.) — *referred to*
Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) — *applied*
Empire-Universal Films Ltd. v. Rank, [1947] O.R. (H.C.) — *referred to*
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*
Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *applied*
Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*
Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Statutes considered:

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

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 —

s. 17(1)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,

b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act* , R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct

which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.) , appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) , where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is

essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.) , cited in *Arab Monetary Fund v. Hashim* , supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

End of Document

Tab 6

2001 SCC 46
Supreme Court of Canada

Western Canadian Shopping Centres Inc. v. Dutton

2001 CarswellAlta 884, 2001 CarswellAlta 885, 2001 SCC 46, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534, [2001] A.W.L.D. 432, [2002] 1 W.W.R. 1, 201 D.L.R. (4th) 385, 253 W.A.C. 201, 272 N.R. 135, 286 A.R. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, J.E. 2001-1430, REJB 2001-25017

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, Appellants/Respondents on cross-appeal and Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc., Respondents/Appellants on cross-appeal

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour, LeBel JJ.

Heard: December 13, 2000
Judgment: July 13, 2001
Docket: 27138

Proceedings: additional reasons to (December 13, 2000), Doc. 27138 (S.C.C.); reversing in part (1998), 228 A.R. 188 (Alta. C.A.); affirming (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.)

Counsel: *Barry R. Crump*, *Brian Beck*, *David C. Bishop*, for Appellants/Respondents on Cross-Appeal
Hervé H. Durocher, *Eugene J. Erler*, for Respondents/Appellants on Cross-Appeal

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Appeal of dismissal of defendants' application to strike representative action on grounds that plaintiffs failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Discretion was exercised to strike balance between efficiency and fairness — No countervailing considerations existed that outweighed benefits of allowing action to proceed.

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Particular relationships — Fiduciary relationship

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Fiduciary duty issues raised by investors were common to all plaintiffs — Material differences between investors' rights could be dealt with if they arose — Class action was not foreclosed on ground that investors might be required to show individual reliance in order to establish breach of fiduciary duty.

Practice --- Discovery — Examination for discovery — Who may be examined — General

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed on further appeal — Plaintiffs cross-appealed decision on appeal that defendants were allowed to discover each individual class member — Cross-appeal allowed — Individualized discovery was premature at this stage of proceeding — Defendants were allowed to discover representative plaintiffs — Discovery of other class members was only available by order of court, upon establishment of reasonable necessity.

Corporations --- Directors and officers — Fiduciary duties — General

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Fiduciary duty issues raised by investors were common to all plaintiffs — Material differences between investors' rights could be dealt with if they arose — Class action was not foreclosed on ground that investors might be required to show individual reliance in order to establish breach of fiduciary duty.

Procédure --- Parties — Recours collectif — Exigences procédurales

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif parce que les plaignants n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Pouvoir discrétionnaire a été utilisé pour concilier l'efficacité et l'équité — Il n'existait pas d'autres considérations défavorables qui l'emportaient sur les avantages d'autoriser le recours.

Fraude et assertion inexacte --- Assertion négligente et inexacte (principe Hedley Byrne) — Relations particulières — Relation fiduciaire

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Questions relatives à l'obligation fiduciaire soulevées par les investisseurs touchaient tous les demandeurs — Différences importantes entre les droits des investisseurs pouvaient être résolues si elles survenaient — Recours collectif n'a pas été interdit au motif qu'on exigerait peut-être des investisseurs qu'ils démontrent un lien de confiance individuel afin de prouver le manquement à l'obligation fiduciaire.

Procédure --- Communication préalable — Interrogatoire préalable — Qui peut être interrogé — En général

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Demandeurs ont formé un appel incident à l'encontre de l'appel des défendeurs, lesquels voulaient interroger chaque membre du groupe individuellement — Pourvoi incident accueilli — À ce stade des procédures, l'interrogatoire préalable individuel était prématuré — Défendeurs ne pouvaient qu'interroger les représentants des demandeurs — L'interrogatoire des autres membres du groupe ne pouvait être autorisé que par ordonnance du tribunal, après avoir établi que c'était raisonnablement nécessaire.

Sociétés par actions --- Administrateurs et dirigeants — Obligations fiduciaires — En général

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Questions relatives à l'obligation fiduciaire soulevées par les investisseurs touchaient tous les demandeurs — Différences importantes entre les droits des investisseurs pouvaient être résolues si elles survenaient — Recours collectif n'a pas été interdit au motif qu'on exigerait peut-être des investisseurs qu'ils démontrent un lien de

confiance individuel afin de prouver le manquement à l'obligation fiduciaire.

The representative plaintiffs, together with 229 other investors, purchased debentures in a corporation under the federal government's business immigration program, in order to facilitate their qualification as Canadian permanent residents. They made their purchases at different times pursuant to different offering memoranda presented to them by different defendants. The corporation invested all of its proceeds into a gold mine, which failed. The plaintiffs lost all of their investment. The plaintiffs commenced a representative action pursuant to R. 42 of the *Alberta Rules of Court* against the defendants for breach of fiduciary duty. The defendants applied to strike the representative action on grounds that the plaintiffs as a group could not show the requisite element of reliance because they invested at different times under different offering memoranda. The application was dismissed on grounds that it was not plain and obvious that the plaintiffs failed to meet the requirements under R. 42 and that the existence of a fiduciary duty was an issue of fact that should be left for the trial judge. The defendants' appeal was dismissed. The defendants appealed.

Held: The appeal was dismissed and the cross-appeal was allowed.

Per McLachlin C.J.C. (Arbour, Binnie, Gonthier, Iacobucci, L'Heureux-Dubé and LeBel JJ. concurring): No comprehensive legislative framework currently exists in Alberta respecting class actions. Practice is governed by R. 42 of the *Alberta Rules of Court*, which allows representative actions where "numerous persons have a common interest in the subject of an intended action". Details of class action practice were left to the courts. The common law of Alberta identified four conditions in order for the class action to proceed. First, the class must be capable of clear definition. Secondly, there must be issues of fact or law common to all class members, and the resolution of those issues must be necessary to a resolution of each class member's claim. Thirdly, success for one class member must mean success for all, and no conflicting interests must exist. Finally, the class representatives must adequately represent the class. When these conditions are met, the court should then exercise its discretion to strike a balance between efficiency and fairness. Class actions should not be approached restrictively. The test was not whether it was plain and obvious that an action should not proceed as a class action, under R. 42. Denial of class status under R. 42 did not defeat the claim, it determined how the claim would proceed. No countervailing considerations outweighed the benefits of allowing the action to proceed in this case. The court retained the discretion to deal with any non-common issues among the plaintiffs. As the fiduciary duty issues raised were common to all the investors, the plaintiffs had satisfied the requirements of R. 42. If the court later determined that the investors were required to show individual reliance to establish breach of fiduciary duty, the court could consider at that time whether the action should continue as a class action.

Allowing individualized discovery at this stage of the proceedings was premature. One of the benefits of a class action was that discovery of the class representatives was usually sufficient. Individual discovery of all class members was the exception rather than the rule. The defendants were allowed to examine the representative plaintiffs as of right. Examination of other class members was only available by court order, upon the demonstration by the defendants of reasonable necessity.

Les demandeurs représentants, ainsi que 229 autres investisseurs, ont participé au programme d'immigration des gens d'affaires du gouvernement fédéral en achetant des débentures d'une compagnie, dans le but de faciliter leur obtention du statut de résident permanent du Canada. Ils ont effectué leurs achats à divers moments selon différentes notices d'offre qui leur ont été présentées par divers défendeurs. La compagnie a investi tous ses profits dans une mine d'or, qui a fait faillite. Les demandeurs ont tout perdu. Ils ont alors intenté un recours collectif, conformément à la règle 42 des *Alberta Rules of Court*, à l'encontre des défendeurs pour manquement à leur obligation fiduciaire. Les défendeurs ont demandé que le recours collectif soit radié sous prétexte que les demandeurs, en tant que groupe, ne pouvaient démontrer le lien de confiance requis parce qu'ils ont investi à divers moment selon différentes notices d'offre. La demande a été rejetée au motif qu'il n'était pas clair et évident que les demandeurs n'avaient pas satisfait à toutes les exigences de la règle 42 et aussi parce que l'existence d'une obligation fiduciaire constitue une question de fait qui devait être tranchée par le juge de première instance. Le pourvoi des défendeurs a été rejeté. Ils ont interjeté appel.

Arrêt: Le pourvoi a été rejeté et le pourvoi incident a été accueilli.

La juge en chef McLachlin (les juges Arbour, Binnie, Gonthier, Iacobucci, L'Heureux-Dubé et LeBel y souscrivant): À l'heure actuelle, il n'existe en Alberta aucun cadre législatif complet relatif aux recours collectifs. Cette procédure est régie par l'art. 42 des *Alberta Rules of Court* qui permet les recours collectifs lorsque « [traduction] de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée ». Les détails de la procédure à suivre pour les recours collectifs ont été laissés aux tribunaux. La common law de l'Alberta a identifié quatres conditions à respecter pour que le recours collectif puisse être exercé. Premièrement, le recours collectif doit pouvoir être clairement défini. Deuxièmement, tous les membres du groupe doivent avoir en commun des questions de fait ou de droit, et la résolution de ces questions doit être nécessaire pour résoudre la réclamation de chacun des membres du groupe. Troisièmement, le succès d'un membre du groupe doit se traduire par celui de tous les membres et il ne doit pas exister de conflits d'intérêts. En dernier lieu, les représentants du groupe doivent représenter adéquatement le groupe. Si toutes ces conditions sont réunies, le tribunal peut exercer son pouvoir discrétionnaire pour concilier l'efficacité et l'équité. Les recours collectifs ne devraient pas être abordés de façon restrictive. En vertu de la règle 42, le critère à respecter n'était pas de savoir s'il était clair et évident qu'une poursuite ne pouvait être intentée comme un recours collectif. Le refus du statut de recours collectif en vertu de la règle 42 n'empêchait pas la poursuite, cela ne faisait que déterminer de quelle façon la poursuite serait intentée. En l'espèce, il n'y avait aucune considération défavorable qui l'emportait sur les avantages que comportait l'autorisation du recours. Le tribunal conservait son pouvoir discrétionnaire lui permettant de trancher toutes questions qui n'étaient pas communes à tous les demandeurs. Les demandeurs avaient rempli toutes les conditions de la règle 42 parce que les questions soulevées relatives aux obligations fiduciaires étaient communes à tous les investisseurs. Si le tribunal venait à déterminer que les investisseurs doivent démontrer un lien de confiance individuel pour prouver le manquement à l'obligation fiduciaire, il pourrait, à ce moment-là, décider si le recours doit se poursuivre comme recours collectif.

À ce stade des procédures, il était prématuré de permettre des interrogatoires au préalable individuels. Un des avantages du recours collectif était que l'interrogatoire des représentants du groupe était habituellement suffisant. L'interrogatoire préalable individuel de tous les membres du groupe constitue l'exception et non la règle. Les défendeurs avaient l'autorisation, de plein droit, d'interroger les demandeurs représentants. L'interrogatoire des autres membres du groupe n'était possible que sur ordonnance du tribunal, une fois que les défendeurs auraient prouvé que cela était raisonnablement nécessaire.

Table of Authorities

Cases considered by/Jurisprudence citée par *McLachlin C.J.C.*:

Bell v. Wood, 38 B.C.R. 310, [1927] 1 W.W.R. 580, [1927] 2 D.L.R. 827 (B.C. S.C.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) — referred to

Chancey v. May (1722), Prec. Ch. 592, 24 E.R. 265, 2 Eq. Ca. Abr. 168 (Eng. Ch.) — referred to

City of London v. Richmond (1701), 2 Vern. 421, 23 E.R. 870 (Eng. Ch.) — referred to

Drummond-Jackson v. British Medical Assn., [1970] 1 All E.R. 1094, [1970] 1 W.L.R. 688 (Eng. C.A.) — considered

Duke of Bedford v. Ellis (1900), [1901] A.C. 1 (U.K. H.L.) — referred to

Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée (1988), 86 N.B.R. (2d) 342, 219 A.P.R.

342 (N.B. Q.B.) — referred to

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — referred to

Horne v. Canada (Attorney General) (1995), 39 C.P.C. (3d) 38, 129 Nfld. & P.E.I.R. 109, 402 A.P.R. 109 (P.E.I. T.D.) — referred to

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

International Capital Corp. v. Schafer (1995), 130 Sask. R. 23 (Sask. Q.B.) — referred to

International Corona Resources Ltd. v. Lac Minerals Ltd., 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574 (S.C.C.) — referred to

Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337, 135 A.R. 389, 33 W.A.C. 389, 15 C.P.C. (3d) 109 (Alta. C.A.) — considered

Langley v. North West Water Authority, [1991] W.L.R. 711n (Eng. H.L.) — referred to

Langley v. North West Water Authority, [1991] 3 All E.R. 610 (Eng. C.A.) — referred to

Lee v. OCCO Developments Ltd. (1994), 148 N.B.R. (2d) 321, 378 A.P.R. 321, [1995] G.S.T.C. 71 (N.B. Q.B.) — referred to

Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021, 79 L.J.K.B. 939, 103 L.T. 369 (Eng. K.B.) — referred to

N.A.P.E. v. Newfoundland (Treasury Board) (1995), (sub nom. *Newfoundland Assn. of Public Employees v. Newfoundland)* 132 Nfld. & P.E.I.R. 205, (sub nom. *Newfoundland Assn. of Public Employees v. Newfoundland)* 410 A.P.R. 205 (Nfld. T.D.) — referred to

Naken v. General Motors of Canada Ltd., [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385, 46 N.R. 139, 32 C.P.C. 138 (S.C.C.) — distinguished

Pasco v. Canadian National Railway (1989), (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway)* 102 N.R. 76, [1990] 2 C.N.L.R. 96, [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (S.C.C.) — referred to

Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells, [1984] 4 W.W.R. 706, 44 C.P.C. 159, 27 Man. R. (2d) 311 (Man. Q.B.) — referred to

Shaw v. Vancouver Real Estate Board, [1972] 5 W.W.R. 726, 29 D.L.R. (3d) 774 (B.C. S.C.) — referred to

Taff Vale Railway v. Amalgamated Society of Railway Servants, [1901] A.C. 426, 70 L.J.K.B. 905 (U.K. H.L.) —

referred to

Van Audenhove v. Nova Scotia (Attorney General) (1994), 28 C.P.C. (3d) 305, 134 N.S.R. (2d) 294, 383 A.P.R. 294 (N.S. S.C.) — referred to

Wallworth v. Holt (1841), 41 E.R. 238, 4 My. & Cr. 619 (Eng. Ch. Div.) — considered

353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd. (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master) — referred to

Statutes considered/Législation citée:

Class Proceedings Act, R.S.B.C. 1996, c. 50
Generally — considered

s. 4(1) — considered

s. 7 — considered

s. 27 — considered

Class Proceedings Act, 1992/Recours collectifs, Loi de 1992 sur les, S.O./L.O. 1992, c. 6
Generally/en général — considered

s. 5(1) — considered

s. 6 — considered

s. 25 — considered

Code de procédure civile, L.R.Q., c. C-25
Livre IX — considered

art. 1003 — considered

art. 1039 — considered

Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66
Generally — considered

Rules considered/Règles cités:

Alberta Rules of Court, Alta. Reg. 390/68
R. 42 — considered

R. 129 — considered

R. 187 — considered

R. 201 — considered

Civil Practice Note 7 — referred to

Civil Procedure Rules, 1998, SI 1998/3132
R. 19.10-19.15 — considered

Federal Rules of Civil Procedure, 28 U.S.C., Appendix
R. 23 — referred to

Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66
Sched., R. 10 — considered

ADDITIONAL REASONS to judgment decided at (December 13, 2000), Doc. 27138 (S.C.C.), reversing in part judgment reported at 228 A.R. 188, 188 W.A.C. 188, [1998] A.J. No. 1364, 30 C.P.C. (4th) 1, 73 Alta. L.R. (3d) 227, 1998 ABCA 392 (Alta. C.A.), affirming judgment reported at 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, 1996 CarswellAlta 690, [1996] A.J. No. 1165 (Alta. Q.B.), dismissing defendants' application to strike representative action.

MOTIFS SUPPLÉMENTAIRES de la décision rendue le 13 décembre 2000, Doc. 27138 (C.S.C.), infirmant en partie l'arrêt publié à 228 A.R. 188, 188 W.A.C. 188, [1998] A.J. No 1364, 30 C.P.C. (4th) 1, 73 Alta. L.R. (3d) 227, 1998 ABCA 392 (Alta. C.A.) qui a confirmé le jugement publié à 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, 1996 CarswellAlta 690, [1996] A.J. No 1165 (Alta. Q.B.), qui avait rejeté le demande des défendeurs de radier le recours collectif.

The judgment of the court was delivered by *McLachlin C.J.C.*:

1 This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc., under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

I. Facts

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"). WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal

Trust"), and would be released to WCSC upon conditions, subsequently amended.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

6 To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

7 In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

8 Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a *pro rata* claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min and Hoi-Wah commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

II. Statutory Provisions

10 *Alberta Rules of Court*, Alta. Reg. 390/68

> **42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

129 (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

(a) it discloses no cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexatious, or

(c) it may prejudice, embarrass or delay the fair trial of the action, or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

187. A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.

201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

11 The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.) for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

12 On the first issue, the chambers judge relied on the decision of Master Funduk in *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.* (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

13 On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on *353850 Alberta*, *supra*, and on the decision of the British Columbia Supreme Court in *Shaw v. Vancouver Real Estate Board* (1972), 29 D.L.R. (3d) 774 (B.C. S.C.). He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or "beyond doubt" or "plain and obvious" that the claim is deficient — the standard applied to applications to strike pleadings for disclosing no reasonable claim: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (Alta. C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, *per* Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227 (Alta. C.A.). The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing *Pasco v. Canadian National Railway*, [1989] 2 S.C.R. 1069 (S.C.C.), in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

17 Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike *Pasco* , the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (*idem*).

IV. Issues

18

1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?

2. Did the courts below err in denying defendants' motion to strike under Rule 42?

3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

V. Analysis

A. The History and Functions of Class Actions

19 The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute to be made parties. The

aim of the courts of equity was to render "complete justice" — that is, to "arrange[] all the rights, which the decision immediately affects": F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (1837), at p. 3; see also C.A. Wright, A.R. Miller and M.K. Cane, *Federal Practice and Procedure* (2nd ed. 1986), § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at s. 76*a*. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J.A. Kazanjian, "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265 (Eng. Ch.), members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be parties" (p. 265); see also Kazanjian, *supra*, at p. 401; G.T. Bispham, *The Principles of Equity* (8th ed. 1909), at para. 415; S.C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 *Colum. L. Rev.* 866, at pp. 867 and 872; J.K. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

21 The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, *supra*, at p. 401; Yeazell, *supra*, at p. 867; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (Eng. Ch.) (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

22 The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace," which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, *supra*, at § 1751; Z. Chafee, *Some Problems of Equity* (1950), at p. 201, T.A. Roberts, *The Principles of Equity* (3rd ed. 1877), at pp. 389-92; Bispham, *supra*, at para. 417.

23 The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238 (Eng. Ch. Div.), at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the *Rules of Procedure*:

> 10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be

sued, or may be authorised by the Court to defend in such actions, on behalf or for the benefit of all parties so interested.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., *Duke of Bedford v. Ellis* (1900), [1901] A.C. 1 (U.K. H.L.); *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (U.K. H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (Eng. K.B.). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century — the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W.K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M.A. Eizenga, M.J. Peerless and C.M. Wright, *Class Actions Law and Practice* (1999), at § 1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at § 1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law — The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at § 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

B. The Test for Class Actions

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, Federal Rule of Civil Procedure 28 U.S.C.A. § 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, *Civil Procedure Rules 1998*, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting such legislation: see Manitoba Law Reform Commission, Report #100, *Class Proceedings* (January 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:

> **42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

32 Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

33 Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: *Bell v. Wood*, [1927] 1 W.W.R. 580 (B.C. S.C.), at pp. 581-82; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (Eng. C.A.), leave denied, [1991] W.L.R. 711n (Eng. H.L.); *N.A.P.E. v. Newfoundland (Treasury Board)* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. T.D.); W.A. Stevenson and J.E. Côté, *Civil*

Procedure Guide, 1996, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

35 Alberta courts moved to fill the procedural vacuum in *Korte*, *supra*. *Korte* prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

36 The *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1984] 4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Sask. Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (N.B. Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (N.B. Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (N.S. S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I. T.D.), at para. 24.

37 The *Korte* criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario *Class Proceedings Act, 1992*, s. 5(1); British Columbia *Class Proceedings Act*, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec *Code of Civil Procedure*, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *supra*, at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at paras. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim.

However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

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

41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

42 While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally *not* constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario *Class Proceedings Act, 1992*, s. 6; British Columbia *Class Proceedings Act*, s. 7; see also Alberta Law Reform Institute, *supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of *whether* the claim should be prosecuted at all, Rule 42 is directed at the question of *how* the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It

recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094 (Eng. C.A.), at pp. 1101-2 (quoted in *Hunt*, *supra*). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action *if* certain conditions are met.

46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), precludes a generous approach to class actions. I respectfully disagree. First, when *General Motors of Canada Ltd.* was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since *General Motors of Canada Ltd.* has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, *supra*, at pp. 3-4.

47 Second, *General Motors of Canada Ltd.* on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use." The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario *Class Proceedings Act, 1992*, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

C. Whether the Investors Have Satisfied Rule 42

52 The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors ... who each invested at least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by ... Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

55 The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

56 The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

57 I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

D. Cross-Appeal

58 The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

59 I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident accueilli.

Tab 7

2012 ONSC 2377
Ontario Superior Court of Justice

Brown v. Canadian Imperial Bank of Commerce

2012 CarswellOnt 5072, 2012 ONSC 2377, [2012] O.J. No. 1853, 2012 C.L.L.C. 210-030, 213 A.C.W.S. (3d) 843, 24 C.P.C. (7th) 251

Michael Brown and Brian Singer, Plaintiffs/Moving Parties and Canadian Imperial Bank of Commerce and CIBC World Markets Inc., Defendants/Respondents

G.R. Strathy J.

Heard: January 31, February 1, 2012
Judgment: April 27, 2012
Docket: CV-08-365119CP

Counsel: Kirk M. Baert, Jonathan Ptak, David Rosenfeld, for Plaintiffs / Moving Parties
Patricia Jackson, Linda Plumpton, Stuart Svonkin, John C. Field, Lauri A. Reesor, for Defendants / Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial; Labour and Employment; Public

Headnote

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

Plaintiffs alleged that while they were eligible for overtime, their overtime hours worked were not recognized and paid by employer — Plaintiffs brought motion to certify proceeding as class action on behalf of class composed of analysts and investment advisors employed by bank — Motion dismissed — Action was not suitable for certification as class action, as class members had little in common but their names — Lack of commonality in functions of class members meant that conclusions on central common issues could not be extrapolated to all members of class — Plaintiffs failed to articulate any workable methodology of determining eligibility for overtime as common issue across diverse class — Plaintiffs failed to establish realistic, efficient and workable procedure for resolution of central common issue of eligibility and individual issues that would necessarily remain.

Table of Authorities

Cases considered by *G.R. Strathy J.*:

Ash v. Flying Colours Corp. (2011), 2011 CarswellNat 5985 (Can. Adjud. app. under Can. Lab. Code) — referred to

Barrette c. Ciment du St-Laurent inc. (2008), 2008 SCC 64, 2008 CarswellQue 11070, 2008 CarswellQue 11071, (sub nom. *Barrette v. Ciment du St-Laurent Inc.)* 299 D.L.R. (4th) 385, 61 C.C.L.T. (3d) 1, 40 C.E.L.R. (3d) 1, (sub nom. *Barrette v. St. Lawrence Cement Inc.)* 382 N.R. 105, (sub nom. *St. Lawrence Cement Inc. v. Barrette)* [2008] 3 S.C.R. 392 (S.C.C.) — considered

Boland v. APV Canada Inc. (2005), 2005 CarswellOnt 532, 2005 C.L.L.C. 210-012, 250 D.L.R. (4th) 376, 38 C.C.E.L. (3d) 95, 195 O.A.C. 152 (Ont. Div. Ct.) — referred to

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

Chadha v. Bayer Inc. (1999), 36 C.P.C. (4th) 188, 45 O.R. (3d) 29, 1999 CarswellOnt 2080 (Ont. S.C.J.) — referred to

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

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

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

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

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

Coulson v. Citigroup Global Markets Canada Inc. (2010), 92 C.P.C. (6th) 301, 2010 CarswellOnt 1593, 2010 ONSC 1596 (Ont. S.C.J.) — considered

Dennis v. Ontario Lottery & Gaming Corp. (2010), 318 D.L.R. (4th) 110, 92 C.P.C. (6th) 119, 2010 ONSC 1332, 2010 CarswellOnt 1975, 101 O.R. (3d) 23 (Ont. S.C.J.) — considered

Dennis v. Ontario Lottery & Gaming Corp. (2011), 2011 CarswellOnt 13514, 2011 ONSC 7024, 286 O.A.C. 329, 344 D.L.R. (4th) 65 (Ont. Div. Ct.) — referred to

Ernewein v. General Motors of Canada Ltd. (2005), 260 D.L.R. (4th) 488, 46 B.C.L.R. (4th) 234, 218 B.C.A.C. 177, 359 W.A.C. 177, 2005 BCCA 540, 2005 CarswellBC 2592, 19 C.P.C. (6th) 253 (B.C. C.A.) — referred to

Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155, 2002 CarswellOnt 3569 (Ont. S.C.J.) — referred to

Fehringer v. Sun Media Corp. (2003), 2003 CarswellOnt 3841, 39 C.P.C. (5th) 151 (Ont. Div. Ct.) — referred to

Fresco v. Canadian Imperial Bank of Commerce (2009), 2009 C.L.L.C. 210-032, 84 C.C.E.L. (3d) 161, 71 C.P.C. (6th) 97, 2009 CarswellOnt 3481 (Ont. S.C.J.) — followed

Fresco v. Canadian Imperial Bank of Commerce (2010), 2010 ONSC 4724, 2010 CarswellOnt 6695, 103 O.R. (3d) 659, 267 O.A.C. 317, 85 C.C.E.L. (3d) 9, 90 C.P.C. (6th) 281, 323 D.L.R. (4th) 376, 2010 C.L.L.C. 210-049 (Ont. Div. Ct.) — referred to

Fulawka v. Bank of Nova Scotia (2010), 2010 C.L.L.C. 210-025, 101 O.R. (3d) 93, 2010 CarswellOnt 1057, 2010 ONSC 1148, 91 C.P.C. (6th) 241 (Ont. S.C.J.) — followed

Fulawka v. Bank of Nova Scotia (2011), 337 D.L.R. (4th) 319, 2011 CarswellOnt 5491, 2011 ONSC 530, 10 C.P.C. (7th) 12, 2012 C.L.L.C. 210-009 (Ont. Div. Ct.) — referred to

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — followed

Hoffman v. Monsanto Canada Inc. (2005), 2005 SKQB 225, 2005 CarswellSask 311, 15 C.E.L.R. (3d) 42, [2005] 7 W.W.R. 665, 264 Sask. R. 1 (Sask. Q.B.) — considered

Hoffman v. Monsanto Canada Inc. (2005), [2006] 5 W.W.R. 400, 2005 SKCA 105, 2005 CarswellSask 572, 17 C.E.L.R. (3d) 139 (Sask. C.A. [In Chambers]) — referred to

Hoffman v. Monsanto Canada Inc. (2007), [2007] 6 W.W.R. 387, 28 C.E.L.R. (3d) 165, 2007 CarswellSask 190, 2007 SKCA 47, 39 C.P.C. (6th) 267, 293 Sask. R. 89, 397 W.A.C. 89, 283 D.L.R. (4th) 190 (Sask. C.A.) — referred to

Hoffman v. Monsanto Canada Inc. (2007), [2007] 3 S.C.R. x (note), 2007 CarswellSask 725, 2007 CarswellSask 726, 383 N.R. 399 (note), 451 W.A.C. 318 (note), 324 Sask. R. 318 (note) (S.C.C.) — referred to

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

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

Kafka v. Allstate Insurance Co. of Canada (2011), 2011 C.L.L.C. 210-026, 2011 CarswellOnt 3118, 2011 ONSC 2305, 89 C.C.E.L. (3d) 283, 12 C.P.C. (7th) 367 (Ont. S.C.J.) — considered

Kafka v. Allstate Insurance Co. of Canada (2012), 2012 ONSC 1035, 2012 CarswellOnt 4089, 98 C.C.E.L. (3d) 53 (Ont. Div. Ct.) — referred to

Kumar v. Mutual Life Assurance Co. of Canada (2001), 2001 CarswellOnt 4449, 17 C.P.C. (5th) 103, (sub nom. *Williams v. Mutual Life Assurance Co. of Canada)* 152 O.A.C. 344, 34 C.C.L.I. (3d) 316, [2002] I.L.R. I-4052 (Ont. Div. Ct.) — referred to

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

Kumar v. Sharp Business Forms Inc. (2001), 2001 CarswellOnt 1569, 5 C.P.C. (5th) 128, 9 C.C.E.L. (3d) 75 (Ont. S.C.J.) — considered

Markson v. MBNA Canada Bank (2007), 43 C.P.C. (6th) 10, 2007 ONCA 334, 2007 CarswellOnt 2716, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273, 224 O.A.C. 71, 85 O.R. (3d) 321 (Ont. C.A.) — considered

McCracken v. Canadian National Railway (2010), 3 C.P.C. (7th) 81, 2010 C.L.L.C. 210-044, 2010 CarswellOnt 5919, 2010 ONSC 4520 (Ont. S.C.J.) — followed

Parsons v. Canadian Red Cross Society (2000), 2000 CarswellOnt 4396, 51 O.R. (3d) 261 (Ont. S.C.J.) — referred to

Pearson v. Inco Ltd. (2002), 2002 CarswellOnt 2446, 33 C.P.C. (5th) 264 (Ont. S.C.J.) — referred to

Pearson v. Inco Ltd. (2004), 2004 CarswellOnt 557, 6 C.E.L.R. (3d) 117, 183 O.A.C. 168, 44 C.P.C. (5th) 276 (Ont. Div. Ct.) — referred to

Pearson v. Inco Ltd. (2005), 2005 CarswellOnt 6598, 205 O.A.C. 30, 78 O.R. (3d) 641, 261 D.L.R. (4th) 629, 20 C.E.L.R. (3d) 258, 43 R.P.R. (4th) 43, 18 C.P.C. (6th) 77 (Ont. C.A.) — referred to

Pearson v. Inco Ltd. (2006), 2006 CarswellOnt 4020, 2006 CarswellOnt 4021, 225 O.A.C. 397 (note), 265 D.L.R. (4th) vii (note), 357 N.R. 394 (note) (S.C.C.) — referred to

Price v. Panasonic Canada Inc. (2002), 2002 CarswellOnt 2087, 22 C.P.C. (5th) 379, [2002] O.T.C. 426 (Ont. S.C.J.) — referred to

Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand (1996), 1996 CarswellQue 916, 1996 CarswellQue 917, 202 N.R. 321, (sub nom. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand)* 138 D.L.R. (4th) 577, 1 C.P.C. (4th) 183, [1996] 3 S.C.R. 211 (S.C.C.) — considered

Risorto v. State Farm Mutual Automobile Insurance Co. (2007), 38 C.P.C. (6th) 373, 2007 CarswellOnt 1014, 47 C.C.L.I. (4th) 78 (Ont. S.C.J.) — considered

S.E. Freight Systems Inc. v. Mayhew (2007), 2007 CarswellNat 6525 (Can. Arb. Bd.) — referred to

Sauer v. Canada (Minister of Agriculture) (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — referred to

Sauer v. Canada (Minister of Agriculture) (2009), 246 O.A.C. 256, 2009 CarswellOnt 680 (Ont. Div. Ct.) — referred to

Singer v. Schering-Plough Canada Inc. (2010), 87 C.P.C. (6th) 276, 2010 ONSC 42, 2010 CarswellOnt 79 (Ont. S.C.J.) — considered

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

Wicke v. Canadian Occidental Petroleum Ltd. (1998), 1998 CarswellOnt 2863, 40 O.R. (3d) 731 (Ont. Gen. Div.) — referred to

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

Wuttunee v. Merck Frosst Canada Ltd. (2009), 2009 SKCA 43, 2009 CarswellSask 191, 69 C.P.C. (6th) 60, 324 Sask. R. 210, 451 W.A.C. 210, [2009] 5 W.W.R. 228 (Sask. C.A.) — referred to

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

1151257 Ontario Inc. v. Director of Employment Standards (December 11, 2003), Doc. 4086-02-ES (Ont. L.R.B.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2008), 2008 CarswellOnt 1156, 89 O.R. (3d) 252, 56 C.P.C. (6th) 88 (Ont. S.C.J.) — referred to

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

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2010), 100 O.R. (3d) 721, 87 C.P.C. (6th) 375, 320 D.L.R. (4th) 612, 265 O.A.C. 134, 2010 ONCA 466, 2010 CarswellOnt 4305 (Ont. C.A.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2011), 417 N.R. 397 (note), 2011 CarswellOnt 499, 2011 CarswellOnt 500, [2011] 1 S.C.R. x (note), 284 O.A.C. 396 (note) (S.C.C.) — referred to

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2
Generally — referred to

Pt. III — referred to

Pt. III, Div. I — referred to

s. 167(2) — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 1 — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 6 ¶ 1 — considered

s. 23 — considered

s. 24 — considered

s. 25 — considered

Employment Standards Act, 2000, S.O. 2000, c. 41
Generally — referred to

Pt. VIII — referred to

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 21 — considered

Regulations considered:

Employment Standards Act, R.S.O. 1990, c. E.14
General, R.R.O. 1990, Reg. 325

Generally — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41
Exemptions, Special Rules and Establishment of Minimum Wage, O. Reg. 285/01

Generally — referred to

s. 8 — considered

MOTION to certify proceeding as class action on behalf of class composed of analysts and investment advisors employed by bank.

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

1 The plaintiffs move to certify this proceeding as a class action on behalf of a class composed of "Analysts," "Investment Advisors" and "Associate Investment Advisors" employed by the defendants Canadian Imperial Bank of Commerce (CIBC) and CIBC World Markets Inc. (CIBCWM) (referred to collectively as CIBC unless otherwise apparent from the context.)

2 The action follows two other overtime cases in the banking sector: *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, [2010] O.J. No. 716 (Ont. S.C.J.), aff'd 2011 ONSC 530 (Ont. Div. Ct.), which was certified at first instance, and *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97, [2009] O.J. No. 2531 (Ont. S.C.J.), aff'd 2010 ONSC

4724 (Ont. Div. Ct.), which was not certified. Appeals in both proceedings have been taken under reserve by the Court of Appeal. *Fulawka* and *Fresco* were "off the clock" cases — that is, the class members alleged that while they were eligible for overtime, their overtime hours worked had not been recognized and paid by their employer. In this case, the plaintiffs allege that they and other similarly-situated class members have been wrongly classified by CIBC as ineligible for overtime.

3 Overtime cases in other industries include: *Wicke v. Canadian Occidental Petroleum Ltd.* (1998), 40 O.R. (3d) 731, [1998] O.J. No. 2818 (Ont. Gen. Div.); *Kumar v. Sharp Business Forms Inc.* (2001), 5 C.P.C. (5th) 128, [2001] O.J. No. 1729 (Ont. S.C.J.); *Corless v. KPMG LLP* (2008), 170 A.C.W.S. (3d) 464, [2008] O.J. No. 3092 (Ont. S.C.J.); and *McCracken v. Canadian National Railway*, 2010 ONSC 4520, [2010] O.J. No. 3466 (Ont. S.C.J.).

4 The plaintiffs say that CIBC has classified its employees by job level and by job title. There is a generic job description attached to most job titles. Employees at and above certain job levels are generally treated by CIBC as ineligible for overtime. As well, employees with certain job titles have been classified as ineligible for overtime. The plaintiffs say that it can be determined, on a job-by-job basis, whether particular employees are legally entitled to overtime and therefore whether they have been misclassified. They say that the same circumstances that allow CIBC to define overtime eligibility by job level or job title will allow the court to determine whether particular groups of employees have been misclassified.

5 In the first section of these reasons, I will outline the underlying facts and the evidence adduced by the parties. I will describe the parties, the organization and structure of CIBC's workplace, the roles and responsibilities of analysts and Investment Advisors within CIBC and the expert and other evidence adduced by the parties. In the second section, I will explain the statutory and legal regime governing overtime under federal and provincial law. Finally, in the third section, I will review and apply the test for certification of a class proceeding set out in section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the *C.P.A.)*.

6 For the reasons that follow, I have concluded that this action is not suitable for certification as a class action. Class members have little in common but their names. The key issue of fact — namely, whether or not a person has managerial responsibilities — which is critical to the determination of overtime eligibility, cannot be determined on a common basis. There is no workable methodology to resolve that issue. The action simply will not work as a class action.

I. The Facts

The Plaintiffs

7 Michael Brown, one of the proposed representative plaintiffs, is a former employee of CIBCWM. He was employed from April 2003 to January 2004 as an "analyst." He was a level 6 employee, with the job title "Analyst IV." He claims that his business title was "Analyst, Corporate Client Support, Global Operations," but CIBC says that his business title was "Senior Analyst." His initial base salary was $48,000 per annum, which was increased to $50,000. His job was to provide support to United Kingdom lending syndicates, in which CIBCWM participated. He analyzed loan documents and processed the relevant information into CIBCWM's system. Due to the time difference between Canada and the UK, he worked shifts from 4:00 a.m. to 12:30 p.m., including breaks. He says that he was frequently required to work overtime. When he asked about overtime pay, he was told that he was not entitled to it under the Bank's overtime policy.

8 Mr. Brown claims that he did not perform managerial functions, supervise other employees, have hire and fire authority, exercise discretion or independent judgment or have any of the other trappings of someone in a managerial or supervisory role. He states that his job and that of other analysts at CIBC was not managerial — it was to "analyze," not to "manage." According to his evidence:

> The job title of analyst at CIBC is a common one and is descriptive of the role performed. The role of an analyst is not to manage people: it is to analyze and process information to support the various business processes of the area the analyst is employed in.

9 The other proposed class representative, Brian Singer, was employed by CIBCWM in various capacities from 1994 to 2002. He started out as a bond salesperson and later became what is now known as an Investment Advisor. He claims that in that job, he worked 65-70 hours per week, including weekends, and was never paid overtime. He claims that CIBCWM knew that he was working more than a typical 44 hour work week and expected him to do so. He says that as an Investment Advisor, he did not perform managerial functions and did not supervise employees, have hire and fire authority, have the ability to make decisions on behalf of the company, exercise discretion in management or perform a leadership or administrative role. During Mr. Singer's "rookie year" as an Investment Advisor, he was guaranteed certain minimum compensation. After this year passed, his remuneration was based entirely on a commission on fees generated by the sale of securities and other products. His earnings between 1998 and 2002 varied from a low of $55,000 in one year to as much as $115,000 in another.

10 Mr. Singer says that this remuneration structure fostered a work place where an Investment Advisor needed to constantly work overtime to meet and sign up new clients and to increase the assets under management. He claims that all Investment Advisors at CIBCWM perform similar tasks. All were classified as ineligible for overtime.

11 Mr. Singer was not originally a plaintiff in this action. He brought a motion to be added as a representative plaintiff in May 2009, after the action had been commenced by Mr. Brown with the proposed class limited to Analysts.

12 Before starting this action, Mr. Singer had never asked CIBCWM for overtime pay and never complained that he had not been paid overtime. He said that he did not become aware that he might have a right to overtime until he had discussions with counsel.

The Defendants

13 CIBC is a Canadian chartered bank. It is federally-regulated and thus governed by the *Canada Labour Code* R.S.C. 1985, c. L-2 (the *Code*). CIBCWM is the wholesale banking arm of CIBC and provides, among other things, investment advice and services to individual clients through Investment Advisors in its retail division, CIBC Wood Gundy. CIBCWM is provincially-regulated and thus is subject in Ontario to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (*ESA 2000*).

Organization of the Workplace and Overtime Policy

CIBC's Overtime Policy

14 CIBC's evidence is that, before 2006, it had no general overtime policy applicable to all employees. Instead, different business areas had their own overtime practices and policies, some of which were in writing and some of which were not. CIBC has located only two written policies for the period before 2006, one applicable to "Technology" employees and the other applicable to "Operations" employees. These policies were put in place in about November 2002. It is not clear how long these policies were in effect prior to the introduction of the new policy, described below, in 2006. There is no evidence of any other policies at CIBC prior to 2002.

15 The overtime policy applicable to Operations employees after November 2002 was, in summary, as follows:

- overtime was defined as hours of work in excess of 8 hours in a day or 37.5 hours in a week and was paid at a rate of 1.5 times the employee's base salary rate;
- employees at levels 1-5 were eligible for overtime, unless they supervised or managed other employees;
- employees at level 6 and above were not eligible for overtime;
- employees who supervised or managed other employees were not eligible for overtime regardless of their job level;
- overtime would only be paid if it was approved in advance by the employee's manager; and
- when requested by the employee and approved by the manager, time off could be taken *in lieu* of overtime.

16 The overtime policy applicable to the Technology employees was substantially the same, except for the job level threshold. Employees at job levels 1 to 7 were eligible for overtime and those at job levels 8 and above were ineligible. Employees who supervised or managed others were not eligible for overtime, regardless of their job level.

17 These pre-2006 policies applied to those analysts who were employed in either the Operations or Technology departments. These were only two of the many departments throughout CIBC in which analysts were employed.

18 In April 2006, CIBC introduced a new overtime policy applicable to the Canadian employees of CIBC and CIBCWM (the Post-2006 Overtime Policy). There were some minor amendments to this policy in 2007 and 2010.

19 Generally speaking, the Post-2006 Overtime Policy provided that eligible employees, who worked more than 8 hours in a day or 37.5 hours in a week, and who received prior approval from their manager to work overtime, were entitled to overtime pay or time off *in lieu*. Overtime that had not been pre-approved could be compensated, provided there were extenuating circumstances and managerial approval was obtained as soon as possible after the work was done.

20 Those not eligible for overtime were described, "as a general rule," as "all roles evaluated at level 7 and above, all people management roles and specific roles deemed to be management functions."

21 The Post-2006 Overtime Policy provided as follows:

> CIBC is committed to creating an environment where all employees across the organization are compensated equitably and according to market practices and Canadian legislation. We recognize that from time to time, management may require employees to work beyond regular hours of work and in those cases, CIBC provides additional compensation to eligible employees in the form of overtime payment or paid time off in lieu. ...
>
> In addition, CIBC achieves to ensure consistent treatment of all employees across Canada whenever possible. ...
>
> This Policy applies to all employees of CIBC and its controlled subsidiaries whose employment relationship is governed by Canadian law and who meet the eligibility criteria as prescribed below. Unionized employees are covered by the terms of their respective collective agreement. ...
>
> For the purposes of this Policy, overtime is defined as pre-approved and authorized time worked by an employee in excess of 8 hours in a day or 37.5 hours in a week as set out in the Employees Eligible for Overtime Pay section below and for which the employee may be entitled to compensation pursuant to their terms of employement, or by law.

22 As noted above, the Post-2006 Overtime Policy specifically exempted certain categories of employees as being *ineligible* for overtime:

> Employees Not Eligible for Overtime (Exempt)
>
> Under Canadian law, some employees based on job function/role are designated as exempt from eligibility for overtime. At CIBC, as a general rule, all roles evaluated at a Level 7 and above, all people-management roles and specific roles deemed to be management functions are designated as exempt. This exemption is based on an analysis of a number of factors and criteria such as level of responsibility, impact, overall compensation, autonomy, authority, complexity and span of control related to the job.

23 The Post-2006 Overtime Policy was supplemented by the Manager's Guidelines. These guidelines identified specific job titles classified as level 6 that were deemed ineligible for overtime pay by CIBC, including the following job titles:

> (1) 0060 — Assoc Inv Adv;
>
> (2) 0193 — Associate Portfolio Management;
>
> (3) 0203 — Associate Commercial Banking;
>
> (4) 0270 — World Markets Professional Analysts;
>
> (5) 1521 — Mgr I/Supervisor III Info Technology;
>
> (6) 3035 — Customer Service Manager III;
>
> (7) 3055 — Branch Manager;
>
> (8) 3081 — Manager II Branch Banking;
>
> (9) 3142 — Business Manager; and
>
> (10) 5534 — Manager of People I.

24 Thus, following the Manager's Guidelines, Associate Investment Advisors, who were level 6 employees, were ineligible for overtime. Investment Advisors were level 8 employees and were ineligible under the policy.

Job Levels, Job Titles and Business Titles

25 As will be described in more detail below, the plaintiffs propose a class comprised of CIBC employees at "Level 6" or higher, who have the words "analyst" or "investment advisor" in either their job titles or their business titles. In order to understand the implications of this class definition, and the suitability of the proposed common issues for class action treatment, it is necessary to understand how CIBC classifies its employees.

26 CIBC classifies all its employees by job titles, which are indentified by a name and a four digit code. There are currently about 1,300 job titles within CIBC, each with an associated job code. Each job title, other than senior executive positions, is assigned a job level between 1 and 10, with level 10 being the most senior. There is no evidence before me concerning the demarcations between job levels.

27 In addition to having formal job titles, some CIBC employees are assigned, or may choose, a "business title." A business title might be used, for example, on the employee's business card. There is no standardized process for the selection of business titles, and a particular employee's business title may not be included in CIBC's Human Resources computer system. In practice, some employees may use only their business title and may never refer to or even know their formal job title.

28 CIBC has developed job descriptions that correspond to particular job titles. Job titles can apply to employees in many different sectors of CIBC's business, and the duties and responsibilities assigned to employees can vary from their formal job descriptions. The evidence establishes that the job performed by an employee in one department may not necessarily be the same as that of another employee with the same job title in the same department or in another department of CIBC. Moreover, employees with the same nominal job title, and therefore the same generic job description can have different levels of responsibility, ranging from no supervisory or managerial responsibility, to some supervisory responsibility, to actual managerial responsibility.

29 Moreover, an employee's job code or job title may not necessarily be determinative of his or her eligibility for overtime. Some employees with a particular job code may be eligible for overtime and may receive overtime, and others, with the same job code, may be ineligible for overtime and do not receive overtime. Further, some employees in levels 1 to 6 may be ineligible for overtime due to their managerial and supervisory responsibilities, and some employees in level 7 and above may be eligible for overtime and actually paid overtime.

30 CIBC has adduced uncontradicted evidence, primarily through Ms. Sandy Sharman, Senior Vice President of Human Resources, Retail Markets of CIBC, which I accept, that eligibility for overtime at CIBC is not determined exclusively based on job levels, job codes or job descriptions. Her evidence is that in appropriate cases, the determination of overtime eligibility requires individual consideration of an employee's circumstances by his or her manager, assisted by the CIBC human relations department. Managers are required to make judgments about the overtime eligibility of their subordinates by examining their actual responsibilities and their degree of managerial responsibility and oversight.

Analysts

31 Mr. Brown claims that, as an "Analyst IV" (job code 5566), he did not perform managerial functions and that, to his knowledge, other analysts at CIBC did not perform managerial functions. Similar evidence was provided by another affiant on behalf of the plaintiffs, Navin Joshi. Mr. Joshi testified that he was a "U.S. Real Estate Loans Administrator, Analyst II" at CIBC from May 2006 to July 2007 and a "Senior Security Analyst" at CIBCWM from approximately 2007 to 2010. It was his evidence that analysts at CIBC simply "processed and analyzed information provided by clients and management" in order to support their particular business group. The picture painted by Mr. Brown and Mr. Joshi is that all "analysts" at CIBC performed routine intellectual tasks that did not involve supervisory responsibility or any of the other *indicia* of management. The evidence adduced by CIBC does not support this conclusion.

32 CIBC's evidence, primarily through Ms. Sharman, is that the title "analyst" at CIBC does not describe a uniform set of functions or responsibilities. She swears that there are over 100 official job titles from level 3 to level 9 of CIBC containing the word "analyst." Some 52 of these job titles are at level 6 and above, and therefore within the proposed class. Many of the people holding these titles are considered as eligible for overtime and have in fact been paid overtime.

33 Ms. Sharman deposes that the proposed class definition will include a disparate group of people with different job titles and business titles, and different duties and responsibilities, linked only by the word "analyst" in their titles, with no homogeneity in function across the titles. People with these titles are scattered in different jobs, in different sectors of CIBC's business, including retail banking, commercial banking, credit, financial reporting, communications, operations, information technology, risk management, audit functions, legal compliance and governance, accounting, real estate and anti-fraud protection. Although all the employees in these positions have the word "analyst" in either their job title or business title, Ms. Sharman's evidence is that they have widely diverse responsibilities, compensation and work environments.

34 To further complicate matters, many employees use the word "analyst" in their business titles, even though their formal job title may not include the term. There are some 448 business titles that have been adopted by CIBC employees using the word "analyst". Ms. Sharman also swears that there are many people employed by CIBC who "analyze" information but are not called "analysts" and many who are called "analysts" whose job does not primarily involve "analysis."

35 CIBC says that during the class period, there were approximately 3,848 employees at level 6 or above who had a job title that included the word "analyst." In addition, there were about 1,030 employees who had a business title that contained the word "analyst." Some of these also had the word "analyst" in their job title and some did not.

36 According to the documents produced by CIBC, for example, a business title containing the word "analyst" was used by various employees in levels 6 to 10 and included people with job titles as diverse as "Executive Director," "Managing Director," "Mgr-Fin Mgmt/Fin Analyst III," "Analyst, P&L/Balance Sheet/RR" and "Analyst." As another example, the business title "Business Analyst" was used by employees ranging from level 6 to level 8 and included people with the job title "IT Project Manager," a "Snr Mgr I — Fin Mgmt/Fin Analyst" and a "Business Specialist," to mention a few.

37 CIBC has adduced evidence from a number of employees concerning the use of the "analyst" job title and business title. The evidence, which I accept, establishes that many employees falling within the proposed class, who have the word

"analyst" in their job title or business title, are people managers who would not likely be eligible for overtime. The evidence equally establishes that many such employees are not people managers, would likely be eligible for overtime, are treated as eligible for overtime and have been paid overtime. This evidence also establishes that a person's job title or business title is not necessarily reflective of their duties or level of responsibility within CIBC. Employees with the same job title or the same business title may in fact perform different functions and have different responsibilities, depending on their particular place in the organization. I will review some of the evidence.

38 Mr. John Allore has the job title "Manager of People V," but his business title is "Executive Director" for the Business Analysis and Project Delivery unit of CIBCWM. He says that his unit has a number of jobs that could be described as "analytical" in nature, some of which have "analyst" in the job title. Some of these employees have the job title "Analyst IV," which is the same job title as the one held by the plaintiff Brown. Of these, some were "Supervisor Portfolio Systems Analysts" (PSAs), who managed a team of analysts. Although these Supervisor PSAs are level 6 employees, they carry out functions that could be broadly described as managerial. They manage a team of PSAs, schedule their hours of work, supervise them, interview candidates for job positions, carry out job performance reviews, and approve overtime. They are regarded as having managerial responsibilities and are not eligible for overtime. In contrast, other employees in the same unit, who also have the job title "Analyst IV" and the business title "Business Analyst," are also in a level 6 position, but because they do not manage other employees, they are eligible for overtime.

39 Marsha Watson began working for CIBC as a "Portfolio Systems Analyst," or PSA, the position described by Mr. Allore. She stated that she was supervised by a "Supervisor, Portfolio Systems Analyst." When she worked overtime, she was compensated at either time and a half or with time off in lieu. She was promoted in July 2010 to a new position, which has the business title "Business Analyst," a level 6 position. Her job title is "Business Specialist." She remains eligible for overtime.

40 Raymond Kadir Hussain has the business title "Senior Manager, Regulatory Reporting" in Finance Shared Services — Regulatory Reporting Wholesale & CFO CIBCWM. His job title is "Senior Financial Analyst II." He describes himself as a manager and has held a managerial position since 1998, though under different titles. He currently has a level 8 position and has four people reporting to him. He approves their hours of work and overtime hours, coaches and trains them, conducts performance reviews and participates in interviewing and hiring.

41 John Goettsch holds the job title "Senior Financial Analyst II." His business title is "Manager of Accounting Finance — Card Products." He used his business title exclusively and was not really aware of his job title. His is a level 8 job. His evidence indicates that he holds a managerial position, in spite of the word "analyst" in his job title. A number of analysts report directly to him and have the job title "Manager-Financial Management/Financial Analyst II." Four of these individuals use the business title "Accounting Analyst" and one uses the title "Settlement Analyst." His evidence is that notwithstanding that some of these individuals have the word "Manager" in their job titles, they do not perform a managerial function and in fact are eligible for overtime compensation under CIBC's Overtime Policy. As well, in spite of the fact that these individuals have "analyst" in their job titles, they engage in very little of what would be considered "analysis." In general, their duties consist primarily of pulling data and inputting that data into the appropriate reports.

42 I do not propose to examine the evidence of Huan-Chun Gao, Anna Grishchenko and Maria Goldberg in any particular detail. The evidence of Ms. Gao establishes that there are employees of CIBC, such as she, who perform "analysis" functions but do not have the word "analyst" in their job title or business title. Some of these people are paid overtime, depending on the nature of their positions. Moreover, although Ms. Gao has a level 7 position and has responsibilities that could be broadly described as managerial, she has been treated as being eligible for overtime and has been paid overtime.

43 Ms. Gao supervises the affiant Ms. Grishchenko, who holds the position of Quality Assurance Analyst, a level 6 position. Ms. Grishchenko's evidence is that when she has worked overtime, her hours have been approved by Ms. Gao and she has received compensation for those hours, sometimes by pay and sometimes by time off *in lieu* of pay.

44 Ms. Goldberg has a level 7 position, as Senior Quality Assurance Analyst. Her work involves testing software applications. It is her evidence that she is paid overtime or provided with time off *in lieu*.

45 The upshot of this evidence is that the fact that a class member has the word "analyst" in their job title or business title tells us nothing about the job that the person actually performs. It does not tell us that the person's job consists primarily of "analyzing" and it is not in any way indicative of the absence of managerial or supervisory responsibilities. Moreover, as I have noted, people with the same job title do not necessarily perform the same job. Nor do people with the same business title, who may have very different job titles, necessarily perform the same job. Within the large class of people that the plaintiffs seek to certify with the word "analyst" in their job title or business title, some people are already eligible for overtime under CIBC's policy and some may be ineligible for overtime as a matter of law and may be properly classified as ineligible, and some may fall into a grey area in which they may or may not be eligible for overtime, depending on their particular circumstances.

46 In summary, the evidence does not support the plaintiffs' rather simplistic assumption that all CIBC employees who have the word "analyst" in their title are simply information processors and are not managers.

Investment Advisors and Associate Investment Advisors

47 As noted earlier, Mr. Singer's evidence was that he did not have any managerial or supervisory responsibilities as an Investment Advisor. He was required to meet and secure new clients, understand their financial goals, research investments that would be suitable for them and purchase securities or financial products on their behalf. He was compensated by a commission on fees generated by the sale of securities and other financial products and by a percentage of the asset management fees paid by clients. These were determined by a "grid," which gave the Investment Advisor a share of the profits in proportion to the total revenue he or she brought to the business and the size of each individual transaction conducted on behalf of a client. Mr. Singer values his claim for unpaid overtime at about $50,000 per year.

48 CIBC has adduced considerable evidence in response to Mr. Singer's claims. In addition to the evidence of Ms. Sharman, it adduced evidence of three Investment Advisors.

49 Investment Advisors work at CIBC Wood Gundy Branches. They provide investment advice to their clients and manage their clients' investment portfolios. Clients would think of them, perhaps in old-fashioned terms, as their "broker." Investment Advisors are registered as "salespersons" under the *Securities Act*, R.S.O. 1990, c. S.5. There is no written job description for Investment Advisors.

50 Since 1996, Investment Advisors have been level 8 employees. Each Investment Advisor has what is referred to as a "book of business" — a set of clients, accounts and portfolios for which he or she manages. Some Investment Advisors have books of business in the hundreds of millions of dollars, generating commissions and fee revenues in the hundreds of

thousands or even millions of dollars. The three Investment Advisors who swore affidavits had books of business ranging in size from $40 million to $800 million.

51 The evidence of these three Investment Advisors will be summarized below.

52 Bryan Baker is the Branch Manager of the Symphony House branch of CIBC Wood Gundy and was Mr. Singer's Branch Manager. He is himself an Investment Advisor and manages his own book of business, which consists of approximately $800 million in assets, generating over $2 million in commission and fee revenue per year. His total annual compensation has averaged in excess of $1 million per year. His affidavit describes his working life as sometimes indistinguishable from his personal life. He works from his home, his cottage and in any other places that his clients may require. He socializes and travels with his clients. He engages in extensive marketing activities. He has complete control over his own hours of work and no one dictates how he spends his time or, subject to compliance with regulatory requirements, how he works on a day-to-day basis. In addition to supervising other Investment Advisors in the branch, Mr. Baker supervises a team of three assistants who support his practice. He pays each of them a bonus, out of his own pocket, based on a percentage of the revenue generated by his book of business. He also pays bonuses to other branch employees. Mr. Baker's evidence is that he enjoys a high degree of discretion over the growth and management of his book of business, the strategies and products he recommends to his clients and the marketing and promotional efforts he undertakes.

53 Christine Timms is also an Investment Advisor. Her experience is similar to Mr. Baker's. She has a book of business of over $300 million in assets under management, which has generated an average of over $2 million per year in revenue. She describes building up her book of business by doing cold calling and conducting seminars. She now has a stable clientele, many of whom have been with her for 15 years or more. She has a team of six people who support her practice. Three of these people have salaries that are paid directly out of her pocket. She also pays bonus compensation to all members of her team. She pays hundreds of thousands of dollars per year to cover the cost of salaries, bonuses, benefits and other expenses of her team members. Like Mr. Baker, she describes a high degree of autonomy and independence in her work and in the management of her team. She has complete control over her hours of work and how she spends her time. She has sole discretion over how to run her book of business, how to expand her business, what marketing and professional activities to undertake and how to plan and execute her work.

54 Fraser Sutherland is an Investment Advisor. He joined the Ottawa Branch of CIBC Wood Gundy in 2003. He is at a relatively early stage of his career in comparison to Mr. Baker and Ms. Timms. He states that each Investment Advisor has his or her own approach to investment and wealth management. In addition to providing his clients with investment advice, Mr. Sutherland gives advice on insurance and estate planning. He focuses on clients who are high net worth business owners, professionals and other clients with complex tax and financial circumstances. His book of business currently has approximately $40 million in assets under management and has generated an average of $327,000 in gross annual commissions. He describes his practice as being in a "growth phase." Much of his time is spent on building client relationships "by taking clients to dinner or lunch, by playing golf with clients, and by taking clients to sporting events." He normally pays for the costs of these activities out of his own pocket. He prepares and circulates his own newsletter. Like Mr. Baker and Ms. Timms, Mr. Sutherland states that he has complete control over his own hours of work and the ways in which he allocates his time to different activities. He has complete autonomy and discretion as to how he carries out his work. His compensation is based entirely on commission and has averaged between $100,000 and $150,000 annually. He is supported by an assistant, to whom he pays a bonus.

55 The evidence is that Investment Advisors enjoy considerable autonomy in how they build their business and how they service their clients. Like the three affiants described above, Investment Advisors, at their own expense, conduct seminars, produce newsletters, host and pay for social events, entertainment and sports outings and the like. They do this in order to

build a client base that will increase their book of business and increase the commissions they receive.

56 Apart from the initial "rookie" stage of their careers, when they are guaranteed a minimum level of compensation, Investment Advisors are compensated entirely by commission. Their compensation is unrelated to hours or work. In general terms, the higher the commission and fee revenue generated by the Investment Advisor and the larger the individual transaction fees generated, the greater the compensation.

57 The evidence establishes that many Investment Advisors manage a team of people who assist them in servicing their clients and pay the salary of this team out of their own pockets. In some cases, the Investment Advisor pays a bonus to his or her team members.

58 Quite obviously, as the evidence shows, many Investment Advisors will work outside "normal" business hours. They communicate with clients or conduct research after work. They entertain clients in the evenings or on the weekends. They conduct seminars, educational programs and marketing activities, all with a view to promoting themselves, establishing relationships and ultimately increasing their books of business and the revenues that they derive from these assets. Although trading on behalf of a client may occur only within normal business hours, every Investment Advisor surely knows that the trade would not have occurred without relationship-building and hard work, some of which often takes place outside normal business hours.

59 In general, it is CIBC's evidence that, subject to regulatory requirements, Investment Advisors have considerable autonomy in how they work, where they work and when they work. They are entitled to set their own goals, including their own income goals. An Investment Advisor who wants to work 9 to 5 can do so and, depending on his or her book of business, may make a very decent living. Another Investment Advisor, who is intent on building up a substantial book of business, may spend every waking hour on the job, in one way or another. This may include searching for and attracting new clients, entertaining or servicing existing clients, or engaging in trades on behalf of clients.

60 Investment Advisors can earn substantial incomes — in the hundreds of thousands of dollars per year, or even more. In Mr. Singer's view, they are entitled to be paid overtime for work outside a normal working day. Presumably, by this logic, if an Investment Advisor, at his or her own expenses takes a prospective client to dinner or a baseball game outside "office hours", and secures the client's business, thereby generating commissions of thousands of dollars a year, the Investment Advisor should be paid "overtime" for the extra three hours spent with the prospective client. The Investment Advisor who phones a client after working hours to discuss a change in the client's portfolio should, apparently, equally be paid for his or her time.

61 The plaintiffs propose to include "Associate Investment Advisors" within the class definition. Associate Investment Advisors provide support to Investment Advisors, but are not compensated under the commission structure. As the decision to include Associate Investment Advisors in the class appears to have come fairly late in the day, the evidentiary record is very sparse concerning their duties and responsibilities.

The Expert Evidence

Statistical Evidence

62 The plaintiffs have introduced the evidence of Dr. Richard Drogin, a professor emeritus of statistics at California State University, who has provided expert statistical evidence in numerous overtime class actions in the United States. He was retained as an expert witness on behalf of the plaintiffs in *McCracken*, *Fulawka* and *Fresco*.

63 Dr. Drogin expressed the opinion that, using random sampling methods, it is possible to determine the average amount of hours worked per day and per week by a particular class and that, if the court found that a certain group of employees had been misclassified as ineligible for overtime, the random sampling could be used to estimate the aggregate class-wide amount of damages. He identified a number of overtime cases in the United States where a random sample of class members had been used for the purpose of giving evidence at trial or to serve as examples for analysis. He suggested that in this case, a random sample of class members would be "deposed" to give "representative testimony," which would be supplemented by CIBC's computerized and hard copy records. If the court determined that class members were misclassified, the results for the random sample could be "projected" to the class as a whole, and consequent aggregate class-wide damages could be computed. Dr. Drogin concluded by stating that in his opinion, a survey from a random sample of class members could reliably indicate the average number of hours worked per day and per week by class members and could be used to calculate the aggregate damages owed by the defendant for each class "if liability was proven and salary data for the class was known."

64 In a supplementary affidavit, sworn January 12, 2011, Dr. Drogin expanded his opinion to state that "statistically sound and scientifically acceptable random sampling methods could also be applied in this case to estimate the percentage and total number of class members who do not perform managerial functions and would be eligible for overtime pay." He stated that if the court determined that a certain percentage of the sample was misclassified as exempt, it could be inferred that the same percentage of the entire class was misclassified. He pointed to two cases in the United States where this had been done for the purpose of determining liability. I will discuss these cases below.

65 In the same affidavit, Dr. Drogin elaborated on his proposed sampling methodology. He suggested that a "Representative Witness Group" would be selected as trial witnesses and that the court would determine, for each member, whether they had been misclassified as exempt from overtime and, if so, the amount of their overtime. These findings would be projected over the entire class to estimate the proportion and number of the class who were misclassified and to estimate the aggregate damages on a class-wide basis. He suggested that the sample size could be increased if the court wished to have a higher level of confidence. He concluded by saying that if the court finds the defendants liable for damages based on the result of the first sample, an estimate of the number of overtime hours worked per week, and aggregate class wide damages, could be computed.

66 In response to the evidence of Dr. Drogin, CIBC introduced the evidence of Jeffrey Gray, an economist and statistician. He opined that while sampling could provide an estimate of the average overtime hours worked by all class members, it would not provide any information about (a) whether a particular non-sampled class member was eligible for overtime or (b) the actual hours worked by the non-sampled members. He noted that Dr. Drogin's experience with overtime cases was limited to cases where the proposed class was significantly smaller and more homogeneous than this case. He observed that the proposed class in this case includes a wide range of job titles with varying responsibilities, some being eligible for overtime and some not. With 25 samples proposed by Dr. Drogin and 52 job titles at issue (not including the over 300 business titles containing the word "analyst"), there would be many job titles for which no information will be obtained by sampling. Mr. Gray concluded that, given the size and variability of the proposed class, the sampling methodology would not inform the court as to the overtime eligibility or average overtime hours worked by the employees in the many jobs potentially at issue.

67 In a further reply affidavit, Dr. Drogin did not dispute that eligibility for class members not in the sample cannot be determined from the sample. He said, however, that the sample would provide information about the "aggregate characteristics" of the non-sampled class members.

Prevalence of Unpaid Overtime

68 A report of Dr. Graham Lowe was also filed on behalf of the plaintiffs. In 2005, Dr. Lowe prepared a report for the Federal Labour Standards Review Committee entitled "Control over Time and Work-Life Balance: An Empirical Analysis." Dr. Lowe was also the author of a report entitled "Unpaid Overtime in Canada's Banking Sector," which was filed as part of the plaintiff's case in *Fresco*. Lax J. found that the report was not helpful, because it dealt with the banking sector in general and not with CIBC in particular.

69 In this case, Dr. Lowe's report was entitled "Unpaid Overtime in Retail and Wholesale Banking in Canada." As in the report filed in *Fresco*, Dr. Lowe examined data compiled by Statistics Canada for two categories of employees. These were NAICS code 5221 (employees of personal, commercial, corporate and institutional banking as well as credit unions, which would include analysts directly employed by banks) and NAICS code 523 (which would include underwriters of securities, brokers, asset managers and Investment Advisors, other than those employed directly by banks). He concluded that, in these two categories, there is a consistent pattern of uncompensated overtime being reported by non-managerial employees in the banking sector. He found that between 2006 and 2009 about 15% of all non-managerial employees in NAICS 5221, reported working overtime for which they received no compensation whatsoever. In NAICS 523, during the same period, the comparable number was 16-20% of employees reported working overtime for which they received no compensation. Dr. Lowe also found that for both sectors, most overtime worked is uncompensated. On average, he found that non-managerial employees in the NAICS 5221 category worked 6.2 to 6.6 unpaid overtime hours per week and in the NAICS 523 category, between 7.2 and 9 hours.

70 As in *Fresco*, none of Dr. Lowe's data pertains directly to CIBC — nor does it pertain directly to the analysts and advisors at issue in this proceeding.

71 In response to Dr. Lowe's report, CIBC has introduced the Report of Dr. Richard Chaykowski, a specialist in Industrial and Labour Relations. His report is entitled "Work Practices and the Distribution of Overtime Hours in the Canadian Finance and Banking Industry." He concludes that:

- banking generally, relative to other federal industries, is a good sector for employment benefits, wages and practices;
- CIBC is an above-average employer in the sector;
- the evidence does not support the conclusion that overtime is a chronic or growing problem in the finance or banking industries; and
- the use of aggregate statistics and extrapolating them to a particular employer is misleading.

72 I do not find it necessary to resolve the conflict between the evidence of Dr. Lowe and Dr. Chaykowski. I find the evidence of Dr. Lowe of no value, as it is general in nature and does not address the circumstances of the particular employees at issue in this action.

Availability of other Procedures

73 The plaintiffs have filed affidavits of Ernest Schirru, a labour law specialist with Koskie Minskie LLP, counsel for the plaintiffs. He opined that the administrative complaints process under the *Code* for the recovery of overtime pay, is not as effective as a class action, because there is no specific provision for a collective remedy and individual employees are reluctant to invoke the statute due to concerns about employer reprisals. He also stated that the process does not provide an effective means for resolving disputes involving numerous employees.

74 Although CIBC did not move to strike the evidence of Mr. Schirru, it asks the court to either strike his evidence or give it no weight on the ground that opinions on legal matters are inadmissible and Mr. Schirru is not independent or sufficiently qualified to express the opinion he gives.

75 I do not find it necessary to address this issue. Quite apart from Mr. Schirru's opinion, I would be prepared to conclude that a class action gives employees a degree of anonymity and collective clout that would not be available under the *Code* process. I came to a similar conclusion in *Fulawka*.

II. Overtime

The Statutory and Legal Regime

76 Part III of the *Code* governs standard hours of work, wages, vacations and holidays of employees in federally-regulated industries. Division I of Part III deals with standard hours of work, including the requirement that an employee's standard daily hours of work are not to exceed eight hours in a forty hour week. Section 167(2) provides that the hours of work and overtime provisions of the *Code* do not apply to employees who are "managers or superintendents or exercise management functions." This stipulation has been in effect throughout the proposed class period. The words "managers," "superintendent" and "management functions" are not defined in the legislation.

77 The comparable provision under the *ESA* is currently contained in O. Reg. 285/01, entitled "Exemptions, Special Rules and Establishment of Minimum Wage." It provides, in section 8, that Part VIII of the *ESA*, dealing with overtime pay, does not apply to "a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis." The previous regulation, R.R.O. 1990, reg. 325, which was in effect from the outset of the class period until 2000, exempted a person "whose only work is supervisory or managerial in character."

78 There is a substantial body of judicial and arbitral authority on the issue of whether a person is a manager or supervisor or whether their work is managerial or supervisory. Much of the case law put before me was reviewed by Perell J. in *McCracken v. Canadian National Railway*, to which I shall refer in a moment.

79 The parties agree that the onus will be on the employer to demonstrate that the employee is exempt from the overtime provisions of the legislation: *1151257 Ontario Inc. v. Director of Employment Standards*, [2003] O.E.S.A.D. No. 1338 (Ont. L.R.B.) at para. 10; *Accuworx Inc. v. Ontario (Employment Standards)*, 2009 CanLII 47294at paras. 36-37 (O.L.R.B.); *S.E.*

Freight Systems Inc. v. Mayhew, [2007] C.L.A.D. No. 464 (Can. Arb. Bd.) at para. 22; *Ash v. Flying Colours Corp.*, [2011] C.L.A.D. No. 49 (Can. Adjud. app. under Can. Lab. Code). There is also no dispute that the exemptions from overtime are to be narrowly construed.

80 The authorities support the conclusion that the determination of whether a person exercises supervisory or managerial functions requires a fact-based analysis of the work actually performed by the employee. The employee's job title and position in the management chain are not relevant considerations. What counts is what the employee actually does, how they do it, and how much independence and authority they exercise in the environment in which they work.

81 In *McCracken*, Perell J. undertook a careful analysis of the case law under the *Code* with respect to the determination of whether someone is a manager. He noted that the issue is a question of fact in each case, having regard to the organization in which the person is employed. Autonomy and independent decision-making authority are key considerations. I can do no better than quote the reasons of Perell J. at paras. 57-67 in full, with the citations omitted:

> The case law about who is a manager or who exercises a management function provides that this question is a question of fact for each case and in the context of the overall organization in which the person is employed ...
>
> Being a manager relates to the nature of the work actually performed ...
>
> An employee's title or job description is not determinative of whether the employee is a manager, and his or her status is determined by what the employee does or has been charged to do in the business enterprise ...
>
> An essential element of being a manager is that the person performs an administrative and leadership role and not just an operational role in the organization ...
>
> The case law reveals that certain activities or functions are regarded as management functions, such as representing the employer in collective bargaining or in discipline or grievance procedure, setting a budget, determining the organization's structure, determining the organization's policies; controlling day-to-day operations; determining staffing levels, supervising and reviewing the performance of subordinates, hiring and firing employees, and dealing with emergencies, but the mere presence of these activities is not enough and they must be accompanied by a significant level of autonomy and real decision-making authority and discretion ...
>
> The degree of autonomy and decision-making authority needs to be significant, but it need not be absolute or unfettered, and a manager may have to report to and be supervised by more senior managers and officials in the organization ...
>
> In some cases, s. 167(2) of the *Code* has been interpreted restrictively to include as managers only those in the most senior positions who act as administrators, having power of independent action, autonomy and discretion ...
>
> However, many cases have not been so restrictive. Where an employee has significant decision-making authority and responsibilities, he or she may be a manager without being at the more senior level of the organization ...
>
> In some cases, evidence that other employees or the public regarded the employee as exercising management duties and responsibilities was a factor in deciding whether a person is a manager ...

82 In *McCracken*, Justice Perell was dealing with a group of 1,550 employees at Canadian National Railway Company (CN) referred to as "first line supervisors." These individuals performed some 70 different jobs, including Assistant Track Supervisor, Trainmaster, Shop Supervisor and Chief Train Dispatcher. CN adduced evidence, as CIBC has here, to show that how first line supervisors carried out their functions depended on their particular position, the nature of the workforce they managed, their own individual experience and aptitudes and the character of the person to whom they reported.

83 Perell J. found that eligibility of first line supervisors to overtime could not be determined on a collective basis. The question depended on individual findings of fact with respect to each claimant (at paras. 331-334). He observed that the question of whether someone is a manager is "inherently an individual matter" (para. 363) and therefore lacked commonality. He compared his decision to the decision of Lax J. in *Fresco*, who concluded that instances of unpaid overtime occurred on an individual basis. He noted the observation of Justice Lax at para. 62 of her reasons:

> This evidence shows a variety of individual circumstances that give rise to unrelated bases for unpaid overtime claims that can only be resolved individually by considering the evidence of the affiant advancing the claim, the evidence of various other current and former CIBC employees who managed and/or worked with that affiant, and various records maintained on a non-centralized basis by CIBC.

84 Perell J. concluded, however, that a common issue could be posed to ask "What are the minimum requirements to be a managerial employee at CN?" He foresaw a common issues trial, in which the judge would articulate a test for a minimum standard applicable to the conduct of an enterprise such as CN. This in turn would result in the division of the class into three groups — (1) those who satisfy the minimum standard "because of who they are and what they do"; (2) those who could not possibly satisfy the standard; and (3) those whose status as a manager would have to be determined. He contemplated that the common issues judge could use the resources available under the *C.P.A.* to structure manageable individual proceedings to make a determination of whether a particular person was non-managerial and therefore eligible for overtime.

85 As explained below, the individual nature of the question of whether someone is a manager, which troubled Lax J. in *Fresco* and Perell J. in *McCracken*, is an insurmountable stumbling block is this case. The solution found by Perell J. in *McCracken* will not work in this case because it will not avoid the need for individual determinations of eligibility for overtime and thus for the determination of CIBC's liability for overtime.

86 I now turn to the test for certification under the *C.P.A.*

III. The Test for Certification

87 As a starting point, I repeat the oft-stated observation that the *C.P.A.* is to be given a broad and liberal interpretation. It should be construed generously in order to realize its objectives: access to justice, judicial economy and behaviour modification: see *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 (S.C.C.), paras. 14-16; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (Ont. C.A.). The merits of the action are not at issue at this stage — the issue is whether the action can be fairly and efficiently prosecuted as a class action.

88 I will discuss the various elements of the certification test in the course of these reasons. In general terms, there must be a cause of action, shared by an identifiable class, from which common issues arise, that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)* (2008), 169 A.C.W.S. (3d) 27, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

(a) Cause of Action

89 Section 5(1)(a) of the *C.P.A.* requires that the pleadings disclose a cause of action. The test is the same as that under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, namely the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, above.

90 The following principles apply to the s. 5(1)(a) test:

(a) no evidence is admissible for the purpose of the test;

(b) allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proven and assumed to be true;

(c) matters of law, not fully settled in the jurisprudence, should be permitted to proceed; and

(d) the pleading must be read generously, with due allowance for drafting deficiencies.

See *Hollick*, per McLachlin C.J. at para. 25.

91 In this case, the plaintiff asserts causes of action for (a) breach of express or implied terms of contract; (b) unjust enrichment; and (c) alternatively, breach of the *ESA 2000* and the *Code*.

92 CIBC does not contest that the plaintiffs meet the section 5(1)(a) requirement.

93 The plaintiffs plead that the provisions of the *Code* and the *ESA* with respect to hours of work, overtime pay and the retention of records are express or implied terms of their contracts. In this case, as in *Fresco*, CIBC admits that the relevant statutory provisions are parts of the contracts of employees who are eligible for overtime. As in *Fresco*, the plaintiffs have pleaded an appropriate cause of action.

94 The plaintiffs also plead that the defendants have been unjustly enriched, as they have received the benefit of uncompensated overtime hours worked by the class. The pleading meets the requirement of a claim for unjust enrichment set out in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21 (S.C.C.).

95 Finally, the plaintiffs plead a direct cause of action for breach of the *Code* and the *ESA*. In *Fulawka*, I struck the plaintiff's pleadings claiming to directly enforce the *Code*. This decision was upheld by the Divisional Court. An appeal to the Court of Appeal, heard concurrently with an appeal in *Fresco*, is under reserve. In the meantime, in *McCracken*, Perell J. declined to follow *Fulawka* and held that there is a cause of action to enforce the overtime provisions of the *Code*. That decision is under reserve by the Court of Appeal as well. In view of CIBC's concession on this issue, and the uncertain state of the law, I would certify the causes of action for breach of the *Code* and for the enforcement of the overtime provisions of the *ESA: Kumar v. Sharp Business Forms Inc.*, [2001] O.J. No. 1729, 5 C.P.C. (5th) 128 (Ont. S.C.J.); *Boland v. APV Canada Inc.*, [2005] O.J. No. 510, 250 D.L.R. (4th) 376 (Ont. Div. Ct.).

96 I am therefore satisfied that the plaintiffs meet the section 5(1)(a) requirement.

(b) Identifiable Class

97 The class definition is problematic.

98 Section 5(1)(b) of the *C.P.A.* requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. The plaintiff initially proposed the following class:

> All Ontario current and former CIBC and CIBCWM employees, since 1996, who were classified by CIBC and CIBCWM as Level 6 or higher, who held the positions of Analyst or Investment Advisor (otherwise known as Financial Advisor), or who performed the same or similar job functions under a different or previous CIBC or CIBCWM job title.

99 In the course of the hearing, plaintiffs' counsel amended the class definition as follows:

> All Ontario current and former CIBC and CIBCWM employees, since 1996, who were classified by CIBC and CIBCWM as Level 6 or higher, who held job titles or business titles that included the words ~~the positions of~~ "Analyst" or "Investment Advisor" (otherwise known as Financial Advisor). ~~or who performed the same or similar job functions under a different or previous CIBC or CIBCWM job title.~~

100 The plaintiffs include "Associate Investment Advisors" within this definition, because their title includes the words "Investment Advisor."

101 The plaintiffs say that since 1996, there have been approximately 3,848 CIBC employees in Ontario who had the word "analyst" in their job titles and approximately 1,030 with that word in their business titles. Assuming that there is some overlap, the "analyst" group would be somewhere in the range of 4,000 to 5,000 members. There are 52 job titles at Level 6 and above that include the word "analyst." There are also, by my count, some 368 business titles, at levels 6 to 10 that include the word "analyst."

102 There have been approximately 934 Investment Advisors employed by CIBC since 2002. I was informed at the hearing that there are a total of 81 Associate Investment Advisors located in 23 CIBC branches in Ontario.

103 It has frequently been observed that the class definition is important, because it describes the persons entitled to relief, those who will be bound by the decision and those who are 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.) at para. 10.

104 In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), Chief Justice McLachlan set out, at para. 38, the importance of a clear definition of the class:

> ... the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

105 As this quotation indicates, it is well-settled that there must be a rational relationship between the class and the common issues: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, [2005] O.J. No. 4918 (Ont. C.A.) at paras. 3 and 44, rev'g (2004), 44 C.P.C. (5th) 276, [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264, [2002] O.J. No. 2764 (Ont. S.C.J.), leave to appeal to S.C.C. denied, [2006] S.C.C.A. No. 1 (S.C.C.). at para. 57. It is the interaction between the causes of action, the class and the common issues that drives a class action forward.

106 The plaintiffs say that the proposed class is bounded in time and objectively defined. Class members will be able to self-identify based on their employment level and their job title or business title. CIBC will be able to confirm the membership of the class from its own records. The plaintiffs also say that the class is rationally connected to the common issues — namely, whether class members have been misclassified as ineligible for overtime. As eligibility for overtime has allegedly been defined by CIBC on the basis of job level and job title, there is a clear rational connection, so the plaintiffs say.

107 The plaintiffs also note that there is, for virtually every job title in the "Analyst" group, a detailed job description that sets out the duties and responsibilities of the job. They also say that, in many cases, the "business title" can be matched to a job title and thus to a job description.

108 CIBC, on the other hand, says that the proposed class is vague, subjective, over-inclusive, and not rationally connected to the common issues. Fundamentally, CIBC says that defining the class by job title and business title does not tell the full story, because eligibility for overtime is not determined by job titles or by job descriptions. It is determined by a contextual analysis of a variety of factors including authority, responsibility, independence and control, based on what a particular employee actually does. CIBC says that employees with the same job title may perform diverse functions and that some may qualify for overtime and others may not.

109 There are some real difficulties with the proposed class definition in this case. I will begin with the analysts.

110 The analyst class has been defined based on Mr. Brown's statement — or assumption — that all "analysts" at CIBC basically do the same kind of work. In his view, all analysts are bean counters, number crunchers, data sorters and form-fillers, whose work does not involve managerial or supervisory responsibilities. The plaintiffs make the assumption that answers to the common issues can be extrapolated to all "analysts," because analysts perform the same function.

111 CIBC says that the plaintiffs make the erroneous assumption that an "analyst" at CIBC is someone who examines and processes information, as opposed to someone who manages people. CIBC points out that most people in a large commercial bank, ranging from the mailroom person to the President, engage in "analysis" as some part of their job. They say, and the

evidence establishes, that within the 52 job titles and 368 business titles containing the word "analyst," there are a wide range of functions, duties, responsibilities and levels of authority. Some employees with these job titles are in fact treated as eligible for overtime. In other cases, employees in "ineligible" categories have actually received overtime.

112 The evidence does not bear out the plaintiffs' assumption that all analysts perform similar duties that are not managerial. It establishes that the duties and responsibilities of "analysts" vary widely. Some analysts unquestionably have managerial responsibilities. Others unquestionably do not. Others fall in a gray area. They have different duties, responsibilities and levels of authority. The only thing they have in common is the word "analyst" in their job title or business title. The identification of an "analyst" class results in a class that is, ultimately, randomly selected. It lacks the glue of commonality that makes it possible to make binding determinations of fact or law that apply to all class members.

113 The problem is not quite as acute with respect to the Investment Advisor or Associate Investment Advisor group, but it exists nonetheless. The evidence proves that there are variations in individual circumstances that would put some Investment Advisors well on the "managerial" side of the scale in view of their individual autonomy, independence and discretion. While further investigation would be necessary to reach a definitive conclusion, it seems to me that there is a good argument that CIBC's witnesses Mr. Baker and Ms. Timms would fall on the managerial side of the scale. There are aspects of Mr. Sutherland's circumstances that could put him on the same side of the scale. CIBC does not dispute that it is possible that there are some Investment Advisors who may be entitled to overtime. It simply says that the determination cannot be made on a collective basis.

114 As will become apparent, the lack of commonality in the functions of the class members means that conclusions on the central common issues cannot be extrapolated to all members of the class. This means that the class definition is not suitable.

(c) Common Issues

115 Section 5(1)(c) of the *CPA* requires that the claims of class members raise "common issues." These are defined as "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts": (s. 1).

116 There are several important principles that apply to the common issues analysis in this case. The first is that for an issue to be common, its answer cannot be dependent on individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (Ont. S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952 (Ont. Div. Ct.), aff'd [2003] O.J. No. 1160 (Ont. C.A.) and [*Zicherman v. Equitable Life Insurance Co. of Canada*] [2003] O.J. No. 1161 (Ont. C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Ont. S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Ont. Div. Ct.). As Cullity J. put it succinctly in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373, [2007] O.J. No. 676 (Ont. S.C.J.) at para. 45: "If an issue is one that the court at trial could decide only by reference to the facts relating to the claim of each class member, it lacks commonality."

117 The second principle is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above.

118 The third principle is that "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." The answer to a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488 (B.C. C.A.) at para. 32; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, [2009] S.J. No. 179 (Sask. C.A.), at paras. 145-146 and 160.

119 The certification motion was argued based on a number of common issues proposed by the plaintiffs. Following the oral argument, I asked the plaintiffs for further submissions on whether the two most important common issues — the class members' eligibility for overtime and the defendants' breach of contract — could be resolved in a workable manner. The defendants were given an opportunity to reply to the plaintiffs' submissions.

120 The plaintiffs took this request as an opportunity to propose additional common issues, set out below. I have the impression that this was because the plaintiffs were unable to come up with a workable methodology to resolve the common issues that would have to be the big hitters in advancing class members' claims. Instead, they offered some weak bunts, which would be easily fielded, and would not really help in moving class members around the bases and towards home plate.

Breach of Contract and Statutory Claim — ESA and Code

121 The plaintiffs initially proposed four common issues concerning the claims for breach of contract and under the *ESA* and *Code*. These are set out as (a) through (d) below. In my view, the only common issue of any particular significance in this case is (b), which asks whether class members are "eligible" for overtime pay under the *Code* or the *ESA*. If this question can be answered as a common issue and resolved in a workable manner, then the potency of the answer would make the action appropriate for certification. If it cannot be answered in common, the other questions become inconsequential and do not move the action forward sufficiently.

(a) Do the minimum requirements of the ESA and/or the Code with regard to overtime form express or implied terms of the contracts with the Class Members?

122 In *Fresco*, a similar common issue was proposed. CIBC had admitted that the statutory duties under the *Code* concerning compensation for overtime were incorporated into class members' contracts of employment. Nevertheless, Lax J. observed, at para. 59, that the resolution of the proposed issue would not advance the litigation:

> Ms Fresco argues, relying on the decision of Winkler J. (as he then was) in *Bywater*, that a common issue of fact or law does not cease to be a common issue simply because the defendant concedes or admits the issue before or at certification and therefore, the issue must be included in a certification order in order to bind members of the class. In *Bywater*, Winkler J. was dealing with the defendant's admission of liability for a fire in the Toronto subway. Without a certification order, the admission did not advance the litigation or bind the defendant to liability. As there is no admission of liability in this case, the same concern does not arise. While I agree that proposed issue 4 could be answered in common, its determination alone will not advance the litigation sufficiently to justify certification as a class proceeding without certification of the more contentious liability issues. The central inquiry in this case is whether CIBC, in some common way, breached the duties it acknowledges it owes to class members giving rise to the claims for breach of contract (common issue 5) and unjust enrichment (common issue 6). Unless there is some evidence of systemic wrongdoing, these cannot be common issues.

123 In *Fulawka*, I found that, although there was no such admission, a common issue to this effect was appropriate. CIBC does not disagree, but it echoes the observation in *Fresco*, with which I agree, that the resolution of this issue does not advance the base runners in this case.

124 I turn to the common issues originally proposed by the plaintiffs.

(b) Are the Class Members eligible for overtime pay pursuant to the ESA and/or the Code?

125 This was the common issue originally proposed by the plaintiffs. Following my request for further submissions, the plaintiffs revised this common issue as follows:

> Are any of the Class Members eligible for overtime pay pursuant to the *ESA* and the *Code?* If so, which job titles are eligible?
>
> [Emphasis added]

126 The issues of eligibility for overtime, and whether CIBC has breached its duties to class members, are the central issues in this case. If the action is workable as a means of resolving these common issues, the action should be certified. If it is not workable, certification will not advance the claims of class members.

127 The plaintiffs say that the resolution of this issue will get the lead-off batter to third base — it "will advance each member's claim to the doorstep of damages." They say that if the issue is resolved in their favour, the only remaining issue will be the number of overtime hours the class members worked and how much compensation is owing to them — issues that they say can be dealt with by an assessment of aggregate damages. They say that the necessary commonality is derived from common duties attached to common job titles and that the question of eligibility can be determined on a common basis, given the generally common duties of class members in each job title.

128 The plaintiffs make the point that every class member is presumptively entitled to overtime pay unless CIBC satisfies the onus on it to establish that the employee falls within an exemption and that, based on the case law, there is a heavy onus on an employer seeking to do so. I accept this submission, but it does not mean that the issue of eligibility can be resolved by ignoring the employer's substantive right to discharge that onus in the case of each and every employee.

129 In my view, the evidence establishes that this question simply cannot be answered on a common basis. The answers in relation to Mr. Brown cannot be extrapolated to class members who have "analyst" in their job title or business title and the answers in relation to Mr. Singer cannot be applied to all other Investment Advisors or to Associate Investment Advisors. In each case, the answer would require an examination of the particular circumstances of employees who are only linked by the commonality of their names. To this extent, my conclusions in this case echo the reasons of Perell J. in *McCracken* and of Lax J. in *Fresco*. They also echo the observations of Horkins J. in *Kafka v. Allstate Insurance Co. of Canada*, 2011 ONSC 2305, [2011] O.J. No. 1683 (Ont. S.C.J.), affd, 2012 ONSC 1035 (Ont. Div. Ct.). Horkins J. observed, at para. 146: " ... the plaintiffs' common issues have a fatal flaw: they lack commonality. The resolution of an issue for the plaintiffs will not avoid individual fact finding and legal analysis to determine the answer for each member of the class."

130 The plaintiffs really offered no explanation as to how eligibility for overtime would be established across the class on a common basis. The Litigation Plan, under the heading "Common Issues Trial," states:

> 27. The trial of the common issues will take place on a timeline agreed by the parties as ordered by this Court and shall be set after the conclusion of discoveries and all preliminary motions.
>
> 28. At present, it is anticipated that the Plaintiffs and perhaps sample [sic] of other members of the proposed class will provide evidence as witnesses at the trial of the common issues. The plaintiffs anticipate that the experts retained will also be called as witnesses at the trial. A full list of the witnesses the parties intend to call will be provided following the completion of discovery as agreed by the parties or as ordered by the Court.

131 These boilerplate statements provide no assistance in determining how the eligibility for overtime can be determined and applied to hundreds of different "analyst" jobs and to a range of circumstances of Investment Advisors. I fully recognize that a Litigation Plan can be a work in progress, but this section, dealing with the fundamental question of whether a class action is workable, is of no assistance.

132 Nor were the plaintiffs' submissions on the certification motion of assistance in determining how eligibility for overtime might be determined on a common basis. They argued that since CIBC was able to determine eligibility for overtime based on job level and job description, the court should be able to perform the same exercise. They said that job descriptions could be examined to determine whether an incumbent in the position was a manager. It was acknowledged by the plaintiffs in oral argument, however, that an individual determination of managerial status might be required, in some cases, where the defendant sought to challenge whether the job description actually described the employee's responsibilities.

133 There are significant difficulties in the plaintiffs' proposal to determine the common issue of overtime eligibility based on the job descriptions. The descriptions are generic and change over time. The evidence is that the job actually performed can vary depending on the business sector in which the person is employed, the responsibilities and authority involved, the skills required for the job and the nature of the work performed. It is not possible to say that people with the same job title are actually performing the duties of the job description attached to that title. As well, some job descriptions actually contemplate that individual circumstances will vary.

134 It may be of assistance to take a few examples.

135 The title "Senior Technology Analyst," has the job code 1971 and is a level 6 position. The job is coded as "eligible" for overtime. The job description is as follows:

> Under the general direction of a senior team member, develop and implement emerging technologies, business processes, applications, platforms and services and provide enhancements and technologies.

136 There follows a fairly detailed description of the duties and responsibilities of this position. Under the heading "Job Complexities/Challenges," the following appears:

> Some roles manage small teams of 3-5 positions.

137 Thus, the job description itself contemplates that some persons with the job title "Senior Technology Analyst" will have responsibilities that might be described as managerial or supervisory. It would be impossible to make a determination of the legal status of any particular person holding the title without examining the particular circumstances of his or her employment. Some may be eligible for overtime and some may not.

138 The affiants Grischchenko, a Quality Assurance Analyst" (job code 1936), and Goldberg, a "Senior Quality Assurance Analyst" (job code 1137), both of whom were treated as eligible for overtime, had job descriptions that indicated that the incumbent could be responsible for the management of "projects, groups or activities'.

139 The job description for "Manager-Financial Management/Financial Analyst III," job code 1133, provides that the employee "may supervise the work of others" and "may be required to provide leadership and motivation to supervised staff." Other job descriptions, such as "Senior Manager I-Financial Management/Financial Analyst" (job code 1134), "Senior Financial Analyst II" (job code 1135) and "Director I-Financial Analyst" (job code 1136) contemplate that employees with those positions could have supervisory and management responsibilities.

140 Another example is the job title "Analyst VI," which is job code 5568, a level 8 position, ineligible for overtime. The job description begins with the following:

> To provide sophisticated analysis of considerably complex business/function information related to the incumbent's area of specialization/business (e.g. economic, legal, tax, risk, insurance) by providing comprehensive recommendations/proposals to management including executives, clients and business leaders. The information analyzed may be of a strategic nature.
>
> Analysts at this level will typically operate with considerable independence in researching and addressing policy and program implementation requirements to meet management and client needs.
>
> May function as an informal department leader, second in command or mentor providing technical and professional advice, guidance, on both routine and non-routine issues to more junior analysts and may manage a small work team in the execution of analysis.

141 Later in the description, the document states that the person:

> May act as a leader within the area of specialization/business, or supervise the work of a small group of analysts.

142 I am unable to see how a common issues judge, looking at this job description, could possibly make a fair determination that every person with the job description attached to his or her job was or was not engaged in management or supervisory duties.

143 The job description for "Analyst VII" (job code 5569) provides that the employee "may direct and/or have overall responsibility of a unit, leading small teams," and "may lead as a unit manager and contribute to the professional

development of specialized analysts." It would be difficult to imagine how a common issues judge could look at this job description and make a binding determination that all employees with the job title "Analyst VII" were or were not managers.

144 While the problem is particularly acute with respect to the analyst class, the evidence, to which I have referred, establishes that the responsibilities, authority and independence of Investment Advisors is not uniform and that their eligibility for overtime — if any — would have to be determined on a case-by-case basis.

145 The plaintiffs have failed to articulate any workable methodology of determining eligibility for overtime as a common issue across this diverse class. They ultimately conceded, in argument, that the determination of whether a particular person was eligible for overtime might have to be determined *after* the common issues trial.

146 Recognizing the difficulties with the commonality issue, Mr. Baert urged me to seize the opportunity offered by Dr. Drogin's evidence and to follow the lead of American courts that have used statistical evidence to arrive at conclusions on liability on a common basis. He suggested that the court could use the approach suggested by Dr. Drogin by selecting a "representative witness group," at random from members of the "analyst" class, hear their evidence at a common issues trial, and draw conclusions about liability on a class-wide basis. Mr. Baert acknowledged that there is no Canadian authority supporting this approach, but said that I should not shut the door on access to justice by foreclosing novel methods of proof. He points to *Chibber v Taco Bell Corp.* (October 28, 2010), Superior Court of the State of California County of San Diego, Case No. GIC 870429 and *Duran v. U.S. Bank National Association* (July 17, 2008), Superior Court of California: Alameda County — Northern Division, Case No.: 2001-035537, as examples of overtime cases that have used this approach.

147 These cases are readily distinguishable from the case at bar for two reasons. First, in those cases, there were no differences in the duties and responsibilities of the employees at issue. It was an all or nothing proposition — the class was homogeneous and either all members were eligible for overtime as the plaintiffs contended or were ineligible as the employer argued. There was no evidence, as there is here, that there were differences within the proposed class that would affect eligibility.

148 In *Chibber*, the class was made up of Taco Bell Restaurant General Managers and Market Training Managers. The court expressly noted that it was not a case in which a trier of fact might determine that a certain percentage of the class was ineligible and another percentage was eligible. The court noted that the action would not be certified unless it was found that the class members' claims were typical and that representative evidence could establish liability.

149 In *Duran*, the class was Business Banking Officers and Small Business Banking Officers. In originally certifying the class action, the court had concluded that there was standardization of these positions. It was determined that it would be appropriate to determine liability and damages based on the evidence of twenty randomly-selected class members, with the findings extrapolated to the balance of the class. There were 261 members of the class.

150 It is well-established in this province that the *C.P.A.* cannot interfere with the substantive right of a defendant to have its liability established based on proof through evidence and not by statistical probability based on the behaviour of others: see *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844 (Ont. Div. Ct.) at para. 25, which reversed (1999), 45 O.R. (3d) 29 (Ont. S.C.J.), aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.); *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 379, [2002] O.J. No. 2362 (Ont. S.C.J.); *2038724*

Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (Ont. S.C.J.); rev'd on other grounds, [2009] O.J. No. 1874 (Ont. Div. Ct.), aff'd [2010] O.J. No. 2683 (Ont. C.A.), leave to appeal to S.C.C. ref'd (2011), [2010] S.C.C.A. No. 348 (S.C.C.); *Risorto v. State Farm Mutual Automobile Insurance Co.*, above; *Parsons v. Canadian Red Cross Society* (2000), 51 O.R. (3d) 261, [2000] O.J. No. 4557 (Ont. S.C.J.); *Dennis v. Ontario Lottery & Gaming Corp.*, 2010 ONSC 1332, [2010] O.J. No. 1223 (Ont. S.C.J.) at paras. 187-231, affd 2011 ONSC 7024 (Ont. Div. Ct.).

151 In *Dennis*, Cullity J. observed at paras. 211 to 213:

> The statistical evidence based on sampling to which Dr Williams referred — and on which plaintiffs' counsel relied — is not, in my opinion, admissible for the purpose of determining commonality of the five of the proposed common issues on which OLGC's liability depends. To ascribe commonality to such issues on the basis of such evidence would be to assert that OLGC's liability, or elements affecting its liability — other than proof of damages or the amount of a monetary award — can be determined on the basis of statistical probability.
>
> Commonality presupposes that the same, or some of the same, material issues of fact or law that will assist in establishing the claims of each class member — and the liability of OLGC — can be decided at the trial of the proposed common issues. The CPA does not permit the requirement of commonality to be avoided by a statistical estimate that 87% of the class members were pathological problem gamblers, or that there was an 87% statistical probability that each class member was a pathological problem gambler. It is a procedural statute and it does not abrogate the requirement that a defendant can be found liable only to those persons who can prove their claims.
>
> Accordingly, it has been held that the statute does not permit the liability of a defendant, or the entitlement of a class member, to be determined on the basis of statistical probabilities based on the behaviour of other persons: *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.); *2038724 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2008] O.J. No. 833 (S.C.J.); rev'd on other grounds, [2009] O.J. No. 1874 (Div. Ct.); *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 51 O.R. (3d) 261 (S.C.J.).

152 The decision was upheld by the Divisional Court (Wilson J. dissenting), which observed at para. 46:

> I agree with the motions judge's conclusion that the plaintiffs' use of the statistical evidence offered by Dr. Williams was to advance the proposition that liability of the OLGC is determinable by statistical probability. The motions judge correctly observed that the CPA does not permit the requirement of commonality to be avoided by statistical estimates of probability of commonality. Nor is the requirement of proof of liability at common law permitted to be replaced by statistical evidence of likelihood of liability.

153 Section 23 of the *C.P.A.* permits the use of statistical evidence and sampling "[F]or the purposes of determining issues relating to the amount or distribution of a monetary award under this Act ..." It does not permit the use of sampling or statistics for the purpose of determining liability.

154 Similarly, section 24 permits an "aggregate assessment of monetary relief," but only if there are no other issues of fact or law to be resolved.

155 Neither of these provisions would assist the plaintiffs or permit the use of statistical evidence for the purpose of determining liability.

156 The plaintiffs rely on *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, [1996] S.C.J. No. 90 (S.C.C.) and *Barrette c. Ciment du St-Laurent inc.*, [2008] 3 S.C.R. 392, [2008] S.C.J. No. 65 (S.C.C.), which they say are similar to the approach taken in the United States cases in which Dr. Drogin has testified.

157 In *l'hôpital St-Ferdinand*, a class action was brought by the Public Curator on behalf of a proposed class of residents of a hospital for people with mental disabilities, alleging that employees at the hospital had engaged in unlawful strikes, thereby causing "moral prejudice" to the patients. One of the difficulties in the case was that, due to their disabilities, none of the patients themselves were able to testify. Evidence was given, however, by replacement workers and by expert witnesses. The trial judge was satisfied that this evidence established that all patients had at least suffered some "discomfort" as a result of the actions of the striking workers. This conclusion was upheld by the Court of Appeal and by the Supreme Court of Canada. In my view, the case simply illustrates that facts can be proven by indirect evidence in appropriate cases. The circumstances of that particular case made it impossible to rely on the direct evidence of the patients themselves.

158 *Barrette* was a class action involving a nuisance emanating from the defendant's cement plant. The Supreme Court simply acknowledged that, in an appropriate case, the court is entitled to draw from the evidence a presumption of fact that all members of the group have suffered a similar injury. In that case, the claim was for nuisance. Sixty-two residents residing in four designated zones near the defendant's cement plant described the annoyances, including dust, odours and noise that they had suffered as a result of the operation of the plant. The trial judge was able to find that all members of the proposed class suffered a common injury that varied in intensity between zones. In that case, it could reasonably be assumed that, if the residents of two houses in the same block experienced smells, dust and noise, it was not necessary to receive evidence from every single resident of the street. Liability — the nuisance — could be established through the evidence of some residents. The case reflects the obvious point that, in an appropriate case, a plaintiff can prove that members of a particular group have suffered a similar and common injury without adducing evidence from every member of the group.

159 With respect, I do not see anything in either of these two decisions of the Supreme Court of Canada that comes even close to endorsing the methodology proposed by Dr. Drogin. Indeed, in the *l'hôpital St-Ferdinand* case, the Supreme Court observed at para. 33 that "in the context of an action in civil liability brought in the form of a class action, the elements of fault, prejudice and causal connection must be established in respect of the members of the group, by the normal evidentiary rules." This observation was repeated in *Barrette* at para. 108.

160 The *Chibber* and *Duran* cases and the *Syndicat national des employés de l'hôpital St-Ferdinand* and *Barrette* cases serve to illustrate why this case is not suitable for class action treatment. In those cases, it was the commonality of the circumstances of the class that permitted the evidence of some class members (or in the hospital case, the evidence of others on their behalf) to be extrapolated to the experience of all. This is, of course, the essence of the commonality requirement — duplication of fact-finding is avoided, because the facts found can be fairly applied to the resolution of the claims of all members of the class. In order to achieve fair and accurate results, however, it must be determined that there is, in fact, commonality. That factor is not present here.

161 Although the plaintiffs disagree with the reasoning that led Justice Perell to adopt an alternative approach in *McCracken* and submit that Dr. Drogin's methodology is superior, they submit, in the alternative, that the approach in *McCracken* could be used here. In that case, as I have noted, Justice Perell found that although overtime eligibility could not be determined on a class-wide basis, it would be possible to determine the minimum standards for being a manager at CN. This determination would make it possible to weed out those who clearly were and clearly were not managers and to engage

in a more intensive analysis of the latter group. The certification decision in *McCracken* was the subject of an application for leave to appeal to the Divisional Court. In granting leave, Jennings J. stated that he had reason to doubt the correctness of the certification of the common issue. Since that time, the appeal of the certification decision has been consolidated with an appeal to the Court of Appeal from the rule 21 order.

162 On a factual level, this case is different from *McCracken*, given the array of positions, duties and job descriptions that fall within the "analyst" category and the lack of homogeneity of responsibilities even within the same job titles. Apart from that, I have two concerns. First, I am not satisfied that, in this case, it is possible to give a useful benchmarking answer to the question: "what are the minimum requirements to be a managerial employee at CIBC?" The case law to which I have referred suggests that the inquiry of whether someone is a manager is nuanced and requires an examination of the employee, the job and the context. I am not satisfied, on the evidence before me, that this question is capable of a useful answer in this case.

163 Second, I am not satisfied that the ascertainment of such minimum requirements would advance the inquiry in this case. It would remain necessary to examine the particular circumstances of every employee in order to see whether he or she met the benchmark for overtime eligibility.

164 I have considered whether there is any other reasonable alternative that might assist the plaintiffs in this case. One possibility that occurred to me, and which the plaintiffs have now proposed in their further submissions, is that each written job description could be examined to determine whether the position was properly classified as exempt or eligible. However, I have concluded that this option would not be viable. As I have noted, there are 52 job descriptions applicable to "analyst" job titles. These descriptions have varied over time. There are no specific job descriptions attached to the many "analyst" business titles. The best one might do is cross-reference the business title to the person's job title and then look at the corresponding job description. As the examples given earlier demonstrate, however, many job descriptions contemplate that the incumbent may or may not have managerial or supervisory duties depending on the circumstances. The case law establishes that a person's job description is not conclusive of the issue and the evidence in this case clearly establishes that the generic job description is not a useful indicator of the employee's actual responsibilities. Ultimately, the exercise would require the examination of individual circumstances.

165 In an attempt to determine whether there is any possibility of finding common issues that might advance the claims of class members and be capable of resolution in a fair, efficient and manageable way, I asked the parties for further written submissions in response to the following question:

> Assuming that I find that Dr. Drogin's methodology is not a fair and workable method of resolving the common issues of eligibility for overtime and breach of contract, how do the plaintiffs say that these issues can be resolved? More particularly, what are the common issues of fact, how would the plaintiffs propose to resolve them at a common issues trial and how is a class action a fair, efficient and manageable procedure for doing so?

166 As I have said earlier, instead of answering these questions and only these questions, the plaintiff took my questions as an invitation to re-argue the certification motion and to re-cast the common issues.

167 The plaintiffs replied that the common job descriptions, together with the criteria used by CIBC to assess overtime eligibility for each job title, could provide a basis for "presumptions" regarding overtime eligibility. The plaintiffs went on to say that "[T]o the extent that the Court requires individual evidence from class members regarding the job duties performed

in a particular role, this can be dealt with in a streamlined, efficient manner. Using [sic] s. 25 of the *Class Proceedings Act, 1992*, or procedures similar thereto." Section 25 permits the Court to establish procedures for the resolution of individual issues *after* the determination of the common issues in favour of the class. It is predicated on the assumption that at least one common issue has been resolved in favour of the class.

168 The plaintiffs elaborated as follows. They say that CIBC's overtime policy essentially determines the overtime eligibility of all employees based on their job level. The pre-2006 policy applicable to Operations employees flatly provided that all employees classified as level 6 and above were not eligible for overtime. The post-2006 Overtime Policy provided that "as a general rule, all roles evaluated at level 7 and above, all people management roles and specific roles deemed to be management functions are designated as exempt." As noted earlier, the policy added:

> This exemption is based on an analysis of a number of factors and criteria such as level of responsibility, impact, overall compensation, autonomy, authority, complexity and span of control related to the job.

169 The plaintiffs add that since 2006, every job title in the CIBC system has been categorized as either eligible or ineligible for overtime.

170 The plaintiffs say that the Court can use CIBC's very own method to determine eligibility for overtime, at least on a presumptive basis, that is, on the basis of job levels, job titles and job descriptions, to evaluate whether CIBC's determinations are compliant with the *ESA 2000* or the *Code*. In effect, they say that CIBC is being cute when it suggests that individual determinations of eligibility are necessary, because CIBC itself does not make individual determinations when it determines eligibility solely on the basis of job level, job title and job descriptions. The plaintiffs say that CIBC's "Manager Guidelines," instructing managers about their responsibilities under the post-2006 overtime policy, simply reference the job levels and job codes attached to job titles. The guidelines actually state:

> Eligibility- generally, employees in job levels 1-6, except those considered to be management, are eligible for overtime pay. Refer to Appendix C for a list of job codes that are ineligible for overtime.

171 The appendix lists three level 5 job codes and titles (Customer Service Mgr. II, Manager I Branch Banking and Client Service Manager Retail) and eleven level 6 job codes and titles that are ineligible for overtime. Included in the level 6 job titles ineligible for overtime are the Associate Investment Advisor Position and a position described as "World Markets Professional Analyst."

172 The appendix also indicates, however, that questions of eligibility for level 6 employees with some managerial responsibilities may require resolution on an individual basis. In these cases, employees can proceed through consultation with their manager or supervisor or through the human resources or employee relations departments.

173 The plaintiffs say that whether CIBC's "categorical," — as opposed to "individual" — approach is permissible under the *ESA* and *Code* can be determined as a common issue, as can the question of whether the determination was done according to appropriate criteria, without the need to examine the individual circumstances of class members.

174 The plaintiffs' supplemental submissions argue that all analysts have common duties and that all Investment Advisors have common duties. They say that the "analyst" group "includes employees who analyze and process information to support various business processes" and that each analyst will have a job description that "describes the functions of that role, including whether there are managerial functions, and is applicable to every employee in that role." The plaintiffs make a similar submission with respect to Investment Advisors. They say that the primary responsibilities of Investment Advisors do not vary from person to person — they provide investment advice and services to clients and buy and sell securities on behalf of clients. The focus of their responsibilities is servicing clients of CIBC and not managerial responsibilities. The plaintiffs say that because CIBC has treated the overtime eligibility of Investment Advisors as an "all or nothing" proposition (if one is ineligible for overtime, then all are ineligible), it becomes a common issue, "which would determine liability one way or the other."

175 In my view, this last submission exposes the fundamental problem in this case and the fundamental flaw in the plaintiffs' logic. The answer to the question: "Are Investment Advisors managers?" simply cannot be answered in common. The answer must be: "It depends." While in my view, there may be a strong argument that the autonomy, responsibilities and method of remuneration of Investment Advisors points in the direction of their positions being managerial, it is possible, as CIBC in fact acknowledges, that some individuals might be considered as eligible for overtime. But the answer to the question would require in each case an individual granular analysis.

176 The same must be true of the hundreds of "analyst" job titles and business titles. The fact that they all "analyze" tells only a fraction of the story.

177 The remaining common issues originally proposed by the plaintiffs are set out below:

(c) Did the Defendant owe contractual duties to the Class Members and/or statutory duties to:

(i) ensure that Class Members were properly classified as entitled to overtime pay pursuant to the ESA and/or the Code?

(ii) advise Class Members of their entitlement to overtime pay for hours worked in excess of the standard hours of work?

(iii) ensure that the Class Members' hours of work were monitored and accurately recorded?

(iv) ensure that Class Members were compensated for hours worked in excess of the standard hours of work in accordance with the ESA and/or the Code?

(d) Did the defendant breach any of their contractual duties or statutory duties? If so, how?

(e) Unjust enrichment: Was the defendant unjustly enriched by failing to compensate Class Members with overtime pay for hours worked in excess of their standard hours of work?

(f) Aggregate Damages: If the defendant breached its duties to the Class or was unjustly enriched, can damages be assessed on an aggregate basis? If so, in what amount?

(g) Punitive Damages: Are the Class Members entitled to an award of aggravated, exemplary or punitive damages based on the defendants' conduct. If so, in what amount?

178 The resolution of common issue (c) would not advance the claims of class members in the absence of a resolution of the eligibility common issue. Common issue (d), the breach issue, would be incapable of resolution on a common basis for the same reasons as the eligibility issue. Without answers to the eligibility and breach issues, the other proposed common issues do not sufficiently advance the inquiry.

179 The plaintiffs' further submissions added additional common issues. They now suggest that new common *legal* issues can be addressed about:

(a) whether an employer is entitled to create a classification scheme that excludes employees from overtime based on job level without consideration of the job functions of the particular job;

(b) whether an employer is entitled to create an overtime classification scheme, which considers the job functions of a particular job title;

(c) what steps an employer must take to ensure that all managers are aware of the factors that would make an employee exempt from overtime and what oversight of managers an employer is required to exercise in this regard;

(d) whether it is permissible for an overtime policy to provide that overtime hours will be paid only if they have been pre-approved; and

(e) what steps the employer must take to monitor and record its employees' working hours and the consequences of failing to do so.

180 The plaintiffs now assert that once the employer's duties have been established by answering the above questions, the court would determine whether CIBC's system met these legal requirements and whether CIBC systematically breached its duties:

(a) by properly considering the job functions attached to job titles when it established its overtime classification scheme and, if so, whether the functions properly resulted in the exclusion of employees from overtime eligibility;

(b) by ensuring that the roles actually performed by employees matched the job descriptions;

(c) by failing to develop overtime policies and managerial guidelines that were in accordance with the *ESA 2000* and the *Code*;

(d) by appropriately giving managers discretion to override the requirements of the overtime policy and monitoring that discretion;

(e) by requiring that overtime be pre-approved.

181 As I stated earlier, it is my impression that these questions are being posed because this class action is incapable of determining which class members are eligible for overtime and which are not. A class action is not meant to be a commission of inquiry into how the defendant conducts its business. It is meant to resolve legal claims.

182 In their supplementary submissions, the plaintiffs added a question asking whether, if CIBC owes class members contractual or statutory duties to ensure that they are properly classified regarding eligibility for overtime:

> (a) What overtime classification system is permissible and, in this context, what are the minimum requirements for a role to meet the managerial exemption under the *ESA* or the *Code?*
>
> (b) What steps, in any, must be taken to ensure that the employees actually perform the functions upon which the overtime classification is based?

It strikes me that these are not appropriate common issues. It is not the court's responsibility to design an overtime classification system for CIBC. The answer to these common issues does not help to resolve the claims of class members.

183 In their further submissions, the plaintiffs submitted that once the Supplementary Common Issues had been determined, the court would consider the issue of "whether particular job titles held by the class members were correctly excluded by the defendants from overtime pay." The plaintiffs say that the court would consider the following common evidence: (a) the functions that CIBC considered were common to each job title when it made determinations about which job titles were eligible for overtime; (b) with respect to analysts, the job descriptions that apply to each analyst job title and the nature and extent of any managerial duties attached to the position; and (c) with respect to Investment Advisors, the "common job function and approach with respect to investment advisors."

184 The plaintiffs say that this analysis could lead to a "rebuttable presumption" that certain job titles are managerial and others are non-managerial. But, in some cases, this presumption could not be made without further evidence — that is, some job titles might be "on the margin" with respect to the extent of the managerial duties. If necessary, to resolve this issue, the plaintiffs propose that "a sample of employees could be called as witnesses to supplement the evidence with respect to job titles for which a presumption is not possible." The plaintiffs note that the onus would be on CIBC, as the employer, to prove that an employee is a manager and therefore ineligible. They say, "If the defendants wish to challenge a presumption of overtime eligibility, they could call witnesses to do so." In my view, this analysis veers away from a common issues inquiry, towards a free-wheeling investigation about how CIBC does its business.

185 The plaintiffs then say that if common determinations with respect to eligibility cannot be made, there will be individual determinations:

> If after hearing all the above evidence, the Court is of the view that common determinations with respect to eligibility cannot be made for employees in particular job titles, the Court could require individual determinations pursuant to section 25 of the *CPA*. The Court has wide discretion to streamline these proceedings to permit the efficient determination of overtime eligibility, which is a relatively narrow and simple issue. The Court will have already established the factors or test which must be used to determine managerial status is these circumstances which can then be applied to the individuals in streamlined proceedings. All of the systemic and common evidence pertaining to the manner in which the defendants manage their employees will have already been advanced and need not be repeated in each individual reference.

186 In other words, the plaintiffs are saying that there may well need to be individual references to determine eligibility. There will have to be further individual references to determine whether they worked overtime and if so, how much.

187 In summary, the plaintiffs say that based on (a) common job descriptions setting out the duties of analysts in specific job titles; (b) common job duties of Investment Advisors and Associate Investment Advisors; (c) common treatment by CIBC through its overtime classification system; and (d) the common legal requirements to meet the managerial exemption under

the legislation, overtime eligibility can be determined as a common issue in a fair, efficient and manageable manner. They say that to the extent individual evidence is required, a sampling of class members in particular jobs can be taken, or section 25 can be used for "streamlined" individual references.

188 I now turn to the preferable procedure requirement in s. 5(1)(d) of the *C.P.A.*

(d) Preferable Procedure

189 Section 5(1)(d) of the *C.P.A.* requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The analysis must consider whether a class proceeding is a "fair, efficient and manageable method of advancing the claim" as a whole: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, [2005] O.J. No. 4918 (Ont. C.A.), per Rosenberg J.A. at para. 67. In *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 (Ont. C.A.), Rosenberg J.A. observed at para. 69:

> ... "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute ...

190 This requires that the court have regard not only to the availability of other procedures for resolving the claims of class members, but also to the goals and advantages of a class action, namely, access to justice, judicial economy and behaviour modification. It also requires that the court consider the importance of the common issues in the context of all the issues. In *Fresco*, Lax J. observed at para. 94:

> 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: *Hollick* at para. 29. The preferability requirement can be met even where there are substantial individual issues, but a class proceeding will not satisfy the requirement that it is the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

191 The plaintiffs say that, as in *Fresco*, *Fulawka* and *McCracken*, a class action will allow class members to overcome barriers to access to justice. They say that it is the only effective way of ensuring that they can obtain fair compensation for the overtime that has been exacted from them by CIBC.

192 I observed in *Fulawka* at para. 145 that misclassification cases are appropriate for certification due to the "commonality of the employment functions and common treatment by the employer." In so doing, I referred to the observation of Lax J. in *Fresco* at para. 54. The full observation of Lax J. was as follows:

> A useful place to begin is to compare the kind of claim that is advanced in this proceeding with the kind of claims that are advanced in the misclassification cases. In those cases, commonality arises from the employees' identical or similar job duties and the determination by the employer that it is not required to pay overtime to employees with these duties. The question for the common issues judge is whether the employees' duties entitle them to overtime within the meaning of the applicable statutes and regulations. This can be assessed without examining individual claims. Success for one

does mean success for all: *Western Canadian Shopping Centres Inc.* at para. 40.

[emphasis added.]

193 The difference between this case and the paradigm described by Lax J. is readily apparent — the analysts in this case do not have anything approaching "identical or similar duties." The same is true of Investment Advisors. The duties and responsibilities of Investment Advisors range from what might be described as administrative at one end of the spectrum to managerial and even entrepreneurial and independent at the other end.

194 As the plaintiffs note, class actions have been found to be the preferable procedure for the resolution of overtime claims relating to the *Code* or the *ESA* in *Fresco*, *Fulawka*, *McCracken*, and *Kumar*. In *Fulawka*, I found at paras. 162-164 that there were likely to be systemic barriers to employees asserting claims under the *Code* and that the anonymity they obtained in a class proceeding would be advantageous. I was also not satisfied that the remedies under the *Code* would be as effective. Moreover, the procedures under the federal and provincial legislation are tailored to individual complaints rather than to the resolution of common issues and collective redress.

195 I do not regard the potential need for individual assessments of damages as detracting from the preferability of a class action. Not only is this factor specifically excluded from consideration by s. 6.1 of the *C.P.A.*, but practical experience has shown that systems can be devised for the fair and efficient resolution of such issues. Indeed, in comparison to the complex inquiries that would be required to determine issues of individual liability and damages in products liability class actions, the inquiries in this action would be relatively simple.

196 In *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.), Perell J. approved a settlement of an overtime class action against a large public accounting and consulting firm. After the commencement of the class action, the employer had taken steps to voluntarily establish an "Overtime Redress Plan" to provide previously unpaid overtime to a group of over 10,000 current and former employees. The plan was subsequently adopted as the mechanism to resolve the claims asserted in the class action. The basic structure of the plan is described in the reasons of Perell J. approving the settlement. He noted that there was an elaborate process to determine claims for overtime, with a built-in mediation and arbitration process for claims that were not resolved on a summary basis. Perell J. found at para. 40 that the settlement was "fair, reasonable, adequate" and "in the best interests of the Class".

197 I noted in *Fulawka*, at paras. 30-35, that Scotiabank had revised its overtime policy to include, as eligible for overtime, a group of employees at "level 6" who had not previously been eligible for overtime. When this change was announced, Scotiabank implemented a retroactive claims process to compensate level 6 employees for the overtime hours they had worked without compensation. A summary claims procedure was established, under which employees completed claims forms, setting out particulars of the hours they had worked without compensation or time off *in lieu* and providing records, where available. Each employee's claim was then reviewed by a superior for its reasonableness, based on knowledge of the employee's circumstances, working hours and work environment. The superior was entitled to, but not required, to meet with the employee, current or former peers or other managers for additional information. Once this process was completed, the claim was reviewed by Scotiabank's Human Resources department. As I noted at paras. 33-34 of my reasons, the process was simple, expedited and effective:

The procedure was a simple and summary one. There was a compressed timetable for processing claims, which expected managers to complete their review of employee claims within a week and the human resources department to complete its review within three weeks. Any applicable payment requests were to be made within a month of the employee

submitting his or her claim.

Scotiabank paid out approximately $5 million to Level 6 employees under the retroactive claims process. This amount includes payments to employees who held jobs as Managers Customer Service or Managers Personal Banking as well as employees in the proposed Class holding jobs as an FA or AMSB. Approximately $3 million was paid to 455 employees who held positions as FA or AMSB.

198 What I take from Scotiabank's experience is that when a large financial institution wishes to retroactively correct unfairness caused by a misclassification of its employees, it is capable of doing so in a fair and efficient way.

199 The insurmountable impediment in this case, and the reason why the preferable procedure requirement has not been met, is that the issue of CIBC's liability to pay overtime to every class member is an individual issue. It will require individual fact-finding concerning the circumstances of every class member and the individual application of the relevant legal principles to those circumstances. A class action would not, therefore, be a fair, efficient and manageable way of advancing the claims of class members and it would not promote either access to justice or judicial economy.

200 Had I found that the issues of eligibility and breach of contract were capable of resolution on a common basis, I would have found that a class action was the preferable procedure for the resolution of the claims of analysts, for reasons similar to those expressed by Lax J. in *Fresco* and for the reasons I expressed in *Fulawka*.

201 I would not have done so with respect to the Investment Advisors and Associate Investment Advisors for two reasons. First, there is no evidence at all that any present or former Investment Advisor, other than Mr. Singer, has a concern about being paid overtime or that there are access to justice concerns in the case of Investment Advisors. Indeed, Mr. Singer's concern arose only as a result of his discussion with class counsel. The evidence adduced by CIBC establishes that if Investment Advisors work outside the 9 to 5 time frame, they do so as a matter of choice. They view themselves as entrepreneurs who are prepared to work long hours to build a book of business from which they will benefit in the long term.

202 The second reason is that, if there are a few Investment Advisors or Associate Investment Advisors, like Mr. Singer, who are seeking overtime, their claims would likely be substantial. Mr. Singer says that his claim is approximately $50,000 per year. The Simplified Procedure under the *Rules of Civil Procedure* would be an appropriate, efficient, expeditious and cost-effective way of conducting the fact-based enquiry that would be necessary to resolve the issue.

(e) Representative Plaintiffs

203 Section 5(1)(e) of the *C.P.A.* requires that that there be a representative plaintiff who would "fairly and adequately represent the interests of the class," has produced a workable litigation plan, and does not have a conflict with the interest of other class members on the common issues.

204 In *Hoffman v. Monsanto Canada Inc.*, [2005] S.J. No. 304 (Sask. Q.B.), leave to appeal granted [2005] S.J. No. 527 (Sask. C.A. [In Chambers]), aff'd [2007] S.J. No. 182 (Sask. C.A.), leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 347 (S.C.C.), G.A. Smith J. described the responsibilities of the representative plaintiff as follows at para. 337:

> The representative plaintiff under The Class Actions Act has the responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the Court.

205 In *Coulson v. Citigroup Global Markets Canada Inc.* [2010 CarswellOnt 1593 (Ont. S.C.J.)], Perell J. made a trenchant observation about the representative plaintiff issue in the context of the realities of class action litigation. He observed at paras. 157 and 158:

> I confess that from reading many certification decisions, from presiding at several myself, and from considering the argument in the case at bar, that there is often a surreal quality to the debate about whether the proposed representative plaintiff satisfies the fifth criteria for certification because the debate on both sides focuses on the personality and character traits of the representative plaintiff while ignoring or not mentioning what everybody knows, which is that the real brain and the real muscle of the class action is class counsel.
>
> As is well known, in many class actions, it is class counsel who initiates the lawyer/client relationship and who selects the representative plaintiff. This is not to say that the representative plaintiff is not a genuine plaintiff, he or she must be. Nor is it to say that the representative plaintiff must not be competent, diligent, vigilant, and committed to giving proper instructions to advance the class action on behalf of the class. The representative plaintiff must have these attributes. It is simply to say that if the access to justice concerns of the *Class Proceedings Act, 1992* are to be accomplished, the court should not subject the proposed representative plaintiff to the LSAT or some sort of Class Action Aptitude Test and should be skeptical of the defendant's arguments based on the personality of the candidate.

206 The defendants challenge the suitability of the proposed class representatives, Mr. Brown and Mr. Singer. They say that Mr. Brown left Canada for personal and family reasons and has provided no information about whether he will return. He refused to come to Canada to be cross-examined. They note my comments with respect to Mr. Singer, who put himself forward as a proposed representative plaintiff in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (Ont. S.C.J.). They say that Mr. Singer's credibility has been impaired and suggest that he and Mr. Brown are simply "benchwarmers" who will not exercise informed and independent judgment about the issues in this action.

207 I cannot help but note that Mr. Singer, who does reside in Canada, did not attend the certification motion. While the motion can hardly be described as high drama, it is disappointing that someone seeking to represent a class of 5,000 or more fellow employees would not attend court to demonstrate his interest in the proceeding and educate himself about the issues. I also note that Mr. Singer and Mr. Brown have never met or even spoken to each other to discuss the litigation that bears their names, demonstrating a troubling detachment from the proceeding.

208 In some cases, the Court's reservations about the adequacy of the representative plaintiff will be offset by the presence of competent and diligent counsel coupled with the oversight that will be provided by case management. This might well have been such a case, had I determined that the action was otherwise appropriate for certification.

209 Case management would not, however, resolve the shortcomings in the plaintiffs' litigation plan. I agree with the defendants' submission that the plan provides no feasible method for dealing with the individual nature of the eligibility determinations that must be made for every member of the class. The plaintiffs have failed to establish a realistic, efficient and workable procedure for the resolution of the central common issue of eligibility and the individual issues that will

necessarily remain.

IV. Conclusion

210 For the foregoing reasons, the motion for certification is dismissed. Costs may be addressed by written submissions to me, care of Judges' Administration, on a schedule to be agreed upon between counsel or at a case conference, if necessary.

Motion dismissed.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RESPONDENT, 0678786 B.C. LTD. (FORMERLY THE MCCANN FAMILY HOLDING CORPORATION)

MOTION FOR THE APPOINTMENT OF REPRESENTATIVE COUNSEL FOR THE CLASS ACTION

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Robert W. Staley (LSUC #27115J)
Raj Sahni (LSUC #42942U)
Jonathan Bell (LSUC #55457P)

Tel: 416-777-4856
Fax: 416-863-1716

Lawyers for 0678786 B.C. Ltd.