Court File No. 14-0815

SUPERIOR COURT OF JUSTICE
(CENTRAL EAST REGION: BARRIE)

DONALD BEST

Plaintiff (Respondent on Motion)

- and-

**GERALD LANCASTER REX RANKING; SEBASTIEN JEAN KWIDZINSKI;
LORNE STEPHEN SILVER; COLIN DAVID PENDRITH;
PAUL BARKER SCHABAS; ANDREW JOHN ROMAN; MA'ANIT TZIPORA ZEMEL;
FASKEN MARTINEAU DUMOULIN LLP; CASSELS BROCK & BLACKWELL LLP;
BLAKE, CASSELS & GRAYDON LLP; MILLER THOMSON LLP;
KINGSLAND ESTATES LIMITED; RICHARD IVAN COX;
ERIC IAIN STEWART DEANE;
MARCUS ANDREW HATCH; PHILIP ST. EVAL ATKINSON;
PRICEWATERHOUSECOOPERS EAST CARIBBEAN (FORMERLY
'PRICEWATERHOUSECOOPERS');
ONTARIO PROVINCIAL POLICE;
PEEL REGIONAL POLICE SERVICE a.k.a. PEEL REGIONAL POLICE;
DURHAM REGIONAL POLICE SERVICE;
MARTY KEARNS: JEFFERY R. VIBERT;
GEORGE DMYTRUK; LAURIE RUSHBROOK;
JAMES (JIM) ARTHUR VAN ALLEN;
BEHAVIOURAL SCIENCE SOLUTIONS GROUP INC.;
TAMARA JEAN WILLIAMSON;
INVESTIGATIVE SOLUTIONS NETWORK INC.;
TORONTO POLICE ASSOCIATION;
JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5
JOHN DOE #1; JOHN DOE #2; JOHN DOE #3; JOHN DOE #4; JOHN DOE #5**

Defendants

RESPONDENT'S AUTHORITIES
(Re motion to set aside Noting in default)

Paul Slansky
Barrister and Solicitor
1062 College Street, Lower Level
Toronto, Ontario
M6H 1A9
Tel: (416) 536-1220; Fax (416) 536-8842
LSUC # 25998I

Counsel for the Responding Party (Plaintiff)

INDEX

Court File No. 14-0815

SUPERIOR COURT OF JUSTICE
(CENTRAL EAST REGION: BARRIE)

DONALD BEST

Plaintiff (Respondent on Motion)

- and-

**GERALD LANCASTER REX RANKING; SEBASTIEN JEAN KWIDZINSKI;
LORNE STEPHEN SILVER; COLIN DAVID PENDRITH;
PAUL BARKER SCHABAS; ANDREW JOHN ROMAN; MA'ANIT TZIPORA ZEMEL;
FASKEN MARTINEAU DUMOULIN LLP; CASSELS BROCK & BLACKWELL LLP;
BLAKE, CASSELS & GRAYDON LLP; MILLER THOMSON LLP;
KINGSLAND ESTATES LIMITED; RICHARD IVAN COX;
ERIC IAIN STEWART DEANE;
MARCUS ANDREW HATCH; PHILIP ST. EVAL ATKINSON;
PRICEWATERHOUSECOOPERS EAST CARIBBEAN (FORMERLY
'PRICEWATERHOUSECOOPERS');
ONTARIO PROVINCIAL POLICE;
PEEL REGIONAL POLICE SERVICE a.k.a. PEEL REGIONAL POLICE;
DURHAM REGIONAL POLICE SERVICE;
MARTY KEARNS: JEFFERY R. VIBERT;
GEORGE DMYTRUK; LAURIE RUSHBROOK;
JAMES (JIM) ARTHUR VAN ALLEN;
BEHAVIOURAL SCIENCE SOLUTIONS GROUP INC.;
TAMARA JEAN WILLIAMSON;
INVESTIGATIVE SOLUTIONS NETWORK INC.;
TORONTO POLICE ASSOCIATION;
JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5
JOHN DOE #1; JOHN DOE #2; JOHN DOE #3; JOHN DOE #4; JOHN DOE #5**

Defendants

RESPONDENT'S AUTHORITIES
(Re motion to set aside Noting in default)

---

1. *Singer v. Shering-Plough Canada Inc*. (2010) 87 C.P.C. (6th) (S.C.J.).
2. *R & G Draper Farms (Keswick) v. 1758691 Ontario Ltd.*, [2013] O.J. 4330
3. *Ferrier v. Sheriff of Wellington County*, (2003) 40 C.P.C. (5th) 344 (S.C.J.)
4. *Isakani v. Al-Saggaf*, [2007] O.J. No. 2922 (C.A.)
5. *Metro Toronto Condominium Corp. 706 v. Bardmore Develpments*, [1991] O.J. No. 717 (C.A.)
6. *Nobosoft v. No Borders*, [2007] O.J. No. 2378 (C.A.)
7. *Flintoff v. von Anhalt*, [2010] O.J. No. 4963 (C.A.)
8. *Sault College of Applied Arts and Technology v. Agresso*, [2006] O.J. No. 5265 (S.C.J.)

Case Name:

Singer v. Schering-Plough Canada Inc.

Between
Brian Singer, Plaintiff, and
Schering-Plough Canada Inc., Defendant
And between
Brian Singer, Plaintiff, and
Playtex Limited, Sun Pharmaceutical Corp., and Playtex Products Inc., Defendants
PROCEEDINGS UNDER the Class Proceedings Act, 1992

[2010] O.J. No. 113

2010 ONSC 42

87 C.P.C. (6th) 276

2010 CarswellOnt 79

Court File Nos. CV-08-00359531-0000CP, CV-08-00359523-0000CP

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: October 14-16, 2009.
Judgment: January 7, 2010.

(232 paras.)

Civil procedure -- Civil litigation -- Parties -- Class or representative actions -- Certification -- Common interests and issues -- Members of class or sub-class -- Representative plaintiff -- Motions for certification of two class actions regarding the advertising and labelling programs of two major sunscreen manufacturers dismissed -- Singer sought to be appointed representative of two class actions representing over three million class members -- Singer failed to plead a proper cause of action -- No evidence of an identifiable class -- No common issues capable of certification -- Class action not the preferable procedure -- Singer was not an appropriate representative.

Motion for certification of two class actions regarding the advertising and labelling programs of two major sunscreen manufacturers. Singer sought to be appointed as a representative on behalf of two classes of Canadian consumers of the defendants' products, alleging that the defendants misrepresented the fact that their products protect primarily against UVB rays and not UVA/UVB rays. The two proposed actions were virtually identical. The proposed classes each contained in excess of three million class members. The statements of claim pleaded negligence, breach of warranty and breaches of various statutes and sought general damages, an aggregate assessment of damages, punitive, exemplary and aggravated damages.

HELD: Motions dismissed. The evidence of Singer's expert was disregarded where it was argument, statements of the law, or expressions of opinion for which he had no qualifications. Singer's case failed to plead a proper cause of action. There was a fundamental disconnect between the causes of action Singer pleaded and the common issues he wanted to certify. There was no evidence of an identifiable class of two or more people seeking access to justice. There were no common issues capable of certification. There was no evidence to establish a basis in fact for the common issues proposed by Singer. A class action would not be the preferable procedure for resolving the dispute. The proposed class action would be unmanageable and inefficient. Singer was not an appropriate class representative. Singer did not have a suitable plan for advancing the proceeding.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 24

Food and Drugs Act, R.S.C. 1985, c. F-27, s. 9(1)

Food and Drug Regulations, C.R.C. c. 870,

Consumer Protection Act 2002, S.O. 2002, c. 30 Schedule A, s. 1, s. 2, s. 8, s. 14, s. 15, s. 16, s. 17, s. 18, s. 37(a), s. 45, s. 46, s. 47, s. 98(3)

Competition Act, R.S.C. 1985, c. C-34, s. 36, s. 52(1), s. 52(1.1)

Rules of Civil Procedure, R.R.O. 1990, reg. 194, Rule 4.06(2), Rule 39.01(1)

Sale of Goods Act, R.S.O. 1990, c. S.1, s. 9

Trade Practices Act, R.S.N.L. 1990, c. T-7,

British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50,

Counsel:

Henry Juroviesky, Eli Karp and Kevin Kaspersz, for the plaintiff.

F. Paul Morrison, Glynnis P. Burt, Jeffrey E. Feiner and Erica Richler, for the defendant Schering-Plough Canada Inc.

Alan H. Mark, Randy C. Sutton and Katherine Smirle, for the defendants Playtex Limited et al.

REASONS FOR DECISION ON CERTIFICATION MOTION

G.R. STRATHY J.:--

Introduction

1 These two proposed class actions, which would each involve some three million class members, are about sunscreen. Long gone are the days when it was called "suntan oil." Today, we recognize the damage that can be done by the sun. Parents tell their children to apply sunscreen liberally to prevent sunburn. Dermatologists and the Canadian Cancer Society tell us to use it, along with other precautions, to reduce the risk of skin cancer. The sunscreen manufacturers tell consumers that it protects them from "the sun's harmful rays." Some products claim to provide "UVA/UVB protection," "long-lasting protection" or to be "waterproof" or "sweatproof". The plaintiff, who seeks to be appointed a representative on behalf of two classes of Canadian consumers of the defendants' products, says that these two major manufacturers of sunscreen have engaged in an advertising and labeling program that misrepresents the effectiveness of their products. He alleges that, by suggesting that these products provide equal protection against UVA and UVB rays, the defendants misrepresented the fact that their products protect primarily against UVB rays. The issue before me is whether these two actions should be certified as class actions under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the *"C.P.A."*).

2 In part I of these reasons, I give a factual overview, describing the evidence put forward by the parties, including the evidence concerning the Canadian regulatory regime for sunscreen, the products produced by the defendants and the complaints made by the plaintiff in his evidence and in the pleadings. In Part II, I set out the five factor test in section 5 of the *C.P.A.* and apply each element of that test to the circumstances of these cases. My conclusions are set out in Part III.

3 I should mention that I am addressing both actions in this single set of reasons, solely as a matter of convenience. The statements of claim are virtually identical, as are the plaintiff's evidence and factums on both motions. The proposed class definitions and common issues are the same, apart from obvious variations in product names. Although the defendants' materials are different, the differences are not particularly significant. The two motions were heard at the same time.

Part I: Overview

The regulation of sunscreen labeling in Canada

4 Sunlight reaches the earth in a variety of wavelengths on the electromagnetic spectrum. Some of this radiation is composed of invisible rays called ultraviolet rays or UV rays. The UV spectrum itself contains rays of various wavelengths. Some of these rays, referred to as UVC, are filtered out by the ozone layer and never reach the earth. This is fortunate, because UVC rays are very energetic and intense and can be dangerous to all life forms. The shorter, somewhat less intense rays, are referred to as UVB rays. Many UVB rays are also filtered out by the ozone layer, but some reach the earth. The UVB rays are primarily responsible for sunburn because they penetrate the surface layer of the skin. UVA rays, which have a longer wavelength and are less intense, penetrate deeper into the skin and can cause wrinkles and premature aging of the skin. They cause burning as well, although it will take a longer time to observe that burning. UVB rays are said to be up to 1000 times more effective in producing skin redness than UVA rays and are responsible for most skin cancers, although UVA rays play a role in the development of some skin cancers. The only difference be-

tween UVA and UVB rays, however, is their place on the UV spectrum. A UVA ray with a wavelength at the low end of the UVA spectrum is not much different from a UVB ray at the high end of that spectrum.

5 The term "Sun Protection Factor" or "SPF," identifies the level of sunburn protection offered by a product. In order to claim a particular SPF, a product must satisfy certain testing criteria. Unprotected skin and sunscreen protected skin of test volunteers is exposed to UV radiation generated by a solar simulator that has approximately the same wavelengths as the sun's rays. An observer measures how long it takes for the test areas to show signs of redness. A product with an SPF of 15, for example, will allow the user to stay in the sun without burning for a period 15 times longer than would be the case if no sunscreen was used. Sunscreens with a higher SPF screen primarily UVB rays, but they also screen UVA rays because they contain certain ingredients that are effective for that purpose. The distinction is important, and has much to do with the plaintiff's complaints in these actions.

6 Evidence adduced by one of the defendants confirms what doctors and experts have been telling us - there is extensive scientific evidence suggesting that sunlight causes skin cancer. The Canadian Cancer Society tells us that it is by far the most common form of cancer - it is estimated that in 2009 there will have been over 80,000 new cases of skin cancer diagnosed in Canada. Basal cell carcinomas are the most common skin cancers in humans and are present primarily on sun-exposed areas (head, neck, shoulders and back). People with very fair skin have a higher incidence of skin cancer. The second most common type of skin cancer is squamous cell carcinoma in which ultraviolet rays are considered to play a role. One of the most aggressive forms of skin cancer, malignant melanoma, has been correlated with UV ray exposure. Dermatologists recommend that we minimize sun exposure and that we use sunscreens with an SPF of 30 or higher, with both UVA and UVB protection.

7 Many sunscreens have ingredients that are considered to be drugs and for this reason the labeling, packaging, advertising, manufacturing and sale of sunscreen products in Canada is regulated by Health Canada and is subject to the provisions of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Food and Drug Regulations*, C.R.C. c. 870. Every such sunburn protectant product marketed in Canada must comply with Health Canada's regulations and must be approved for use in Canada. In order to obtain approval, a manufacturer is required to submit detailed information concerning its product. A Drug Identification Number ("DIN") is issued for the product if the requisite information has been provided and the Minister is satisfied that the sale of the product would not cause injury to the health of a consumer or otherwise violate the *Food and Drugs Act* or Regulations. Each of the products at issue in these actions was required to go through this process, and the proposed label was provided to Health Canada for review and approval.

8 Health Canada also regulates the types of representations that can be made in labeling and advertising concerning the efficacy of sunscreens. In addition to claims about the product's SPF and protectant properties, products that claim to be "waterproof" or "sweatproof" must continue to provide sunburn protection consistent with the SPF value after 80 minutes of water immersion. They also contain specific ingredients which, upon drying, produce a continuous film over the skin, do not block pores and allow perspiration to pass through the sunscreen film. All the representations made by the defendants concerning their products have been approved by Health Canada.

9 Health Canada issues "monographs" for various non-prescription drugs such as sunscreens. These monographs describe, among other things, the mandatory and approved claims that can be

made in the labelling and packaging of the products to which they pertain. Health Canada has issued a monograph for "sunburn protectants," which describes acceptable uses as well as approved and prescribed label and advertising claims.

10 Three product monographs have been in force in Canada over the proposed class period, each describing the different required and approved claims that can be made in advertising and labelling of sunscreens in Canada. The primary indication is SPF. All of the products at issue therefore include the SPF on the label, to indicate the degree to which the product protects against sunburn. The monograph has, however, changed over time. For example: the 1997 and 2002 product monographs both provide under the heading "Labelling" that the following statement (or other wording conveying the same intent) could be used on the product: "*the liberal and regular use of this product over the years may help reduce the chance of premature aging of the skin*." The 2006 monograph does not allow such a statement to be made on a sunscreen product.

11 While some of the ingredients in some sunscreens are capable of providing protection against UVA rays, there is no scientific consensus on whether a product's UVA protection can be measured separately from its UVB protection. For this reason, Health Canada does not permit a manufacturer to make separate representations about a product's UVA protection. The product monograph does provide, however, that if the sunscreen contains certain ingredients that absorb or screen UVA rays, additional statements, such as the following, are permitted: "UVA/UVB sunburn protection," "UVA/UVB protection," "broad spectrum UVA/UVB protection," "broad spectrum protection against UVA/UVB rays," "absorbs throughout the UVA/UVB spectrum to provide sunburn protection" and "protects against UVA/UVB rays." The recognized UVA screening ingredients include avobenzone, oxybenzone, titanium dioxide and zinc oxide.

12 The 1997, 2002 and 2006 product monographs state that any reference to highlight UVA protection, beyond "combined UVA and UVB protection against sunburn", is considered inappropriate. For example, the 2006 Product Monograph states that:

> *Any reference to highlight UVA protection beyond combined UVA and UVB protection against sunburn is considered inappropriate.* A consensus as to the accepted methodology to separately measure the UVA portion of the spectrum and its clinical significance has not yet been determined. A claim for combined UVA and UVB protection against sunburn is acceptable only for products containing a UVB absorber and a UVA absorber identified in the monograph or for titanium dioxide and zinc oxide. [Emphasis added]

13 Manufacturers have until 2010 to comply with the 2006 monograph with respect to products that were on the market when the monograph was issued. This impacts some of the defendants' marketing and labeling, because between 2002 and 2006, manufacturers were permitted to claim that a particular product "provides [x] times your natural protection against sunburn" whereas this claim is not permitted under the 2006 monograph.

The pleadings

14 It will assist in appreciating the parties' evidence if I briefly briefly set out the allegations made in the statement of claim. The common issues, which I shall discuss in due course, are set out in the appendix to these reasons.

15 The allegations in the statements of claim in the two actions are basically identical. At the outset of the pleading there is a section entitled "Summary of the Action" that sets out the plaintiff's theory of the case. The plaintiff claims that in labeling and advertising their products as providing "protection from the sun's harmful UVA and UVB rays," the defendants are misrepresenting that their products provide equal protection against both types of rays. The plaintiff says that in fact the SPF of a sunscreen is a measure of the product's protection against UVB rays, not its protection against UVA rays. The plaintiff claims that the use of an SPF factor in conjunction with both UVA and UVB rays falsely represents that the protection against both types of rays is the same. The plaintiff also alleges that the defendants' products are not "waterproof," "sweat proof" or "sunblock" as they advertise. The pleading states:

> 2. Defendants engage in marketing and advertising campaigns that promote the use of their sun-protection products for the protection of one's skin from the sun's Ultraviolet ("UV") rays.
> 3. For example, labeling of Defendants' sun-protection products represent to consumers, inter alia, that Defendants' sun protection products offer "protection from the sun's harmful UVA and UVB rays". Defendants have also advertised, marketing and represented that many of their sun-protection products provide "waterproof", "sweat-proof" and/or "sunblock" protection against all of the sun's harmful UV rays (that is to say both UVA and UVB rays).
> 4. Plaintiffs plead that Defendants have made misleading representations to the public, and that Defendants' sun-protection products have misleading labeling, in that Defendants' sun protection products do not offer the same protection from the sun's damaging UVA rays in the same manner or level of protection as the protection offered from UVB rays, as advertised, or as implied, and that Defendants' sub-protection products are in fact not "waterproof", "sweat-proof" or truly "sunblock", as advertised, or represented.
> 5. Further, Plaintiffs plead that Defendants' sun-protection products do not protect from all of the sun's harmful UV rays for periods of time nor under conditions as claimed on labeling of Defendants' sun-protection products.

16 The plaintiff pleads several causes of action, including negligence, breach of warranty, breaches of various statutes, including the *Consumer Protection Act 2002*, S.O. 2002, c. 30 Schedule A, ("*Consumer Protection Act*") the *Food and Drugs Act*, and the *Competition Act*, R.S.C. 1985, c. C-34. The plaintiff also pleads unjust enrichment. I will discuss these pleadings, and the causes of action in more detail when I discuss the test for certification. In each action, the plaintiff claims general damages of $20 million and an order pursuant to section 24 of the *C.P.A.* directing an aggregate assessment of damages as well as punitive, aggravated and exemplary damages.

17 The statement of claim in these actions makes extensive reference to a proposed, but not finalized, United States monograph, which is under discussion by the United States Food and Drug Administration ("FDA"). There is no reference at all, however, to the Health Canada monograph. The language of the statement of claim, suggests that it has been based on a pleading in United States litigation to which I shall refer shortly.

18 The plaintiff does not plead that he has suffered any kind of personal injury as a result of the defective manufacture of the defendants' products or as a result of the alleged misrepresentations concerning UVA protection. Although Mr. Singer has had skin cancer, he does not allege that the

defendants' products failed to protect his skin from harm. The claim is for economic loss, based on the theory that the defendants' products have a value less than what the plaintiff paid for them, because they do not provide the level of protection represented in their labeling and advertising.

The Defendants

19 The defendants are manufacturers of well-known sunscreen products. The Playtex defendants market sunscreens under the "Banana Boat" trade name. The Schering-Plough defendant markets "Coppertone" and "Bain de Soleil" products, among others. Each manufacturer produces a variety of products, catering to a wide range of consumer needs and preferences. In the case of the Playtex defendants, there are some 60 products that fall within the class. In the case of the Schering-Plough defendant, approximately 66 products have been marketed in Canada, 57 of which were under the "Coppertone" brand. Each company has marketed different product lines with multiple products in a line. Playtex claims that more than eight million containers of its products have been sold by retailers across Canada during the proposed class period. Schering-Plough estimates sales of over three million sunscreen products annually and says that approximately 2.6 million Canadians purchased Coppertone products annually in the years 2007 and 2008.

20 The defendants manufacture a wide range of sunscreen products, which vary considerably in their form and in their ingredients. For example, the products offer different levels of SPF protection (ranging from SPF 4 to SPF 50), with differing product characteristics (tanning, tear free, waterproof, sweatproof, PABA free, pediatrician tested, Canadian Dermatology Association approved) and contain multiple active ingredients in varying quantities (for example, the active UVA ingredient alone can be any one of oxybenzone, avobenzone and titanium dioxide in varying quantities). Some of these products, with a low SPF, provide no UVA protection and make no representations in that regard. Other products make none of the representations of which the plaintiff complains; still others make more than one such representation.

21 Many of the defendants' products are permitted to use the expression "Recognized by the Canadian Dermatology Association" on their labels, under a licensing agreement with that association because their products provide broad spectrum UVA and UVB protection. That association reviews the formula for each product and the labeling used as a condition of its recognition of the product.

22 None of the defendants sells directly to the public - they sell to retailers or to wholesalers who in turn sell to retailers. They engage in a variety of marketing campaigns, typically in larger urban centres, using television, radio and print and event-based marketing. They also advertise on the internet through their websites.

23 Both defendants emphasize that the consumers of their products are not a monolithic group with similar characteristics, demographics, or behaviour patterns. Rather, consumers have a range of approaches to the sun and sun protection, and a variety of individual needs and preferences, which will affect what sunburn protectant products they buy and why they buy them.

24 Schering-Plough's market research has determined that approximately 62% of the consumer market is comprised of what it calls "Sun Avoiders," and approximately 38% of the market is comprised of "Sun Worshippers." Within these segments there are six additional sub-segments, as follows: Sun Scared; Sun Cautious; Sun Passive; Sun Lovers; Careless; and Real Tanners. I do not propose to examine the characteristics of these groups except to note that when it comes to sun protection consumers have different needs and preferences. They range from people like Mr. Singer,

who wish to avoid the sun at all costs and are fastidious when it comes to protection, to "Sun Worshippers" or "Real Tanners" who do not believe the sun is dangerous and would do anything to prolong or accelerate their tans. The defendants make the point that these different groups will respond to marketing messages in different ways.

25 The expert evidence adduced by Schering-Plough on this motion is that consumers are not all the same in their product needs, wants and preferences in response to marketing communications. Consumer buying needs and wants, and receptivity to marketing communications, come from a variety of sources, and what they regard as material information can vary from consumer to consumer. Schering-Plough contends that determining how representations on product labels and marketing messages are received by consumers - and what is relied upon or induces the product purchase - requires an examination of each individual consumer with respect to the specific product purchased. There is no one monolithic labeling or marketing message for Schering-Plough's sunburn protectant products. Similarly, there is no one typical recipient of a marketing message who could be representative of a class. The degree to which an individual has been affected or influenced by Schering-Plough's marketing messages, if any, will vary from person to person.

26 Playtex's expert evidence is to the same effect. Its expert says that it is not possible to generalize that the buying pattern of one consumer is representative of the decision process undertaken by other class members who purchase the same brand or product. In fact, an analysis of the sunscreen market and studies that have been done illustrates a remarkable diversity in attitudes, brand perceptions and benefits sought by consumers. Different consumers have different needs, and to suggest that every consumer understood (or misunderstood) the terms SPF, UVA and UVB as the plaintiff did or purchased the defendants' products for the reasons that the plaintiff says he did, is not a plausible assumption. Indeed, many consumers would have no interest in knowing whether a sunscreen product blocked UVA rays.

The Plaintiff's Evidence

27 The plaintiff's certification motion in each action is supported by an affidavit of Mr. Singer, the proposed plaintiff, and by two affidavits of Mr. Eliezer Karp, a lawyer in the office of plaintiff's counsel. Mr. Singer describes himself as an "avid user of sunscreen [applying] it regularly as part of my daily routine." He says that he has purchased the defendants' sunscreen products and has "suffered damages, economic [sic] and other damages" as a result. He states his belief that the defendants have made materially misleading statements about the protection provided by their products and that they have misled the class by representing that their products provided necessary protection against UVA rays when in fact the protection provided was significantly less than the protection against UVB rays. He states that the defendants falsely represented that their products provide equal protection against UVA and UVB rays.

28 Mr. Karp's affidavit states his opinion that the plaintiff has a good cause of action and that the action is appropriate for certification as a class action. The affidavit contains expressions of opinion for which Mr. Karp has no qualifications. It also contains statements that are argument as opposed to evidence. For example, paragraph 2 of his affidavit in the Playtex action states:

> "This Affidavit addresses the above captioned Class Action, which alleges that Defendants knowingly placed into the stream of Canadian commerce products that were plainly mislabelled with false and misleading information as to the effectiveness, quality and suitability of the product. *In general, the product is not*

> *equally effective against UVA as UVB, which is suggested otherwise on the package.* Neither is the product "waterproof" or "long-lasting". Furthermore, we contend that the actual effectiveness and limitation of the products were known to defendants. Plaintiffs allege that no representation as to the actual limitations and effectiveness were made to them upon purchase of the products in question." [emphasis added]

29 Paragraph 11 of the affidavit states:

> I verily believe that the Defendant breached its duty of care to Plaintiffs in that, inter alia, defendant placed false, misleading and/or deceptive information on its sun-protection products for the purpose of generating sales of such products.

30 On a number of occasions Mr. Karp's affidavit uses the expression "Upon information and belief ..." without setting out the source of his information or the fact of his belief. For example, paragraph 37 states:

> Upon information and belief (from extensive research of the topic of sun-protection products and consumer reports and other experts) Defendant's products described in the Amended Statement of Claim do not have the effectiveness indicated on its packaging.

31 There is no evidence at all to indicate that Mr. Karp is qualified to make this statement or other expressions of opinion contained in his affidavit. Nor is there evidence of the nature of the "extensive research" he has carried out or any identification of the "other experts" to whom he refers.

32 Much of the balance of the affidavit consists of expressions of opinion that the plaintiff has a good cause of action.

33 In paragraph 56 of his affidavit, Mr. Karp states:

> While, to my knowledge, Playtex has not publicized or recognized the disparity between the effectiveness of their product and the falsely suggested effectiveness and quality in their packages and marketing, contrarily my research suggest [sic] that the subject is well documented and investigated, even mentioning Defendant's brand name, Banana Boat, in an article addressing the issue."

34 Mr. Karp attaches as an exhibit to his affidavit, an article published on the internet on CNN.com, entitled "Lawsuit asks: Is your sunscreen doing its job?" The article refers to allegations in a class action filed in California Superior Court, which makes claims about some of the products referred to in this proceeding. The article includes quotations from plaintiff's counsel in that action, and a response from a spokesperson for the American Academy of Dermatology, who is quoted as saying that current sunscreen labels are "the best tool we've got. But they are far from perfect, as the skin cancer rates we see today tell us." Thus, we have plaintiff's counsel in this case citing statements made by plaintiff's counsel in a like proceeding in the United States, quoted in an internet news clip, as being evidence of the scientific basis for the claims made in these actions. The brief article is not reflective of serious or credible scientific research on the subject.

35 In a supplementary affidavit, sworn August 20, 2009, Mr. Karp makes reference to "monographs" published by the FDA. He states at paragraph 3 of that Affidavit: "The United States of America's Food and Drug Administration ("FDA"), as well as the European Union's Commission of the European Communities ("CEC"), have implemented labelling standards for over the counter Sun-Protection Products, such as those manufactured and sold by the Defendants, in efforts of correcting the use of misleading labelling as it relates to implicit and explicit claims that the product produces equivalent protection against UVA rays as against UVB rays." He then attaches a proposed amendment to a monograph issued by the FDA in August, 2007 and discusses recommendations made in the monograph, including a recommendation that UVA radiation protection should be designated in a manner that consumers can clearly understand.

36 Mr. Karp's affidavit continues:

> "The commentary and suggested changes by both the FDA and CEC of the misleading nature of the labelling of current sunscreen products including those labelling claims that purport that the product protects in an equivalent level of efficacy from both UVA and UVB rays support the propositions in my opinion that the claims of the Plaintiffs in this matter have a basis in fact."

37 He goes on to state, with reference to a particular product, that the statement that the product provides "30 times your natural protection against the sun's damaging UVA and UVB rays" is false, and that the product in fact provides 30 times the skin's protection against sunburn and UVB rays.

38 He concludes "The labelling of [the product] is false and, in my view, violates the Canadian monograph for permissible labelling and various other Canadian federal and provincial statutes." This is the first and only reference to the Canadian monograph in Mr. Karp's affidavit. He does not append the Canadian monograph as an exhibit to his affidavit. Nowhere in his affidavit does he even mention the fact that the labeling and advertising of sunscreen products in Canada is governed by the *Food and Drugs Act* and that there is a distinct Canadian regulatory scheme. He does not state how the labeling of the defendants' products violates the Canadian monograph. Nor does he identify the "various other Canadian federal and provincial statutes" that are allegedly violated by the labeling.

39 Mr. Karp's affidavits in the Playtex and Schering-Plough actions are virtually identical.

40 Not surprisingly, the defendants object to the evidence of Mr. Karp and say that it is inadmissible and that his affidavits should be struck because:

(a) they contain opinion evidence that Mr. Karp is not qualified to give;
(b) they contain improper statements of information and belief without setting out the source of information and the fact of belief;
(c) they contain statements of fact that are not within his personal knowledge; and
(d) they contain argument and improper conclusions of law.

The defendants also say that Mr. Karp's second affidavit is impermissible case-splitting.

41 Rule 4.06(2) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, provides:

> An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

42 Rule 39.01(4) applies to the evidence to be used on motions and provides:

> An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

43 Where evidence is scientific, technical, or specialized in nature, opinion evidence may be given by a qualified expert in order to provide guidance to a trier of fact. It is axiomatic that expert opinion evidence requires a properly qualified expert: *R. v. Mohan*, [1994] 2 S.C.R. 9 at p. 20, [1994] S.C.J. No. 36.

44 A properly qualified expert is one "who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify": *R. v. Mohan* at p. 25. When assessing the qualifications of a proposed expert, trial judges consider factors such as the proposed witness' professional qualifications, actual experience, participation or membership in professional associations, the nature and extent of the witness' publications, involvement in teaching, involvement in courses or conferences in the field and the witness's efforts to stay current with the literature in the field and whether or not the witness has previously been qualified to testify as an expert in the area: *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378, [2006] O.J. No. 1146, at para. 21 (S.C.J.).

45 Courts have struck out improper opinion evidence in the context of certification motions. In *Chopik v. Mitsubishi Paper Mills Ltd.*, (2002), 26 C.P.C. (5th) 104, [2002] O.J. No. 2780 (S.C.J.), Shaughnessy J. heard the defendants' motion to strike paragraphs from affidavits filed in support of the plaintiff's certification motion and summarized the law applicable to affidavits on such motions, at para 26:

> 1. Affidavits on a motion that fail to state the source of the deponent's information and belief will be struck if the paragraph deals with a contentious matter; but it may be saved by Rule 1.04 if it deals with non-contentious matters and the exhibits to the affidavit or other evidence filed on the motion reveal the source of the information and belief.
> 2. Improper hearsay, argument and irrelevant information should not be contained in an affidavit. Similarly, legal argument belongs in a factum or brief, not an affidavit. Legal submissions contained in affidavits are superfluous and should be struck.
>
> [...]
>
> 4. Where it is clear in law that evidence is inadmissible, to leave the evidence on the record is embarrassing and prejudicial to the fair hearing of the motion or application. A party should not be put to the needless expenditure of time and resources in responding to evidence which can have no impact on the outcome of the proceeding.

> 5. The fact that this action is a proposed class proceeding has no bearing on the analysis. It is not an objective of the *Class Proceeding Act, 1992* to modify or abridge the traditional rules of practice and pleading. [Citations omitted.]

46 Shaughnessy J. struck out numerous portions of the plaintiff's affidavit as not relevant to the certification motion. These included documents referencing other litigation in the United States, a statement of belief regarding the workability of the litigation plan, and a paragraph containing arguments of fact and law.

47 In *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97, [2009] O.J. No. 2531 (S.C.J.), Lax J. disregarded an affidavit that was filed on a motion to certify the action as a class proceeding, on the basis that it constituted inadmissible hearsay.

48 In *Punit v. Wawanesa Mutual Insurance Co.* [2006] O.J. No. 3685, 45 C.C.L.I. (4th) 109 (S.C.J.), C.L. Campbell J. granted the defendants' motion to strike affidavits filed by the plaintiff's counsel that appended the opinion of experts.

49 In *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, [2005] B.C.J. No. 2370 at para. 31, leave to appeal dismissed [2005] S.C.C.A. No. 545, the British Columbia Court of Appeal refused to recognize a report that had been appended to a solicitor's affidavit on a motion for certification in a putative class action. The Court held as follows:

> Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants. [Citations omitted.]

50 Mr. Karp has no qualifications as an expert. He acknowledged in cross-examination that he has no expertise in the area of sunburn protectant products or their manufacture, marketing, and regulation. His statements of opinion on the efficacy and labeling of sunscreen products are inadmissible, as are his argumentative assertions.

51 Recognizing the vulnerability of Mr. Karp's affidavit, plaintiff's counsel submits that the plaintiff can discharge the modest evidentiary burden in this case, to establish "some basis in fact" for the certification requirements (other than the requirement of a cause of action) simply by referring to the defendants' own evidence.

52 The defendants are also critical of the supplementary affidavit of Mr. Karp, on the basis that it is improper case-splitting. It is well-established that a party may not split its case, first relying on *prima facie* proof, and when this has been shaken by his opponent, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534; *R. v. Michael*, [1954] O.R. 926, 110 C.C.C. 30, 20 C.R. 18.

53 The defendant's objections to Mr. Karp's affidavits are well founded. I disregard those portions that are argument, statements of the law, or expressions of opinion for which Mr. Karp has no qualifications.

The Defendants' Evidence

54 I have already identified some of the evidence adduced by the defendants. Both have filed substantial evidentiary records. These are directed at three broad factual propositions, all of which are undisputed.

55 First, the evidence shows that the defendants produce a wide range of sun-screen products, which have a variety of ingredients in various combinations, with variations in their labeling and marketing, catering to a variety of market sectors. They can range in SPF factor from 4 to 50, can be targeted to children (e.g., "Coppertone Kids"), people engaged in sports (e.g., "Coppertone Sport"), people wanting bug repellent properties (e.g., "Coppertone Bug and Sun Block"), people requiring extra moisturizer and others. The products come in a variety of delivery mechanisms and have different characteristics including being waterproof, non-greasy, fast absorbent, and with or without fragrance. The composition of the products and their labeling has changed over time. The products make different claims, depending on their ingredients.

56 Second, the defendants' evidence establishes that there is a distinct Canadian regulatory regime, described above, with which the defendants and their products are compliant. Sunscreen products containing specified ingredients cannot be sold in Canada without compliance with the *Food and Drugs Act* and regulations, including the monograph. The Canadian regulatory regime is designed for the protection of the public and prescribes, among other things, what can and cannot be said in the labeling and advertising of sunscreen products. More specifically, the statements of which the defendants complain in this action are statements that are permitted under the current regulatory regime.

57 The Canadian regime differs from the one in the United States. The approval of the FDA is not required prior to sale of sunscreen in the U.S.A. While the *proposed* monograph in the United States, setting out labeling requirements, has been in discussion for a number of years, that monograph is not in final form. It is anticipated, however, that the U.S.A. will issue regulations requiring separate identification of UVA protection on sunscreen products. This will not replace SPF ratings.

58 Third, the defendants' evidence establishes what might be considered a truism, namely that people respond in different ways to labeling and marketing messages of all products, including sunscreens.

Part II: The test for certification

59 The test for certification of a class action is set out in s. 5(1) of the *C.P.A.*:

> 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. [emphasis added]

60 The decision to certify is not merits-based. The test is to be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 26-29; *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15.

61 For an action to be certified as a class proceeding, "there must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers:" *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (S.C.J.) at para. 14.

Application to this Case

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

62 Section 5(1)(a) of the *C.P.A.* provides that the pleadings must disclose a cause of action. The material facts pleaded are accepted as true and a pleading will be struck only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City),* above; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.) at para. 53, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492, [2003] O.J. No. 2698 (Div. Ct.). The pleading is to be read generously.

63 For the reasons that follow, I have concluded that the plaintiff fails to plead a proper cause of action. His fundamental problem is that he asserts causes of action that are not available to him or that are not properly pleaded. Moreover, there is a fundamental disconnect between the causes of action Mr. Singer pleads and the common issues he would like to certify. The common issues are largely, but not exclusively, focused on misrepresentation, but there is no explicit pleading of misrepresentation because to do so in this case would probably cause certification to founder on issues of reliance and causation. So the plaintiff has searched for other causes of action, none of which fits the facts as pleaded.

64 I shall review the causes of action pleaded in the following order: (i) negligence; (ii) breach of warranty; (iii) breach of the *Consumer Protection Act 2002*; (iv) breach of the *Food and Drugs Act;* (v) breach of the *Competition Act*; and (vi) unjust enrichment.

(i) Negligence

65 The amended statement of claim in the Schering-Plough action (which is similar to the pleading in the Playtex action) sets out the claim in negligence as follows:

Negligence

> Defendant at all material times owed a duty of care to Plaintiffs to provide Plaintiffs with accurate information on the packaging and labeling of Defendant's sun-protection products and not to make deceptive, false or misleading claims on the packaging and labeling of all sun-protection products, or on the web.
>
> Plaintiffs plead that Defendant breached its duty of care to Plaintiffs in that, *inter alia*, Defendant placed false, misleading and/or deceptive information on its sun-protection products for the purpose of generating sales of such products.
>
> It was foreseeable that Plaintiffs would suffer damages as a result of the negligence of Defendant.
>
> As a result of Defendants' [sic] breach of duty, and its placing the false, misleading and/or deceptive advertising on the product labels, the Plaintiffs have suffered damages.

66 It is important to note that this is not a products liability case, in which the plaintiff asserts that he was harmed as a result of a defective product. Nor does the plaintiff claim that he suffered physical harm as a result of the defendants' products not giving the protection they claim. The basic claim of the plaintiff is for economic loss as a result of the alleged failure of the products to live up to the claims made in their labeling.

67 The plaintiff's claim in negligence, as summarized in his counsel's factum, is that the defendants owed a duty of care to the plaintiff and class members to provide them with accurate information on the labeling of the products and not to make false or misleading claims on the labeling, advertising and marketing of the products. The plaintiff claims that the defendants breached this duty and that he suffered damages. The plaintiff does not give particulars of his damages, other than to describe them as "economic and other damages". Nor does the plaintiff plead a causal link between the defendants' negligence and his alleged damages.

68 The pleading is replete with references to "misleading representations", "misleading claims", "misleading statements", "misleading labeling and advertising" and includes allegations that the defendants knew or should have known that their products did not have the qualities they ascribed to them.

69 In effect, rather than plead negligent misrepresentation, the plaintiff has pleaded that the representations made on the packaging were false due to the negligence of the defendants. The plaintiff asserts that this is a different cause of action in negligence, with different essential elements. I am not persuaded by this assertion. The plaintiff's claim is clearly in negligent misrepresentation, albeit improperly pleaded. This is clear from a reading of the statement of claim and from the common issues proposed by plaintiff, particularly common issues 1 to 4 (see below and see the attached appendix). As such, it suffers from the fatal defect that there is no pleading that the plaintiff *relied* on these misrepresentations and suffered damages as a result. The leading case is *The Queen v. Cognos*, [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, which sets out the essential ingredients of the pleading of this cause of action:

> (a) a duty of care based on a special relationship between the representor and the representee;

(b) that the representation was untrue, inaccurate or misleading;
(c) that the representor acted fraudulently or negligently in making the representation;
(d) that the *representee reasonably relied upon the representation*; and
(e) that the reliance was detrimental to the representee in the sense that damages resulted.

70 The plaintiff has not pleaded reliance or causation. He has not done so for the obvious reason that proof of reliance and causation could only be done on an individual basis and this would be fatal to certification: the proceeding would break down into individual proceedings to prove reliance: see *Williams v. Mutual Life Assurance Co.* (2003), 226 D.L.R. (4th) 112, [2003] O.J. No. 1160 (C.A.).

71 Plaintiff's counsel disclaimed a necessity to plead reliance and submitted at a common issues trial the court would determine whether the defendants' "marketing message" was "false and misleading" to a "reasonable person." Such a conclusion would be meaningless unless the court were to conclude that there was reliance on the misleading statement and that damages were incurred as a result. This could only be done on an individual basis.

72 While one must exercise caution in referring to class action decisions in the United States, it is noteworthy that in the proposed sunscreen class action in the Superior Court of California (County of Los Angeles), *Robert Gaston et al. v. Schering-Plough Corporation et al.*, Case No. BC310407 (Jan. 13, 2009), the plaintiff's motion for certification was denied. A cause of action was asserted under the California *Unfair Competition Law*, B & P Code para. 17200 and following and para. 17500 and following and the *Consumer Legal Remedies Act*. The court found, at page 9 of the decision "... reliance and causation present overbearing, highly individualized inquiries, rendering class treatment unsuitable". The court continued, at page 13:

> Causation also presents a highly individualized issue. The Court would be required to determine whether any alleged reliance on the product labeling caused putative class members damage under each of the claims in the case. While variance in the amount of the damage is insufficient grounds to deny class certification, a determination as to whether damages could be recovered is highly individualized as to the [*Consumer Legal Remedies Act*] and fraud/negligent misrepresentation claims.

73 I conclude that the pleading expressed in negligence is really a claim for negligent misrepresentation; it fails to plead reliance and, as such, plainly cannot succeed.

(ii) Breach of express warranty

74 The statement of claim pleads that the defendants' labels and advertising were affirmations of fact about the qualities of their products and were express warranties that the products would conform to those qualities. The plaintiff says that, contrary to those warranties, the products did not protect users from all UVA rays, did not provide the same level of protection against UVA rays as they did against UVB rays, and did not provide "waterproof" or "sweatproof" protection," "all day protection" or "[x] hours" of protection or "[x] times your natural sun-protection," as advertised. The factum of plaintiff's counsel simply recites these allegations without demonstrating how these

allegations give rise to a cause of action. The subject was not developed in oral argument, except in reply.

75 The fundamental problem with this cause of action is that there is no contractual relationship between the plaintiff and the defendants. The problem facing Mr. Singer is the same one that faced the plaintiff in *Wuttenee v. Merck Frosst Canada Ltd.*, [2007] 4 W.W.R. 309, [2007] S.J. No. 7, rev'd on other grounds, (2009), 69 C.P.C. (6th) 60, [2009] S.J. No. 179. In that case, Klebuc C.J.S. summarized the nature of warranty claims at paras. 65 and 66:

> It is well established that warranties may arise between parties by virtue of *The Sale of Goods Act*, R.S.S. 1978, c. S-1, the [Saskatchewan *Consumer Protection Act*] or the *Competition Act* or by means of a collateral contract. ... In the context of the sale of goods, warranties are defined as an agreement with reference to the goods that are the subject of a contract but collateral to the main purpose of the contract. A breach of such warranty gives rise to a claim for damages but not a right to reject the goods. In the context of a collateral agreement, a warranty is "a binding promise", the breach of which may warrant a contract being set aside if the breach is of a serious nature.
>
> In the instant case, no sale is alleged between Merck, as vendor, and any plaintiffs, as purchasers. In the result, *The Sale of Goods Act* does not apply. Similarly, no collateral contract between Merck, as manufacturer, and a plaintiff, as purchaser, is alleged in the amended statement of claim. In these circumstances, I must conclude that the amended statement of claim fails to raise a cause of action based on either an express or implied warranty other than warranties arising pursuant to the *CPA* or the provisions of the *Competition Act*. Consequently, the claims based on a breach of warranty will be struck save as they relate to the *CPA* or the *Competition Act*.

76 This is not a claim for breach of warranty under the *Sale of Goods Act*, R.S.O. 1990, c. S.1. There is no contract of sale between the plaintiff and the defendants. Nor is it a case like *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) in which Lax J. certified a class action against a computer manufacturer on the basis, among other things, of an implied contractual warranty, at common law or under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, to supply goods that were free from material defects and fit for their intended use. There is no allegation in this case that the defendants breached the *Sale of Goods Act* warranties. Moreover, unlike in *Griffin v. Dell Canada Inc*, there is no allegation in this case that the impugned product suffers from defective materials or workmanship. The plaintiff does not assert that the defendants' products have been improperly manufactured or tested. Thus, even if the implied contractual warranty were found to apply in this case, it would not have been breached.

77 To the extent that the plaintiff might assert a collateral warranty, inducing the contract to purchase the defendants' products, this cause of action suffers from the same failing as the pleading of negligence. There can be no cause of action unless there is a causal nexus between the alleged warranty and the behaviour of the plaintiff. Thus, in *Murray v. Sperry Rand Corp.* (1979), 23 O.R. (2nd) 456, 96 D.L.R. (3d) 113 (Ont. H.C.), a case that was relied on by the plaintiff, Reid J. found that the representations contained in a manufacturer's sales brochure were collateral warranties that were repeated by the dealer and were fundamental to the plaintiff's decision to purchase the de-

fendant's harvester. In contrast, in *Olsen v. Behr Process Corp.*, 2003 BCSC 429, [2003] B.C.J. No. 627 a claim in a proposed class action for breach of warranty was rejected because there was no allegation that the statements made by the defendant induced the plaintiff to purchase the product. In striking the claim, Holmes J. stated at paras. 24 and 25:

> The plaintiffs here must allege that a statement intended by the defendants to be a warranty induced them to purchase. Reliance by the plaintiff purchaser on the alleged inducing statements of the defendant manufacturers is the essence of the requisite cause of action for breach of warranty. The pleadings do not indicate that reliance.
>
> It is of no assistance to refer to brochures or other written material of the defendants alleged to have effect as a warranty where there is no nexus alleged between such material and the plaintiffs.

78 For these reasons, I conclude that the claim for breach of warranty does not disclose a cause of action.

(iii) Breach of the *Consumer Protection Act 2002*

79 The plaintiff claims that the purchase and sale of the defendants' products were "consumer transactions" under the *Consumer Protection Act* and that the misleading representations concerning the products were "unfair practices" under Part III of that statute, which entitle the plaintiff to either damages or rescission of his contracts. As well, the plaintiff claims a right to a refund under s. 98, based on the allegation that the defendants have received a fee or an amount or payment in contravention of the statute. Alternatively, the plaintiff says that the purchase and sale of the products were "remote agreements" under s. 20(1) of the *Consumer Protection Act* and that members of the class are entitled to cancel the agreements pursuant to s. 45 to 47 of that Act.

80 Section 1 of the *Consumer Protection Act* contains the following definitions:

> "consumer agreement" *means an agreement between a supplier and a consumer* in which the supplier agrees to supply goods or services for payment;
>
> "consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;
>
> "supplier" means a person who is in the business of *selling, leasing or trading in goods or services* or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier; [emphasis added]

81 Section 17 prohibits unfair practices. Section 17(2) provides that a person who performs an act referred to in s. 14 (false, misleading or deceptive representations), s. 15 (unconscionable representations) or s. 16 (unfair pressure) is deemed to be engaging in an unfair practice. Section 14 pro-

vides, among other things, that it is an unfair practice for a person to make a false, misleading or deceptive representation concerning the quality of goods.

82 The plaintiff also pleads that the representations were breaches of s. 9 (deemed implication of the warranties under the *Sale of Goods Act*) and s. 15 (unconscionable representations) under the *Consumer Protection Act*.

83 The plaintiff claims the statutory remedy, under s. 18, of rescission or alternatively damages:

> 18.(1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.
>
> (2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,
> (a) because the return or restitution of the goods or services is no longer possible; or
> (b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

84 As well, the plaintiff claims the consumer remedy of a refund under Part IX of the statute (Procedures for Consumer Remedies) which entitles the consumer to demand a refund in certain cases.

85 There are some fundamental difficulties with the plaintiff's claims under the *Consumer Protection Act.* The most significant is that a manufacturer is not a "supplier" under the statute and there is no pleading of any "agreement" entered into between the plaintiff and the defendants. There is no contractual privity between them. There is no pleading of any "dealings" between the plaintiff and the defendants other than his purchase of their products. Although the plaintiff pleads that the purchase and sale of the defendants' products is a "consumer transaction", there are no facts pleaded that would support this assertion. This point was made by the Newfoundland and Labrador Supreme Court in *Sparkes v. Imperial Tobacco Ltd*. (2008), 67 C.P.C. (6th) 152, [2008] N.J. No. 379, considering similar claims against a manufacturer. The definition of "supplier" under the *Trade Practices Act*, R.S.N.L. 1990, c. T-7, included someone who "advertised" their products. In dismissing the Plaintiff's motion for certification, the Court noted at para. 69 that:

> There is also little doubt that the Defendants are suppliers within the meaning of the TPA, as they advertised their products in the province. But the real issue is whether the Plaintiff has "entered into" a consumer transaction with the Defendants. I have some significant reservations about that as there is no direct relationship between the Plaintiff and the Defendants. The Defendants do not sell their products to consumers in the province.

In that case, the court found that the plaintiff had not pleaded that he had suffered damages as a result of the unfair trade practice allegedly committed by the defendant and this was fatal to his claim. Nor did the plaintiff have an independent cause of action for breach of the statute.

86 In this case, s. 17 of the *Consumer Protection Act* provides that no person shall engage in an unfair practice. The prohibited unfair practices are the acts referred to in s. 14, 15 and 16 of the statute. The remedy for an unfair practice is provided for in s. 8 which allows the consumer to rescind any agreement "entered into by a consumer after or while a person has engaged in an unfair practice."

87 The remedy of rescission, under s. 18, or alternatively damages, can only be available as between a consumer and the "supplier" with whom he or she contracted. The remedy under section 98 only entitles the consumer to a refund if the "supplier" has "charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act." As between the manufacturer and the consumer in this case, there is no agreement to rescind and no money to refund.

88 The second difficulty with the plaintiff's cause of action is that the *Consumer Protection Act* only applies to consumer transactions that occurred on or after July 30, 2005, the date that the Act was proclaimed in force: *Consumer Protection Act*, s. 19; Proclamation, July 30, 2005, O. Gaz. Vol. 138, No. 18, April 30, 2005. It is obvious that it cannot apply to purchases made during the portion of the class period from July 2002 to July 2005.

89 Third, while s. 2 of the *Consumer Protection Act* provides that the Act applies "in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place," it is far from clear that the statute gives non-resident plaintiffs a remedy.

90 The plaintiff also claims that the sale of the defendants' products were "remote agreements". A "remote agreement" means a consumer agreement entered into when the consumer and supplier are not present together (s. 20(1)). Under the *Consumer Protection Act* the supplier under a remote agreement is required to disclose certain information to the consumer at the time the remote agreement is made (s. 45) and is required to deliver a copy of the agreement to the consumer within a prescribed time of the agreement being made (s. 46), failing which the consumer is entitled to cancel the agreement (s. 47).

91 It is my view that the remedies applicable to "remote agreements" in s. 45 to 47 have no application, because a "remote agreement" is an agreement between a "consumer" and a "supplier". As I have noted, a manufacturer is not a supplier and does not enter into an agreement with a consumer. The provisions in the statute regarding "remote agreements" are really intended to deal with agreements between consumers and sellers that are made over the telephone, the internet or by mail order.

92 The other difficulty is that the "remote agreement" provisions of the *Consumer Protection Act* only apply to transactions exceeding a certain monetary value. Under O. Reg. 17/05 made under the *Consumer Protection Act*, the prescribed amount is $50.00. There is no pleading or evidence that any purchase made by the plaintiff exceeded this amount and is it difficult to imagine that a purchase of an individual container of sunscreen would exceed $50.

93 In conclusion, I find that there is no cause of action under the *Consumer Protection Act.*

(iv) Violations of the *Food and Drugs Act*

94 The plaintiff pleads that the defendants' conduct was a violation of s. 9(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27:

> Plaintiffs plead that the Defendant's conduct regarding misrepresentations made about its sunscreen protection products herein described above was a breach of s. 9(1) of the *Food and Drugs Act* in that the representations are false, misleading and/or deceptive regarding the value and safety of the product.

95 That section provides, in part:

> No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

96 In support of their submissions that this pleading discloses no cause of action, the defendants rely on well-settled authority that breach of a statute does not, of itself, give rise to a civil cause of action: *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225, [1983] S.C.J. No. 14. In that case, the Supreme Court declined to recognize a nominate tort of breach of a statute, and stated that breach of a statue should be considered in the context of the general law of negligence. The decision was recently applied to strike pleadings in a proposed class action based on alleged breaches of the *Food and Drugs Act* in *Wuttenee v. Merck Frosst Canada Ltd.*, above.

97 Plaintiff's counsel acknowledged that there is no independent cause of action for breach of the *Food and Drugs Act*. He submitted, however, that breach of the statute is "wrongful conduct," "unlawful conduct," or "morally reprehensible conduct" that gives rise to a remedy in restitution. I will address this submission when I discuss the pleading of restitution.

(v) Claims under the *Competition Act*

98 The plaintiff claims that in packaging, labeling and advertising their sunscreen products the defendants made false and misleading material misrepresentations to the public for the purpose of promoting the supply or use of their products, in breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34. He pleads that he is entitled to damages as a result, pursuant to s. 36 of that statute.

99 Section 52, which is contained in part VI of the *Competition Act* (Offences in Relation to Competition) provides, in part:

> 52.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

100 For the purposes of establishing that s. 52(1) has been contravened, it is not necessary to establish that any person was actually deceived or misled as a result of the misrepresentation (s. 52(1.1)(a)).

101 Subsection 52(2) provides that a representation that is expressed on an article offered or displayed for sale or on its wrapper or container is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

102 Section 52 creates an offence, but it does not create a cause of action. A cause of action is created by s. 36(1), which provides:

> 36.(1) Any person who has suffered loss or damage as a result of
>
> (*a*) conduct that is contrary to any provision of Part VI, or
>
> (*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

103 The defendants submit that although reliance on a misleading statement is not necessary for the purpose of prosecution for breach of s. 52(1), a plaintiff claiming damages under s. 36(1), must establish:

(a) that the defendant engaged in conduct that breached s. 52(1);
(b) that the plaintiff suffered a quantifiable loss; and
(c) that the loss suffered was *as a result of* the defendant's conduct - i.e., resulted from the false or misleading representation.

104 The plaintiff's pleading appears to anticipate this argument. He pleads:

> Plaintiffs rely on section 52(1.1) of the *Competition Act* and *plead that reliance on a misleading statement is not necessary for the purpose of establishing breach of Section 52 of the Competition Act*.
>
> Plaintiffs were damaged due to the breach of Section 52 of the *Competition Act* and are entitled to recover such damages under s. 36 therein and the costs of these proceedings and obtain any other legal or equitable relief the Court deems appropriate. [emphasis added]

105 Both parties refer to the decision of Lax J. in *Griffin v. Dell Canada Inc.*, referred to above. The plaintiff in that case pleaded that the defendant made false and misleading representations concerning the quality, character and effectiveness of its computers for the purpose of promoting its business interests. The plaintiff pleaded that he and other class members relied on these misrepresentations in making decisions to purchase their computers. Alternatively, he pleaded that it was not necessary for class members to show actual reliance and pleaded s. 52(1.1) of the *Competition Act*.

106 Lax J. noted, at para. 65 of her reasons, that the plaintiff had not given any particulars of the alleged representations as to "quality, character or effectiveness." She stated: "[T]hese are simply bald allegations lacking in particularity and deficient in material facts. It is plain and obvious that this claim cannot possibly succeed on the present pleading, but I grant the plaintiffs leave to amend." It appears that, following the certification order of Lax J., the claim under the *Competition Act* was abandoned.

107 As I have noted, s. 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert,

that the plaintiff must show *both* a breach of s. 52 *and* loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.

108 Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment.

(vii) Unjust enrichment

109 The plaintiff's pleading of this claim in the Schering-Plough action (which is substantially the same as the pleading in the Playtex action) is as follows:

> Defendant has been unjustly enriched by increased profits derived from sales of its sunscreen protection products as a result of its misleading advertising and labeling of such products, in breach, *inter alia*, of statutes including *Consumer Protection Act*, the *Food and Drug [sic] Act*, and the *Competition Act* and other common law duties.
>
> Plaintiffs have suffered corresponding deprivation in that they purchased the Defendants [sic] products under false pretenses.
>
> Plaintiffs plead there is no juristic reason for Defendant's enrichment and the Plaintiffs' [sic] corresponding deprivations. It would be inequitable for Defendant to retain any profits, or other compensation it obtained from its wrongful conduct related to the sale of its sun protection products and Defendant's violation of the *Consumer Protection Act*, the *Food and Drug [sic] Act*, and the *Competition Act.*
>
> Plaintiffs seek restitution of all profits derived by Defendant that are rationally related to Defendant's misleading advertising and labeling practices.

110 The proposition expressed in the factum is that "It would be inequitable for Defendants to retain any profits, or other compensation it obtained from its wrongful conduct related to the sale of its sun-protection products and Defendants' [violation of the statutes] and other common law duties." Plaintiff's counsel submits that the breach of statute, such as the *Food and Drugs Act,* is wrongful conduct," "unlawful conduct," or "morally reprehensible conduct" which fuels the remedy for unjust enrichment.

111 The requirements of unjust enrichment are well-settled:

(a) enrichment;

(b) corresponding deprivation; and
(c) absence of juristic reason: *Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21 at para. 30.

It is equally well-settled that there must be a direct nexus between the enrichment of the defendant and the deprivation of the plaintiff.

112 This issue was discussed by the Court of Appeal in the context of an attack on a pleading in a proposed class action involving a prescription drug: *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, [2003] O.J. No. 2218. The plaintiff claimed, among other things, that she was entitled to reimbursement from the manufacturer for the purchase price paid for the drug on the ground of unjust enrichment. In dismissing the appeal on this issue, the Court of Appeal held that the price paid by the consumer had been paid to retailers and not to the manufacturer. The indirect and incidental benefit received by the manufacturer could not ground a claim for unjust enrichment. The Court of Appeal stated, at paras. 20 and 21:

> [T]he appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. *The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery.* In *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, 1992 CanLII 21 (S.C.C.), [1992] 3 S.C.R. 762, McLachlin J. said this at para. 58:
>
> > To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. [Citations omitted.] It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. *The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant*, such as the services rendered for the defendant or money paid to the defendant.
>
> Thus I would dismiss the appeal from the order striking these paragraphs from the statement of claim [emphasis added].

113 A similar conclusion was reached by Gill J. of the Alberta Court of Queen's Bench in *Evanoff Enterprises Ltd. v. Pioneer Hi-Bred Limited*, 2009 ABQB 223, [2009] A.J. No. 400. Several actions were brought by canola farmers against retailers, suppliers and a manufacturer of seeds, alleging that the seeds did not perform as expected. The plaintiffs sought to amend their claims to include a claim for unjust enrichment, including a claim for an accounting of all revenues and profits earned by the defendants from the sale of the seed. Referring to the decision of the Court of Appeal in *Boulanger v. Johnson & Johnson Corp.* and the decision of the Supreme Court of Canada in

Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario, Gill J stated, at paras. 61 and 62:

> In this case, the Plaintiffs admit in their respective affidavits that they purchased the Seed from the Defendant Agricore United, the retailer, and not directly from the manufacturer, Pioneer. There was no evidence brought forward to support the Plaintiffs' claim that the retailers were actually owned or operated by the Defendant manufacturers. As such, I find that as there is no direct benefit or enrichment to Pioneer, these amendments do not meet the first element of the unjust enrichment test and are hopeless.
>
> In addition, the commercial relationship between the Plaintiffs and the Defendants constitutes a juristic reason for the enrichment and the corresponding deprivation. The enrichment in this case flows from the contract for the purchase and sale of the Seed. A contract can constitute juristic reason: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 44. As noted by the Alberta Court of Appeal in *Harris v. Cinabar Enterprises Ltd. et al.* (1996), 141 D.L.R. (4th) 410 at 420:

114 I might note that in the decision at first instance in *Boulanger v. Johnson & Johnson Corp.* (2002), 14 C.C.L.T. (3d) 233, [2002] O.J. No. 1075 (S.C.J.), Nordheimer J. made a similar observation about the "juristic reason" requirement, at para. 37:

> It appears to me that the third requirement of unjust enrichment, namely the lack of a juristic reason for the retention of the benefit, is also missing in this case. The plaintiff paid monies for Prepulsid, received Prepulsid and consumed Prepulsid. There is clearly an issue as to damages that may have been caused by the use of the drug. There is also an issue raised as to whether the drug had any value at all. Those allegations, however, do not constitute a lack of a juristic reason for the retention of the benefit by the manufacturer. As Madam Justice McLachlin also noted in the Peel case, the mere assertion that it would be unjust or unfair for the party to retain the benefit is not a sufficient basis upon which to found a claim for unjust enrichment.

115 In my view, the claim based on unjust enrichment does not disclose a cause of action. The purchase of sunscreen by the plaintiff did not result in a corresponding enrichment of the defendants because the plaintiff purchased the products from a retailer and not directly from the defendants.

(viii) Waiver of tort

116 The plaintiff also pleads a remedy in waiver of tort:

> Plaintiffs reserve the right to waive the tort of negligence and seek restitution of the profits derived from the sale of its sun-protection products.

117 The claim was not addressed in the plaintiff's original factum and for that reason it received little consideration in the defendants' factums. The plaintiff filed a reply factum, identifying the claims for relief asserted, which made no reference to waiver of tort. Although not addressing the claim as one of waiver of tort, plaintiff's counsel made considerable reference to the observations on

the topic that were made by Lax J. in *Griffin v. Dell Canada Inc*., above, at paras. 59 - 64 and by Cullity J. in *Serhan Estate v. Johnson & Johnson,* (2004), 72 O.R. (3d) 296 (S.C.J.) at paras. 27 - 46. As I find that the plaintiff has not pleaded any tenable cause of action, and has failed to establish any wrongful conduct on the part of the defendants, it is not necessary for me to explore the scope of the remedy of waiver of tort.

Conclusion: Cause of action

118 For the foregoing reasons, I find that the statement of claim fails to disclose a cause of action. As a result, the proceeding cannot be certified as a class action. I will, nevertheless, address the other aspects of the test under s. 5 of the *C.P.A.*

Section 5(1)(b): Identifiable Class

119 Section 5(1)(b) of the *C.P.A.* requires that:

> there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

120 In the amended notice of motion for certification, the plaintiff proposes to define the class in the Playtex action as:

> "All persons resident in Canada who purchased sun-protection products for personal use between July 2002 and the date of judgment (the 'Class Period') that were manufactured, distributed, sold, advertised and/or marketed by Defendants, particularly under the brand name 'Banana Boat'(R) which contained wording on the label stating that it provided UVA/UVB, UVA and UVB, or UVA protection."

121 The definition in the Schering Plough action is the similar, except for the description of the product as "Coppertone"(C) [sic]. It appears that in each case this is the third attempt by the plaintiff to define the class in such a way as to make the proceeding suitable for certification.

122 These are massive classes. Although precise figures are not in evidence, the class size would likely be in excess of three million people in each action and the class would be national in scope.

123 The description of the class is important because:

(a) it identifies the persons who have a potential claim against the defendant;
(b) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action;
(c) it describes who is entitled to notice: *Bywater v. T.T.C.*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.); *Phaneuf v. Ontario,* [2007] O.J. No. 352, 4 C.P.C. (6th) 33 (S.C.J.) at para. 48.

The class definition must state objective criteria by which members of the class can be identified: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at p. 554.

124 The plaintiff says that there is a rational connection between the class description and the causes of action asserted and the common issues identified below. The plaintiff says that the mil-

lions of consumers who purchased the defendants' products during the class period is a group capable of objective identification, unconnected to the merits of the claims asserted.

125 As a preliminary matter, the use of the words "particularly those" in the class definition introduces ambiguity and uncertainty in the class definition. This is undesirable and the class definition would have to be amended to specifically identify the products that are the subject of the action.

126 The more substantial concerns, advanced by the defendants, are twofold. The first is that the class definition is overly broad because it includes purchasers of sunscreen products that do not relate to the common issues. The second concern is that there is no evidence of a class of of "two or more persons" who assert a claim.

127 Dealing with the first concern, some of the common issues are premised on the allegation that the defendants made false or misleading representations that their products were "waterproof" and sweatproof" or that "the product provides (x) times your skins [sic] [natural] protection from [harmful effects of] UVA and UVB rays." The obvious difficulty with these is that the proposed class will include people who purchased a product that made no claim at all that it was "waterproof" or sweatproof" or that it provided the stated degree of protection. Thus the resolution of the common issues concerning these particular statements will not advance in any way the claims of class members who did not purchase products with that labeling.

128 The second concern is more fundamental. The defendants submit that there is no evidence of "two or more persons" who assert a claim, as required by s. 5(1)(b) of the *C.P.A.* They say that this criterion has not been satisfied because there is no evidence that anyone other than Mr. Singer asserts a claim in relation to the wrongs alleged in this proceeding. While the plaintiff's counsel has provided some information that other individuals have recently contacted his firm, or responded to a website, there is no evidence about these individuals, no evidence that they ever purchased the defendants' products or that they actually wish to assert a claim against the defendants.

129 The defendants rely on the observations of Winkler, J., as he then was, in *Lau v. Bayview Landmark Inc.* [1999] O.J. No. 4060, 40 C.P.C. (4th) 301 (S.C.J.) at para. 23:

> [A] class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. *The record before the court must contain a sufficient evidentiary basis to establish the existence of the class* [emphasis added].

130 The defendants also refer to the decision of Nordheimer, J. in *Bellaire v. Independent Order of Foresters,* [2004] O.J. No. 2242, 5 C.P.C. (6th) 68 (S.C.J.) at para. 33:

> In my view, before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

131 The issue was raised in *Chartrand v. General Motors Corp.* 2008 BCSC 1781, [2008] B.C.J. No. 2520, in which the plaintiff sought to certify an action on behalf of owners of GM vehi-

cles with allegedly defective parking brakes. Martinson J. declined to certify the action, holding that there was no evidence that two or more people had a complaint about the product or that it had caused them any loss or that the manufacturer had been enriched. There was evidence that the regulatory requirements had been met and there was no evidence of complaints by the regulator. The putative plaintiff was not even aware that there was an issue until she was contacted by counsel. Martinson J. described the identifiable class requirement as an "air of reality test", testing the reality of the linkage between the plaintiff's claim and the proposed class: *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790, 22 B.L.R. (3d) 46, aff'd 2003 BCCA 87, 10 B.C.L.R. (4th) 234; *Nelson v. Hoops L.P., a Limited Partnership*, 2003 BCSC 277, [2003] B.C.J. No. 382, aff'd 2004 BCCA 174, [2004] B.C.J. No. 618. This requires not simply that there be a theoretical link between the claim, the class and the common issues, but that there be a demonstrated link in fact to two or more *bona fide* claimants.

132 Martinson J. noted that in many products liability cases, the link between the class and the common issues will be obvious and will be reflected by recalls, public safety alerts and complaints. She concluded at paras. 67 and 68:

> In this case, there have been no complaints in British Columbia to GM or Transport Canada about the alleged defective parking brake system. No regulatory body in Canada or the United States has expressed concern over the safety of the parking brake system on the automatic proposed class vehicles. *There is no evidence that GM has been unjustly enriched. There is also no evidence of anyone wanting to participate in the class proceeding; Ms. Chartrand herself was recruited to participate.*
>
> *There is no air of reality to the assertion that there is a relationship between the proposed class, being the owners of the automatics in question, and the proposed common issues that arise in Ms. Chartrand's negligence and unjust enrichment claims.* [Emphasis added].

133 Other cases have expressed the concern that the plaintiff is required to show that the claim is more than idiosyncratic: *Ducharme v. Solarium de Paris Inc.*, [2007] O.J. No. 1659, 48 C.P.C. (6th) 194, (S.C.J.), aff'd [2008] O.J. No. 1558 (Div. Ct.); *Zicherman v. Equitable Life Insurance Co. of Canada* (2000), 47 C.C.L.I. (3d) 39, [2000] O.J. No. 5144 (S.C.J.).

134 *Poulin v. Ford Motor Co. of Canada* (2008), 65 C.P.C. (6th) 247, [2008] O.J. No. 4153, (Div. Ct.) was a proposed product liability class action alleging defective door latches in certain Ford trucks. The motion judge had refused to certify the proceeding, a decision that was affirmed by the Divisional Court. In dealing with the preferable procedure requirement, the Divisional Court noted that neither the proposed plaintiff nor any member of the class had repaired the allegedly defective latch, there was no record of complaints to the manufacturer or Transport Canada and there was a serious question as to whether there was, in fact, a safety issue that required resolution. If there was, investigation and rectification of the issue through the regulatory mechanism would be expeditious and cost-effective. The Divisional Court, at para. 55, repeated the observations of Nordheimer J. in *Bellaire v. Independent Order of Foresters*, quoted above, and agreed with the motion judge's conclusion that a class action was not a preferable procedure.

135 Finally, in *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120, [2009] O.J. No. 1910 (S.C.J.), Cullity J. observed that not every case will require evidence that there is a group of putative class members waiting in the wings. The nature of the claims and the circumstances of the case may permit the court to infer the existence of a class looking for a solution. Cullity J. suggested, however, that the analysis of the issue is best considered together with the other factors that bear on the exercise of the court's discretion in the "preferable procedure" analysis. In that case Cullity J. was prepared to give plaintiff's counsel leave, if required, to file evidence to establish that other putative class members had expressed interest in the proceeding.

136 It has been suggested that on a motion for certification the court plays an important gate keeping function to ensure that the proceeding is in fact suitable for certification: *Arabi v. Toronto-Dominion Bank* (2006), 30 C.P.C. (6th) 164, [2006] O.J. No. 2072 (S.C.J.), aff'd. (2007), 53 C.P.C. (6th) 135, [2007] O.J. No. 5035 (Div. Ct.); *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874. In this case, there is no evidence of a class of two or more people seeking access to justice. In a case where all the other requirements of s. 5(1) of the *C.P.A.* had been met, it might be appropriate to follow the approach of Cullity J. in *Lambert v Guidant Corp*., but in my view this is not such a case.

Section 5(1)(c): Common Issues

137 Section 5(1) of the *C.P.A.* requires that "the claims or defences of the class members raise common issues". Section 1 of the *C.P.A.* defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

138 Common issues are at the heart of the class action process because it is the resolution of the common issues that makes a class action an efficient way of providing access to justice, resulting in economic use of judicial resources and behaviour modification.

139 It is apparent that there can be no common issues without an identifiable class with one of more causes of action. I will, nonetheless, examine the proposed common issues advanced by the plaintiff. I will begin with some propositions of law concerning the common issues requirement. I will then make some general observations about the common issues proposed by the plaintiff. Finally, I will examine those common issues and will explain, with reference to the principles I have stated, why these issues are incapable of certification.

140 The following general propositions, which are by no means exhaustive, are supported by the authorities:

> **A**: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
>
> **B**: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.

C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce,* above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General),* above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City),* above, at para. 18.

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee,* 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd.*

> *v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.
>
> **J**: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

141 I now turn to some general observations about the common issues proposed by the plaintiff, as set out in the Amended Notice of Motion, before examining those issues in more detail.

142 The plaintiff's factum identifies misrepresentation as the *core common issue* in these actions: "In short, the core common issue in dispute in the present matter is whether Defendant made false and/or misleading representations in their marketing and sale of their [brand] sunscreen products." The other core common issue (although not expressed as such) is whether the alleged misrepresentations affected the value of those products or resulted in a disparity between what the products were worth and what consumers paid for them.

143 There are two fundamental problems with the common issues, when viewed at the macro level.

144 The first problem is that there is no evidence to establish a basis in fact for these core common issues. There is no evidence to establish misrepresentation of facts and there is no evidence to establish that the alleged misrepresentations affected the value of the products. This violates the principle expressed in proposition C, above. Moreover, as I will explain in the discussion of common issues 1 - 4, the claim for misrepresentation founders on the need to prove individual reliance.

145 Second, in an apparent attempt to find commonality, many of the common issues are stated in hopelessly vague and broad terms. Simply by way of example, common issue 3 states:

> "Was the true effectiveness of the product and the nature of the misleading representations made aware to the consumer by [the manufacturer] prior to or at the time of sale of the products?"

146 And common issue 26 asks:

> Did [the manufacturer' violate the *Food and Drugs Act*? (a) Did [the manufacturer]'s advertising and/or marketing create an erroneous impression as to the quality or effectiveness of its product?

147 These issues do not refer to any specific product, label, representation or advertising. They are stated in the broadest imaginable terms, thus masking the individual inquiries that would have to be made to answer them. This violates proposition J.

148 I propose now to examine the individual common issues. For the sake of convenience, I will examine them in groups.

Common Issues 1, 2, 3, 4

149 Common issues 1, 2, 3, and 4, deal with the issue of misrepresentation:

1. Do any of the following statements on the packaging and/or containers of Defendants' [product] line discussed in the Amended Statement of Claim, contain false and misleading information as to the effectiveness and quality of the product?

    * The product provides (x) times your skins [natural] protection from [harmful effects of] UVA and UVB rays.
    * The product provides (x) times your skins [natural] protection from [harmful effects of] the sun.
    * The product provides (x) times your skins [natural] protection from [harmful effects of] the sun's rays".
    * SPF juxtaposed with UVA/UVB;
    * The product is "waterproof";
    * The product is "sweatproof";
    * The products protect from the "sun" (not specifying that the products protect from sunburn);

2. If so, was and does [the manufacturer] continue to be aware of these false and misleading statements? If not, should [the manufacturer] have been aware of such misrepresentations?
3. Was the true effectiveness of the product and the nature of the misleading representations made aware to the consumer by [the manufacturer] prior to or at the time of sale of the products?
4. Does [the manufacturer]'s false and misleading statements and labeling constitute a misrepresentation in violation of:

    * Common law;
    * Contract;
    * Statute?

150 Plaintiff's counsel submits that these are appropriate common issues because "[D]espite the Defendant's numerous products under their [product] line of sun protectants, the claims of the Class originate from the misrepresentations made in the labelling and marketing features of the product which are generally uniform in message meaning and theme across products, making these claims common to the Class as a whole."

151 There is no basis in fact for these common issues. There is no admissible evidence that the alleged misrepresentation were untrue or misleading about the effectiveness or quality of the products. There is no basis in fact for the assertion that products labeled "waterproof" or "sweatproof" do not have that quality: proposition C.

152 Acknowledging that the defendants are likely to argue the requirement of reliance will defeat misrepresentation as a common issue, the plaintiff says that "none of the causes of action alleged in the Amended Statement of Claim require the element of reliance be proven." Alternatively,

the plaintiff says that if the court finds that reliance is necessary, it may be "imputed" from s. 52(1.1) of the *Competition Act.*

153 For the reasons I have set out above under the discussion of causes of action, proof of *reliance* is a necessary ingredient of a common law claim for negligent misrepresentation and a claim under s. 36 of the *Competition Act*. The plaintiff submits, however, that the court is entitled to infer reliance from the circumstances.

154 The plaintiff refers to two authorities. The first is *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, [1997] B.C.J. No. 968 (C.A.), application for leave to appeal dismissed, [1997] S.C.C.A. No. 380. In that case, which was not a class action, a group of investors sued an auditor for alleged misrepresentation in the company's prospectus. The auditor's report stated that the financial statements were a fair presentation of the financial position of the company in accordance with generally accepted accounting principles, when in fact the auditor knew that material information had been omitted. The trial judge had dismissed the claim, [1995] B.C.J. No. 174, holding that reliance could not be established unless it could be said that the plaintiffs would not have purchased the debentures had they known of the company's true financial position. The judge found that it was the plaintiffs' previous experience with the company, and not the auditors' approval of the financial statements, that had induced them to make the purchases. The Court of Appeal, applying the test in *The Queen v. Cognos*, reversed the trial judge, holding, among other things, that the trial judge's statement of the test for reliance was inaccurate. It was not necessary for the plaintiffs to show that the alleged misrepresentation was fundamental to their decision. It was sufficient to show that it was *one factor* that induced them to act to their detriment. Reliance could be inferred where the statement was designed or calculated to induce the plaintiff to act on it. The majority of the Court of Appeal stated, at paras. 101 to 103:

> ... Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many such cases, however, as the authorities point out, it would be unreasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. This is such a case.
>
> The distinction between cases of negligent and fraudulent misrepresentation is that proof of a dishonest or fraudulent frame of mind on the defendant's part is required in actions of deceit. That, too, is an issue of fact and one which may also, of necessity, fall to be resolved by way of inference. There is, however, nothing in that which touches on the issue of the plaintiff's reliance. I can see no reason why the burden of proving reliance by the plaintiff, and the drawing of inferences with respect to the plaintiff's state of mind, should be any different in cases of negligent misrepresentation than it is in cases of fraud.
>
> It is sufficient, therefore, for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. *I am also of the view that where the misrepresentation in question is one which was calculated or which would natu-*

> *rally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred.* The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor [emphasis added].

155 This case is distinguishable for two reasons. First, there was a single uniform representation made to each and every plaintiff - the statement that the financial statements were a fair presentation of the company's financial position. That is unlike the present case where there are numerous and different statements made, with no commonality across the range of products marketed by the defendants. Second, I do not read the British Columbia Court of Appeal's reasons as relieving the plaintiff of the obligation to prove causation in the sense of reliance on the statement and resulting damages. The court stated that the plaintiff need not prove that the misrepresentation was the predominant cause of his or her behaviour, but it must still be proven to have been a factor. Like proof of any other fact, it may be established by inference from other facts. In the case of a person acquiring securities under a prospectus one might reasonably infer that a "clean" auditor's report is a motivating factor. Tested the other way, if the auditor had stated that the financial statement *did not* fairly represent the state of the company, investors might have acted differently.

156 In this case, there is no evidence before me that would cause me to conclude that reliance could be proven by inference. The evidence is entirely to the contrary. There is no evidence that the defendant's messages are delivered to a market that is uniform and behaves in predictable ways. On the contrary, the evidence is clear that the market is segmented and marketing messages are received and processed in different ways by different consumers.

157 The second authority relied on by the plaintiff is *Knight v. Imperial Tobacco Canada Limited*, 2005 BCSC 172, 250 D.L.R. (4th) 347, var'd. (2006), 267 D.L.R. (4th) 579, [2006] B.C.J. No. 1056 (C.A.) This was a proposed class action by a class of British Columbia smokers with respect to "light" cigarettes. The claim was that the marketing of "light" and "mild" cigarettes was deceptive because it conveyed a false and misleading message that those cigarettes were less harmful than regular cigarettes. The claim in that case was purely statutory, based on what was then the British Columbia *Trade Practices Act*, R.S.B.C. 1996, c. 457 and successor legislation, the *Business Practices and Consumer Protection Act,* S.B.C. 2004, c. 2. No common law cause of action was asserted. The plaintiff pleaded that relief under that statute did not require proof of causation or actual reliance or that, alternatively, reliance should be assumed. In the further alternative, the plaintiff pleaded that there was reliance on the misrepresentations when the consumers purchased the cigarettes relying on the representation that they were "light" or "mild".

158 In opposing certification, the defendant argued that the assertion of deceptive practices did not give rise to a cause of action because the cause of action could not be complete without causation and reliance, which were said to be individual issues making the case inappropriate for certification. Significantly, however, the defendant conceded during oral argument that the statutory definition of a deceptive act or practice did *not* require evidence of individual reliance. The defendant maintained its position, however, that any *remedy* under the statute required evidence of reliance in order to prove a causal link between the deceptive act and the alleged loss for which the plaintiff claimed compensation. In turn, the plaintiff conceded that some of the statutory remedies required proof of causation, but suggested that this could be proved by something other than individual reliance.

159 On a reading of the other sections of the statute relied upon, Santanove J. concluded that while proof of causation was required, it was not necessary to prove reliance by the individual con-

sumers. The plaintiff argued that it could lead evidence to show that the entire market place was distorted by the deceptive practice and that all class members paid too much for a product which did not truthfully exist. Santanove J. found, at para. 36:

> I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the [*Trade Practices Act*], but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

160 The Court of Appeal reversed the decision, in part, holding that the plaintiff was not entitled to bring a class action for breach of the *Trade Practices Act*, because that statute made provision for an action to be brought in a representative capacity. The British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50, contained a provision similar to s. 37(a) of the *C.P.A.*, which states that the statute does not apply to "a proceeding that may be brought in a representative capacity under another Act."

161 The Court of Appeal held, however, that the plaintiffs were entitled to proceed by way of a class action under the *Business Practices and Consumer Protection Act.* In response to the defendant's submission that this would require the examination of a multitude of individual consumer transactions, which would ultimately overwhelm the common issues, the Court of Appeal stated, at para. 26:

> ... it seems to me that the question of whether or not it can be established by the plaintiff that there have been deceptive acts or practices committed by the defendant in marketing cigarettes is central to the claims advanced on behalf of the plaintiff. *Given the broad definition of deceptive acts or practices which includes acts or practices capable of deception*, the question of deception or no deception is something that can, in my opinion, be litigated without reference to the circumstances of the plaintiff or individual class members. [Emphasis added]

162 It is clear that the statutory definition of deceptive acts or practices was central to the court's conclusion that the existence of deceptive acts or practices could be determined as a common issue. That is not the case with respect to any of the causes of action pleaded here.

163 Common issue number 4, which asks whether the manufacturer's statements were a "misrepresentation" in violation of common law, contract or statute suffers from the same problem - the common law at issue (negligent misrepresentation) and the statutory remedy (s. 36 of the *Competition Act*), require a causative link that would have to be established individually. Since there is no contract between the manufacturer and the consumer, the contract question is irrelevant to any cause of action.

164 Claims based on misrepresentation are capable of giving rise to common issues that are capable of certification: *Bondy v. Toshiba of Canada Ltd.*, [2007] O.J. No. 784, 39 C.P.C. (6th) 339 (S.C.J.) (alleged misrepresentation of computer's speed and processing capability); *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393, 267 D.L.R. (4th) 601 (C.A.)

(misrepresentation in college's course description); *Murphy v. BDO Dunwoody LLP*, [2006] O.J. No. 2729, 32 C.P.C. (6th) 358 (S.C.J.) (misrepresentation in accountant's financial projections for investment funds); *Haddad v. Kaitlin Group Ltd.*, [2008] O.J. No. 5127 (S.C.J.) (misrepresentation in marketing materials for subdivision and golf course); *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069, 33 C.P.C. (5th) 127 (Div. Ct.), rev'g [2002] O.J. No. 2858. 25 C.P.C. (5th) 188 (S.C.J.) (misrepresentation in financial statements; *Kerr v. Danier Leather Inc.*, [2001] O.J. No. 4000, 14 C.P.C. (5th) 292 (S.C.J.) (misrepresentation in a prospectus); *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 1136, 7 C.C.L.S. 155 (Gen. Div.) (misrepresentation in offering circular). These claims have typically involved very specific, clearly defined and limited representations made in circumstances in which reliance could reasonably be inferred.

165 It must be kept in mind that each manufacturer produced in the range of sixty different sunscreen products during the class period, that the ingredients of those products differed both between products and over time and that the labelling and marketing and advertising of those products varied over time. Advertising was done in a variety of formats. Some members of the class may have purchased only one type of product whereas others may have purchased several types. The words of the Saskatchewan Court of Appeal in *Merck Frosst Canada Ltd. v. Wuttunee* are applicable to this case, where the proposed common issues were described, at para 162, as:

> ... even if a very liberal notion of "common issue" were adopted, (to admit as a common issue what is in fact a complex array of issues, each common only to a portion of the members of the class as a whole, but none common across the entire class), this very complexity would in this case defeat the requirement that a class action be a fair, efficient and manageable method of advancing the claims of the class members.

166 I find it difficult to imagine how common issue 4 could be drafted in any more general terms. It makes no reference to any particular product or representations. It does not identify the "common law", "contract" or "statute" to which it refers. If it is a reference to a common law claim for misrepresentation, no such claim has been pleaded, as I have already pointed out. There is no contract between the plaintiff and the defendants. There is no identification of the statute in question. Some care is required in the drafting of the common issues. They cannot be so narrow that their resolution does not advance the proceeding; they cannot be so broad that commonality is only found because of their generality: see proposition J and *Rumley v. British Columbia*, above, at para. 29:

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, supra, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". *It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings.* That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient. [Emphasis added].

167 In any case, as I have indicated, there is no pleading that would support a cause of action for negligent misrepresentation or unjust enrichment. There is no basis for a contractual claim as there is no contractual relationship between the plaintiff and the defendants. Assuming the plaintiff is referring to the *Food and Drugs Act* as the relevant statute, not only is that statute irrelevant to any pleaded cause of action, but there is no basis in fact for the allegation that there is a violation of that statute as the labeling of the defendants' products has been scrutinized by and approved by Health Canada.

Common Issues 5 and 6

168 These common issues ask:

> 5. Did [the manufacturer] at all material times owe a duty of care to the Plaintiff and Class Members to:
>
> (a) Ensure that the products were fit for their intended purpose;
> (b) Conduct adequate testing prior to sale to ensure that the products were of merchantable quality and conformed with the representations made on the packages and containers; and
> (c) Manufacture, package, market and sell the products in such a manner that their effectiveness and quality was accurately and truthfully represented to the consumer?
>
> 6. If so, did Defendants breach their duty of care by:
>
> (a) Manufacturing, marketing and selling the products in such a manner that their true effectiveness and quality was not accurately and truthfully represented to the consumer;
> (b) Failing to ensure that the products were fit for their intended purpose and of merchantable quality;
> (c) Failing to conduct appropriate testing to determine whether the products were as effective and of the same quality as marketed and warranted;
> (d) Manufacturing, marketing and selling products that [manufacturer] knew or ought to have known were of a lesser effectiveness or quality than suggested to the consumer which would ultimately result in damage and/or injury to the plaintiff and Class Members;
> (e) Failing to disclose the true effectiveness and quality of the products; and
> (f) Failing to recall the products from the Canadian market immediately upon learning of the lesser effectiveness and quality of the product line than represented to the public?

169 Both common issue 5 and issue 6 relate to a claim in negligence. The plaintiff's real claim, as set out in his counsel's factum, is for negligent misrepresentation. I have found that the claim is not properly pleaded.

170 The common issues offend propositions E and F as their resolution neither advances the plaintiff's claim nor is necessary for its disposition. In addition, these common issues offend Proposition C: they have no basis in fact.

Common Issues 7, 8, 9, 17, 20, 22

171 I have grouped these common issues under a single heading because they all address, in some way, the damages that would be claimed in the action. The proposed common issues are as follows:

> 7. If the products were not as effective and/or of the quality represented to the consumer, were the Banana Boat Products *not worth* the amount paid by Plaintiff and Class Members?
> 8. What was the *true value* of the Banana Boat Products?
> 9. If the *value* of the products was less than what Plaintiff and Class Members paid for, did [the manufacturer] receive *profits* unjustly at the
>
> expense of the Plaintiff and Class Members?
>
> 17. Was [the manufacturer] unjustly enriched by the *excess* in *sale price* over *fair-market value? ...*
> 20. How should we *calculate* the *damages*?
> 22. Can the *damages* be *calculated* on an individual basis?

172 I have emphasized references to "value," "sale price," "fair market value," "profits," "damages" and "calculated" to point out that the answers to these issues will require a determination of the "value" of the product in question.

173 To begin with, there is no allegation in the amended statement of claim that the defendants' products were worth less than their market value or what purchasers paid for them. Thus, it is not at all clear that the determination of the products' "true value" is necessary to the determination of each class member's claim, *as pleaded.*

174 Second, there is no basis in fact for these issues, because there is no evidence at all that the defendants' products had a "value" less than the price at which they were sold. Even if I accept the premise of plaintiff's counsel that the defendants misrepresented the level of UVA protection in their products, there is no evidentiary basis in fact for the proposition that this impacted the "value" of the products. The plaintiff himself does not allege that he received less value than what he paid for the defendants' products.

175 To take one example, from just one of the defendants' products, labeled:

BANANA BOAT
Ultra Block
Sunblock
Spray Lotion
SPF 48
UVA & UVB Protection

176 Not only is there no evidence that these "representations" are untrue, but there is no evidence that, if they were proven to be untrue, the "value" of the product would be affected. Even if one were to accept the plaintiff's theory that the words "SPF 48" coupled with "UVA & UVB Protection" would lead a consumer to believe that the product provided *equal* protection against UVA and UVB rays, there is no evidence at all that the product would have a lower value if the truth were

known. The plaintiff has put forward no evidence at all to show that the products without the impugned representations would have a lower value or that the damages could be calculated on a class-wide basis.

177 It must be repeated that there are well over one hundred products at issue in the combined two actions and their medicinal characteristics and labeling changed over time. "Value" can only be determined by reference to each particular product, in relation to its particular ingredients at a particular point in time, in comparison with its labeling and advertising at that particular point in time. As the defendants' evidence confirms, the "value" of a particular product *to the consumer* will depend not only on the nature of the product, but also on the consumer's needs in relation to the information that he or she has received about the product. The same product may have a different "value" to a consumer, depending on what he or she is looking for and what information he or she has received about the product through labeling, advertising or other sources. A product with an SPF of 4 is of little or no value to a consumer who is "Sun Scared", but it may be of significant value to a consumer who is a "Real Tanner." A product that is "waterproof" may be very important to a water polo player, but of no value to a non-swimmer. Some consumers may stop reading the label when they see "SPF 4" or "waterproof" if that is all that matters to them - other consumers may study the label and any other information they can obtain because they want to be absolutely certain about the product's myriad characteristics.

178 The following table, which reflects only three of the defendants' products and three hypothetical consumers, illustrates that some products will have almost no value to a particular consumer, whereas other products will have different values depending on the consumer's wants. The consumer who is "Sun Scared" and one who is "Indifferent," may both buy products with SPF 30 or SPF 50 on the label, but the characteristics of the product, and hence its value, are much more important to the "Sun Scared" consumer than the "Indifferent" consumer who is simply interested in putting *something* on his or her skin to protect from sunburn.

Type of Consumer	Type of Product		
	BAIN de SOLEIL ***« Luminessence »*** SPF 4 Sunscreen	**BANANA BOAT** ***«Ultra Defense»*** Sunscreen Location SPF 30 Broad Spectrum UVA/UVB Protection Protects against the drying effects of the sun	**BANANA BOAT** ***«Sport»*** Sunscreen Lotion SPF 50 Broad Spectrum UVA/UVB Protection Sweatproof Waterproof
Sun Scared She applies sunscreen daily. Always reads the label	She does not buy the product because its SPF is too low	She buys this product occasionally. She knows that it provides less protection than SPF 50 but she wants a moisturizing lotion that is enriched with vitamin E and aloes	She regularly buys the product because she wants the maximum available protection on a daily basis
Indifferent He just does not want to get a sunburn – anything will do	He is not likely to buy this product except by mistake	He may buy the product. He wants some protection from sunburn but is not particularly fussy about SPF	He may buy the product. He wants some protection from sunburn. He also thinks of himself as athletic and likes the "Sport" on the label
Sun Worshipper She spends as much time in the sun as possible. Wants a great tan	She regularly buys the product. She is only interested in getting the best possible tan	She seldom buys the product but may purchase just to have a back-up in case she starts to burn	She seldom buys the product unless she is planning to be in the water for extended periods of time and thinks her tan is good enough

179 This table, based on the market evidence adduced by the defendants, illustrates that the "value" or worth of each of the products will vary from consumer to consumer and the effect of the alleged misrepresentation will vary depending on the person's knowledge and needs in relation to the characteristics of the product. The product's allegedly lower UVA protection will be of no significance to the "Indifferent" consumer and may actually be perceived as a positive feature by the "Sun Worshipper" who is looking for a deeper tan. Only the "Sun Scared" consumer would regard it as a negative feature.

180 The proposed common issues offend proposition J. They are only common when they are framed in overly broad terms; they also offend proposition H: they are dependent on individual findings of fact that would have to be made about individual claimants. Question 8, for example, "What was the *true value* of the Banana Boat Products?" is absurdly broad, unconnected to any particular product, at any particular time, in relation to its ingredients, labeling and advertising and the wide range of consumers who might have bought it. Question 7, which essentially asks whether a product was "worth the price a class member paid for it" necessarily begs the question: "Worth the price *to whom?"* Question 17, which asks about the "fair market value" of a product, begs the same question.

Common Issue 10

181 Common issue 10 asks:

> Can it be established that under Section 52 of the *Competition Act* that the Defendants made materially false and misleading representations to the public which stated a level of performance of their products which was untrue and/or failed to disclose to the Class the true effectiveness and quality of the products?

182 The answer to this question, on its own, does nothing to advance the plaintiff's claim, because s. 52 of the *Competition Act* does not create a civil cause of action. The answer might advance the resolution of a claim under s. 36 of the *Competition Act*, since a breach of section 52 is a necessary prerequisite to such a claim. Answering the question would require an examination of a wide range of products and a variety of representations concerning each product, over a lengthy time period. The answer to this question would not, however, advance the resolution of the claims of class members, because a court would have to find that the plaintiff suffered a loss caused by the breach and this could only be accomplished on an individual basis. This common issue, therefore, offends propositions F and H.

Common Issues 11, 12, 13, 14, 15, 16, 18, 19, 20 23, 24 (*Consumer Protection Act*)

183 These common issues relate to the pleading of the *Consumer Protection Act, 2002*:

> 11. Are the sales of the Defendant's Banana Boat sun-protection products to Class Members "consumer transactions" and/or "consumer agreements" as defined by section 1 of the *Consumer Protection Act 2002* ...
>
> ?
>
> 12. Are the solicitation and promotions by the Defendants of its Banana Boat Products to Class Members, "consumer transactions" and/or "consumer agreements" as defined by section 1 of the *Consumer Protection Act* ... ?
> 13. With respect to the sales of the Defendants' Banana Boat Products to Class Members, is the Defendant a "supplier" as defined in section 1 of the *Consumer Protection Act* ... ?
> 14. Are the class members "consumers" as defined under section 1 of the *Consumer Protection Act* ... ?

15. Did [the manufacturer] engage in deceptive acts or practices in the solicitation, offer, marketing and sale of its sun-protection products contrary to the *Consumer Protection Act* ... ?
16. If yes, does that cause damages to the purchasers of Defendant's Coppertone product line:

a) If so was such damage caused intentionally?

b) If not was it negligent?

...

18. If [the manufacturer was enriched by the excess of the products' sale price over their fair market value], are Plaintiffs and Class Members entitled to cancellation of contract under section 37, contract damages, rescission and/or disgorgement of profits under section 18 of the *Consumer Protection Act*?
19. If so, are Plaintiffs and Class Members entitled to cancellation of contract under section 37, contract damages, rescission and/or disgorgement of profits under section 18 of the *Consumer Protection Act* ...
20. Alternatively, are Plaintiffs and Class Members entitled to full refund of the amount paid for such products under section 98(3) of the *Consumer Protection Act Consumer Protection Act* ...

184 As I have indicated, the defendants are not "suppliers" under the *Consumer Protection Act* and there is no pleading of any dealings between the plaintiff and the defendants that would bring his claim within that statute. As such, the determination of these issues is not rationally connected to any cause of action, and would therefore not advance the litigation: proposition E and F.

Common Issues 21

185 Common Issue 21 asks:

> Can the damages be calculated on an unjust enrichment/restitution basis? (a) Can the damages be calculated on an aggregate basis under section 24 of the [Class Proceedings Act]? (i) How?

186 As I have noted under the common issues dealing with damages, above, it would be impossible to calculate damages on anything other than an individual basis. I have also concluded that there is no basis for a claim in this case for unjust enrichment.

187 Section 24 of the *C.P.A.* provides:

> The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

188 Plaintiff's counsel submits that if liability of the class is proven on a class-wide basis, the claim would support an aggregate assessment of damages and that "the only question remaining would be individual entitlements to monetary damages (if appropriate) ..." He submits, in his factum that "[i]f the common issues are resolved in favour of the Plaintiffs and liability is established for the class, then, subject to court instruction, and the litigation plan's approval, damage calculation formula can be established, and payments administered, without court oversight where applicable, absent the use of large amounts of judicial and court resources."

189 It is possible, but not necessary, to include aggregate assessment of damages as a common issue: *Cloud v. Canada (Attorney General),* above, at para. 70,); *Smith v. National Money Mart Co*. [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.); *Lee Valley Tools Ltd. v. Canada Post Corp.*, [2007] O.J. No. 4942, 57 C.P.C. (6th) 223 (S.C.J.).

190 In *Fresco v. Canadian Imperial Bank of Commerce,* above, *Lax* J. stated at para. 82:

> Strictly speaking, it is not necessary to certify a common issue on the suitability of an aggregate assessment as this determination is made by the common issues trial judge. However, it has become the practice to do this if the court is satisfied that there is a reasonable likelihood that the conditions for an aggregate assessment of damages could be satisfied: *Cassano v. Toronto-Dominion Bank* (2005), 9 C.P.C. (6th) 291 (Ont. S.C.J.) at para. 50, a decision reversed on other grounds but implicitly approved on this point by the Court of Appeal, at 2007 ONCA 781, 87 O.R. (3d) 401, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15 at paras. 18, 38-53; *Tiboni v. Merck Frost* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J.), leave to appeal denied on certification, [2008] O.J. No. 4731 at para. 94; *Lee Valley Tools v. Canada Post Corp.*, [2007] O.J. No. 4942, 57 C.P.C. (6th) 223 (S.C.J.) at para. 43.

191 It is important to focus on the requirements of s. 24 that an aggregate award is only appropriate where no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. If liability has not been established on a class-wide basis, and issues of liability remain, and would require individual proof, an aggregate award is inappropriate. In this case, it is extremely unlikely that the conditions for an aggregate assessment of damages would be satisfied. Specifically, after the common issues trial, there would be factual questions relating to individual issues of reliance and causation left to be determined.

192 It would also be necessary for the plaintiff to establish some basis in fact for the conclusion that an aggregate assessment of damages would be possible. There is no such evidence in this case.

Common Issue 23

193 Common issue 23 asks:

> Is the [manufacturer] liable to its customers for punitive damages?

194 The defendant's liability for punitive damages may constitute a common issue: *Cloud v. Canada (Attorney General),* above, at para. 72; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179, 40 C.P.C. (6th) 170 (S.C.J.) at para. 48, leave to appeal ref'd [2007] O.J. No. 1991, 157 A.C.W.S. (3d) 482 (S.C.J.). The suitability of punitive damages as a common issue could not, however, bootstrap the certification of proceeding that is otherwise unsuitable: *Pearson v. Inco,* [2002] O.J. No. 2764, 33 C.P.C. (5th) 264 (S.C.J.) at para. 107, var'd (2005), 78 O.R. (3d) 641, [2005] O.J. No. 4918 (C.A.), leave to appeal dismissed [2006] S.C.C.A. No. 1.

195 As there is no evidence of any wrongdoing on the part of the defendants, and as I have not found any other appropriate common issues, I must reject the proposed common issue relating to punitive damages.

Common Issue 26

196 Common issue 26 asks:

> Did [the manufacturer] violate the *Food and Drugs Act*? (a) Did [the manufacturer]'s advertising and/or marketing create an erroneous impression as to the quality or effectiveness of its product?

197 As I have noted earlier, the pleading of a cause of action based on breach of the *Food and Drugs Act* cannot stand. Nor is there any basis in fact for a common issue of this nature, given that the labelling of the products was approved by Health Canada and there is no admissible evidence that the labelling of the products breached the *Act*.

Section 5(1)(d): Preferable Procedure

198 Section 5(1)(d) of the *C.P.A.* requires an examination of whether a class action would be the preferable procedure for the resolution of the common issues. I must consider whether a class action is a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims of the class and whether it will advance the goals of access to justice, judicial economy and behaviour modification.

199 In *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at para. 69, leave to appeal dismissed [2007] S.C.C.A. No. 346, the Court of Appeal summarized the approach to the preferable procedure analysis:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

200 The "claim as a whole" includes the common issues and any individual issues that remain to be resolved: *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 58; leave to appeal dismissed [2008] S.C.C.A. No. 15:

> The third principle requires that the preferability determination be made by looking at the common issues in relation to the claim as a whole. The claim as a whole includes any individual issues as well as the common issues. The scheme of the CPA, which is a procedural statute, provides for the resolution of common issues and any individual issues that remain.

201 The preferability analysis was neatly summarized by Perell J. in *De Wolf v. Bell ExpressVu Inc*. (2008), 58 C.P.C. (6th) 110, [2008] O.J. No. 592 at paras. 47 - 50:

> For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims ...
>
> The preferable procedure criterion requires an analysis of whether a class proceeding is preferable because it constitutes a fair, efficient, and manageable way of determining the common issues presented by the claims of the proposed class members and whether such determination of the common issues advance the proceeding in accordance with the policy objectives of access to justice, judicial economy, and the modification of the behaviour of wrongdoers ... .
>
> Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute ... .
>
> In considering the preferable procedure criterion, the court should consider: the nature of the proposed common issue(s); the individual issues which would remain after determination of the common issue(s); the factors listed in s. 6 of the Act; the complexity and manageability of the proposed action as a whole; alternative procedures for dealing with the claims asserted; the extent to which certification furthers the objectives underlying the Act; and the rights of the plaintiff(s) and defendant(s) ... [references omitted].

202 Not surprisingly, the parties view the case from very different perspectives when it comes to the preferability analysis. The plaintiff says that the case is all about the common issues, that it is framed in such a way as to make individual issues irrelevant and that a class action is the only way to give access to justice to millions of similarly-situated consumers who have relatively small but important claims. The plaintiff says that damages do not require an assessment of individual behaviour and that they can be resolved by an aggregate assessment under s. 24 of the *C.P.A.*

203 The defendants emphasize the need for individual inquiries that will overwhelm the analysis of the common issues. They say that liability cannot be established on a class-wide basis because it will depend on the product at issue, the information contained on its label, the advertising of the product in a multitude of formats, what each class member knew or understood about the claims

being made for the product, what impact those claims had on the class member's purchase of the product, what price was paid for the product and whether the class member received less "value" for the product because it did not have the characteristics that the consumer understood it to have.

204 The defendants emphasize that the factual inquiry will involve an examination of representations made in the labeling and advertising of over one hundred products over a period of seven years. The products had different ingredients, made different representations and were advertised in different ways. The alleged misrepresentations were made to in excess of three million consumers, each of whom would have reacted to the information in a different way.

205 I am satisfied that a class proceeding would decidedly *not* be a preferable procedure for the following reasons. First, I am convinced that a class action, at least as envisaged by this plaintiff, would be unmanageable and inefficient. The multiplicity of products, product ingredients and advertising and labeling claims would make the resolution of the common issues extraordinarily complex.

206 Second, I am not satisfied that access to justice considerations are deserving of particular concern in this case for the reasons discussed under the subject of the identifiable class requirement. I am not even satisfied that Mr. Singer has a real complaint or that he has suffered any damages, but if he wishes to make a point of principle, it could be appropriately pursued in the Small Claims Court or as a test case. An individual action would permit him to pursue claims that would not be available in a class action, such as a common law claim for negligent misrepresentation and claims under the *Competition Act*, provided he can show reliance. Those actions are likely to be more effectively and efficiently prosecuted based on individual allegations of reliance and damages.

207 Third, there is an appropriate statutory and regulatory regime in place concerning the labeling and advertising of sunscreen products. That regime considers scientific evidence concerning the efficacy of sunscreen products and determines what representations can appropriately be made about each product. If there are concerns about representations made concerning specific products, those concerns can be addressed to the regulator. There is, therefore, a built-in behaviour modification process. To the extent that the plaintiff believes that there have been transgressions that require sanctions, complaints can be directed to the appropriate regulators under the *Food and Drugs Act* and the *Competition Act.*

Section 5(1)(e): Representative Plaintiff

208 Section 5(1)(e) of the *C.P.A.* requires the court to be satisfied that there is a representative plaintiff or defendant who:

> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

209 The Court must be satisfied that the proposed plaintiff will vigorously and capably prosecute the claim on behalf of the class: see *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1, [1997] B.C.J. No. 2477 (C.A.), application for leave to appeal dismissed, [1998] S.C.C.A. No. 13; *Western Canadian Shopping Centres Inc. v. Dutton,* above, at para. 41. The court must also be sat-

isfied that the counsel he or she has chosen is qualified to advance the proceeding on behalf of the class. This is part of the court's supervisory jurisdiction in class actions: see *Poulin v. Ford Motor Co. of Canada*, above, at para. 88.

210 The application of these requirements in this particular case is problematic for a number of reasons.

211 To put matters in perspective, as I have said before, if certified these will be massive class actions. They will involve over three million potential class members, and make serious allegations and claim substantial damages against two large pharmaceutical companies. If the actions are certified, there is every reason to believe that the litigation will be hard fought, time-consuming and expensive. There is no reason to assume that the claims will be settled. The court has a responsibility to ensure that the putative class representative will bring informed and independent judgment to bear on the task and that class counsel has the experience, the resources and the capacity to prosecute these actions.

212 Mr. Singer's evidence is that he is a financial adviser and lives in Thornhill, Ontario. He had been a client of Mr. Karp, one of the lawyers acting on behalf of the proposed class. He came to the law firm's office on a regular basis to participate in prayer meetings. During one of his discussions with Mr. Karp, he mentioned that he had had skin cancer. He was told that the firm was monitoring potential class action litigation and that it was aware of a proposed sunscreen class action in the United States. This appears to have been the *Gaston et al. v. Schering-Plough Corporation et al.*, action, identified in Mr. Karp's affidavit and referred to earlier. Mr. Singer became interested and agreed to act as the putative representative plaintiff in these two actions. He is already acting as the representative plaintiff in another proposed class action, which has nothing to do with sunscreen.

213 Mr. Singer says that he understands the steps that will be taken in the litigation and his responsibilities as representative plaintiff. He says that he has been involved in meeting with proposed class counsel on numerous occasions and that he has reviewed the statement of claim and other documentation. He says that he is prepared to instruct class counsel.

214 One has to query Mr. Singer's motivation, considering he had no apparent complaints about the defendants' products until Mr. Karp told him about the U.S. litigation. In spite of this action, he continues to purchase and use the defendants' products. It is hard to imagine that the litigation holds any significant financial reward for him.

215 One also has to query Mr. Singer's interest in the issues. At the time of his cross-examination, he was not even aware of the existence of the Canadian monograph on the labeling and advertising of sunscreen products. While he is not required to have extensive knowledge of the case, it surprises me that he was unaware of the regulatory system in Canada or of the fact that the representations of which he complains had been approved by the regulator.

216 A class action must have a representative plaintiff who has a real interest in the dispute and will provide fair representation to the class. The representative must be able to instruct counsel and to exercise independent judgment concerning the important issues that will arise during the progress of the litigation. The representative plaintiff cannot be a mere benchwarmer or a puppet manipulated by counsel. These concerns were addressed by Perell J. in *Fantl v. Transamerica Life Canada*, (2008), 60 C.P.C. (6th) 326, [2008] O.J. No 1536 (Sup. Ct.) at para. 63, aff'd [2008] O.J. No. 4928, 66 C.P.C. (6th) 203 (Div. Ct.), and aff'd 2009 ONCA 377, [2009] O.J. No. 1826

> The identity of plaintiffs and class representatives is particularly important in class action proceedings where they have responsibilities to prosecute the action on behalf of and in the interests of the class: *Englund v. Pfizer Canada*, [2007] S.J. No. 273 (C.A.) at para. 50; *Hoffman v. Monsanto Capital Inc. and Bayer Cropscience Inc.*, [2007] S.J. No. 182 (C.A.) at paras. 87-92. There are many good reasons for a class proceeding having a genuine plaintiff with a genuine claim and exposure to costs if the claim is unmeritorious. The presence of a genuine claimant reduces frivolous claims, acts as a check and balance to the excesses of entrepreneurial law firms, provides a voice to protect the interests of the absent class members, and goes some distance to ensuring that the access to justice and behaviour modification provided by the Act make a meaningful contribution to both private and social good.

217 In that case, Mr. Fantl had been invited by the law firm to become the representative plaintiff. Perell J. found that he was nonetheless a genuine plaintiff. Perell J. noted the importance of the development of entrepreneurial and risk-taking law firms who are prepared to take on challenging class action litigation, thereby promoting the important goals of class actions. He observed, however, that there can be a tension between the entrepreneurial interests of the lawyers and the interests of the absent members of the class, who have no direct involvement in the proceedings - this is why a capable, informed and independent class representative is an important check and balance in the process.

218 In *Smith v. Canadian Tire Acceptance Limited* (1995), 22 O.R. (3d) 433, [1995] O.J. No. 327, aff'd [1995] O.J. No. 3380. 26 O.R. (3d) 94 (C.A.), Winkler J., as he then was, stated at para. 63:

> This legislation does not envisage that causes of action, legitimate though they may be, will be identified and class members recruited, for the ultimate financial gain of the organizers. Instead, the legislation anticipates a genuine representative plaintiff. The purpose of the legislation is to facilitate the litigation of causes of action and not to generate them for financial gain.

219 Martinson J. adopted this language in *Chartrand v. General Motors Corp.* above, at para. 99:

> What is needed is a genuine plaintiff with a real role to play and not a placeholder plaintiff for the entrepreneurial interests of lawyers who have so much at stake. The *CPA* does not contemplate that causes of action, legitimate though they may be, will be identified, and class members recruited, for the ultimate financial gain of lawyers or organizers. See: *Richard*, at para. 42; *Poulin v. Ford Motor Co. of Canada*, (2007), 52 C.P.C. (6th) 294 at para. 63 (Ont. S.C.J.); and *Fantl v. Transamerica Life Canada*, (2008), 60 C.P.C. (6th) 326 at para. 104 (Ont. S.C.J.).

220 In that case, Ms. Chartrand had been recruited by counsel. Martinson J. stated, at para. 104 - 105:

> Ms. Chartrand was unquestionably recruited by her lawyer. At the time she had no idea that there was a problem with the parking brake on her truck. Her lawyer paid for the repair of the truck as what she has called an incentive. She will never have to pay, even if she is unsuccessful in her claims. This goes beyond an indemnity agreement relating to costs and disbursements. While she may have some minor damage claims outstanding, she has no real stake in the resolution of the common issues or in the litigation generally.
>
> There is no specific legislative provision or legal principle which prohibits recruitment. Nevertheless, recruitment is a factor to consider in deciding whether a proposed representative plaintiff can fairly and adequately represent the class.

221 I agree that recruitment of the class representative is not fatal. After all, not many people wake up in the morning and decide that they want to start a class action. They may well need the encouragement of experienced counsel to take up the cudgels and put their name to a worthy cause. Recruitment was obviously not fatal in *Fantl v. Transamerica Life Canada*; *however*, the recruitment of the plaintiff is a factor to be considered in determining whether the plaintiff has the necessary interest, independence and incentive to fulfill his or her duties to the class. It is also a factor to be considered in assessing whether there is indeed an underlying class with an actual grievance, as opposed to an issue identified by the industry of counsel.

222 I am troubled in this case by Mr. Singer's close relationship with Mr. Karp and his firm, by his desire to be a representative in no less than three class actions (one of which deals with a separate matter altogether), and by the fact that these two actions are the product of the lawyers' research and not Mr. Singer's desire to redress a real injury. I am concerned that when the time comes to make important decisions concerning these actions, for example proceeding to trial or considering settlement, the court and the class will not be able to look to Mr. Singer to make informed and independent recommendations. If he was not sufficiently engaged and interested to inform himself of the Canadian regulatory system that endorses the representations at issue (all of which is described in the affidavits filed on behalf of the defendants), I fear that he will he not be sufficiently engaged to act as an independent voice for the classes of millions of consumers he seeks to represent

223 Section 5(1)(e)(ii) also requires that the plaintiff have a suitable plan for advancing the proceeding on behalf of the class. This includes demonstrating that the plaintiff and his or her counsel have thought through the mechanics of advancing the litigation. It also includes demonstrating that the counsel chosen by the plaintiff has the experience, competence, capacity and resources to undertake the litigation.

224 The litigation plan in this case is rudimentary, vague and boilerplate. The statements concerning the anticipated evidence do not demonstrate that any serious thought has been given to how the litigation will be advanced. For example:

> *At present, it is anticipated* that the representative Plaintiff will provide affidavit evidence, and perhaps other members of the proposed class, as witnesses at the trial of the common issues. *The parties will have a better sense* of the witnesses they intend to call upon completion of discovery.

> In addition, the Plaintiff *may file* a damages brief. The Plaintiff *will assess the need* for expert evidence as the case proceeds. The Plaintiff's Counsel have considerable experience in retaining experts, where necessary, in the context of class proceedings.
>
> The Plaintiff will ask the court to order the exchange of any expert opinions after the completion of examinations for discovery, and before the pretrial conference is held.
>
> ... If the common issues are resolved in favour of the class, and the court allows statistical evidence to be admitted and aggregate damages to be calculated, *the Plaintiff will hire a financial expert* to craft a damage assessment plan. [emphasis added]

225 The litigation plan says nothing about the experts who might be required for the prosecution of an action of this kind or whether the plaintiff and counsel have made any investigation of the necessary expert evidence. It says nothing about the manner in which damages will be proven or assessed. It says nothing to establish that damages could be assessed on an aggregate basis. It says nothing about what individual issues will remain after the common issues are resolved and how those individual issues will be dealt with: see *Dumoulin* at para. 48.

226 Neither the litigation plan nor the affidavit evidence say anything about the experience, capability or resources available to plaintiff's counsel. I am satisfied that plaintiff's counsel has had experience with class actions and complex commercial litigation. There is, however, no indication of the number of lawyers in the firm, their years of call, their litigation experience in general or their class action experience in particular. Nor is there any evidence concerning the size of the firm, or the resources that are available to counsel in terms of administrative personnel and associates.

227 In a nutshell, there is nothing to answer the kind of questions that I must ask, to determine whether the counsel selected by Mr. Singer has the capability to undertake the prosecution of these two actions.

228 Counsel for the defendants have pointed to certain deficiencies in the presentation of the evidence in this case, and to certain admissions made on the cross-examination of Mr. Karp and Mr. Singer, that they say demonstrate the unsuitability of Mr. Singer to act as plaintiff and of his counsel for the role of class counsel. I must say that the statement of claim is this action looks as if it has been borrowed from a U.S. pleading without adequate research of the Canadian regulatory regime. The affidavit of Mr. Karp is clearly an inappropriate attempt to introduce opinion evidence through an unqualified witness. The plaintiff's motion records did not even include the statements of claim. These circumstances make me question whether adequate effort and investigation has been made in the preparation of these two actions which seek to represent millions of consumers.

229 Suffice to say that the plaintiff has not discharged the burden of showing that the requirements of s. 5(1)(e) of the *C.P.A.* have been met in this case. In a case in which the other requirements were clearly established, I might give leave to add an additional plaintiff or to file additional evidence or both. In the circumstances of this case, it is neither necessary nor appropriate to do so.

III. Conclusion

230 In summary, these motions for certification fail on many levels. The plaintiff pleads causes of action that are not available to him and fails to plead or improperly pleads causes of action that could be available in an individual action but would be unsuitable for certification in a class action. There is no evidence of an identifiable class sharing the plaintiff's expressed interest in an issue that appears to have been conceived by lawyers. There is a lack of connection between the common issues and the causes of action pleaded and there is no basis in fact for these issues. If an issue does exist, it is a narrow and technical one, best addressed by the existing regulatory regime.

231 The certification of these actions would not serve any of the goals of the *C.P.A.* It would not provide access to justice because there is no class of people who have suffered damages and are looking for justice. Far from promoting judicial economy, it would saddle the court with two massive class actions that have been cobbled together with an insufficient legal and evidentiary foundation. It would not result in behaviour modification because there is a sophisticated and scientifically-supported regulatory system that serves that very purpose. In my view, the public will be rightly cynical, and the administration of justice will be brought into disrepute, if the class action process is used to prosecute theoretical and insubstantial wrongs, creating massive and enormously expensive litigation, but not redressing real injuries suffered by real people.

232 The motions are therefore dismissed. If the costs cannot be resolved, written submissions, not more than five pages in length (exclusive of any costs outline or supporting data) may be made to me. The defendants' submissions shall be delivered within fifteen days and the plaintiff shall have fifteen days to respond. The defendants may deliver brief reply submissions within ten days thereafter.

G.R. STRATHY J.

* * * * *

Appendix: Proposed Common Issues

1) Do any of the following statements on the packaging and/or containers of Defendant's Coppertone product line discussed in the Amended Statement of Claim, contain false and misleading information as to the effectiveness and quality of the product?

    c) The product provides (x) times your skins [natural] protection from [harmful effects of] UVA and UVB rays.
    d) The product provides (x) times your skins [natural] protection from [harmful effects of] the sun.
    e) The product provides (x) times your skins [natural] protection from [harmful effects of] the sun's rays".
    f) SPF juxtaposed with UVA/UVB;
    g) The product is "waterproof";
    h) The product is "sweatproof";
    i) The products protect from the "sun" (not specifying that the products protect from sunburn);

2) If so, was and does Schering-Plough continue to be aware of these false and misleading statements? If not, should Schering-Plough have been aware of such misrepresentations?
3) Was the true effectiveness of the product and the nature of the misleading representations made aware to the consumer by Schering-Plough prior to or at the time of sale of the products?
4) Does Schering-Ploughs's [sic] false and misleading statements and labeling constitute a misrepresentation in violation of:

a) Common law;
b) Contract;
c) Statute?

5) Did Schering-Plough at all material times owe a duty of care to the Plaintiff and Class Members to:

a) Ensure that the products were fit for their intended purpose;
b) Conduct adequate testing prior to sale to ensure that the products were of merchantable quality and conformed with the representations made on the packages and containers; and
c) Manufacture, package, market and sell the products in such a manner that their effectiveness and quality was accurately and truthfully represented to the consumer?

6) If so, did the Defendant breach its duty of care by:

a) Manufacturing, marketing and selling the products in such a manner that their true effectiveness and quality was not accurately and truthfully represented to the consumer;
b) Failing to ensure that the products were fit for their intended purpose and of merchantable quality;
c) Failing to conduct appropriate testing to determine whether the products were as effective and of the same quality as marketed and warranted;
d) Manufacturing, marketing and selling products that Schering-Plough knew or ought to have known were of a lesser effectiveness or quality than suggested to the consumer which would ultimately result in damage and/or injury to the plaintiff and Class Members;
e) Failing to disclose the true effectiveness and quality of the products; and
f) Failing to recall the products from the Canadian market immediately upon learning of the lesser effectiveness and quality of the product line than represented to the public?

7) If the products were not as effective and/or of the quality represented to the consumer, were the Coppertone Products not worth the amount paid by Plaintiff and Class Members?
8) What was the true value of the Coppertone Products?
9) If the value of the products was less than what Plaintiff and Class Members paid for, did Schering-Plough receive profits unjustly at the expense of the Plaintiff and Class Members?
10) Can it be established that under Section 52 of the *Competition Act* that the Defendant made materially false and misleading representations to the public which stated a level of performance of their products which was untrue and/or failed to disclose to the Class the true effectiveness and quality of the products?
11) Are the sales of the Defendant's Coppertone sun-protection products to Class Members "consumer transactions" and/or "consumer agreements" as defined by section 1 of the *Consumer Protection Act* 2002, c. 30, Sched. A, as amended?
12) Are the solicitation and promotions by the Defendant of its Coppertone Products to Class Members, "consumer transactions" and/or "consumer agreements" as defined by section 1 of the *Consumer Protection Act* 2002, c. 30, Sched. A, as amended?
13) With respect to the sales of the Defendant's Coppertone Products to Class Members, is the Defendant a "supplier" as defined in section 1 of the *Consumer Protection Act* 2002, c. 30, Sched. A, as amended?
14) Are the class members "consumers" as defined under section 1 of the *Consumer Protection Act* 2002, c. 30, Sched. A, as amended?
15) Did Schering-Plough engage in deceptive acts or practices in the solicitation, offer, marketing and sale of its sun-protection products contrary to the *Consumer Protection Act* 2002, c. 30, Sched. A?
16) If yes, does that cause damages to the purchasers of Defendant's Coppertone product line:

a) If so was such damage caused intentionally?
b) If not was it negligent?

17) Was Schering-Plough unjustly enriched by the excess in sale price over fair-market value?

    a) Was there an enrichment based on the price of the products?
    b) Was there a corresponding deprivation of the purchaser?
    c) Is there a juristic reason for the enrichment?

18) If so, are Plaintiffs and Class Members entitled to cancellation of contract under section 37, contract damages, rescission and/or disgorgement of profits under section 18 of the *Consumer Protection Act*?

19) Alternatively, are Plaintiffs and Class Members entitled to full refund of the amount paid for such products under section 98(3) of the *Consumer Protection Act* as a result of Defendants' actions?
20) How should we calculate the damages?
21) Can the damages be calculated on an unjust enrichment/restitution basis?

    a) Can the damages be calculated on an aggregate basis under section 24 of the *CPA*?

    i) How?

22) Can the damages be calculated on an individual basis?

    a) Is it practical and or cost effective to calculate the damages on an individual basis?

23) If the Defendant is found to have engaged in deceptive practices contrary to the *Consumer Protection Act* 2002, c. 30, Sched. A, should the court order an injunction against Schering-Plough prohibiting them from manufacturing, marketing and selling their Coppertone sun-protection products to the public until proper labeling and marketing has been implemented?
24) If the Defendant is found to have engaged in deceptive practices contrary to the *Consumer Protection Act* 2002, c. 30, Sched. A, should the Defendant be required to advertise the Court's judgment, declaration, order or injunction and, if so, on what terms and conditions?
25) Is the Schering-Plough liable to its customers for punitive damages?
26) Did Schering-Plough violate the *Food and Drugs Act*?

    a) Did Schering-Plough's advertising and/or marketing create an erroneous impression as to the quality and effectiveness of its product?

Case Name:

R & G Draper Farms (Keswick) Ltd. v. 1758691 Ontario Inc. (c.o.b. ATV Farms)

Between
R & G Draper Farms (Keswick) Ltd., Applicant, and
1758691 Ontario Inc. c.o.b. ATV Farms, Respondent

[2013] O.J. No. 4330

2013 ONSC 5873

Court File No. CV-12-449220

Ontario Superior Court of Justice

W.M. Matheson J.

Heard: September 13, 2013.
Judgment: September 26, 2013.

(75 paras.)

Counsel:

Morris Manning, Q.C. and Theresa R. Simone, for the Applicant.

J.F. Lalonde, for the Respondent.

---

1 **W.M. MATHESON J.**:-- In this Application, the Applicant ("Draper Farms") seeks an order declaring that the arbitral award made by Robert E. Goldman dated December 20, 2011 (the "Award") is invalid and seeks an order setting it aside. The Award arose from a dispute between Draper Farms and the Respondent ("ATV Farms") regarding the purchase and sale of carrots and 2" carrot chunks. Draper Farms alleges a number of jurisdictional and fairness deficiencies in the arbitration process.

2 Draper Farms is located is Keswick, Ontario. ATV Farms is located in Bradford, Ontario. Both Draper Farms and ATV Farms were members of the Fruit and Vegetable Dispute Resolution Corporation ("DRC") and the arbitration proceeded under its Rules.

3 Draper Farms has also brought a motion to strike out certain evidence proffered by witnesses for ATV Farms on this Application. That motion was heard together with this Application.

Transactions Giving Rise to Arbitration

4 In 2011, Draper Farms ordered ten shipments of 2" carrot chunks from ATV Farms. Draper Farms planned to sell them to its customer in Salinas, California. Ultimately, Draper Farms tried to cancel the last two orders, and there were disputes between ATV Farms and Draper Farms about the price and quality of a number of the other shipments. ATV Farms, having not been paid for the shipments, invoked the DRC dispute resolution mechanism described below.

5 ATV Farms had purchased the whole carrots from which it produced the carrot chunks from Draper Farms. Again, there was a dispute between the parties about price. As a result, Draper Farms counterclaimed against ATV Farms in the DRC dispute resolution process, seeking set off of the amount it said it was due for its carrots.

DRC

6 The DRC is an industry-run organization with its head office in Ottawa, Ontario. Its members include, among others, farmers and fresh food processors. It describes itself as arising from NAFTA:

> BY-LAW NO. 1
>
> Preamble. The North American Free Trade Agreement (NAFTA) Advisory Committee on Commercial Dispute Resolution Regarding Agricultural Goods, a tri-national committee composed of government and industry representatives from Mexico, Canada and the United States appointed pursuant to [s]707 of NAFTA, unanimously recommended that an industry-driven program be created to deal with commercial disputes arising in cross-border trade between the three NAFTA countries. In accord with that recommendation, and based upon extensive consultation with appropriate industry and government representatives from the three (3) NAFTA countries, this Corporation is hereby organized.

7 Membership in the DRC is voluntary. ATV Farms applied and became a member in 2008. Draper Farms applied and became a member in 2009. The DRC requires that its members adhere to its mediation and arbitration procedures.

8 As provided for in Article 9 of the DRC Rules, the application form requires applicants to agree as follows:

> I understand and agree that if I and/or the organization I represent are accepted as a member or members of the [DRC], I and/or the organization I represent shall be bound by the Articles of Incorporation, Bylaws, Rules, Trading Standards, Transportation Standards and Mediation and Arbitration Rules of [DRC]. *I specifically agree that all disputes between me and/or my organization and any other member or members of the DRC shall be resolved exclusively pursuant to the Mediation and Arbitration Rules of the DRC.* [emphasis added]

9 The Rules also provide as follows:

> Article 2(3) Each regular member agrees that any dispute, controversy or claim with another member, ... arising out of or in connection with any transaction involving fresh fruits and vegetables as defined in the By-Laws of the [DRC] shall be resolved exclusively in accordance with these Rules ...

10 The DRC administers a six-stage dispute resolution process, including, in its final two stages, formal mediation and arbitration.

Dispute Resolution Regarding ATV Farms' Claim

11 By Notice of Dispute dated June 10, 2011, ATV Farms invoked the DRC mediation process, seeking $68,187.42 in relation to allegedly unpaid invoices rendered to Draper Farms for the eight shipments of 2" carrot chunks. Draper Farms responded in accordance with the Rules, including a counterclaim for 968 boxes of whole carrots it sold to ATV Farms, for which Draper Farms claimed it had not been paid. Mediation proceeded but was unsuccessful.

12 At the conclusion of the mediation process, the DRC sent the parties a notice about next steps. It emphasized the confidentiality of the mediation process, stating as follows:

> Please also be advised that the informal file currently in our possession will be "sealed". When each of you participates in selecting the arbitrator, that arbitrator will not have access to the paperwork, conversations, or any background associated with this case prior to the filing of the Notice of Arbitration & Statement of Claim. You will therefore each need to document your case completely and provide a full explanation of your position in the matter.

13 Article 2 of the DRC Rules provides that all discussion between the parties in the informal consultation process shall be kept confidential and may not be used by the parties in subsequent proceedings. Article 25 further provides that all records, reports or other documents received by the mediator while serving in that capacity shall be confidential.

14 ATV Farms proceeded to the next step in the DRC alternative dispute resolution process. In August of 2011, it delivered a Notice of Arbitration and Statement of Claim.

15 Although both parties were entitled to counsel, neither party was represented by counsel in the arbitration.

16 In its Notice of Arbitration and Statement of Claim, ATV Farms appended a number of documents, including documents prepared by Draper Farms for use in the mediation. ATV Farms included, for example, a document that Draper Farms submitted to the mediator setting out its position on the merits of the ATV Farms claim. ATV Farms also included material from the mediation in its Defence to the Draper Farms counterclaim.

17 Draper Farms, after receipt of these materials, did not ask that the mediation documents be removed. The DRC, which also received the ATV Farms materials, did not ask that the mediation documents be removed. Thus, they ultimately went to the Arbitrator and it appears from the Award that the Arbitrator took them into account.

18 As part of the arbitration process, the DRC encouraged the parties to agree on a place of arbitration, which they did. The arbitration was conducted on the ATV Farms premises in Bradford Ontario. As well, the DRC provided a list of potential candidates for the arbitrator, although the

parties were not limited to selecting from the list. The DRC provided a brief summary of each potential arbitrator's background. Mr. Goldman was shown as being from Florida and having a speciality in agricultural law.

19 In the absence of an agreement between the parties, the DRC Rules provided that the parties rank the listed arbitrators, and the DRC would select an arbitrator. Mr. Goldman was selected. He had been ranked 2nd by Draper Farms and 4th by ATV Farms. The parties also had an opportunity to challenge the DRC's selection of Mr. Goldman after receiving notice of it. The selection of Mr. Goldman was not challenged by either Draper Farms or ATV Farms.

20 The arbitration proceeded at the premises of ATV Farms. During the arbitration, the Arbitrator requested ATV Farms obtain and produce additional documents and a witness, both of which were available on the premises. Draper Farms now challenges this and other aspects of the arbitrator process as outside the Rules.

Arbitration Award and Challenge by Draper Farms

21 By decision dated December 20, 2011, the Arbitrator awarded ATV Farms damages in the amount of its claim of $68,187.24 (using the price of $0.21/pound claimed by ATV Farms), less $9,680 for the Draper Farms counterclaim (rather than the $110,944 it claimed).

22 On December 21, 2011, the DRC notified the parties that payment of the Award was due within 30 days of the date of the Award (unless extended by the Arbitrator). It also noted that the DRC Rules did not provide for an appeal process, but did give the arbitrator a very limited ability to amend or correct a decision based on clerical, arithmetic or typographical errors, or accidental slips or mistakes. The DRC Notice was silent on the subject of the application of arbitration legislation.

23 The DRC Rules make no mention of any arbitration legislation, or which legislation may apply. In this Application, there is a dispute between the parties on that key question. ATV Farms says the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Arbitration Act*") applies, and Draper Farms says the *International Commercial Arbitration Act,* R.S.O. 1990, c. I.9 ("ICAA") applies.

24 The President of the DRC, Mr. Webber, who provided evidence on this Application, attested that when the Rules were drafted the DRC took both Acts into consideration and decided to draft the Rules such that either statute would apply depending on the specific circumstances of each dispute. This information was not included either in the Rules or in the many detailed DRC communications with the parties explaining each step in the arbitration process. This was profoundly unhelpful in this case given the dispute that has now arisen.

25 By Notice signed by Mr. Webber dated January 19, 2012, the DRC notified Draper Farms that if the Award was not paid by the next day, Draper Farms' membership would automatically terminate under the Rules, and the termination of membership would be made public. Mr. Webber wrote to Draper Farms again on January 23, 2012 to inform it that those steps would be taken, and they were.

26 Mr. Webber also assisted ATV Farms by providing evidence for an application to enforce the Award, commenced on March 1, 2012 in Ottawa.[1]

27 Draper Farms proceeded to challenge the Award by commencing this Application on March 2, 2012, within the three month time period provided under the ICAA. However, the *Arbitration Act* requires that any court challenge permitted under that *Act* be brought within 30 days of receipt of the Award, i.e., January 20, 2012. ATV Farms therefore contends that Draper Farms is out of time.

28 Very briefly, Draper Farms challenges the Award on these grounds:

(1) that carrots do not fall within the definition of "fresh fruits and vegetables" in the DRC Rules and therefore the DRC process did not apply and the Arbitrator did not have jurisdiction;
(2) that the Arbitrator lost jurisdiction due to a failure to apply mandatory minimum prices under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9 and related *Vegetables for Processing-Marketing*, R.R.O. 1990, Reg. 440;
(3) that the Arbitrator did not have the necessary expertise, as is shown by his failure to invoke the Farm Products Marketing legislation and regulations;
(4) that the Arbitrator breached the Rules by relying on documents from the Mediation;
(5) that it was unfair in hindsight for the arbitration to be held at ATV Farms even though Draper Farms agreed to the choice of location at the time;
(6) that the Arbitrator failed to keep control of the arbitration and wrongly called for documents and another witness during the arbitration.

29 With respect to all the matters listed above, Draper Farms did not raise the issue, or object, at the time. Thus, in addition to other arguments, ATV Farms relies on waiver.

30 Draper Farms also complains that there was an unfounded claim for privilege over parts of certain emails produced on Mr. Webber's cross-examination on this Application. These emails were written in 2013 and related to a challenge to Mr. Webber's impartiality as an expert witness. Given my ruling on the motion to strike, below, this complaint is no longer relevant.

Motion to Strike Out Portions of Affidavits

31 Draper Farms moves to strike out certain affidavits, or, alternatively, asks that they be given no weight. At issue are affidavits of Fred Webber (President and CEO of the DRC), Crystal Medeiros (Office Manager of ATV Farms) and Susan Charron (Law Clerk). The challenge is on a number of different bases, including that these affiants put forward speculation, argument, unqualified opinion evidence, information without foundation or source, and generally frivolous, vexatious and scandalous statements.

32 With respect to Mr. Webber in particular, there is also a challenge to his ability to provide expert evidence. This arises because in one of Mr. Webber's supplementary affidavits he provides opinion evidence together with a detailed account of his background and experience, and a signed expert undertaking in the form required under Rule 53 of the *Rules of Civil Procedure*.

33 ATV Farms' position on the motion was that Mr. Webber signed the Rule 53 undertaking because as a third party, Mr. Webber understood that he had to give evidence that was fair, objective and impartial. ATV Farms' counsel confirmed at the hearing of the Application that Mr Webber is not being advanced at as expert.

34 ATV Farms disputed any improper evidence in any of the affidavits, and alternatively indicated that any minor defects could be dealt with by the relieving provisions in the *Rules of Civil Procedure.*

35 There is no doubt that these affidavits contain paragraphs that fail to observe the requirements for affidavit evidence on an application. The affidavits contain a significant amount of argument, which is both inappropriate and unhelpful, unfounded opinion evidence, and general observations and conclusions without foundation or identification of the source of the information.

36 With regard to Mr. Webber's opinion evidence, his October 11, 2012 affidavit does reasonably leave the reader with the impression that he is being advanced as an expert witness under Rule 53. Draper Farms was understandably concerned at the suggestion that Mr. Webber was being advanced as an impartial expert witness given his position at the DRC and direct involvement in this matter. Although it has now been clarified that he is not being advanced as an expert, his evidence includes opinion evidence.

37 I, therefore, indicated at the hearing that I was of the view that Draper Farms had raised valid objections to these affidavits. I indicated that I was not inclined to strike out the affidavits altogether, since they are an amalgam of proper evidence and other material.

38 The motion is therefore granted in respect of the alternative relief sought -- that the improper evidence be given no weight.

Issues

39 The issues on this Application are as follows:

> (i) whether the *Arbitration Act* or the ICAA applies;
> (ii) if the *Arbitration Act* applies, whether the court has jurisdiction to grant an extension of time, and if so whether an extension be granted; and,
> (iii) if the ICAA applies or an extension of time is granted under the *Arbitration Act*, whether the Award should be declared invalid and set aside.

Applicable Arbitration Legislation

40 Draper Farms has proceeded under the ICCA, the applicability of which is now disputed. ATV Farms submits that the *Arbitration Act* applies and Draper Farms is, therefore, out of time.

41 The *Arbitration Act* and the ICAA are mutually exclusive. Section 2 of the *Arbitration Act* provides as follows:

> 2(1) This *Act* applies to an arbitration conducted under an arbitration agreement unless ...
>
> (b) the [ICAA] applies to the arbitration.

42 The ICAA adopts the Uncitral Model Law, set out in the Schedule to the ICAA. Article 1 of the Model Law provides that it applies to international commercial arbitration. Article 1(3) provides that an arbitration is international if:

> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
> (b) one of the following places is situated outside the State in which the parties have their place of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement,

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

43 There is no question that the parties both have their places of business in Ontario, and have not expressly agreed that the subject-matter of the arbitration relates to more than one country. Nor was the place of arbitration outside Ontario. Only Article 1(3)(b)(ii) is of potential relevance to invoke the jurisdiction of the ICAA.

44 Here, the commercial relationship at issue was between two Ontario businesses. Draper Farms sold carrots to ATV Farms to be made into carrot chunks, and bought carrot chunks from ATV Farms. Draper Farms bought the carrot chunks for sale to a California purchaser; however, the California company was the customer of Draper Farms, not ATV Farms. The California customer was not a party to the purchase and sale agreements that were the subject of the Award. Nor did ATV Farms ship directly to the California company; Draper Farms took delivery of the carrot chunks at issue.

45 While the involvement of a California company forms part of the backdrop to the transactions in dispute in the arbitration, Ontario remains the place where the obligations of the commercial relationship between ATV Farms and Draper Farms were to be performed. Ontario also remains the place with which the subject-matter of the dispute is most closely connected. I therefore conclude that in this case the ICAA does not apply.

46 Draper Farms relies upon the decision of the Divisional Court in *Freshway Specialty Foods Inc. v. Fruit and Vegetable Dispute Resolution Corp.* (2006), 209 O.A.C. 385 ("*Freshway*") in support of its position. In that case, Freshway was located in British Columbia and had a dispute with an Arizona company. This statement appears in the judgment of the Divisional Court, at para. 3:

> The [ICAA] applies to arbitration administered by DRC. Freshway was a party to a DRC supervised ICAA arbitration. The other party was MAP, located in Arizona, U.S.A.

47 There is no doubt that the ICAA applied on the facts of the *Freshway* case; however, the Court did not find that the ICAA applies exclusively to all arbitrations under the DRC. In *Freshway*, there was no dispute about which arbitration legislation applied. I, therefore, do not consider the above statement as determinative of the issue in this Application.

48 Draper Farms also points to the DRC's own description of its inception, arising from NAFTA, and the international nature of its mandate. There is no doubt that there is an international aspect to the inception and mandate of the DRC. However, the ICAA definition of "international arbitration" does not turn on the reasons for or mandate of the organization administering the arbitration process. It focuses on the location of the place of business of the parties, the location of the actual arbitration, the place where the obligations are performed and the place the subject matter of the arbitration is connected with. Here, all of those locations/places are Ontario.

49 Turning to the *Arbitration Act*, Draper Farms advances one further argument that it does not apply. Specifically, it argues that because that *Act* applies only to an arbitration conducted under an "arbitration agreement" (s. 2, above) it has no application to the Award. Draper Farms argues that there must be a specific agreement between the parties to arbitrate, and there was no such agreement here. Further, Draper Farms argues that its participation in the ATV-initiated mediation/arbitration was compulsory, not voluntary. Once ATV Farms initiated the process, Draper Farms had no choice but to participate under the DRC Rules.

50 The modern approach to statutory interpretation requires courts to interpret a legislative provision in its total context, in keeping with the legislative text and the legislative purpose. The term "arbitration agreement" is defined in the Act as follows:

> s. 1 "arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

51 Also relevant is s. 5 (1) of the *Act*, which provides as follows:

> An arbitration agreement may be an independent agreement or part of another agreement.

52 These provisions do not require a specific agreement between the parties to arbitrate a single dispute. Further, the legislative purpose supports a broad interpretation of the term. It would be unduly narrow to construe the *Act* to be limited to specific individual agreements.

53 To join, all members of the DRC must agree as follows: "I specifically agree that all disputes between me and/or my organization add any other member of members of the DRC shall be resolved exclusively pursuant to the Mediation and Arbitration Rules of the DRC." This satisfies the requirement of s. 2 of the *Act* that the arbitration be conducted under an arbitration agreement.

54 I, therefore, conclude that the *Arbitration Act* applies.

Extension of Time

55 The *Arbitration Act* provides that an award binds the parties unless it is set aside or varied under s. 45 (appeals on questions of law) or s. 46 (setting aside an award on specified grounds). Section 47 imposes a 30-day time period within which these challenges must be brought. Draper Farms brought this Application within the three month period provided for in the ICAA, but outside the 30-day period under the *Arbitration Act*. It therefore needs an extension of time.

56 I am satisfied that Draper Farms intended to challenge the Award in a timely way, and that there is no prejudice to ATV Farms in extending the time. I would grant an extension of time if I had the jurisdiction to do so.

57 The *Arbitration Act* contains no provision authorizing a court to extend the 30-day time period. However, it does authorize the extension of another time period. Section 39 gives the court authority to extend the time within which the arbitral tribunal is required to make an award, even if the time has expired.

58 The question of whether or not the court has authority to extend the 30-day time period prescribed by s. 47 of the *Act* was addressed in *Jean Estate v. Wires Jolley LLP* (2010), 2010 ONSC

4835. In that case, Justice Grace concluded that he did not have authority to extend the time period for the following reasons (at para. 55):

> (i) the statute has created its own time frame within which an appeal is to be commenced. The time limits set forth in the Rules of Civil Procedure do not apply;
> (ii) since jurisdiction to extend time in one situation is expressly given in section 39, I am of the view the power to extend a time limit in the *Arbitration Act, 1991*, does not exist unless it is specifically conferred;
> (iii) section 47 of the *Arbitration Act, 1991* contains no such statement.

59 Justice Grace concluded that this is not a situation where the Legislature has left a "functional gap or vacuum" that the court can fill using its inherent jurisdiction.

60 I find that the decision in *Jean Estate* applies here with equal force. I do not have jurisdiction to extend the 30-day time period. This Application is therefore statute-barred.

Merits of Application

61 If I am wrong on the issue of an extension of time, I would nonetheless dismiss the Application on the merits.

62 As set out in s. 6 of the *Arbitration Act*, no court shall intervene in a matter governed by the *Act* except for the following purposes, in accordance with the *Act*:

> 1. To assist the conducting of arbitrations.
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
> 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
> 4. To enforce awards.

63 Only purposes 2 and 3 are of potential relevance here.

64 Section 45 of the *Act* provides, in some circumstances, for appeals on questions of law or mixed fact and law. Section 46 provides that an award may be set aside on various listed grounds. Those grounds include exceeding the scope of the arbitration agreement and failure to treat an applicant fairly and equally. Assuming this Application was proceeding under this *Act*, I do not find legal error or unfair or unequal treatment that would justify setting aside the Award.

65 Beginning with the issue of whether the DRC has jurisdiction over carrots, I find that carrots are caught within the definition of "fresh fruits and vegetables" in the DRC Rules.

66 Article 5 of the DRC By-laws defines fresh fruits and vegetables as follows:

> The definition of fresh fruits and vegetables includes all fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, *but excludes any fresh fruits and vegetable that is frozen or been planted as seed*. [emphasis added]

67 Essentially, Draper Farms argues that the exclusion for vegetables grown "as seed" should be read as excluding all vegetables grown "from seed" (my emphasis). This would not only exclude carrots but numerous other vegetables. I accept the position that the exclusion applies only to vegetables that are planted as seed, such as seed potatoes. This is supported by other DRC documents that expressly list carrots, suggesting that carrots were intended to be within its mandate.

68 By becoming a member of the DRC, Draper Farms agreed that any dispute, controversy or claim with another member arising out of or in connection with any transaction involving fresh fruits and vegetables as defined in the By-Laws would be resolved exclusively under the DRC Rules. The dispute with ATV Farms falls squarely within this agreement to arbitrate. I, therefore, find that there was jurisdiction.

69 With respect to the argument that the Arbitrator lost jurisdiction due to a failure to apply mandatory minimum prices under the *Farm Products Marketing Act* and related *Vegetables for Processing - Marketing* Regulation, I find that ATV Farms is not a "processor" within the meaning of the Regulation. Under the Regulation, "processor" means a person engaged in the business of processing vegetables. The definition of "processing" in the Regulation is very specific, providing that "processing" means,

> (a) canning, dehydrating, drying, freezing, pickling or processing with sugar or sulphur dioxide or any other chemical or by heat, and combining or mixing a vegetable with one or more other vegetables,
> (b) entering into a contract for the purchase of vegetables for the purpose of performing on the vegetables any of the operations mentioned in clause (a), or
> (c) entering into a contract for the purpose of having any of the operations mentioned in clause (a) performed on vegetables.

70 It is not alleged that ATV Farms entered into a contract as contemplated by subparagraphs (b) and (c). I am satisfied on the evidence of Mr. Agresti of ATV Farms that its production of 2" carrot chunks from whole carrots does not fall within subparagraph (a). I, therefore, conclude that the Regulation does not apply.

71 The complaint about Mr. Goldman's expertise was based upon his failure to apply the above regime. Given my finding on the inapplicability of the Regulation, there is no foundation for this complaint. Further, Article 65 of the DRC Rules requires that objections to an arbitrator be made within certain time lines and Draper Farms did not object to Mr. Goldman's expertise in a timely way. It had an opportunity to exclude Mr. Goldman at the outset and instead ranked him its second choice of all the names put forward by the DRC. It also did not object to the DRC's selection of Mr. Goldman, though it had an opportunity to do so.

72 With respect to the use of documents from the Mediation in the arbitration process, it does appear that the Rules were breached by ATV Farms. However, the breach has been waived. Draper Farms received the ATV Farms pleadings as part of the formal pre-arbitration pleadings of ATV Farms. The pleadings appended Draper Farms mediation documents. Draper Farms was obviously in the position to recognize its own mediation documents. Further, Draper Farms had just received a notice from the DRC reminding the parties about confidentiality regarding the mediation process. Draper Farms must have known of the breach and was well placed to object at that early stage if it wished to do so. It did not object. The DRC Rules provide that any party that knows of a failure to comply with the Rules and proceeds without promptly stating its objection in writing shall be deemed to have waived the objection. I conclude that this objection was waived.

73 On the location of the arbitration, Draper Farms specifically agreed to it. On the alleged failure to keep control of the arbitration as evidenced by requesting documents and another witness during the arbitration, Article 76(3) of the DRC Rules provides that at any time in the proceedings, the arbitrator may order parties to produce other documents, or other evidence he deems necessary

or appropriate. The Arbitrator was, therefore, within his authority to request documents and another witness during the arbitration. While it may appear to Draper Farms, in hindsight, that it would have been in a better position if that evidence was not so conveniently available, it does not justify setting aside the Award.

74 In conclusion, I find that there was jurisdiction and no failure to treat Draper Farms fairly and equally. I would therefore not set the Award aside.

Order and Costs

75 The Application is, therefore, dismissed. If either party seeks costs of the Application or the motion to strike it may provide brief written submissions together with a bill of costs, to be delivered to me by October 25, 2013. The responding party to a costs request shall deliver a brief written response, if any, by November 15, 2013.

W.M. MATHESON J.

cp/e/qllqs/qlrdp/qljac

1 That proceeding has since been stayed pending the determination of this Application.

Case Name:

Ferrier v. Wellington (County) Sheriff (Ferrier v. Civiero)

Between
Phyllis May Ferrier, plaintiff/applicant, and
The Sheriff of the County of Wellington, Draganjac Pressman, 398730 Ontario Limited, Mazta Holdings Limited and Peter Civiero, Defendants/respondents
And between
Phyllis May Ferrier, plaintiff/applicant, and
Her Majesty the Queen in Right of Ontario, Peter Civiero, Gino Civiero, Mazta Holdings Limited, 398730 Ontario Limited, and Draganjac Pressman, defendants/respondents

[2003] O.J. No. 4084

[2003] O.T.C. 923

46 B.L.R. (3d) 123

40 C.P.C. (5th) 344

13 R.P.R. (4th) 204

18 R.P.R. (4th) 253

126 A.C.W.S. (3d) 404

Court File Nos. 4208/03 and 4517/03

Ontario Superior Court of Justice

MacKenzie J.

Heard: July 28 and 30, 2003.
Judgment: October 8, 2003.

(96 paras.)

Counsel:

P. Fallis and W. Gullett, for the plaintiff/applicant.
G. Cohen, for the defendants/respondents Mazta Holdings Limited, 398730 Ontario Limited and Peter Civiero.
T. Barclay, for H.M.Q. in Right of Ontario.
S. Pettipiere, for defendant/respondent Draganjac Pressman.

RULINGS UPON VARIOUS MOTIONS
IN THE ABOVE ACTION AND APPLICATION

MacKENZIE J.:--

Introduction

1 By Statement of Claim issued on March 25, 2003 in Action No. 4208/03 (hereinafter the "Action"), the plaintiff claims the following relief:

> As against the defendant Mazta Holdings Limited ("Mazta")
>
> (a) an order setting aside the January 6, 2003 sale of certain real property (the Property) by the Sheriff of the County of Wellington to Mazta (the Sale) on the 6th of January, 2003;
> (b) a Certificate of Pending Litigation respecting the Property;
> (c) for declarations respecting the shareholding interests of the defendant Peter Civiero in Mazta; and
> (d) orders prohibiting further transfers of shares in Mazta without prior approval of the court and directing the president of Mazta provide full and complete shareholding records of Mazta including the names and address of each shareholder and the number and type of shares held by each shareholder;
>
> As against the Sheriff of the County of Wellington (the Sheriff):
>
> (e) an order setting aside the Sale of the Property by the Sheriff to Mazta;
> (f) for a declaration to the effect that the plaintiff was entitled in law to receive notice and time of the Sale of the Property by the Sheriff at least 30 days prior to the Sale; and
> (g) for an order declaring that the Sale made by the Sheriff without notice to the plaintiff is void and of no force or effect in law;
> (h) in the alternative, damages in the sum of $900,000.00; ...
>
> As against the defendant, 398730 Ontario Limited ("398730"):

(i) a declaration that a default judgment obtained by 398730 as plaintiff on or about the 6th of October, 2001 against the present defendant Peter Civiero and the defendant in that action, 77936 Ontario Corporation, was a fraud and that two Writs of Seizure and Sale obtained in said action, one of which was directed to the Sheriff of the County of Wellington, be declared fraudulent and void; and

(j) that the Sheriff lift and return both these Writs of Seizure and Sale for cancellation;

As against the defendant, Draganjac Pressman ("Pressman):

(k) declarations that a certain default judgment obtained by Pressman in 2000 against the defendant Peter Civiero was a fraud and that the Writ of Seizure and Sale issued by the court in 2002 in relation to such judgment was a fraud; and

(l) an order that the Sheriff return that Writ of Seizure and Sale to the issuing court for cancellation;

As against the defendant, Peter Civiero:

(m) a declaration that he is the controlling mind and shareholder of Mazta; and

(n) a declaration that any transfer by the defendant Peter Civiero of any of his shares in Mazta made on or after the 30th of September, 1993 was a fraudulent conveyance for purposes of defeating the plaintiff as a creditor of the defendant Peter Civiero;

(o) a declaration that all of the issued and outstanding shares of Mazta are owned by the defendant Peter Civiero;

(p) an order for the same relief with respect to further transfers of the shares of Mazta and for production by the president of Mazta of the same shareholder information, set out in the relief sought against Mazta, described above.

2 On March 25th, 2003, being the date of issuance of the statement of claim, a motion was made by the plaintiff without notice to all defendants other than the Sheriff for an order appointing a date, time and place for adjudicating upon matters in dispute under the Creditors Relief Act.

3 Snowie, J. granted two orders. By the first order, the plaintiff was granted leave to obtain and register a Certificate of Pending Litigation against the Property (the CPL order). By the second order,

(a) the Sheriff was directed to continue holding in trust the proceeds from the Sheriff's sale to Mazta of the Property.

(b) all issued and outstanding shares in Mazta were "frozen"; and the president of Mazta was required to produce to the plaintiff all the shareholder information in Mazta, noted above (the Injunctive Relief Order).

4 Both orders provided for the service of the orders, the statement of claim and notices of motion and motion record forthwith upon all defendants.

5 By Notice of Application 4517/03 dated July 16th, 2003 (the "Application"), the plaintiff seeks the following relief.

As against H.M.Q. in Right of Ontario ("HMQ"):

(q) a declaration that HMQ is in contempt of an order of Maloney, J. made on or about the 28th of October, 1998 ("the 1998 Order") wherein the Land Registrar for the Land Registry Office for Wellington was directed to re-abstract entries for a certain mortgage and discharge of mortgage and delete the prior "ruling off" of the entries for two such instruments that had previously been undertaken by the staff at the Land Registry Office for Wellington and that the Land Registrar for the said Land Registry Office comply with the substantive terms of the 1998 Order;

(r) declarations that

(i) a Writ of Seizure and Sale issued on the 22nd of January, 2002 and filed with the Sheriff on January 24th, 2002 is a nullity; and

(ii) that all steps taken by the Sheriff thereunder, including the Sale of the Property to Mazta on January 17th, 2003 are nullities and of no legal force and effect.

As against the other respondents:

(s) punitive damages and costs;

6 HMQ and the other named defendants who have appeared through counsel seek the dismissal of the application on various grounds, particulars of which will be referred to later in these rulings.

Background

7 The Action and Application are the latest battles in the lengthy warfare between the plaintiff/applicant and the defendant Peter Civiero. Although the materials describe the warfare in colourful and sweeping language reminiscent of Edward Gibbon's account of the assault of the barbarians on the Roman Empire, it will suffice for purposes of these rulings to give a much more abridged and clinical account of the salient facts.

Previous proceedings

8 In 1989, the plaintiff/applicant sold real property to the defendant, Peter Civiero, taking back a mortgage as part of the purchase price in the amount of $569,700.00, payable interest only, semi-annually at 10% with a 5 year term. In 1992 the defendant, Peter Civiero, defaulted in payments under the mortgage and the plaintiff/applicant on September 30th, 1993 brought an action for the amount owing under the mortgage, namely $676,404.20. After trial in March of 1996, the plaintiff obtained judgment of $547,604.33 plus costs. The trial judgment was upheld on appeal in October of 1997.

9 The plaintiff/applicant obtained and filed two writs of seizure and sale in numerous judicial districts including Wellington County. One of these writs was for the above judgment amount and the second was for $5,000.00, representing costs. The plaintiff/applicant has not received any payment on account of her judgment since 1992.

10 In October of 1998, the defendant Peter Civiero brought an application for a declaration that the plaintiff/applicant's writs of seizure and sale against the defendant, Peter Civiero, did not constitute a lien upon or an interest in lands. The plaintiff applicant brought a counter-application and obtained an order declaring that the defendant respondent, Peter Civiero, had a 25% beneficial interest in those lands (the "October 1998 Order").

11 The plaintiff/applicant then brought an application under the Partition Act to obtain the sale of the Property with a view to obtaining 25% of the sale proceeds thereof in satisfaction of her judgment.

12 The Partition Act application was dismissed on the basis that the plaintiff as an execution creditor was not a "person interested in land" and was not entitled to immediate possession of an estate therein. The ruling at first instance was affirmed by the Divisional Court and the Court of Appeal.

13 In or about February 2003, the plaintiff applicant was informed by her former solicitors that they had received notification from the Sheriff respecting the proposed distribution of the proceeds of the Sheriff's sale of the Property that was completed on January 6th, 2003. The proposed distribution showed four writs of seizure and sale against the defendant respondent Peter Civiero, two of these registered by the plaintiff/applicant and two others registered by 398730 and by Pressman. The first of the last two writs was for $4,056,459.00 and the second of them was for $82,491.50.

14 The plaintiff/applicant objected to the proposed distribution of the proceeds of the sale and has brought the Action and the Application for the relief respectively described at the beginning of these rulings.

15 The parties now bring various motions in both the Action and the Application.

In the Action

16 The plaintiff moves for orders;

(a) granting leave to add H.M.Q., Marta Elena Civiero and 1068161 Ontario Limited as defendants; and deleting the Sheriff from the title of proceeding; ...
(b) continuing the Certificate of Pending Litigation and the Injunctive Relief granted in the Injunctive Relief Order;
(c) expanding the "freezing" of shares in Mazta by restraining the issue of any new shares or approving the redemption of any outstanding shares;
(d) for production by the Sheriff of his files relating to four writs of seizure and sale in his office.

17 The defendants, Peter Civiero, Mazta, and 398730 move for orders;

(e) setting aside the C.P.L. order and discharging the Certificate of Pending Litigation; and
(f) setting aside the Injunctive Relief Order.

In the Application:

18 H.M.Q. moves for orders;

(g) Striking the affidavit of Ernest J. McMillan sworn July 10, 2003 (the McMillan Affidavit), proferred as expert evidence by the plaintiff/applicant; and
(h) dismissing the Application against H.M.Q.:

19 The respondents, Peter Civiero, Mazta, 398730 and Pressman seek an order

(i) dismissing the Application as against all of them.

20 I shall deal first with the purely procedural motions.

The Motion for production of the Sheriff's files.

21 When the motions in the Action and in the Application were called for hearing on the morning of July 28th, 2003, counsel for the plaintiff/applicant moved for production by the Sheriff of his files relating to the four writs of seizure and sale previously described. Although the plaintiff/applicant failed to file a notice of motion in form prescribed in Rule 37.01, I nonetheless heard the motion.

22 The gist of the plaintiff/applicant's motion was that the production of those files was necessary to enable the plaintiff/applicant to properly present her case to the court, since H.M.Q. through her responsible officers had denied the plaintiff/applicant access to the files. In response, counsel for H.M.Q. submitted that the files in question were not matters of public record comparable to documents filed in court proceedings. Counsel points out that the files are subject to the access to information legislative regime and that such regime requires a formal request in writing for production of any documents covered by the regime. Counsel indicates that this requirement was not complied with by the plaintiff/applicant and that accordingly, there is no basis for bringing her motion.

23 I dismissed the motion on the grounds that in the absence of her compliance with the request procedure under the access to information legislative scheme, the plaintiff/applicant had no status to mount this motion.

24 Notwithstanding this dismissal, the plaintiff/applicant remounted the application by notice of motion dated July 29th, 2003, returnable on the morning of July 30th, 2003 being the second hearing date for all the motions in both proceedings. As there was no substantive difference in the submissions or arguments on the point, this formal motion under Rule 37.01 was disposed of in the same way as the informal motion heard July 28th, 2003.

The motion to strike the McMillan affidavit that has been filed in support of the Application.

25 Mr. McMillan is a solicitor and a partner of counsel for the plaintiff/applicant. The grounds for the motion to strike are:

(a) the McMillan affidavit contains, in addition to legal argument, conclusions of law that are solely within the province of the court; and
(b) the affiant, being a partner in the law firm representing the plaintiff/applicant, is in a conflict of interest and is thereby not in a position to provide independent and objective testimony on any subject properly receivable as opinion evidence.

26 In response, the plaintiff/applicant submits that the affiant has credentials to opine on the operations of the land registry system which reflect the state of title to real property in Ontario and

that the statements in the affidavit are not legal argument but rather opinions on conveyancing matters respecting the significance of registered and omitted instruments in the land registry system.

27 The jurisdiction of the court to deal with the form and content of affidavits and to delete in whole or in part affidavits is set out in Rules 4.06(2) and 25.11, respectively.

28 Much of the language in the McMillan affidavit used to convey allegedly admissible opinion evidence is combative in tone. Discounting such tone, reading the affidavit as a whole leads to the conclusion that it is rife with conclusory statements and findings that are not properly the subject of expert opinion evidence. Counsel for H.M.Q. in her factum on this part of the motion has made a thorough analysis of the McMillan affidavit, setting out examples of legal argument and opinion and conclusory findings on legal issues arising in the dispute: see pages 5 and 6 of the H.M.Q. Factum. The most egregious of these is found in paragraphs 16 and 18 as follows:

> 16. I am of the opinion that such deletion and removal of record of Registered/Deposited instruments from the title Registers has happened without any apparent notice to all of the parties whose interest in the Lands is effected by such removal and deletion is so serious and has so many legal ramifications that, unless this Court intervenes to right those wrongs and protect the electronic registration system, continuing confidence in this new "Polaris" Land Titles System cannot expected to be sustained. [My emphasis]
> 18. In my opinion the erroneous and patent deletion of those instruments affects the rights of the Applicant and others to a continuing interest in the Lands and "serves only to bring disrepute to the Electronic Land Registration System, and can only erode the confidence of the integrity of that Polaris Registration System therein by all of its users in the Province of Ontario". [My emphasis]

29 However, if the subject matter of the McMillan affidavit was properly characterized as opinion evidence, the affiant fails to meet the impartiality and objectivity requirements of the credentials test for expert witness. As noted above, the affiant is a partner in the law firm representing the plaintiff/applicant. He has an obligation to the plaintiff/applicant as a member of that firm. As a proffered expert, he has an obligation to present opinion or expert evidence on an objective basis without any partiality towards either side of the dispute. In these circumstances he is in a classic apprehension of bias position that effectively defeats the impartiality and objectivity requirements for an expert witness.

30 In the result the McMillan affidavit will be struck in its entirety, without leave to amend.

31 I turn now to the substantive motions.

The Issues

32 In the Action:

> Whether the plaintiff/applicant as an execution creditor of the defendant/respondent Peter Civiero was entitled to notice of the Sale of the Property by the Sheriff?

33 In the Application:

(a) Whether the relief sought by the plaintiff/applicant is properly the subject matter of an application under Rule 14.05 of the Rules of Civil Procedure?
(b) Whether there is any basis under Rule 14.05 to:

(i) grant injunctive remedies against H.M.Q. and/or her servants; and
(ii) award damages or monetary relief against H.M.Q.

(c) Whether Peter Civiero, Mazta and 398730 are properly joined as respondents under Rule 14.05 when the only relief sought against them is for punitive damage and costs.

Analysis

34 The essential ground in support of the motions by the defendants/respondents is a failure by the plaintiff/applicant on the without notice motions to make full and fair disclosure of material facts, thereby contravening Rule 39.01(6) and, with respect to the Injunctive Relief Order, a failure by the plaintiff/applicant in its notice of motion to comply with Rule 37.06(a) in that:

(a) her notice of motion did not state the precise relief being sought;
(b) the Injunctive Relief Order obtained without notice exceeded the maximum duration of 10 days from the date of its issuance; and
(c) no undertaking pursuant to Rule 40.03 was filed at the hearing of the without notice motion. (It is acknowledged that the plaintiff/applicant has rectified this omission by subsequently filing the required undertaking prior to the hearing of the present motions.)

35 I turn first to the C.P.L. order.

There are two aspects to be addressed in dealing with the validity of the C.P.L. order:

(a) procedural issues, and
(b) substantive issues.

36 The procedural issues focus on the question of whether a party moving without notice to obtain a certificate of pending litigation has complied with the provisions of Rule 39.01(6), that is, whether the moving party has made "full and fair disclosure of all material facts".

37 The substantive issues essentially address the question whether the plaintiff/applicant had an interest in land in accordance with s.103 of the Courts of Justice Act, by virtue of her status as an execution creditor having filed a writ of seizure and sale against the interest of the defendant respondent Peter Civiero in the Property.

38 In like manner, to determine whether the plaintiff/applicant is in compliance with Rule 39.01(6), regard must be had to her status as execution creditor having filed a writ of seizure and sale against the defendant/respondent Peter Civiero.

39 The record is not in dispute that in previous proceedings, the courts ruled that the plaintiff/applicant had no interest in the lands by virtue of her having filed the writ of seizure and sale and that the interest she obtained through the writ of seizure and sale was in the sale proceeds of

whatever legal or equitable interest the defendant Peter Civiero as judgment debtor had in any real property: see the decisions in Ferrier v. Civiero et al., Superior Court of Justice, [1999] O.J. No. 4892, dated November 24th, 1999; Divisional Court dated June 7th, 2000; and Ontario Court of Appeal, [2001] O.J. No. 1883, dated May 22nd, 2001.

40 It is noteworthy that counsel for the plaintiff/applicant appeared as counsel for the plaintiff/applicant in these proceedings just described. In light of that involvement, it is difficult to understand why the plaintiff/applicant through counsel would not only seek to assert an interest in lands for purposes of obtaining a certificate of pending litigation knowing that the court had previously ruled against her but also why the fact of such adverse or contrary ruling was not brought to the attention of the court on the return of the without notice motion for a certificate of pending litigation.

41 I find a distinct linkage between the procedural non-compliance, being the failure to bring to the court's attention the material fact, namely a decision contrary to the plaintiff's purported claim of an interest in land, and the unequivocal finding by the court of first instance supported at two appellate levels that the interest of the plaintiff/applicant as judgment creditor holding a writ of seizure of and sale was not an interest in land within the meaning of s.103 of the Courts of Justice Act.

42 This failure, even if unintentional, is in the circumstances "sufficient ground for setting aside" the C.P.L. Order: see Launch! Research and Development Inc. v. Essex Distribution Company (1977), 4 C.P.C. 261 and J. & P. Goldfluss Ltd. v. 306569 Ontario Ltd. (1977), 4 C.P.C. 296.

43 Quite apart from the sufficiency of this ground to set aside the C.P.L. Order, the plaintiff/applicant's claim of an interest in the Property for purposes of s.103 is rendered untenable not only by the result of her previously described litigation but also in other case law referred to by the moving parties.

44 This case law establishes that the holder of a writ of seizure and sale is entitled to obtain, by the prescribed procedure for the sale of lands in which the judgment debtor has an interest, satisfaction in whole or in part from the proceeds of such sale subject to the application of the Creditor's Relief Act relating to the distribution by the Sheriff of the proceeds of sale.

45 There is no merit in the contention of the plaintiff/applicant that the writ of seizure and sale constitutes an interest in land by virtue of s.10 of the Executions Act which provides, in part, that such writ "binds the lands". In my view, this section is purely an enforcement mechanism to the extent that it binds the interest of a judgment debtor in lands. It is the mechanism by which a sheriff conducting the sale pursuant to a writ of seizure and sale transfers the title or interest of the judgment debtor in the lands to the purchaser of such lands. Under this mechanism, if the net proceeds of sale respecting the interest of the judgment debtor in the lands are insufficient to extinguish the judgment debt, the writ of seizure and sale remains in effect against the judgment debtor to the extent of the unsatisfied or outstanding balance of the judgment debt. The lien created by the Executions Act on the interest of a judgment debtor in lands is not an interest in lands per se but rather in the proceeds of sale of the debtor's interest in such lands.

46 In addition to determining whether the plaintiff/applicant has a "reasonable claim to an interest in the land", the court must exercise its discretion in equity and look at all the relevant matters between the parties in determining whether the certificate of pending litigation should be discharged or vacated: see 931473 Ontario Limited v. Coldwell Bank of Canada Inc. (1992), 5 C.P.C. (3d) 238 (Ont.G.D.). In applying the equitable factors set out in 572383 Ontario Inc. v. Dhunna (1987), 24

C.P.C. (2d) 287 (Master, S.C.O.), that were adopted in 9731473 Ontario, above, the plaintiff/applicant is claiming, in her dispute over the proposed distribution under the Creditor's Relief Act, the entire proceeds of sale. Whatever may be the plaintiff/applicant's grounds for seeking such relief, "the entire proceeds of sale" which she seeks is referable only to the interest of the defendant/respondent Peter Civiero. The Sheriff is not empowered to sell anything other than the interest of Peter Civiero in the Property. In the result, her proposal to set aside the sale of the defendant/respondent Peter Civiero's interest in the Property to Mazta does not in any way increase the proceeds of such sale. To set aside the sale merely creates a potential for another sale to some other purchaser at some unascertainable time in the future, presumably on the assumption that the market value of the Property at that unascertainable time in the future will be greater than the proceeds of the January 6th, 2003 sale by the Sheriff to Mazta.

47 In the result, I find that the defendants/respondents Peter Civiero, Mazta and 398730 are entitled to an order discharging the certificate of pending litigation on the basis of non-disclosure of a most material fact. I further find on the basis that the plaintiff/applicant did not have a reasonable claim to the interest in land pursuant to s.103(6)(a)(ii) of the Courts of Justice Act, that the court's discretion should be exercised in favour of the moving parties.

48 I turn next to the Injunctive Relief Order.

49 The defendants/respondents Peter Civiero, Mazta and 398730 move to set aside the Injunctive Relief Order on the same basis as the C.P.L. order, that is, failure to make full and fair disclosure of material facts on the return of the without notice motion for the Injunctive Relief Order, as required by Rule 39.01(6). In this regard, the moving parties contend that the plaintiff/applicant through her counsel failed to disclose to the motions judge the conduct of earlier proceedings between the parties or their proxies. They submit that the plaintiff/applicant disclosed only evidence from a judgment debtor examination of the defendant/respondent Peter Civiero in support of the plaintiff/applicant's position and failed to disclose evidence from the same judgment debtor examination which would not have assisted the plaintiff/applicant.

50 The moving parties submit that these items of non-disclosure together with the others referred to in the motion record are not merely an inadvertent omission of material facts but constitute intentional non-disclosure of material facts. On this basis, the moving parties contend that the failure by the plaintiff/applicant to make full and fair disclosure in these circumstances are sufficient grounds to set aside the Injunctive Relief Order regardless of whether that order might have been made upon full disclosure by the plaintiff/applicant.

51 The moving parties further submit there are additional grounds to set aside the Injunctive Relief Order. These relate to the jurisdiction of the court generally and defects in the material before the court on March 25th, 2003.

52 These defects include the following:

(a) Rule 37.07 provides for motions to be made on notice to persons to be effected thereby, unless the nature of the motion or the circumstances render service of the notice of motion impractical or unnecessary. The moving parties submit there is nothing in the record showing that notice was either impractical or impossible to give without defeating the purpose of the or-

der and accordingly, the court failed to give effect to the above rule by granting the Injunctive Relief Order on or without notice motion.

(b) The motion with notice did not contain a pro forma notice of motion stating the "precise relief sought" and "the grounds to be argued", as required by Rule 37.06.

(c) The plaintiff/applicant did not satisfy the three branches of the test for granting of interim/interlocutory injunctive relief established in R.J.R. MacDonald v. Attorney General of Canada, [1994] S.C.J. No. 17. In essence, the moving parties' position on this point is that in the absence of full and fair disclosure on any without notice motion, it was impossible for the court on the return of such motion to find that the plaintiff/applicant as moving party had met the requirements either for interlocutory injunctive relief or mandatory injunctive relief. The moving parties further submit that in the case of a mandatory injunction, the threshold issue of a serious question be tried is increased significantly due to the mandatory, as opposed to the restraining, nature of the injunctive relief sought: a moving party for mandatory injunctive relief must establish to the court's satisfaction a "high degree of assurance" that at trial, the moving party will be successful: see Ticket Net Corp. v. Air Canada, (1987) 21 C.P.C. (2d) 38 (O.H.C.).

(d) The injunctive relief requiring production of the shareholder information in Mazta is not properly within the jurisdiction granted to the courts under s.101 of the Courts of Justice Act for interlocutory injunctive relief, the purpose of which is to preserve the rights of the parties pending trial. The moving parties contend that the plaintiff/applicant has no right or entitlement at law or in equity for orders disclosing particulars of shareholding in Mazta in the context of interlocutory injunctive relief. In the absence of such entitlement or right, the court in granting injunctive relief giving effect to such entitlement or right does not act intra vires s.101 of the Courts of Justice Act or Rule 40.

53 In response, the plaintiff/applicant submits there was no material non-disclosure or intentional non-disclosure by her. She contends even it there was some non-disclosure, it was not material and consideration should be given to the fact that the plaintiff/applicant was, at the time leading up to the Injunctive Relief Order on March 25th, 2003, operating under strict time constraints and limitations. As to the omission of "precise relief sought" in the notice of motion, the plaintiff/applicant submits that the relief sought and granted was described in paragraphs (g) and (h) of the plaintiff/applicant's statement of claim dated March 25th, 2003. Accordingly, the plaintiff/applicant submits that the failure to comply with Rule 37.06 is an irregularity under Rule 2.01(1) and it has not been demonstrated "as necessary and in the interests of justice" that the Injunctive Relief Order should be set aside, either in whole or in part, pursuant to clause (b) of subsection 1 of Rule 2.01.

54 I am persuaded that the Injunctive Relief Order cannot stand and must be set aside, for the following reasons:

(a) The egregious failure by the plaintiff/applicant to make full and fair disclosure of the material facts, being the previous court orders denying the plaintiff/applicant's claim for an interest in lands;
(b) The absence of any necessity for proceeding on a without notice basis;
(c) The granting of relief not sought in the notice of motion which was inappropriate to interlocutory injunctive relief, being the freezing of shareholding in Mazta and requiring production/delivery of data respecting shareholding in Mazta;
(d) The failure to address the three branches of the test in R.J.R. MacDonald, above, specifically, the second and third branches of the test, being irrevocable harm in the balance of convenience respectively; and
(e) As the relief granted in the Injunctive Relief Order was not made in accordance with s.101 of the Courts of Justice Act and Rule 40.01 of the Rules of Civil Procedure, the court in making such order was not acting intra vires s.101.

55 I turn now to the plaintiff/applicant's motion in the Action seeking, among other relief, to add H.M.Q., Marta Elena Civiero, 108861 Ontario Ltd. as defendants. The other relief includes the continuation of the injunctive and mandatory relief previously granted and the extension of that relief as it affects the share holding of Mazta by restraining Mazta from approving the issuance of any new shares or the redemption of any shares without prior court approval.

56 The part of the motion seeking to add H.M.Q. as a defendant in the place of the Sheriff and to add Marta Elena Civiero, 108861 Ontario Ltd. as defendants is granted, with corresponding leave to the plaintiff/applicant to issue a fresh amended statement of claim within 30 days from the date of issuance of these reasons and thereafter the exchange of pleadings to be governed by the Rules of Civil Procedure.

57 The motion to extend and enlarge the injunctive and mandatory relief granted in the Injunctive Relief Order until trial is dismissed, for the same reasons that the moving parties' motion to set aside the Injunctive Relief Order was granted.

58 I now address the motions of the defendant/respondents in the Application.

59 The position of all defendants/respondents is that the Application should be dismissed against each of them.

60 I shall deal first with the position of H.M.Q. as the substantial relief being sought in the Applications is against her and those for whom she is responsible in law. (I note in passing that the plaintiff/applicant has abandoned the contempt portion of the relief sought in the Application against H.M.Q.)

61 Counsel for H.M.Q. submits the following grounds for dismissing the Application as against her:

(a) The court does not have jurisdiction to order injunctive relief or relief of a specific performance or mandatory nature against the Crown or its servants;
(b) The court has no jurisdiction to order monetary relief in an Application;

(c) There is no factual or legal basis for any proceedings arising out of actions taken by the Land Registrar;
(d) The writ of seizure and sale obtained by the respondent Pressman on which the Sale to Mazta took place was properly and validly requisitioned and issued;
(e) There is no factual or legal basis for the Application arising out of any actions taken by the Sheriff in this matter; and
(f) The Application is a frivolous and vexatious proceedings or is otherwise an abuse of process.

62 The circumstances describing the impugned actions taken by the Land Registry office are set out in copious detail in the affidavit of Donna Gail Trevors sworn July 17th, 2003 filed in the H.M.Q. motion record. The description of the process relating to entries and the transfer of title data and records from the non-automated Registry system to the automated land registration system in 1998 are unchallenged. The gravamen of the plaintiff/applicant's complaint is that when that process, i.e., the change from the non-automated to the automated registry system was implemented, words indicating the trust capacity in which the defendant/respondent Peter Civiero and one, Ignat Kaneff, took title to the Property in 1976, being the words "in trust" following their names, are not shown on the automated system under the Land Titles Act. The absence of these words on the Property abstract, according to the Trevor affidavit, would not change the effect of these words on the paper deed which still remains a document of title affecting the Property.

63 In addition, a mortgage by the defendant/respondent Peter Civiero and the said Ignat Kaneff (the "Mortgage") was registered in 1976 and a discharge of the Mortgage (the Discharge) was registered in August 1981. In accordance with the abstracting standards in effect at the time, a line was drawn through the entry of the Mortgage on the paper record of the abstract of title and particulars of the Discharge were entered by hand beside the deletion line.

64 At the time of automating the Land Registry system in 1998, neither the entry for the Mortgage or Discharge were brought forward and noted in the automated system.

65 As previously indicated, the plaintiff/applicant obtained the October 1998 order declaring, among other things, that the defendant/respondent Peter Civiero had at least a 25% equitable interest in the Property and directing the Land Registrar to re-abstract the entries for the Mortgage and Discharge and to delete the prior "ruling off" of the entries for these two instruments. Since the Mortgage had been validly discharged, it was not physically possible to give effect to the words in the October 1998 Order to delete the "ruling off" of the Mortgage on the paper abstract of title. Accordingly, the Land Registry office staff, in the absence of any applicable standards for abstracting such an order, wrote in below the October 1998 Order that had been registered on the automated record, a remark to the effect "re-abstract the entries for each of the Mortgage and the Discharge". It is undisputed that in response to correspondence, these actions were explained to counsel for the plaintiff/applicant by a letter dated April 7th, 2003.

66 In January 2003 the defendant/respondent Pressman, a judgment creditor of the defendant/respondent Peter Civiero, requisitioned a writ of seizure and sale in the Toronto office of this court. On the same day a writ of seizure and sale was issued and directed to the Sheriff, first erroneously described as "the Sheriff of Wellington Centre" and then corrected by hand to "the Sheriff" (the Pressman writ of seizure and sale). The Sheriff was directed to seize and sell the interest of the defendant/respondent Peter Civiero in any lands in which he had beneficial interest and to realize

from the proceeds of sale the judgment sum with accruing interest plus costs and expenses to be incurred by the Sheriff in enforcing the writ of seizure and sale.

67 On August 26th, 2002 the Sheriff received a direction to enforce the Pressman writ of seizure and sale by the sale of the 25% beneficial interest of the respondent Peter Civiero in the Property. After further notification to him in October and November of 2002 by the Sheriff of the enforcement instructions, the defendant/respondent Peter Civiero was informed that as no arrangements for payment of the judgment debt had been made by him, his interest in the Property would be sold.

68 On or about December 3, 2002 the Sheriff placed notices of sale in the locations prescribed by Rule 60.07(19)(b) and a copy of the notice of sale was mailed to Pressman as the execution creditor who directed the sale, in accordance with Rule 60.07(19)(a). There is no question that the Sheriff complied with the requirements of sub-rule 19 of Rule 60.07.

69 On the appointed day of sale, only three prospective purchasers attended upon the Sheriff where the sale was being conducted. Two of the prospective purchasers bid but Mazta was the successful bidder for the 25% beneficial interest of the defendant/respondent Peter Civiero. The sale price for such interest was $110,000.00.

70 In accordance with the Creditor's Relief Act, the Sherifff prepared a proposal for distribution of the proceeds of sale and delivered a copy of that proposal to each creditor or his solicitor. The amended distribution proposal set out the amounts proposed for distribution to each judgment or execution creditor, based on the percentage of such creditor's claim, regardless of the date that each creditor filed his or her writ of seizure and sale.

71 On or about February 27th, 2003 the plaintiff/applicant attended on the Sheriff and inquired about the distribution proposal. She was informed of her recourse under the Creditors Relief Act if she wished to dispute the proposed distribution amounts. By letter dated February 28th, 2003 the plaintiff/applicant informed the Sheriff that she intended to object to the proposed distribution.

72 In the plaintiff/applicant's statement of claim dated March 25th, 2003 and in her notice of motion dated March 21st, 2003 the plaintiff/applicant alleges that the Sheriff failed to provide to her the notice of sale of the Property. As noted above, she sought a declaration of nullity as to the Sale and the resulting conveyance by deed-poll to Mazta of the interest of the defendant/respondent Peter Civiero in the Property. Although H.M.Q. had neither received a notice of claim under the Proceedings against the Crown Act nor had been served with the plaintiff/applicant's statement of claim, a solicitor respresenting the Sheriff acted as agent for the Crown on the return date of the motions on March 25th, 2003 that solicitor requested an order be made pursuant to the Creditors Relief Act that the proceeds of sale be held by the Sheriff until resolution of the dispute respecting the sale of the interest of the defendant/respondent Peter Civiero in the Property. An order to this effect was made on March 25th, 2003; the Sheriff has not distributed the funds and continues to hold these funds subject to further order of the court.

73 On April 15th, 2003 the parties in the Action appeared before Belleghem, J. The Action was discontinued against the Sheriff on consent, on the basis that no notice was provided to the Crown pursuant to the Proceedings against the Crown Act.

74 Counsel for H.M.Q. submits that the relief being sought by the plaintiff/applicant is injunctive and mandatory in nature in that the plaintiff/applicant seeks to have the court order H.M.Q. and

her servants to take specific actions with respect to the real property register. In this regard, counsel points out that s.14 of the Proceedings against the Crown Act prohibits the granting of orders in the nature of injunctive or mandatory relief against the Crown or its servants. The only exception to this rule is where a finding is made of a willful and deliberate flouting of legal rights by the Crown or by its servants on its behalf. Counsel contends in this case there is no evidence of such conduct and the actions taken by various servants of the Crown were done in accordance with the applicable statutory regimes and the protocols for administrative action implemented under those statutes, as well as with the Rules of Civil Procedure.

75 Counsel further submits: there is no evidence that the actions of the staff of the Land Registrar were taken without legal authority or otherwise improper; that the October 1998 Order was given effect the best possible way having regard to the automated land registry system then in effect; and that the deletion of other writs of seizure and sale, including that of the plaintiff/applicant subsequent to the Sale by the Sheriff of the defendant/respondent Peter Civiero's interest in the Property, was done in accordance with an application made by Mazta as purchaser pursuant to s.75 of the Land Titles Act to delete instruments that no longer affected the Property.

76 In this regard, it was pointed out that the application of Mazta for deletion of the plaintiff/applicant's writ of seizure and sale is entirely proper and the Land Registrar does not have the responsibility or duty to "go behind" the face of documents in support of any statutory application. Counsel emphases that by deleting the October 1998 Order, the Land Registrar has not nullified the legal effect of that order. The sale of the 25% beneficial interest of the defendant/respondent Peter Civiero in the Property rendered that portion of the October 1998 Order no longer applicable. Counsel points out that if the October 1998 Order were not deleted, the parcel register for the Property would not reflect the current state of title after the Sale by the Sheriff, namely, that the respondent Peter Civiero no longer owned a 25% beneficial interest in the Property.

77 In similar fashion counsel contends that by complying with the request of Mazta as purchaser to remove from the title of the Property the October 1998 Order and the plaintiff/applicant's statutory declaration which stated that the defendant/respondent Peter Civiero had an interest in the Property, the Land Registrar has not "purged and expunged" those documents nor has it "sanitized" the register or "vacated and nullified" the effect of the October 1998 Order. Counsel submits that the full parcel register for the Property showing deleted instruments (which are available in the Land Registry office) provides a full historical record of transactions on title to the Property and each of such instruments is available for viewing by the general public.

78 As to the status of the plaintiff/applicant's writ of seizure and sale, counsel for H.M.Q. states that those writs continue to be enforceable against the respondent. Counsel points out that the effect of the Sale by the Sheriff, the transfer of title by the deed-poll instrument and the subsequent application by Mazta to delete instruments on title is simply that the plaintiff/applicant's writs of seizure and sale against Peter Civiero no longer binds the Property since the defendant/respondent Peter Civiero no longer has an interest in the Property.

79 It is the position of H.M.Q. that the Sheriff has complied fully with the provisions of Rule 60.07(19) in the conduct of the Sale. In particular, counsel points out that the Sheriff mailed to Pressman, the holder of the writ of seizure and sale who requisitioned the Sale of the Property, a notice of the time and place of Sale in accordance with the provisions of clause (a) of sub-rule 19 of Rule 60.07. The relevant sub-rule and clause provides as follows:

(19) A sale of land shall not be held under a writ of seizure and sale unless notice of the time and place of sale has been,

(a) mailed to the creditor at the address shown on the writ or to the creditor's solicitor and to the debtor at the debtor's last known address, at least thirty days before the sale;

80 This sub-rule and clause raise a question of interpretation, the determination of which is crucial to the plaintiff/applicant's success in obtaining the declaratory relief as to the alleged nullity of the Sheriff's Sale. She contends that as an execution creditor she was entitled to obtain by mail notice of the time and place of sale and that the failure to do so invalidates the Sale.

81 Counsel for the plaintiff/applicant argues that as all execution creditors are entitled to notice under the power of sale pursuant to the Mortgages Act, by analogy all execution creditors in the context of a sale of lands by a sheriff should also be entitled to notice.

82 He submits that clause (a) of sub-rule 19 of Rule 60.07 should be interpreted to imply a plural meaning to the word "creditor" therein. The contention is that by the Sheriff not mailing to her notice of the time and place of the Sale, the plaintiff/applicant was deprived of her rights and was denied natural justice.

83 The answer to this last contention can be simply put. It would have been open to the legislature through the Courts of Justice Act and the Rules of Civil Procedure promogated thereunder to make plural the word "creditor" contained in clause (a) of sub-rule 19 of Rule 60.07. The legislature did not do so. However, the legislature did create a class of creditors of mortgagors in s.31 of the Mortgages Act, by providing that every person appearing by the index of executions to have an interest in the mortgaged property (such as execution creditors) shall be entitled to receive a notice of exercising power of sale by the mortgagee. I find the analogy to be inapt. It is not tenable for the plaintiff/applicant to argue that the entitlement of execution creditors to notices of power of sale by mortgagees should apply to notices of sale by sheriffs when the legislative sources governing each procedure clearly and unequivocally establish different notice entitlements.

84 In this regard, the giving of notice of a sale by a sheriff is addressed in its entirety in Rule 60.07. The legislature has deemed notice of such sale to the public at large, including other creditors of the judgment debtors whose lands are subject to sale, to be given by publication in the Ontario Gazette and in a newspaper of general circulation where the land is situate. In addition, publication is directed on a time schedule, as set out in clause (b) sub-rule 19 and by posting in a conspicuous space in the office of the sheriff for 30 days before the sale as set out in clause (c) of sub-rule 19.

85 Absent a challenge to the validity of the sale procedure set out under Rule 60.07, I am unable to conclude that the plaintiff/applicant was deprived of her legal and equitable rights by not receiving through the mail notice of the Sale of the Property. I note in passing the submission by counsel for the plaintiff/applicant of the applicability of the principles of due process of law described in Magna Carta, a portion of which is contained in an Act respecting Certain Rights and Liberties of the People, R.S.O. 1897, Chapter 322, as amended. The plaintiff relies upon an extract from Magna Carta found in s.2. The relevant part of s.2 provides as follows:

> 2. No man shall be ... disseized or put out of his freehold or franchises ... unless he be brought in to answer and prejudged of the same by due course of law.

86 The differences that existed between the Barons of England and King John in the year 1215 addressed at Runnymede by the Great Charter are captured in the words "by due course of law" in the above extract.

87 These words are of no assistance to the plaintiff/applicant. Simply put, the complaint of the plaintiff/applicant in the Action and Application cannot be described as arising from a defect in the "due course of law" in Ontario that governs the matters in dispute between the parties.

88 The defendants/respondents Peter Civiero, Mazta and 398730, as well as the respondent Pressman, move for dismissal of the Application against them on the following grounds:

(a) Substantially all the relief being sought against these respondents falls outside the provisions of Rule 14.05(3);
(b) There is non-compliance with Rule 14.06(3) in that the notice of Application seeks declaratory relief pursuant to s.97 of the Courts of Justice Act. However, Rule 14.05(g) permits granting of an injunction, mandatory order or declaration when it is made ancillary to relief claimed in a proceeding properly commenced by a notice of application. These respondents contend that the plaintiff/applicant is not entitled to seek relief pursuant to s.97 of the Courts of Justice Act in light of the foregoing limiting provision contained in Rule 14.05(g); and
(c) There is such a similarity between the subject matter of the Application and the Action there is a strong probability of inconsistent and conflicting findings. In the circumstances, these respondents submit that the Application should be dismissed on the basis of avoiding multiplicity of proceedings.
(d) As the only relief being sought against Peter Civiero, Mazta or 398730 as well as Pressman is for punitive damages and costs, there is no basis upon which the Application should be permitted to continue against these respondents.

89 Counsel for the plaintiff/applicant alleges collusion between and among the respondents (excepting H.M.Q.), the effect of which is to deprive the plaintiff/applicant of her rights as an execution creditor of the respondent Peter Civiero. The plaintiff/applicant has sought to make much of what is on its face a clerical error and the description of the Sheriff on the requisition to obtain the writ of seizure and sale by Pressman.

90 Although the plaintiff/applicant acknowledges (in paragraph 45 of her factum) the court has inherent discretionary jurisdiction to correct by way of Rectification [sic] errors in procedure made by a court officer, the plaintiff/applicant contends that such discretion should be exercised "with a view to the equities between and among the Parties to a proceeding having regard to all of the Equities among the Parties" and that where the court finds there is a "reasonable suspicion of fraud", it should act on its equitable jurisdiction.

91 These submissions and statements suggest that this court in hearing the Application should find that there is "a reasonable suspicion of fraud" in the dealings between the parties and accordingly should not exercise its "inherent discretionary jurisdiction to correct a clerical error on the face of the requisition". I am unaware of any proposition of law that would equate a "reasonable suspicion of fraud" with a finding of fraud having an evidentiary foundation. This distinction emphasis the need for a trial of the issues, in particular whether there has been collusion of a fraudulent nature between the defendants/respondents in relation to the writs of seizure and sale filed by them against the interest of the defendant/respondent Peter Civiero in the Property. Such trial must be held within the context of the Action, and not as the trial of an issue in the Application.

Conclusion

92 I find there is no basis for the relief claimed against H.M.Q., either in the Action or in the Application.

93 I find also there is no basis for the relief claimed against the defendants/respondents Peter Civiero, Mazta, 398730 and Pressman in the Application. The substantial relief that has been claimed against them in the Application is similar to the relief sought against them in the Action.

94 The plaintiff shall be at liberty to continue the Action against the defendants/respondents other than H.M.Q. However, as many of the issues that have been the subject of determination in this Application are pertinent in the Action, it shall be open to the respondents as defendants in the Action to plead issue estoppel in the Action on any issues therein that have been determined in the Application.

Disposition

95 In the result, an order shall go:

(a) Setting aside the C.P.L. Order and discharging the certificate of pending litigation thereunder;
(b) Setting aside the Injunctive Relief Order;
(c) Dismissing the Application on the terms and conditions described in "Conclusion", above.

96 The respondents shall have their costs throughout. I shall entertain brief written submissions, not to exceed 4 pages in length exclusive of supporting materials, according to the following schedule:

(a) By the defendants/respondents, within 30 days following the date of release of these reasons;
(b) By the plaintiff/applicant in response, within 10 days following the date of their receipt of the defendants/respondents' submissions; and
(c) Reply, if any, by the defendants/respondents, within 7 days of receipt of the plaintiff/applicant's responding submissions.

MacKENZIE J.

cp/e/nc/qw/qlsja/qlkjg

Case Name:

Isakhani v. Al-Saggaf

Between
Haleh Isakhani, Applicant (Respondent in Appeal), and
Abubakr Al-Saggaf, Respondent (Appellant in Appeal)

[2007] O.J. No. 2922

2007 ONCA 539

226 O.A.C. 184

40 R.F.L. (6th) 284

159 A.C.W.S. (3d) 850

2007 CarswellOnt 4805

Docket: C46548

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., M.J. Moldaver and
P.S. Rouleau JJ.A.

Heard: July 3, 2007.
Judgment: July 26, 2007.

(46 paras.)

Family law -- Custody and access -- Considerations -- Best interest of child -- Conduct of parents -- Risk of future harm -- Custody -- Appeal by father from motion judge's order accepting jurisdiction in child custody matter after judge determined that the child would be at serious risk if returned to Dubai with the father -- Appeal dismissed -- Given the father's history of alcoholism, his serious physical and emotional abuse of the mother, and other factors, the evidence amply justified the order made by the motion judge that the child would suffer serious harm if he were to be removed from Ontario and returned to Dubai.

Appeal by Al-Saggaff, the father, from a motion judge's decision to accept jurisdiction of a custody matter after the judge found the child would be at serious risk of harm if he was returned to Al-Saggaf in Dubai. Al-Saggaff was originally from Yemen. His wife, Isakhani, was from Iran. In May 2000, they met in Dubai, where he was working, and began living together in February 2001. At that time, she was in the process of obtaining immigration status in Canada. In October 2001, Isakhani became pregnant and the couple agreed that she would give birth to the child in Canada. Before giving birth, the parties married in Dubai. The child was born in Toronto on July 17, 2002. Shortly thereafter, the couple returned to Dubai with their new son and resided there, as a family, until March 2005, when Isakhani separated from Al-Saggaf. On April 17, 2005, she left Dubai and came to Canada with the child. According to her, she did so because Al-Saggaf was an alcoholic who abused her both physically and mentally and she was concerned for her safety and the safety of the child. Al-Saggaf, on the other hand, maintained that Isakhani abducted the child and came to Canada solely because she wanted to live here. After she arrived in Canada, Isakhani obtained an ex-parte order which granted her temporary custody of the child. Al-Saggaf learned of that order and, five months later, moved to set it aside and have the child returned to Dubai. In March, 2006, the motion judge set aside the ex-parte order on the basis that it had been obtained by means of false information, namely, an affidavit filed by Isakhani in which she stated that the child was habitually resident in Canada. Nonetheless, after a full hearing that lasted several days and included a mass of affidavit evidence, the judge accepted jurisdiction over the child to determine matters of custody and access under s. 23 of the Children's Law Reform Act after he found that the child would be at serious risk of harm if he was returned to Dubai.

HELD: Appeal dismissed. Given the father's history of alcoholism, his serious physical and emotional abuse of the mother, his stated belief that he was justified in the use of immediate physical force to stem invasions of his privacy and to rebuke verbal insults, his dominant and controlling behaviour, and a court order from Dubai which required the wife to reside with him and obey him, the evidence amply justified the order made by the motion judge that the child would, on a balance of probabilities, suffer serious harm if he were to be removed from Ontario and returned to the father in Dubai.

Statutes, Regulations and Rules Cited:

Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 23(a), s. 23(b)

Appeal From:

On appeal from the order of Justice Susan Greer of the Superior Court of Justice dated December 21, 2006, dismissing the appeal from the order of Justice James P. Nevins of the Ontario Court of Justice dated March 27, 2006.

Counsel:

Daniel S. Melamed, for the appellant.

Sheilagh O'Connell, for the respondent.

The judgment of the Court was delivered by

1 **M.J. MOLDAVER J.A.**:-- The appellant husband is originally from Yemen and the respondent wife is from Iran. In May 2000, they met in Dubai, where the husband was working, and they began living together in February 2001. At that time, the wife was in the process of obtaining immigration status in Canada.

2 In October 2001, the wife became pregnant and she and her husband agreed that she would give birth to the child in Canada. Before giving birth, the parties married in Dubai.

3 The child was born in Toronto on July 17, 2002. Shortly thereafter, the couple returned to Dubai with their new son and resided there, as a family, until March 2005, when the wife separated from the husband.

4 On April 17, 2005, the wife left Dubai and came to Canada with the child. According to the wife, she did so because her husband was an alcoholic who abused her both physically and mentally and she was concerned for her safety and the safety of the child. The husband, on the other hand, maintained that the wife abducted the child and came to Canada solely because she wanted to live here.

5 After arriving in Canada, the wife sought and obtained an *ex-parte* order on April 29, 2005 granting her temporary custody of the child. The husband learned of that order and five months later, he moved to set it aside and have the child returned to Dubai.

6 On March 27, 2006, the motion judge, Nevins J. of the Ontario Court of Justice, set aside the *ex-parte* order on the basis that it had been obtained by means of false information, namely, an affidavit filed by the wife in which she stated that the child was habitually resident in Canada. Nonetheless, after a full hearing that lasted several days and included a mass of affidavit evidence, he accepted jurisdiction over the child to determine matters of custody and access under s. 23 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (*C.L.R.A.*). He did so after finding that the child would be at serious risk of harm if he returned to Dubai.

7 Section 23 of the *C.L.R.A.* provides:

> Despite sections 22 and 41, a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child where,
>
> (a) the child is physically present in Ontario; and
> (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
>
> (i) the child remains in the custody of the person legally entitled to custody of the child,
> (ii) the child is returned to the custody of the person legally entitled to custody of the child, or
> (iii) the child is removed from Ontario.

8 The husband appealed from that order and his appeal was dismissed by Greer J. on December 21, 2006. He now appeals to this court.

ISSUES

9 The husband raises the following two issues on appeal:

(1) Did the motion judge err in fact and law in concluding that the husband had physically assaulted and mentally abused his wife in the child's presence and that overall, the situation was violent and put the child in an intolerable position; and

(2) Did the motion judge err in fact and law in concluding that there was a reasonable likelihood that the violence and abuse to which the wife had been exposed would continue if she and child returned to Dubai, and that she and the child would not be adequately protected from it.

10 The husband submits that both of the alleged errors are significant and that if we find merit in either one, we should set aside Nevins J.'s order, declare that Ontario does not have jurisdiction to determine matters of custody and access relating to the child, and order that the child be returned to Dubai forthwith. Alternatively, he submits that we should remit the matter to the Ontario Court of Justice for the "trial of an issue" under s. 23 of the *C.L.R.A.*.

11 For reasons that follow, I would not give effect to either ground of appeal. Accordingly, I would dismiss the appeal.

Issue One: Physical and mental abuse of the wife

12 Greer J. considered the motion judge's careful review and analysis of the evidence on this issue and concluded that he correctly interpreted and applied the appropriate legal test and standard of proof under s. 23. I agree with her analysis and conclusion and would simply add the following observations.

13 The motion judge gave detailed and comprehensive reasons for concluding that there was "a significant degree of violence, physical and verbal, oral and written, directed by the [husband] to the [wife]" and ... that "the child was exposed to this, in the sense that he was in the environment". He further found that while the evidence was not overwhelming, there was "a significant amount of evidence" that justified "a finding on the balance of probabilities that the situation was violent and put the child in an intolerable situation".

14 In my view, it was open to the motion judge to make those findings. In doing so, I am satisfied that he applied the correct standard of proof and took into account and weighed the pertinent evidence.

15 As his reasons disclose, the motion judge was very much alive to the frailties in the wife's evidence and he properly sought out confirmatory evidence before relying on it to find that she had been victimized, both physically and mentally, by the husband.

16 Contrary to the husband's submission, I am satisfied that the confirmatory evidence relied upon by the motion judge was sufficiently cogent to restore his faith in the wife's evidence, such that he could safely act on it to make the findings of abuse on a balance of probabilities.

17 By way of illustration, relatives in Toronto attested to the husband's abusive and dominant character, and a woman from Dubai confirmed the wife's evidence about an occasion in Dubai when the wife was assaulted by her husband and the police were called. The wife also filed photographs showing her injuries.

18 In addition, there were two significant e-mails from the husband that provided compelling confirmatory evidence regarding two incidents of assault that the wife was able to recall in detail.

19 The first of these incidents occurred in April or May of 2003. According to the wife, the husband physically assaulted her and in the course of the attack, he bit her on the left shoulder with such intensity that he left a bite mark and a scar that remained visible for several years. In respect of this incident, to which the police were called, the husband wrote to the wife as follows:

> I want to reconfirm my sorrow and shame for what happened on the night of Tuesday/Wednesday May 13/14, 2003. It is up to you to accept my apology or refuse it. My feelings of sorrow stand for the fact that you -- my wife -- are emotionally and physically harmed ... .regardless of your intention to forgive me or not, to continue the police and court case or not, and to continue our marriage or not.

20 As the motion judge noted, the content of that e-mail amounted to an admission of fault for which the husband apologized and sought forgiveness.

21 The second incident involved an assault on the wife that occurred on April 11, 2005, after she and the husband had separated and days before she left for Canada. The police were also called to this incident. Of note, the wife and her friend, who was with her at the time, stated that on this occasion the police paid no attention to the wife and communicated only with the husband.

22 In an e-mail sent by the husband to the wife on April 29, 2005, the husband stated as follows:

> BUT TO MAKE IT CLEAR:
>
> I am ONLY dangerous if someone ATTACKS me dangerously.
>
> But that applies not only to ME, but to almost EVERY HUMAN BEING.
>
> To me, that applies for example to April 11, after your dangerous invasion of my privacy, and your dangerous abuse of [the child] as a shield to protect you during that invasion.
>
> And yes, I will remain a dangerous DEFENDANT of my privacy, my legal rights, my pride, my dignity. IF someone on Earth wants to have peace, he/she should AVOID HARMING ME. The message is simple and clear, and every man on Earth would repeat it: Don't harm me, and I will remain a peaceful man towards you. But if you harm me, I may become a dangerous defendant of myself against that harm. Take that to any police station, and they will understand it. Take it to any court, and they will approve it.
>
> BUT YOU SAY:
>
> "Remember NO matter what people do; it's no excuse for you to lose control and yell at them, and punish them physically,"

> I SAY:
>
> WRONG, I DISAGREE: "No matter what people do?" No!. I am not Jesus Christ. There was only ONE Christ (otherwise he would be jealous to have a SECOND competitor!).
>
> If someone attacks me, I will attack back. If there is no immediate punishment on the spot, bad people like you would continue to harm others who left them in peace. Verbal insult against me is an ATTACK. Invading my privacy is an attack. Abusing my son as a shield in that invasion is an attack. Every attack must be punished immediately, so that it STOPS immediately. Because Police and Courts need some time to stop it, the damage would be more severe if I wait for them and do not punish attackers on the spot, to stop them from extending the attack." [Emphasis in original.]

23 The motion judge quite properly found the content of that e-mail to be "very concerning and upsetting". Not only did the e-mail confirm the husband's violence towards the wife on the occasion in question; it also showed him to be a man who was controlling and dominating and willing to resort to violence at the slightest provocation.

24 Overall, the motion judge found that the situation in the household was violent and put the child in "an intolerable situation and exposes him to serious harm". He also found that the child was very aggressive and, while he could not with certainty determine the cause of this behaviour, it supported the wife's position that it was caused by exposure to the domestic violence.

25 In the end, I am satisfied that the motion judge gave careful and considered reasons for accepting, in the main, the evidence of the wife over that of the husband. Contrary to the husband's submission, I am not persuaded that the motion judge either misapprehended material evidence or failed to consider it. As this court has pointed out on numerous occasions, he was not required to recount every piece of evidence or resolve every conflict in the evidence.

26 Read as a whole, the motion judge's reasons address the material aspects of the evidence and explain, in considerable detail, why he was satisfied that the wife had been the victim of physical and mental abuse at the hands of her husband and why the husband's misconduct exposed the child to serious harm.

27 Accordingly, I would not give effect to this ground of appeal.

Issue Two: Risk of serious harm should the wife and child return to Dubai

28 This issue is somewhat more troublesome. Central to it is the husband's contention that the motion judge erred in admitting and relying upon a report prepared by Amnesty International, released May 11, 2005, concerning discrimination and violence against women in the Gulf Cooperation Countries, including Dubai, and the inadequate measures taken by the police and the courts to prevent and deter such conduct.

29 The motion judge admitted the Amnesty International Report over the husband's objection. In his reasons for judgment, he stated at one point that because the Report stood "uncontradicted", he could "give weight [to it] insofar as it proves there is reason to be concerned about the degree of access to justice that a woman in general, and a married woman in particular, would have in that

part of the world where there is a concern over domestic violence or domestic abuse". Elsewhere in his reasons, the motion judge stated that the Report "can and should be given a considerable amount of weight". In the penultimate paragraph of his decision, he held that the Report should be given "a fair bit of weight", along with other evidence, in concluding that "if returned to Dubai, there is a reasonable likelihood that the violence and the abuse to which [the wife] has been exposed would continue and that she would not be adequately protected from it, and most certainly, the child would not be adequately protected from it".

30 On appeal, Greer J. held that the Report had "some relevance" in the circumstances of the case, and found that the Report was not "highly prejudicial" to the husband since it was not commissioned by the wife and submitted by a paid expert.

31 With respect, I am of the view that in the circumstances of this case, the Amnesty International Report should not have been admitted into evidence, and the motion judge and Greer J. erred in holding otherwise.

32 On its face, the Report did not purport to be a study devoted to the problems of violence and discrimination against women in Dubai, nor did it specifically address the inadequacies of the Dubai justice system in counteracting these forces. Indeed, as the husband points out, the Report was not even specific to the United Arab Emirates (UAE), of which Dubai is but one member; rather, it related to a host of countries in the region, including Bahrain, Kuwait, Oman, Qatar and Saudi Arabia, as well as UAE.

33 Upon reviewing the sixty-five page Report, it is noteworthy that the UAE is only referred to on a handful of occasions and Dubai is mentioned only twice. More to the point, the Report does not record a single instance of domestic assault in Dubai that state authorities failed to address. Only one of the women interviewed by the Amnesty International team was from Dubai, and her story of discrimination involved an entirely unrelated matter (i.e. her inability to marry without her father's consent).

34 Arguably, at its highest, the Report could perhaps have served to confirm, in the most general way, the wife's evidence concerning the indifference of the police towards her when they were called in connection with the April 11, 2005 incident. Perhaps as well, the Report could have been used, again in the most general way, to challenge the expert evidence tendered by the husband regarding the legal system in Dubai and the protections it offers to victims of spousal abuse.

35 I am respectfully of the view however, that with regard to Dubai, the Report was so general that its probative value was at best slight when weighed against its potential prejudicial effect. Hence, I believe that the Report should not have been admitted.

36 Contrary to the position of the wife, I do not accept that the rules relating to evidence on motions under the *Family Law Rules*, O. Reg.114/99, assist on this issue. Although those rules may relieve against certain evidentiary hurdles, they do not allow for the admission of evidence of marginal relevance where the probative value is manifestly outweighed by its prejudicial effect.

37 That brings me to the second concern about the Amnesty International Report, namely, whether it constituted inadmissible hearsay evidence.

38 Given my conclusion that the Report was otherwise inadmissible, I need not finally resolve the hearsay issue. I would simply point out that where a document like the Amnesty International Report is being tendered for the truth of its contents in respect of contested facts (be they adjudica-

tive, legislative or social) that are at the centre of the controversy between the parties, the reliability and trustworthiness of the document takes on added importance. To that end, I believe that trial and motion judges should be guided by the principles set forth by Binnie J. in *R. v. Spence* (2005), 202 C.C.C. (3d) 1 at paras. 60-61. Although Binnie J.'s comments were directed to the issue of judicial notice, I believe that they are apposite to situations like the one at hand. Thus, in this case, the closer the Amnesty International Report came to the dispositive issue, namely, whether the wife and child would be adequately protected by the Dubai justice system, the closer scrutiny it deserved.

39 Here, that could well have translated into a need to submit evidence from witnesses with firsthand knowledge of the Report who could be subject to meaningful cross-examination. No such witnesses were available here. The Report was appended to the affidavit of Mr. Robert Alexander Neve, Secretary-General of Amnesty International, Canadian Section. As is apparent from Mr. Neve's affidavit, he did not participate directly in the drafting of the Report; hence, he could only attest to the fact that it had been prepared "in conformity with Amnesty International's exacting quality control standards".

40 Without questioning the adequacy or legitimacy of those standards, it is apparent that Mr. Neve could not have been questioned about any of the details underlying the Report, including basic matters such as the people who were interviewed and, perhaps more importantly, those who were not.

41 Despite my conclusion that the Amnesty International Report should not have been admitted into evidence, I am nonetheless of the view that the motion judge came to the right conclusion in making the order he did.

42 The Amnesty International Report was but one factor that the motion judge took into account in concluding that if the wife returned to Dubai, there was "a reasonable likelihood that the violence and the abuse to which [she] has been exposed would continue" and that neither she nor the child would be "adequately protected from it".

43 Apart from the Amnesty International Report, the motion judge had before him evidence of at least one instance (the April 11, 2005 incident) in which the police in Dubai were called and did nothing to protect the wife's interests, choosing instead to communicate only with the husband. Moreover, there was evidence, which the motion judge quite properly viewed as significant, that following the wife's flight from Dubai to Canada, the husband obtained an order from a court in Dubai which required the wife to return to the husband's home and obey him. The pertinent part of the order reads as follows:

> The first request of the Plaintiff [husband] is: to oblige the Defendant [wife] to obey him, thus the Court is accepting his request. It is stated legally, that the wife is supposed to stay in her husband's house and obey him. She shall not leave his house without a lawful reason. Whereas the witnesses to the Plaintiff confirmed that he has treated his wife in a good way, has provided her with suitable house and comfortable living. *In spite of that, she left without reason, from which this court orders her to return and obey her husband*. [Emphasis added.]

44 Given the husband's history of alcoholism, his serious physical and emotional abuse of the wife, his stated belief that he is justified in using immediate physical force to stem invasions of his privacy and to rebuke verbal insults, his dominant and controlling behaviour, and a court order from

Dubai requiring the wife to reside with him and obey him, I believe the evidence amply justifies the order made by the motion judge.

45 In short, having regard to the findings of the motion judge, I believe that he was correct in concluding that the child would, on a balance of probabilities, suffer serious harm if he were to be removed from Ontario and returned to the husband in Dubai.

46 In the result, I would dismiss the appeal. The parties agree and I concur that the wife should have her costs in the amount of $7,500 inclusive of G.S.T. and disbursements.

M.J. MOLDAVER J.A.
D.R. O'CONNOR A.C.J.O.:-- I agree.
P.S. ROULEAU J.A.:-- I agree.

cp/e/qlfxs/qllkb

Indexed as:

Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.

Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd., 710-73345 Investments Inc., 67551 Ontario Ltd. (c.o.b. Galaxy Towers), Lederman, Glazer and Von Essen

[1991] O.J. No. 717

3 O.R. (3d) 278

49 O.A.C. 1

26 A.C.W.S. (3d) 1171

Action No. 630/90

Court of Appeal for Ontario

Mckinlay, Griffiths and Carthy JJ.A.

May 13, 1991

Counsel:

Mark H. Arnold, for respondent.

M.J. Dermer, for appellants.

The judgment of the court was delivered by

1 MCKINLAY J.A.:-- This is an appeal from an order of the Honourable Mr. Justice McKeown dated June 20, 1990 [summarized at 21 A.C.W.S. (3d) Paragraph1057], setting aside an order of Master Donkin dated May 23, 1990 [summarized at 21 A.C.W.S. (3d) Paragraph1056], which had in turn set aside the noting in default of the defendants.

2 The plaintiff/respondent's claim is for damages arising from the defendants' alleged negligence, negligent misrepresentation, breach of contract and breach of fiduciary duty. The plaintiff alleges, inter alia, that the defendants failed to construct a building -- being Condominium Corporation No. 706 -- in a good and workmanlike manner in accordance with applicable building codes. The plaintiff further alleges that the defendants negligently or knowingly misrepresented the condition of the building in order to induce the individual unit holders to purchase condominium units in 1987 and thereafter. In para. 18 of the statement of claim the plaintiff estimates its damage at $8,000,000.

3 The following is a chronology of relevant events:

1. December 22, 1989. Action filed with the Supreme Court.
2. January 23, 1990. All defendants have been served with statement of claim.
3. February 13, 1990. Letter from solicitor for the defendants requesting that the defendants not be noted in default as the defendants' data is being assembled.
4. February 15, 1990. Correspondence from plaintiff's counsel to defendants' counsel extending time for the filing of a defence to February 19, 1990.
5. February 20, 1990. Letter from defendants' counsel serving demand for particulars.
6. March 15, 1990. Letter from plaintiff's counsel to defendants' counsel serving answers to demand for particulars and delivering technical audit report in two volumes.
7. April 2, 1990. Letter from plaintiff's counsel to defendants' counsel confirming receipt of amended demand for particulars. Defence demanded no later than April 4, 1990 or the defendants will be noted in default.
8. April 5, 1990. All defendants noted in default.
9. April 9, 1990. Letter from plaintiff's counsel to defendants' counsel advising that the defendants have been noted in default and offering to set aside the noting in default if a valid defence on the merits is received no later than April 11, 1990.
10. April 10, 1990. Service of defendants' notice of motion requiring the plaintiff to answer demand for particulars and amended demand for particulars.
11. April 16, 1990. Letter from plaintiff's counsel to defendants' counsel advising that defence not received.
12. April 17, 1990. Telephone discussion between counsel setting a date for April 24, 1990 for the defendants' motion to have the noting in default set aside.
13. April 19, 1990. Letter from defendants' counsel requesting change in date for the motion.
14. April 20, 1990. Letter from plaintiff's counsel to defendants' counsel setting date of the motion for April 27, 1990.
15. April 30, 1990. Service of notice of motion re setting aside noting in default returnable May 3, 1990.
16. May 23, 1990. Attendance before Master Donkin.

4 Two motions were heard by Master Donkin -- one to set aside the noting in default of the defendants, and the other to require the plaintiff to answer the amended demand for particulars. After hearing submissions from both counsel, the learned master set aside the noting in default but re-

fused to order the plaintiff to answer the amended demand for particulars. The following is the typescript of the master's handwritten endorsement on the record:

> 1. Re setting aside noting in default. In my view what is required is an intention to defend and some reason why defence was not filed on time. It is not required that defendant show a good defence -- see Rastas v. Pinetree Mercury -- 27 October 1989 -- White J. -- 39344/89.
>
> Reason for defence being late is questionable -- i.e. -- can a defendant serve a second demand for particulars -- but that reason did exist. Noting in default set aside.
>
> 2. Re particulars.
>
> (a) For reasons attached dismissed.
> (b) I question bona fides of second demand.
>
> Order (1) noting in default set aside. (2) statement of defence to be delivered on or before June 4, 1990.
>
> Costs to plaintiff, on solicitor/client scale as of preparation for two motions and counsel fee on one in any event.

5 It was only the decision of the master setting aside the noting in default which was appealed to weekly court.

6 The appellants rely on the clear law that on appeal a discretionary order of a master should not be set aside unless it is clearly wrong. See Marleen Investments Ltd. v. McBride (1979), 23 O.R. (2d) 125, 27 Chitty's L.J. 69, 13 C.P.C. 221 (Ont. H.C.J.) and Clairmonte v. Canadian Imperial Bank of Commerce, [1970] 3 O.R. 97, 12 D.L.R. (3d) 425 (C.A.). What then did the learned master do, in exercising his discretion, that was "clearly wrong"? The learned weekly court judge dealt with two issues in his reasons. First, he agreed with the master that on such a motion it is not necessary that the defendants show a good defence on the merits, relying on Rastas v. Pinetree Mercury Sales Ltd. (1989), 39 C.P.C. (2d) 287 (H.C.J.). However, he disagreed with the master's disposition of the motion on the basis that no valid reason for being late in filing and serving a defence was given by the defendants. He was of the view that the law requires "not just any reason" but a "valid reason".

7 The appellants take the position that the weekly court judge erred in deciding that the law requires a "valid reason" for the defendant's delay in order to set aside a noting in default. They argue that all the moving party needs is a bona fide intention to defend and no undue delay in bringing the motion to set aside a noting in default, both of which were shown in this case.

8 The respondent, on the other hand, takes the position that the moving party must show by affidavit a good defence to the action on the merits and also a bona fide explanation of why the statement of defence was not filed and delivered within the time limited by the rules.

9 Noting in default under the Rules of Civil Procedure, O. Reg. 560/84, is analogous to noting pleadings closed under the former Rules of Practice, R.R.O. 1980, Reg. 540. Under the old rules there was no provision for setting aside the noting of pleadings closed. Nevertheless, in exercising the court's inherent jurisdiction to control its own processes, courts frequently set aside the noting of pleadings closed in appropriate circumstances. Rule 19.03(1) of the new rules provides that:

> The noting of default may be set aside by the court on such terms as are just.

10 The question arises as to whether the former practice should continue under rule 19.03(1), or whether the practice should parallel that applied on a motion to set aside a default judgment under rule 19.09(1), which reads as follows:

> A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

Former practice

11 Under the Judicature Act, R.S.O. 1980, c. 223 [now Courts of Justice Act, 1984, S.O. 1984, c. 11], the practice in Ontario in setting aside the noting of pleadings closed was different from the practice in setting aside default judgments. The leading case of Wieder v. Williams (1976), 13 O.R. (2d) 528 (Master) held that where there was a continued intention to defend, where there was no great delay, and where the uncontradicted evidence was that the failure to defend in time was due to inadvertence, it was not necessary to show a valid defence on the merits in bringing a motion to set aside the noting of pleadings closed.

12 That decision was adopted by Montgomery J. in Lopet v. Technor Sales Ltd. (1982), 29 C.P.C. 43 (Ont. H.C.J.), where he stated:

> I do not believe that in all cases of motions to set aside a noting of pleadings closed that it is obligatory to show a good defence on the merits. It may be that in some extreme case that test should be considered.

13 While the old rules were in force, it would have been unusual for the court to require affidavit evidence of a defence on such a motion because of the strong likelihood that the proceedings would be unnecessarily delayed by the plaintiff insisting on the right to cross-examine. For minor defaults it was considered more expeditious to allow the defendant to plead in the normal way and then proceed to discoveries. In a situation where the default was substantial and the behaviour of the defendant reprehensible, the court could always exercise its discretion to require that the defendant show a defence on the merits. In contrast, in setting aside default judgments, the defendant was always required to show a defence on the merits.

Practice under the new Rules of Civil Procedure

14 Since the coming into force of the new rules, conflicting decisions have emerged. The first was the decision of Master Sandler in SM Graphics International Ltd. v. Constriuzione Macchine Serigrafiche (1988), 65 O.R. (2d) 265, 28 C.P.C. (2d) 253, in which the learned master stated his view that since the relevant language in both rules is identical the criteria applied under each rule should be the same.

15 Morrissey D.C.J., in Caroli v. Rudan, Ont. Dist. Ct., March 1, 1989 [summarized at 15 A.C.W.S. (3d) 145], agreed with Master Sandler's interpretation of rule 19.03, but adjourned the defendant's motion to set aside a noting in default to enable the defendant to file material to show a good defence.

16 A year later the decision of White J. in Rastas v. Pinetree Mercury Sales Ltd., supra, commenced a line of cases taking the opposite view. At p. 288 C.P.C. he stated:

> There has been no undue delay by the defendants in defending the action. There has been a bona fide intention to defend throughout. The circumstances do not call upon the defendants to file an affidavit that they would have good defence on the merits as they would have to do to have summary judgment set aside.

He was of the view that the rules were applied with "excessive rigidity" in the SM Graphics case. The Rastas decision has been followed in the following cases: Granger J. in Hart v. Kowall (1990), 75 O.R. (2d) 306, 74 D.L.R. (4th) 126 (Gen. Div.); Farley J. in Axton v. Kent, Ont. Gen. Div., February 22, 1991, affd by the Divisional Court (Steele, Campbell and McKeown JJ.), April 10, 1991 [now reported 2 O.R. (3d) 797], and by Mr. Justice McKeown in this case.

17 In Hart v. Kowall, Granger J. stated at p. 308 O.R.:

> ... a defendant within the prescribed time for filing a statement of defence can always serve and file a statement of defence regardless of the merits of his defence. In my view if the omission to file a statement of defence within the required time can be explained, the defendant should not be in a different position than a defendant who serves and files a statement of defence within the prescribed time. The plaintiff's proper course of action if there is a lack of merit in the statement of defence is to move for summary judgment. A default judgment is different as the plaintiff has recovered a formal judgment and the defendant in seeking a discretionary order of the court is required to show that there is a meritorious reason for setting aside the default judgment.

18 I agree with this position. Rule 19.03 provides that a noting in default "may be set aside by the court on such terms as are just", and rule 19.09 provides that a default judgment "may be set aside or varied by the court on such terms as are just". It seems clear that the language in both cases is intended to leave the matter within the discretion of the court, and not intended to create a legislative requirement to use identical tests. The situations in which these two rules are applied are different, and I see no coherent rationale for the application of similar tests. Although as a general rule one would expect similar words in statutory or regulatory provisions to be applied similarly, when the wording involved is that of broad discretion rather than specific and detailed rules, it is the context and factual situation in which the discretion arises which should determine its application. Such factors as the behaviour of the plaintiff and of the defendant, the length of the defendant's delay, the reasons for the delay, and the complexity and value of the claim involved are all relevant factors to be taken into consideration. However, I consider that it would only be in extreme situations that a trial judge would exercise his discretion to require an affidavit as to the merits of the defence on a motion to set aside a noting in default.

19 I agree with the decision of the learned weekly court judge on this point.

Validity of reason for delay

20 I am aware of no cases, and none were cited to us, where there was a refusal to set aside a noting in default or a noting of pleadings closed on the sole basis that the court considered the reason given by the defendant for tardiness in pleading to be an inadequate one. In this particular case there was a continuing intention to defend, the delay was not inordinate, the case was factually complicated, and a large amount of money was at stake. The learned master did state that the "reason for defence being late is questionable", but he also said "but that reason did exist". He obviously considered that the reason for delay, although "questionable", was sufficient along with the other factors referred to above to warrant setting aside the noting in default.

21 It should be remembered that in this case the master was dealing with two motions -- one to set aside the noting in default and another to require the plaintiff to respond to the second demand for particulars. It was in dealing with the second motion with respect to particulars that the trial judge stated "I question bona fides of second demand". That motion for further particulars was dismissed by the master and is not under appeal. Although the endorsement is slightly confusing, I believe that when the master questioned the bona fides of the second demand he was stating his reasons for dismissing the motion for further particulars.

22 I am not satisfied that the master was "clearly wrong" in his disposition of the motion to set aside the noting in default. On the contrary, I am satisfied that his disposition was correct. I would, therefore, set aside the decision of the weekly court judge and restore the decision of Master Donkin. I would make no order as to costs of the appeal.

Appeal allowed.

Case Name:

Nobosoft Corp. v. No Borders Inc.

Between
Nobosoft Corporation, Respondent (Plaintiff), and
No Borders Inc., Raul Hinojosa, Michael Rosenfeld
and Ruben Sanchez, Appellants (Defendants)

[2007] O.J. No. 2378

2007 ONCA 444

225 O.A.C. 36

43 C.P.C. (6th) 36

158 A.C.W.S. (3d) 896

2007 CarswellOnt 3903

Docket: C46105

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, J.C. MacPherson and E.A. Cronk JJ.A.

Heard: June 12, 2007.
Oral judgment: June 12, 2007. Released: June 18, 2007.

(10 paras.)

Civil procedure -- Judgments and orders -- Default judgments -- Setting aside -- Noting in default -- Appeal by defendant from dismissal of motion to set aside noting in default allowed and noting in default set aside -- Judge erred in failing to consider explanation for lack of intent to defend action, to consider whether or not defendant had arguable defence, and to note lack of prejudice to plaintiff if relief granted to defendant.

Appeal by No Borders from the denial of a motion for an order setting aside its noting in default. The evidence showed No Borders did not intend to defend Nobosoft's action against it in Ontario, as this could result in attornment to the jurisdiction of the Ontario court. The judge did not assess this

explanation for No Border's conduct, and did not consider whether or not No Borders had an arguable defence on the merits to the action.

HELD: Appeal allowed, and the noting in default was set aside. The judge erred in inquiring only as to whether No Borders showed intent to defend prior to the expiry of the time for delivery of its defence. There was no evidence No Borders sought to flout or abuse court rules. It moved fairly promptly to set aside the noting in default. No evidence of prejudice to Nobosoft was established if the noting in default was set aside.

Statutes, Regulations and Rules Cited:

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

Appeal From:

On appeal from the order of Justice Patrick J. Flynn of the Superior Court of Justice dated November 24, 2006.

Counsel:

Jonathan L. Rosenstein, for the appellants.

Edward L. D'Agostino, for the respondent.

The following judgment was delivered by

1 THE COURT (orally):-- The appellants appeal the denial of their motion for an order setting aside the noting in default obtained against the appellant No Borders Inc. ("No Borders") by the respondent.

2 In our view, the motion judge erred by inquiring only as to whether there was an intent to defend formed by No Borders prior to the expiry of the time for delivery of its defence set by Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 On the authority of this court's decision in *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 at para. 18, the full context and factual matrix in which the court is requested to exercise its remedial discretion to set aside a noting in default are controlling factors. In particular, as noted by the court at para. 18 of *Bardmore*, such factors as the behaviour of the plaintiff and of the defendant, the length of the defendant's delay in seeking to respond to the plaintiff's claim, the reasons for the delay and the complexity and value of the claim involved, are all relevant matters to be taken into consideration.

4 In this case, there was no evidence that No Borders formed an intent to defend within the requisite time period. Indeed, to the contrary, the evidence indicated that No Borders formed an intent not to defend in Ontario because it feared that to do so would result in attornment to this jurisdiction. It was the uncontradicted sworn evidence of No Borders' representative that it did not defend the action "to avoid attorning to the jurisdiction". Although the appellant's representative was cross-examined on his affidavit, this part of his evidence was unchallenged.

5 The motion judge made no assessment of this explanation for No Borders' conduct. Nor does he appear to have considered whether, on the evidence before him, No Borders has an arguable defence on the merits to the respondent's claim.

6 There is no evidence here that No Borders sought to flout or abuse the *Rules of Civil Procedure*. It moved relatively promptly to set aside the noting in default. At the very least, its delay in seeking relief was not inordinate. Moreover, there is nothing on this record establishing prejudice to the respondent if the requested relief was granted.

7 We agree with the observations of Molloy J. of the Superior Court of Justice at para. 2 of *McNeill Electronics Ltd. v. American Sensors Electronics Inc.* (1996), 5 C.P.C. (4th) 266 (Ont. Gen. Div.), reversed on other grounds (1998), 108 O.A.C. 257 (C.A.):

> Motions to extend the time for delivery of pleadings and to relieve against defaults are frequently made and are typically granted on an almost routine basis. Usually opposing counsel will consent to such relief as a matter of professional courtesy. Where there is opposition to a motion of this kind, it is usually related to additional terms which are sought as a condition to the indulgence being granted or to issues of costs ... It is not in the interests of justice to strike pleadings or grant judgments based solely on technical defaults. Rather, the Court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties.

8 Accordingly, the appeal with respect to the noting in default is allowed and the noting in default of No Borders is set aside. No Borders shall serve and file its statement of defence in this action within thirty days from the date of this decision.

9 Although the appellants also seek leave to appeal the award of costs made against them by the motion judge, in our view it is unnecessary to deal with the costs issue raised by the appellants. Even if the error alleged concerning the fees and disbursements associated with the relevant out-of-province examination was demonstrated, responsibility for these costs could have been imposed as a term of setting aside the noting in default. Accordingly, in these circumstances, leave to appeal costs is denied.

10 The respondent is entitled to its costs of this appeal, and of the motion before this court for security for costs, on the partial indemnity scale as against No Borders, fixed in the total amount of $5,000, inclusive of disbursements and G.S.T. Because leave to appeal the costs award below is denied for the reasons given, that award stands.

D.H. DOHERTY J.A.
J.C. MacPHERSON J.A.
E.A. CRONK J.A.

cp/e/qlbxr/qlpwb

Case Name:

Flintoff v. von Anhalt

Between
Kevin Flintoff, Ken Parish, Marie Parish, Stan Parish, Lois Parish, Connie Parkinson, Brian Parkinson, Paul Alexander Parkinson, George Edward Parkinson, Ines Primc, Tari Rinder, Craig Robinson, Ronald Vale, Maya Varma and Frank Workman,
Respondents, and
Emilia von Anhalt, Appellant

[2010] O.J. No. 4963

2010 ONCA 786

Docket: C52097

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg, M.J. Moldaver and A. Karakatsanis JJ.A.

Heard: November 16, 2010.
Judgment: November 19, 2010.

(15 paras.)

Civil litigation -- Judgments and orders -- Default judgments -- Noting in default -- Setting aside -- Appeal by defendant from refusal to set aside noting in default and from default judgment dismissed -- Respondents commenced claim after appellant promised to sell shares, took payment, and never delivered shares -- Appellant failed to defend action -- No error in dismissing motion to set aside noting in default as it was a discretionary decision and open to judge to reject appellant's reasons for failure to defend action -- Judge entitled to act upon available evidence, which was not materially inconsistent with statement of claim -- Any limitations defence defeated as no evidence as to when claim was discovered.

Appeal by the defendant from the refusal to set aside a noting in default and the from a default judgment. The appellant was formerly an officer and director of a diamond exploration company. In November 2002, the Securities Commission made an order against her and her late husband limiting the circumstances in which they could trade in the securities of the company. When the Commission learned that the appellant and her husband were continuing to sell securities of the company in breach of the earlier order, it commenced a quasi-criminal prosecution of them. The appellant left

the country and did not attend the trial. She was tried in absentia, convicted and sentenced to a term of imprisonment. In 2007, the husband sold his shares in the company. As a result of an application commenced by the Commission, a security interest in the appellant's and her husband's shares in the corporation was granted to named victims in the quasi-criminal proceedings. Consequently, the bulk of the purchase price was paid into court and ultimately distributed to various persons, including the five victims. The appellant did not provide any restitution and she retained her shareholdings in the company. In July 2008, the respondents commenced a claim against the appellant alleging breach of contract, fraud and fraudulent misrepresentation as a result of agreements the appellant entered into with them but failed to honour. She was served with the claim by email and advised that the respondents would be seeking default judgment. As the appellant did not respond or take any steps, she was noted in default. Subsequently, the appellant was allowed to exercise her dissent rights under the Business Corporations Act and the new owners of the corporation paid $400,000 into court for the purchase of her securities. The respondents brought a motion for default judgment, which was adjourned to allow the appellant to bring a motion to set aside the noting in default. The motions judge found that the appellant was a fugitive from justice and had not filed a defence to the action although she had known about it from the time it was commenced. In addition, he found that the appellant advanced no credible evidence for her failure to defend the action, and only disputed the quantum of money owed to the respondents. He concluded that it was not necessary to set aside the noting in default in order to determine the quantum owing, and consequently refused to do so. The position of the appellant was that the default judgment should be set aside because the motions judge should have ordered that the action proceed to trial because of concerns with the evidence, including that there was an inconsistency between some facts pleaded in the statement of claim and the evidence provided in the respondent's affidavits, the evidence did not support the amounts claimed and there might have been a Limitations Act defence to one of the claims.

HELD: Appeal dismissed. The motions judge made no error in dismissing the appellant's motion to set aside the noting in default as it was a discretionary decision and it was open to the motions judge to reject the appellant's claims regarding her reasons for her failure to defend the action. The motions judge was entitled to act upon the available evidence, which was not materially inconsistent with the facts pleaded in the statement of claim, and even if there was a limitations defence available to the appellant, there was no evidence as to when the respondents discovered their claim, which would have defeated any such defence.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. B.16, s. 185

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

Rules of Civil Procedure, Rule 19.05(3)

Appeal From:

On appeal from the judgment of Justice James M. Spence of the Superior Court of Justice dated April 22, 2010.

Counsel:

Alistair Crawley and Clarke Tedesco, for the appellant.

David Milosevic, for the respondents.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- The appellant, Emilia von Anhalt, appeals from the orders of Spence J. refusing to set aside the noting in default and granting default judgment in the amount of $776,710.74. For the following reasons the appeal is dismissed, except that the amount of prejudgment interest is reduced to 3.3 percent.

The Noting in Default

2 The appellant was formerly an officer and director of Lydia Diamond Exploration of Canada Ltd. In November 2002, the Ontario Securities Commission made an order against her and her late husband under s. 127 of the *Securities Act inter alia* limiting the circumstances in which they could trade in the securities of Lydia Diamond. In October 2004, the OSC received information that the appellant and her husband were continuing to sell Lydia Diamond securities in breach of the 2002 order. As a result, the OSC commenced a quasi-criminal prosecution of the appellant and her husband in late 2005. While the appellant's husband attended the trial, the appellant left the jurisdiction and was therefore tried *in absentia.* She was eventually convicted and sentenced in 2007 to a term of imprisonment. There is also a warrant for the appellant's arrest for charges of forgery and fraud allegedly committed in Toronto in 2005. The appellant has apparently not been in Canada since 2005.

3 In November 2007, Pepall J. heard an application by the OSC which led to the granting of a security interest in the von Anhalts' shares in Lydia Diamond to named victims from the quasi-criminal proceedings. Days before the hearing the appellant's husband sold his securities to certain investors. As a condition of obtaining court approval of the sale, these investors paid the bulk of the approximately $1.4 million purchase price into court. Ultimately, these funds were distributed to various persons, including five of the victims. The appellant did not provide any restitution and she has retained her shareholdings in Lydia Diamond.

4 In July 2008, the respondents commenced an action against the appellant alleging breach of contract, fraud, and fraudulent misrepresentation as a result of agreements the appellant had entered into with them but failed to honour. While the respondents did not know where the appellant lived, they had an e-mail address for her and served her with the statement of claim by e-mail on July 3, 2008. An order for substituted served by e-mail was subsequently made on September 3, 2008. On that date, the respondents' counsel served the appellant with a copy of the order for substituted served and advised her that the respondents would be seeking default judgment. The appellant did not respond or take any other steps and was noted in default on January 26, 2009.

5 In an order of December 21, 2009, Pepall J. allowed the appellant to exercise her dissent rights under s. 185 of the *Business Corporations Act* and provided for a payment into court by the new owners of Lydia Diamond of funds for the purchase of the appellant's Lydia Diamond securities. $400,000 has now been paid into court. The respondents then brought their motion for default judgment, which was returnable on January 26, 2010. The respondents, having learned that the ap-

pellant had retained Ontario counsel, served him with a motion record in support of the motion for default judgment. The motion for default judgment was adjourned to allow the appellant to move to set aside the noting in default. The appellant filed an affidavit in an attempt to explain her default and some of the circumstances under which she took money from the respondents. She was cross-examined on her affidavit. She did not cross-examine any of the respondents on their affidavits.

6 In brief reasons, the motions judge referred to the correct test for setting aside default judgment. He noted that she was a fugitive from justice and did not file a defence in the action for a year and half even though she was aware of the action from the time it was commenced. He found that she had put forward no credible evidence for her failure to defend the action. He also took the view that the appellant did not dispute that she owed money to the respondents, she only disputed the quantum. Therefore, it was not necessary to set aside the noting in default to deal with the question of quantum.

7 Whether to set aside a noting in default is a discretionary decision. The court will look at the non-exhaustive list of factors including the behaviour of the plaintiff and of the defendant, the length of the defendant's delay, the reasons for the delay and the complexity and value of the claim. See *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 (C.A.). We have not been persuaded that the motions judge erred in dismissing the appellant's motion to set aside the noting in default. The appellant claimed that she did not defend the action because of lack of funds. It was open to the motions judge to reject this claim given the evidence that she had access to funds which she used for other purposes. The more probable explanation for her failure to defend and the lengthy delay is that the appellant had no intention to defend the action until she saw there was a possibility her Lydia Diamond securities might have some value following Pepall J.'s December 2009 order.

The Default Judgment

8 The appellant submits that the default judgment should be set aside because there is an inconsistency between some of the facts pleaded in the statement of claim and the evidence provided in the respondents' affidavits. She also submits that the evidence provided in the affidavits does not support the amounts claimed. Finally, she submits that there may be a *Limitations Act* defence to the claim by Tari Rinder. Given all of these concerns with the evidence, the appellant submits that the motions judge should have exercised his discretion under rule 19.05(3) and ordered that the action proceed to trial.

9 We would not give effect to any of these arguments. While the respondents' affidavits claimed for various sums they gave to the appellant, the motions judge limited judgment to amounts related to the shares in Lydia Diamond that the appellant promised to give to the respondents and which she never delivered. In cross-examination, she admitted that she received the funds and that those funds went into a bank account over which she had sole control. For example, in relation to the Parkinsons' claim, she admitted that she did not dispute that funds were advanced; she only disputed the quantum.

10 A review of the affidavit evidence indicates that the respondents, some of whom were elderly and had lost their life savings, attempted to gather as much documentary evidence as possible to support their claims. They were not able to provide documents for all of the claims but the motions judge had their sworn testimony as to the amounts they provided to the appellant. He was fully

entitled to act upon that evidence. In the case of Brian Parkinson, the motions judge, having reviewed the evidence, substantially reduced the amount originally claimed.

11 The appellant points out an apparent inconsistency between the promissory note attached to Mr. Parkinson's affidavit and the amount claimed in the affidavit. Admittedly, the affidavit is somewhat confusing. However, the explanation for some of the confusion is due to the fact that, as explained by Mr. Parkinson, part of the promissory note is missing.

12 We are also not persuaded that there is a material inconsistency between the facts pleaded in the statement of claim and the affidavit evidence. The facts in the statement of claim indicate that the appellant induced the respondents to enter into share subscription and option agreements pursuant to which she purported to sell shares in Lydia Diamond. She did so at a time when she had no authority to engage in sales of Lydia Diamond and when there was no prospect that the shares would be traded on a recognized exchange. She never delivered the shares nor did she pay back the amounts provided by the respondents. The affidavit evidence is consistent with those facts. The fact that some of the funds may have originally been provided as loans to the appellant is not material to the appellant's liability for the amounts advanced by the respondents. And, as we have noted above, the appellant does not dispute that she owed some amount to the respondents.

13 Finally, assuming a *Limitations Act* defence was available, there is evidence as to when the respondents discovered their claim which would defeat any such defence.

Prejudgment interest

14 The respondents concede that the rate of prejudgment interest should be reduced from 5 percent to 3.3 percent.

DISPOSITION

15 Accordingly, except for an amendment to paragraph 3 of the Judgment to reduce the rate of prejudgment interest to 3.3 percent, the appeal is dismissed with costs fixed at $12,500 inclusive of disbursements and applicable taxes.

M. ROSENBERG J.A.
M.J. MOLDAVER J.A.
A. KARAKATSANIS J.A.

Case Name:

Sault College of Applied Arts and Technology v. Agresso Corp.

Between
Sault College of Applied Arts and Technology,
Plaintiff, and
Agresso Corporation, Defendant

[2006] O.J. No. 5265

154 A.C.W.S. (3d) 584

Ontario Superior Court of Justice
Sault Ste. Marie, Ontario

R.A. Riopelle J.

Heard: September 29, 2006.
Oral judgment: September 29, 2006.

(17 paras.)

Counsel:

O. Rosa Counsel for the Plaintiff

D.J. Mackeigan Counsel for the Defendant

REASONS ON MOTION

1 **R.A. RIOPELLE J.** (orally):-- The License Agreement between B.C. software designer Agresso and Sault College provides that any law suit between them relating to this contract is to be brought before the B.C. courts. Notwithstanding this, the College is suing Agresso in Ontario. Agresso brings a motion under S. 106 of the *Ontario Courts of Justice Act* for a stay of the Ontario proceedings. For the reasons that follow the request for a stay is declined: the proceedings will continue in Ontario.

2 A consideration of several legal principles was required before reaching that decision:

1) a consideration of the forum clause as selected by the parties;
2) having determined that the forum clause no longer applied, it was then necessary to inquire as to whether the dispute has a real and substantial connection to Ontario; and
3) having determined that the matter has a real and substantial connection to both B.C. and Ontario, it was necessary to determine whether the doctrine of forum non-conveniens favours Ontario or B.C. as the most appropriate forum.

3 Where there are no public policy or uneven bargaining power considerations, a court should give effect to a forum selection clause agreed to by the parties unless the party seeking to have the case heard in another jurisdiction can establish that there is a "strong cause" to override the forum selection clause. The burden of proving a strong cause is on the College. In exercising its discretion, a court should take into account all of the circumstances of the particular case, the interests of the parties and the interests of justice.

4 The License Agreement provides that it shall be "construed and governed by the laws of the Province of British Columbia applicable hereto and the parties hereby submit and attorn to the courts of such jurisdiction." The Maintenance Agreement provides that the contract is to be construed in accordance with and governed by the laws of British Columbia and so does the Service Agreement. There is also a dispute resolution mechanism in the contracts which provides that "... any dispute arising in connection with this agreement or if either party feels that there's been a default under any terms or conditions of this agreement", then the concerned party will deliver a Notice of Default. If the mediation proceedings do not produce a successful resolution, or if they are not at all engaged, then the matter will be submitted to binding arbitration according to the *Commercial Arbitrations Act*.

5 The arbitration and mediation provisions do not apply. The use of language referring to "default under ... this agreement" and to "any dispute arising in connection with this agreement" limits the disputes to contractual matters dealing with the agreement itself and defaults under the contracts. This action involves more than just that. It involves the formation of the contract itself because of allegations of misrepresentation and tort damages in paragraph 38 of the Claim. That's dispositive of this matter, but, in addition there's been an attornment by conduct. There is no doubt that, from the very beginning of the discussions between the parties following difficulties with the product, Agresso maintained that all proceedings should occur in British Columbia. The parties then engaged in non-litigious bargaining between them to see if it would be possible to resolve their differences. Throughout all of that process, Agresso continued to maintain that the matter should be in B.C. and not in Ontario and the plaintiff continued to maintain its right to jurisdiction in Ontario. There was attornment because Agresso filed:

1) an unconditional Notice of Intent to Defend;
2) a Defence, even if it contains a paragraph whereby Agresso maintains its right to contest the matter of jurisdiction; and
3) an Affidavit of Documents.

6 It is significant that at no time during the ongoing discussions did Agresso ever insist that the College comply with the formal requirements of the dispute resolution procedure set forth in the agreements or comply with the necessity to arbitrate as set forth in the agreements.

7 Agresso argued that it did not attorn but rather showed restraint in the Ontario proceedings in that:

1) it didn't file a counter-claim even though it might have a right to do that;
2) it has not discovered any of the plaintiff's witnesses yet; and
3) it has not responded to the Undertakings - in fact, Agresso was very careful not to recognize them simply only as Undertakings but also as Acknowledgements under the Rules that apply in British Columbia and agreed that the transcripts may be used for non-litigious purposes but also in the court of either Ontario or B.C., depending on where the proceedings would continue.

8 Other arguments advanced by Agresso:

1) that the College was aware of the clause being there, having required other types of amendments removing the words "B.C." in terms of privacy law and changing the time zone requirements; and
2) that if Unit 4 is added as a party it may be prejudiced because it may not be able to shelter under the forum clause if it doesn't apply

do not impact on the conclusion that there has been attornment, not just by the filing of legal documents, but also an attornment by lack of conduct - it is incumbent on a party who intends to rely on a right not only to insist on that right but to protect it. Parties are expected to act diligently and not "sleep on their rights". For reasons that will be clear when we deal with forum non-conveniens, Agresso's delay in enforcing its right was too long, inexcusable and amounts to attornment in fact.

9 A party served with a Claim out of the province and in contradiction of a forum clause has several means of challenging the jurisdiction of the court. Firstly, there's Rule 17.06 which allows a party who has been served outside Ontario to move for an order setting aside the service or staying the proceeding. That was not available to Agresso because it had filed an unconditional Defence and otherwise participated in the proceedings. Secondly, there's Rule 21.03 which is a motion that allows a defendant to move to have the action stayed or dismissed on the grounds that a court has no jurisdiction over the subject matter of the action. There is no such motion on this matter. Thirdly, and this is the motion that we're dealing with, S. 106 of the *Courts of Justice Act* provides for a stay of proceeding on the ground that the court lacks jurisdiction.

10 Section 106 is a two-step process. The court must first decide whether it has jurisdiction simpliciter; if it decides that it has jurisdiction, then it has to decide whether it ought to decline the jurisdiction on the basis of forum non conveniens.

11 The determination of whether there's a real and substantial connection between the Claim and Ontario is what decides whether there is jurisdiction simpliciter. That determination involves an assessment of the following eight factors which must be considered as a group since no one factor is determinative of the issue:

1) the connection between the forum (that would be Ontario) and the plaintiff's case;
2) the connection between Ontario and the defendant;
3) unfairness to the defendant if Ontario were to assume jurisdiction;
4) unfairness to the plaintiff if Ontario did not assume jurisdiction;
5) the involvement of any other party to the suit;
6) whether the case is inter-provincial or international in nature;
7) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; and
8) comity and the standards of jurisdiction and enforcement prevailing elsewhere.

12 On most of those eight factors it's easy to determine that there is a real and substantial connection between Ontario and the cause of action:

1) The connection between Ontario and the plaintiff's Claim. The implementation of the software and the use of the software was to have occurred in Ontario. The alleged misrepresentations are alleged to have occurred in Ontario and the damages suffered to the College's reputation and to its business is something that has occurred in Ontario.
2) The connection between Ontario and the defendant. There isn't much connection between Ontario and Agresso. The slightest link that can be made is that Agresso markets its product not only in B.C. but also outside of the jurisdictional limits of B.C.; and it is therefore foreseeable that damages may occur to parties outside of B.C. which may take it into somebody else's forum.
3) Unfairness to the Defendant. The only unfairness in this case is that the Defendant really wanted this to proceed in British Columbia. It would be more practical for the Defendant obviously; it would be less disruptive to its business and to its employees. But there is no unfairness in the sense that the law has not been established to be any different in Ontario than British Columbia, the process would be very similar and while it may be a little more expensive and a little more inconvenient for Agresso to come to Ontario, it's not so unfair as to override the real and substantial connection to Ontario.
4) Unfairness to the Plaintiff in not assuming jurisdiction. It's the same argument but in reverse. It's obviously more efficient for the Plaintiff if the suit is continued in Ontario. It will have more ready access to the documents that it has in its possession; the program is still here; its employees are still here; and Ontario is its domestic jurisdiction.
5) The involvement of other parties. As to Unit 4, whether the proceedings be in B.C. or in Ontario is not much of a factor.
6) Whether the case is inter-provincial or international in nature. When it's inter-provincial in Canada there is a strong body of law that indicates that the threshold is fairly low. That's because all legal systems in Canada are of approximately equal caliber: the judges appointed to the Supreme Court of each jurisdiction are appointed in the same way in the whole federation,

they're paid the same wages by the same employer and the last court of appeal to resort to is the same in all of the provinces. There is between sister provinces a comity of recognizing and accepting each others' judgments.

7) & 8) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis. That is not an issue in this case.

13 So, for all of those reasons, there is real and substantial connection between this case and Ontario. But this is a two-step process. Quite obviously there's also an obvious connection between this case and British Columbia because the Defendant resides in British Columbia, because there's a clause that says any law suit should be in British Columbia and because many of its witnesses and its software analysts and programmers are in British Columbia. So now that you've determined that there's a real and substantial connection to Ontario and a real and substantial connection to British Columbia, it's now a matter of determining whether one forum is more appropriate than the other. The Ontario court should decline jurisdiction if another forum is more appropriate. There are a number of factors that the courts have over the years considered as important when determining the jurisdiction that is the more convenient and more appropriate for the pursuit of the action in procuring the ends of justice. The eight factors that you look at for determining the jurisdiction that is the most convenient forum have been set out in many decisions and are:

1) the location where the contract was signed;
2) the applicable law of the contract;
3) the location in which the majority of the witnesses reside;
4) the location of the key witnesses;
5) the location where the bulk of the evidence will come from;
6) the jurisdiction in which the factual matters arose;
7) the residence or place of business of the parties; and
8) loss of juridical advantage.

1) The location where the contract was signed. A motions judge is not to make findings of fact on contradictory evidence. I accept Agresso's position that it's very likely this contract was signed in British Columbia. Two of the documents are dated September 25th . One of the documents is executed in Ontario October 2nd and in British Columbia October 6th. In fact there were cheques received in British Columbia even before the October 6th date. The fact that there was a formal kick-off ceremony where counterparts were signed is immaterial.
2) The applicable law of the contract. That's clearly been indicated to be British Columbia but there has not been any evidence that the law of Ontario and the law of British Columbia conflict in any material way.
3) The location where the majority of the witnesses reside. Clearly, that's going to be Sault Ste. Marie or Ontario. There are many witnesses who will have to come from British Columbia but there are many more witnesses who are in Ontario.
4) The location of key witnesses. The key witnesses to explain the alleged misrepresentations and why the implementation of the software didn't work will come from Ontario mostly. Ontario is where the bulk of the evidence will come from as well; the documents are here; the software is still here; the people who prepared all of these documents are still here; third parties who may be called are

from Ontario; the supplier for the hardware is from North York; the supplier for the software that was required to run this program is from London. They may have to be called because there are allegations by Agresso that their products are partially responsible for the problems.

5) The jurisdiction in which the factual matters arose. The misrepresentations and the damages are alleged to have occurred in Ontario. In *Tolofsen v. Jensen*, [1994] 3 S.C.R. 1022, the court gave prominence to the rule that tort cases should be governed by the law of the place where the tort was committed.
6) The residence or place of business of the parties. The Plaintiff is domiciled in Ontario. The Defendant in British Columbia.
7) Loss of juridical advantage. There isn't any from the evidence, other than Agresso would like to retain the services of its counsel who's certainly very familiar with this contract and probably with Agresso's business in general. Under the National Mobility Agreements, he may be able to get special permission to be the lawyer on this matter in the Ontario Courts.
8) This is an inter-provincial matter. Ontario or B.C. can be an appropriate forum.

14 The overriding consideration is whether there is some other forum more convenient and more appropriate for the pursuit of the action than the one selected. That is not the case. Ontario is the more appropriate forum.

15 A review of the facts is probably necessary in order to give some background to this matter. In 1999 there was a proposal made by Agresso to Sault College. In July, 2000 there was a Power Point presentation made by Agresso staff to Sault people at which there were 42 College staff present. The Claim alleges that's where the misrepresentation commences. In September, 2000 there was a demonstration before 22 people from the College. There was also a Memorandum of Agreement. Three contracts were signed: the License dated September 25th, the Maintenance Agreement October 6th and the Implementation Agreement in December. There was a kick-off ceremony November 2nd. There's a large Project Charter Document which outlines the parties' expectations. Attached to that is a large document called Principles and Visions prepared by a number of College staff. There's a Project Plan as well. There are diploma audit functionality requirement documents that were prepared. There were, according to some numbers, 33 different visits by Agresso staff at the College to present the product and to implement the software which consisted of 123 days and numerous employees from Agresso. The project managers were stationed in Ontario. There was hardware purchased from North York; software purchased from London; there were four full-time people the College dedicated to the implementation. Every department in the College had something to say about this program, had some input into this program and those people will be required as witnesses. That includes admission, accounting, graduation, all of the departments. When significant problems arose, issue lists were drawn and some of these issue lists showed as many as 34 functional problems. In 2003, the College made a decision through its executive committees to abandon the Agresso product and on June 30th, 2003 the first lawyer's letter was dispatched from the College to the President of Agresso, following which there were meetings and discussions with respect to non-litigious resolution of the disputes. Nowhere during any of those discussions was there insistence that the matter proceed in accordance with the default provisions of the agreements or that the matter proceed through arbitration proceedings. Throughout, the College maintained that jurisdiction was appropriate in Ontario and throughout Agresso maintained that jurisdiction should be in British Columbia. There was an explanation of the narrative by the College to Agresso; three

volumes of materials were provided. No response was ever received. There were suggestions that there might be mediation in Toronto. Some names were suggested. But no mediation was ever arranged. At some point the College started to threaten litigation. It was reminded that litigation should occur in B.C. On July 28th, 2004 the Claim was issued. The Claim speaks of tort damages, breach of contract, fundamental breach and misrepresentation. It was served August 4th. A Notice of Intent to Defend was filed September 7th. Advice was received that the solicitor from British Columbia may have the capacity to appear before the courts of Ontario under the new National Mobility Agreement. There's communication between counsel to the effect that the College does not agree that jurisdiction is an issue; they still believe that they're entitled to proceed in Ontario. Agresso is advised that the College is no longer interested in mediation. An Affidavit of Documents is supplied. Again the College confirms that it thinks Ontario is the proper jurisdiction. In January 2005 the Plaintiff filed his Reply. The pleadings are completed at this point. On February 8th and again on February 21, 2005 Agresso tells the College that it's retained an Ontario firm to contest the jurisdiction issue. February 23rd, Agresso files its Affidavit of Documents. May 16th and 17th there are examinations in B.C. The examinations are totally without prejudice and they're done with the hope that they will lead to a non-litigious settlement of the matter. Both parties agree that the transcripts can be used either in Ontario or B.C. once the jurisdictional issue is determined and counsel is careful not to give only Undertakings under Ontario law but Acknowledgements under B.C. law.

16 The important thing is the Claim was issued in July 2004 but the date of the motion to contest jurisdiction wasn't set until December, 2005 almost a year after the pleadings are closed. The Defendant is not responsible for all of that delay. There are some months where the College said to Agresso that it couldn't understand why Agresso would want to bring that kind of a motion given that there were settlement discussions going on. But once the settlement discussions are over, there's no excuse for more than a year of delay. By filing a Notice of Intent, the Defence and an Affidavit of Documents, by not protecting its right, Agresso has attorned to the jurisdiction of Ontario. If it had brought its motion before filing the Notice of Intent, before filing a Defence, under Rule 17 or S.106 based on the forum clause in the document, it is very possible that this action would now be in British Columbia. Parties are expected to act diligently and not "sleep on their rights." Agresso has not done so and instead has allowed the process to go on since 2004, more than two years ago. It is reasonable for the Plaintiff to believe and to expect that the action will continue to proceed in Ontario. It would cause prejudice in terms of additional delay and additional costs to the Plaintiff to have the matter transferred to British Columbia.

17 For all of those reasons, it is appropriate that the matter remain in Ontario.

qp/e/qlhjk/qlpwb

Court File No. 14-0815

SUPERIOR COURT OF JUSTICE

(CENTRAL EAST REGION: BARRIE)

DONALD BEST

Plaintiff (Respondent on Motion)

- and-

**GERALD LANCASTER REX RANKING; SEBASTIEN JEAN KWIDZINSKI;
LORNE STEPHEN SILVER; COLIN DAVID PENDRITH;
PAUL BARKER SCHABAS; ANDREW JOHN ROMAN; MA'ANIT TZIPORA ZEMEL;
FASKEN MARTINEAU DUMOULIN LLP; CASSELS BROCK & BLACKWELL LLP;
BLAKE, CASSELS & GRAYDON LLP; MILLER THOMSON LLP;
KINGSLAND ESTATES LIMITED; RICHARD IVAN COX;
ERIC IAIN STEWART DEANE;
MARCUS ANDREW HATCH; PHILIP ST. EVAL ATKINSON;
PRICEWATERHOUSECOOPERS EAST CARIBBEAN (FORMERLY 'PRICEWATERHOUSECOOPERS');
ONTARIO PROVINCIAL POLICE;
PEEL REGIONAL POLICE SERVICE a.k.a. PEEL REGIONAL POLICE;
DURHAM REGIONAL POLICE SERVICE;
MARTY KEARNS: JEFFERY R. VIBERT;
GEORGE DMYTRUK; LAURIE RUSHBROOK;
JAMES (JIM) ARTHUR VAN ALLEN;
BEHAVIOURAL SCIENCE SOLUTIONS GROUP INC.;
TAMARA JEAN WILLIAMSON;
INVESTIGATIVE SOLUTIONS NETWORK INC.;
TORONTO POLICE ASSOCIATION;
JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5JOHN DOE #1; JOHN DOE #2; JOHN DOE #3; JOHN DOE #4; JOHN DOE #5**

Defendants

RESPONDENT'S AUTHORITIES
(Re motion to set aside Noting in default)

Paul Slansky
Barrister and Solicitor
1062 College Street, Lower Level
Toronto, Ontario, M6H 1A9
Tel: (416) 536-1220; Fax (416) 536-8842
LSUC# 25998I

Counsel for the Responding Party (Plaintiff)