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ONTARIO

SUPERIOR COURT OF JUSTICE

<table>
<tr><td>B E T W E E N:</td><td></td></tr>
<tr><td>DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and DAVID GORDON HYDUK, as Estate Trustee of the Estate of RUSSELL WALTER HYDUK

Plaintiffs</td><td>Kirk Baert, Richard Sommers Q.C., Robert Hart Q.C. and Robyn Matlin, for the Plaintiffs</td></tr>
<tr><td>- and -</td><td></td></tr>
<tr><td>IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.

Defendants</td><td>Lyndon A. J. Barnes and Deborah Glendinning, for defendant Imperial Tobacco Canada Limited

Earl A. Cherniak Q.C. and Susan Wortzman, for the defendant RJR-Macdonald Inc.

Steven Sofer and Marshall Reinhart, for the defendant Rothmans, Benson & Hedges Inc.</td></tr>
<tr><td></td><td>HEARD: January 12 to 16 and January 19, 2004</td></tr>
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PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, *1992*

REASONS FOR DECISION

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WINKLER J.

Nature of the Motion

[1] This intended class proceeding is the first piece of major tobacco litigation seeking damages for personal injuries in Canada. The plaintiffs seek to certify a class pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("*CPA*"), which is broadly defined to include all residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed, or sold by the defendants. They also seek to include in the proposed class all persons having derivative claims under the *Family Law Act*, R.S.O. 1990, as amended. On the plaintiff's estimate, there are more than 2.4 million persons, not including former smokers, *FLA* claimants, deceased persons or persons under the age of 15 in the proposed class. The defendants give a larger estimate, stating that the class size is greater than 15 million persons, including 6.4 million current, former and deceased smokers, and 9 million *FLA* claimants. To put this in perspective, the defendants' estimated class size numbers almost one-half of the Canadian population and more than the present population of the Province of Ontario.

Background

[2] The action was commenced in 1995. There are four proposed representative plaintiffs, including the estate of one individual who died after the action was commenced. These plaintiffs allege personal injuries caused by their use of the defendants' cigarette products. Each claims personally, apart from the claims asserted on behalf of the proposed class, one million dollars in damages. There are additional claims for aggravated, punitive and exemplary damages. In addition, the plaintiffs seek to have the court issue a mandatory order requiring the defendants to create and fund a treatment center for those class members addicted to nicotine.

[3] The three defendant multinational corporations control almost 100% of the Canadian cigarette products market. The defendant Imperial Tobacco, a subsidiary of Imasco Ltd., dominates this market with a 70% share. The defendant Rothmans, Benson & Hedges is owned by Philip Morris Companies, the world's largest tobacco company. RJR-Macdonald was, at the time this action commenced in 1995, a subsidiary of R.J. Reynolds Tobacco Company.

[4] The plaintiffs' claims are based on the assertion that the defendants designed, manufactured and placed into the stream of commerce an inherently defective and dangerous product in the form of cigarettes. The plaintiffs describe cigarettes as nicotine drug delivery devices, which are promoted and marketed under various brand names, belonging to various product categories, such as "light," "extra-light," "ultra-light," "mild," "ultra-mild," "filtered," etc. It is alleged that the defendants promoted and marketed these products with the knowledge that their products were addictive. The addictive quality allegedly leads to continued use of the products which in turn causes injury to the smokers who are unable to

stop using the product. The plaintiffs claim that the defendants had full knowledge of the harmful nature of the product, which was not only undisclosed, but rather was deliberately suppressed by the defendants.

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[5] The plaintiffs claim that the facts pleaded give rise to nine causes of action, including negligence, strict liability, products liability, breach of a duty to inform, deceit, negligent misrepresentation, unfair business practices, breach of implied warranty, and conspiracy, all of which are compensable in damages and suggest a claim for punitive damages. The defendants deny these allegations and assert that some causes of action are improperly pleaded while others, they state, are not pleaded at all. Further, the defendants contend that certain of the causes of action advanced by the plaintiffs are not known to the law of Ontario. Although no statement of defence has been delivered at this point, the defendants submitted in argument that, in any event, there are numerous defences, including voluntary assumption of risk, expired limitation periods and issues of contributory negligence to be considered.

Positions of the Parties

[6] The plaintiffs assert that they have satisfied the five necessary elements for certification as a class proceeding, as set out in the *CPA*. In their submission, the pleadings disclose a cause of action; there is an identifiable class; there are common issues; a class proceeding would be the preferable procedure; and finally, that there are plaintiffs capable of representing the class's interests in the proceeding.

[7] The defendants do not contend that there is no cause of action asserted within the meaning of the *CPA*. They do however, take issue with several of the claims asserted. The thrust of their argument in opposition focuses on three points. They submit that the class is overly broad, that the action as framed does not have a sufficient element of commonality and that in any event, a certified class proceeding would be completely unmanageable, a fact that they say is demonstrated by the plaintiffs' failure to provide a workable litigation plan.

[8] In other words, the defendants assert that a class proceeding would not be the preferable procedure because of the vast number of individual issues that must be decided in respect to each of the millions of putative class members, leaving the proceeding hopelessly unmanageable and complex. Further they assert that the plaintiffs have failed to establish the necessary ingredients for certification because they have not produced a litigation plan showing, with sufficient particularity, that the claims of class members can be litigated to finality within the confines of the class proceeding.

[9] The defendants further state that certification of the action as a class proceeding cannot benefit the plaintiffs or the proposed class in this case. They propose that rather than a class proceeding, individual trials are the preferable procedure by which tobacco litigation seeking damages for personal injury ought to be pursued. Further, the defendants submit that proposed class members who began smoking after 1972 are in a different position than those who

commenced before that time because of the existence of express warnings regarding the health risks inherent in smoking.

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[10] In substance, therefore, the defendants' position is that the proposed class proceeding lacks the core element of commonality that is necessary to obtain certification.

Analysis

[11] While I do not accept all of the defendants submissions, I have concluded that the motion for certification must be dismissed. The action as presently framed, and in light of the evidentiary record before the court, is not suitable for certification as a class proceeding. My reasons follow.

[12] It is well settled that a class proceeding certification motion is procedural only and does not constitute a determination of the merits of the proceeding. Nevertheless, the record on this strictly procedural motion exceeds 66 volumes and has taken over eight years to assemble. The complexity of the action is manifest.

[13] Nonetheless, it is not the case that complexity alone is a sufficient basis to deny certification of an action as a class proceeding. Regardless of the complexity, if the action meets the five part test set out in s. 5(1) of the *CPA*, it must be certified as a class proceeding by the court:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or 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 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.

Cause of Action

[14] The plaintiffs each claim:

(a) Damages in the sum of one million dollars;

(b) Aggravated, punitive and exemplary damages;

(c) A mandatory order for the creation and funding of nicotine addiction rehabilitation centers for those addicted to nicotine…

[15] I have distilled the underlying factual allegations supporting these claims, from paras. 17-37 of the Amended Statement of Claim and the Particulars, as follows:

> ***Addiction***
>
> The plaintiffs claim they are addicted to the cigarette products that the defendant tobacco companies designed, manufactured and distributed. More specifically, the plaintiffs allege that they are addicted to the nicotine contained in these products. They claim that the consumption of such products creates "reinforcing behaviour," which compels addicted individuals to consume more.
>
> ***Intentional Concealment***
>
> The plaintiffs claim that, at all material times, the defendants were aware or should have been aware of the addictive nature of the nicotine in their products. They allege that the defendants carried out extensive research, establishing that nicotine was highly addictive and caused cancer. However, the defendants concealed and misinformed the general public about this research. The plaintiffs further claim that the defendants denied the validity of research from governmental and private agencies, which established the addictive effects of nicotine. Instead, the defendants maintained their position that nicotine was not addictive and was not the reason people continued to purchase their products.
>
> ***Intentional Manipulation***
>
> The plaintiffs claim that the defendants have developed or adopted methods to manipulate the nicotine content of their products. They state that the

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defendants hold numerous patents in respect of the alteration of nicotine levels in their products; thus, the defendants are allegedly able to control the amount of nicotine in their products, artificially raising nicotine levels in their products above the levels that naturally occur in tobacco plants. The plaintiffs further state that the defendants have manipulated the nicotine in their low tar cigarettes, raising the nicotine dose to the smoker and ensuring addiction. Moreover, they allege that the defendants are aware that the actual levels of nicotine and tar consumed by smokers are greater than those measured by conventional measurement techniques and those reported to consumers.

Awareness and Denial

The plaintiffs claim that the defendants were aware, at all material times, of the serious and frequently fatal health consequences associated with the consumption of their products; these include cancer, respiratory and cardiovascular disease. Moreover, they allege that the defendants have denied these health consequences.

Targeting Minors and Young Adults

The plaintiffs claim that the defendants engaged in advertising, media, and public relations campaigns designed to increase their sales, which explicitly or implicitly denied all health-related consequences of consuming their products. Further, they allege that the defendants targeted children and young adults, as the defendants' own research indicated that 90% of smokers begin to smoke before age 18 and that it was unlikely for a person to start smoking after the age of 19.

[16] The plaintiffs assert that these factual claims give rise to nine causes of action: negligence, strict products liability, products liability, breach of duty to inform, deceit, negligent misrepresentation, breach of implied warranty, conspiracy and unfair business practices.

[17] The defendants assert that there can be no causes of action founded in strict products liability, breach of implied warranty, conspiracy and *FLA* claims prior to 1978. The plaintiffs conceded on the motion that there can be no *FLA* claims prior to 1978.

[18] The determination of whether a cause of action has been disclosed on a certification motion utilizes the principles to be applied on a motion to strike a pleading under r. 21. Accordingly, the jurisprudence applicable to r. 21 motions is equally applicable to s. 5(1)(a) of the *CPA*. In that respect, the Court of Appeal for Ontario has determined that "the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence". (See *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)).

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[19] The defendants contend that the there can be no cause of action based on strict product liability, as pleaded by the plaintiffs at para. 40 in their Amended Statement of Claim. They argue that strict liability is not a recognized cause of action in Ontario and that it should therefore be struck. I agree. As Dambrot J. stated in *Anderson v. St. Jude Medical Inc.*, [2002] O.J. No. 260 (S.C.J.):

> While academics and the Law Reform Commission have long argued that strict liability ought to be part of the tort law of Canada, their recommendations have neither been enacted in Ontario nor adopted by the courts. In fact, in four decisions since 1971, the Ontario Court of Appeal has declined to do so, but rather has preferred to subsume product liability under traditional negligence principles, requiring proof of negligence.

[20] The defendants further submit that there is no viable cause of action based on breach of implied warranty, which was set out at paras. 53-4 in the Amended Statement of Claim. Warranties are a contract-based claim. According to the doctrine of privity of contract, where a retailer sells goods to the ultimate consumer, the consumer cannot sue the manufacturer on implied warranties. (*Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd.*, [1915] A.C. 847 (H.L.)).

[21] In this case, the plaintiffs do not allege that the defendant manufacturers sold their products to them and thus the defendants submit that, as they are not the vendors vis à vis the plaintiffs, there can be no claim for breach of implied warranty based on the common law. Further, although not specifically pleaded by the plaintiffs, the defendants contend that the *Sale of Goods Act*, R.S.O. 1990, c.S.1 offers no assistance in maintaining the claim. Section 15 of that Act sets out the circumstances where implied warranties may exist between the buyer and seller. However, a party cannot advance a claim for breach of implied warranty under this section unless there is a privity of contract between the parties (see *Mann-Tattersal (Litigation Guardian of) v. Hamilton (City)*, [2000] O.J. No. 5058 (S.C.J.)).

[22] I cannot accede to the defendants' submissions regarding the breach of implied warranty claim. They turn on the doctrine of privity of contract. While it may have been the case that the law regarding privity of contract was settled for a number of years, it is also the case that a number of exceptions have been developed to this doctrine. Indeed, following its decision in *London Drugs Ltd. v. Kuehne & Nagel Int. Ltd.*, [1992] 3 S.C.R. 299, the Supreme Court of Canada has enunciated a two part test to determine when a new exception should be created. As stated by Iacobucci J. in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at para. 32:

> In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of

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> the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[23] Clearly, the application of these factors depends on the evidence adduced at trial. At this stage of the proceeding, and given the test enunciated in *Fraser River*, it is not plain and obvious to me that the plaintiffs cannot succeed in establishing that an exception to the doctrine of privity may apply in the circumstances of this case. Further, given the possibility that an exception may be created in the proper circumstances, it cannot be said that the law is "fully settled" as contemplated in *Nash.*

[24] The defendants also argue that a claim of conspiracy should be struck where the unlawful acts are independently actionable and have already been pleaded. Therefore, the defendants contend that the conspiracy claim merges with the specific torts pleaded and "adds nothing," unless special damages are claimed with respect to the conspiracy, citing *Graye v. Filliter* (1997), 25 O.R. (3d) 57. The defendants argue that the plaintiffs allege numerous acts in support of the conspiracy claim and that each act is invoked to support at least one of the other causes of action advanced. As the plaintiffs do not allege any special damages, the defendants contend that the claim is superfluous and should be struck.

[25] I cannot accede to this submission. First, I am not certain that *Graye*, when read in its entirety, stands for the proposition advanced by the defendants. Secondly, there appears to be binding authority to the contrary as to how this issue ought to be dealt with at this stage of the proceeding. In considering a similar argument regarding a plea of conspiracy, Wilson J. stated in *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959 at para. 49 that:

> If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

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and at para. 54 that:

> …while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts.

[26] Nordheimer J. considered the same issue in *Private Equity Management Co. v. Vianet Technologies Inc.* (2000), 48 O.R. (3d) 294 (S.C.J.). Although he acknowledged that there may be a conflict between *Hunt* on the one hand and certain Ontario authorities on the other with respect to the tenability of pleadings sounding in conspiracy, he held that:

> …when faced with a decision of the Supreme Court of Canada that appears to be directly on point and a decision of the Court of Appeal that only alludes to another possible outcome, I am bound to follow the decision of the Supreme Court of Canada until the issue is clarified.

[27] Given the test enunciated in *Nash* with respect to issues of law that arise on pleadings motions, Nordheimer J.'s approach appears to be the proper course. The Ontario cases may be adopted in the future as the correct position but, until then, it cannot be said that the law is "fully settled" on the point. This remains an issue to be determined at trial. Accordingly, it is not appropriate to strike this cause of action at this time.

[28] In the result, the pleadings disclose a cause of action such that the requirement of s. 5(1)(a) is satisfied.

Identifiable Class

[29] Throughout the course of this proceeding, the plaintiffs have proffered constantly changing class descriptions. In their Amended Statement of Claim, they originally sought to certify a class of "addicted" persons who suffered injury as a result of their addiction. The class was defined as follows:

> Persons who due to the conduct of the defendants, their agents, servants or employees, have become addicted to the nicotine in the defendants' products, namely cigarettes, or who have had such addiction heightened or maintained through the consumption of said products, and who have as a result of said addiction suffered loss, injury and damage, persons with *Family Law Act* claims in respect to the claims of such addicted persons, and estates of such addicted persons.

[30] The plaintiffs subsequently amended the proposed class in their factum on this motion, describing it as follows in para. 4:

> (a) all residents of Ontario, whether living or now deceased,[1] who have ever smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the defendants; and
>
> (b) persons with *Family Law Act* claims in respect of such smokers and former smokers, and the estates of such smokers and former smokers.[2]

[31] The defendants, in their factum at para. 20, criticized this class definition as follows:

> Class membership is not defined by reference to time or amount smoked or where the class members currently reside, where the tort was committed or where or whether damage has been suffered. The class includes virtually every living or dead person who has ever resided in Ontario and smoked even one cigarette.

[32] In response to this criticism, the plaintiffs amended the proposed class in their reply factum at para. 61:

> (a) all Ontario residents who claim personal injury as a result of consumption of the defendants' cigarette products; and
>
> (b) persons with derivative claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3.

[33] They further amended the proposed class during the argument of this motion:

> (a) all current residents of Ontario, whether living or now deceased, who ever purchased and smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the

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[1] Subject to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c.T.23, which provides a 2 year limitation period.
[2] Also subject to s.38(3) of the *Trustee Act*.

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defendants, from January 1, 1950 to the date of the certification order herein; and

(b) persons with *Family Law Act* claims in respect of such smokers and former smokers, and the estates of such smokers and former smokers.

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[34] As stated above, they also indicate that the estates claims are prescribed by s. 38(3) of the *Trustee Act*, which creates a two-year limitation period from death. The plaintiffs further concede that there is no cause of action for the derivative *FLA* claims prior to 1978.

[35] The *CPA* mandates in s. 5(3) that each party to a motion for certification shall provide the parties' best information about the number of members in the class. The plaintiffs state, based upon a review of Statistics Canada's 1994 *Survey on Smoking in Canada* that the class size exceeds 2.4 million persons. The defendants estimate the number of persons in the class on or about the date the action was commenced, the same date as chosen by the plaintiffs. The defendants' evidence of class size is adduced through Mr. McCormick, a professional economist, who deposed that in addition to approximately 2 million smokers, the proposed class would include more than 2 million Ontario residents 15 years of age or over, who were former smokers as of January 1995, more than 2 million individuals who died prior to 1995 and approximately 9 million *FLA* claimants. Thus, the defendants state in their factum that a "ballpark estimate" of the size of the class, using both the plaintiffs' and defendants' evidence, would be between 5.5 and 6.4 million smokers or former smokers and up to 9 million *FLA* claimants, although there would be some overlap between the *FLA* claimants and primary class members.

[36] Given the magnitude of the numbers submitted by the parties, it is unnecessary for the court to make a finding on the exact number of class members for the purposes of this motion. It is undisputed on the evidence that the potential class comprises at least 2.4 million members without counting the deceased members, former smokers, minors or those with *FLA* claims alone.

[37] I use the words "potential class" advisedly because the plaintiffs have experienced considerable and continuing difficulty in arriving at an acceptable class definition. The proposed class is currently defined geographically to include all residents of Ontario, living or deceased, who have ever smoked cigarette products manufactured and sold by the defendants. This includes all persons who have ever smoked, regardless of how much they smoked, persons who have quit smoking, and all of the *FLA* claims associated with these persons. The temporal boundary of 1950, which was inserted into the class definition during the plaintiff's argument, is purely arbitrary as it is based on the year that one of the plaintiffs, Russell Hyduk, started to smoke.

[38] The purpose of the class definition was set out in *Bywater v. T.T.C.* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (S.C.J.):

(a) It identifies those persons who have a potential claim for relief against the defendants;
(b) It defines the parameters of the lawsuit so as to identify those persons who are bound by its result;
(c) It describes who is entitled to notice pursuant to the Act.

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[39] Although *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 holds that the plaintiffs can arbitrarily restrict the causes of action asserted in order to make a proceeding more amenable to certification (at 201), the same does not hold true with respect to the proposed class. Here the plaintiffs have not chosen to restrict the causes of action asserted but rather attempt to make the action more amenable to certification by suggesting arbitrary exclusions from the proposed class. This is diametrically opposite to the approach taken by the plaintiffs in *Rumley*, and one which has been expressly disapproved by the Supreme Court in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. There, McLachlan C.J. made it clear that the onus falls on the putative representative to show that the "class is defined sufficiently narrowly" but without resort to arbitrary exclusion to achieve that result. As stated at para.21:

> The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, the class could not be defined more narrowly *without arbitrarily excluding some people who share the same interest in the resolution of the common issue*. (Emphasis added.)

[40] The plaintiffs do appear to be relying on *Hollick* in one respect, however, in their appeal to the court to fashion a class that is certifiable as an exercise of discretion. The court's discretion to alter the class definition was addressed in *Hollick*, also at para. 21., where McLachlin C.J. stated that "where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition the definition of the class be amended."

[41] The plaintiffs prevail upon me to amend the class definition to redefine the class in any way necessary to render this action certifiable. In my view, this approach is not what McLachlin C.J. was advocating in *Hollick.* As I read her reasons, the court may either reject certification where the class is not properly defined or otherwise grant a conditional certification on the basis that the plaintiffs will have to provide an acceptable definition to the court. In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. That is not the case here. What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.

[42] In this case, it is clear that the plaintiffs are having difficulty in reaching any definition that meets with even their own approval let alone the approval of the court. Further, none of the solutions proffered by the plaintiffs to create an acceptable definition could achieve that result without resort to arbitrary exclusions that *Hollick* holds are improper. As an example, one suggestion the plaintiffs made was to drop the *FLA* claimants. Another was to drop the estate claims. Still another is to limit the class to only current residents. Yet another is to redefine the class in terms of purchasers as opposed to smokers.

[43] There were other suggested definitions. All had the same fatal defect. They contained arbitrary exclusions of "some people who share[d] the same interest in the resolution of the common issue" as the people who would remain in the class.

[44] The plaintiffs have had numerous opportunities to amend their proposed class. The court should not be asked to exercise its discretion in order to produce a more certifiable class when the plaintiffs have not or cannot do so on a principled basis. Moreover, even if I were inclined to produce a class definition appropriate for certification, I could not do so in these circumstances. There is an insufficient evidentiary record upon which any such class definition could be based. As stated in *Hollick*, at para. 25, "the class representative must show some basis in fact for each of the certification requirements", other than the cause of action.

[45] In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.

Common Issues

[46] The third element in the test for certification is that the claims of the class members raise common issues. Although s. 5(1)(c) is silent as to the quality of the common issues that must be present, in *Hollick*, McLachlin C.J. stated at para.18 "an issue will not be common in the requisite sense unless the issue is a substantial ingredient of each of the class members' claims". Further, the common issues must be such that their resolution will "significantly advance the action". (*Hollick* at para. 32).

[47] The plaintiffs and the defendants have diametrically opposed views with respect to whether common issues are raised by the claim pleaded. The plaintiffs submitted that there are

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seven substantial common issues which in turn give rise to over 60 incidental common issues. The defendants on the other hand state that none of the common issues submitted by the plaintiffs meet the *Hollick* threshold and thus should be rejected.

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[48] Having made the submission that the plaintiffs common issues should be rejected, the defendants did not proffer any alternative common issues during the hearing. This is not surprising given the defendants contention that the action as framed is still inherently individualistic and unsuitable for certification as a class proceeding.

[49] The substantial common issues advanced by the plaintiffs were set out at para.80 of their factum as follows:

(a) are the defendants liable to members of the class for damages relating to addiction and/or other injuries, and death;

(b) are members of the class entitled to

i. a global assessment of damages in respect of monies expended by them on the purchases of defendants' cigarette products, from the defendants, from the date class members sought, but were unable, to cease using defendants' cigarette products;

ii. a global assessment of damages in respect of monies expended by them on the defendants' health reassurance cigarette products marketed as "filtered", "light", "extra light", "ultra light", "ultra mild" and similarly described terms, from the defendants, from the date class members switched to such cigarette products;

iii. a global assessment of punitive and exemplary damages in respect of the defendants' alleged intentional, wanton, reckless, and reprehensible conduct directed at the class as a whole;

iv. equitable relief;

(c) should the court impose sanctions or determine other relief in respect of evidence suppression and concealment; in respect of class claims; and

(d) [have limitation periods] begun to run, or are there special circumstances that would toll its running in respect of class claims, given the defendants' past and ongoing tortious conduct?

[50] In my view, the majority of the foregoing proposed common issues proceed on a theory of aggregation that is fundamentally misconceived. First, the claim for damages for addiction, other injuries and death cannot proceed as a common issue through to a

determination of liability. Although deficient in other respects, the record before the court makes it apparent that, regardless of the common issues asserted and potentially resolved through a single trial, individual issues will remain to be decided before the liability of the defendants to individual class members can be ascertained. Regardless of the conduct of the defendants, they are entitled to a fair procedure, whether by way of a class proceeding or otherwise.

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[51] Moreover, the plaintiffs have not put any evidence before the court on this motion that indicates that that liability could be determined as a common issue. Cogent evidence of that fact would be a prerequisite to granting certification of the common issue asserted by the plaintiffs regarding liability to the class as a whole. This principle was enunciated by the Court of Appeal for Ontario in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) where Feldman J.A. stated at para. 52 "[i]n my view, the motions judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification."

[52] The plaintiffs assertion that there are common issues regarding aggregate damages in respect of monies expended by the class are equally flawed. Section 24(1) of the *CPA* speaks to the requirements that must be met prior to an assessment of aggregate damages in a class proceeding. It provides:

> 24. (1) 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.

[53] The plaintiffs asserted common issues regarding monies expended by the class run afoul of both 24(1)(b) and 24(1)(c). There will be individual issues to be determined at the conclusion of a common issue trial. Further, the issues as framed contemplate the need for proof by individual class members. The plaintiffs also propose, in paras. 97-100 of their factum, to have the common issues trial judge determine whether an aggregate assessment of pecuniary damages for cigarette-related injuries including nicotine addiction, lung cancer, oral cancers, respiratory disease and cardiovascular disease can be made on the basis of

epidemiological, economic and other expert evidence. This damages assessment would have to be based largely on statistical evidence.

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[54] This latter proposition contravenes both s. 24 and the procedures governed by the *CPA*. In *Bywater* this court rejected a claim for an aggregate assessment on the grounds that the action involved a claim for damages for personal injuries, property damage and *FLA* claims. These required proof by individual class members and proof of causation. In the final analysis, each claim was fact driven and idiosyncratic in nature. That case involved exposure to smoke in a sub-way fire. As stated at para. 19:

> All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations…[t]he property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.

[55] The circumstances there were starkly similar to those in the present case. This case is equally unsuited to an aggregate assessment concerning the damages claimed. There are numerous, and significant, individual issues pertinent to the issue of liability and damages that must be determined. As stated by Feldman J.A. in *Chadha* at para. 49:

> …s.24 of the Class Proceedings Act is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage.

[56] Moreover, the plaintiffs contention that the common issues judge should identify the common issues is ill conceived. That task must be completed at the certification stage and not left for later. As the phrase implies, the judge presiding over the "common issues trial" is there in the role of arbiter of issues that have already been set out. That role is to make findings with respect to issues certified for trial, rather than to decide what issues are to be resolved. Setting the issues for trial is the role of the motions judge on certification.

[57] Nonetheless, there are three issues proposed by the plaintiffs that appear, at first impression, to be amenable to resolution on a class wide basis in general terms. The issues identified in paragraph 54 above as (b)(iii) regarding punitive damages, (c) relating to conduct of the defendants and (d) with respect to limitation periods, are all resolvable after inquiry into the conduct of the defendants and without participation from the class members. This is particularly so with regard to punitive damages. As stated by McLachlin C.J. in *Rumley* at para. 34:

> In this case, resolving the primary common issue will require the court to assess the knowledge and conduct of those in charge of JHS over a long

> period of time. This is exactly the kind of fact-finding that will be necessary to determine the whether punitive damages are justified…"an award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff." (Internal citation omitted).

[58] However, as McLachlin C.J. went on to say, "[c]learly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue." This is the situation in the present circumstances with respect to the remaining three issues. The proposition is that the assessment or determination of each will be made on a class wide basis. Obviously there must be an identifiable class in existence for whom the assessment or determination applies. Here there is no such class.

[59] In short, for these reasons I reject the plaintiffs common issues.

[60] In *Hollick the* Supreme Court of Canada stated at para. 20 that "…implicit in the 'identifiable class' requirement is the requirement that there be some rational relationship between the class and the common issues.", and later in the same para. that, "it falls to the putative representative to show that the class is defined sufficiently narrowly." In the present case I have concluded that the plaintiffs have failed to meet this requirement of establishing an identifiable class as required by the Act and reinforced by the Supreme Court. Absent a properly defined class, it is not appropriate, nor is it feasible, for me to craft common issues. Any such attempt in these circumstances would be to engage in mere speculation. Accordingly, I decline to exercise my discretion to state common issues with respect to this proceeding.

Preferable Procedure

[61] Notwithstanding that I would dismiss the motion for lack of an identifiable class and common issues, in my view, the proceeding also fails the fourth element of the test for certification, namely, whether certification of this action as a class proceeding would be the preferable procedure for the resolution of the "the class members' claims". (*Hollick* at para. 29). The test to be applied in determining whether a class proceeding is the preferable procedure is set out at para. 28 in *Hollick*

> The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on".

[62] To paraphrase McLachlin C.J., a two-part test is to be applied on a preferable procedure determination. As such, it is not enough for the plaintiffs to establish that there is no

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other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. Both parts of the test must be considered in the context of the three goals of the *CPA*, judicial economy, access to justice and behavioural modification of tortfeasors.

[63] The defendants assert that individual proceedings are preferable to a class proceeding in the present factual matrix. I am not persuaded that such is the case. The time, and doubtless many lawyer hours, spent on simply getting this action before the court on a certification motion, let alone an examination of the positions taken in the expert evidence filed by the defendants, is indicative that an individual attempting to pursue litigation would likely find his or her resources taxed beyond sustainable limits.

[64] In like fashion, I am unable to accede to the defendants' submission that an "admission" such as that set out in their factum at para. 107 would render individual proceedings preferable. Paragraph 107 reads:

> The defendants acknowledge that there are significant health risks associated with smoking. Accordingly, there is no issue on this motion as to whether tobacco products are capable of causing or contributing to disease. The only causation issue will be whether or not a potential class member can establish whether his or her individual disease was caused or contributed to by the use of tobacco products.

[65] In my view, the supposed "admission" is of little use to any plaintiff in an individual proceeding. It would not advance any particular proceeding to a significant degree and in any event, an admission made on this motion in the absence of a certification order does not bind the defendant to the class members. (*Bywater* at paras. 13-14; See also Griffith v. Winter, [2003] B.C.J. No.1551 (C.A.) at para. 20; *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729 (S.C.) at para. 8) As stated in *Bywater*:

> [para13] Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.
>
> [para14] I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class.

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[66] It is clear that, were it possible to do so, resolving the claims of class members in single class proceeding would be preferable to any other procedure.

[67] Nonetheless, as stated above, the plaintiffs must additionally demonstrate that a class proceeding will be "fair, efficient and manageable". However, in as much as the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis, neither can the plaintiffs satisfy the onus with argument alone. It must be supported by some evidence. As stated in *Hollick* at para. 25 "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action".

[68] In respect of this aspect of the preferable procedure element. the plaintiffs' evidence must establish that a class proceeding will be "fair, efficient and manageable" and capable of achieving the goals of the *CPA*. In my view, the plaintiffs have failed to satisfy this onus on the evidentiary record proffered in support of this motion.

[69] It is self evident that the scope and complexity of a proceeding bears directly on its manageability and the steps that will have to be taken to ensure that it proceeds in a fair and efficient manner. With respect to issues regarding the "fairness" of a class proceeding, it is most often the case that the defendants raise concerns. Here, however, the magnitude of the potential class leaves me with concerns as to whether the proceeding would be fair to either the proposed class members or the defendants.

[70] While the opt out provision in the *CPA* permits individual claimants to attempt to pursue their own individual litigation if this action were certified as a class proceeding, for the reasons stated above, such pursuit is unlikely. Accordingly, the members of any certified class may well perceive that a court approved class proceeding offers the best prospect for recovery of any possible claim they may have. In that case, those who choose to remain in the class are in essence captive to the litigation until its conclusion. In the result, it is incumbent on the court to ensure that a proceeding will be capable of achieving a resolution for the class members so that the decision to remain accords the benefits envisioned by the legislature in enacting the *CPA*. In that regard, the legislature chose to impose the requirements set out in s. 5(1) prior to certification as, in part, "safeguards" to ensure that plaintiffs were not disadvantaged. As stated in the *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), "safeguards must provided to protect those involved, whether as representative plaintiff, as defendants or as class members".

[71] The *Report* continues on to state that "[this concern arises] from the fact that a class action is brought by an individual representative plaintiff on behalf of a group of absent class members. These absent plaintiffs are not necessarily present before the court and lack any real ability to determine the course of litigation which may affect their individual rights." Accordingly the court must carefully scrutinize any prospective class proceeding before granting certification. This is particularly so where the manageability of a proceeding is suspect on the face of the record.

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[72] Here, notwithstanding the inability of the plaintiffs to define an acceptable class in relation to the causes of action alleged, it appears that any class would be comprised of at least several million people. The eight remaining legal bases for asserting claims allegedly arise from multiple fact situations spanning at least 50 years, during which prevailing circumstances changed dramatically. The legal principles underlying the claims asserted require inquiry into the circumstances of each individual class member in order even to ascertain liability, let alone damages. This would be necessary on a procedural basis to ensure that the defendants are treated fairly but would also be necessary from the perspective of the members of the class so that each would receive fair compensation. Further, even if the defendants were to only contest a portion of the individual claims, and each dispute could be concluded in one day, simple mathematics indicate that such a process would require the equivalent of 1,000 years of litigation, if it were to be conducted sequentially.

[73] In my view, a class proceeding based on the present action would not be "fair, efficient and manageable" and, therefore, it does not meet the fourth element of the test for certification.

Representative Plaintiffs with a "Workable" Litigation Plan

[74] The final element in the test for certification is that there be a representative plaintiff who "would fairly and adequately represent the interests of the class.". There are four proposed representative plaintiffs: David Caputo, Luna Roth, Lori Carwardine and the Estate of Russell Hyduk. Although the choice to posit arbitrary exclusions from the class definitions in obvious disregard for the persons so affected causes me concern, I am satisfied that, on balance, the proposed representative plaintiffs are capable of fairly and adequately prosecuting an action on a representative basis. In the present case the first problem, however, lies in the fact that there is no identifiable class for them to represent. Further, they have not provided a workable litigation plan for the class they propose in any event. Accordingly, the last element in the test is not met.

[75] The *Act* mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class…".McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[76] Here the plaintiffs have tailored the proposed class proceeding in such a way as to attempt to remove the overburden of individual issues. They have endeavored to achieve this through the use of aggregate assessments combined with an argument that the common issues trial judge should bear the burden of both determining whether individual issues exist and

fashioning a method for their resolution. This approach is unacceptable. It is apparent that individual issues exist and that they must be dealt with in order for the class members to obtain relief even if a common issues trial were to be decided in their favour. Consequently, by neglecting to address the presence of individual issues and an acceptable method for dealing with them, the plaintiffs have a proposed litigation plan, such as it is, that is "unworkable".

[77] The court now has a number of large class proceedings under case management. My experience with these cases is that even where liability is not an issue because of a global settlement, the sheer volume of work required to process claims on behalf of class members is gargantuan. Any shortcomings in the process will detrimentally affect the class members. Here, with a proposed class of somewhere between 2.4 and 15 million, substantial resources will be required to move a class proceeding forward if certified. Further, as noted in the *Report of the Attorney General's Advisory Committee*, certification makes class members captive to the proceeding. Mindful of this, and in light of the other considerations above, the litigation plan produced by the plaintiffs is unacceptable.

[78] In my view, in a proceeding of this size and complexity, a proper litigation plan should reflect a clear acknowledgement of the massive undertaking involved. Thus, the plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. In respect to the latter point, I do not wish to be taken as holding that only large firms can prosecute class actions nor that the proposed representative plaintiffs must be themselves sufficiently wealthy to finance litigation. Rather, the plan should satisfy the court as to how the resources available to the plaintiffs can be brought to bear to ensure that the litigation can be conducted in such a way so as to protect the interests of the class members. The detail required with respect to each of these elements is relative to the nature of the action. With respect to the financing of the action, it is to be kept in mind that the purposes of certain sections of the *CPA*, and related legislation, is to permit proposed representative plaintiffs to commence and maintain class proceedings through means not available in ordinary litigation.

[79] In consideration of the foregoing, and given the paucity of information proffered in the certification motion record, the plaintiffs have not met the requirement of providing a "workable" litigation plan to the court. Were it the case that this was the only defect, I would normally be inclined to grant a conditional certification, subject to the plaintiffs producing an acceptable litigation plan. However, in this case, the other deficiencies are such that, without changing the entire theory of the case, it is not possible for the plaintiffs to satisfy the requirement.

Conclusion and Disposition

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[80] In my view, the action as advanced is not appropriate for certification as a class proceeding. The best estimates of the number of class members is a range between 2.4 and 15 million persons. The plaintiffs proceed on the basis that tobacco is inherently dangerous and therefore the class should include everyone who smokes or has ever smoked in Ontario, whether alive or deceased, and regardless of individual differences pertaining to smoking habits or the effects of smoking on any particular individual class member. It is apparent on any careful analysis of the proposed class in the context of the conduct complained of and the allegations set out in the Amended Statement of Claim, that the plaintiffs have combined at least five, and possibly more, classes, not to mention innumerable subclasses, into one globally defined class for the purpose of seeking certification. In adopting this strategy, the plaintiffs have presented an action lacking a core of commonality that would permit the court to approve, or frame, common issues that would significantly advance the proceeding.

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[81] Moreover, there must be a rational connection between the class and the common issues. These must in turn emerge from the causes of action asserted, which similarly must have a basis in the class. Thus, if there is no class which is defined sufficiently narrowly, it is impossible for the court to craft common issues. In the present case, the plaintiffs have not provided the court with any principled or evidentiary basis for varying the class definition they propose. Therefore, this is not an appropriate case for the court to exercise its discretion to amend the class definition on its own motion for the purpose of granting certification.

[82] The defective class definition cannot be remedied by the plaintiffs' attempt to construct common issues regardless. The issues of significance proposed by the plaintiffs cannot be accepted for the purposes of certification because they rely on either a mistaken assumption with respect to class definition or an ill conceived theory of aggregation. Any assistance that the court might, in its discretion, provide with respect to framing common issues is foreclosed by the deficiencies in the evidentiary record and the flawed class description.

[83] In like fashion, the action does not meet the "preferable procedure" element of the test for certification as a class proceeding. There are obvious individual issues flowing from the causes of action asserted in the Amended Statement of Claim. The Supreme Court has held that the certification analysis must take into account the fairness, efficiency and the manageability of the proceeding as a whole, including those individual issues that might exist. As McLachlin C.J. stated in *Hollick* at para. 30, "I cannot conclude… that the drafters intended the preferability analysis to take place in a vacuum." Individual issues cannot be ignored. Similarly, their presence or importance in the certification analysis cannot be diminished by a creative, but ultimately flawed, assertion that obvious individual issues can be dealt with as though they were in fact common to the class as whole.

[84] The presence of these numerous individual issues and the corresponding lack of commonality lead me to the conclusion that even if there were a class to work with, a class proceeding would not be the preferable procedure for dealing with these claims. In other words, a class proceeding such as the one proposed by the plaintiffs could not be manageable,

efficient and fair. The plaintiffs litigation plan provides no assistance to the court in this respect. In my view, it does not contain the minimum level of information necessary to establish that it is "workable" as required under the *CPA*.

[85] In essence, the plaintiffs seek certification of an amorphous group of people comprised of individuals of different ages, covering different decades, who knew different things concerning the risks inherent in smoking and who began to smoke for different reasons. They smoked different products, in different amounts, received different information about the risks of smoking, quit smoking or continued to smoke for different reasons and developed or failed to develop different diseases or symptoms associated with different risk factors. The only apparent common element in this action is that all of the proposed class members allegedly smoked cigarettes at one time or another.

[86] The plaintiffs have not met the test for certification. The motion must be dismissed. However, I do not intend that these reasons should stand for the proposition that no class proceeding relating to tobacco use can ever be certified under the *CPA*. My reasons for refusing certification relate to defects in this particular action, not such litigation in general. As always, and to reiterate the words of McLachlin C.J. in *Hollick,* the "question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case."

[87] Counsel may make brief submissions, in writing, as to costs.

WINKLER J.

Released: February 5, 2004

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COURT FILE NO.: 95-CU-82186CA
DATE: 20040205

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and DAVID GORDON HYDUK, as Estate Trustee of the Estate of RUSSELL WALTER HYDUK

Plaintiffs

- and –

IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.

Defendants

REASONS FOR DECISION

WINKLER J.

Released: February 5 , 2004

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