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# HOW TO BULLET-PROOF AND ATTACK CLASS ACTION PLEADINGS

(Prepared for Canadian Institute's 7th Annual National Forum
on Litigating Class Actions – September 25, 2006 Workshop)

*by*

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# HOW TO BULLETPROOF AND ATTACK CLASS ACTION PLEADINGS[1]

## (WORKSHOP – SEPTEMBER 25, 2006)

## I. INTRODUCTION – Class Actions Pleadings seem different

### A. Conventional Litigation:

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. Pleadings that are merely tactical and designed to put unfair pressure on the opponents, or to embarrass them, are liable to be struck as an abuse of process. Moreover, it is improper to make an excessive or grossly exaggerated claim for damages. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. Facts may be pleaded but not the evidence by which those facts are to be proved.[2]

### B. Class Actions:

Class proceedings are not exempt from the usual rules for pleadings.[3] The *Class Proceedings Act* does not create substantive rights, or modify the substantive law.[4]

However, statements of claim in proposed class actions still look different.[5] The pleading may run to a hundred paragraphs or more. It may have a table of contents. There may be a

[1] A longer version of this paper, prepared for the 2005 Workshop, is available at www.mccarthy.ca under Publications – Class Actions Practice Group, under the author's name.

[2] *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.); *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Gen. Div. Comm. List); *Air Canada v. WestJet Airlines Ltd.* (2004), 72 O.R. (3d) 669 (S.C.J.).

[3] *Shaw v. BCE Inc.* [2003] O.J. No. 2695 (S.C.J.), para. 5; *Williams v. Canada* (2005), 257 D.L.R. (4th) 704 (Ont. S.C.J.), para. 17.

[4] *Bisaillon v. Concordia University*, 2006 SCC 19, paras. 16-18, 22; *MacKinnon v. National Money Mart Company* (2004), 33 B.C.L.R. (4th) 21 (C.A.), para. 44; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.); *Serhan v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.), para. 41 and para, 252 (Chapnik J. dissenting).

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definition section. The pleading may include a very detailed description of disease, the history of drug trials and approvals or other product testing, or of a defendant's (alleged) bad conduct. Damages claimed may be in the billions of dollars.

## II. PLEADINGS BASICS

A statement of claim that pleads, concisely, the material facts setting out a complete cause of action will be bulletproof. A statement of claim that is missing basic elements of substantive claims, or which is a rambling, mixed-up mass of facts, evidence, arguments and law, will be attackable.[6]

### A. The Rules of Civil Practice

Drafters of pleadings must know what the local rules of civil procedure say about pleadings, and follow the rules.

### B. Material Facts stating a Cause of Action

The "material facts" are the facts that are essential for the purpose of formulating a complete cause of action.[7]

Depending on the jurisdiction, a plaintiff will not need a personal cause of action against all defendants.[8]

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[5] The claims in *Mondor v. Fisherman* and *Harrington v. Dow Corning Corp.* are two out of many examples of very lengthy statements of claim. Both have a table of contents. Definition sections are found in the statements of claim in *Serhan v. Johnson & Johnson* and *Smith v. National Money Mart*, among others. Detailed description of disease is pleaded in *Serhan* (diabetes) and *Vezina v. Loblaw Companies Ltd.* (hepatitis A). In *Andersen v. St. Jude Medical Inc.*, over 20 paragraphs are devoted to describing the development, testing and recall of the alleged defective product. The statement of claim in *Grant v. Canada (Attorney-General)* (2005), 258 D.L.R. (4th) 725 (Ont. S.C.J.) was described by defence counsel as a "statement in pursuit of a political agenda." Nevertheless, only parts were struck out. *Grant* involved the consequences of relocation of a residential community, in particular problems with alleged toxic mold.

[6] *Cadillac Contracting and Developments Ltd. v. Tanenbaum*, [1954] O.W.N. 221, at pp. 224-5; and see Cullity J's comment that the statement of claim in *Yordanes v. Bank of Nova Scotia* (2006), 78 O.R. (3d) 590 (S.C.J.) was "monstrously unwieldy." The whole claim was struck out.

[7] *DuMoulin v. Ontario* (2005), 71 O.R. (3d) 556 (S.C.J.), and *Cassano v. Toronto-Dominion Bank* (2005), 9 C.P.C. (6th) 291 (Ont. S.C.J.), [2005] O.J. No. 845; leave to appeal refused [2006] O.J. No. 2930.

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### C. Has a reasonable claim been stated?

Before a pleading will be struck out for failing to disclose a reasonable claim (or defence), the failure must be "plain and obvious" on a generous reading.[9]

The "plain and obvious" test does not mean the complicated questions of law are *necessarily* unsuited for resolution on an application to strike, and it does not permit defective pleadings. Nevertheless, actions based on uncertain areas of the law should not be resolved at the pleadings stage, without the advantage of a full factual background.[10]

Leading cases help to "bulletproof" pleadings.[11]

## III. CHALLENGING PLEADINGS (AND SURVIVING ATTACK) – WHAT IS WORKING AND WHAT IS NOT

If a cause of action is one where individual issues are significant, and will likely overwhelm and predominate over any common issues, the chances of certification are diminished.[12] For plaintiff's counsel, more is not necessarily better.[13]

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[8] Compare *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) and *Hughes v. Sunbeam Corp. (Canada)* (2001), 11 B.L.R. (3d) 236 (Ont. S.C.J.), varied (2002), 61 O.R. (3d) 433 (C.A.) with *MacKinnon v. National Money Mart Company* (2004), 33 B.C.L.R. (4th) 21 (C.A.). For the time being, Alberta is following Ontario: see *Pauli v. ACE INA Insurance*, 2002 ABQB 715 and *Gillespie v. Gessert*, 2006 CarswellAlta 429 (oral reasons dated March 24, 2006). Saskatchewan may be following B.C.: see the *obiter* comments in *Frey v. BCE Inc.*, 2006 SKQB 331, at para. 15.

[9] *Hunt v. Carey Can. Inc.* (1990), 49 B.C.L.R. (2d) 273 (S.C.C.), at pp. 288-289; *Kimpton v. Canada (Attorney General)* (2002), 9 B.C.L.R. (4th) 139 (S.C.), at para. 7; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont.C.A.), para. 9; *Serhan v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.), paras. 42-43.

[10] Compare *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.), 94 D.L.R. (4th) 284, at B.C.L.R. pp. 67-68 (order striking claims upheld) with *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.) (plaintiff's appeal of order striking claim allowed) and *Klein v. American Medical Systems*, [2005] O.J. No. 4910 (S.C.J.); leave to appeal granted [2006] O.J. No. 2188 (S.C.J.). Consider also also *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.), para. 25 (judges and masters have a duty to enforce the rules concerning pleadings when asked to do so) and *Auger v. Berkshire Investment Group. Inc.*, [2001] O.J. No. 379 (C.A.), paras. 14-15 (cited by Epstein J. in *Serhan*, para. 43).

[11] See for example *Queen v. Cognos* (1993), 99 D.L.R. (4th) 626 (S.C.C.) and *Hercules Managements Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.) (misrepresentation claims); *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257 (S.C.C.) (punitive damages; conclusions must be supported by material facts); *Hunt v. Carey* (conspiracy claims); *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1993), 101 D.L.R. (4th) 699 (S.C.C.) (economic loss); *Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 (S.C.C.) (negligence claims); *Soulos v. Korkontzilos* (1997), 146 D.L.R. (4th) 214 (S.C.C.) (constructive trust); *Garland v. Consumers Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.) (unjust enrichment).

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In advance of the certification application, a defendant should ensure that *all* elements of a claim are pleaded properly, since one or more of them may give rise to individual issues that may be highly significant in the context of the case as a whole. Defendant's counsel must also analyse the class description and the proposed common issues in the light of the pleadings.[14]

## A. Tort and Misrepresentation Claims

So-called "mass torts" are tailor-made for class actions, and vice versa. "Disasters spawn litigation."[15]

Recent examples involving direct attacks on pleadings include *Williams v. Canada* (2005), 257 D.L.R. (4th) 704 (Ont. S.C.J.) (SARS; claims against the Federal Crown and the City of Toronto struck, claims against the Provincial Crown struck in part), *Abarquez v. Ontario* (2005), 257 D.L.R. (4th) 745 (Ont. S.C.J.) (SARS, claim by nurses; claims against Provincial Crown struck in part), *Grant v. Canada* (2005), 258 D.L.R. (4th) 725 (Ont. S.C.J.) (claims struck in part), *Gorecki v. Canada* (2006), 265 D.L.R. (4th) 206 (Ont. C.A.) (constructive trust claim based on defendant's alleged "wrongful conduct" struck out), and *Klein v. American Medical Systems*, [2005] O.J. No. 4910 (S.C.J.), leave to appeal granted [2006] O.J. No. 2188 (S.C.J.)

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[12] Compare *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19 (S.C.C.) with *Pearson v. Inco Limited* (2006), 78 O.R. (3d) 641 (C.A.). In *Olsen v. Behr Process Corporation*, 2003 BCSC 429, the plaintiffs were forced to amend their pleadings, and on certification only some of the issues were certified: see *Olsen v. Behr Process Corporation* (2003), 17 B.C.L.R. (4th) 315 (S.C.). The case was settled in 2005.

[13] Consider the original scope – compared with what eventually was certified at the appellate level – of *Pearson v. Inco* and *Rumley v. British Columbia* (1998) 65 B.C.L.R. (3d) 382 (dismissing certification), rev'd (1999), 72 B.C.L.R. (3d) 1 (C.A.), aff'd (2001), 205 D.L.R. (4th) 39 (S.C.C.). Compare also *MacKinnon v. National Money Mart Company*, 2005 BCSC 271 (attempt to certify an industry-wide class action dismissed) with *Bodnar v. The Cash Store*, 2005 BCSC 1904, aff'd 2006 BCCA 260, *McCutcheon v. The Cash Store Inc.* [2006] O.J. No. 1860 (S.C.J.) and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.* 2006 BCSC 1018 (certification granted against specific companies or related businesses, including certification of conspiracy common issues). See also the ruling on the certification application in *Frey v. BCE Inc.*, [2006] S.J. No. 453, 2006 SKQB 328, where the court concluded that much of the 40 page statement of claim failed to plead reasonable claims. Certification was refused on the grounds that there was no appropriate representative plaintiff or litigation plan. Concurrently, the court ruled in favour of defendants on applications to dismiss the action on the grounds it was scandalous, frivolous or vexatious: see *Frey v. BCE Inc.*, 2006 SKQB 329 and 2006 SKQB 331.

[14] Compare the result in *Cloud* with the results in *Ragoonanan v. Imperial Tobacco Canada Limited* (2006), 78 O.R. (3d) 98 (S.C.J.), *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont.S.C.J.), leave to discontinue granted [2006] O.J. No. 537 (S.C.J.), and *DuMoulin v. Ontario*, [2005] O.J. No. 3961 and [2006] O.J. No. 1233, 23 C.P.C. (6th) 207 (S.C.J.). None of the latter three cases were certified. A significant problem in the first two was describing an identifiable class.

[15] *Carom v. Bre-X Minerals Ltd.* (2001), 51 O.R. (3d) 238 (C.A), at p. 238.

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(claim arising from surgical insertion of device licensed by the Medical Devices Bureau of Health Canada; AG's motion to strike dismissed; leave to appeal dismissal granted).

The appeal to the Ontario Divisional Court of the certification order in *Serhan v. Johnson & Johnson* also involved an attack on the pleadings, specifically the plaintiff's "waiver of tort" cause of action. In *Reid v. Ford Motor Company*, 2006 BCSC 712, the plaintiff's application to amend her statement of claim to plead the "wavier of tort" type of claim that Cullity J. had certified in *Serhan* was dismissed.[16]

In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047, the defendant challenged the statement of claim in advance of the certification application. Several claims were struck out, including spoliation, unjust enrichment and constructive trust claims.[17] Paragraphs describing other proceedings involving Microsoft were also struck on the grounds that they improperly pleaded evidence. However, a "waiver of tort" claim was not struck out.

In *Sauer v. Canada* (2005), 19 C.P.C. (6th) 298, [2005] O.J. No. 4237 (Master) and (2006), 79 O.R. (3d) 19 (S.C.J.), the proposed class members were all commercial farmers. It was alleged that they suffered damages as a result of the borders of the United States, Mexico and Japan being closed to sale of Canadian cattle following identification of a case of BSE in Alberta. The defendant Ridley Canada was alleged to be the manufacturer of the cattle feed alleged to have been consumed by the infected Alberta cow. Its Australian parent was also named as a defendant. There was no allegation that any putative class member had purchased feed from Ridley, or lost any cattle or lost any sales of any cattle. The claim against Australian parent company, which had been amended five times, was struck without leave to amend. However, the other claims were not struck. With respect to the claim that Ridley Canada had breached a duty to warn the putative class members, Mr. Justice Winkler said (citing *Haskett v. Equifax*): "It is a novel case and when the considerations regarding policy are coupled with the

[16] *Reid* was a conventional "defective and dangerous product" case that was certified in 2003: see *Reid v. Ford Motor Company*, 2003 BCSC 1632. On the application to amend, plaintiff's counsel candidly conceded that the purpose of the amendment was to avoid the necessity of proving that each individual class member suffered loss as a result of Ford's negligence or failure to warn.

[17] The plaintiff was granted leave to amend however. See Tysoe J.'s summary of his rulings at para. 108 of the judgment.

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caution in *Haskett*, it is not plain and obvious at this stage that a court could not find a duty of care to exist. . . . This is not to be taken as a finding that a duty of care as pleaded exists but rather a determination that it is not plain and obvious that one does not exist."[18]

However, not everything succeeds. For example, complaints concerning an alleged duty and failure to warn have been refused certification,[19] and claims for reimbursement of drug costs have been struck out.[20]

## B. Contract-based Claims

Claims based on implied terms (including implied warranties), or oral terms, are particularly problematic for plaintiffs and their counsel. Even if some common issues are present, individual issues are likely to overwhelm and predominate.[21] Such cases can also present problems in arriving at an appropriate class definition.

Cases based on written agreements, particularly standard form contracts, are likely to be certified.[22] *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2003), 31 C.P.C. (5th) 171 (Ont. S.C.J.) was not certified when two levels of court concluded the claims were based on alleged oral contract terms, but was certified when the Ontario Court of Appeal concluded the claims were based on an alleged written contract (see *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (C.A.).

[18] *Sauer v. Canada* (2006), 79 O.R. (3d) 19 (S.C.J.), para. 85.

[19] *Rumley v. British Columbia* (1999), 72 B.C.L.R. (3d) 1 (C.A.), at para. 45; *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.), at para. 8. On the hearing of the certification application in *Carriere v. Bell Canada*, [2006] O.J. No. 2360 (S.C.J.), claims, including an alleged duty to monitor, investigate and warn Bell customers of "modem hi-jacking," were struck out, but with leave to amend. The court rejected the defendant's motion to dismiss.

[20] *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 2218 (C.A.), affirming in part [2002] O.J. No. 1075, 14 C.C.L.T. (3d) 233 (Ont. S.C.J.).

[21] *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.), at para. 50; *Mouhteros v. DeVry Canada Inc.* (1998), 22 C.P.C. (4th) 198 (Ont. S.C.J.); *Macleod v. Viacom Entertainment Canada Inc.* (2003), 28 C.P.C. (5th) 160 (Ont. S.C.J.), *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.) and *MacLean v. Telus Corporation*, 2006 BCSC 766, [2006] B.C.J. No. 1107.

[22] See *Scott v. TD Waterhouse Investor Services (Canada)* (2001), 94 B.C.L.R. (3d) 320 (S.C.) ("*Scott Certification*"); *Wilson v. Re/Max Metro-City Realty Ltd.* (2003), 63 O.R. (3d) 131 (S.C.J.); *Bodnar v. The Cash Store Inc.*, 2006 BCCA 260, affirming 2005 BCSC 1904.

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Properly pleaded breach of warranty claims clearly are amenable to certification where the focus can remain on the conduct of the defendant, and there is no real issue concerning the status of the claimants.[23] Even where the claimants are not direct purchasers, pleading a breach of an implied warranty under the *Sale of Goods Act* may survive attack.[24]

**C. Suing "an industry" or multiple defendants in a single action**

Suing multiple, unrelated defendants inevitably raises issues concerning manageability, and therefore preferability, of litigating the claims in the context of a class action.[25]

**D. Particular causes of action and creative pleading can facilitate certification**

Causes of action where the primary focus can be on conduct of the defendant, and where determinations made in respect of that conduct can advance the claims of the class members in a meaningful way, will facilitate certification.[26]

Compare *Scott v. TD Waterhouse Investor Services (Canada)* (2001), 94 B.C.L.R. (3d) 320 (S.C.) and *Cassano v. TD Bank*. Both involved financial services, both involved foreign exchange rates, and in both cases the plaintiffs complained that the defendant had been unjustly enriched at their expense. Only *Scott* was certified.

Compare also *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) ("*Caputo*"), which was not certified, with the claims advanced in *Knight v. Imperial Tobacco Canada Limited* (2005), 250 D.L.R. (4th) 347 (B.C.S.C.), 2005 BCSC 172, varied 2006 BCCA

[23] An example is a claim relying on breach of implied warranties under the *Sale of Goods Act*, where the defendant is the seller and the class members are purchasers. See *Fakhri v. Wild Oats Markets Canada Inc.* (2004), 41 C.P.C. (4th) 369 (B.C.S.C.) and *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 (S.C.J.).

[24] See *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.), para. 22. Although the attack on the pleadings was unsuccessful, the certification application was dismissed, and the action subsequently discontinued.

[25] *Harrington v. Dow Corning Corp.* (2000), 82 B.C.L.R. (3d) 1 (C.A.), affirming (1996), 22 B.C.L.R. (3d) 97 (S.C.) (certification granted and upheld on appeal) but plaintiff unable to move the litigation forward (see *Harrington v. Dow Corning Corp.* (2002), 3 B.C.L.R. (4th) 51 (S.C.)); and *MacKinnon v. National Money Mart Company*, 2005 BCSC 271 (certification of industry-wide class action dismissed). Compare with *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.) and (2005), 252 D.L.R. (4th) 742 (S.C.J.) (multiple defendants, but all related), and *Bodnar v. The Cash Store*, 2006 BCCA 260 (certification of less ambitious action upheld).

[26] *Cloud v. Canada* (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), *Pearson v. Inco Limited* (2006), 78 O.R. (3d) 641 (C.A.) and *Hoy v. Medtronic, Inc.* (2003), 14 B.C.L.R. (4th) 32 (C.A.) are appellate level decisions granting or affirming certification, despite the prevalence (if not the predominance) of individual issues.

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235 ("*Knight*"), which was certified. *Caputo* was pleaded as a product liability claim, complete with individual issues concerning causation and damages. The gist of the claim in *Knight* – relying on B.C.'s *Trade Practice Act*, a consumer protection statute that proscribed "deceptive" trade practices – was that the defendant has misrepresented the true nature of "light" cigarettes. It focussed on the defendant's knowledge and conduct, and no claim was made for individual damages.

## E. "Aggregate Damages"

Despite the express provisions in class actions statutes concerning aggregate awards of monetary relief,[27] plaintiffs' counsel are receiving more encouragement from the court to include for certification common issues concerning "aggregate damages" or an "aggregate assessment" of damages.[28]

## F. Drafting Common Issues

Common issues are in fact "pleadings." They have their origins in the statement of claim, and possibly also a statement of defence.[29] The extent to which common issues receive real scrutiny as pleadings is open to debate. One approach is that broadly drafted common issues are acceptable and indeed preferred, particularly since amendments can be made later. However, others (including class counsel) have recognized that common issues that are too broadly or vaguely drafted will not help the court and counsel to move the litigation forward to trial and a determination of issues on the merits.

Ironically, Mr. Justice Cullity identified the problem with common issues that were too broadly drafted, in *Egglestone v. Barker*, [2003] O.J. No. 3137 (S.C.J.) (**bold** added):

> ¶ 16 As drafted, the proposed issues have an appearance of commonality in the sense that an affirmative, or negative, answer

[27] See, e.g., B.C. *Class Proceedings Act*, s. 29, Ontario *Class Proceedings Act*, s. 24.

[28] Recent examples are found in *Cloud v. Canada*, paras. 55-56, 70 (note the court's qualification); *Vezina v. Loblaw Companies Ltd.*; *Serhan v. Johnson & Johnson*, paras. 130 and following (citing *Vezina*); *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.), paras. 63-64; *McCutcheon v. The Cash Store*, [2006] O.J. No. 1860 (S.C.J.), para. 74. The Ontario Court of Appeal also appeared to be encouraging plaintiffs in *Pearson v. Inco*, para. 77 (citing *Kranjcec*).

[29] In *Knight*, some of the certified common issues were derived from the statement of defence.

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> to the question posed by each of them would resolve the issue in respect of all members of the class. In that sense, the task of framing common issues for the purpose of a motion for certification would rarely, if ever, give rise to difficulty. **In most cases, the question whether the defendants are liable to the members of the class could be considered to be a common issue.** If that were sufficient, the requirement of commonality would call for nothing more than an exercise in drafting.

In British Columbia, it proved difficult to "move the litigation forward" in cases such as *Harrington v. Dow Corning Corp.* and *Rumley*, without providing more detail for the original broad and general common issues certified.[30]

In *Collette v. Great Pacific Management Co.* (2004), 26 B.C.L.R. (4th) 252 (C.A.), a case alleging negligence by investment advisors in relation to investments in mortgage units, the B.C. Court of Appeal reversed the dismissal of the certification application, and certified the following issues:

> 1. Did the Defendants, or any of them, owe, to the class members with whom they dealt, a duty in contract, tort, or both, to evaluate the Multimetro Mortgages by a standard of due diligence and not to offer units in the mortgages for sale to class members if the investments did not meet the standard of due diligence?
>
> 2. If the answer to question 1 is "yes", did the Defendants, or any of them, breach that duty?
>
> 3. If the answers to questions 1 and 2 are "yes", did the breach of duty cause damage to the class members?

However, with the case now proceeding to trial, the plaintiff applied to "amend" these common issues.[31] Remarkably, the grounds on which the plaintiff's application was made were that (a) the common issues as stated by the Court of Appeal conflated the issues of duty of care and standard of care; and (b) the standard of care allegedly owed to the class by the defendant required clarification. The court dismissed the plaintiff's application, saying that the plaintiff's

[30] See *Harrington v. Dow Corning Corp.* (2002), 3 B.C.L.R. (4th) 51 (S.C.) (plaintiff's application to approve a trial plan dismissed; pleadings needed to be settled first) and *Rumley v. British Columbia* (2003), 12 B.C.L.R. (4th) 121 (S.C.) (motion to decertify dismissed, but only after the court redrafted the common issues).

[31] *Collette v. Cartier Partners Securities Inc.*, 2005 BCSC 1749 ("*Collette* (motion to amend)").

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new proposed common issues "alter the substance of the common issues as stated by the Court of Appeal such that, if granted, they would no longer satisfy the requirements" for certification.[32]

In *Ernewein v. General Motors of Canada Ltd.* (2005), 46 B.C.L.R. (4th) 234 (C.A.), the B.C. Court of Appeal allowed the defendant's appeal from an order granting certification and dismissed the application – a very rare event. Although the defendant's appeal succeeded on other grounds, Newbury J.A. specifically noted problems and inadequacies in the drafting of the common issues.[33]

In Ontario, broadly drafted common issues – provided they are not of the "is the defendant liable to the class members" variety – appear to be quite acceptable, particularly following the Ontario Court of Appeal's decision in *Cloud v. Canada*.

The final list of common issues certified by the Ontario Court of Appeal in *Cloud* were (para. 72):

> (1) By their operation or management of the Mohawk Institute Residential School from 1953 to 1969 did the defendants breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?
>
> (2) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?
>
> (3) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the families and siblings of the students of the School?
>
> (4) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?

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[32] *Collette* (motion to amend), para. 6. The new proposed common issues are at para. 51.

[33] See the comments of Newbury J.A. at paras. 22-23.

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> (5) If the answer to any of these common issues is yes, were the defendants guilty of conduct that justifies an award of punitive damages?
>
> (6) If the answer to that is yes, what amount of punitive damages is awarded?

A more detailed list of 53 common issues – which Cullity J. somewhat pejoratively described as a "shopping list" – was specifically rejected.[34]

Recently, in *Serhan v. Johnson & Johnson*, the Ontario Divisional Court upheld the certification of these common issues:[35]

> (1) Are the defendants, or any of them, constructive trustees for all, or any, class members of all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and Associated Paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whom are such proceeds held?
>
> (2) Are the defendants, or any of them, liable to account to all, or any, of the class members on a restitutionary basis for all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and associated paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whose benefit is such accounting to be made?
>
> (3) Should one or more of the defendants pay punitive damages? If so, in what amount and to whom?
>
> (4) Who should pay the cost of administering and distributing amounts to which class members are entitled and how, and when, should such cost the [sic; be] determined?

At least some judges appear to be unconcerned that often the common issues being proposed for certification are logically complex questions, which assume that many elements of

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[34] See Cullity J.'s comments on the common issues at (2003), 65 O.R. (3d) 492 (Div. Ct.), at paras. 10-11, 14-15, 31. In the Court of Appeal, the common issues were reduced to six.

[35] See *Serhan v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.), para. 35.

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the class members' case have already been proved or which inevitably must be broken down into their component parts for trial.[36] However, neither the court nor the parties are well served if a case in fact cannot be moved forward because it lacks appropriate definition of the issues – all of them – that will have to be determined.

## G. When in the proceedings should pleadings be challenged?

If a defendant intends to mount a full-fledged attack with the goal of forcing the plaintiff to plead properly, or to have all or parts of a statement of claim struck out, the better option (if available) is to bring the motion separately, and in advance of the certification application.[37]

On a defendant's motion to strike, the defendant has the onus of satisfying the court that the motion should be granted. There can be tactical and strategic advantages to the defendant in being the party who first lays out for the court the aspects of the statement of claim that are problematic or deficient, and who has the right of reply.

A defendant who intends to file a statement of defence in advance of certification will also want to have a properly pleaded statement of claim.

## H. A Motion to Strike is not a summary judgment motion

A motion to have a claim struck out challenges the legal sufficiency of the plaintiff's pleadings. If the defendant in fact wants to argue that the claim should be dismissed on the merits, the defendant must make an application for summary dismissal.[38]

Doherty J.A. noted this distinction in *Hickey-Button v. Loyalist College*, at para. 46:

> Loyalist's arguments that the claims do not reveal a cause of action are really submissions that the claims will fail on their merits at least with respect to some members of the proposed classes. The

[36] This in fact was necessary in *Rumley*, in order to avoid decertification. See *Rumley v. British Columbia*, 2003 BCSC 234, (2003), 12 B.C.L.R. (4th) 121 (S.C.)

[37] This was the approach taken in (among other cases) *Carom v. Bre-X*, *Ragoonanan*, *Hughes v. Sunbeam*, *Olsen v. Behr Process Corporation*, *Sauer v. Canada*, *Yordanes v. Bank of Nova Scotia* and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047, with positive results.

[38] The difference between the two types of applications is discussed in *Dawson v. Rexcraft Storage*.

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> ultimate success or failure of the claim is irrelevant to whether a cause of action is disclosed.

However, compare these comments with those of Madam Justice MacDonald in *Arabi v. Toronto-Dominion Bank*.[39]

Recently, the B.C. Court of Appeal in *Dahl v. Royal Bank of Canada*, 2006 BCCA 369 gave encouragement to defendants who are interested in disposing of claims on the merits, without incurring the very significant time and expense associated with a certification application. Kirkpatrick J.A. wrote (at para. 37):

> [T]he issue in this case is a relatively simple matter of contract interpretation. It makes no sense to require the banks to oppose a certification hearing in circumstances where the discrete legal issue [which decides a substantial portion of the case] is capable of summary determination. In such cases it is appropriate to decide a central legal issue in circumstances where, as here, it is ripe for determination. Such determination saves enormous time and expense for all the parties. It makes no sense to expose the parties to the expense of a certification hearing and the discovery process when the litigation can be pared to its proper dimensions by the appropriate determination of central legal issues.

### I. Particulars can be ordered after certification

See *Hoy v. Medtronic Inc.* (2002), 31 C.P.C. (5th) 86 (B.C.S.C.). The particulars demanded are set out in Appendix “A”.

## IV. STATEMENTS OF DEFENCE

### A. Should a Defence be filed (even if it is not required)?

A statement of defence can give added focus and weight to a defendant’s affidavit evidence and arguments in opposition to certification. By filing a defence, a defendant takes an official position concerning the issues that the court will (eventually) have to address before the

[39] See in particular paras. 35, and 45-46.

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case will be fully adjudicated.[40] A defendant can use its defence to begin laying out for the court all of the individual issues that at some point will have to be tried, and that the defendant will be arguing make the case unsuitable for prosecution as a class proceeding.

There are at least two examples where the court appeared on the certification application to discount the defendant's arguments on issues, where the defendant had not yet filed a statement of defence.[41]

## B. What should the Defence say?

A statement of defence (like the statement of claim) must follow the basic rules of pleading. There is no point filing a statement of defence if it fails to disclose a reasonable defence to the claims.

One of the purposes of filing a statement of defence will be to begin laying out the case *against* certification. Defendant's counsel needs to give careful thought both to the merits of the defence *per se* and to those features of the defence that counsel will want to argue should defeat the certification application.

Defence counsel faced with blanket pleadings where multiple defendants are lumped together in an undifferentiated mass as "the Defendants" should consider both making a motion to strike, and filing separate defences even where counsel is representing more than one defendant, or all of the defendants in the group.

[40] A strong argument in favour of filing a statement of defence is found in *Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2000), 83 B.C.L.R. (3d) 365 (S.C.), paras. 38 and following. (Note this case, which decided that a statement of defence should be filed prior to the certification application, was overruled on that point in *MacLean v. Telus Corp.* 2005 BCCA 338.)

[41] See *Reid v. Ford Motor Company*, 2003 BCSC 1632 (S.C.), [2003] B.C.J. No. 2489 (para. 52); and *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (S.C.J.) (para. 60) and ruling on costs [2004] O.J. No. 3102 (S.C.J.), para. 10.

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Once a decision has been made to file a defence, counsel should look on it as a important tool, not only to defend the case on the merits, but also to oppose certification of the action as a class proceeding.

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**APPENDIX "A"**
**Demand for Particulars from *Hoy v. Medtronic, Inc.***
(see (2002), 31 C.P.C. (5th) 86 (B.C.S.C.))

The particulars that the defendants seek are identified by reference to the common issues and sub-issues as set out in the Order of the Honourable Madam Justice Kirkpatrick pronounced on September 27, 2001. The defendants seek particulars of the allegations made by the plaintiffs or the class as to those issues as follows:

1. With respect to paragraph 6 (a) (iii) of the order, which reads as follows: "(a) Was the lead insulation unreasonably prone to degeneration and failure due to … (iii) negligent processing of polyurethane during the manufacture of the Leads?"

**As to each model of the Leads, please provide particulars of:**

(a) the way or ways in which the processing of the polyurethane during manufacture was negligent, including each standard that the defendants should have met but failed to meet in manufacturing and each respect in which they failed to meet such standard;

(b) as to each such standard, when that standard first became applicable;

2. As to paragraph 6 (b) (i), which reads: "(b) Did the defendants fail to … (i) ensure that the Leads were free of defects;"

**As to each model of the Leads, please provide particulars of:**

(a) each act or omission that is alleged to amount to an actionable failure to ensure that such model was free of defects;

(b) each such defect;

(c) when each such defect is alleged to have occurred or been allowed to occur.

3. As to paragraph 6 (b) (ii), which reads: "(b) Did the defendants fail to . . . (ii) perform sufficient pre-market tests on the Leads;"

**Please provide particulars of:**

(a) each standard of pre-market testing which applied to each model of the Leads;

(b) each act or omission that is alleged to amount to an actionable failure to perform proper and sufficient pre-market testing by reference to such standard or standards; and

(c) as to each such standard, when the standard first began to apply.

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4. As to paragraph 6 (b) (iii), which reads: "Did the defendants fail to …(iii) design and manufacture Leads that were adequate to protect against failure and degeneration during ordinary use in employing P80A as insulation;"

**Please provide particulars of:**

(a) the characteristics of the use or uses alleged to amount to "ordinary use";

(b) each respect in which P80A was inadequate to protect against failure and degeneration during such ordinary use;

(c) each act or omission of the defendants which caused or contributed to any such failure; and

(d) each standard applicable to Lead design and manufacturer that such act or omission breached; and

(e) when each such standard first became applicable.

5. As to paragraph 6 (b) (iv), which reads: "Did the defendants fail to … (iv) produce a product capable of withstanding the stresses of ordinary and foreseeable uses;"

**Please provide particulars of:**

(a) the characteristics of the use or uses which are alleged to amount to "ordinary and foreseeable uses" of the Leads; and

(b) each act or omission of the defendants that is alleged to be such an actionable failure.

(c) each standard of Lead production that such act or omission breached; and

(d) when each such standard first became applicable.

6. As to paragraph 6 (b) (v), which reads: "Did the defendants fail to … (v) employ available design and manufacture techniques that would have reduced the likelihood of failure of the Leads;"

**Please provide particulars of:**

(a) each such design technique and when it first became available; and

(b) as to each such technique:

(i) each failure, the likelihood of which it would have reduced; and

(ii) how it would have reduced the likelihood of each such failure.

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7. As to paragraph 6 (b) (vi), which reads: "Did the defendants fail to …(vi) ensure that the Leads did not deviate in a material way from their design and release specifications;"

**Please provide particulars of:**

(a) each respect in which each model of the Leads deviated from its:

(i) design specifications; and

(ii) release specifications; and

(b) as to each such deviation, each act and each omission that caused or contributed to such deviation.

8. As to paragraph 6 (b) (vii), which reads: "Did the defendants fail to … (vii) recall the Leads when they knew or ought to have known of the risk of injury prior to the implantation of Leads into class members;"

**Please provide particulars of:**

(a) each risk of injury (including the nature of the injury) of which the defendant had knowledge, or the means of knowledge; and

(b) as to each such risk, the time at which the defendants first had, or ought to have had, such knowledge; and

(c) every source of information from which the defendants received, or should have received, such knowledge.

9. As to paragraph 6 (b) (viii), which reads: "Did the defendants fail to … (viii) obtain all required approvals;"

**Please provide particulars of each required approval that any defendant failed to obtain.**

10. As to paragraph 6 (b) (ix), which reads: "Did the defendants fail to … (ix) provide Health Canada (and its predecessors) and the U.S. Food and Drug Administration ("FDA") with all relevant information regarding any risks posed by the Leads;"

**Please provide particulars, as to each of Health Canada, its predecessors, and the FDA, of:**

(a) each risk as to which the defendants failed to provide relevant information;

(b) each item of information that it is alleged that a defendant should have provided but failed to provide; and

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(c) when each such item of information ought to have been provided.

11. As to paragraph 6 (b) (x), which reads: "Did the defendants fail to … (x) provide adequate warnings as to any risk of the Leads to physicians, surgeons and all other intermediaries as well as class members of any potential risks or hazards associated with the use of the Leads?"

**Please provide particulars of:**

(a) each warning that a defendant should have provided but failed to provide, specifying:

(i) the nature of the warning that should have been provided;

(ii) when; and

(iii) to whom;

it should have been given;

(b) each failure to adequately or sufficiently inform:

(i) any doctor;

(ii) any surgeon;

(iii) any learned intermediary; or

(iv) any class member;

of potential risks or hazards associated with the use of such lead (identifying the person or persons whom such Defendant failed to inform) and, as to each such failure, specifying:

(v) when such failure is alleged to have occurred; and

(vi) the potential risk; or

(vii) the potential hazard (as the case may be)

and identifying each item of information that alerted, or should have alerted, any Defendant that it should warn any such person.

12. As to paragraph 6 (c), which reads: "If the defendants breached the duty of care owed to the plaintiffs, are the plaintiffs entitled to an award of punitive damages having regard to the nature of the established breaches?"

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**Please provide particulars of any act of any defendant that alone or taken together with any other act of any defendant is alleged to have been:**

(a) harsh;

(b) vindictive;

(c) reprehensible;

(d) malicious;

(e) high handed;

(f) arbitrary;

(g) deserving of condemnation; or

(h) deserving of punishment,

and, in respect of each such act, please specify:

(i) when;

(j) where; and

(k) by whom

such act was committed.

13. As to paragraph 5 (b), which reads: "Did the defendants breach the standard of care in designing, manufacturing and distributing the Leads, and if so, when did the breach begin?"

**To the extent that the facts alleged by the plaintiffs relevant to this common issue are not expressly identified in paragraph 6 of the draft order, please provide particulars of:**

(a) each relevant standard of care in respect of design, manufacture or distribution which the defendants are alleged to have breached, when that standard became applicable and when, if at all, it ceased to be applicable;

(b) the way or ways, not previously particularized in response to requests 1 through 12 above, that a defendant breached the relevant standard with respect to a model of the Leads; and

(c) as to each such alleged breach, when the breach began.

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## APPENDIX "B" - LIST OF CASES[42]

**Abarquez v. Ontario* (2005), 257 D.L.R. (4th) 745 (Ont. S.C.J.)

**Air Canada v. WestJet Airlines Ltd.* (2004), 72 O.R. (3d) 669 (S.C.J.)

**Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (S.C.J.)

**Andersen v. St. Jude Medical Inc.* [2004] O.J. No. 3102 (S.C.J.) (ruling on costs)

**Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.)

**Auger v. Berkshire Investment Group. Inc.*, [2001] O.J. No. 379 (C.A.)

**Bisaillon v. Concordia University*, 2006 SCC 19

**Bodnar v. The Cash Store*, 2005 BCSC 1904, aff'd 2006 BCCA 260

*Boulanger v. Johnson & Johnson* (2003), 64 O.R. (3d) 208 (S.C.J. Div. Ct.)

**Boulanger v. Johnson & Johnson Corp.* [2003] O.J. No. 2218 (C.A.), affirming in part [2002] O.J. No. 1075, 14 C.C.L.T. (3d) 233 (Ont. S.C.J.)

*Bruce v. Odham Press Ltd.*, [1936] 1 K.B. 697 (C.A.)

**Cadillac Contracting and Developments Ltd. v. Tanenbaum*, [1954] O.W.N. 221

*Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. 343 (C.A.), affirming (1996), 25 B.C.L.R. (3d) 329 (S.C.)

**Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.); leave to discontinue granted [2006] O.J. No. 537 (S.C.J.)

*Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163 (Ont. G.D.)

*Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (S.C.J.)

**Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.), (1999), 46 O.R. (3d) 315 (Div.Ct.), (2000), 51 O.R. (3d) 236 (C.A.)

**Carriere v. Bell Canada*, [2006] O.J. No. 2360 (S.C.J.)

**Cassano v. Toronto-Dominion Bank* (2005), 9 C.P.C. (6th) 291 (Ont.S.C.J.), [2005] O.J. No. 845; leave to appeal dismissed [2006] O.J. No. 2930

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[42] Cases marked with an * are mentioned in the body of the paper. Other cases are mentioned in the 2005 version of the paper.

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*Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), affirming (2001), 54 O.R. (3d) 520 (Div. Ct.)

*Chopik v. Mitubishi Paper Mills Ltd.* (2002), 26 C.P.C. (5th) 104, [2002] O.J. No. 2780 (S.C.J.)

**Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), reversing (2003), 65 O.R. (3d) 492 (Div. Ct.)

**Collette v. Cartier Partners Securities Inc.*, 2005 BCSC 1749

*Collette v. Great Pacific Management Co.* [2003] B.C.J. No. 529 (S.C.), reversed (2004), 26 B.C.L.R. (4th) 252 (C.A.)

*Consumers' Association v. Coca-Cola Bottling Company*, 2005 BCSC 1042

**Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 (S.C.C.), affirming (2000), 184 D.L.R. (4th) 287 (B.C.C.A.) reversing (1999), 68 B.C.L.R. (3d) 274 (S.C.) and 68 B.C.L.R. (3d) 293 (S.C.)

**Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.)

**Dahl v. Royal Bank of Canada*, 2006 BCCA 369

*Davy v. Garrett* (1878), 7 Ch. D. (473) C.A.

**Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont.C.A.)

*Direnfeld v. National Trust* (2002), 17 C.P.C. (5th) 102 (Ont. C.A.)

**DuMoulin v. Ontario* (2005), 71 O.R. (3d) 556 (S.C.J.)

**DuMoulin v. Ontario*, [2005] O.J. No. 3961 and [2006] O.J. No. 1233, 23 C.P.C. ($6^{th}$) 207 (S.C.J.)

*Edwards v. Law Society of Upper Canada* (2001), 206 D.L.R. (4th) 211 (S.C.C.)

**Egglestone v. Barker*, [2003] O.J. No. 3137 (S.C.J.)

**Ernewein v. General Motors of Canada Ltd.* (2005), 46 B.C.L.R. ($4^{th}$) 234 (C.A.)

**Fakhri v. Wild Oats Markets Canada, Inc.* (2004), 41 C.P.C. ($4^{th}$) 369 (B.C.S.C.)

*Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (Ont. S.C.J.)

*Fraser-Reid v. Droumtsekas* (1980), 103 D.L.R. (3d) 385 (S.C.C.)

**Frey v. BCE Inc.*, [2006] S.J. No. 453, 2006 SKQB 328 (ruling on certification application); 2006 SKQB 329 (ruling on motion by BCE defendants to dismiss action); 2006 SKQB 331 (ruling on motion by Rogers Communications Inc. and others to dismiss action)

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*Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, (2004), 237 D.L.R. (4th) 385

*Gillespie v. Gessert*, 2006 CarswellAlta 429 (oral reasons)

**Gorecki v. Canada* (2006), 265 D.L.R. (4th) 206 (Ont. C.A.)

**Grant v. Canada (Attorney-General)* (2005), 258 D.L.R. (4th) 725 (Ont. S.C.J.)

**Harrington v. Dow Corning Corp.* (2000), 82 B.C.L.R. (3d) 1 (C.A.), affirming (1996), 22 B.C.L.R. (3d) 97 (S.C.)

**Harrington v. Dow Corning Corp.* (2002), 3 B.C.L.R. (4th) 51 (S.C.)

**Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.)

**Hercules Managements Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.)

**Hickey-Button v. Loyalist College of Applied Arts & Technology* (2003), 31 C.P.C. (5th) 171 (Ont. S.C.J.); rev'd [2006] O.J. No. 2393 (C.A.)

*Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225 (Q.B.), [2005] S.J. No. 304; leave to appeal granted 2005 SKCA 105, [2006] 5 W.W.R. 400

**Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19 (S.C.C.)

**Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.)

**Hoy v. Medtronic, Inc.* (2002), 94 B.C.L.R. (3d) 169, 2001 B.C.S.C. 1343; aff'd (2003) 14 B.C.L.R. (4th) 32, 2003 B.C.C.A. 316

**Hoy v. Medtronic Inc.*, (2002), 31 C.P.C. (5th) 86 (B.C.S.C.)

* *Hughes v. Sunbeam Corp. (Canada) Limited* (2001), 11 B.L.R. (3d) 236 (Ont. S.C.J.); varied (2002), 61 O.R. (3d) 433 (C.A.)

**Hunt v. Carey Can. Inc.* (1990), 49 B.C.L.R. (2d) 273 (S.C.C.)

*Imperial Oil Ltd. v. Lubrizol Corp.* (1996), 67 C.P.R. (3d) 1 (F.C.A.)

**Kimpton v. Canada (Attorney General)* (2002), 9 B.C.L.R. (4th) 139 (S.C.)

**Klein v. American Medical Systems*, [2005] O.J. No. 4910 (S.C.J.); leave to appeal granted [2006] O.J. No. 2188 (S.C.J.)

**Knight v. Imperial Tobacco Canada Limited* (2005), 250 D.L.R. (4th) 347 (B.C.S.C.), 2005 BCSC 172, varied 2006 BCCA 235

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*Knowles v. Roberts* (1888), 38 Ch. D. 263 (C.A.)

**Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.)

**Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.), 94 D.L.R. (4th) 284 (B.C.L.R)

*Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.)

*MacKinnon v. National Money Mart Company*, 2004 BCSC 1532

**MacKinnon v. National Money Mart Company* (2004), 33 B.C.L.R. (4th) 21 (C.A.)

**MacKinnon v. National Money Mart Company*, 2005 BCSC 271

**MacLean v. Telus Corp.*, 2005 BCCA 338

**MacLean v. Telus Corporation*, 2006 BCSC 766, [2006] B.C.J. No. 1107

**Macleod v. Viacom Entertainment Canada Inc.* (2003), 28 C.P.C. (5th) 160 (Ont. S.C.J.)

**McCutcheon v. The Cash Store Inc.* [2006] O.J. No. 1860 (S.C.J.)

*Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.J.), (2001) 18 B.L.R. (3d) 260 (Ont. S.C.J.)

**Mouhteros v. DeVry Canada Inc.* (1998), 22 C.P.C. (4th) 198 (Ont. S.C.J.)

*Moyes v. Fortune Financial Corp.* (2001), 13 C.P.C. (5th) 147 (Ont. S.C.J.)

*Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3d) 385 (S.C.C.)

**National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Gen. Div. Comm. List)

**Olsen v. Behr Process Corporation* (2003), 17 B.C.L.R. (4th) 315 (S.C.), 2003 BCSC 1252

**Olsen v. Behr Process Corporation*, [2003] B.C.J. No. 627 (S.C.), 2003 BCSC 429

**Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.)

*Ontario Public Services Employees Union v. Ontario*, [2005] O.J. No. 1841 (S.C.J.)

*Patterson & Hidson v. Livingstone and others*, [1931] 1 D.L.R. 386 (S.C.C.)

**Pauli v. ACE INA Insurance*, 2002 ABQB 715

**Pearson v. Inco Limited* (2006), 78 O.R. (3d) 641 (C.A.)

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*Price v. Panasonic Canada Inc.*, [2000] O.J. No. 3123 (S.C.J.)

**Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047

**Queen v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.)

**Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.)

**Ragoonanan v. Imperial Tobacco Canada Limited* (2006), 78 O.R. (3d) 98 (S.C.J.)

**Reid v. Ford Motor Company*, 2003 BCSC 1632 (S.C.), [2003] B.C.J. No. 2489

**Reid v. Ford Motor Company*, 2006 BCSC 712

**Rumley v. British Columbia* (1998) 65 B.C.L.R. (3d) 382 (dismissing certification), rev'd (1999), 72 B.C.L.R. (3d) 1 (C.A.), aff'd (2001), 205 D.L.R. (4th) 39 (S.C.C.)

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

**Sauer v. Canada* (2005), 19 C.P.C. (6th) 298, [2005] O.J. No. 4237 (Master) and (2006), 79 O.R. (3d) 19 (S.C.J.)

**Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2000), 83 B.C.L.R. (3d) 365 (S.C.)

**Scott v. TD Waterhouse Investor Services (Canada)* (2001), 94 B.C.L.R. (3d) 320 (S.C.)

*Serhan v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.), leave to appeal granted [2004] O.J. No. 4580 (S.C.J.)

**Serhan v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.)

*Shaw v. BCE Inc.* (2003), 42 B.L.R. (3d) 107 (Ont. S.C.J.), aff'd (2004), 49 B.L.R. (3d) 1 (Ont. C.A.)

**Shaw v. BCE Inc.* [2003] O.J. No. 2695 (S.C.J.)

**Soulos v. Korkontzilos* (1997), 146 D.L.R. (4th) 214 (S.C.C.)

*Stone v. Wellington (County) Board of Education* (1999), 29 C.P.C. (4th) 320 (Ont. C.A.)

**Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.* 2006 BCSC 1018

**Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 (S.C.J.)

*W.W. v. Canada (Attorney General)* (2004), 24 B.C.L.R. (4th) 347 (S.C.)

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.)

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*_Whiten v. Pilot Insurance Co._ (2002), 209 D.L.R. (4th) 257 (S.C.C.)

*_Williams v. Canada_ (2005), 257 D.L.R. (4th) 704 (Ont. S.C.J.)

*_Wilson v. Re/Max Metro-City Realty Ltd._ (2003), 63 O.R. (3d) 131 (S.C.J.)

*_Wilson v. Servier Canada Inc._ (2000), 50 O.R. (3d) 219 (S.C.J.) and (2005), 252 D.L.R. (4th) 742 (S.C.J.)

*_Winnipeg Condominium Corp. No. 36 v. Bird Construction Co._ (1993), 101 D.L.R. (4th) 699 (S.C.C.)

_Wong v. Sony of Canada Ltd._ (2001), 9 C.P.C. (5th) 122 (Ont. S.C.J.)

_Wyman v. Vancouver Real Estate Board_ (1957), 8 D.L.R. (2d) 724 (B.C.C.A.)

*_Yordanes v. Bank of Nova Scotia_ (2006), 78 O.R. (3d) 590 (S.C.J.)

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