Court File No. 08-CV-42639CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

GRAHAME PLAUNT and KENNETH L.W. BOLAND

Plaintiffs

and

RENFREW POWER GENERATION INC.

Defendant

BOOK OF AUTHORITIES OF THE PLAINTIFFS
(Re Decertification Motion – January 25, 2017)

January 10, 2017

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2014 ONSC 1684
Ontario Superior Court of Justice

Ducharme v. Solarium De Paris Inc.

2014 CarswellOnt 3383, 2014 ONSC 1684, 238 A.C.W.S. (3d) 304

Doris Ducharme, Plaintiff and Solarium de Paris Inc., Defendant

Robert J. Smith J.

Heard: March 7, 2014
Judgment: March 20, 2014
Docket: Ottawa 06-CV-035171

Counsel: William J. Sammon, for Plaintiff
Brian C. Elkin, for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Contents of certification order

Plaintiff brought class action alleging negligence by defendant in design and manufacture of solariums — Plaintiff brought motion to settle certification order and notice to class — Defendant brought cross-motion to amend class definition, to remove representative plaintiff, and to decertify class action — Defendant's cross-motion dismissed — Fact that representative plaintiff's solarium had been demolished pursuant to order of buillding inspector was known by defendant for many years and did not change representative plaintiff's ability to claim damages on her behalf and on behalf of other class members — Representative plaintiff remained member of class who purchased solarium model as defined — Representative plaintiff had already been approved as acceptable representative plaintiff and there had been no material change — Issues of whether defendant owed duty of care in designing solariums, whether defendant was negligent in its design and manufacture of solariums, whether they posed risk to health and safety, whether defendant sold models knowing they were unsafe, and entitlement to punitive damages were all common issues applicable to all class members, including representative plaintiff.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Of notices

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

Plaintiff brought class action alleging negligence by defendant in design and manufacture of solariums — Plaintiff brought motion to settle certification order and notice to class — Defendant brought cross-motion to amend class definition, to remove representative plaintiff, and to decertify class action — Defendant's cross-motion dismissed — Fact that representative plaintiff's solarium had been demolished pursuant to order of buillding inspector was known by defendant for many years and did not change representative plaintiff's ability to claim damages on her behalf and on behalf of other class members — Representative plaintiff remained member of class who purchased solarium model as defined — Representative plaintiff had already been approved as acceptable representative plaintiff and there had been no material change — Issues of

whether defendant owed duty of care in designing solariums, whether defendant was negligent in its design and manufacture of solariums, whether they posed risk to health and safety, whether defendant sold models knowing they were unsafe, and entitlement to punitive damages were all common issues applicable to all class members, including representative plaintiff.

MOTION by plaintiff in class proceeding to settle terms of certification order and notice to class and to obtain orders with respect to costs; CROSS-MOTION by defendant to amend class definition, to remove representative plaintiff, and to decertify class action.

***Robert J. Smith J.*:**

1 The plaintiff has brought a motion to:

(a) Settle the certification order along with the notice to the class;

(b) Obtain an order to have the action proceed on an undefended basis if the two outstanding costs orders are not paid within 30 days; and

(c) Obtain an order to have the defendant pay $7,000 into his counsel's trust account as security for payment of its share of the cost of publishing the notice.

2 The defendant has brought a cross-motion seeking an order to:

(a) Amend the class definition to remove purchases of solariums and to refer to them instead as "All residents of Ontario who *own and use* a solarium model numbers..."

(b) Remove Doris Ducharme as the representative plaintiff because she no longer uses a solarium;

(c) Decertify the action as a class proceeding; and

(d) Require the plaintiff to disclose its fee arrangement in the notice to class members.

Unpaid Costs by the Defendant

3 The defendant did not object to an order that it pay the unpaid costs within 30 days. However, if the defendant fails to pay the outstanding costs within 30 days, the plaintiff may return this part of the motion and make written submissions within 10 days after default on the remedy sought, the defendant to have 10 days to respond, and the plaintiff to have 7 days to reply.

1. Should the Defendant be Ordered to pay $7,000 to his Counsel's Trust Account for His Share of the Costs to Publish Notice?

4 Given the defendant's reluctance to pay costs awards and the extensive delay in getting the action moving forward, the defendant is ordered to pay $7,000 into his counsel's trust account as security for payment of his share of the costs of publishing notice in the newspapers as agreed by the parties.

2. Should the Definition of Class Member be Amended from the "Purchases of...." to "Those who Own and Use Solarium

Models...”?

5 The defendant seeks to amend the definition of class member from “All residents of Ontario who, since on or after the 12th of November, 2004, purchased a solarium model numbers...” to “those Ontario residents who own and use a solarium model numbers...”.

6 The defendant expressed a concern that a solarium may have been gifted to its present owner and user. I do not find that this concern is justified and amounts to speculation on the part of the defendant that some of the solariums may have been gifted to their current owners. This possibility is unlikely and may be dealt with in the future if some of the solariums turn out to have been gifted.

7 The defendant also seeks to amend the class definition because it became aware from Dr. Pilette’s expert report that Ms. Ducharme had sold her home and moved into an apartment. If the proposed amendment was granted it would exclude the representative plaintiff from the class definition and require the appointment of a new representative plaintiff.

8 The plaintiff submits that the class definition of all those “Ontario residents who purchased a solarium model numbers...” has been the same since the class proceeding was commenced and approved on appeal to the Divisional Court several years ago. The defendant did not appeal further and this issue has been settled. I agree with the submission.

9 The plaintiff further submits that the class definition of anyone who “purchased a solarium model numbers...” includes both the original purchaser and any subsequent purchaser of a solarium or a structure to which a solarium is attached. I agree with the plaintiff’s submissions and find that the definition as approved by Charbonneau J. and the Divisional Court is acceptable as ordered.

10 The defendant’s final argument is that they have only recently discovered that Ms. Ducharme was not using her solarium and had sold her home. However the defendant was always aware that Ms. Ducharme had purchased a solarium, installed it at her residence, and then was ordered to take it down by the Building Inspector for Renfrew County. As a result, the defendant has always been aware of the evidence that Ms. Ducharme was not using her solarium because she was ordered to remove it. This is not new or fresh evidence as this was the situation from the outset.

11 Ms. Ducharme’s damages have crystalized and the damages are an individual issue in any event. The common issues of whether the defendant owed a duty of care in designing the solarium, whether the defendant was negligent in its design and manufacture, whether they pose a risk to health and safety, whether the defendant sold the models knowing they were unsafe and if class members are entitled to punitive damages are all common issues that are applicable to all class members including Ms. Duscharme.

12 Common Issue 4(a), related to question 2 and 3 also applies to whether Ms. Ducharme’s solarium had to be demolished. The answer to question 4(a) will assist in determining the damages for all members of the class as well as for Ms. Ducharme.

Deposition of Issue #3

13 For the above noted reasons the defendant’s motion to amend the definition of the class is dismissed.

3. Should Ms. Ducharme be Removed as Representative Plaintiff?

14 As I have refused the defendant’s motion to amend the definition of a class member to exclude Ms. Ducharme, she remains a member of the class who purchased a solarium model as defined. In addition she has already been approved as an acceptable representative plaintiff and there has been no material change, as a result the defendant’s motion to have her removed as the representative plaintiff is dismissed.

4. Should the Class-Proceeding be Decertified?

15 The defendant has not presented any fresh evidence which would justify decertifying the class-proceeding which has been approved by the Divisional Court. The fact that Ms. Ducharme's solarium was demolished pursuant to the order of the Renfrew Building Inspector has been known by the defendant for many years and does not change her ability to claim for damages on her behalf and also on behalf of other class members. There has been no material change or fresh evidence and so the defendant's motion is dismissed.

5. Should the Order and Notice to the Class be Approved as Submitted?

16 The defendant's main objections were in changing the definition of class members to one that would exclude Ms. Ducharme, and therefore require her removal as the representative plaintiff. In his letter dated January 8, 2014, the defendant listed a number of objections to the wording of the proposed notice to class. The plaintiff has made some of the suggested amendments.

17 For reasons given previously the definition of class member remains as stated in paragraph 2 of the order. I agree with the submission of the plaintiff that the subsequent purchasers of a residence would acquire the solarium and would be included in the class definition as a purchaser of a solarium.

18 I find that paras. 4 and 5 of the proposed order provide an adequate summary of the plaintiff's claim.

19 Para. 6, setting out the common issues, is approved and para. 10, outlining the method for opting out of the class proceeding, is also approved. The order as submitted at this hearing is approved.

Notice to Class

20 Most of the defendant's objections to the notice to the class, attached as Schedule A to the draft order were addressed when settling the order.

Financial Details

21 The defendant expresses concern that the notice does not adverse class members of the financial arrangement in a manner that is sufficiently detailed. The notice sets out the financial consequences to class members. The notice states that the fees are on a contingency basis. The legal fees charged will have to be approved by the Court in any event, which will ensure that the fees charged are fair and reasonable to class members.

22 To ensure that class members are fully informed the following sentence should be added: "*Any member of the class will be provided with a copy of the retainer agreement with the representation plaintiff on request*". The above sentence shall be added in the second paragraph of the notice at the top of page 3, after the sentence "any fees charged by the lawyers for the representative plaintiff must be approved by the Court".

Costs

23 If the parties are unable to agree on costs, the plaintiff is to make brief submissions on costs within 10 days, the defendant is to have 10 days to respond and the plaintiff will have 7 days to reply.

Order accordingly.

End of Document

2014 ONSC 1684, 2014 CarswellOnt 3383, 238 A.C.W.S. (3d) 304

2007 BCSC 800
British Columbia Supreme Court

Barbour v. University of British Columbia

2007 CarswellBC 1282, 2007 BCSC 800, [2007] B.C.J. No. 1216, [2008] B.C.W.L.D. 906, [2008] B.C.W.L.D. 907

Daniel S. Barbour (Plaintiff) and The University of British Columbia (Defendant)

R.B.T. Goepel J.

Heard: April 23-May 10, 2007
Judgment: June 5, 2007
Docket: Vancouver L050032

Counsel: S.D. Matthews, R. Mogerman for Plaintiff
D.G. Cowper, Q.C., R. Berrow, D. Ullrich for Defendant

Subject: Civil Practice and Procedure; Public

Headnote

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

University enacted parking regulations, including provisions for offences and penalties — Plaintiff's application for certification of class proceeding challenging parking regulations was granted — University brought application to decertify class action — Plaintiff brought application for reconsideration regarding bifurcation concerning remedies — University's application dismissed and plaintiff's application granted in part — There were common issues regarding university's power to make regulations, university's ability to collect amount equivalent to fines through contract or common law proprietary rights, entitlement of plaintiff and class members to public law restitution and pre-judgment interest, and limitation periods — Issues of individual class members would not overwhelm common issues — Class proceeding was still preferred procedure.

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

University enacted parking regulations, including provisions for offences and penalties — Plaintiff's application for certification of class proceeding challenging parking regulations was granted — University filed statement of defence — University brought application to decertify class action — Plaintiff brought application for reconsideration regarding bifurcation concerning remedies — University's application dismissed and plaintiff's application granted in part — Whether parking regulations were, in whole or part, ultra vires was common issue — Whether university could collect fees based on contract or common law proprietary rights was common issue — Whether there was entitlement to public law restitution for amount of parking fines regardless of any juristic reason for collection of fines, subject only to possible Limitation Act defences, was common issue — Determination of limitation period for restitution claims and availability of pre-judgment interest were common issues — Remedies and balancing of equities between each class member had to await outcome of common issues trial as, aside from criminal context or possible extension of public law restitution, equitable and set off defences needed to be considered regarding each class member's entitlement to restitution.

Table of Authorities

Cases considered by *R.B.T. Goepel J.*:

Fern Investments Ltd. v. Golden Nugget Restaurant (1987) Ltd. (1994), 1994 CarswellAlta 128, 19 Alta. L.R. (3d) 442, 149 A.R. 303, 63 W.A.C. 303 (Alta. C.A.) — referred to

Kilroy v. A OK Payday Loans Inc. (2007), 2007 BCCA 231, 2007 CarswellBC 842 (B.C. C.A.) — distinguished

Kingstreet Investments Ltd. v. New Brunswick (Department of Finance) (2007), 2007 CarswellNB 6, 2007 CarswellNB 7, 2007 SCC 1, 355 N.R. 336, 25 B.L.R. (4th) 1, 51 Admin. L.R. (4th) 184, 2007 D.T.C. 5041 (Fr.), 2007 D.T.C. 5029 (Eng.), 276 D.L.R. (4th) 342, 309 N.B.R. (2d) 255, 799 A.P.R. 255 (S.C.C.) — considered

MacKinnon v. National Money Mart Co. (2007), 2007 BCSC 348, 2007 CarswellBC 561 (B.C. S.C.) — distinguished

Markson v. MBNA Canada Bank (2007), 2007 ONCA 334, 2007 CarswellOnt 2716 (Ont. C.A.) — distinguished

Pacific National Investments Ltd. v. Victoria (City) (2000), [2000] 2 S.C.R. 919, 144 B.C.A.C. 203, 236 W.A.C. 203, 2000 SCC 64, 2000 CarswellBC 2439, 2000 CarswellBC 2441, [2001] 3 W.W.R. 1, 83 B.C.L.R. (3d) 207, 263 N.R. 1, 193 D.L.R. (4th) 385, 15 M.P.L.R. (3d) 1 (S.C.C.) — referred to

Pacific National Investments Ltd. v. Victoria (City) (2004), 34 B.C.L.R. (4th) 1, 327 N.R. 100, [2004] 3 S.C.R. 575, 206 B.C.A.C. 99, 338 W.A.C. 99, 42 C.L.R. (3d) 76, [2005] 3 W.W.R. 1, 3 M.P.L.R. (4th) 1, 2004 SCC 75, 2004 CarswellBC 2673, 2004 CarswellBC 2674, 245 D.L.R. (4th) 211 (S.C.C.) — referred to

Parsons v. Coast Capital Savings Credit Union (2007), 2007 BCCA 247, 2007 CarswellBC 901 (B.C. C.A.) — distinguished

Statutes considered:

Class Proceedings Act, R.S.B.C. 1996, c. 50
s. 10(1) — referred to

Court Order Interest Act, R.S.B.C. 1996, c. 79
Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Limitation Act, R.S.B.C. 1996, c. 266
Generally — referred to

University Act, R.S.B.C. 1996, c. 468
Generally — referred to

s. 27(1) — referred to

s. 27(2)(t) — referred to

APPLICATION by university to decertify class action, arising out of dispute over university's parking regulation fines; APPLICATION by plaintiff for reconsideration of conclusion that question of remedy had to await conclusion of common issues trial.

***R.B.T. Goepel J.*:**

Introduction

1 The University of British Columbia ("UBC") is a university incorporated pursuant to the *University Act*, R.S.B.C. 1996, c. 468 (the "*Act*"). Section 27(1) of the *Act* vests the management, administration and control of the property, revenue, business and affairs of the university in its Board of Governors (the "Board"). Pursuant to s. 27(2) (t) of the *Act*, the Board is given the power "to control vehicle and pedestrian traffic on the university campus".

2 The Board enacted the UBC Parking Regulations (the "Parking Regulations") and made them effective as of September 1, 1990. The Parking Regulations contain provisions governing vehicle traffic on campus including the parking of cars. The Parking Regulations include provisions regarding offences, penalties, enforcements and appeals.

3 The plaintiff brings this action on his own behalf and on behalf of all persons from whom UBC collected fines and related towing fees, storing charges, administrative fees and/or other expenses and monies (the "Parking Regulation Fines") from September 1, 1990 to the present (the "Class"). The plaintiff alleges that the enforcement provisions of the Parking Regulations are unlawful because they are *ultra vires* UBC's delegated legislative authority. The plaintiff seeks restitution of and the constructive trust over, the collected Parking Regulation Fines.

The Certification Decision

4 In Reasons for Judgment found at 2006 BCSC 1897 (B.C. S.C.), I certified the action as a class proceeding (the "certification decision"). I found the common issues to be:

1. Are the Parking Regulations *ultra vires* the legislative powers delegated to UBC and of no force and effect?

2. Did UBC unlawfully collect the Parking Regulation Fines?

5 At the time of the certification hearing, UBC had not yet filed its statement of defence. In my reasons, I suggested that if the potential defences outlined in submissions were pled, they may shed an entirely different light on the proceedings and the court would have to determine how to proceed and could even withdraw leave to have the claim proceed as a class action. I held that once the statement of defence was filed, counsel would be at liberty to make submissions as to the precise framing

of the common issues.

6 UBC has appealed the certification decision.

The Statement of Defence

7 UBC has now filed its statement of defence. In its defence, UBC first pleads that the Parking Regulations are *intra vires* the powers vested in the Board pursuant to the *Act*. Alternatively, it pleads that if the Parking Regulations are *ultra vires*, there exist various private law justifications for the enforcement of the Parking Regulations and UBC's collection and retention of the Parking Regulation Fines. The private law justifications asserted in the statement of defence are, in summary, that:

> (a) UBC entered into contracts or licences with the Class members, in various ways, incorporating the Parking Regulations or giving UBC the right to collect the Parking Regulation Fines;
>
> (b) UBC's common law proprietary rights as the owner of the UBC campus, in trespass and nuisance, entitle UBC to collect and retain the Parking Regulation Fines as damages, and to tow vehicles parked on UBC property without consent or in such a way as to constitute a nuisance;
>
> (c) UBC is entitled to set off, against the claim of each Class member who used parking services without payment, or committed a trespass or nuisance; and
>
> (d) Class members who used parking services without payment, or committed a trespass or nuisance, come to the court with unclean hands and are not entitled to the relief sought (i.e., their conduct constitutes a juridical reason for UBC to retain the amounts collected).

The Reply

8 In reply, the plaintiff does not challenge UBC's ability to charge for parking or to make rules governing where vehicles may be parked on UBC property. Nor does the plaintiff deny that, apart from the Parking Regulations, UBC as a landowner has the contractual powers and proprietary rights, which normally accompany the ownership of real property. The reply does assert that if the Parking Regulations are *ultra vires* as a matter of public law, UBC cannot incorporate them into contracts and licences or rely on its private law contractual and proprietary powers for the collection and retention of the Parking Regulation Fines. The plaintiff submits that contracts and licenses cannot include penalty provisions and that common law proprietary rights do not include the right to levy and collect the Parking Regulation Fines.

The Applications

9 UBC now applies to have the action decertified. Alternatively, it submits that the common issues should be reframed.

10 The plaintiff applies for reconsideration of my conclusion that the question of remedy must await conclusion of the common issues trial. He submits this issue should be revisited in light of the Supreme Court of Canada's recent decision in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1 (S.C.C.) and the decisions in *MacKinnon v. National Money Mart Co.*, 2007 BCSC 348 (B.C. S.C.), *Kilroy v. A OK Payday Loans Inc.*, 2007 BCCA 231 (B.C. C.A.), *Parsons v. Coast Capital Savings Credit Union*, 2007 BCCA 247 (B.C. C.A.) and *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.), all of which have been handed down subsequent to the certification decision.

11 The parties also apply to settle the litigation plan and notice.

Position of the Parties

12 The plaintiff submits that the statement of defence raises no individual issues that were not contemplated at the certification hearing and that the preferability analysis set out in the certification decision should not now be disturbed. He notes that the certification decision was not premised on their being no individual issues. He submits that the new pleadings do allow the common issues to be stated with greater precision.

13 The plaintiff relies in particular on my comments at ¶ 66-75 of the certification decision, discussing preferability and my conclusion that the determination of the common issues will move the proceeding forward significantly, serve judicial economy, improve access to justice and serve to modify wrongful behaviour.

14 It is common ground that the question of whether the enforcement provisions of the Parking Regulations are *ultra vires* the legislative powers delegated to UBC and of no force and effect, as a matter of public law, is a common issue (the "*ultra vires* issue"). UBC also agrees that the plaintiff's contention that the *Act* derogates from UBC's private law contractual and property rights (the "derogation issue") raises a further common issue.

15 UBC submits that the *ultra vires* issue and the derogation issue are the only truly common issues arising from the pleadings. It submits that the remaining issues arising from the pleadings are incapable of being resolved on a class basis and that the trial of the *ultra vires* and derogation issues would, at best for the plaintiff, create the need for extensive individual adjudication of the merits of each class member's claim.

16 In UBC's submission, the second issue identified in the certification decision, being "Did UBC unlawfully collect the fines?" subsumes a number of distinct issues which, UBC submits, will require individual assessment. In the circumstances, UBC submits that a class proceeding is not the preferable means of resolving the litigation and the action should be decertified.

The Common Issues

17 Whether the proceeding should now be decertified cannot be considered in a vacuum. I must first determine the appropriate common issues and then decide whether I am satisfied that a class proceeding remains the preferable procedure in this case.

18 The plaintiff submits that the common issues should be restated as follows:

> A. Are the University of British Columbia Parking Regulations *ultra vires* the legislative powers delegated to the University of British Columbia, and of no force and effect?
>
> B. Did the University of British Columbia unlawfully collect the Parking Regulation Fines?
>
> > (1) Can UBC enter into a contract that adopts *ultra vires* parking regulations or are such contracts also *ultra vires*, void and of no force and effect?
> >
> > (2) If the answer to (1) is yes, are all such contractual terms void and of no force and effect because they are in the nature of penalties?
> >
> > (3) If the answer to (1) is yes, and (2) is no, do the standard form contracts actually adopt the regulations?
> >
> > (4) Can UBC rely on a purported common law property right to collect fines and penalties and/or enforce an *ultra vires* regulation?
> >
> > (5) If it is possible to adopt the regulations by contract and UBC has done so, will the law allow UBC to set off its private law rights against the restitution claim for monies that it has collected pursuant to an *ultra vires* regulation?
>
> C. If the answer to (a) or (b) is yes, are the plaintiff and other Class Members entitled to public law restitution in the

amount of the Parking Regulation Fines, subject to applicable defences, if any, under the *Limitation Act*?

D. If the answer to (a) or (b) is yes, are the plaintiff and other Class Members entitled to restitution for unjust enrichment in the amount of the Parking Regulation Fines, subject to applicable defences, if any, under the *Limitation Act*?

E. If the answer to (c) or (d) is yes, are the plaintiff and other Class Members entitled to a remedial constructive trust in the amount of the Parking Regulation Fines, subject to applicable defences, if any, under the *Limitation Act*?

F. What limitation periods, if any, apply to the plaintiff's claims for restitution and a remedial constructive trust under (c), (d) and (e)?

G. Are the plaintiff and the Class Members entitled to prejudgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79?

19 UBC submits the common issues should be limited to the following:

1. Are the University of British Columbia Parking Regulations (the "Parking Regulations"), in whole or in part, *ultra vires* the public law powers delegated to the Board of governors (the "Board") of the University of British Columbia ("UBC") by the *University Act*, as amended?

2. Apart from UBC's public law powers pursuant to the *University Act*, can UBC:

(a) enter into valid and enforceable contractual licenses which incorporate the substance of the Parking Regulations; or

(b) rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of the Parking Regulation fines?

3. Is UBC's ability to manage its property, as described in 2(a) and (b), affected if the Parking Regulations are found to be *ultra vires*, in whole or in part, the public law powers of the Board?

20 UBC admits that the *ultra vires* issue and the derogation issue are issues of law common to all class members. Fundamental to UBC's position is its contention that, regardless of powers vested to it in the *Act*, it continues to have the private law contractual and proprietary rights that other landowners have in relation to parking. Pursuant to those powers, it can impose the enforcement provisions found in the Parking Regulations. The plaintiff challenges that contention and submits that UBC cannot adopt *ultra vires* powers as contractual terms. It relies on the decisions of the Supreme Court of Canada in *Pacific National Investments Ltd. v. Victoria (City)* (2000), 193 D.L.R. (4th) 385 (S.C.C.) and *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575 (S.C.C.). UBC submits that the two decisions are distinguishable. This is not the time to determine the merits of those submissions. I am satisfied that the question of whether UBC can adopt ultra vires powers as contractual terms does raise a common issue.

21 As to the framing of the agreed common issue concerning whether the Parking Regulations are *ultra vires*, I prefer UBC's proposed language because the plaintiff does not challenge all of the Parking Regulations. I would adopt its wording as the first common issue.

22 As to whether or not UBC unlawfully collected the Parking Regulation Fines, I agree with UBC's submission that the underlying question is whether UBC, apart from its public law powers pursuant to the *Act*, can enter into contractual licenses or rely on its common law proprietary rights to collect and retain the equivalent of the Parking Regulation Fines. The second question, which follows, is whether those rights, if they do exist, are limited or curtailed because the Parking Regulations are found to be *ultra vires*. UBC's questions (2) and (3) encompass the plaintiff's common issues B(1) and B(4). I would adopt as a common issue the language used in UBC's question (2) and reformulate UBC's question (3) as follows:

If the Parking Regulations are found to be *ultra vires*, in whole or in part, the public law powers of the Board, can UBC:

> (a) enter into valid and enforceable contractual licenses which incorporate the substance of the Parking Regulations; or
>
> (b) rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of the Parking Regulation Fines?

23 The plaintiff's question B (2) seeks a determination that would limit UBC's ability to contract on the terms of the Parking Regulations because they are in the nature of penalties. I do not believe that question can be tried as a common issue. The problem is that even if the Parking Regulations Fines are penalties, this does not necessarily render them unenforceable. The general rule is that a penalty clause is enforceable unless it would be unconscionable or oppressive to give effect to it, having in mind the circumstances of the case for which the enforcement is sought: *Fern Investments Ltd. v. Golden Nugget Restaurant (1987) Ltd.* (1994), 19 Alta. L.R. (3d) 442 (Alta. C.A.). Those comments are particularly apropos in the present circumstances. Assuming, for example, the towing charge is found to be a penalty, it may be neither unconscionable nor oppressive to give effect to it depending on the circumstances in which the tow has occurred. Whether a penalty is enforceable can only be determined at the individual issue stage.

24 The plaintiff's question B (3) seeks to determine whether UBC actually entered into the standard form contracts alleged in its statement of defence. I do not think that question can be answered at the common issues stage. In its statement of defence, UBC alleges contracts with assorted groups of class members. It also sets out several ways that UBC and class members contracted. While the terms of the suggested contracts may be identical, the manner by which they came into existence is not. The class contains approximately 100,000 members. It is not possible to determine as a common issue whether such contracts were, in fact, made. If UBC is entitled to enter into such contracts, it may become necessary to create several sub-classes to deal with whether the contracts were actually made.

25 In the certification decision, I held that the question of remedy, assuming a finding that the Parking Regulation Fines were unlawfully collected, must await the outcome of the common issue trial. The plaintiff seeks to review this conclusion in light of the Supreme Court of Canada's decision in *Kingstreet*. In that case, the court held that restitution was generally available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*.

26 In the plaintiff's submission, *Kingstreet* confirms that public law restitution applies even if the recipient could have raised equitable defences in an action by a private plaintiff. He submits that if the Parking Regulations are *ultra vires*, a similar remedy is available to class members, notwithstanding UBC's argument that it would raise common law and equitable defences. The plaintiff also relies on *MacKinnon*, *Kilroy*, *Parsons* and *Markson* to support his submission that restitution based on unjust enrichment can be decided as a common issue. *MacKinnon*, *Kilroy*, *Parsons* and *Markson* are all criminal interest rate cases.

27 UBC submits that both *Kingstreet* and the criminal interest rate cases are limited to their facts and do not provide a basis to revisit my earlier conclusion, that the question of remedy must await the common issue trial.

28 While *Kingstreet* may prove to be distinguishable, I am satisfied that it raises a common issue in the context of a possible common remedy if the Parking Regulations are *ultra vires*. I would, accordingly, add the following additional common issue:

> If the answer to question (1) is yes, are the plaintiff and other class members entitled to public law restitution in the amount of the Parking Regulation Fines, subject only to applicable defences, if any, under the Limitation Act R.S.B.C. 1996, c. 266 regardless of any juristic reason for the collection of the Parking Regulation Fines, including contracts and licenses entered into between UBC and class members, and UBC's common-law propriety rights as the owner of the UBC campus?

29 For the reasons set out at ¶ 62 of the certification decision, I remain of the view that the remaining questions concerning remedies must await the outcome of the common issue trial. This case is distinguishable from the criminal interest rate cases, where the defendants were enriched as a result of a violation of provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. Outside the criminal law context and a possible extension of the reasoning in *Kingstreet*, equitable and set off defences are relevant factors that must be considered with regard to each class member's entitlement to restitution. The question of remedies and the balancing of equities between each class member and UBC must await the outcome of the common issue trial.

30 I agree with the plaintiff that the determination of the appropriate limitation period for the restitution claims and the availability of pre-judgment interest, are issues common to the class that can be decided at the common issue trial.

31 In the result I would reframe the common issues as follows:

1. Are the University of British Columbia Parking Regulations (the "Parking Regulations") in whole or in part, *ultra vires* the public law powers delegated to the Board of Governors (the "Board") of the University of British Columbia ("UBC") by the *University Act*, R.S.B.C. 1996, c. 468?

2. Apart from UBC's public law powers pursuant to the *University Act*, can UBC:

(a) enter into valid and enforceable contractual licenses which incorporate the substance of the Parking Regulations; or

(b) rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of all fines and related towing fees, storing charges, administrative fees and/or other expenses and monies collected under the Parking Regulations from September 1, 1990 to the present (the "Parking Regulation Fines")?

3. If the Parking Regulations are found to be *ultra vires*, in whole or in part, the public law powers of the Board, can UBC:

(a) enter into valid and enforceable contractual licenses which incorporate the substance of the Parking Regulations; or

(b) rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of the Parking Regulation Fines?

4. If the answer to question (1) is yes, are the plaintiff and other class members entitled to public law restitution in the amount of the Parking Regulation Fines, subject only to applicable defences, if any, under the *Limitation Act*, R.S.B.C. 1996, c. 266, regardless of any juristic reason for the collection of the Parking Regulation Fines, including contracts and licenses entered into between UBC and class members, and UBC's common-law propriety rights as the owner of the UBC campus?

5. What limitation periods, if any, apply to the plaintiff and class members' claims for restitution?

6. Are the plaintiff and the class members entitled to prejudgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79?

Decertification

32 UBC contends that the case is not manageable as a class proceeding and should, therefore, be decertified pursuant to s. 10(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which reads:

> Without limiting section 8(3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6(1) are not satisfied with respect to a class proceeding.

33 In support of this submission, UBC contends that at the end of the day individual issues will overwhelm this proceeding. While acknowledging the existence of some common issues, it submits that the case will ultimately require individual assessments for thousands of Class members.

34 UBC's submissions are not materially different from those I rejected in the certification decision. For the reasons set out in the certification decision, I remain of the view that a class proceeding is the preferred procedure for a fair resolution of the common issues. Whether the proceedings can continue as a class action, once the common issues are decided, cannot be presently determined. UBC's application to decertify the action is dismissed.

Litigation Plan

35 Given the uncertainty concerning the common issues, the parties spent limited time making submissions on the litigation plan. If the parties cannot now agree on a litigation plan, they should make arrangements to make further submissions.

36 The parties have come to an agreement concerning notice. In the first instance, UBC will fund the notice. Class Counsel have undertaken to reimburse UBC for any reasonable out of pocket costs, if so ordered by the Court, following the common issues trial and taking into account all matters the Court considers relevant.

University's application dismissed and plaintiff's application granted in part.

2002 BCSC 511
British Columbia Supreme Court

Harrington v. Dow Corning Corp.

2002 CarswellBC 772, 2002 BCSC 511, [2002] B.C.W.L.D. 494, [2002] B.C.J. No. 691, 100 B.C.L.R. (3d) 307, 112 A.C.W.S. (3d) 1019, 17 C.P.C. (5th) 215

HELEN HARRINGTON and BETTY GLADU, AS REPRESENTATIVE PLAINTIFFS (PLAINTIFFS) AND DOW CORNING CORPORATION, DOW CORNING CANADA INC., THE DOW CHEMICAL COMPANY, DOW CORNING-WRIGHT CORPORATION, McGHAN NUSIL CORPORATION, McGHAN MEDICAL CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY (3M), INAMED CORPORATION, UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., UNION CARBIDE CORPORATION, BAXTER INTERNATIONAL INC., BAXTER HEALTHCARE CORPORATION, MENTOR CORPORATION, BRISTOL-MYERS SQUIBB COMPANY, MEDICAL ENGINEERING CORPORATION, THE COOPER COMPANIES, INC. (DEFENDANTS)

Edwards J.

Heard: March 15, 28, 2002
Judgment: April 8, 2002*
Docket: Vancouver C954330

Counsel: *David Klein*, *Mark R. Steven*, for Plaintiff
Allan P. Seckel, *Andrew D. Borrell*, for Defendants, Bristol-Myers Squibb Company, Medical Engineering Corporation, Cooper Companies, Inc.
Oleh W. Ilnyckyj, for Defendants, Baxter Healthcare Corporation
J. Kenneth McEwan, for Defendant, Minnesota Mining and Manufacturing Company (3M)

Subject: Civil Practice and Procedure

Headnote

Practice --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Decertification

B Ltd. was shareholder of M Corp. and C Inc., which manufactured silicone breast implants — Plaintiffs alleged that B Ltd. participated in joint venture with M Corp. and C Inc. to market breast implants — Class proceeding was certified against several manufacturers of breast implants, including B Ltd., C Inc. and M Corp. — Manufacturers' appeal of certification was dismissed — M Corp., B Ltd., and C Inc. brought application for particulars, and for decertification of class proceeding against B Ltd., on grounds that B Ltd. was not manufacturer of implants — Application dismissed regarding decertification and adjourned regarding particulars — M Corp., B Ltd., and C Inc. were estopped from claiming that B Ltd. was not manufacturer of breast implants — Issue of whether B Ltd. was manufacturer of breast implants had not been argued during certification proceedings, when order was under consideration for entry, or on appeal — Amending order under ss. 8(3) or 10(1) of Class Proceedings Act was not appropriate remedy — Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 8(3), 10(1).

Table of Authorities

Cases considered by *Edwards J.*:

Archipelago (Township) v. Shawanaga First Nation, 1994 CarswellOnt 3531 (Ont. Gen. Div.) — considered

Horvath v. Thring, 2000 BCSC 123, 2000 CarswellBC 160 (B.C. S.C.) — distinguished

Horvath v. Thring, 2001 BCCA 551, 2001 CarswellBC 1971, 93 B.C.L.R. (3d) 51, 157 B.C.A.C. 152, 256 W.A.C. 152 (B.C. C.A.) — referred to

Laye v. College of Psychologists (British Columbia), 105 B.C.A.C. 214, 171 W.A.C. 214, 1998 CarswellBC 583 (B.C. C.A. [In Chambers]) — considered

Statutes considered:

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

s. 4(1)(c) — referred to

s. 8(3) — considered

s. 10(1) — considered

s. 36 — referred to

Court of Appeal Act, R.S.B.C. 1996, c. 77
s. 1 — referred to

s. 6 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 19 — pursuant to

APPLICATION by defendants for decertification of class proceeding against one defendant, and for particulars.

***Edwards J.*:**

1 The defendants Bristol-Myers Squibb Company (”Bristol”), Medical Engineering Corporation (”MEC”) and the Cooper Companies Inc. (”Cooper”) apply pursuant to Rule 19 and the *Class Proceedings Act* (”the *Act*”) for an order that:

> 1. the Certification Orders in these proceedings be amended to decertify the claim against the Defendant Bristol-Myers Squibb Company Inc., and
>
> 2. the plaintiffs be required to deliver particulars which plead the material facts upon which they claim the common issue certified in these proceedings arises.

2 I note that the first of these defendants is referred to in the style of cause in these proceedings as “Bristol-Myers Squibb Company”, but is defined under the name “BRISTOL-MYERS SQUIBB *and* COMPANY” as “Bristol” at paragraph 150 of the Amended Statement of Claim and referred to as Bristol-Myers Squibb Company *Inc*.” in that part of the Notice of Motion quoted above. Since counsel made no mention of these minor discrepancies in the name of this defendant, I assume there is one corporate entity only, Bristol-Myers Squibb Company, and the other versions of the name are erroneous.

3 Mr. Seckel, for the applicants, in response to a question form the court, agreed that if the claim were decertified against Bristol-Myers Squibb Company, that company would be indifferent to the requested particulars of material facts upon which the common issue certified in these proceedings arises, but stated that the other two defendants he represents, MEC and Cooper, required these particulars since they would still be obliged to defend on the certified common issue.

4 That is also the position of Mr. Ilnyckyj and Mr. McEwan, counsel representing the other defendants, who supported the applicants’ request for particulars.

5 After submissions by counsel on March 15, 2002, I sent them a memo dated March 18, 2002, requesting further submissions. As a result, on March 28, 2002, counsel made further oral submissions. At that time counsel for the plaintiffs provided the court and defendants’ counsel with a “Plaintiffs’ Revised Plan” (”the Plan”) as a response to the motion for particulars. It included a schedule for, among other things, examinations for discovery and exchange of expert reports leading to a six-week trial in October 2003.

6 Since defendants’ counsel were unprepared to deal with the proposed Plan presented to them just before the court convened, consideration of it was postponed. The motion for particulars has been effectively subsumed into an anticipated application to approve the Plan. I therefore adjourn the motion for particulars for consideration at the same time as the application to approve the Plan.

7 I next consider the motion for decertification of the claim against Bristol.

8 On April 11, 1996, after a five day hearing March 25-29, 1996, Mr. Justice Mackenzie, then of this court, issued 57 paragraphs of reasons and certified this as a class action. An appendix to his reasons set out 18 “common questions” proposed by the plaintiff. At para. 35 Mackenzie J. found all but one of the 18 questions “fail the test of commonality” necessary for certification under s. 4(1)(c) of the *Act*.

9 At para. 41 Mackenzie J. determined that the question “Are silicone gel breast implants reasonably fit for their intended purpose?” raised “ . . . a threshold issue which is common to all intended members of the class . . . and to the several *manufacturers* of such implants.” [my emphasis].

10 At para. 50 Mackenzie J. concluded that “claims in conspiracy, fraud, misrepresentation, and joint venture against defendants collectively are vague and devoid of the specificity required for those claims to stand”, which I take to mean that they are unsuitable for certification as common issues.

11 At paras. 51 and 53 Mackenzie J. stated :

> The primary cause of action to which the common issue relates is negligent manufacture and distribution. Negligence is a cause of action which involves the manufactures severally and it may be appropriate to divide the class into subclasses by manufacturer, with separate representatives for each subclass. ... I will hear further submissions on this aspect of class representation after counsel have had an opportunity to consider their position in the light of the common issue set.
>
> . . .
>
> The claims against the defendants Union Carbide and McGhan Nusil rest on the supplying of raw or semi-processed silicone materials to other defendants to be used in the manufacture of breast implants. On the pleadings as they stand, I do not think that limited involvement imposes a duty as manufacturer. There are no particulars of any representations by those defendants associated with the use of their products, usually reprocessed by others, in breast implants. A position as shareholder, even a controlling shareholder, in a manufacturer is an insufficient foundation in itself to impose a manufacturer's duty. Accordingly, the defendants Inamed Corporation, Baxter International Inc., Union Carbide Corp., Union Carbide Chemicals and Plastics Company Inc., and McGhan Nusil Corporation will be excluded from any certification order.

12 The position of Bristol on this application is that Bristol was no more than a controlling shareholder of the defendants MEC and Cooper and, therefore, that the reasoning of Mackenzie J. dictates that the case ought not to be certified against Bristol in the absence of any express finding by Mackenzie J. that Bristol was a manufacturer.

13 The reasons for judgment of Mackenzie J. disclose no express finding that Bristol was or was not a manufacturer or a distributor or was or was not more than a mere passive shareholder of MEC and Cooper.

14 Counsel for Bristol argued that the Amended Statement of Claim, paragraphs 21 and 132-144 make the similar allegations against the defendant Baxter International Inc. ("Baxter") and its subsidiaries as paragraphs 26 and 145-163 make against Bristol and its subsidiaries, and yet Baxter is not included as a defendant manufacturer under the class certification order.

15 In support of the contention that Bristol was no more than a shareholder, Bristol filed a three paragraph affidavit sworn by Sandra Leung, corporate secretary of Bristol, who states that "Bristol is not and at no time has been a manufacturer of breast implants" and that MEC, which has been wholly owned by Bristol since 1982, purchased Cooper in 1988. It is not disputed that MEC and Cooper were manufacturers.

16 The plaintiffs filed an affidavit to which are appended 65 documents obtained from the Plaintiffs' Steering Committee in the United States Federal Court Multi-District Litigation ("MDL 926") that is dealing with the U.S. silicone breast implant litigation. These documents indicate, among other things, that Bristol employees acted in concert with MEC employees to respond to Canadian media reporting about breast implants in 1988 and 1989.

17 From these documents, plaintiffs' counsel argued the inference should be drawn that Bristol was more than a mere passive shareholder and took an active part in protecting the market for breast implants from the consequences of adverse publicity. This, plaintiffs' counsel characterized as evidence of Bristol's participation in a "joint venture" with its subsidiaries MEC and Cooper to market breast implants.

18 Bristol's counsel argued that even if Bristol participated in the sale and distribution of implants, that involvement did not go to the certified issue of the "fitness" of breast implants, noting that Mackenzie J. rejected the joint venture claims as a basis for certification.

19 Plaintiffs' counsel pointed to paragraph 159 of the Amended Statement of Claim which alleges that Bristol conducted research into the hazards of breast implants and that its Technical Evaluation and Services Department performed audit and review functions for MEC and found a number of conditions regarding production of breast implants that needed corrective action. No parallel allegation is made regarding Baxter.

20 Notwithstanding the close parallel between the allegations pleaded against Baxter and Bristol (apart from paragraph 159 just noted) and notwithstanding the fact that Bristol's counsel did not agree to the form of order dated February 14, 1997

and entered December 1, 1997, giving effect to the April 11, 1996 judgment of Mackenzie J., which expressly states "this proceeding ... is hereby certified as a class proceeding against ...Bristol" (and others) and "this proceeding is not certified against ... Baxter" (and others), the point now raised, that Bristol was not a manufacturer, was not raised when the certification issue was before the Court of Appeal. At para. 1 of the Court of Appeal reasons of Madam Justice Huddart, this case is characterized as follows:

> ... The claim is against manufacturers of silicone breast implants and Bristol-Myers Squibb Company, a supplier of silicone.

suggesting Huddart J. did not regard Bristol as a manufacturer of implants.

21 However, the point advanced by Bristol on this application, that the entered order did not properly reflect the reasons for judgment of Mackenzie J. when it included rather than excluded Bristol as a defendant in respect of the certification, was not taken before the Court of Appeal. Bristol's counsel submitted there was no need to take this point before the Court of Appeal since it would have been moot had the appeal succeeded and had the certification order been overturned in its entirety by the Court of Appeal.

22 He further submitted that in any event Bristol's failure to take the point in the Court of Appeal did not derogate from this court's express authority in s. 10 (1) of the *Act* to decertify or to amend the certification order in s. 8(3).

23 In my memo to counsel dated March 18, 2002, I asked for submissions as to whether I was precluded from granting the decertification order sought by Bristol in light of the Court of Appeal decision in this case, even if I was persuaded that the entered order did not properly reflect the reasons of Mackenzie J. I referred counsel to *Horvath v. Thring*, 2000 BCSC 123 (B.C. S.C.) (paras. 30 and 31), 2001 BCCA 551 (B.C. C.A.) (para. 16).

24 In a written submission Bristol's counsel distinguished *Horvath* on the basis that case involved an application to vary an entered order after a trial on the merits, whereas the present application is one to change an order on a procedural point.

25 I accept that distinction. If ss. 8(3) and 10 (1) of the *Act* are to have any effect, the court cannot be precluded by the entry of an order from reviewing the order. I find the court has jurisdiction to reconsider an entered certification order and to decertify or amend the certification order.

26 The *Act*also provides for appeal of a certification order in s. 36. In this case Bristol did not raise the point now before the court so the Court of Appeal did not rule on the question of whether Bristol was a manufacturer properly included in the certification order.

27 Bristol could have asked the Court of Appeal to review the certification order on the basis Bristol was not properly included because it was not a manufacturer. Normally, estoppel precludes a litigant from raising an issue which could have been dealt with on facts and law known or discoverable when an earlier proceeding, including an appeal, could have decided the issue. See *Archipelago (Township) v. Shawanaga First Nation*, [1994] O.J. No. 1703 (Ont. Gen. Div.) at para. 8.

28 Neither plaintiffs' nor Bristol's counsel contended issue estoppel did not apply.

29 Plaintiff's counsel argued it applied to preclude the court from altering the certification order.

30 Bristol's counsel argued that the findings to which issue estoppel applied were that the action would be certified on the specified question engaging manufacturers alone and that Bristol was not a manufacturer. As a result, he argued, it was not now open for the plaintiffs to introduce evidence to persuade the court Bristol was a manufacturer. If that is so, then Ms. Leung's affidavit must also be disregarded.

31 I find issue estoppel operates here to preclude the court from granting Bristol an order decertifying the case against it even if it was not a manufacturer.

32 Underlying issue estoppel are the principles of finality and avoidance of a multiplicity of proceedings. Issue estoppel

prevents parties from litigating in tranches and from raising afresh issues which were or ought to have been decided when all relevant facts and law could have been put before the court.

33 The entered order reflects an implicit finding that Bristol was a manufacturer, even if the reasons for judgment underlying the order do not make an express finding to that effect. Under ss. 1 and 6 of the *Court of Appeal Act*, orders, not reasons for judgment, are the subject of appeals. The Court of Appeal had jurisdiction to rectify any error in the order of Mackenzie J.

34 In *Laye v. College of Psychologists (British Columbia)* (1998), 105 B.C.A.C. 214 (B.C. C.A. [In Chambers]), Rowles J.A. (in Chambers) observed regarding reasons for judgment under appeal, at para.11:

> A reviewing court may refer to the reasons for judgment in order to ascertain whether the decision from which the appeal is brought has been arrived at by a reviewable error but the appellate review process relates to attacks on the order that has been made, not the reasons for judgment. If an appeal is successful, it is the order that is set aside, not the reasons or a portion thereof that is "overturned". To suggest otherwise does not accord with well-accepted appellate practice and procedure.

35 Here, Bristol had three opportunities to argue that the certification order should not apply to it since it was not a manufacturer, once before Mackenzie J., again when the formal order was under consideration before entry and again when that order was before the Court of Appeal.

36 Finality and avoidance of a multiplicity of proceedings are less a concern in a case such as this where there has been no determination on the substantive merits of the plaintiffs' claim. The order Bristol seeks to vary is essentially a procedural one. There is specific authority in the *Act* for this court to amend the order and to decertify. The parties have taken no significant procedural steps in the six years since the order was entered in reliance on it.

37 Nevertheless, I am of the view that in the absence of any new facts or law (and none were alleged by Bristol) this court should not exercise its authority under ss. 8(3) and 10(1) of the *Act* to grant the relief sought in light of the doctrine of issue estoppel and the binding effect of the judgment of the Court of Appeal.

38 If I am wrong in that finding, I would not exercise this court's discretion to amend or decertify because the practical consequences of the certification order are not particularly onerous on Bristol. Bristol will be involved in the litigation of the certified issue so as to be subject to discovery procedures in respect of the certified issue.

39 Bristol's two subsidiaries MEC and Cooper are subject to those procedures. If the documents from the MDL 926 proceeding are any indication, many potentially relevant documents are discoverable in their hands. These documents are in any event available to the plaintiffs from the MDL 926 proceeding. They have been disclosed by Bristol or its subsidiaries in that litigation and are apparently in the public domain.

40 Further, as Bristol's counsel acknowledged, the decertification it seeks would not result in dismissal of the action against it. Bristol is therefore subject to discovery on the whole of the allegations against it in the pleadings, whether Bristol is subject to the certification order or not. Therefore decertification would not necessarily reduce the ultimate scope of discovery against Bristol in this action, although as a practical matter the likelihood of the action proceeding against Bristol otherwise than as a class action is low.

41 Bristol's application for decertification of the action against it is dismissed.

42 Plaintiff's counsel sought costs. Bristol's counsel did not address the issue of costs. Counsel may address the issue of costs in written submissions.

Application dismissed regarding decertification and adjourned regarding particulars.

Footnotes

[*] A corrigendum issued by the court April 12, 2002 has been incorporated herein.

2006 SKQB 373
Saskatchewan Court of Queen's Bench

Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.

2006 CarswellSask 595, 2006 SKQB 373, 152 A.C.W.S. (3d) 204, 286 Sask. R. 1, 36 C.P.C. (6th) 144, 36 C.P.C. (6th) 148

TOMS GRAIN & CATTLE CO. LTD. and MARK E. SZAKACS (RESPONDENTS / PLAINTIFFS) and ARCOLA LIVESTOCK SALES LTD., FRANK EATON LIVESTOCK LTD., FRANKLIN EATON, JUDITH EATON, CHADWICK EATON, SHANNON EATON, JAMESON LIVESTOCK LTD., GILROY CATTLE COMPANY LTD., SINCLAIR HOLDINGS CORP. and PLAYTYME HOLDINGS LTD. (APPLICANTS / DEFENDANTS)

E.J. Gunn J.

Judgment: August 10, 2006
Docket: Regina Q.B.G. 2746/03

Counsel: Peter T. Bergbush for Respondents / Plaintiffs
William R. Howe for Applicants / Defendants, Arcola Livestock Sales Ltd., Frank Eaton Livestock Ltd., Eatons
Kevin C. Mellor for Defendants, Jamieson Livestock Ltd., Gilroy Cattle Company Inc., Sinclair Holdings Corp.

Subject: Civil Practice and Procedure

Headnote

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

Plaintiffs launched undisclosed action against defendants and co-defendants — Action was certified by court as class action — Defendants were denied leave to appeal certification order — Certification was overturned with respect to co-defendants on appeal — Defendants brought fresh application for order decertifying class action — Application dismissed — Defendants failed to establish grounds for decertification of action — Defendants were estopped from seeking new application — No new issues of fact or law were being alleged since defendants were initially denied leave to appeal original certification order — Fact that co-defendants were able to decertify action was not necessarily change in circumstances affecting defendants' case.

Table of Authorities

Cases considered by *E.J. Gunn J.*:

Angle v. Minister of National Revenue (1974), 1974 CarswellNat 375, 28 D.T.C. 6278, 1974 CarswellNat 375F, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397 (S.C.C.) — considered

Ayrton v. PRL Financial (Alta.) Ltd. (2006), 2006 ABCA 88, 2006 CarswellAlta 319, 384 A.R. 1, 367 W.A.C. 1, 265 D.L.R. (4th) 240, [2006] 7 W.W.R. 36, 57 Alta. L.R. (4th) 1, 26 C.P.C. (6th) 203 (Alta. C.A.) — considered

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2) (1966), [1967] 1 A.C. 853, [1967] R.P.C. 497, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125 (U.K. H.L.) — considered

Collette v. Cartier Partners Securities Inc. (2005), 2005 BCSC 1749, 2005 CarswellBC 3020 (B.C. S.C.) — considered

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — considered

Harrington v. Dow Corning Corp. (2002), 100 B.C.L.R. (3d) 307, 17 C.P.C. (5th) 215, 2002 CarswellBC 772, 2002 BCSC 511 (B.C. S.C.) — followed

Rumley v. British Columbia (2003), 12 B.C.L.R. (4th) 121, 2003 BCSC 234, 2003 CarswellBC 324 (B.C. S.C.) — considered

Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd. (2006), 2006 SKCA 20, 2006 CarswellSask 89, 22 C.P.C. (6th) 339 (Sask. C.A.) — considered

Webb v. 3584747 Canada Inc. (2005), 2005 CarswellOnt 499, 40 C.C.E.L. (3d) 74, [2005] O.T.C. 104, 9 C.P.C. (6th) 50 (Ont. S.C.J.) — considered

Statutes considered:

Class Actions Act, S.S. 2001, c. C-12.01
s. 12 — pursuant to

Class Proceedings Act, S.A. 2003, c. C-16.5
s. 11 — referred to

Class Proceedings Act, R.S.B.C. 1996, c. 50
s. 10 — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 5 — referred to

s. 10 — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
Generally — referred to

R. 441B [en. Sask. Gaz. Nov. 13/87] — referred to

APPLICATION by defendants for order decertifying class action.

***E.J. Gunn J.*:**

1 Arcola Livestock Sales Ltd., Frank Eaton Livestock Ltd., Franklin Eaton, Judith Eaton, Chadwick Eaton, and Shannon Eaton ("the applicants") apply for an order pursuant to s. 12 of *The Class Actions Act*, S.S. 2001, c. C-12.01 ("CAA") decertifying the action as a class action against them.

2 The applicants are defendants in an action which was certified as a class action. The applicants were denied leave to appeal the certification order in relation to them. Three other defendants were granted leave to appeal the certification order and the certification order was overturned in respect of those three defendants. (See *Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.*, 2006 SKCA 20, 22 C.P.C. (6th) 339 (Sask. C.A.)).

Preliminary Issue

3 The notice of motion brought by the applicants fails to state the grounds upon which the application is being brought, contrary to the requirements of Rule 441B of the *Queen's Bench Rules of Court*. The only ground advanced by Shannon Eaton in his affidavit and by counsel for the applicants in argument is that the action was decertified against the successful appellants in *Jameson*, *supra* and that the court should therefore decertify the action against the applicants. The applicants raise no new issues of fact or law.

4 The respondents submit the application should be dismissed on the basis of the non-compliance with Rule 441B, but they declined the opportunity for any additional time to respond to the application with the grounds being clearly identified.

5 Although it would be within my discretion to dismiss the application for non-compliance with the Rules, I am not prepared to do so on this occasion and will deal with the application on its merits on the grounds identified in argument.

Issues

1. *Decertification*
2. *Issue Estoppel*
3. *Conclusion*

Re: 1. Decertification

A. The Legislation

6 Section 12 of the CAA provides as follows:

> **12**(1) Without limiting subsection 10(3), at any time after a certification order is made pursuant to this Part, the court may amend the certification order, decertify the action or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 6 or subsection 8(1) are not satisfied with respect to a class action.
>
> (2) If the court makes a decertification order, the court may permit the action to continue as one or more actions between different parties and may make any order mentioned in section 11 in relation to each of those actions.

7 Ontario, British Columbia and Alberta have class proceedings legislation with similar provisions. They provide as follows:

8 Section 10 of the *Class Proceedings Act*, 1992, S.O. 1992 c. 6:

> **10**(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5(1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.
>
> **10**(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.
>
> **10**(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7(a) to (c).

9 Section 10 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50:

> **10**(1) Without limiting section 8(3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6(1) are not satisfied with respect to a class proceeding.
>
> (2) If the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9(a) to (c) in relation to each of those proceedings.

10 Section 11 of the *Class Proceedings Act*, S.A. 2003, c. C-16.5:

> **11**(1) Without limiting section 9(4), if at any time after a certification order is made under this Part the Court, with respect to the class proceeding, determines that it is no longer satisfied as to the matters referred to in section 5 or 7(1), the Court may do one or more of the following:
>
> (a) amend the certification order;
>
> (b) decertify the proceeding;
>
> (c) make any other order, not referred to in clause (a) or (b), that the Court considers appropriate.

11(2) If the Court makes an order under subsection (1) decertifying a proceeding as a class proceeding, the Court may

(a) permit the proceeding to continue as one or more proceedings between different parties, and

(b) make any order referred to in section 10 in relation to each of those proceedings.

B. The Law

11 *Jameson, supra* is the only Saskatchewan case to examine decertification of class action orders, and it was an appeal of the original certification order, rather than an application under s. 12 for decertification.

12 In *Webb v. 3584747 Canada Inc.*, [2005] O.T.C. 104, 40 C.C.E.L. (3d) 74 (Ont. S.C.J.) an application for decertification was brought after summary judgment had been granted respecting common issues, during the quantification of individual damages. In *Webb*, *supra* Pitt J. heard an application for leave to appeal the order of Brockenshire J. denying an application for decertification of a class action. The application for decertification was denied as the requirements for a class proceeding under s. 5 of Ontario's *Class Proceedings Act* were still met. The court examined the requirements for certification of a class proceeding after the action had commenced and new issues had arisen respecting judicial economy.

13 In *Rumley v. British Columbia*, 2003 BCSC 234, 12 B.C.L.R. (4th) 121 (B.C. S.C.) an application for decertification was made after the class proceeding had commenced. The defendants asserted that the conduct of the case by the plaintiffs was markedly different from the class proceeding certified by the Court of Appeal. Humphries J. declined to decertify the action but amended the common issues to be tried.

14 In *Ayrton v. PRL Financial (Alta.) Ltd.*, 2006 ABCA 88, 265 D.L.R. (4th) 240 (Alta. C.A.) the court dismissed an appeal from an order certifying a class action proceeding, and stated the following at para 14:

> ¶14 The Alberta legislation supports a purposive approach and provides extensive flexibility in terms of procedures available to certification judges to deal with class actions as they unfold. For example, if need be, the judge can decertify the proceedings or common issues later in the proceedings and can draw on many different methods of resolving individual issues on a timely and efficient basis. . .

15 *Collette v. Cartier Partners Securities Inc.*, 2005 BCSC 1749, [2005] B.C.J. No. 2753 (B.C. S.C.) involved two applications, including one for decertification. The British Columbia Court of Appeal had previously certified the action as a class action. The defendants argued for decertification on the basis that new evidence disclosed that the claims did not raise common issues. Wedge J. was satisfied that the new evidence did not undermine the Court of Appeal's decision to certify the action as a class action.

16 In this case no new facts or law are alleged. The certification order in respect to the applicants has already been the subject of review in the Court of Appeal and leave to appeal has been denied.

Re: 2. Issue Estoppel

17 The requirements for issue estoppel were articulated by Dickson, J. in *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) at p. 254 where he quoted Lord Guest in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.) at p. 935:

> . . . (1) the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . .

18 The requirements from *Angle*, *supra*, have been applied by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) where Binnie J. at para. 33 states:

> ¶33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: *BritishColumbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 C.A. at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia PublicService Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para 56.

19 Binnie J. described the scope of issue estoppel at para 54:

> ¶54 . . . The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

20 In *Harrington v. Dow Corning Corp.*, 2002 BCSC 511, 17 C.P.C. (5th) 215 (B.C. S.C.) E.R.A. Edwards J. dismissed an application for decertification of a class action proceeding on the basis that no new facts or law had been presented by the defendant. He stated the following at paras 31-32:

> ¶31 I find issue estoppel operates here to preclude the court from granting Bristol an order decertifying the case against it even if it was not a manufacturer.
>
> ¶32 Underlying issue estoppel are the principles of finality and avoidance of a multiplicity of proceedings. Issue estoppel prevents parties from litigating in tranches and from raising afresh issues which were or ought to have been decided when all relevant facts and law could have been put before the court.

21 He continued at para. 37 to state:

> ¶37 Nevertheless, I am of the view that in the absence of any new facts or law (and none were alleged by Bristol) this court should not exercise its authority under ss. 8(3) and 10(1) of the Act to grant the relief sought in light of the doctrine of issue estoppel and the binding effect of the judgment of the Court of Appeal.

Re. 3. Conclusion

22 The applicants have failed to establish any grounds for decertification of the action as no new issues of fact or law are being alleged since the Court of Appeal denied the applicants leave to appeal the original certification order. The application for decertification of the action is dismissed.

23 The respondents will have the taxable costs of the application in any event of the cause from the applicants.

Application dismissed.

End of Document

2004 CarswellOnt 5026
Ontario Court of Appeal

Cloud v. Canada (Attorney General)

2004 CarswellOnt 5026, [2004] O.J. No. 4924, [2005] 1 C.N.L.R. 8, 135 A.C.W.S. (3d) 567, 192 O.A.C. 239, 247 D.L.R. (4th) 667, 27 C.C.L.T. (3d) 50, 2 C.P.C. (6th) 199, 73 O.R. (3d) 401

MARLENE C. CLOUD, GERALDINE ROBERTSON, RON DELEARY, LEO NICHOLAS, GORDON HOPKINS, WARREN DOXTATOR, ROBERTA HILL, J. FRANK HILL, SYLVIA DELEARY, WILLIAM R. SANDS, ROSEMARY DELEARY, and SABRINA YOLANDA WHITEYE (Plaintiffs / Appellants) and THE ATTORNEY GENERAL OF CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON and THE NEW ENGLAND COMPANY (Defendants / Respondents)

Catzman, Moldaver, Goudge JJ.A.

Heard: May 10-11, 2004
Judgment: December 3, 2004
Docket: CA C40771

Proceedings: reversing *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492, 2003 CarswellOnt 4630, 41 C.P.C. (5th) 226 (Ont. Div. Ct.); affirming *Cloud v. Canada (Attorney General)* (2001), 2001 CarswellOnt 3739, [2001] O.T.C. 767 (Ont. S.C.J.); additional reasons at *Cloud v. Canada (Attorney General)* (2002), 2002 CarswellOnt 706 (Ont. S.C.J.)

Counsel: Kirk M. Baert, Russell M. Raikes for Appellants
Paul Vickery, Monika Lozinska, Donald Padget for Respondent, Attorney General of Canada
Robert B. Bell for Respondent, New England Company
Brian T. Daly, Lisa Gunn for Respondent, Diocese of Huron

Subject: Civil Practice and Procedure; Public; Criminal; Churches and Religious Institutions

Headnote

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

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — Identifiable class requirement under s. 5(1)(b) of Class Proceedings Act, 1992 was met — Motion judge applied wrong test in this regard by requiring that all students fully share cause of action — Shared interest need only extend to resolution of common issues — All class members shared same interest in resolution of whether certain duties were owed to them and whether those duties were breached.

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

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — Common issue requirement under s. 5(1)(c) of Class Proceedings Act, 1992 was met — Proper analysis involved question of whether there were any issues resolution of which would be necessary to resolve each class

member's claim and which could be said to be substantial ingredient of those claims — Plaintiffs' claim of systematic breach of duty was a part of every class member's case and was of sufficient importance to meet commonality requirement.

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

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — Preferable procedure requirement under s. 5(1)(d) of Class Proceedings Act, 1992 was met — In context of entire claim, resolution of common issues would significantly advance action — Resolution of common issues would take action framed in negligence, fiduciary duty and aboriginal rights up to point where only harm, causation and individual defences such as limitations remained for determination — Access to justice would be greatly enhanced by single trial of common issues — Class action was manageable method of advancing claim.

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

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — Workable litigation plan requirement under s. 5(1)(e)(ii) of Class Proceedings Act, 1992 was met — Certification motion did not fail on basis that plaintiffs had not yet produced workable litigation plan — Litigation plan produced by the plaintiffs was, as was case with all litigation plans, something of work in progress — It would undoubtedly have to be amended, particularly in light of issues found to warrant common trial — Nothing in litigation plan exposed weaknesses in case as framed that undermined conclusion that class action was preferable procedure.

Aboriginal law --- Practice and procedure — Parties — Representative or class actions

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — All of requirements under s. 5(1) of Class Proceedings Act, 1992 were met.

Churches and religious institutions --- Practice and procedure

It was appropriate to certify residential schools action involving students who attended particular institute between 1922 and 1969 as class action — All of requirements under s. 5(1) of Class Proceedings Act, 1992 were met.

The plaintiffs brought an action against Canada, the Incorporated Synod of the Diocese of Huron and the New England Company for breach of fiduciary duty, negligence, assault, battery and breaches of aboriginal and treaty rights with respect to the operation of a residential school. The claims were made for the period from 1922 to 1969 on behalf of all students who attended the institute during that period. The plaintiffs estimated that there were approximately 1,400 such students. In addition, two of the plaintiffs advanced claims for breach of fiduciary duty and for loss of care, guidance and companionship under the Family Law Act. Those plaintiffs sought to represent the parents, siblings, spouses and children of former students. The number of such persons was estimated to be 4,200.

The plaintiffs moved for certification as a class proceeding. The motion judge determined that the Superior Court of Justice did not have jurisdiction to entertain claims under the Crown Liability and Proceedings Act arising from acts or omissions that occurred prior to May 14, 1953. The motion judge held that the plaintiffs did not have causes of action with respect to claims by family members of former students brought under the Family Law Act. The motion judge found that there were numerous, significant individual issues that would require trial beyond the resolution of any common issues and that the procedure of certification would not result in any judicial economy.

The plaintiffs' appeal was dismissed. The majority for the Divisional Court found that the motion judge committed no error with respect to the pre-May 14, 1953 claims and the Family Law Act claims. The majority found that the motion judge

correctly determined that the resolution of the common issues presented to him for consideration would do nothing to avoid or limit the length of the individual claims which would be inevitable given the diverse experiences of each student. The majority found that even if the common issues advanced in this case were reformulated in terms of systemic negligence, the result would not be altered; the common issues would not significantly advance the action. The majority found that a class action was not the preferable procedure because the underlying policy objectives of access to justice, judicial economy and behaviour modification would not be served by certifying the action.

The dissenting judge for the Divisional Court found that the pre-May 15, 1953 claims against the Crown for breach of fiduciary duty were not barred by statute. The dissenting judge found that each of the criteria in s. 5(1) of the Class Proceedings Act ("CPA") was satisfied and that the action should be certified. The dissenting judge found that the primary class of plaintiffs consisted of all individuals who were students at the institute between 1922 and 1970. The dissenting judge found that if attention was directed solely to the possible existence of issues of systemic breach of duty in this case, such issues were common to the members of the primary class. The dissenting judge found that the required rational connection between the criteria for identifying members of the class and such issues was present. The dissenting judge found that a trial of the common issues would be a fair, efficient and manageable method of advancing the claims pleaded. The dissenting judge found that as the focus of the inquiry would be on the conduct of the defendants, those issues could be determined without regard to differences in the family backgrounds, the experiences of particular class members at the school and the facts of each incident in which harm was alleged to have occurred.

The plaintiffs appealed.

Held: The appeal was allowed and the action was certified.

The plaintiffs properly conceded that the Family Law Act claims, the claims for negligence occurring before 1953 and the claims for treaty rights could not be proceeded with. Otherwise, the claims for vicarious liability (although the plaintiffs conceded that those claims did not give rise to any common issue), breach of fiduciary duty and negligence (but only between 1953 and 1969 for negligence), survived the test in s. 5(1)(a) of the CPA that the claims must disclose a cause of action.

The identifiable class requirement under s. 5(1)(b) of the CPA was met. The motion judge applied the wrong test in this regard, by requiring that all students fully share a cause of action. The shared interest need only extend to the resolution of the common issues. The majority of the Divisional Court did not address the identifiable class issue, but the dissenting judge correctly found that the requirement was met. The plaintiffs satisfied all dimensions of the requirement. None of the proposed classes was open-ended but, rather, were circumscribed by their defining criteria. The classes were rationally linked to the common issues found by the dissenting judge. All class members shared the same interest in the resolution of whether certain duties were owed to them and whether those duties were breached.

The common issues requirement under s. 5(1)(c) of the CPA was met. The motion judge focused on those aspects of the claim that in his view would require individual determination, student by student, and did not analyse what parts of the claim could be said to be common. The motion judge erred in his ultimate conclusion that there were no common issues. The majority of the Divisional Court did not address this requirement. The dissenting judge correctly analysed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims. The plaintiffs' claim of systematic breach of duty was a part of every class member's case and was of sufficient importance to meet the commonality requirement. A class action was sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. The existence of limitations defences did not negate a finding that there were common issues. The common trial would take the claims to the point where only causation and harm remained to be established, and it would adjudicate a substantial part of each class member's claim by

doing so. Also, as stated by the dissenting judge from Divisional Court, in a trial of the common issues the claims for an aggregate assessment of damages and punitive damages were properly included as common issues.

The preferable procedure requirement under s. 5(1)(d) of the CPA was met. As the dissenting judge of the Divisional Court found, in the context of the entire claim the resolution of the common issues would significantly advance the action. Resolution of the common issues would take the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remained for determination. The common issues were fundamental to the action and could not be described as negligible in relation to the consequential individual issues or to the claim as a whole. A single trial of the common issues would achieve substantial judicial economy. Without a common trial , the issues would have to be dealt with in each individual action at an obvious cost in judicial time and possibly resulting in inconsistent outcomes. Access to justice would be greatly enhanced by a single trial of the common issues, and this consideration strongly favoured the conclusion that a class action was the preferable procedure. A class action was a manageable method of advancing the claim. The alternative dispute resolution ("ADR") system that had been put in place by Canada to deal with claims of those who attended native residential schools did not displace the conclusion that the class action was the preferable procedure. The ADR system was a system unilaterally created by one of the defendants and could be unilaterally dismantled without the consent of the plaintiffs. It dealt only with physical and sexual abuse. It capped the amount of possible recovery and, importantly, compared to the class action it shared the access to justice deficiencies of individual actions.

The "workable litigation plan" requirement under s. 5(1)(e)(ii) of the CPA was met. The certification motion did not fail on the basis that the plaintiffs had not yet produced a workable litigation plan. The litigation plan produced by the plaintiffs was, as was the case with all litigation plans, something of a work in progress. It would undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Nothing in the litigation plan exposed weaknesses in the case as framed that undermined the conclusion that a class action was the preferable procedure.

Table of Authorities

Cases considered by *Goudge J.A.*:

Carom v. Bre-X Minerals Ltd. (2000), 2000 CarswellOnt 3838, 51 O.R. (3d) 236, 1 C.P.C. (5th) 62, 138 O.A.C. 55, 11 B.L.R. (3d) 1, 196 D.L.R. (4th) 344 (Ont. C.A.) — referred to

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Lafrance Estate v. Canada (Attorney General) (2003), 2003 CarswellOnt 994, 30 C.P.C. (5th) 59, 169 O.A.C. 376, *(*sub nom. *Bonaparte v. Canada (Attorney General))* [2003] 2 C.N.L.R. 43, *(*sub nom. *Bonaparte v. Canada (Attorney General))* 64 O.R. (3d) 1 (Ont. C.A.) — referred to

Rumley v. British Columbia (2001), 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 9 C.P.C. (5th) 1, 205 D.L.R. (4th) 39, [2001] 11 W.W.R. 207, 95 B.C.L.R. (3d) 1, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 10 C.C.L.T. (3d) 1, [2001] 3 S.C.R. 184 (S.C.C.) — followed

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

Statutes considered:

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

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

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e)(ii) — considered

s. 10 — referred to

s. 24 — referred to

s. 25 — referred to

Crown Liability Act, S.C. 1952-53, c. 30
Generally — referred to

s. 24(1) — referred to

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Indian Act, R.S.C. 1906, c. 81
s. 2(f) "Indians" — referred to

APPEAL by plaintiffs from judgment reported at *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492, 2003 CarswellOnt 4630, 41 C.P.C. (5th) 226 (Ont. Div. Ct.) dismissing appeal from judgment dismissing motion for certification of action as class proceeding.

***Goudge J.A.*:**

Introduction

1 The appellants seek to bring this action on behalf of the former students of the Mohawk Institute Residential School, a native residential school in Brantford, Ontario, and their families. They seek to recover for the harm said to have resulted from attending the School. The action is against those said to be responsible for running the School, namely Canada, the Diocese of Huron and the New England Company.

2 The question before us is whether the action should be certified pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the CPA).

3 The motion judge and the majority of the Divisional Court found that the action should not be certified, primarily because they saw no identifiable class of plaintiffs and no common issues, and, therefore, a class action could not be the preferable procedure. Rather, they viewed the case as one in which the issues were almost exclusively unique to each student and hence required adjudication individual by individual.

4 Cullity J. dissented in the Divisional Court. He found that the criteria for certification set out in s. 5(1) of the CPA were met. He found that there were common issues of sufficient relative importance in the context of the action as a whole that it should be certified.

5 In a case like this, set in the context of a residential school, the primary challenge is to determine if there are common issues and then, in light of the almost inevitable individual issues, to assess the relative importance of those common issues in relation to the claim as a whole. That question is centre stage in this appeal.

6 Cullity J. decided in favour of certification. I agree with his conclusion and, in large measure, with his analysis. Thus, for the reasons that follow, I would allow the appeal and certify the action.

The Background

7 The legislative context for this appeal is found in s. 5(1) of the CPA. It provides that an action must be certified if certain specified criteria are met. The subsection reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

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

8 The facts relevant to this appeal centre on the Mohawk Institute Residential School which was located in Brantford near the Six Nations Reserve. The School began its existence in 1828 as a residential school for First Nations children. It was founded by the New England Company, an English charitable organization dating back to the 17th century, with the mission of teaching the Christian religion and the English language to the native peoples of North America.

9 The New England Company ran the School until 1922, when it leased the School to the federal government. Under the lease, Canada agreed to continue the School as an educational institution for native children and agreed to continue to train them in the teachings and doctrines of the Church of England. Indeed, in 1929, Canada sought to appoint an Anglican clergyman as principal of the School and looked to the Bishop of the Diocese of Huron to nominate appropriate candidates, a selection process that was repeated in 1945. The lease also entitled the New England Company to maintain some measure of control over the premises. It was renewed in similar terms in 1947 and ran until 1965, when the New England Company sold the School to Canada. Four years later, in 1969, the School closed.

10 This action covers the years from 1922 to 1969. During that time, there were 150 to 180 students at the School each year, ranging in age from 4 to 18 and split roughly equally between boys and girls. All were native children, that is Indians within the meaning of the *Indian Act*, R.S.C. 1906, c. 81, as amended. In all, approximately fourteen hundred native children attended the School in these years. They constitute the primary class of claimants proposed for this action. The appellants put forward two additional classes, a “siblings” class (namely the parents and siblings of the students) and a “families” class (namely their spouses and children).

11 The appellants are members of the various First Nations from which the students came. They allege that Canada, the New England Company and the Diocese of Huron, either singly or together, were responsible for the operation and management of the School.

12 Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native languages and were forced to attend and participate in Christian religious activities. It is alleged that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.

The Judgments Below

13 The statement of claim commencing this action was issued on October 5, 1998. It seeks damages on behalf of the students for breach of fiduciary duty, negligence, assault, sexual assault, battery, breach of aboriginal rights and breach of Treaty rights. Damages are also claimed on behalf of the siblings and families of the students for breach of fiduciary duty and for loss of care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3. Finally, the statement of claim advances a claim for punitive damages.

14 In June of 2001, the appellants sought certification of the action pursuant to the CPA, although they excluded the claims for sexual assault from that request.

15 Haines J. dismissed the motion. He dealt in turn with each of the criteria for certification set out in s. 5(1) of the CPA. He found that it is plain and obvious that any claims arising from acts or omissions before May 14, 1953, when the *Crown Liability Act*, S.C. 1952-53, c. 30 came into effect, cannot succeed because the Superior Court of Justice has no jurisdiction to consider those claims. For the period from 1953 to 1969 he concluded that the pleadings were sufficient to disclose a cause of action for breach of fiduciary duty, for the torts alleged, and for breach of aboriginal rights, but not for breach of Treaty rights. Finally, he found it plain and obvious that the claims of the siblings and family members could not succeed.

16 The motion judge then examined whether there was an identifiable class and whether there were any common issues. He found neither, because in essence he could see no cause of action common to all the students who attended the school between 1922 and 1969. He found that the circumstances and experiences of the students were far too diverse to support the notion that the respondents owed identical duties to each student, nor could it be said that, to the extent these duties were breached against one, they were breached against all.

17 The motion judge then briefly addressed the preferability criterion. He concluded that it was not met because of the wide variety of important individual issues requiring independent inquiry, and thus certification would not serve the objectives of access to justice, judicial economy and behaviour modification.

18 Lastly, the motion judge found the appellants to be suitable representatives but the proposed litigation plan to be unworkable in that it sought a common minimum award of damages for each student who had attended the school.

19 In dismissing the motion for certification, the motion judge summed up his conclusion at para. 80 of his reasons:

> I have concluded that the statement of claim does disclose a cause of action with respect to certain claims of the student plaintiffs. I have found, however, that the plaintiffs have failed to establish there is an identifiable class and have failed to demonstrate their claims raise common issues. In the result, the motion for certification is dismissed.

20 On appeal, the majority of the Divisional Court upheld this conclusion. They agreed with the motion judge that the Superior Court of Justice has no jurisdiction over claims arising before May 14, 1953, and that the claims of family members under the *Family Law Act*, must fail because they are based on legislation first enacted in 1978 that cannot be given retroactive effect, as decided in this Court's decision in *Lafrance Estate v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (Ont. C.A.).

21 Although the majority noted that the motion judge found no common issues, they did not discuss either that conclusion or his finding that there was no identifiable class. Rather, they found it necessary to address only the preferability criterion in s. 5(1)(d) of the CPA. They concluded that there was no evidence of access to justice difficulties with individual students pursuing individual claims and no need to consider behaviour modification because residential schools are now a thing of the past in Canada. Most importantly, they concluded that no judicial economy would be achieved by certification because no matter how any common issues might be framed, their resolution would do nothing to avoid or limit the individual claims which would be inevitable, given the diverse experiences of each student. Finally, they said that a class action would be unfair to the defendants and would create an unmanageable trial.

22 Cullity J. dissented. He found each of the five criteria in s. 5(1) of the CPA to be satisfied, and concluded that the appeal should be allowed and the action certified.

23 In addressing whether the pleadings disclose a cause of action as required by s. 5(1)(a) he found that claims against the Crown for vicarious liability for the actions of its employees prior to May 14, 1953, can be brought in the Superior Court of Justice because of the jurisdiction given to that court by the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 as amended, and because the ban in s. 24(1) of the *Crown Liability Act* does not extend to claims like this because they could have been brought against the Crown before May 14, 1953, in the Exchequer Court.

24 Similarly, he found that the claim against the Crown for breach of fiduciary duty is a claim in equity that could have been brought against the Crown in the Exchequer Court before May 14, 1953, and can therefore now be brought in the Superior Court even if it arises before that date. Although he does not say so expressly, it is implicit in his reasons that he treated the claim for breach of aboriginal rights in the same way, because he found it to be a common issue as well.

25 However, he agreed with the motion judge that the claims in tort for breach of duty owed by the Crown directly to class members can only be advanced if they arose after May 14, 1953. Finally, he also agreed that the claim pursuant to the *Family Law Act* cannot stand.

26 He found that the requirement that there be an identifiable class was also met. He held that the members of the class of individuals who were students at the school between 1922 and 1969 could be ascertained by objective criteria rationally linked to the common issues he identified.

27 He also concluded that the families and siblings of the students both constituted identifiable classes, provided that the claim for breach of fiduciary duty owed to them by the Crown could be said to disclose a cause of action sufficient to meet the criterion in s. 5(1)(a).

28 He then turned to examine in more detail whether the claims of class members raised common issues as required by s. 5(1)(c). He began by describing the sizeable challenge faced by the motion judge on this score, given that the litigation plan first presented by the plaintiffs proposed a list of fifty-three common issues. Many, such as how the operations of the school were funded, were drafted with such particularity that their resolution would be of little moment in the trial of these claims. He quite rightly pointed out that although class actions often require active and continual management of the proceedings by the court, plaintiffs' counsel nonetheless has the responsibility to establish that the criteria for certification are met, including the identification of common issues. Counsel cannot expect the judge on a certification motion to single-handedly fashion the common issues in order to meet the requirements of s. 5(1)(c).

29 By the time of the appeal to the Divisional Court, the appellants had reworked their list and were proposing eight more broadly framed common issues. Cullity J. found that with some further refashioning there were common issues sufficient to satisfy s. 5(1)(c). He placed considerable reliance on the reasons of the Supreme Court of Canada in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) which were released after the decision of the motion judge here. He focused on the duty of care said to be owed to all members of the student class and the fiduciary duty owed both to them and the families and siblings classes. He found that the common issues could be defined in terms of these duties and their breach. He described his conclusion about the common issues at paras. 25 and 31 of his reasons:

> As in *Rumley*, they would include a failure to have in place management and operations procedures that would reasonably have prevented abuse and, in addition, issues similar to those described by the Court of Appeal in *Lafrance Estate* as the essence of the claims for breach of fiduciary duty against the Crown in that case: namely, whether "the very purpose of the Crown's assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability 'to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people.'"
>
> . . . . .
>
> While I would not accept without modification the original formulation — or the reformulation — of the common issues proposed on behalf of the plaintiffs, such issues could, I believe, be defined in terms of the existence and breach of duties of care, and fiduciary duties, owed by the defendants to class members — and the infringement of the aboriginal rights of the members — with respect to the purposes, operations, management and supervision of the Mohawk Institute and with respect to each of the categories of harm referred to in paragraphs 51 and 52 of the statement of claim. The issues relating to the existence and breach by the Crown of duties of care in tort would be confined to conduct that occurred after May 13, 1953. I would also include as common issues the claim for punitive damages arising from any of the above breaches that are proven and the possibility of an aggregate assessment of damages.

30 He did, however, go on to reject the claim for vicarious liability, finding that because the claim addressed the conduct of particular employees towards particular students it could not qualify as a common issue.

31 Finally, he turned to the preferability requirement of s. 5(1)(d). He found that any deference owed to the motion judge on this issue was displaced because the preferability analysis can be properly done only in light of the common issues identified and the motion judge identified none. He went on to conclude that the trial of the common issues he identified would be a fair, efficient and manageable method of advancing the claims pleaded and would be preferable to other procedures. Unlike his colleagues, he accepted the evidence of the vulnerability of class members and thus found that the objective of access to justice would be served to an appreciable extent by certification. However, he gave most weight to the judicial economy to be achieved by having one trial of the common issues rather than fourteen hundred.

32 In summary, he found that the focus of the trial of the common issues would be on the conduct of the respondents rather than on the precise circumstances of particular class members and that the existence of individual issues such as limitation periods or causation of harm to individual students was not enough to outweigh the conclusion that resolution of the common issues would significantly advance this action.

33 He concluded by finding that although the proposed litigation plan required reformulation in light of his findings, its deficiencies were not sufficient to deny the motion. He would have allowed the appeal, granted certification, and left the details of the litigation plan to be resolved by counsel under the supervision of the judge assigned to case manage the proceedings.

Analysis

34 With leave, the appellants appeal to this court, seeking an order setting aside the orders of the Divisional Court and the motion judge and certifying the action. They invite us to do so on the basis of the reasoning of Cullity J. which they fully endorse. They argue that all of the five of the criteria in s. 5(1) of the CPA are met and that the court must therefore certify. The respondents contest each of these, some more vigorously than others, most pointedly the preferability requirement.

35 Before addressing in turn each of these factors, it is helpful to repeat the full subsection and set out the principles applicable to its application as they have been developed by the Supreme Court of Canada and this court. Section 5(1) reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class

members.

36 The Supreme Court of Canada has issued three important decisions to guide the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), and *Rumley*, supra. In *Hollick*, the Supreme Court of Canada had its first opportunity to enunciate the interpretive approach to be applied to the CPA in general and to its certification provisions in particular.

37 Speaking for the Court at paras. 14-16, McLachlin C.J.C. made clear that in light of its legislative history, the CPA should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

38 In addition, she emphasized that the certification stage is decidedly not meant to be a test of the merits of the action, but rather focuses on its form. As she said at para. 16, "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action."

39 For its part, this court has said that because of the expertise developed in this new and evolving field of class actions by the small group of judges across the province who have significant experience in hearing certification motions, an appellate court should proceed with deference and should restrict its intervention to matters of general principle. See *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.). This admonition is somewhat complicated in this particular case because both Haines J. and Cullity J. have been part of that small group.

40 It is against this backdrop then that the debate between the parties on each of the requirements of s. 5(1) must be considered.

The Cause of Action Criterion — s. 5(1)(a)

41 It is now well established that this requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

42 Although the parties originally differed on whether that test is met here, by the time of argument in this court they had come to agree that the appellants' pleadings disclose the following causes of action within the meaning of that test:

> (a) The claim for vicarious liability of the defendants over the full period of this action namely, 1922 to 1969 (although the appellants do not contest Cullity J.'s conclusion that these claims do not give rise to any common issue);
>
> (b) The claim for breach of fiduciary duty owed to the members of the student class over the full time frame of the action;
>
> (c) The claim for breach of fiduciary duty owed to the members of the families and siblings classes over the full time frame of the action (given this court's decision in *Lafrance Estate*, *supra*); and
>
> (d) The claims for negligence of the defendants but only between 1953 and 1969.

43 I agree with the parties that these causes of action survive the test in s. 5(1)(a). Although it was not the subject of separate argument before us, I would reach the same conclusion concerning the claim for breach of the aboriginal rights of the members of the student class over the full time frame of the action, because this claim is so closely akin to the claim for breach of fiduciary duty.

44 On the other side of the coin, the appellants also now properly concede that the following claims cannot be proceeded with:

(a) The claims of the members of the families and siblings classes pursuant to the *Family Law Act*;

(b) The claims for negligence occurring before 1953; and

(c) The claims for breach of Treaty rights (which the motion judge found were not made out on the pleadings and which the appellants did not thereafter pursue).

The Identifiable Class Requirement — s. 5(1)(b)

45 *Hollick*, *supra*, at para. 17, describes what is necessary to meet this requirement. The appellants are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.

46 As I have said, Haines J. found that the appellants failed to establish any identifiable class. In my view, he applied the wrong test in doing so by requiring that all students fully share a cause of action. This is inconsistent with *Hollick*, *supra*, which makes clear that the shared interest need only extend to the resolution of the common issues. The application of a wrong test is an error in principle and the decision which results can attract no deference. For its part, the majority of the Divisional Court did not address the identifiable class issue. However Cullity J. found that the requirement in s. 5(1)(b) had been satisfied by the appellants.

47 In my view, he was correct in doing so. The appellants satisfy all the dimensions of this requirement. Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the families class requires that a person meet the objective criterion of being a spouse, common law spouse or child of someone who was a student. Likewise the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues found by Cullity J. in that it is the class members to whom the duties of reasonable care, fiduciary obligation and aboriginal rights are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach of these duties and that they all suffered at least some harm as a result, these classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed these duties and whether these duties were breached. Any narrower class definition would necessarily leave out some who share that interest. Thus I conclude that the identifiable class requirement is met.

The Common Issues Requirement — s. 5(1)(c)

48 As with each of the criteria in s. 5(1) the common issues requirement must be discretely addressed and satisfied for the action to be certified. However, there is no doubt that this analysis will often overlap with that required by other factors in s. 5(1). Indeed in some cases these inquiries may be somewhat interdependent. For example, the identification of common issues will often depend in part upon the definition of the identifiable class and vice versa. This particular interrelationship is reflected in the requirement that there be some rational relationship between the identifiable class and the common issues. Hence the discussion of common issues must have in mind the identifiable class, just as the discussion of identifiable class proceeded in light of the common issues.

49 Moreover, like the other criteria in s. 5(1), save for the disclosure of a cause of action, the common issues criterion obliges the class representative to establish an evidentiary basis for concluding that the criterion is met. McLachlin C.J.C. put

it this way in *Hollick*, *supra*, at para. 25: "In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

50 *Hollick* also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

51 *Hollick* also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question at para. 18:

> A more difficult question is whether "the claims...of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial...ingredient" of each of the class members' claims.

52 This requirement has been described by this court as a low bar. See *Carom*, *supra*, at para. 42. Indeed this description is consistent with the commonality finding in *Hollick* itself. The class action proposed there was on behalf of some thirty thousand people who lived in the vicinity of a landfill site that was alleged to cause harm through noise and physical pollution. The Supreme Court found that the issue of whether the site emitted pollutants into the air met the test of s. 5(1)(c) because each class member would have to show this or see his claim fail. The Court did not see this conclusion to be at all undermined by the fact that this common issue was but one aspect of the liability issue and a small one at that. It clearly accepted that after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually. Yet it found the commonality requirement to be met.

53 In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

54 Neither the reasons of the motion judge nor those of the majority of the Divisional Court reflect this approach to the commonality assessment. The motion judge focused on those aspects of the claim that in his view would require individual determination, student by student. Although he did not have the benefit of the Supreme Court decision in *Hollick*, *supra*, he did not analyze what parts of the claim could be said to be common as explained in that decision. Moreover, in my view, he erred in his ultimate conclusion that there were no common issues. For its part, the majority of the Divisional Court felt it unnecessary to address this criterion.

55 On the other hand, I think Cullity J. approached the commonality issue correctly and reached the right result. As I have described, rather than focusing on how many individual issues there might be and concluding from that that there could be no common issues, Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.

56 Relying on *Rumley*, he found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. For the student class these duties are framed in negligence, fiduciary obligation and aboriginal rights. For the other two classes the claim is one of fiduciary obligation. The need to determine the existence of these duties and whether they were breached in respect of all class members is a significant part of the claim of each class member. Finally, he found that the claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement. Thus he found that s. 5(1)(c) was met.

57 The appellants urge us to adopt Cullity J.'s conclusion. On the other hand the respondents attack it in several ways.

58 The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. As the analysis in *Hollick*, *supra*, exemplifies, the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.

59 The respondents also argue that the claim of systemic negligence in running the School cannot serve as a common issue because the standard of care would undoubtedly change over time as educational standards change. However, in my view this argument is answered by *Rumley*, which was also a claim based on systemic negligence in the running of a residential school for children. There the Supreme Court found that the class action proceeding is sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. In that case the claim covered a forty-two year period. Here, in analogous circumstances, the negligence claim covers only sixteen years, from 1953 to 1969.

60 The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposes of s. 5(1)(c).

61 Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues.

62 The respondents other than Canada also argue that, at least for them, the finding of common issues by Cullity J. is undermined by their assertion that their proximity to Canada in exercising control over the operation of the School varied over time. Again, I disagree. At best that assertion may provide these respondents with a defence to the appellants' claims in the common trial for certain periods of time. Nonetheless the common issues remain and require resolution.

63 Lastly the respondents say that in reaching his conclusion about common issues Cullity J. should not have relied on *Rumley*, but should have distinguished it. They say this essentially for two reasons. First *Rumley* involved sexual abuse of students and therefore there could be little debate about the duty to prevent it owed by those running the school, whereas, here, the legal duties alleged are seriously contested. Second, they say that in *Rumley* there were very few individual issues requiring resolution because, for example, sexual abuse had been found to occur and there were no issues of vicarious liability or limitations requiring individual resolution.

64 In my view neither of these renders *Rumley* inapplicable to this case. Although the existence of the systemic duty of care to all students and its precise nature may be more hotly contested here than in *Rumley*, nonetheless the issue is a significant one requiring resolution for each class member and is a proper common issue.

65 Moreover, at para. 33 of *Rumley*, the Supreme Court made clear that the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment. Although the Court underlined that it was dealing with the British Columbia *Class Proceedings Act* (which explicitly states that the common issues requirement may be met whether or not these issues predominate over individual issues, whereas the CPA is silent on the point), in my view the same approach is implicit in the CPA. A weighing of the relative importance of the

common issues and the remaining individual issues is necessarily an important part of the preferability inquiry. I do not think that the CPA contemplates a duplication of that task as part of the commonality inquiry. The CPA's silence on the point cannot be read as mandating the opposite of the B.C. legislation. Thus the extent of individual issues that may remain after the common trial in this case does not undermine the conclusion that the commonality requirement is met.

66 I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way.

67 In the affidavits of the ten representative plaintiffs there is a clear showing of some basis in fact supporting this description of the way in which the School was run. Although their cross-examinations support the conclusion that students were not all treated the same way and did not all experience the same suffering, the appellants have shown some basis in fact for their assertion that the management and operation of the School raises the common issues required for certification by s. 5(1)(c). They have met their evidentiary burden.

68 The appellants acknowledge that if they are successful in the common issues trial it will be necessary to separately establish causation of harm and quantification of damages for each individual class member for all three classes.

69 Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

70 I also agree with Cullity J. that in a trial of these common issues the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can also properly assess whether this conduct towards the members of the three classes as a whole should be sanctioned by means of punitive damages.

71 In summary, I agree with Cullity J. that the appellants have met the requirements set by s. 5(1)(c) of the CPA. The focus of the common trial will be on the conduct of the respondents as it affected all class members, and how and for what purpose they ran the School. Although evidence from individuals that speaks to the respondents' systemic conduct may be relevant to this, findings of causation and extent of harm must await the individual trials to follow.

72 As the class action proceeds, the judge managing it may well determine that the common issues should be restated with greater particularity in light of his or her experience with the class proceeding. To permit that process to unfold with flexibility, at this stage. I would state the common issues in general terms, as follows:

> (1) By their operation or management of the Mohawk Institute Residential School from 1953 to 1969 did the defendants breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?
>
> (2) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?
>
> (3) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the

defendants breach a fiduciary duty owed to the families and siblings of the students of the School?

(4) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?

(5) If the answer to any of these common issues is yes, were the defendants guilty of conduct that justifies an award of punitive damages?

(6) If the answer to that is yes, what amount of punitive damages is awarded?

The Preferable Procedure Requirement — s. 5(1)(d)

73 As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.

74 *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

75 At para. 30 of that decision the Court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.

76 In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues. The preferability finding in *Hollick* itself was just this and the requirement was therefore found not to be met. That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

77 Neither the motion judge nor the majority of the Divisional Court properly addressed this vital aspect of the preferability inquiry and thus their conclusion cannot stand. As Cullity J. said, the determination of whether, in the context of the entire claim, the resolution of the common issues will significantly advance the action can only be done in light of the particular common issues identified. Here the motion judge found none and therefore could not make this assessment. The majority of the Divisional Court did not address the common issues requirement but simply stated its conclusion that any attempt to formulate common issues in terms of systemic negligence would not significantly advance the litigation given the numerous individual claims. With respect, without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made. It would risk a conclusion based not on relative importance but simply on the existence of a large number of individual issues. It would also preclude any appellate review.

78 On the other hand, as I have outlined, Cullity J. found that in the context of the entire claim the resolution of the common issues he found would significantly advance the action and that otherwise the preferability requirement was met. I agree with that conclusion.

79 As they did with the common issues, the respondents contest this finding in several different ways. Here too their primary attack is that the vast majority of issues require individual determination. They say that these issues involve individual acts of abuse, different perpetrators, unique individual circumstances both before and after attendance at the school

widely varying impacts and damage claims, and an array of different limitations, triggers and discoverability issues. They argue that the common issues are negligible in comparison and that their resolution will not significantly advance the action.

80 I do not agree. An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class members. Together these assertions comprise the common issues that must be assessed in relation to the claim as a whole.

81 I agree with Cullity J. that whether framed in negligence, fiduciary obligation or aboriginal rights the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. Save for those relating to limitations they are all aspects of harm and causation, both of which the appellants acknowledge they will have to establish individual by individual. The limitations questions are all individual defences, which the appellants also acknowledge will require individual adjudication.

82 The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

83 The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor to the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.

84 This assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial. The finding in *Rumley* demonstrates this. The class there was defined as students at the residential school between 1950 and 1992 who reside in British Columbia and claimed to have suffered injury, loss, or damages as a result of misconduct of a sexual nature occurring at the school. The common issues were defined very similarly to those in this case. The Supreme Court recognized that following their resolution, adjudication of injury and causation would be required individual by individual. Although the number of individual adjudications appears to have been uncertain, the time frame of the action alone suggests that it might be relatively high. Yet the Court was able to conclude that the common issues predominated over those affecting only individual class members, which is a consideration required by the British Columbia legislation. This as an even higher standard than that set for preferability under the CPA, namely that viewed in the context of the entire claim, the resolution of the common issues must significantly advance the action. However, in both cases the assessment is a qualitative one, not a comparison of the number of common issues to the number of individual issues.

85 In this case that qualitative assessment derives from the reality that resolving the common issues will take the action a long way. That assessment is also informed in an important way by the considerations of judicial economy and access to justice. Because residential schools for native children are no longer part of the Canadian landscape, the third objective of class proceedings, namely behaviour modification, is of no moment here.

86 However, I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

87 Access to justice would also be greatly enhanced by a single trial of the common issues. I do not agree with the majority of the Divisional Court that there is nothing in the record to sustain this conclusion. The affidavit material makes clear that the appellants seek to represent many who are aging, very poor, and in some cases still very emotionally troubled

by their experiences at the school. Cullity J. put it this way at para. 46 of his reasons:

> While the goal of behavioural modification does not seem to be a value that would be achieved to any extent by certification, I am satisfied that the vulnerability of members of the class — as evidenced by the uncontradicted statements in the affidavits sworn by the representative plaintiffs — is such that the objective of providing access to justice would be served to an appreciable extent. Each of the representative plaintiffs referred to the poverty of many of the former students, their inability to afford the cost of individual actions and the effect such proceedings would have on the continuing emotional problems from which they suffer as a result of their experiences at the Mohawk Institute. These statements were not challenged on cross-examination and, unlike my colleagues, I see no reason to reject their truth or their significance.

88 In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure. The language used by the Chief Justice in *Rumley* at para. 39 is equally apt to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

89 The respondents also attack Cullity J.'s preferability finding by saying that a class action would be unfair to them and would create an unmanageable proceeding. I do not agree. The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in fourteen hundred.

90 That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in *Rumley* unmanageable and does not do so here. Moreover, the CPA provides for great flexibility in the process. For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

91 Lastly, the respondents argue that Cullity J. was wrong because the class action is not preferable to other means of resolving class members' claims. They support this position with fresh evidence filed in this court describing the alternative dispute resolution system that has been put in place by Canada to deal with claims of those who attended native residential schools.

92 Even if we were to admit this fresh evidence I do not agree that this ADR system displaces the conclusion that the class action is the preferable procedure. It is a system unilaterally created by one of the respondents in this action and could be unilaterally dismantled without the consent of the appellants. It deals only with physical and sexual abuse. It caps the amount of possible recovery and, most importantly in these circumstances, compared to the class action it shares the access to justice deficiencies of individual actions. It does not compare favourably with a common trial.

93 Thus I conclude that each of the respondents' attacks must fail and that Cullity J. was correct to find that the appellants have met the preferability requirement.

The Workable Litigation Plan Requirement — s. 5(1)(e)(ii)

94 Although it was not strenuously pursued in oral submissions, the respondents also argue in their factums that the action

cannot be certified because the appellants have not yet produced a workable litigation plan.

95 I do not agree that the appellants' certification motion should fail on this basis. The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

Conclusion

96 I conclude that the appellants have shown that their action satisfies all the requirements of s. 5(1) of the CPA. It must therefore be certified and remitted to the supervision of the Superior Court judge assigned to manage the action.

97 That judge will undoubtedly face significant challenges as this class action unfolds. If they prove insurmountable, the CPA provides remedies. However, the CPA also provides the judge with much flexibility in addressing these challenges and assessing them at this stage of the proceedings, I am not persuaded that they cannot be satisfactorily met within this form of proceeding.

98 I would therefore allow the appeal, set aside the orders of the Divisional Court and the motion judge and substitute an order certifying the action consistent with these reasons.

99 The parties have given us proposed bills of costs. However given the amounts at stake, I invite the parties to make written submissions as to the costs here and below. These submissions are to be exchanged and filed within six weeks of the release of these reasons and are not to exceed five pages, double spaced. Within a further two weeks, each party may then file a written reply not to exceed three pages, double spaced.

***Catzman J.A.*:**
I agree.

***Moldaver J.A.*:**
I agree.

Appeal allowed.

235 A.C.W.S. (3d) 326
Supreme Court of Canada

Dell'Aniello c. Vivendi Canada inc.

2014 CarswellQue 28, 2014 CarswellQue 29, 2014 SCC 1, 2014 C.E.B. & P.G.R. 8066 (headnote only), 2014 CSC 1, [2014] 1 S.C.R. 3, [2014] S.C.J. No. 1, 235 A.C.W.S. (3d) 326, 369 D.L.R. (4th) 195, 453 N.R. 150, 51 C.P.C. (7th) 1, 8 C.C.P.B. (2nd) 163, J.E. 2014-124

Vivendi Canada Inc., Appellant and Michel Dell'Aniello, Respondent and Alliance of Manufacturers & Exporters of Canada, carrying on business as Canadian Manufacturers & Exporters, and Canadian Chamber of Commerce, Interveners

LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: April 24, 2013
Judgment: January 16, 2014
Docket: 34800

Proceedings: affirmed *Dell'Aniello c. Vivendi Canada inc.* (2012), 2012 CarswellQue 1613, 2012 QCCA 384, 95 C.C.P.B. 165, Chamberland J.C.A., Léger J.C.A., Rochon J.C.A. (C.A. Que.); reversed *Dell'Aniello c. Vivendi Canada inc.* (2010), 83 C.C.P.B. 22, 2010 CarswellQue 7870, 2010 QCCS 3416, Mayer J.C.S. (C.S. Que.)

Counsel: Sylvain Lussier, Michel Benoit, Julien Ranger-Musiol, for Appellant
Claude Tardif, Catherine Massé-Lacoste, for Respondent
Michael A. Feder, Pierre-Jérôme Bouchard, for Interveners

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

Civil procedure --- Class actions — Certification

V. made unilateral amendment to health insurance plan for retirees and surviving spouses — Intending to challenge amendment, D. applied to Superior Court for authorization to institute class action on behalf of Plan beneficiaries — Motion dismissed on basis that claims did not raise common question given different rules governing each member's right to benefits under the Plan — Court of Appeal allowed D.'s appeal, finding that motion judge erred in assessment with respect to criterion in art. 1003(a) of Code of Civil Procedure (Que.), by focussing on individual questions that might arise — Court of Appeal concluded there was common question and authorized class action — V.'s appeal dismissed — Section 1003(a) of Code requires there to be question of law or fact that is "identical, similar or related" for all members of proposed class for class action to be authorized — Question "common" if it can advance resolution of every class member's claim; not necessary for answer to be identical or that answer benefit each class member to same extent — Quebec courts' interpretation of commonality requirements broader and more flexible than common law provinces — Even where circumstances vary from one member to another, class action can be authorized if some questions are common — To meet commonality requirement, applicant must establish existence of common question that would serve to advance resolution of litigation with respect to all group members, and that would not play insignificant role in outcome of case — Multitude of legal schemes applicable to individual claims not itself a bar nor does existence of subgroups within proposed group, on its own, constitute sufficient basis for refusing to authorize class action — Criteria in art. 1003 of Code exhaustive; whether class action "preferable" procedure not relevant consideration — Motion judge erred in ruling on merits by determining that rights to benefits of some members had not crystallized, thereby overstepping bounds of function of screening motions — Motion judge also adopted wrong methodology by seeking common answers rather than identifying common question — Question raised concerned validity of Plan amendments which had effect of reducing certain benefits — Since claims of all proposed class members based on Plan, validity of amendments arose for all members and answer to question would advance resolution of all claims

— There was, therefore, a common question

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Words and phrases considered:

class action

The class action . . . is "the procedure which enables one member to sue without a mandate on behalf of all the members" of a group.

Termes et locutions cités:

recours collectif

[L]e recours collectif est « le moyen de procédure qui permet à un membre d'agir en demande, sans mandat, pour le compte de tous les membres » d'un groupe.

APPEAL by new employer from judgment reported at *Dell'Aniello c. Vivendi Canada inc.* (2012), 2012 CarswellQue 1613, 2012 QCCA 384, 95 C.C.P.B. 165 (C.A. Que.), allowing representative's appeal from motion judge's decision to dismiss his motion for authorization to institute class action challenging new employer's decision to modify terms of pension plan.

POURVOI formé par un nouvel employeur à l'encontre d'une décision publiée à *Dell'Aniello c. Vivendi Canada inc.* (2012), 2012 CarswellQue 1613, 2012 QCCA 384, 95 C.C.P.B. 165 (C.A. Que.), ayant accueilli l'appel interjeté par le représentant à l'encontre de la décision du juge d'autorisation de rejeter sa requête en autorisation de déposer un recours collectif contestant la décision du nouvel employeur de modifier les termes du régime de retraite.

***LeBel, Wagner JJ.* (Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring):**

I. Overview

1 The class action, which was introduced into Quebec law in 1979, is "the procedure which enables one member to sue without a mandate on behalf of all the members" of a group: *art. 999(d), Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"). This procedural vehicle has several objectives, including facilitating access to justice, modifying harmful behaviour and conserving judicial resources: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 15; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.), at paras. 27-29.

2 In *art. 1003 C.C.P.*, the Quebec legislature has laid down the essential conditions that must be met for a court to authorize the bringing of a class action. One of these conditions is that there be one or more questions of law or fact that are "identical, similar or related" for all the members of the group. It is this criterion that is at the heart of this appeal. More specifically, a court hearing an application for authorization must decide whether *art. 1003(a) C.C.P.* requires a common answer, for all the members of the group in question, to the common question raised by their claims.

3 The litigation in this case arises out of a unilateral amendment made by Vivendi Canada Inc. to the health insurance plan ("Plan") of which it is the sponsor for its retirees and their surviving spouses. Mr. Dell'Aniello, the respondent in this appeal, filed a motion for authorization to institute a class action, on behalf of all the beneficiaries of the Plan, in order to challenge the validity of the amendment. The Superior Court dismissed the motion on the basis that the claims of all the members of the proposed group did not raise questions that were "identical, similar or related", having regard to each

member's particular situation. The Court of Appeal concluded that the judge who heard the motion for authorization had erred in his assessment with respect to the criterion set out in art. 1003(*a*) *C.C.P.*, and that there was a question common to the claims of all the members of the group.

4 For the reasons that follow, we are of the opinion that the appeal must be dismissed. The Court of Appeal was right to intervene, as the motion judge had erred in inquiring into the possibility that the class action would lead to a common answer to the questions raised by the claims of all the members of the group. The *C.C.P.* requires not a common answer, but a common question that can serve to advance the resolution of the litigation with respect to all the members of the group. Moreover, by considering the merits of the dispute, the motion judge had also overstepped the bounds of his role of screening motions at the authorization stage.

II. Facts

5 Seagram Ltd. was established in 1857 and over time became Canada's leading producer and distributor of wine and spirits. Seagram's employees had generous conditions of employment, including the Plan.

6 According to a description set out in a document dated 1977, the Plan covered Seagram's employees, and their dependents, both during the employees' working lives and after they retired. The employees were required to contribute to the Plan while they were working, but Seagram paid all the costs after they retired.

7 Over the years, the Plan was revised several times. In particular, in July 1985, Seagram inserted a unilateral amendment clause in a footnote in the document that set out the details of the Plan. This clause read as follows:

> While Seagram expects to continue this Supplementary Health Insurance Plan indefinitely, future conditions cannot be foreseen, thus it necessarily reserves the right to modify or suspend the Plan at any time. [A.R., vol. II, at p. 104]

8 In December 2000, Vivendi S.A. acquired Seagram, which had about 700 employees at the time. In December 2001, Seagram's assets related to the production and distribution of wine and spirits were sold. As part of that transaction, Seagram became Vivendi Universal Canada Inc., which in turn became Vivendi Canada Inc. ("Vivendi"). Vivendi is therefore Seagram's successor and the Plan's sponsor.

9 Seagram, and later Vivendi, complied fully with the terms of the Plan for many years. In September 2008, however, Vivendi told the Plan's beneficiaries that it would be making several changes to the Plan that were adverse to their interests. These changes took effect on January 1, 2009 ("2009 amendments"). As of that date, the Plan's only remaining members were retirees and surviving spouses, since Vivendi no longer had any operations in Canada related to the production and distribution of wine and spirits.

10 As a result of the 2009 amendments, the respondent applied to the Quebec Superior Court for authorization to institute a class action against Vivendi and asked that court to ascribe to him the status of representative of the following persons:

> [TRANSLATION]
>
> All retired officers and employees of the former Seagram Company Limited who are eligible for post-retirement medical care under Vivendi Canada Inc.'s health care plan ("Plan") and eligible dependents within the meaning of the Plan ("beneficiaries"), as well as, with regard to the damages claimed, the successors of any such officers, employees or beneficiaries who have died since January 1, 2009. [A.R., vol. II, at p. 2]

11 The identical, similar or related questions of law or fact for which the respondent seeks a decision through the class action are as follows:

[TRANSLATION]

(a) For group members who are retirees, do the Plan's benefits constitute deferred compensation that is paid today in the form of benefits but was earned when they were active employees?

(b) From the date of their retirement, pursuant to the Plan and other documents cited herein, did the group members who are retirees have rights with respect to health care under the Plan that had vested or crystallized as of their retirement date and that could not be diminished without their consent?

(c) From the date of their retirement, in accordance with a general legal principle or a principle developed by the courts, did the group members who are retirees have rights with respect to health care under the Plan that had vested or crystallized as of their retirement date and that could not be diminished without their consent?

(d) Is the clause unilaterally inserted into the Plan in 1985 one whose purpose is to make it possible to harmonize the Plan with and adapt it to legislative changes, or does it instead authorize the respondent to unilaterally reduce the coverage of health care under the Plan for group members who are retirees in the absence of any legislative change obliging the respondent to do so?

(e) Assuming that the clause unilaterally inserted into the Plan in 1985 permitted the respondent to unilaterally reduce the coverage of health care under the Plan for group members who are retirees in the absence of any legislative change obliging the respondent to do so,

(1) is the clause purely potestative, and is it null for that reason?

(2) does the clause make the Plan contract non-binding, and is it null for that reason? or

(3) does the clause make all the Plan's contractual obligations indeterminate or indeterminable, and is it null for that reason?

(f) Is the Plan a contract of adhesion, and if so, in case of doubt, must it be interpreted in favour of the adhering parties, that is, the members of the group? [A.R., vol. II, at pp. 15-16]

The purpose of all these questions is to answer the more general question whether the 2009 amendments are valid or lawful.

III. Judicial History

A. Quebec Superior Court (Mayer J.), 2010 QCCS 3416, 83 C.C.P.B. 22 (C.S. Que.)

12 As we mentioned above, Mayer J. dismissed the motion for authorization to institute a class action on the basis that there were no questions that were identical, similar or related for all the members of the group. This conclusion was based on his opinion that too many factors specific to each member had to be considered for one or more of the questions to be decided collectively. Moreover, not all the group's members had in their possession, at the time they retired, the documents the respondent had in his.

13 Mayer J. considered whether the questions raised in the motion for authorization to institute a class action were identical, similar or related, within the meaning of art. 1003(*a*) *C.C.P.*, for all the members of the group. After identifying the principles established by the courts, he concluded that because of the large number of questions requiring individualized analyses, the claims of the members of the proposed group did not lend themselves to a collective resolution.

14 Mayer J.'s conclusion that numerous individualized analyses would be necessary arose out of his interpretation of the rules governing the right of retirees to insurance benefits. He stated that it must be determined whether the right to insurance

benefits during retirement has vested, because it is settled that an employer cannot modify or abolish a vested right without the retiree's consent. In his view, because the right to insurance benefits "crystallizes" at the time of retirement, the intention of the parties with respect to the vesting of rights must be determined as of that time. For this, the contract in effect at the time of retirement must be examined together with the communications between the employer and each employee in order to determine whether any rights have vested.

15 According to Mayer J., the respondent's premise that the question of vested rights could be considered collectively was wrong. The employees covered by the action had retired on different dates between 1971 and 2003, and the various groups of retirees had not all received the same communications from the employer. In addition, individual communications had been sent to the retirees. In Mayer J.'s opinion, it was essential to rule on the rights of the various members of the proposed group on the basis of the communications each of them had actually received. To proceed in any other way would be unfair to Vivendi.

16 In support of his conclusion that it was necessary to conduct individual analyses, Mayer J. identified five subgroups. Subgroup 1 consisted of the surviving spouses of employees who had retired before January 1, 1977. According to Mayer J., the rights of these members could not be governed by the documents applicable to the respondent, since those documents had not existed at the time the employees in question retired. To determine the scope of the rights of the members of subgroup 1, it was instead necessary to consider the communications between the deceased employees and the employer before or at the time of their retirement. Mayer J. found that, according to the documents in the record, a surviving spouse was no longer eligible for insurance benefits after the retired employee died.

17 Subgroup 2 was made up of employees who had retired between January 1, 1977 and July 14, 1985, and the surviving spouses of such employees. When the employees in question retired, they had the 1977 benefit guide in their possession as well as the insurance policy issued by Sun Life of Canada. Mayer J. stated that because Seagram had reserved the right to terminate the insurance contract, the rights of the members of this subgroup to insurance benefits had not crystallized.

18 Subgroup 3 consisted of employees who had retired between July 15, 1985 and December 31, 1995, and the surviving spouses of such employees. At the time they retired, the employees in question had in their possession a letter from Mr. Kosiuk, a representative of Seagram, and the benefit guide prepared in 1985, which contained the unilateral amendment clause. As a result, Mayer J. found, that clause, according to which Vivendi could modify the insurance benefits, prevented the rights of the members of subgroup 3 from crystallizing.

19 Subgroup 4 was made up of employees who had retired between January 1, 1996 and June 20, 2000, and the surviving spouses of such employees. The employees in question had in their possession a letter from Mr. Wilson dated November 20, 1995 and the 1996 benefit guide. As with the members of subgroups 2 and 3, Mayer J. concluded that because Vivendi had retained the right to modify the Plan unilaterally, the rights of the members of subgroup 4 had not crystallized.

20 Finally, the members of subgroup 5, which included the respondent, were employees who had retired after June 21, 2000. A number of documents relating to the Plan, namely three emails from Mr. Borgia and a letter from Mr. Wilson, were sent, the first dated June 21, 2000, but not all the members of this subgroup had them in their possession when they retired.

21 This division into five subgroups of the group covered by the motion for authorization to institute a class action showed that not all the group's members had in their possession, at the time they retired, the documents the respondent had in his. As a result, Mayer J. found that the various group members had different rights. He also asserted that individual analyses would be required within each subgroup, since each member of a subgroup could have received documents or communications that the others had not received.

22 Mayer J. also noted that the unilateral amendment clause did not apply to those who had retired before July 15, 1985, who made up 20 percent of the group. It was therefore irrelevant to the analysis on the vesting of the rights of those retirees, and a decision concerning the interpretation or the validity of the clause would not serve to advance the resolution of the litigation with respect to those individuals.

23 Mayer J. also stated that the injury allegedly suffered by the group's members could be established only on an individual basis. This was another factor that weighed against authorizing the class action.

24 Finally, given that the proposed group's members had worked in six different provinces, this lack of homogeneity was, in Mayer J.'s view, another relevant factor that supported a refusal to authorize the class action. The law of the common law provinces would apply to the retirees who had worked in those provinces, whereas Quebec law would apply to those who had worked in Quebec. In light of the number of subgroups and different legislative schemes that would apply to the various questions, he concluded that a minimum of 22 separate analyses would be needed to answer the questions the respondent said to be "common".

25 Mayer J. therefore found that, because of this [TRANSLATION] "range of individual recourses", the requirement set out in art. 1003(*a*) *C.C.P.* was not met (para. 137). As a result, he dismissed the respondent's motion for authorization to institute a class action.

B. Quebec Court of Appeal (Chamberland, Rochon and Léger JJ.A.), 2012 QCCA 384, 95 C.C.P.B. 165 (C.A. Que.)

26 The Court of Appeal unanimously allowed the appeal, authorized the institution of a class action and ascribed the status of representative to the respondent. It held that Mayer J. had erred in finding that the condition set out in art. 1003(*a*) *C.C.P.* was not met. It also concluded that the question whether the 2009 amendments were valid or lawful was common to all the members of the group.

27 The Court of Appeal found that the motion judge had erred in law by ruling on the merits on the question whether the 2009 amendments were valid in relation to the members of the group. All the Superior Court had to do at the authorization stage was decide whether the questions relating to the validity or the legality of the 2009 amendments were identical, similar or related for the claims of all the members of the proposed group.

28 According to the Court of Appeal, Mayer J. had instead focused on the individual questions that might arise in light of the different rules governing each member's right to insurance benefits. In so doing, Mayer J. had ruled on the merits of the arguments raised by the appellant and the respondent, thereby overstepping the bounds of his function of screening motions at the authorization stage.

29 The Court of Appeal concluded that, [TRANSLATION] "by taking the fragmentation of the subgroups too far and deciding the question of vested rights, [Mayer J.] disregarded the *prima facie* case requirement and, without saying so, indirectly ruled on the validity of the 1985 clause in which the employer reserved the right to modify the Plan in the future": para. 53.

30 The Court of Appeal then considered whether the validity or the legality of the 2009 amendments was a question common to all the members of the group for the purposes of art. 1003(*a*) *C.C.P.* The court held that it was. First of all, the court stated on the basis of this Court's decision in *Dutton* that questions that are common to all the members of the group can coexist with questions that concern individuals; all that is needed is that there be a common, related or similar question. In the context of the case at bar, the Court of Appeal accepted that the main question at issue was whether the 2009 amendments were valid or lawful and that this question applied to all the members of the group. The members had all entered into a contract of employment with Seagram, and subsequently Vivendi, that provided for certain benefits, including the Plan. According to the Court of Appeal, the main question raised by the motion could give rise to serious argument. If the analysis with respect to the criterion set out in art. 1003(*a*) *C.C.P.* is based on the questions actually at issue rather than on factual differences that are not relevant at the preliminary stage, it is inappropriate for the judge hearing the motion for authorization to create subgroups in order to decide the motion.

31 The Court of Appeal also stated that the *prima facie* case requirement of art. 1003*(b) C.C.P.* was met. Therefore, since the criteria of art. 1003(*a*) and (*b*) *C.C.P.* were met and the appellant had admitted that the motion met the criteria set out in art. 1003*(c)* and *(d)*, the Court of Appeal set aside the motion judge's judgment and authorized the class action.

IV. Analysis

A. Issues

32 In this appeal, the Court must resolve two issues. First, did the motion judge make an error that justified the Court of Appeal's intervention? Second, if the motion judge erred, we will decide whether the respondent's questions are identical, similar or related within the meaning of art. 1003(*a*) *C.C.P.*

B. Did the Motion Judge Make an Error That Justified the Court of Appeal's Intervention?

33 Article 1003 *C.C.P.*, which establishes the conditions for authorizing a class action, confers significant discretion on the court hearing a motion for authorization. In its opening words, the expression "if of opinion that" introduces an enumeration of the criteria to be met:

> **1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> (a) the recourses of the members raise identical, similar or related questions of law or fact;
>
> (b) the facts alleged seem to justify the conclusions sought;
>
> (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

34 The Quebec Court of Appeal, mindful of the importance of the motion judge's discretion with respect to the criteria set out in art. 1003 *C.C.P.*, has stated on many occasions that its power to intervene in this regard is limited and that it must show deference to the motion judge's decision. It will therefore intervene in an appeal from a decision on a motion for authorization to institute a class action only if the motion judge erred in law or if the judge's assessment with respect to the criteria of art. 1003 *C.C.P.* is clearly wrong: *Bouchard c. Agropur coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349 (C.A. Que.), at para. 42; *Union des consommateurs c. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243 (C.A. Que.), at paras. 45-46; *Harmegnies c. Toyota Canada*, 2008 QCCA 380 (C.A. Que.), at paras. 25-26; *Union des consommateurs c. Bell Canada*, 2010 QCCA 351 (C.A. Que.), at para. 23.

35 A class action may be authorized only if the four criteria of art. 1003 *C.C.P.* are met. If the motion judge errs in law or if his or her assessment with respect to any criterion of art. 1003 *C.C.P.* is clearly wrong, the Court of Appeal can substitute its own assessment, but only for that criterion and not for the others. An error in relation to one criterion does not give the Court of Appeal carte blanche to reconsider all the other criteria to be met before the bringing of a class action may be authorized.

36 In the instant case, the appellant argues that the Court of Appeal erred in substituting its own assessment for that of the Superior Court on the basis that the Superior Court had decided certain aspects of the case on the merits. The appellant further argues that even if the motion judge did make such an error, the error did not authorize the Court of Appeal to substitute its own analysis with respect to the identical, similar or related question criterion of art. 1003(*a*) for that of the motion judge. For the reasons that follow, we are of the opinion that the Court of Appeal was right to intervene.

i. Role of a Judge Hearing an Application for Authorization to Institute a Class Action

37 The judge's function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits: *Option consommateurs c. Infineon Technologies AG*, 2013 SCC 59 (S.C.C.), at paras. 59 and 61. However, the law does not impose an onerous burden on the applicant at this stage, as he or she need only establish a "*prima facie* case", or an "arguable case": *Infineon*, at paras. 61-67; *Marcotte c. Longueuil (Ville)*, 2009 SCC 43, [2009] 3 S.C.R. 65 (S.C.C.), at para. 23. Thus, all the judge must do is decide whether the applicant has shown that the

four criteria of art. 1003 *C.C.P.* are met. If the answer is yes, the class action will be authorized. The Superior Court will then consider the merits of the case. In considering whether the criteria of art. 1003 are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted: *Infineon*, at para. 68; *Marcotte*, at para. 22.

38 Article 1003(*a*) *C.C.P.* provides that a class action may be authorized only if the court concludes that "the recourses of the members raise identical, similar or related questions of law or fact". This commonality requirement applies not only in Quebec law, but also in that of all the common law provinces of Canada.

39 We will therefore turn now to the principles to be applied in deciding whether a class action raises a common question that meets the criterion of art. 1003(*a*). These principles can be found, *inter alia*, in the decisions of this Court and of the Quebec Court of Appeal.

(a) Principles From Dutton and Rumley

40 We must consider a few important decisions of this Court. Although they were rendered in cases based on the common law, they are nevertheless often relied on and discussed in decisions of the Quebec courts. However, a few caveats are in order as regards their application in Quebec civil procedure. We will return to this point below.

41 In *Dutton*, this Court laid down certain principles to be applied in deciding whether a class action raises one or more issues that are common to the claims of all the members of a class. McLachlin C.J., writing for the Court, stated the following:

> Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> [Emphasis added; para. 39.]

42 Although *Dutton* was based on the procedural law of Alberta, the principles laid down by this Court with respect to the commonality requirement have been applied by the Quebec Court of Appeal on many occasions. In *Collectif de défense des droits de la Montérégie (C.D.D.M.) c. Centre hospitalier régional du Suroît du Centre de santé & des services sociaux du Suroît*, 2011 QCCA 826 (C.A. Que.), for example, the Court of Appeal noted that an issue will be considered common for the purposes of art. 1003(*a*) *C.C.P.* if addressing the issue enables all the claims to move forward:

> [TRANSLATION]
>
> A single common, related or similar issue of law suffices to meet the condition in article 1003(*a) CCP* if it is significant enough to affect the outcome of the class action; however, it need not be determinative of the final resolution of the case: *Comité d'environnement de la Baie inc. v. Société de l'électrolyse et de chimie de l'Alcan ltée*, [1990] R.J.Q. 655 (CA) at paragraphs 22 and 23. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis (Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice* (Cowansville, Que: Yvon Blais, 2006) at 92; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para 39).
>
> It is quite possible that the determination of common issues does not lead to the complete resolution of the case, but that

> it results instead in small trials at the stage of the individual settlement of the claims. This does not preclude a class action suit. Professor Lafond, *supra*, writes at pages 88-89:
>
> > [TRANSLATION]
> >
> > Differences in members' claims and the possible need for each member to prove the personal damages suffered no longer bar a class action suit. As pragmatically stated by a court magistrate: [TRANSLATION] "In the event of a monetary award, some accounting work would be inevitable, at the most." [paras. 22-23]

See also *Union des consommateurs* (2012), at paras. 67-68.

43 In *Dutton*, this Court also stated that, for there to be a "common issue", success for one member of the class must bring with it a benefit for all the others:

> All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests. [para. 40]

44 In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.), this Court confirmed the principles from *Dutton*. In the case of the commonality requirement, the purpose of the analysis is to determine "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": para. 29, quoting *Dutton*, at para. 39. The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.

45 Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

46 *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

47 There is nothing new about this flexible approach to the commonality requirement. It was adopted by the Saskatchewan Court of Appeal in *Frey v. Bell Mobility Inc.*, 2011 SKCA 136, 377 Sask. R. 156 (Sask. C.A.):

> Having regard for these authorities, the common issue requirement, "success for one is success for all", may in appropriate cases be met in circumstances where different results may be possible for different class members, provided there is no conflict among the class members, in the sense that success for one class member must not mean failure for another. [para. 60]

(b) Application of the Principles in Light of the C.C.P.

48 Caution must be exercised when applying the principles from *Dutton* and *Rumley* to the rules of Quebec civil procedure relating to class actions. Although those decisions have now been recognized in Quebec law and have been cited and applied many times by Quebec courts, the issue that is central to this appeal nonetheless shows that it is necessary to clarify the relevance and scope of the principles in question in the context of Quebec procedural law. *Dutton* and *Rumley*

certainly provide a general framework for analyzing the application of the commonality requirement, but it must be borne in mind that tests established in a common law context cannot necessarily be imported without adaptation into Quebec civil procedure.

49 To determine how the principles from *Dutton* and *Rumley* apply in Quebec law, we will analyze the wording of the *C.C.P.* first, before considering the principles developed by the Quebec courts.

50 The source of the commonality requirement in Quebec civil procedure is art. 1003 *C.C.P.*, which requires that "the recourses of the members raise identical, similar or related questions of law or fact".

51 Two observations are in order with respect to the wording of art. 1003(*a*) *C.C.P.* First, this paragraph provides that a class action can be authorized only if the *questions* are common. Nowhere has the legislature stated that there must be common *answers*.

52 Second, if art. 1003(*a*) is compared with the legislation of the common law provinces, it can be seen that the wording used to establish the commonality requirement is different in the latter. For example, the requirement is expressed in broader and more flexible terms in Quebec's *C.C.P.* than in Ontario's legislation, which requires the existence not merely of similar or related questions, but of "common issues": *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(c). Moreover, the wording of the Ontario statute is used in the legislation of all the other common law provinces of Canada that have legislated with respect to class actions: *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(c); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1)(c); *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 6(1)(c); *Class Proceedings Act*, C.C.S.M. c. C130, s. 4(c); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 7(1)(c); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 6(1)(c); *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5(1)(c).

53 Although the expression "common issues" is frequently used by Quebec judges and authors, its content is not exactly the same as that of the expression "identical, similar or related questions of law or fact". It would be difficult to argue that a question that is merely "related" or "similar" could always meet the "common issue" requirement of the common law provinces. The test that applies in Quebec law therefore seems to be less stringent. Because of the differences in the wording of the applicable legislation, the case law on class actions from the common law provinces is not determinative where the application of the criterion of art. 1003(*a*) is concerned.

54 In addition, it can be seen from the Quebec courts' interpretation of art. 1003(*a*) *C.C.P.* that their approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces. The Quebec courts propose a flexible approach to the common interest that must exist among the group's members: P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 408.

55 As this Court noted in *Marcotte*, at para. 22, the courts have, by interpreting and applying the criteria of art. 1003 *C.C.P.* broadly, favoured easier access to the class action: see also *Infineon*, at para. 60.

56 In the specific case of the commonality requirement, the Quebec Court of Appeal has consistently favoured a broad definition of the conditions that make it possible to satisfy the requirement of art. 1003(*a*). It laid the groundwork for this approach in *Comité d'environnement de La Baie Inc. c. Société d'électrolyse & de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A. Que.), in which it made the following comment:

> But Article 1003 (*a*) does not require that *all* of the questions of law or of fact in the claims of the members be identical or similar or related. Nor does the article even require that the majority of these questions be identical or similar or related. From the text of the article, it is sufficient if the claims of the members raise *some* questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action. [Italics in original; underlining added; p. 659.]

57 Thus, the Quebec approach to authorization is more flexible than the one taken in the common law provinces, although the latter provinces do generally subscribe to an interpretation that is favourable to the class action. The Quebec approach is also more flexible than the current approach in the United States: *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (U.S. Sup. Ct. 2011). As Professor Lafond says, [TRANSLATION] "Quebec procedure surpasses in this regard the procedure of the

other Canadian provinces, and of England and the United States, which struggle with the rigid concepts of 'same interest' or 'common interest', and of 'predominance of the common issues'": *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, at p. 408.

58 There is one common theme in the Quebec decisions, namely that the *C.C.P.*'s requirements for class actions are flexible. As a result, even where circumstances vary from one group member to another, a class action can be authorized if some of the questions are common: *Riendeau c. Cie de la Baie d'Hudson* [2000 CarswellQue 224 (C.A. Que.)], 2000 CanLII 9262, at para. 35; *Comité d'environnement de la Baie*, at p. 659. To meet the commonality requirement of art. 1003(*a*) *C.C.P.*, the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute: *Harmegnies*, at para. 54; see also *Lallier c. Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490 (C.A. Que.), at paras. 17-21; *Del Guidice c. Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496 (C.A. Que.), at para. 49; *Kelly c. Communauté des Soeurs de la Charité de Québec*, [1995] J.Q. No. 3377 (C.S. Que.), at para. 33. All that is needed in order to meet the requirement of art. 1003(*a*) *C.C.P.* is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible: *Collectif de defense des droits de la Monteregie (CDDM)*, at paras. 22-23.

59 In short, it can be concluded that the common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(*a*) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

60 In light of these principles, we are of the opinion that the motion judge was mistaken in emphasizing the possibility that numerous individual questions would ultimately have to be analyzed. He should instead have inquired into whether the condition provided for in art. 1003(*a*) was met, that is, whether the applicant had established the existence of a common question that would serve to advance the resolution of the litigation with respect to all the members of the group, and that would not play an insignificant role in the outcome of the case.

(c) Places of Residence of the Group's Members

61 The group proposed by the respondent includes 250 retirees or surviving spouses of employees who worked in six provinces: Quebec (134 members), Ontario (82 members), Alberta (3 members), British Columbia (16 members), Saskatchewan (2 members) and Manitoba (13 members). Since no applicable law was designated in the contracts of employment of the various employees, the law of the province where each employee worked would have to apply to that employee's case (art. 3118 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*")). According to the motion judge, the multitude of legal schemes applicable to the individual claims is an additional difficulty that demonstrates the proposed group's lack of homogeneity.

62 However, the fact that the employees worked in six different provinces is not in itself a bar to the authorization of the class action. In a class action, the court can accept proof of the law applicable in the common law provinces or take judicial notice of that law: art. 2809 *C.C.Q.* Only substantial differences between the applicable legal schemes would cause a class action to lose its collective nature: *Union des consommateurs* (2012), at paras. 120 and 123.

63 In the case at bar, the fact that members of the group live in different Canadian provinces should not prevent the court from authorizing the class action. There are common questions in the claims of the members of the proposed group with respect to the legality or the validity of the 2009 amendments.

(d) Principle of Proportionality

64 The principle of proportionality, which is recognized in Quebec civil procedure, is set out in art. 4.2 *C.C.P.*:

> **4.2** In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs

> and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

65 The appellant submits that an interpretation of art. 1003(*a*) that encourages a multiplicity of substantive analyses is contrary to the principle of proportionality. It bases its position primarily on the reasons of the majority in *Marcotte*, in which LeBel J. stated that the principle of proportionality must not be limited "to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec": para. 42.

66 In our view, the approach proposed by the appellant is wrong. *Marcotte* confirmed the importance of the principle of proportionality in civil procedure, and as a source of the courts' power to intervene in the management of a case: paras. 42 and 43. In the class action context, however, the judge's discretion in respect of the application of the four criteria of art. 1003 *C.C.P.* must be reconciled with the power provided for in art. 4.2 *C.C.P.*: *Bouchard*, at paras. 37, 41 and 44; *Harmegnies*, at paras. 20-22. In our view, insofar as the four criteria set out in art. 1003 *C.C.P.* are exhaustive, and it is our opinion that they are, the principle of proportionality must be considered in the assessment with respect to each of these criteria. The proportionality of the class action is not a separate fifth criterion.

67 This conclusion is supported by the wording of the legislation and by the case law. In enacting the class action provisions of the *C.C.P.*, the Quebec legislature did not consider it appropriate to require that a class action be the "preferable" procedure for the resolution of the dispute or the common issues, which is the criterion found in the legislation of other provinces. Caution therefore dictates that such a criterion not be introduced indirectly into Quebec's rules of civil procedure. Article 1003 is clear: the motion judge must authorize the class action if he or she is of the opinion that the four criteria are met. The judge does not have to ask whether a class action is the most appropriate procedural vehicle.

68 The Quebec case law leads to the same conclusion. As Baudouin J.A. stated in *Harmegnies*, the judge's discretion [TRANSLATION] "is exercised in the context, and only in the context, of the four requirements established by the legislature": para. 22; see also *Brown c. Roy*, 2012 QCCA 900 (C.A. Que.), at para. 67; *Billette c. Toyota Canada inc.*, 2009 QCCA 2476, [2010] R.J.Q. 66 (C.A. Que.), at para. 44; *St-Germain c. Apple Canada inc.*, 2010 QCCA 1376 (C.A. Que.), at paras. 55-57; P.-C. Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at pp. 153-54; É. M. David, "La règle de proportionnalité de l'article 4.2 C.p.c. en matière de recours collectif — Premières interprétations jurisprudentielles", in Service de la formation continue du Barreau du Québec, *Développements récents en recours collectifs* (2007), 315, at p. 335. The effect of the principle of proportionality is to reinforce the discretion judges are already acknowledged to have when considering each of the four criteria of art. 1003 *C.C.P.*: *Marcotte*, at para. 85. However, the motion judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the established criteria.

ii. Errors Made by the Motion Judge

69 In assessing the criterion of art. 1003(*a*) *C.C.P.*, the motion judge made two errors. First, he ruled on the merits of the case by determining that the rights to insurance benefits of certain members of the group had not crystallized. Second, he adopted the wrong methodology by seeking common answers rather than merely identifying one or more questions that were common to the claims of all the members of the proposed group. We will consider each of these errors in turn.

70 It is clear from the motion judge's reasons that he ruled on the merits of the case. When discussing the reasons why the rules governing the retirees' right to insurance benefits would require an individualized analysis, he decided on the right of certain members to receive such benefits following the insertion of the unilateral amendment clause and the making of the 2009 amendments. It is clear from the following paragraphs from his reasons that he considered the merits on certain of the questions raised in the motion for authorization, thereby overstepping the bounds of the function of screening motions to which he should have limited himself:

> [TRANSLATION]
>
> The right of the members of Subgroup 2 to post-retirement insurance benefits did not crystallize, since the employer

> reserved the power to terminate the insurance coverage. A right to resiliate such as this is in fact inconsistent with an intention to confer a vested right.
>
> The section of the 1977 benefit guide entitled "*Termination of Coverage*" / "*Cessation de l'assurance*" indicates clearly that the employer is free to terminate the insurance coverage at any time by resiliating the group insurance contract:
>
> . . . . .
>
> The right of the members of Subgroup 3 to post-retirement insurance benefits did not crystallize, since the employer expressly reserved the right to modify or terminate the insurance coverage.
>
> . . . . .
>
> The right of the members of Subgroup 4 to post-retirement insurance benefits did not crystallize, since the employer expressly reserved the right to modify or terminate the insurance coverage. [Emphasis added; paras. 92, 93, 98 and 103.]

71 The appellant argues that the motion judge expressly stated that he was not ruling on the *prima facie* case requirement of art. 1003(*b*) *C.C.P.* and that, as a result, the above-quoted passages cannot be interpreted as decisions on substantive questions. With respect, the appellant is confusing the conclusion required by art. 1003(*b*) — that the facts alleged in the motion for authorization seem to justify the conclusions being sought — with a ruling on the merits by the motion judge on certain questions. As we have already said, the motion judge performs a function of screening motions; this is a procedural stage that does not involve consideration of the questions on the merits. The motion judge must inquire into whether the four criteria of art. 1003 *C.C.P.* are met. The questions can be decided on the merits only by the trial judge, after authorization to institute the class action has been granted.

72 The motion judge also took the wrong approach in his analysis with respect to the criterion of art. 1003(*a*) *C.C.P.* Rather than determining whether the claims of all the members of the proposed group raised an identical, similar or related question that could serve to advance the resolution of the litigation, he asked whether there were common answers to the questions raised in the motion for authorization to institute a class action. This approach is clear from paras. 69 and 70 of his reasons:

> [TRANSLATION]
>
> In the case at bar, the Court finds that because of the large number of questions requiring an individualized analysis for each member of the proposed group, the Applicant's action does not lend itself to a collective resolution.
>
> If the action is authorized, the trial judge will have to conduct a detailed review of a multitude of individual circumstances before he or she will be able to determine whether the 2009 amendments apply to each member of the group.

At the authorization stage, the judge must simply determine whether one or more questions exist that are common to the claims of all the members of the proposed group. As we mentioned above, at this stage, the threshold that must be met to find that there are common questions is a low one.

73 In this case, the errors made by the motion judge warranted the intervention of the Court of Appeal.

C. Are the Questions Raised in the Motion for Authorization to Institute a Class Action Identical, Similar or Related Within the Meaning of Article 1003(a) C.C.P.?

74 We have found that the motion judge erred in law in requiring answers that were common to the claims of all the members of the proposed group. As a result, this Court, like the Court of Appeal, must reopen the analysis under art. 1003(*a*) in light of the applicable principles.

75 In this case, the main question raised in the respondent's motion for authorization to institute a class action is whether the amendments made to the Plan in 2009 are valid or lawful. Those amendments had the effect of reducing, as of January 1,

2009, certain benefits promised to the retirees and surviving spouses. Since the claims of all the group's members are based on the Plan, the question of the validity or the legality of the 2009 amendments arises for all the members. The answer to this question can serve to advance the resolution of all the claims. Hence, there is a common question.

76 A few comments must be made about the existence of subgroups in light of the motion judge's conclusion that the large number of subgroups was a factor that supported the dismissal of the motion for authorization. With respect, that conclusion conflicts with the principles established by the courts regarding the relevance of subgroups at the authorization stage. In several Canadian provinces, including Quebec, the existence of subgroups within the proposed group does not on its own constitute a sufficient basis for refusing to authorize a class action: W. K. Branch, *Class Actions in Canada*, vol. 1 (loose-leaf), at p. 4-103; *Dutton*, at para. 54; *Rumley*, at para. 32. As we mentioned above, the circumstances of the various members of the group can differ as long as the members have no conflicting interests.

77 Moreover, as this Court stated in *Dutton*, if material differences emerge, the court will deal with them at trial: para. 54. The creation of subgroups will become relevant at that stage, when the judge answers the questions in light of the facts applicable to each member of the group. We therefore agree with the Court of Appeal that a subgroup analysis is neither necessary nor relevant at the authorization stage: para. 66.

78 In the instant case, if the review of the claims led to different outcomes for the different subgroups or for different members of the subgroups, that would not necessarily mean that their interests are in conflict. It is more likely that the success or failure of the claims will depend on a key date or a specific term in the subgroup's contract of employment. The possible answers are therefore not mutually exclusive. Success for one subgroup or one member does not mean failure for another. In other words, there are no conflicting interests among the members of the group.

79 In our opinion, there is in this case, as required by art. 1003(*a*) *C.C.P.*, a question common to the claims of all the members of the proposed group: whether the 2009 amendments are valid or lawful. The answer to this question may have to be nuanced on the basis of the retirement dates of the various members of the group, or of other circumstances specific to individual members.

IV. Conclusion

80 The validity or legality of the 2009 amendments and the other questions raised by the respondent in his motion for authorization to institute a class action are the type of questions referred to in art. 1003(*a*) *C.C.P.* Since Vivendi has admitted that the conditions of art. 1003(*c*) and (*d*) are met and has not contested the Court of Appeal's decision finding that the one set out in art. 1003(*b*) is met, all the criteria of art. 1003 *C.C.P.* are met.

81 We would therefore affirm the judgment of the Court of Appeal and dismiss the appeal with costs.

Appeal dismissed.
Pourvoi rejeté.

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2015 ONSC 2220
Ontario Superior Court of Justice (Divisional Court)

Wright v. United Parcel Service Canada Ltd.

2015 CarswellOnt 7474, 2015 ONSC 2220, 253 A.C.W.S. (3d) 527, 336 O.A.C. 21, 73 C.P.C. (7th) 244

Ryan Wright and Julia Zislin, Plaintiffs/Respondents and United Parcel Service Canada Ltd., Defendant/Appellant

Swinton, Harvison Young, Lederer JJ.

Heard: March 17, 2015
Judgment: May 19, 2015
Docket: Toronto 415/11

Proceedings: affirming *Wright v. United Parcel Service Canada Ltd.* (2011), [2011] O.J. No. 3936, 2011 ONSC 5044, 2011 CarswellOnt 8902, C. Horkins J. (Ont. S.C.J.)

Counsel: Michael A. Eizenga, C. Scott Ritchie, Q.C., Daniel Bach, for Plaintiffs / Respondents
John A. Campion, Robin Roddey, Sebastien Kwidzinski, for Defendant / Appellant

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

Headnote

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

Plaintiffs alleged various violations of Consumer Protection Act, 2002 (Ont.) arising from practices of defendant in relation to international parcel shipping transactions — Among other things, plaintiffs alleged that defendant violated s. 13 of Act when it charged additional fees for brokerage services on delivery of imported packages, as plaintiffs claimed that brokerage services were unsolicited — Action was certified as class proceeding — Defendant appealed motions judge's decision that there was common issue as to whether brokerage services were unsolicited — Appeal dismissed — Defendant failed to identify error of law or palpable and overriding error of fact — Motions judge correctly set out legal principles and considered pleadings, evidence and s. 13 of Act — Motions judge made no palpable and overriding error in concluding that there was common issue with respect to unsolicited services — Plaintiffs' claim was systemic in nature and focused on conduct of defendant and its compliance with Act — It was grounded on fact that defendant used standard form contract in dealing with customers, which did not contain term for provision of brokerage services — Focus would not be on knowledge of consignee at time of entering into contract — There was basis in fact to certify common issue respecting unsolicited services and motions judge did not make any error.

Commercial law --- Sale of goods — Buyer's remedies — Consumer protection legislation — Applicability of legislation

Plaintiffs alleged various violations of Consumer Protection Act, 2002 (Ont.) arising from practices of defendant in relation to international parcel shipping transactions — Among other things, plaintiffs alleged that defendant violated s. 13 of Act when it charged additional fees for brokerage services on delivery of imported packages, as plaintiffs claimed that brokerage services were unsolicited — Action was certified as class proceeding — Defendant appealed motions judge's decision that there was common issue as to whether brokerage services were unsolicited — Appeal dismissed — Defendant failed to identify error of law or palpable and overriding error of fact — Motions judge correctly set out legal principles and considered pleadings, evidence and s. 13 of Act — Motions judge made no palpable and overriding error in concluding that

there was common issue with respect to unsolicited services — Plaintiffs' claim was systemic in nature and focused on conduct of defendant and its compliance with Act — It was grounded on fact that defendant used standard form contract in dealing with customers, which did not contain term for provision of brokerage services — Focus would not be on knowledge of consignee at time of entering into contract — There was basis in fact to certify common issue respecting unsolicited services and motions judge did not make any error.

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s. 13(2) — considered

s. 13(3)-13(5) — considered

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s. 15 — referred to

s. 16 — referred to

s. 22 — referred to

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s. 24 ¶ 6 — referred to

APPEAL by defendant company from judgment reported at *Wright v. United Parcel Service Canada Ltd.* (2011), 2011 ONSC 5044, 2011 CarswellOnt 8902, [2011] O.J. No. 3936 (Ont. S.C.J.), certifying plaintiff customers' class action.

***Swinton J.*:**

Overview

1 This appeal arises out of a class proceeding certified by Horkins J. ("the motions judge") on August 26, 2011. The respondents, the representative plaintiffs in the action, allege various violations of the *Consumer Protection Act,2002*, S.O. 2002, c. 30, Sch. A ("CPA") arising from practices of the appellant, United Parcel Service Canada Ltd. ("UPS"), in relation to international parcel shipping transactions. Among the issues raised in the proceeding is the allegation that UPS violated s. 13 of the CPA when it charged additional fees for brokerage services on delivery of imported packages, as the respondents claim that the brokerage services were "unsolicited services."

2 On June 14, 2012, Wilton Siegel J. granted leave to appeal part of the certification order - namely, that there was a common issue as to whether brokerage services were unsolicited. Accordingly, the only issue on this appeal is whether the motions judge erred in certifying, as a common issue, the question with respect to unsolicited services.

3 In my view, the appeal should be dismissed, as the appellant has failed to identify any error of law or palpable and overriding error of fact on the part of the motions judge.

Factual Background

4 UPS is an international courier that provides transportation and brokerage services. As a customs broker, it collects custom duties and HST in accordance with federal legislation when a shipment enters Canada from outside the country.

5 As explained in the affidavit of Shelley Gares, Vice-President of Brokerage for UPS, primary UPS customers have customized contracts setting out specific rates, discounts, service charges and other terms. Those who do not have customized contracts "contract with UPS through waybills and ship at published rates under the published standard terms and conditions of service or tariff." Ms. Gares describes such individuals as "typically infrequent or irregular shippers" (at para. 7).

6 Ryan Wright and Julia Zislin, the representative plaintiffs in this proceeding, arranged for the shipment of parcels from the United States to their homes in Ontario. They and the other members of the class did not have customized contracts.

7 Mr. Wright bought a pair of shoes from an eBay vendor in the United States. The vendor, acting as Mr. Wright's agent, shipped the shoes to Mr. Wright in Canada via UPS, using the "standard service" level offered by UPS. Mr. Wright paid the vendor US$22 for shipping. UPS used a waybill to confirm the agreement to ship the shoes to Mr. Wright. The waybill did

not contain a term regarding brokerage services or the payment of additional fees. Indeed, the waybill requires the shipper to select who will pay any "charges". The selection allocates shipping, duty and V.A.T. among the shipper, recipient or third party. There is no box to check to demonstrate any agreement to pay additional fees, such as brokerage fees, and the waybill is marked "non-negotiable". However, at the time of delivery, Mr. Wright was asked to pay $40.80, comprising $9.47 in government levies, $29.55 in "additional fees" (a brokerage fee, a disbursement or bond fee, and a C.O.D. fee), and $1.78 in GST on the brokerage fees. If he did not pay the charges, the shoes would not be released to him, and so he paid. Ultimately, the fee was reimbursed for reasons unrelated to this proceeding.

8 Ms. Zislin asked her mother to ship her ski boots from the United States to Canada. Her mother paid US$19.23 for "standard shipping" to ship the boots, and the shipping was documented by an "international parcel shipping order" ("IPSO"). The IPSO did not contain a term regarding brokerage services or the payment of additional fees. The IPSO contains an entire agreement clause and "supersedes all prior/subsequent and/or contemporaneous representations, written or oral." Again, upon delivery, UPS requested $49.10 from Ms. Zislin comprising government levies of $7.65, additional fees of $39.10 and GST on the additional fees of $2.35. Again, the boots would not have been released without payment of the fees, so Ms. Zislin paid the amount requested.

9 The respondents do not take issue with their obligation to pay customs duties and HST on the content of the parcels. As well, they agree that the consignor acted as their agent, and they were bound by the terms of the agreement between their consignor and UPS. However, they do object to the payment of the additional fees for brokerage services charged by UPS for the movement of the imported goods through customs, as they did not request these services. In the rest of these reasons, I will refer to the fees for brokerage services, bond fees and C.O.D. fees as "additional fees."

The Class Proceeding

10 The certification order approved a class defined in the following terms:

> All Consumers within the meaning of the *Consumer Protection Act*, resident in Ontario who have paid UPS, fees charged by UPS which include Customs Brokerage Fees, Disbursement Fees (also known as Bond Fees) and C.O.D. Fees and where a waybill or International Parcel Shipping Order was used in shipping the parcel from July 30, 2005 through August 26, 2011 [the date of the certification order].

11 The motions judge found that the following causes of action pleaded by the respondents met the requirement of s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as they were all viable causes of action (Reasons at para. 133):

> (1) Unsolicited service: s. 13 CPA;
>
> (2) False, misleading or deceptive representations: s. 14 CPA;
>
> (3) Unconscionable representations: s. 15 CPA;
>
> (4) Using custody of goods to "renegotiate" an arrangement: s. 16 CPA;
>
> (5) Failure to meet the specific requirements for future performance agreements: s. 22 CPA;
>
> (6) Violation of the criminal interest provisions of the *Criminal Code*; and
>
> (7) Unjust enrichment.

12 The motions judge certified nine common issues, including common issue 2:

(a) Does the waybill include a term for the provision of brokerage services?

(b) Does the International Parcel Shipping Order include a term for the provision of brokerage services?

(c) If not, was the provision of "brokerage services" unsolicited?

13 Common issue 2(c) requires consideration of s. 13 of the CPA, which provides a consumer with a cause of action to recover an amount paid for unsolicited goods or services (see s. 13(8)). The term "unsolicited goods and services" is defined in s. 13(9):

(9) In this section,

"unsolicited goods or services" means,

(a) goods that are supplied to a consumer who did not request them but does not include,

(i) goods that the recipient knows or ought to know are intended for another person,

(ii) a change to periodically supplied goods, if the change in goods is not a material change, or

(iii) goods supplied under a written future performance agreement that provides for the periodic supply of goods to the recipient without further solicitation, or

(b) services that are supplied to a consumer who did not request them but does not include,

(i) services that were intended for another person from the time the recipient knew or ought to have known that they were so intended,

(ii) a change to ongoing or periodic services that are being supplied, if the change in the services is not a material change, or

(iii) services supplied under a written future performance agreement that provides for the ongoing or periodic supply of services to the recipient without further solicitation.

14 Subsection 13(2) speaks to the obligation of a supplier, stating:

(2) No supplier shall demand payment or make any representation that suggests that a consumer is required to make payment in respect of any unsolicited goods or services despite their use, receipt, misuse, loss, damage or theft.

15 Subsections (3) through (5) deal with the determination whether goods or services have been solicited. Notably, s. 13(3) provides:

(3) A request for goods or services shall not be inferred solely on the basis of payment, inaction or the passing of time.

Subsections (4) and (5) do not arise in the present proceeding, as they deal with a material change where a consumer is

receiving goods or services on an ongoing basis.

16 Subsections (6) through (8) deal with the consumer's right to demand a refund and ultimately to bring an action to recover the payment.

17 The motions judge found that the parties' contract was co-extensive with the documentation provided to the consignor who arranged the shipping — either the waybill or the IPSO. She held that consumer knowledge is irrelevant in applying the CPA, and therefore, the CPA does not permit any inquiry into what the consumer knew in order to determine the terms of the contract. She stated (Reasons at para. 249):

> The UPS argument that an individualized inquiry is required to determine the existence and terms of the contract cannot succeed for three reasons. First, it misses the point of this action. Second, it ignores UPS's own evidence that it relied on the waybill. Third, and most important, the UPS position is at odds with both the language and purpose of the *Consumer Protection Act*.

She held that the essence of the claim was systemic in nature and grounded in the CPA, focusing on the system used by UPS and how customers were billed for the service. She held that UPS submitted evidence against its own argument that there must be an individualized inquiry, since the waybill and the IPSO were described as either "non-negotiable" or the "entire agreement" between the parties. Accordingly, it was not necessary to look at each class member's individualized knowledge to determine the terms of the contract.

18 The motions judge also found that the class proceeding was the preferable procedure and granted the certification order. At the same time, she granted partial summary judgment to the respondents on the unsolicited services issue. She also found that UPS failed to adhere to the statutory disclosure requirements in its contracts, that it used its custody and control of goods owned by the class members to force them to pay the additional fees and that it had made false, misleading or deceptive requirements, all contrary to the CPA.

19 The appellant sought leave to appeal the certification order. Wilton-Siegel J. granted leave only with respect to common issue 2(c). The appellant also appealed the summary judgment determination to the Court of Appeal, including the unsolicited services aspect of the decision. That appeal has been stayed pending resolution of the current appeal.

The Issue on Appeal

20 The only issue on this appeal is whether the motions judge erred in finding that question 2(c) was a common issue within the meaning of s. 5(1)(c) of the *Class Proceedings Act*.

The Standard of Review

21 Certification decisions are entitled to deference by an appellate court. The court should interfere only if there is an error of legal principle or a palpable and overriding error of fact or mixed fact and law (*Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477 (S.C.C.) at para. 111; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781 (Ont. C.A.) at para. 23).

The Test for a Common Issue

22 The Supreme Court of Canada has recently reaffirmed that the threshold to determine commonality is a "low one". An issue is common if "its resolution is necessary to the resolution of each class member's claims" (*Dell'Aniello c. Vivendi Canada inc.*, [2014] 1 S.C.R. 3 (S.C.C.) at para. 72).

23 However, the Supreme Court has emphasized that "[i]t is not essential that the class members be identically situated *vis-à-vis* the opposing party" (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39).

In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.), the Supreme Court stated that a question could be common even if the answer would be nuanced to reflect individual claims (at para. 32). It reiterated this view in *Vivendi* (at para. 45):

> A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all members. However, success for one member must not result in failure for another.

24 The judge hearing the certification motion must only determine whether there is some basis in fact to support the conclusion that an issue is common to class members. It is not the role of the judge to enter into a consideration of the merits of the particular issue (*Pro-Sys* at paras. 99, 102).

The Appellant's Argument

25 The appellant submits that a court cannot determine whether brokerage services were unsolicited on a common basis. The motions judge is said to have erred in law when she held that the provisions of the CPA mandate that a court cannot look beyond the documentation exchanged between the parties in order to determine the services that the consumer has requested. Rather, the determination whether services were unsolicited requires a consideration of each transaction, including the knowledge of the consignor and the consignee about brokerage services and fees. If the consumer shared UPS's intention to charge a fee for brokerage services (either personally or through his or her consignor as agent), the parties' contract would include terms to this effect, and the services cannot be said to be unsolicited.

26 The appellant supports this argument by pointing to s. 13(3) of the CPA, which states that "[a] request for goods or services shall not be inferred *solely* on the basis of payment, inaction or the passing of time" (emphasis added). The reference to "solely" implies that the act of payment is relevant to determining the consumer's intention and, along with other indicia, may constitute evidence that the services were requested by the consumer.

27 The appellant also relies on *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada) Inc.*, 2009 BCSC 201 (B.C. S.C.), which was followed in *MacFarlane v. United Parcel Service Canada Ltd.*, 2009 BCSC 740 (B.C. S.C.), aff'd 2010 BCCA 171 (B.C. C.A.) and *Leblanc v. United Parcel Service du Canada ltée*, 2012 QCCS 4619 (C.S. Que.). Garson J. in *Blackman*, after a summary trial, struck a proposed class action claiming that brokerage services were unsolicited services under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s.12 ("BPCPA"). In reaching her decision, she considered the context of the transaction as a whole, including the plaintiff's knowledge of customs brokerage fees, stating (at para. 56):

> Mr. Blackman was aware through the Fedex Service Guide that the goods did have to clear customs and he must be presumed to know the law, which requires a courier of a shipment to clear it through customs if the owner does not present him or herself at the border. He was aware from the Fedex Service Guide, International Service Conditions that Fedex Ground may appoint and invoice a broker. (See Section A1. "Duties, taxes, and broker fees may be billed to the shipper ..."; Section B "Fedex Ground does not provide this service but may assist in brokerage selection...".) He may well have objection to the appointment of FTN as broker without his authority. He may well have objection to the amount of the brokerage fee he was charged. But I do not find that Mr. Blackman can say he did not request or authorize customs brokerage services necessary to import the shipment across the border. The services provided were essential to transport the shipment across the international border and cannot be construed as unsolicited services within the meaning of the *BPCPA.*

28 In *MacFarlane*, the plaintiff in a proposed class proceeding also made various claims under the BPCPA. The British Columbia Court of Appeal held that the plaintiff had no cause of action, given the earlier holding in *Blackman*.

29 *Leblanc*, a Quebec case, agreed with the conclusion in *Blackman* (at para. 225) and found that the performance of customs brokerage services was an implied term of the contracts of transport (at para. 227).

Did the Motions Judge Err?

30 In my view, the motions judge made no error in law in finding question 2(c) to be a common issue. She correctly set out the applicable legal principles governing the determination of common issues at paras. 198 to 204 of her reasons.

31 She then considered the pleadings, the evidence and s. 13 of the CPA and concluded that there was a common issue with respect to unsolicited services. That conclusion was one of mixed fact and law, and it is deserving of deference. Absent some palpable and overriding error, this Court should not interfere with the motions judge's determination. In my view, UPS has not shown any such error.

32 UPS argues that the unsolicited services issue requires an individualized inquiry into the knowledge of the consignor. However, the argument misconceives the claim made by the respondents. Their claim is systemic in nature, focusing on the conduct of UPS and its compliance with the CPA. It is grounded in the fact that UPS used standard form contracts (the waybill and the IPSO) in dealing with customers who did not have customized contracts. Those contracts were either "non-negotiable" or the "entire agreement" between the parties, and they did not contain a term for the provision of brokerage services or the payment of additional fees for brokerage services. Therefore, in determining the merits of the claim, the focus will not be on the knowledge of the consignor at the time of entering into the contract, given the express terms of the contract.

33 UPS argues that there must still be an individual inquiry into the knowledge of the consignee. It is not altogether clear what UPS is arguing here. On the one hand, UPS seems to argue that a consignee who paid for brokerage services on other shipments could be said to share the intent of UPS to collect fees for brokerage services, and thus the obligation to pay fees is part of the contract. Alternatively, the argument is that the knowledge of the consumer and subsequent payment can constitute a request for the brokerage services. UPS asserts that the inquiry requires consideration not only of the terms of the contract, but also the knowledge and actions of each individual - an inquiry that is highly individualistic in nature.

34 There are three problems with this argument. First, to the extent that UPS seeks to read terms into the contract based on the consumer's information, the waybill and IPSO preclude such reading in. Moreover, evidence of subjective intention is not admissible to interpret the terms of the written contract, absent some ambiguity. UPS has pointed to no ambiguity in the contract.

35 Second, to the extent that UPS argues that the focus should be on the conduct of the consignee in requesting the services, a "request" would arguably require both knowledge of the services and consent by the consumer to pay for them. The respondents argue that the structure of the CPA requires disclosure of the fees for brokerage services and the consumer's agreement to pay for them. This would be consistent with the remedial purpose of the CPA and applicable provisions of the CPA dealing with disclosure (see ss. 5 and 22 of the CPA and s. 24(6) of O. Reg. 17/05). Payment alone is not sufficient to show the services were solicited (see s. 13(4) of the CPA). Whether the respondents are correct in their interpretation of the obligations under the CPA and the impact on s. 13(9) is an issue that can be determined in common.

36 Third, there was evidence from the two respondents that they did not ask UPS to perform the brokerage services for them, and UPS did not disclose the existence of the brokerage services or the additional fees which include the fee for those services. They were told on delivery that they could not receive their parcels without paying the additional fees, and UPS employees followed a common practice on delivery of demanding payment of the brokerage fees before the release of the parcels, as set out in Ms. Gares' affidavit. In the circumstances, there was some basis in fact to support the conclusion that the services were unsolicited by the representative plaintiffs, and question 2(c) could be determined on a common basis.

37 Even if UPS is correct in arguing that there could be different responses to the question whether a consignee requested the brokerage services, the answer to a common issue need not be the same for every class member, as the Supreme Court has said numerous times, most recently in *Vivendi*. In effect, UPS's argument asserts that the answer to the common issue may be nuanced. However, that does not preclude certification, as an issue can be common even if the answer might vary from one class member to another.

38 In my view, the motions judge correctly held that the British Columbia decisions in *Blackman* and *MacFarlane* were

not binding on her and could be distinguished. *Blackman* arose in the context of a customized account held by the consignor, not a standard form contract that contains no reference to brokerage services and additional fees. Garson J. held that the consignee was aware of the terms relating to customs dues and brokerage fees, given the knowledge of the consignor.

39 In contrast, the contracts in the present case are standard form, not customized. To the extent that Garson J. relied on the consignor's knowledge as an account holder to support the conclusion that the consignee agreed to the brokerage services and the payment, that conclusion does not assist in the present case, given the terms of the UPS standard form contracts. Moreover, there is reason to doubt the correctness of the *Blackman* decision, given the failure to consider the importance of reading consumer protection legislation generously to protect the consumer, as the Supreme Court of Canada stated in *Seidel v. Telus Communications Inc.*, 2011 SCC 15 (S.C.C.) at para. 37.

40 To the extent that UPS argues that a term for the payment of brokerage services should be implied, as in *Leblanc*, I note that the conclusion in *Leblanc* rests on the presumed legal knowledge of the consignee of the need for the shipper to clear customs on importing the parcel and the implied request for the brokerage services to facilitate the entry of the goods to Canada. Whether such a term can be implied in the contracts in issue here, given the terms of the documents and the various provisions of the Ontario legislation, including the obligation to disclose brokerage fees, is an issue that can be determined on a common basis. It is not an issue that should be determined in the course of the certification motion, where the judge's role is not to determine the merits.

41 In my view, UPS has failed to establish any error by the motions judge. There was a basis in fact to certify a common issue of whether, in light of the standard form contracts and UPS's systemic practice, UPS provided unsolicited services under s. 13 of the CPA.

Conclusion

42 Accordingly, the appeal is dismissed. If the parties cannot agree on costs, they may make brief written submissions through the Divisional Court office within 21 days of the release of this decision.

Appeal dismissed.

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2005 CarswellOnt 499
Ontario Superior Court of Justice

Webb v. 3584747 Canada Inc.

2005 CarswellOnt 499, [2005] O.J. No. 449, [2005] O.T.C. 104, 137 A.C.W.S. (3d) 35, 40 C.C.E.L. (3d) 74, 9 C.P.C. (6th) 50

KAREN WEBB (Plaintiff) and 3584747 CANADA INC. (Defendant)

Brockenshire J.

Heard: December 6-7, 2004
Judgment: February 11, 2005
Docket: 98-GD-43927

Counsel: Michael McGowan, Gabrielle Pop-Lazic, David Deluzio for Plaintiff
John C. Field, Glenn P. Christie for Defendant

Subject: Civil Practice and Procedure

Headnote

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

H Co. purchased department store chain, closed about 31 of its stores across Canada, and merged remaining stores with two chains already owned by H Co. — About 5,000 employees were consequently terminated outside of BC and Quebec — Employees brought action against H Co. for damages for wrongful dismissal and action was certified as class proceeding — Employees successfully brought motion for partial summary judgment finding that they were entitled to pay in lieu of notice — Parties agreed to determine individual issues of damages and mitigation by summary hearings before retired judges — Only 15 of first 24 employees were awarded additional compensation, and expense of hearing often exceeded award amounts — H Co. brought motion for decertification of action as class proceeding — Motion dismissed — Class action had undoubtedly been preferable way to deal with common issues and continued to be preferable procedure — Solicitors would be unlikely to take on individual small claims on contingency basis — Only practical way for solicitor to take on matters of this kind on contingency basis would be to take on sufficient number to make it worthwhile — Further, consistency in treatment and in eventual awards would be important for justice to be seen to be done in transnational case — Use of extra-judicial referees helped greatly in achieving judicial economy — Requiring relatively small number of remaining claimants to seek their own legal representation at this point could bring administration of justice into disrepute — Remaining claimants might also lose benefit of suspension of limitation period.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Order on common issues and individual issues

H Co. purchased department store chain, closed about 31 of its stores across Canada, and merged remaining stores with two chains already owned by H Co. — About 5,000 employees were consequently terminated outside of BC and Quebec — Employees brought action against H Co. for damages for wrongful dismissal and action was certified as class proceeding — Employees successfully brought motion for partial summary judgment finding that they were entitled to pay in lieu of notice — Parties agreed to determine individual issues of damages and mitigation by summary hearings before retired judges — Only 15 of first 24 employees were awarded additional compensation, and expense of hearing often exceeded award amounts — Employees brought motion for variation of terms governing procedure for dealing with individual claims — Motion

granted — Appointment of single judge to engage in mediation/arbitration was not appropriate in light of traditional role of judges and burden on justice system — Referees were to be nominated by each side and appointed by court after giving other side opportunity to object — Decisions of referees were to be reviewed and approved by court — Employer was not required to pay for referees as employer did not acknowledge that further compensation was due — Parties would continue to share costs prior to hearings and to leave issue of costs in particular cases to referees — Parties were invited to make further submissions regarding timing of offers to settle following confirmation of hearing dates and regarding use of certified statements of facts from employees.

Table of Authorities

Cases considered by *Brockenshire J.*:

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

Cloud v. Canada (Attorney General) (2004), 2 C.P.C. (6th) 199, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2004 CarswellOnt 5026 (Ont. C.A.) — considered

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

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

Machtinger v. HOJ Industries Ltd. (1992), 40 C.C.E.L. 1, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022, 1992 CarswellOnt 989, [1992] 1 S.C.R. 986, 1992 CarswellOnt 892 (S.C.C.) — considered

Mouhteros v. DeVry Canada Inc. (1998), 1998 CarswellOnt 2704, 22 C.P.C. (4th) 198, 41 O.R. (3d) 63 (Ont. Gen. Div.) — considered

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331, 1995 CarswellOnt 994 (Ont. Gen. Div.) — considered

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

Rumley v. British Columbia (2001), 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 9 C.P.C. (5th) 1,

205 D.L.R. (4th) 39, [2001] 11 W.W.R. 207, 95 B.C.L.R. (3d) 1, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 10 C.C.L.T. (3d) 1, [2001] 3 S.C.R. 184 (S.C.C.) — considered

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

Statutes considered:

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

s. 5 — considered

s. 5(1) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — considered

s. 5(1)(e)(ii) — referred to

s. 12 — referred to

s. 25 — referred to

s. 28(1) — referred to

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

s. 14(1) — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 49 — considered

R. 49.03 — referred to

R. 49.10 — referred to

MOTION by employees in class proceeding for variation of terms governing procedure for dealing with individual claims; CROSS-MOTION by employer's successor for decertification of action as class proceeding.

***Brockenshire J.*:**

1 In this long outstanding class action, class counsel moves for substantial amendments to previous orders made under s. 12 and particularly under s. 25 of the *Class Proceedings Act* for dealing with individual issues. The defence disputes that motion, and by cross-motion seeks an order decertifying this action as a class proceeding. Class counsel disputes this defence motion.

Background

2 The Hudson's Bay Company purchased the K-Mart Canadian retail chain and on March 2, 1998 announced that the K-Mart chain would be merged with the Zellers and Bay chains already owned by The Hudson's Bay Company. This involved closing about 31 K-Mart stores across Canada, and terminating many K-Mart employees. There were roughly 5000 former employees let go outside of B.C. and Quebec, excluding employees under union contracts or written contracts with fixed termination dates or terms. These, broadly speaking, constitute the "class" in this action, which was certified as a national class action by me on June 14, 1999. The common issues, as stated by me in that decision, were:

> 1. Whether the class members' contracts of employment required the defendant to provide them with reasonable notice of termination, and/or pay in lieu of notice, if dismissed without just cause and,
>
> 2. Whether the class members were so dismissed.

3 After defining the class to exclude persons dismissed for just cause, summary judgment was granted on behalf of the class members on the common issues.

4 It was recognized that questions of the quantum of damages and efforts to mitigate would be individual issues, and class and defence counsel worked out a largely consensual process for determination of individual issues, if necessary, by summary hearings before retired judges who were members of ADR Chambers.

5 Twenty-four claims were so heard. In nine of them, the defendant's continuing assertion was borne out by findings that the employees had been adequately compensated on dismissal. Although in the remaining 15, the referees found some additional notice should have been given, the most frequent amounts were in the two to three month range. Commonly, the expenses of ADR Chambers exceeded the award amount, and unfortunately for many of the otherwise successful claimants, defence offers made before a hearing exceeded the award so that they suffered a loss when the resulting costs of the defence and tribunal were factored in because Rule 49 was built in to the process.

6 Class counsel applied to the court to amend the hearing system to something less costly. By subsequent order I directed that in Ontario (where the majority of the claims are being made) deputy judges of the Small Claims Court who agreed would be appointed as referees, the idea being that as they would be appointed by virtue of their judicial office, their own expenses would be picked up by the justice system. Defence counsel moved for leave to appeal, and the motions judge opined that this could be regarded as scheduling a judge, which under the *Courts of Justice Act* would be the prerogative of the Chief Justice. That point was argued, successfully, in the Divisional Court and the Court of Appeal with leave for a further appeal to the Supreme Court of Canada being refused. Unfortunately, in that lengthy and no doubt expensive odyssey, no application was made back to me as the managing judge to amend the decision to avoid the problem, and no inquiry was made of the Chief Justice as to whether she would schedule the deputy judges as contemplated in the order, nor was any inquiry directed to the Attorney General as to whether the province would pick up the cost of funding extra hours for the deputy judges.

7 Against this background counsel for the class and for the defence both appeared before me. As, if successful, it disposes of the class counsel motion, I will deal first with the motion to decertify brought by the defence.

Motion to Decertify

8 The motion record filed in support of this motion consists of seven volumes, containing considerable detail of, among other things, the 24 individual cases that have gone through a hearing process. The defendant, as moving party, referring to s. 5(1) of the *Class Proceedings Act*, concedes that the pleadings disclose a cause of action and that there is an identifiable class of two or more persons who would be represented by the representative plaintiff. However issue is taken with paragraphs (c), (d), and (e)(ii). The argument then is essentially over common issues, preferable procedure, and a workable method of advancing the proceeding.

Common Issues

9 To start with, the statute simply requires that:

> The claims...of the class members raise common issues.

There is no qualification placed upon the words “common issues”. In fact, in Ontario a policy decision was made not to adopt the “predomination” type of provision, which is standard in the American class action provisions, and which had resulted in so much litigation in the U.S.A. over whether or not the common issues were sufficiently important to support the class proceeding.

10 However, Mr. Field argues that now a proposed common issue must be a “substantial ingredient” of each of the class members claim such that its resolution avoids the need for duplication of fact finding and/or legal analysis. In support of this *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.), at 401 para. 39 and also *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), at 30 para. 18 are cited. Also cited is *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.), at 52 para. 29, for the proposition that where issues are common only in the most general of terms, then the proposed class proceeding will inevitably break down into individual proceedings.

11 In *Western Canadian Shopping Centres Inc.*, *supra*, McLachlin C.J.C. in fact said at paragraph 39, the following:

> [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 members claim. However the class members’ claims must share a substantial common ingredient to justify a class action. Determining whether the common issue justifies 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.

12 In *Hollick*, *supra*, at para. 18, the Chief Justice, again speaking for the court, simply repeated what she had said in paragraph 39 of *Western Canadian Shopping Centres Inc.*, *supra*. However at paragraph 16 of the same judgment she points out that the drafters of the Ontario *Class Proceedings Act* specifically rejected a “preliminary merits test” which had been recommended by the Ontario Law Reform Commission, so that the certification stage focuses on the form of the action, and the question there is not whether the claim is likely to succeed but whether the suit is appropriately prosecuted as a class action.

13 In *Rumley*, *supra*, the Chief Justice, again speaking for the court, said in para. 29 that:

> It would not serve the ends of fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings.

However, in para. 30 she goes on to differentiate that, in a residential school case, from an allegation of "systemic" negligence — a concept that appeared in *Cloud v. Canada (Attorney General)* [2004 CarswellOnt 5026 (Ont. C.A.)] referred to later.

14 In addition to the three leading Supreme Court of Canada cases from 2001, Mr. Field relies upon a number of decisions from lower courts. In those cited it was variously held, in the particular fact situation of the proposed class action, that a proposed common issue was negated by the overwhelming presence of individual issues, or the proposed common issues would not move the litigation forward, or the common issue determination would be overwhelmed by the need to engage in a number of individual determinations, or that a finding on the common issue would not materially improve the position of the class members.

15 I have re-read all of the cases cited in support of these propositions. I conclude they turn on their individual facts, and none of the fact situations in those cases are identical to the fact situation here. For instance, *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.) was a decision not to certify by Winkler J. in a case where a proposed claim was intended to be on behalf of all of the persons who attended four campuses of the defendant private school over a five year period, some 17,000 in all, allegedly attracted there by negligent misrepresentations in hundreds of different advertisements and by hundreds of different recruiters, to take a wide range of full-time and part-time course. Winkler J., in the last page of his decision concluded that:

> ...What common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such an [sic] class action would be completely unmanageable.

16 Similarly, in *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) where Nordheimer J. was asked to certify a class action relating to allegations that the Inco Refinery in Port Colborne, which operated for 65 years, was alleged to have continuously emitted toxic and dangerous chemicals that allegedly affected the health of people living and working in the area as well as causing agricultural damage, and devaluation evaluation of properties. In a variety of reasons for refusing to certify, at paragraph 104 Nordheimer J. said that:

> ... The issue is whether the resolution of the proposed common issues sufficiently advances the overall determination of liability so as to justify the certification of the action as a class proceeding. An important consideration in this regard is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined is sufficiently extensive that the determination of the common issues essentially marks the commencement as opposed to the completion of the liability inquiry..

17 In *Cloud v. Canada (Attorney General)*, a decision of the Ontario Court of Appeal released December 3, 2004, not yet reported, the court at para. 53, after reviewing generally the law on common issues, concluded that:

> ...An issue can constitute a substantial ingredient of the claims and satisfy section 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by section 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of

> that legislation as foreseen by its drafters.

18 This is not an overly broad and complex case such as *De Vry*, *supra*, or *Inco*, *supra*. It involves a number of employees, all working for the same employer, whose employment was terminated as a result of a single occurrence — the takeover of the employer by another company. The common issues accepted for certification, and on which summary judgment was subsequently granted, were that all of the class members had been dismissed without just cause, and the contracts of employment of all of the class members required the defendant to provide them with reasonable notice of termination and/or pay in lieu of notice if so dismissed. In my view, the definition of these issues and the subsequent finding against the defendant on them both significantly moved this litigation forward by putting firmly in place for each of the class members the presumption restated by Iacobucci J., speaking for the court in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.), that as employees, these class members were all entitled to reasonable notice. Further, those determinations on the common issues fundamentally changes the subsequent individual proceedings from mini-trials of all issues to assessments of damages, thus materially improving the position of the class members.

19 Defence counsel argued before me in 1999, and again briefly on this motion, that the defence was always prepared to admit that the class members were dismissed without just cause, and as such were entitled to reasonable notice. In my decision in 1999 I responded by quoting from Winkler J. in *Bywater v. Toronto Transit Commission*, then cited only at (Ont. Gen. Div.), subsequently reported at (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.). He had said that:

> Without a certification order from this court, no public statement by the defendant ... binds the defendant in respect to the members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties...(and if they are not parties) the admission of liability, as it relates to them, is no more than a mere promise.

Quicklaw tells me that *Bywater*, *supra*, has subsequently been judicially considered in 50 reported decisions to date, including *Hollick*, *supra* and *Western Canadian Shopping Centres Inc.*, *supra*, in the Supreme Court of Canada, with no indication of disapproval of the use of the issue of liability, even if admitted by the defence, as a common issue.

20 Justice McLachlin in the quote, supra, from *Western Canadian Shopping Centres Inc.*, *supra*, said "The commonality question should be approached purposively." In *Bywater*, *supra*, the court was faced with the situation of a fire in the Toronto subway, which forced thousands of passengers to walk from trains stopped in the subway tunnels to the nearest station, exposing them to inhalation of dense smoke for varying periods. I have no doubt that the using of an admission of liability as a common issue was done not with the purpose of providing the ground work for the single liability trial but instead for the purpose of meeting a statutory requirement for certification, thus making available a preferable procedure, the class action. In this case, I think it would be obvious a similar purposive approach had been taken, which leads to the next topic.

Preferable Procedure

21 It must be clearly noted and remembered that s. 5 of the CPA does not speak of the class proceedings being the preferable procedure generally. Section 5(1)(d) says specifically that:

> A class proceeding would be the preferable procedure for the resolution of the common issues.

In the fact situation of this case, it is obvious that there is no doubt that a class action approach was the preferable way to deal with the common issues put forward. They were essentially admitted by the defence, yet as was pointed out in *Bywater*, *supra*, such an admission does not have any affect unless tied specifically and judicially to the individual plaintiffs. By binding all of the affected individuals together as a class, the admission of liability could be made to all in one simple statement, and the summary judgment that followed in the class action formalizes that admission to the benefit of each and every one of the class members, in one brief and relatively inexpensive motion.

22 In *Hollick*, *supra*, Chief Justice McLachlin however expands past the wording of the statute itself by endorsing, in para. 29, a statement made by Ward K. Branch in his text *Class Actions in Canada* (in what had been para. 4.690 in this

loose-leaf text as updated to December 1998, release 4) where he noted that the B.C. and Ontario Acts spoke of preferable procedure for the resolution of the common issues (as opposed to the entire controversy). His view, endorsed by the Supreme Court in *Hollick*, *supra*, was that:

> However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However it is important to adopt a practical cost benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

The Chief Justice said in para. 30:

> I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context.

She says, after reviewing other quotes, at the end of para. 31:

> In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, not just at the possibility of individual actions.

In the end of course in *Hollick*, *supra*, she concluded that the small claims would be better off seeking no fault compensation from the Small Claims Trust Fund operated by the Ministry of the Environment, in relation to this landfill, and the substantial claims would be better off as individual actions.

23 Here, Mr. Field argues that the individual class members would have been better off, and would still be better off in pursuing their claims, if they wished, in the Small Claims Courts of the various provinces or at least in Ontario, as Simplified Procedure actions.

24 It is no secret that the hope of Mr. McGowan had been that once the action was certified, it would settle for an aggregate sum, and all of the special powers under the *Class Proceedings Act* could be used to approve a settlement, handle distribution, and if necessary adjudicate some individual problems. A basis of that hope was three somewhat similar cases he had had before. That turned out to be a very vain hope indeed. However at the time of certification there were, in my view, very strong reasons, completely apart from the possibility of a general settlement, that made class procedure preferable.

25 Perhaps the most important was that at the time, in Ontario, contingency fees, permitted under the *Class Proceedings Act*, were not permitted outside of it. This was a very important factor as Mr. McGowan was undertaking the class action, and the individual assessments, on a contingency basis. That meant, quite simply that these previous K-Mart employees, who otherwise would be unable to finance an individual action against a large corporation, and who felt they were entitled to more than what they received when dismissed, had the opportunity to attempt to recover at least a good part of what they might be found entitled to, without expense on their part. Mr. McGowan and those working with him have remained true to their word given before certification, and have continued to provide representation, and thus access to justice, on a contingency fee basis to the class members. Even with the generalized approval of contingency fees in other provinces, and now approval in Ontario, I would question whether a lawyer would be prepared to take on the case of an individual class member on a contingency fee basis. As Mr. Field has pointed out in his materials, the claims processed so far have turned out to be relatively small. It would seem to me the only practical way for a lawyer to take on matters of this kind on a contingency basis would be to take on a sufficient number to make it worthwhile. Hence the preferability of the class action approach.

26 Further, these claims are spread across Canada. Despite the geographic diversity, they are all by employees, working in similar jobs for a single large corporation. Consistency in treatment and in eventual awards, if any, would be important for justice to be seen to be done in a case such as this. If each class member was left to go on his or her own, before the courts in his or her home province, the resulting consistency of decisions would be doubtful. However the process envisioned in the first and second efforts of this court, where hearings would be held before referees, whose decisions could be reviewed by myself as the case management judge, provides a mechanism for dealing with potential inconsistencies. Further, the earlier

proposals for using referees, rather than imposing large numbers of these assessments of damages on the regular court system, would help greatly in achieving the object of judicial economy. Justice McLachlin, in *Rumley*, *supra*, in para. 29 spoke of serving the ends of fairness and efficiency. In *Western Canadian Shopping Centres Inc.*, *supra*, at para. 39, she spoke of approaching issues purposively. In my view, those overarching ends and approaches are best addressed by certification.

27 Despite all of the intervening problems and delays in the many years since certification, in my view the original reasons for finding a class action to be the best procedure still apply, and to this must be added two other factors. First, there are roughly 1,000 of the approximately 5,000 class members who have filed claims. Mr. Field puts that forth as a reason to not continue with a class action, as 80% of the potential claimants have in effect, dropped out. This is of course a great interim success for the defence. However, I am concerned over the 1,000 or so that have been waiting to have their claims processed. If they are now told that the class action, on which they had pinned their hopes and in which they had participated, has been de-certified and they are on their own to seek their own personal legal representation, I have a real concern as to whether that would put the administration of justice in disrepute. Further, by the terms of the *Class Proceedings Act*, s. 28(1), limitation periods are suspended for the class members. Mr. Field has indicated that if the action was de-certified, his firm would undertake to waive any limitation defence. However I have a real concern over whether under the new *Limitations Act*, now in effect, such a waiver can be made or enforced.

28 As a footnote to this part of the discussion, I note that defence counsel relies on *Franklin v. University of Toronto* (2001), 56 O.R. (3d) 698 (Ont. S.C.J.), at 17, para. 56 as support for the proposition that a class proceeding is not preferable where the individual issue determination process outstrips any purported judicial economy arising from the common issue determination. However in that case, which involved allegations as to systemic gender and salary discrimination against female faculty members at the university, Mr. Justice Gans ended that paragraph by saying:

> In my view, the common issue of systemic discrimination pales in comparison to the individual issues, which distinguishes this case from the decision in *Webb v. K-Mart Canada Ltd.*, [1998] O.J. No. 5469.

Workable Method of Advancing the Proceeding

29 Defence counsel quite briefly says in para. 103 of defence factum that:

> The plaintiff's various litigation plans, as put forward in the past or proposed now, are not methods for advancing the litigation, dealing with the individual claims in a way that is fair to both parties, achieving economies of scale or preserving judicial resources.

30 That brevity is appropriate, in view of the obvious facts that plaintiff's counsel agrees that the first proposal of dealing with the claims, consensually agreed upon with the defence, by hearings before retired judges with ADR associations is not workable because of the expenses of those referees, and the second proposal, using deputy judges of the Ontario Small Claims Court, was found not workable by the courts because of s. 5(1) of the *Courts of Justice Act*. Plaintiff's counsel is now back before me seeking approval of another plan, and has put forward several alternatives. Defence counsel has criticism of the various proposals, but they are best dealt with when reviewing the details of the plaintiff's motion. However, defence counsel does raise two further general issues, that should be addressed.

Judicial Economy Is Not Achieved

31 Defence counsel argues that this has not been achieved because each individual claim of wrongful dismissal that has been put forward has been dealt with in the same way as if it were a trial. There has been no aggregation of proceedings or aggregation of issues of liability which would give rise to any judicial economy. Mr. McGowan's answer to the latter statement, which I accept, is that plaintiff's counsel from the beginning has been trying to get the defence to agree to an aggregate settlement, or at least proposals for settlement amount to be arrived at by mathematical formula based on length of

employment, etc., rather than individual issues, and the defence has refused to agree. The defence of course has put forth very cogent reasons for refusing to agree, based on the existing law on wrongful dismissal. On the other hand, the defence had hoped that plaintiff's counsel would accept the "landscape" provided by the results of the 24 hearings that were held, and plaintiff's counsel has not concurred. On the other hand, plaintiff's counsel argues that the defence has not put forth offers on the remaining claims, while the defence advises it will consider making offers if and when the plaintiff sets claims down for hearings, which has not happened, the two sides are currently at a stalemate because of the cost of the referees. It is my tentative view, based on what has occurred so far, that if further hearings are held, perhaps a pattern would emerge sufficient to persuade counsel on both sides that assessments of their remaining claims could be made without hearings. Whether that should actually develop of course waits to be seen.

32 However, in the conventional sense, to date judicial economy in the trial courts has certainly been achieved, because they have been saved from the additional burden of 1,000 or so trials. If those trials had proceeded, in each case the background would have had to been pleaded and explained to a trial judge, and all of the steps of normal litigation would have had to be followed. All of that, plus the involvement of a multitude of individual trial judges, has been avoided. In my view judicial economy has, and will be achieved in this class action.

Modification of Wrongdoing

33 The definition of this, chosen by defence counsel in para. 98 of the defence factum, happens to be one that I gave in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 40 C.P.C. (3d) 245 (Ont. Gen. Div.), at 255, para. 42:

> ... to generally inhibit misconduct by those who might be tempted to ignore their obligations.

34 That statement came at the end of a paragraph in which I had accepted in that case that there was no evidence of willful or intentional wrongdoing, and had concluded that behaviour modification was of little direct importance in that litigation. I have seen nothing to date to indicate that this situation is any different in this case. The defendant reached a business decision that a business operation had to close, and reached resulting business decisions to not only make severance payments to displaced workers, but to make employment offers to them where possible in related businesses, and to offer them counselling and assistance. We have, so far, had hearings by referees in only 24 cases, in nine of which the employees making claims were found to have been adequately compensated by the defendant. However in the remaining 15, while there were no findings that the individuals had been "low balled" the referees' findings was that the compensation received from K-Mart was insufficient.

35 As I said before, the decisions on what to pay to the displaced employees was a business decision, or a series of business decisions. In making those decisions, perhaps a business person would be influenced by what the displaced employee would likely accept, more than by what the judicial officer hearing the facts might award. In as much as in our society we would regard the latter, rather than the former approach to be the fair one, it could well be the judicial assessment of this group of claims might assist in modification of employer's views of the obligation existing when persons are terminated.

Conclusion — Decertification

36 My conclusion, for all of the reasons above outlined, is that the motion to de-certify this action will be dismissed, and that the action should continue.

Plaintiff's Motion to Amend Hearing Process

37 The plaintiff moves for either one of two alternate proposed changes to the hearing process to deal with individual claims - (1) the appointment of myself to hear all of the roughly 1,000 outstanding claims; or (2) the appointment of a number of new referees in various places to hear the claims, with provision for adding still more. The plaintiff also moves for

an amendment to the original costs direction, so that in effect the defendant would pay the referees' costs, and could not claim against the plaintiff for costs unless misconduct by the class member involved could be demonstrated. I intend to deal briefly with each of these issues in the following paragraphs.

I Do All the Hearings

38 The details of Mr. McGowan's proposal under this heading is that in claims under $25,000, I would conduct a brief mediation and then if unsuccessful, proceed to do a brief hearing conducted on a paper record without *viva voce* evidence. If the claim was over $25,000, I again would do a brief mediation, followed, if unsuccessful, by a hearing, not to exceed one day, with each party allowed half a day for the parties' evidence in chief, the parties' cross-examinations of the opposite parties' witnesses, and the parties' submissions.

39 Mr. Field for the defence had many comments to make about this proposal. I accept the majority of them.

40 As I commented during argument, "Med-Arb" is a well recognized and often used alternate dispute resolution method. However, it is used in consensual dispute resolution proceedings, typically over business problems, between two parties of relatively equal strength, who have mutually appointed a person in whom they both have trust and confidence, to try to work out a resolution, failing which they agree the mediator would assume an arbitrator's role and impose a solution, which they agree in advance to accept. This is almost diametrically opposed to a judicial process, particularly in a case like this, where an individual employee who had been dismissed is seeking damages from a large national employer, in the court system where an impartial decision from a judicial officer who has had no previous involvement in the particular issue is expected. I agree with Mr. Field that taking on the roles of both mediator and decision maker by any judicial officer in a matter before the courts would be entirely inappropriate.

41 When the suggestion of "paper trials" was put forth in argument, I recalled that I had read at least one decision, I believe it related to the patent or copyright office, where there was an appellant ruling that adjudication based entirely upon documents filed was nevertheless a trial. Certainly in our court, affidavit evidence can be received, and on an assessment of damages, it is not unusual for the evidence to all be in the form of affidavits and documents. Costs disputes, often for very large amounts, are resolved on written submissions. However, these are wrongful dismissal claims, in which a court is called upon to assess, among other things, the impact upon the plaintiff of the dismissal, the efforts made and problems encountered in trying to find other employment, and most importantly the credibility of the former employee. The court is also concerned with the propriety and credibility of the employer's agents in dealing with and responding to the employee. While documentary material, such as the will-say statements called for under the current procedure are, or should be helpful to the opposing party, they cannot substitute for *viva voce* evidence in assisting the judicial officer in reaching a determination. In my view, these matters should all, as a matter of course, proceed on *viva voce* evidence, with full right of cross-examination. If the parties consent, or if on application after submissions, the trier of fact directs, the hearings could proceed in all or part on documentary evidence. However, counsel and a trier of fact must remember that an important right of the parties, in particular the plaintiff, is the right to be heard by the tribunal.

42 Mr. McGowan proposes that individual hearings on *viva voce* evidence be limited to one day. In my view, that would be a useful, generalized guideline, but should not be turned into a limitation. In my observation, one of the problems with the hearings before the retired judges, was that while all the evidence and submissions on the dismissal was typically presented in a day or less, there was an additional day or part thereof devoted to extensive arguments over costs. Hopefully each of these individual matters can be dealt with completely in one day, but fairness of the hearing process dictate that there be no absolute limitation.

43 Incidentally, in para. 35 of my original procedural order, released September 9, 1999, I had provided for brief statements of material facts relied upon from the individual class member plus summaries of the statements, or will-says, of any witness proposed to be called. Mr. Field, in argument against paper hearings, had pointed out that in many of the hearings that did take place, cross-examination revealed that written statements of the claimants were not accurate or complete. Particularly, he mentioned that on more than one occasion it was found in cross-examination that the claimant in fact had received offers of employment during part of the time in which they claimed they were entitled to pay in lieu of notice. I make the suggestion, subject of course to submissions by counsel, that these statements of material facts be backed up by certification from one of the lawyers representing the class, to the affect that the lawyer had interviewed the claimant,

had pointed out the necessity of complete disclosure, and believes that the statement of material fact is accurate and complete.

44 Aside from the details of the procedure, there are two basic problems with my personally undertaking the 1,000 or so assessments that are still outstanding. Mr. Field raised them in his factum and oral argument and I accept them both. First, his estimate of the time required to deal with all of these claims even if paper hearings were permitted for the smaller ones, is approximately one year. If they were all done by way of oral hearings, I suspect the time required would more likely be at least two or three years. This commitment of time invites a revisiting of s. 14(1) of the *Courts of Justice Act*. The scheduling of my judicial time is done to help meet the needs of the southwest judicial region of the Province of Ontario by the Regional Senior Justice as the representative of the Chief Justice. Although this case originated in, and is being managed from this region, it is questionable as to whether dealing with the individual claims of persons scattered all over Canada could be a priority in this region, particularly when alternatives are available. If I were to be devoted solely to hearing individual claims of former K-Mart employees for the next several years, that would require the approval of my Regional Senior Justice and, no doubt, the Chief Justice, and frankly I would have great difficulty in justifying it. Further, if I was the sole trier of fact in all of these claims, that in itself would inhibit access to justice as it would hold up the processing of claims to meet my personal schedule. In my view, these claims have been outstanding for far too long and need to be dealt with very expeditiously. That of course can only happen if a number of people are dealing with them all at once.

45 Additionally, the vast majority of these claims are put forth by persons outside of Windsor, and in fact outside of the southwest region. Access to justice for these people would certainly be inhibited if they were required to travel to Windsor to present their claims, I have no certainty that the federal government would be prepared to fund my travel expenses if I were to go to them.

46 Mr. McGowan, in his factum, indicates that he would not actually expect me to hear all of the 1,000 or so claims but would hope instead that once the hearing process started, the vast majority of the claims would settle. That may actually happen, but all of the indications to date are that the defence takes the position that all of these former employees were fully compensated for their dismissal, and unless in any individual case, the defence is persuaded that that was in fact not so, the individual case will have to go through a hearing. The defence is perfectly entitled to take that position, and the final results of the few hearings that have been held did not indicate there is anything unreasonable in that position.

47 For all of the foregoing reasons, I conclude that my personally hearing all of the 1,000 or so outstanding claims is not the best way to deal with them or to accomplish the objectives of the *Class Proceedings Act*.

Appointment of New Referees

48 The alternate proposal put forth by Mr. McGowan is that new referees be appointed. Mr. McGowan, and regional counsel for the class have gathered 16 names and have filed consents from these 16 persons to act as referees. Most of them are in Ontario, but there are also persons in Newfoundland, New Brunswick, and Manitoba, and Mr. McGowan indicates that additional persons could be appointed later. Mr. Field points out that there are no prospective referees put forth in several of the provinces in which class members reside, but I accept that deficiency can be remedied. Mr. Field also points to the diversity in the fees claimed, ranging from $232 per day to $1,300 per day. If someone otherwise qualified is prepared to serve for very low compensation, that is no concern of this court. However, in view of the previous problem with referees expenses, in my view the court would have to hear special reasons why a person claiming more than $1,000 per day should be appointed. Mr. Field points to inconsistencies in the backgrounds of the various persons put forth. I had previously indicated that in Ontario at least, I had no problem with persons who had the qualifications for, and had been appointed as deputy judges of the Small Claims Court. I see that the Court of Appeal appeared to agree with that, so long as they were appointed as individuals and not as judges of the court. I see that some of the individuals put forth have had experience as mediators. That experience should certainly not count against an appointment, but in view of my comments above on the conflict arising if the adjudicators of these claims were also to act as mediators, I do not believe that experience as a mediator could in any way be a criteria for appointment.

49 The comments put forth by Mr. Field in his factum and submissions were directed towards the idea of appointing mediators, rather than being specifically directed to the names put forward. In my view, defence counsel should have the opportunity to make specific objections to any of the persons put forth by plaintiff's counsel as proposed referees, and plaintiff's counsel should have the opportunity to respond. Similarly, the defence should be entitled to put forth the names of

persons with the same following rights of objection and response. As before, the appointments would all be made by this court, with the decisions of the referees to be reported back to this court and to take force and effect only when approved by this court. That is in conformity with the *Class Proceedings Act*, and makes clear that in hearings outside of Ontario, although the substantive law of the province involved would govern the employment contract, the procedural law, and the resulting decision is that of the Superior Court of Justice in Ontario. That, in my view, fully answers the issues raised by Mr. Field about the applicability of the Ontario rules outside of Ontario, or the argument that a referee in a province outside of Ontario would be a judicial officer of that province, rather than a judicial officer of Ontario.

Costs Re the Hearings

50 Plaintiff's counsel again puts forth the proposal made in 1999 and in 2001, that the defendant be required to pay the referees' fees and expenses unless there is some misconduct by the class member in a particular case. Defence counsel objects that that proposal was in fact put forth by plaintiff's counsel on several occasions, including twice to appellate courts, and has always been rejected, and argues that request should now be dismissed out of hand as *res judicata*. I would accept that legal argument, were it not that plaintiff's counsel points to the changing circumstances in this case, and the court's power under the *Class Proceedings Act* to amend its orders to accommodate changes in the litigation.

51 The plaintiff's argument for raising the issue again is that the previous systems of dealing with the individual issues have not worked, and in other cases, where the defendants pay all or most of the adjudication expenses they do work. However, the problem with that is the purported evidence before the court is of other cases in which the defence conceded that it owed something to all or most of the class members, the question being how much. Here the position is that the class members have already been compensated, and no payment will be made to any individual unless a tribunal rules otherwise, or at least an individual case put forth persuades a defence otherwise. Plaintiff's counsel points to the large majority of the decisions of the previous referees in favour of some payment to the claimants, but it was admitted that class counsel looked to these as the best cases to put forward.

52 I am not persuaded that the material now presented to me calls for the change in the process advocated by class counsel. In my view, it is best to leave the issue of payment of referees' expenses to be dealt with under the existing order, whereby the parties contribute equally to the advance payments required, and the referee, in dealing with costs, deals also with the expenses of the hearing.

53 Class counsel also asks the court to set an early deadline by which the defendant and class members must serve any offers to settle in order for those offers to have any effect on costs consequences. The current regime provides that rule 49 and its consequences shall apply, with rule 49 offers to be made at any time, subject to rule 49.03. That imports the proviso that if an offer to settle is made less than seven days before the hearing commences, the costs consequences in rule 49 do not apply.

54 Class counsel, in asking for an "early deadline" was suggesting a date early in this year, and before any hearing dates had been assigned. The complaint of class counsel was that the defence was "withholding" offers to settle until hearing dates had been assigned. Defence counsel explained that while background work had been done on all claims, it would be impractical to attempt to review and make offers on all of them within a short time period, and it was much more practical to do that review and make offers if and when an individual claim was actually committed to a hearing.

55 I agree with the defence position, particularly since it would not be known to the defence whether a particular claimant was actually prepared to proceed to a hearing unless the hearing date had been set. From the defence point of view, the class counsel's suggestion is only a step removed from the suggestion that an aggregate offer be made, which has been rejected by the defence and this court.

56 However, on the other hand, I appreciate the difficulties that class counsel, including various regional counsel now appointed, may have in contacting, counselling and receiving instructions from individual claimants if offers are made a week before a hearing. I can appreciate that by that time, counsel on both sides would, or should have spent considerable time and effort in preparation for an actual hearing that might prove unnecessary. The defence, and the defendant corporation, has no doubt by now had a great deal of time to consider the written documentation provided by class counsel in these individual cases, and of course, ample time to consider the background as known to the defendant corporation. On the assumption that

hearing dates would be fixed at least six weeks into the future, I conclude that would be of great assistance to the parties, and counsel on both sides if the provision for the effectiveness of rule 49 was varied to provide that if an offer to settle is made more than ten days after the date for a hearing has been confirmed, the cost consequences referred to in rule 49.10 do not apply. I am presuming, in saying this, that the process of establishing a confirmation date would be available — by say fax from the proposed referee confirming a date or a fax from one counsel to another. I also appreciate that the ten day figure mentioned is an arbitrary one, not requested by either counsel, and therefore I invite specific submissions on that figure, while maintaining the view that in these cases, offers can and should be made substantially earlier than seven days before a hearing, to attract cost consequences.

Conclusion — Amending Process

57 I have concluded that the process for hearing individual claims should be varied, to provide for the appointment of a number of individual referees, to do individual hearings in the geographical areas where the individual claimants reside or more importantly where they had worked for K-Mart. I have rejected class counsel's request that the defence should pay all of the costs of the arbitrators and have proposed a change in detail of the effect of rule 49.

58 I now await submissions of counsel on persons put forth or to be put forth as potential arbitrators, on my proposal for a ten day after confirmation of hearing limit for rule 49 offers, on my suggestion of certifications to accompany statements of fact by claimants, and on the particular wording of the order implementing these reasons, and also submissions on costs of these motions.

Motion granted; cross-motion dismissed.

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2005 CarswellOnt 3394
Ontario Superior Court of Justice (Divisional Court)

Webb v. 3584747 Canada Inc.

2005 CarswellOnt 3394, [2005] O.J. No. 3306, 141 A.C.W.S. (3d) 347, 201 O.A.C. 113, 43 C.C.E.L. (3d) 147

KAREN WEBB (Plaintiff) and 3584747 CANADA INC. (Defendant)

Pitt J.

Heard: June 24, 2005
Judgment: August 4, 2005***
Docket: 228/05

Proceedings: refusing leave to appeal *Webb v. 3584747 Canada Inc.* (2005), 2005 CarswellOnt 499, 40 C.C.E.L. (3d) 74, 9 C.P.C. (6th) 50 (Ont. S.C.J.); additional reasons at *Webb v. 3584747 Canada Inc.* (2005), 2005 CarswellOnt 4029 (Ont. Div. Ct.)

Counsel: Michael McGowan, David Deluzio for Plaintiff
John C. Field, Glenn P. Christie for Defendant

Subject: Civil Practice and Procedure; Employment; Public

Headnote

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

H Co. purchased department store chain, closed about 31 of its stores across Canada, and merged remaining stores with two chains already owned by H Co. — About 5,000 employees were consequently terminated outside of BC and Quebec — Employees brought action against H Co. for damages for wrongful dismissal and action was certified as class proceeding — Employees successfully brought motion for partial summary judgment finding that they were entitled to pay in lieu of notice — Parties agreed to determine individual issues of damages and mitigation by summary hearings before retired judges — Only 15 of first 24 employees were awarded additional compensation, and expense of hearing often exceeded award amounts — H Co.'s motion for decertification of action as class proceeding was dismissed — Trial judge found class action had undoubtedly been preferable way to deal with common issues and continued to be preferable procedure — Trial judge found solicitors would be unlikely to take on individual small claims on contingency basis — Trial judge found only practical way for solicitor to take on matters of this kind on contingency basis would be to take on sufficient number to make it worthwhile — Trial judge found consistency in treatment and in eventual awards would be important for justice to be seen to be done in transnational case — Trial judge found use of extra-judicial referees helped greatly in achieving judicial economy — Trial judge found requiring relatively small number of remaining claimants to seek their own legal representation at this point could bring administration of justice into disrepute — Trial judge found remaining claimants might also lose benefit of suspension of limitation period — H Co. brought motion for leave to appeal — Motion dismissed — Motion judge properly appreciated issues — Individual issues would not overwhelm common issues.

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Webb v. 3584747 Canada Inc. (2001), 2001 CarswellOnt 2390, 54 O.R. (3d) 587, 9 C.P.C. (5th) 188 (Ont. S.C.J.) — referred to

Webb v. 3584747 Canada Inc. (2002), 2002 CarswellOnt 2125, (sub nom. *Webb v. 3574747 Canada Inc.*) 161 O.A.C. 244, (sub nom. *Webb v. 3574747 Canada Inc.*) 24 C.P.C. (5th) 76 (Ont. Div. Ct.) — referred to

Webb v. 3584747 Canada Inc. (2004), 2004 CarswellOnt 325, 69 O.R. (3d) 502, 41 C.P.C. (5th) 98, 183 O.A.C. 155 (Ont. C.A.) — referred to

Webb v. 3584747 Canada Inc. (2004), 331 N.R. 399 (note), 2004 CarswellOnt 2988, 2004 CarswellOnt 2989 (S.C.C.) — referred to

Statutes considered:

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

s. 5(1) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 10(1) — referred to

s. 25(1) — referred to

s. 25(2) — referred to

s. 25(3) — referred to

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

s. 41(1) — referred to

Rules considered:

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

R. 49 — referred to

R. 62.02(4)(b) — pursuant to

MOTION by employer for leave to appeal judgment reported at *Webb v. 3584747 Canada Inc.* (2005), 2005 CarswellOnt 499, 40 C.C.E.L. (3d) 74, 9 C.P.C. (6th) 50 (Ont. S.C.J.), dismissing employer's motion to decertify class proceeding.

***Pitt J.*:**

1 This is a motion brought by the Defendant for leave to appeal to the Divisional Court from the Orders of the Honourable Mr. Justice Brockenshire (the "motion judge"), dated February 11, 2005 and May 31, 2005.

2 The February 11, 2005 decision dismissed the Defendant's motion for an Order decertifying this action as a class proceeding. The May 31, 2005 decision varied the process (in part) for the adjudication of the individual class members' claims.

3 Leave is sought pursuant to Rule 62.06(4)(b) only. This subsection provides that leave shall not be granted unless there appears to a Judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. In *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.), the court held it is not necessary to conclude that the decision in question is wrong or probably wrong, but that its correctness is open to serious debate.

Grounds for Leave

4 The following are the grounds for leave set out in the defendant's factum.

> (i) the motion judge erred, in the face of the experience of the parties, in finding that entitlement to reasonable notice in an indefinite term employment contract, which exists by operation of law, was a common issue which satisfied the test under Section 5(1)(c) of the *Class Proceedings Act*, 1992 S.O., Chapter 6 ("CPA");
>
> (ii) the motion judge erred in finding that the Defendant's acknowledgement that reasonable notice, absent cause for dismissal, was required upon termination, constituted an "admission of liability";
>
> (iii) the motion judge erred in finding that this "admission of liability" was a common issue which advanced the litigation;
>
> (iv) the motion judge erred in finding that the preferability test in Section 5(1)(d) of the CPA continued to be met. The motion judge made this finding in the face of the evidence and the experience of the parties which established that the references constituted individual wrongful dismissal trials;
>
> (v) the motion judge erred in finding that there was a workable plan under Section 5(1)(e) of the CPA.

5 There is legislative jurisdiction conferred by section 10(1) of the CPA to decertify proceedings where the conditions required by section 5(1) cannot ultimately be satisfied.

6 The defendant further submits that there is good reason to doubt the correctness of the motion judge's decision in varying the process for the reference hearings. The motion judge erred in ordering that Rule 49 does not apply unless an offer to settle is made "within 10 days after the date for a hearing has been confirmed", thereby depriving the parties of a substantive right under the Rule and which was used to support certification in the first place.

Facts

7 The main action involves former employees of K-Mart Canada Ltd. whose employment was terminated when thirty-one K-Mart stores were closed across Canada as a result of being merged with Zellers and the Bay stores. Roughly five thousand employees were let go (not including those in British Columbia and Quebec or those under union contracts or written contracts with fixed termination dates or terms). The employees were provided with various amounts of working notice and pay in lieu of notice at the time of dismissal. The claimants allege that they were wrongfully dismissed.

8 On June 14, 1999, the motion judge certified the former employees' action for wrongful dismissal as a national class action, with the common issues being:

> (a) Whether class members' contracts of employment required the defendant to provide them with reasonable notice of termination, and /or pay in lieu of notice, if dismissed without just cause; and
>
> (b) whether the class members were so dismissed.

See *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (Ont. S.C.J.).

9 The motion judge excluded, from the class, persons dismissed for just cause, and proceeded to grant summary judgment on the common issues. The defendant's motion for leave to appeal the certification was dismissed (*Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 638 (Ont. Div. Ct.)) and the appeal with respect to the common issues was abandoned.

10 A process was set up for the determination of the individual issues such as quantum of damages and efforts to mitigate. Summary hearings were to be held, if necessary, before retired judges who were members of ADR Chambers. Twenty-four claims were heard in this manner, which proved to be expensive — the costs were frequently higher than the amounts awarded. As a result, the class counsel applied to amend the hearing system to something less expensive. The motion judge amended the process so that deputy judges of the Small Claims Court were to be appointed as referees for the claims heard in Ontario. See *Webb v. 3584747 Canada Inc.* (2001), 54 O.R. (3d) 587 (Ont. S.C.J.). This amendment was successfully appealed to the Divisional Court, affirmed by the Court of Appeal, leave to the Supreme Court of Canada was denied, on the ground that the motion judge exercised the power reserved to the Chief Justice under s. 14(1) of the *Courts of Justice Act* to direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties. See *Webb v. 3584747 Canada Inc.* (2002), 24 C.P.C. (5th) 76 (Ont. Div. Ct.), aff'd (2004), 69 O.R. (3d) 502 (Ont. C.A.), leave to appeal to S.C.C. dismissed (S.C.C.).

11 It is instructive to refer to paragraph 13 of the Divisional Court's decision:

> In reaching our conclusion, we are not to be taken as having agreed with the appellant's attack upon the Judge's finding that the ADR referral system had failed. There was ample evidence in support of that finding and we would not interfere with it.

Paragraph 18 of the Court of Appeal's endorsement also states as follows:

> We are sympathetic to the efforts of the motion judge to bring about an expeditious resolution of these claims. If the motion judge had appointed Small Claims Court judges as individuals in their private capacity to be paid in accordance with the direction of the referee rather than by the government, and without the involvement of the court's administrative staff, we do not think that s. 14(1) of the *Courts of Justice Act* would have been contravened. Indeed, we hope that counsel will be able to agree upon an approach to appointing referees that will result in the individual claims being dealt with in an expeditious and cost-effective manner.

12 The plaintiff thereafter brought a motion to appeal the individual hearing system to correct the defects found by the Divisional Court and the Court of Appeal. The defendants brought a cross-motion to decertify the case. The motion judge granted the plaintiff's motion and dismissed the defendant's motion. He concluded that:

> Despite all of the intervening problems and delays in the many years since certification, in my view the original reasons for finding a class action to be the best procedure still apply, and to this must be added two other factors. First, there are roughly 1,000 of the approximate 5,000 class members who have filed claims. Mr. Field puts that forth as a reason to

> not continue with a class action, as 80% dropped out. This is of course a great interim success for the defence. However, I am concerned over the 1,000 or so that have been waiting to have their claims processed. If they are now told that the class action, on which they had pinned their hopes and in which they had participated, has been de-certified and they are on their own to seek their own personal legal representation, I have a real concern as to whether that would put the administration of justice in disrepute. Further, by the terms of the Class Proceedings Act, s. 28 (1), limitation periods are suspended for the class members. Mr. Field has indicated that if the action were de-certified, his firm would undertake to waive any limitation defence. However, I have some real concern over whether under the new *Limitations Act* now effect, such a waiver can be made or enforced. (*Webb v. 3584747 Canada Inc.* (2005) 40 C.C.E.L. (3d) 74, [2005] O.J. No. 449 (S.C.J.) at para. 27).

Current Status of the Action

13 About 1005 class members have perfected claims, of which 48 have been resolved, 24 being adjudicated and 24 by individual settlement. Some 957 class members are still waiting resolution.

Defendant's Position

14 As I understand the defendant's argument, the motion judge made a major error in law when he certified the action since he found a common issue, in the entitlement of the class members to reasonable notice of termination, a fact the motion judge held was "admitted by the defendants". The defendant also submits that the motion judge made an error in finding that the common issues significantly move the litigation forward as required by *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), at 36-37, para. 32 and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), at 424.

15 The defendant submits, in substance, that the referral hearings mandated by the certification process were in essence wrongful dismissal trials that would inevitably overwhelm the determination of the common issues.

16 The defendant further submits that the motion judge failed to appreciate that the task posed by the common issues test is not to elucidate the various individual issues which may remain in the common trial, but to investigate whether there are aspects of the case that meet the certification requirement, as set out in *Cloud v. Canada (Attorney General)*, supra, p.415, para. 53.

17 The defendant says, in short, the common issues identified by the motion judge are not common issues at all, but well-established principles of law that the defendant does not dispute. In addition, the acknowledgment of a well-established legal principle, like a requirement for reasonable notice in defending a wrongful dismissal action, does not amount to an admission of liability.

18 The defendant summarized that part of their argument in paragraphs 53-57 of the factum:

> (53) The issue in dispute between the parties is not whether the defendant was required to provide reasonable notice upon termination (as this principle is well established by operation of law) but whether the amount of notice of termination provided to each class member at the time of their dismissal was reasonable in all of the relevant, individual circumstances.
>
> (54) In *Bardal v. Globe and Mail*, McRuer J. held as follows, with respect to the determination as to whether the notice of termination provided by an employer was reasonable:
>
> > There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

> (55) There is no formula for deciding whether the notice of termination provided to an employee is "reasonable": "[d]etermining the reasonable notice period is an art not a science".
>
> (56) The amount of notice owing can be reduced by any replacement earnings that an employee earns during the period of notice of termination. The court will also consider whether the employee has made reasonable efforts to find replacement work. Some of the factors considered by courts in determining whether an employee's job search was "reasonable" include: the employee's personal circumstances; the geographical location of the alternative work; pay and status and responsibility.
>
> (57) The only common fact between the class members is that they were employed, prior to their termination, by the defendant. Any other issues of fact, specifically those listed in *Bardal*, supra, are not common. The determination of reasonable notice and mitigation activity is entirely based on the individual's personal circumstances.

19 The defendant submits that the motion judge made an error in resolving the preferable procedure issue in favour of the plaintiff, by failing to recognize that the class proceeding is not preferable for the resolution of the common and individual issues as required by cases like *Hollick, Cloud* and *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), at 41-42, paras. 53-54).

20 The defendant argues that in order to find the class proceeding preferable, it must be found, at a minimum, that it achieves one of the goals of judicial economy, improved access to the courts, and modification of behaviour of active or potential wrongdoers; and neither of these goals has been achieved and experience of the process has shown that they are not achievable.

21 Since the nature of the claim is predominantly individual and the certification will result in a multitude of trials that will overwhelm any advantages gained by the trial of a few common issues, a class proceeding is not preferable, as decided in cases like *Hollick*, *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.), at 299, para. 115 and *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), at 73.

22 In the view of the defendant, there were at least 19 individual issues and only 2 alleged common issues.

23 The defendant also submits that the motion judge made a major error in concluding that the representative plaintiff has a workable plan for advancing the proceeding, as the plaintiff has been required to approach the court from time to time to change his plan.

24 Finally the defendant submits that the motion judge made a major error in his variation order by introducing a procedure that would have the effect of undermining the objective of Rule 49. That procedure mandated the application of Rule 49 only if an offer to settle is made within 10 days after the date that a hearing is confirmed.

Disposition

25 It is notable that although this case has been to both the Divisional Court and the Court of Appeal, admittedly on an issue that is *not* before this Court, in neither court was there the slightest suggestion that this was not an appropriate case for a class proceeding. In fact, in both the passages referred to earlier from those courts, one can discern something in the nature of an endorsement of the proceedings, subject to the resolution of the jurisdictional issue involving section 14(1) of the *Courts of Justice Act*.

26 In addition, it is important to recognize the deference due to class action judges endorsed by both the Divisional Court and the Court of Appeal. See *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), at 667; *Brimner v. VIA Rail Canada Inc.* (2001), 15 C.P.C. (5th) 27 (Ont. Div. Ct.) and *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.).

27 There is no reason to believe that the motion judge did not appreciate the true nature of wrongful dismissal law, which is admittedly preoccupied almost exclusively with the appropriateness of notice or salary in lieu of notice.

28 I am also of the view that section 25(1), (2) and (3) of the CPA effectively dispose of the procedural objections raised by the defendants. This section reads as follows:

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

29 While the proceeding is not without its difficulties, there does not appear to be any good reason to doubt the correctness of the orders in question. In fact, my reading of *Cloud*, *supra*,at para. 53 is that it supports certification in this case:

> In order words, an issue can constitute a substantial ingredient of the claims and satisfy s.5 (1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s.5 (1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

30 The motion is accordingly dismissed.

Costs

31 Subject to any agreement between the parties, brief written submissions on costs are to be made within 20 days of the

release of these reasons.

Motion dismissed.

Footnotes

[*] A corrigendum issued by the court on August 22, 2005 has been incorporated herein.

[**] Additional reasons at *Webb v. 3584747 Canada Inc.* (2005), 2005 CarswellOnt 4029 (Ont. Div. Ct.).

End of Document

Court File No: 08-CV-42639CP

GRAHAME PLAUNT et al. Plaintiffs	- and -	RENFREW POWER GENERATION INC. Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

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