

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

Citation: *Sparkes v. Imperial Tobacco Canada Limited* 2008NLTD207

Date: 20081229

Docket: 200401T2716 CP

BETWEEN:

VICTOR TODD SPARKES

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED

FIRST DEFENDANT

AND:

IMPERIAL TOBACCO COMPANY LIMITED

SECOND DEFENDANT

AND:

THE ATTORNEY GENERAL OF CANADA

THIRD PARTY

**BROUGHT UNDER THE *CLASS ACTIONS ACT*
BEFORE THE HONOURABLE MR. JUSTICE ADAMS
CASE MANAGEMENT JUDGE**

Before: The Honourable Mr. Justice James P. Adams

Place of hearing:

St. John's, Newfoundland and Labrador

Held: **The application for certification as a class action is denied.**

Appearances:

Chesley F. Crosbie, Q.C. and Douglas Lennox	Counsel for the Plaintiff
J. David B. Eaton, Q.C., Stacey O’Dea and Deborah Glendenning	Counsel for the First and Second Defendants
Paul Vickery Catharine Moore and Korinda McLaine	Counsel for the Third Party

Authorities Cited:

CASES CONSIDERED: Potter v. Bank of Canada, 2007 ONCA 234; **Hollick v. Toronto (City)**, [2001] 3 S.C.R. 158 (S.C.C.); **Western Canadian Shopping Centres Inc. v. Dutton**, [2001] 2 S.C.R. 534(S.C.C.); **Wheadon et al. v. Bayer Inc.**, 2004 NLSCTD 72 (NLTD); **Rumley v. British Columbia**, [2001] 3 S.C.R. 184 (S.C.C.); **Knight v. Imperial Tobacco Canada Limited** (2005), 2050 D.L.R. (4th) 347 (BCSC); **Canada v. Saskatchewan Wheat Pool** [198] 1 S.C.R. 205; **Aspinall v. Phillip Morris Cos.**, 442 Mass 381 (2004) (Massachusetts Supreme Judicial Counsel); **Mouhteros v. DeVry Canada Inc.** (1998) 41 O.R. (3rd) 63 (Ont. General Division); **Chace v. Crane** [1996] B.C.J. No. 1606 (S.C.), Aff’d [1997] B.C.J. No. 2862(C.A.) (QL); **Carom v. Bre-X Minerals Ltd.** (2000) 1996 D.L.R. (4th) 344 (Ont. CA); **Reid v. Ford Motor Co.**, [2003] B.C.J. No. 2489 (S.C.) (QL); **Jameson Livestock Ltd. v. Toms Grain & Cattle Co.**, [2006] S.J. No. 93; **McKay v. CDI Career Development Institutes Ltd.**, [1999] B.C.J. No. 561 (S.C.); **Caputo v. Imperial Tobacco** [2004] O.J. No. 299.

STATUTES CONSIDERED: *Class Actions Act, S.N.L. 2001, c. C-19.1; Trade Practices Act, R.S.N.L., 1990, c. T-7; Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6; Tobacco Act S.C. 1997 c.13; British Columbia Business Practices and Consumer Protection Act, B.C. 2004, c. 2); British Columbia Trade Practices Act, R.S.B.C., c. 457*

RULES CONSIDERED: *Rules of the Supreme Court, Rule 38*

ARTICLES CONSIDERED: **Advocacy in Class Proceedings Litigation,** Justice Warren Winkler (2000) 19 Advocates Soc. J. No. 1, 6-9.

REASONS FOR JUDGMENT

ADAMS, J.:

INTRODUCTION

[1] The Plaintiff, who is a resident of Newfoundland and Labrador, is seeking certification of this action as a class action under the *Class Actions Act, S.N.L. 2001, c. C-19.1* (“CAA”).

[2] The First Defendant is a Canadian Corporation with its head office in Quebec. It is the largest manufacturer of tobacco products in the country. It is not registered to do business in Newfoundland and Labrador. The Second Defendant is also incorporated under the laws of Canada and is registered to do business in Newfoundland and Labrador.

[3] The Plaintiff filed his Statement of Claim on 29 June, 2004 and a further amended Statement of Claim on 07 December, 2004. The Statement of Claim was further expanded in a reply to a demand for particulars dated 06 July, 2007.

[4] The Defendants filed an application pursuant to Rule 38 of the Rules of Court seeking a preliminary determination whether the Statement of Claim disclosed a cause of action. The Plaintiff objected to the Rule 38 application proceeding on the grounds that it would be preferable to hear the full certification application as the question as to whether there is a cause of action disclosed by the pleadings is one of the criteria for certification under the CAA. The Plaintiff submitted that by hearing the certification application in its entirety the court would be better equipped to make a reasoned decision on the merits of the Rule 38 application. The Defendants' position is that the Rule 38 application raises a discreet issue which does not require any evidence and can be decided in advance. A decision on the Rule 38 application in favour of the Defendants would end the matter.

[5] The Defendants have not yet filed a Defence. On 29 January, 2006 the Defendants filed a Third Party Notice joining the Attorney General of Canada as a Third Party to the action claiming, among other things, contribution and indemnity against the Attorney General if the Defendants are found liable to the Plaintiff. The Attorney General opposed being joined as a Third Party but has chosen not to pursue its application in that regard at this time and has fully participated in this application resisting certification of the matter as a class action.

[6] I heard the Rule 38 application but decided that it would be better in the circumstances to proceed with the certification application before making a ruling on the Rule 38 application, essentially for the reasons advanced by the Plaintiff.

NATURE OF PLAINTIFF'S CLAIM

[7] The Plaintiff claims that the Defendants' descriptors of "light" and "mild", as well as other similar descriptive terms, were part of a deliberate misinformation campaign undertaken by the Defendants intended to mislead and deceive the public into thinking that the use of such products would deliver less harmful impacts than smoking "regular" cigarettes. The Plaintiff claims that the Defendants changed the

design of their “mild” cigarettes using modified cigarette papers and filters and by placing tiny vent holes around the filters to dilute the toxins produced by smoking tobacco. However, the Plaintiff alleges, these design features are negated by the phenomenon known as “compensation” by which the smoker compensates for the loss of the addictive chemicals in the tobacco smoke by covering the vent holes with his/her fingers or lips, inhaling the smoke more deeply, puffing more frequently, smoking the cigarette to a shorter butt, holding the smoke in the lungs for a longer period and by smoking more cigarettes.

[8] The Plaintiff alleges that as a result of the above actions the Defendants committed numerous unfair trade practices contrary to the *Trade Practices Act*, R.S.N.L, 1990, c. T-7 (hereinafter referred to as “the TPA”) by misstating toxicity levels of their products, failing to disclose material facts about the health hazards about smoking tobacco products, including ‘light’ and “mild” brands, failing to mark vent holes so as to assist in preventing compensation, failing to instruct consumers on how to smoke properly and failing to tell consumers that they manipulated the design and content of “mild” cigarettes so as to increase nicotine levels delivered under normal smoking conditions, among other things. He alleges that the acts and omissions of the Defendants violate section 5(1) of the TPA.

[9] The Plaintiff seeks various remedies pursuant to section 14(2) of the TPA including:

- (a) an order certifying the proceeding as a class proceeding;
- (b) a declaration pursuant to section 14(2)(a) of the TPA;
- (c) a permanent injunction pursuant to section 14(2)(d) of the TPA;
- (d) an order requiring the Defendants to advertise any adverse findings against it pursuant to section 18 of the TPA;
- (e) disgorgement and/or restitution by the Defendants pursuant to section 14(2)(c) and 14(2)(e) of the TPA;
- (f) damages pursuant to section 14(2)(b) of the TPA;

- (g) punitive and exemplary damages pursuant to section 14(2)(b) of the TPA;
- (h) costs pursuant to section 37(2) of the *Class Actions Act*, SNL 2001, c. C-18.1;
- (i) interest pursuant to the *Judgment Interest Act*, R.S.N. 1990, c. J-2, and as damages at common law or equity; and
- (j) such further and other relief this Honorable Court may find just.

[10] The Plaintiff seeks certification of the following class of consumers and class periods:

“Natural persons, resident in Newfoundland and Labrador, who, during the Class Period, purchased the Defendant’s [sic] Light, Extra Light or Mild brands of cigarettes in Newfoundland and Labrador for personal, family or household use. The Defendant’s [sic] light and mild brands of cigarettes include the following brands: Player’s Light, Player’s Light Smooth, Player’s Extra Light, du Maurier Light, du Maurier Extra Light, du Maurier Ultra Light, du Maurier Special Mild, Matinee Extra Mild, Matinee Ultra Mild and Cameo Extra Mild.

The Class period is the period from June 30, 1998 with respect to the First Defendant, and from November 30, 1998, with respect to the Second Defendant, up to the opt-out date set by the Court in this proceeding.

Excluded from the class are directors, officers and employees of the Defendants.”

[11] The Plaintiff seeks an order stating the following to be common issues for determination:

- (a) Are the sales of the Defendants’ light and mild brands of cigarettes to class members for the class members’ personal, family or household use, “consumer transactions” as defined in the TPA?
- (b) Is one or both of the Defendants a “supplier” as defined in the TPA?

- (c) Are the class members “consumers” as defined in the TPA?
- (d) Did the Defendants engage in unfair trade practices in the offer, advertisement or sale of their light and mild brands of cigarettes contrary to the TPA as alleged in the Amended Statement of Claim?
- (e) If the Court finds that one or both of the Defendants have engaged in unfair trade practices contrary to the TPA, should an injunction be granted restraining one or both of the Defendants from continuing those acts or practices?
- (f) If the Court finds that one or both of the Defendants have engaged in unfair trade practices contrary to the TPA, should Defendant be required to advertise the Court’s judgment, declaration, order or injunction and, if so, on what terms or conditions?
- (g) If the Court finds that one or both of the Defendants have engaged in unfair trade practices contrary to the TPA, should a monetary award be made in favour of the class and, if so, in what amount?
- (h) If the Court finds that one or both of the Defendants have engaged in unfair trade practices contrary to the TPA, should punitive or exemplary damages be awarded against one of both of the Defendants and, if so, in what amount?
- (i) Whether the Defendants’ interactions with the Government of Canada constitute a defence to claims under the TPA?
- (j) Whether the doctrine of *volenti non fit injuria* constitutes a defence to claims under the TPA?
- (k) Whether the provisions of the *Contributory Negligence Act*, RSNL 1990, c. C-33, have any application to a claim under the TPA?

[12] The only evidence the Plaintiff produced at the certification hearing was the affidavits of Victor Todd Sparkes, Shawn Lewis and Aaron Felt. At the hearing, the plaintiff also relied on the evidence of the Defendants’ affiant, Dr. A.J. Liston.

FACTS

[13] The facts in this matter are drawn from affidavits filed by the proposed representative Plaintiff, Victor Todd Sparkes, dated 30 November, 2004, the proposed alternate representative Plaintiff, Shawn Lewis, dated 22 June, 2006, Aaron Felt, an articled clerk with Ches Crosbie Barristers, counsel for the proposed class, dated 23 June, 2006 with various exhibits attached and A.J. Liston, an expert retained by the Defendants, dated 24 October, 2006 with various exhibits attached. Neither of the affiants was cross-examined on his affidavit.

Victor Todd Sparkes

[14] Mr. Sparkes stated that he was 37 years old at the date of his affidavit. He worked as a Chef at Memorial University of Newfoundland and Labrador in St. John's and is a graduate of the College of the North Atlantic.

[15] He began smoking in or about 1985 at the age of 16. He began by splitting a package of cigarettes with a friend but within three years was smoking a pack of Player's Filter cigarettes each day. He switched to Player's Light in or about 1989 and eventually to Player's Extra Lights.

[16] Mr. Sparkes was born in Newfoundland and Labrador and has lived here his entire life up to the date of his affidavit. He stated that the vast majority of his cigarette purchases were made in Newfoundland and Labrador and that he purchased and consumed between 20-30 cigarettes each day between 1989 and early 2000. He has not smoked since February, 2000.

[17] He stated that he is willing to act as the representative plaintiff in the class action if certified and indicated what he understood to be his responsibilities in that regard. He set out what steps he had taken to date in pursuing the action and what he intended to do in the future if the class action were certified. He stated that he did not have any interest in conflict with the interests of others in the proposed class and that he felt that he could fairly and adequately represent the interests of the class. He stated that he had no personal knowledge of the size of the proposed class; that he is not aware of any other representative or class proceeding in respect of the proposed class; and, that he is not aware of any material fact not disclosed in his affidavit.

Shawn Lewis

[18] The affidavit of Shawn Lewis states that he wishes to be a member of the proposed class and that he is willing to act as a representative plaintiff if Mr. Sparkes is unable to serve in that capacity.

[19] He was 38 years of age at the time of his affidavit. He works for Petro Canada as an Electronics Technologist. He began smoking in 1982 at the age of 15, initially smoking Player's Regular, then switching to Player's Light in the late 1980's. He smoked these until he quit smoking on 21 September, 2005. He took up smoking again in February, 2006 and smoked Export A Light, a brand not manufactured by the Defendants.

[20] Mr. Lewis was born and has lived most of his life in Newfoundland and Labrador. He lived outside the province between 1988 and 1989 and 1990 to 1996. He stated that the vast majority of his cigarette purchases were made in this province.

[21] He indicated that he understood the major steps required of a plaintiff in a class action and his responsibility if he is appointed a representative plaintiff in this

action. He outlined the steps he has taken to date and what he intends to do in the future to fairly represent the interests of the class.

[22] Mr. Lewis stated that he did not have any interest in conflict with interests of any other class member. He indicated that he has no personal knowledge of the size of the proposed class; that he is not aware of any other class or representative proceeding in the province relating to the same proposed class; and, that he has disclosed all facts material to the application of which he is aware.

Aaron Felt

[23] Mr. Aaron Felt was at the time of his affidavit an articulated law clerk with the Plaintiff's counsel. His affidavit essentially puts before the court various documents as exhibits to his affidavit of which he has no personal knowledge, including:

- A. A letter dated 30 May, 2001 from the then Minister of Health for Canada, the Honourable Alan Rock, to Mr. Robert Bexon, the President and Chief Executive Officer of Imperial Tobacco Canada Limited, requesting that the Defendants voluntarily "remove all confusing descriptors" such as "light" and "mild" from their brand names and packages.
- B. A copy of a regulatory notice published in the Canada Gazette, part 1, dated 1 December, 2001 setting out the proposed issue of regulations removing light and mild descriptors from the Defendants' cigarettes, following the Defendants' failure to comply with the request contained in Mr. Rock's letter set out in A above.

- C. A copy of the Annual Information Form of the First Defendant dated 30 March, 2005 published by the First Defendant setting out, among other things, the Defendants' brand names and market share.
- D. A copy of a data sheet published by Health Canada for the year 2005 setting out the smoking status and average number of cigarettes smoked per day, by province, including Newfoundland and Labrador.
- E. A list for 2001 of Canadian sales numbers for the Defendants' brands obtained from Physicians for a Smoke-Free Canada.
- F. The Plaintiff's litigation plan.
- G. The *curriculum vitae* for Dr. Richard Pollay of the University of British Columbia, a proposed expert witness who will present expert evidence at the common issues trial regarding the marketing strategies of the Defendants in their marketing of light and mild cigarettes and the effect of this marketing on consumers.
- H. The *curriculum vitae* for Dr. Andre Castonguay of Lavelle University who will present expert evidence at the common issues trial regarding the toxicology of light and mild cigarettes, the pharmacological impact of nicotine contained in cigarettes and the universal phenomenon among smokers of light cigarettes known as smoker compensation.
- I. The *curriculum vitae* for Dr. Johanna Cohen of the University of Toronto who will present expert evidence at the common issues trial

on Canadian consumer knowledge, or lack of knowledge, concerning light and mild cigarettes.

- J. The *curriculum vitae* for Dr. Shridar Moorthy of the University of Toronto who will present expert evidence at the common issues trial as to how the damages in this case may be calculated for the class as a whole and for individual class members, utilizing economic and statistical models as well as the Defendant's own business records and data available from Health Canada to calculate appropriate information to impose an aggregate monetary remedy.

[24] Mr. Felt also stated that Plaintiff's counsel is experienced in complex litigation and class proceedings and named a number of cases that Plaintiff's counsel has been previously involved in regarding such matters. Mr. Felt also stated that the Plaintiff has served the amended statement of claim on the Director of Trade Practices on 25 November, 2005 pursuant to section 14(3) of the TPA and that the Plaintiff has not received a response from the Director.

A. J. Liston

[25] Dr. A. J. Liston filed an affidavit on behalf of the Defendants. He stated that he is a self-employed consultant providing various industries with strategic advice concerning regulatory and policy issues and specifically liaising between industry and government, in particular, Health Canada.

[26] Dr. Liston stated that he was employed by the Health Protection Branch ("HPB") of the Department of National Health and Welfare of the Government of Canada between 1964 and 1992, initially as a research scientist, then as the Executive Director General and finally as Assistant Deputy Minister, HPB, the most senior administrative position in that branch, reporting directly to the Deputy Minister.

[27] The HPB was responsible for the government's regulatory programs relating to the sale and labeling of tobacco, among many other things. He was the major policy contact for the government with the tobacco industry and it was during his tenure at the HPB that light and mild cigarette products were developed and introduced into the Canadian market.

[28] Dr. Liston outlined the background to the development of light and mild cigarette products in Canada which was, in part, a response to federal government pressure on the industry as one component of an overall smoking and health strategy. As part of its anti-smoking health strategy, Dr. Liston stated that the government also promoted the use of a lower delivery product, i.e., a product that delivered fewer known toxins contained in cigarette smoke.

[29] Dr. Liston also stated that, consistent with this policy, the HPB requested that beginning in 1974 the first health warnings would be placed on cigarette packages, including the deliveries of tar and nicotine. He also stated that the Federal Government adopted a strategy to require manufacturers to reduce the sales weighted average tar ("SWAT") based on an averaging of the machine derived tar deliveries of various products. Dr. Liston stated that there are a variety of ways that a cigarette manufacturer can lower the standard delivery of toxins in its products, including the blend and type of tobacco used, the porosity of the cigarette paper, the type of filter and filter ventilation.

[30] Dr. Liston outlined the standard machine derived tar and nicotine deliveries which were advertised and published on cigarette packages and in advertisements for cigarettes and he described the standardized testing system employed in that regard. Dr. Liston went on to indicate that smoking is a uniquely individual behavior and that the machine derived deliveries of toxins as published and advertised were intended for comparative purposes only and were not to be used as a tool to compare the relative deliveries to any individual from the product consumed. He outlined the factors that would have to go in to determining the delivery of tar, nicotine and other constituents to any particular smoker. He went on to describe the phenomenon known as "compensation" whereby a smoker

modifies his or her smoking behaviour in an attempt to obtain higher deliveries from a lower delivery product.

[31] Dr. Liston attached various exhibits to his affidavit, including

- (a) his *curriculum vitae*;
- (b) some examples of various press releases and league tables published by the Federal Government during the late 1960's and early 1970's;
- (c) information about deliveries provided by various cigarettes from the Government of British Columbia website;
- (d) a copy of the Tobacco Products Control Regulations, SOR/89-21, dated 27 December, 1988, passed pursuant to the *Tobacco Products Control Act*, S.C. 1988, C-20 mandating the methodology to be used for testing the standard tar, nicotine and carbon monoxide deliveries in cigarettes and the information to be published on cigarette packages;
- (e) the current Tobacco Products Information Regulations, SOR/2000-272 setting out the current federal testing regulations;
- (f) a news release from Health Canada dated 24 January, 1983 entitled Carbon Monoxide Yields of Cigarettes; and

- (g) a news release from Health and Welfare Canada dated 20 December, 1973 entitled Tar and Nicotine Levels in Canadian Cigarettes.

ISSUES

[32] Should the Plaintiff's proposed class action be certified?

[33] This issue raises a number of sub-issues which are common to all class actions pursuant to s. 5 of the CAA, namely:

- (a) Is there a cause of action disclosed in the Plaintiff's Statement of Claim?
- (b) Is there an identifiable class?
- (c) Are there common issues capable of certification?
- (d) Is a class action the preferable procedure?
- (e) Has the Plaintiff provided the court with an adequate litigation plan?

[34] The Defendant also raised a preliminary issue: Is the Plaintiff's action under the TPA prohibited by the provisions of the CAA?

[35] As well, as I have already indicated, the Defendant brought on an application under Rule 38 for a determination of an issue of law, i.e., Does section 14(1) of the TPA provide the Plaintiff with a cause of action?

[36] Rule 38 states:

38.01. (1) The Court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

- (a) determine any relevant question or issue of law or fact, or both;
- (b) determine any question as to the admissibility of any evidence;
- (c) order discovery or inspection to be delayed until the determination of any question or issue;
- (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;
- (e) where the pleadings do not sufficiently define the issues of fact, direct the parties to define the issues or itself settle the issues to be tried, and give directions for the trial or hearing thereof; or
- (f) order different questions or issues to be tried by different modes and at different places or times.

(2) Where in the opinion of the Court, the determination of any question or issue under rule 38.01(1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, or counterclaim, the Court may thereupon order the entry of such judgment or make such order, as is just.

(3) Unless the Court otherwise orders, a trial or hearing shall not be stayed pending an appeal from an order under Rule 38.

[37] As I have already stated, since the first of the criteria the Plaintiff must establish under the CAA is whether he has a cause of action, at the conclusion of

the Rule 38 application I felt my discretion was better exercised by hearing the full application and wrapping the Rule 38 application into my decision on whether the Plaintiff had demonstrated that he has a cause of action under the CAA.

Preliminary Issue

[38] The Defendants submitted that a class action based on the TPA is prohibited by section 41(c) of the CAA, which states:

41. This Act does not apply to
 - (c) an action that may be brought in a representative capacity under another Act.

[39] The TPA allows the Director of Trade Practices (hereinafter referred to as “the Director”) to commence an action in a representative capacity on behalf of a consumer in respect of all remedies available to a consumer under Section 14 of that Act, the very provision pursuant to which the Plaintiff has brought this action. I find this argument unpersuasive.

[40] The Plaintiff’s action cannot be taken in a representative capacity under the TPA unless undertaken by the Director in his regulatory role under section 15 or following a written request by a consumer under section 16. There is no mechanism under section 15 to bind all members of the class, although the court may grant relief for the benefit of the class. The hallmark of a representative action is that it be binding on all persons represented or else there is little point in pursuing such an action. The Rules of Court provide for such representative actions and binding provisions in Rule 7.11 but the Rules of Court are not “another Act” as set out in section 41 of the CAA.

[41] This issue was considered by the Ontario Court of Appeal in **Potter v. Bank of Canada**, 2007 ONCA 234, an action dealing with the alleged unlawful extraction of funds by the bank from the pension plan established for its employees and section 37(a) of the *Ontario Class Proceedings Act*, 1992, S.O. 1992, c. 6, which is identical to our section 41(c). At paras. 37 to 40 and 47 to 48, Goudge, J. A. stated:

37 First, I find support in the precise language used by the legislature in s. 37(a). While it is true that with the assistance of the *Interpretation Act*, R.S.O. 1990, c. I-11 the language used in the English and French versions could probably be extended to include "regulation" we were pointed to no regulation under which a representative proceeding can be brought other than *Rules of Civil Procedure*. Had the legislature intended to extend the prohibition in s. 37(a) to proceedings that may be brought "... under another Act or the *Rules of Civil Procedure*", that language could easily have been employed.

38 Moreover, I think the legislative intent behind the Act is contrary to the respondent's position. It is beyond controversy that one of the primary objectives was to facilitate access to justice. An aspect of that was to reduce the legal and economic obstacles for actions that would otherwise have to be brought as representative proceedings under the *Rules of Civil Procedure*. This theme is seen clearly in the thinking that led up to the Act, for example in Ontario, Ministry of the Attorney General, *The Report of the Attorney General's Advisory Committee on Class Action Reform*, vol. 1 (Toronto: Policy Development Division, 1990) at 18-19.

39 Given that the Act was designed in part to make it procedurally easier to bring actions that would otherwise have to be brought as representative proceedings under the rules, it would be anomalous to interpret s. 37(a) as automatically removing that remedial benefit for actions that could be brought as representative proceedings under Rule 10. Such an interpretation would make it impossible to do what the Act was designed to achieve.

40 Rather, in my view, the correct interpretation of s. 37(a) is that it precludes resort to the Act only where another piece of legislation provides expressly for representative proceedings. That is, in enacting s. 37(a) the legislature decided that only where it had elsewhere provided specific legislation authorizing representative proceedings in a particular context would that prevail over its legislation of general application, namely the Act. Examples of such specific legislation are the *Co-operative Corporations Act*, R.S.O. 1990, c. C-35, s. 68(1),

and the *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11, s. 50(1).

47 The respondent's alternative argument is that s. 37(a) prohibits this action from being brought as a class action because under s. 33.2(1) of the *PBSA* the Superintendent may bring any cause of action against the administrator of a pension plan that a beneficiary under the plan could bring.

48 The simple answer to this is that what is authorized under the *PBSA* is not a representative proceeding. It is an adjunct to the Superintendent's regulatory role in the protection of beneficiaries. It is not a mechanism to bind all those who may be interested in or affected by the proceeding.

[42] The CAA, just as the Ontario Act, is remedial legislation designed to reduce obstacles to bringing actions which would formerly have had to be taken in a representative capacity under the Rules of Court. If the Legislature in enacting the CAA had intended to bar an action by a consumer under the TPA in a manner submitted by the Defendants, in my view, it would have to have stated so in a clear manner as to do so would have undermined the legislative intent of the CAA. Likewise, as I have already stated, what is contemplated under sections 15 and 16 of the TPA is not a true representative action as there is no provision making any decision binding on all members of the class, although by virtue of Section 15(2) the court may make an order allowing the relief provided for in s. 14(2), including relief for the entire class of consumers affected by an unfair trade practice.

[43] The CAA should be given a broad and expansive interpretation in order to achieve the intention of the legislature to provide litigants with a remedy where an individual action would not be cost effective or efficient: **Hollick v. Toronto (City)**, [2001] 3 S.C.R. 158 (S.C.C.).

[44] For all these reasons, I reject the Defendants' position on this point and I find that section 41(c) of the CAA does not prohibit an individual action under the TPA in conjunction with the CAA.

CERTIFICATION ISSUES

[45] Class action legislation was enacted in the province (as in other jurisdictions) to promote three goals: (1) access to justice, (2) judicial economy and (3) behaviour modification: **Western Canadian Shopping Centres Inc. v. Dutton**, [2001] 2 S.C.R. 534(S.C.C.). It is through the prism of these three objectives that all applications for certification must be viewed.

[46] Section 5 of the CAA sets out the criteria which must be met for certification of an action. It states:

5. (1) On an application made under section 3 or 4, the court shall certify an action as a class action where
 - (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
 - (d) a class action is the preferable procedure to resolve the common issues of the class; and
 - (e) there is a person who
 - (i) is able to fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[47] The Plaintiff has an obligation to show some basis in fact for each of the requirements in section 5 of the CAA other than paragraph (a), i.e., that the pleadings disclose a cause of action. As stated by McLachlin, C.J. in **Hollick**, *supra*, at para. 25:

... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose [page176] a cause of action unless it is "plain and obvious" that no claim exists:

[Authority omitted]

[48] However, the evidentiary threshold is low. As stated by Barry, J. (as he then was) in **Wheadon et al. v. Bayer Inc.**, 2004 NLSCTD 72 (NLTD); leave to appeal denied, [2005] N.J. No. 122 (CA); leave to appeal denied, [2005] S.C.C.A. No. 211, at para. 90:

... this test establishes a "low threshold" for class certification. This was confirmed in *Hollick* where the Chief Justice noted the evidentiary threshold is not an onerous one. Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to insure that its policy goals are realized. Courts must be mindful not to impose undue technical requirements on plaintiffs.

[Authorities omitted]

[49] The application for certification is procedural in nature and it does not require, indeed does not permit, a trial on the merits at that stage. As stated by McLachlin, C.J. in *Hollick*, *supra*, at para. 16:

...Thus the certification stage is decidedly [page171] not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

[50] Moreover, a plaintiff may tailor his/her action for class certification to make it more amenable to certification: ***Rumley v. British Columbia***, [2001] 3 S.C.R. 184 (S.C.C.), para. 30. In this way, the plaintiff may choose to advance only those elements of the claim, including damages, which make the case more likely to be certified as a class action.

[51] I turn now to the certification criteria in section 5 of the CAA.

(a) **Cause of Action**

[52] This criterion is decided on the pleadings only. No evidence is to be considered and the allegations are accepted as true. The plaintiff will have satisfied this requirement unless it is “plain and obvious” from the pleadings that the action cannot succeed, not that it may not succeed: **Hollick**, *supra*, para. 16, **Wheadon**, *supra*, para. 97.

[53] The Defendants, both in their Rule 38 application and the certification application, submitted that the action as framed cannot succeed. They were supported in this position by the Third Party.

[54] The Defendants’ position is based primarily on the wording of section 14(1) of the TPA. That section states:

14. (1) Where a consumer has entered into a consumer transaction with a supplier and has suffered damages as a result of an unfair trade practice or unconscionable act or practice, he or she may start an action in a court against the supplier.

[55] The Plaintiff alleges in his statement of claim that the Defendants engaged in conduct contrary to the TPA. He relies on section 14(1). He submitted that he has met all the requirements of the TPA in that he is a natural person, i.e., a consumer, who entered into a “consumer transaction”, i.e., “the sale ... or other disposition of goods for a consideration”. He says that the Defendants are “suppliers” within the definition of that term in the TPA which advertised their goods for sale.

[56] He claims that since section 5(1) of the TPA includes in the definition of “unfair trade practice” conduct “which might reasonably have the effect” of deceiving or misleading a consumer, he does have to prove reliance on the alleged misrepresentation. In addition, the Plaintiff contends that the purchase of a falsely advertised product constitutes an injury to a consumer which amounts to damage as a result of an unfair trade practice.

[57] The Plaintiff contends that given the purpose of the TPA, being remedial consumer protection legislation, a broad and liberal interpretation should be given to its provisions. The plaintiff relies heavily on the case of **Knight v. Imperial Tobacco Canada Limited** (2005), 250 D.L.R. (4th) 347 (BCSC); varied (2006) 267 D.L.R. (4th) 579 (BCCA) which certified a class action involving a nearly identical allegation as in this case and based on legislation which the Plaintiff submitted is very similar to the TPA.

[58] In the alternative, if the court refuses to certify the action under section 14(1), the Plaintiff submitted that it should be certified under section 14(2) of the TPA which states:

(2) In an action started under this section, or in another action concerning a supplier where it appears to the court that an unfair trade practice or unconscionable act or practice has occurred, the court may ...

(Emphasis added]

[59] The Plaintiff contended that if he does not have any action under section 14(1) then he has one for damages suffered under “another action” as contemplated by section 14(2). The plaintiff submitted that “another action” under section 14(2) simply means a claim distinct from a section 14(1) action or a common-law claim for intentional breach of statutory duty as set forth in **Canada v. Saskatchewan Wheat Pool** [1983] 1 S.C.R. 205. He has pleaded that the Defendants have breached either or both sections 7 of the TPA or section 20 of the *Tobacco Act* S.C. 1997, c.13

[60] Section 7 of the TPA states:

7. A person shall not engage in an unfair trade practice or unconscionable act or practice.

[61] Section 20 of the *Tobacco Act* states:

20. No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

[62] The Defendants submitted that the pleadings do not disclose a cause of action. They said that section 14(1) of the TPA only sets out a cause of action against “the” supplier with whom the consumer entered into a “consumer transaction”. Since, they submitted, the Defendants have never sold any products directly to consumers in the province there cannot have been a “consumer transaction” with the Defendants within the meaning of the TPA.

[63] The Third Party, in support of the Defendants’ position, says that the Plaintiff has not pleaded a proper cause of action and has not pleaded that he has suffered any damage as a result of the alleged unfair trade practices by the Defendants. The Plaintiff submitted that there is a difference between “damage” in the tort sense and “damages” which could include statutory damages of the type contemplated by section 14(2), the remedies section of the TPA.

[64] The Plaintiff submitted that the TPA was a part of a wave of consumer protection legislation passed by legislators in the 1980’s and 1990’s intended to offer broader remedies than might be available to a consumer in a strict sale of goods context. The definition of “supplier” in Section 2(g) of the TPA includes one who “advertises the sale of goods or service to a consumer” in the course of his business. It should be noted that the Defendants do not seriously dispute that they could fit within this definition.

[65] The Plaintiff further submitted that a consumer transaction includes not only a sale but also an “other disposition of goods for consideration” (section 2(b)).

This could, he submitted, on a liberal interpretation of the legislation, include the Defendants who do not deny that they advertised their cigarettes.

ANALYSIS

[66] While it is true that the TPA is consumer protection legislation and should be construed liberally, the Plaintiff still has to comply with the provisions of the legislation.

[67] If one breaks down the elements of a cause of action under section 14(1), the Plaintiff must prove the following:

1. The plaintiff must be a consumer.
2. The plaintiff must have entered into a consumer transaction with a supplier as defined in the TPA.
3. The action must be brought against “the” supplier with whom he/she has entered into the consumer transaction.
4. The plaintiff must have suffered damages.
5. The damages must have been suffered as a result of an unfair trade practice committed by the defendant.

[68] There is no doubt that the Plaintiff is a consumer. The Defendants and Third Party concede the point. His affidavit evidence satisfies me that he purchased the Defendants' "light" and "mild" cigarettes in the province.

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

[70] The Plaintiff has not pleaded that he entered into a consumer transaction with the Defendants. He simply pleaded that there was a consumer transaction and the Defendants were suppliers. He concludes, therefore, that he has constituted a sufficient relationship with the Defendants to give him a cause of action under section 14(1) of the TPA.

[71] In addition, however, in order for the Plaintiff to establish an action under section 14(1), he must establish that he has suffered damages as a result of the alleged unfair trade practice. The Plaintiff's amended statement of claim does not make such a claim. Instead, the Plaintiff relies on so called "statutory damages" which may be ordered pursuant to section 14(2) of the TPA. He submitted that individual reliance by the plaintiff on some alleged misrepresentation by the defendant is not required for a section 14(1) action. He referred to the definition of "unfair trade practice" in section 5 of the TPA in support of that proposition. That section states:

5. (1) In this Act, an unfair trade practice is a representation, conduct or failure to disclose material facts that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer, and includes ...

[Emphasis added]

[72] The Plaintiff says that the words “or might reasonably have the affect” in that section eliminates the need for individual reliance and takes a section 14(1) action out of the doctrine of privity of contract. The Plaintiff relies on the certification of a similar action in **Knight**, *supra*, in the British Columbia Court of Appeal. However, the British Columbia legislation under consideration in that action was considerably different than that in the TPA.

[73] That legislation allows for two types of action; one, where an action may be brought by a person who has suffered damages as a result of an unfair trade practice and, another, by the Director or a person who has no connection to such a consumer transaction (see sections 171(1) and 172(1) of the *British Columbia Business Practices and Consumer Protection Act*, B.C. 2004, c. 2). Similar provisions prevailed under the provisions of the *British Columbia Trade Practices Act*, R.S.B.C., c. 457, section 18(1) and 22(1).

[74] The TPA creates a single cause of action by a consumer under section 14(1) which may lead to various remedies under section 14(2). But in that action, the plaintiff must allege that he suffered damages as a result of an unfair trade practice committed by “the” supplier, i.e., the defendant with whom he entered into a consumer transaction.

[75] The TPA also allows for a Director’s action in section 15 by which the Director of Trade Practices may commence an action against “a” supplier who has, in his opinion, “engaged” in an unfair trade practice. The Director may seek the remedies available under section 14. There are no issues of a consumer transaction, individual reliance, damages or privity of contract.

[76] In my view, the Plaintiff is attempting to pursue a Director’s action under the guise of an individual action which is not permissible under the legislation.

[77] The Plaintiff has therefore not established that he has a cause of action under section 14(1) of the TPA.

[78] The Plaintiff has pleaded in the alternative, however, that, if he is unsuccessful in establishing a cause of action under section 14(1), he has “another action” under section 14(2). He submitted that his “other action” arises by virtue of the Defendants having breached section 7 of the TPA or section 20 of the Tobacco Act. (see para. [60 and 61], *supra*)

[79] In essence, the Plaintiff is alleging that he has suffered damage as a result of an unfair trade practice which gives rise to a cause of action for breach of statute, i.e., “The purchase of a falsely advertised product, in and of itself, is a form of injury.” (see para. 47 of Plaintiff’s Brief). He relies on an authority from the highest court of the State of Massachusetts in the United States of America: **Aspinall v. Phillip Morris Cos.**, 442 Mass 381 (2004) (Massachusetts Supreme Judicial Counsel).

[80] I find that that case should not be relied on in this jurisdiction to create a nominate tort of breach of statute. In fact, the law in Canada has expressly rejected such a notion: **Canada v. Saskatchewan Wheat Pool**, *supra*. Instead, the Supreme Court of Canada has ruled that the civil consequences for breach of statute should be subsumed in the law of negligence. The Plaintiff has not pleaded any common-law tort or breach of duty.

[81] I therefore find that the plaintiff has failed to establish another cause of action under section 14(2) of the TPA.

[82] My above findings are sufficient to dispose of this case as the Plaintiff has failed to overcome the first hurdle under the CAA, i.e., to establish that he has a cause of action.

[83] I therefore dismiss the Plaintiff's application for certification under the CAA.

[84] However, for the sake of completeness, I propose to offer a few comments on some of the other issues which arise on the certification application as in my view there are also numerous other problems with this proposed class action.

Identifiable class

[85] In my view, the proposed class is inordinately broad. If, as I have found, individual reliance is necessary to ground an action under s. 14(1) of the TPA, then the class is far too broad and over-inclusive.

[86] The Supreme Court of Canada in **Western Canadian Shopping Centres Inc.**, *supra*, para. 38 stated:

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

[Authorities omitted]

[87] The putative class proposed by the Plaintiff, i.e., anyone who purchased the Defendants' products in the province in the class period, would include persons

who had smoked “light” or “mild” cigarettes for a long time and those who had never smoked them or any other cigarettes, either before or after the purchase of them. It would include people who had relied in some way on the Defendants’ alleged misrepresentations and those who did not. It would include those who suffered damages and those who did not.

[88] In **Mouhteros v. DeVry Canada Inc.** (1998) 41 O.R. (3rd) 63 (Ont. General Division), Winkler, J. (as he then was) rejected a class definition of “all persons who attended [school] at anytime [during the class period]”. The defendants operated a private, for profit, post secondary educational institution in four Canadian campuses. The plaintiff, a former student, brought action for negligence and fraudulent misrepresentation regarding the quality of its programs and facilities and alleging that those who relied on those representations did so to their detriment.

[89] As stated in the headnote to that case at p. 63, para. (f)-(h):

The nature of the representations made in the defendant's advertising and promotions, the question of whether the representations were false and misleading and whether they were made negligently or fraudulently would vary according to the content of the advertisement or the statements made by the admissions officer, the time at which it was published or communicated, the program of study undertaken by each individual student and the conditions then extant at each of the defendant's campuses. In these circumstances, the statutory and common law misrepresentation issues set out in the statement of claim could not constitute common issues.

Assuming that the misrepresentation issues were capable of a common resolution, the plaintiff would have to prove reasonable reliance on a misrepresentation negligently made. The question of reliance must be determined based on the experience of each individual student and would involve a large number of evidentiary issues. Even if the class members were able to demonstrate reliance, they would then have to show that they relied to their detriment. Damages would require individual assessment. Certification would result in a multitude of individual trials, which would completely overwhelm any advantage to be derived from a trial of the few common issues.

[90] In **Wheadon**, *supra*, Barry, J., in a product liability case, defined the class as:

persons resident in Newfoundland and Labrador who were prescribed and injected Baycol and who claim personal injury as a result.

See also **Chace v. Crane** [1996] B.C.J. No. 1606 (S.C.), Aff'd [1997] B.C.J. No. 2862(C.A.) (QL); **Carom v. Bre-X Minerals Ltd.** (2000) 1996 D.L.R. (4th) 344 (Ont. CA); and **Reid v. Ford Motor Co.**, [2003] B.C.J. No. 2489 (S.C.) (QL).

[91] At para. 110 of **Wheadon**, *supra*, Barry, J. stated, “Narrowing the proposed class by excluding those who do not allege injury seems simply a matter of common sense”.

[92] In this case, the Plaintiff has not pleaded any reliance on an alleged misrepresentation by the Defendants, nor even that he has was exposed to one. He simply says that anyone who purchased light or mild cigarettes in the class period should be included in the class.

[93] It seems to me that, based on the wording of section 14(1) of the TPA, there must be a rational connection between the class definition and the alleged common issues which, at bottom, is the allegation of misrepresentation of their products by the Defendants.

[94] As stated by Winkler, J. in **Mouhteros**, *supra*, page 68, para. (d):

(d) In my view, there must be some connection between the class definition and the common issues. The mere fact that a group of people is identifiable is not sufficient to render them a class for the purposes of the Act. Indeed, such a connection is contemplated by the wording of s. 5(1)(c), which mandates that the claims or defences of the class members raise common issues. ...

[95] This problem is compounded in this case where there is no evidentiary basis for identifying the class based on reliance on the alleged misrepresentations of the Defendants: **Jameson Livestock Ltd. v. Toms Grain & Cattle Co.**, [2006] S.J. No. 93 at para. 20.

[96] I am therefore not satisfied that the Plaintiff has established an identifiable class in that it is overly broad and overly inclusive, bearing no rational connection to the alleged common issues.

Common Issues

[97] The plaintiff has proposed a long list of alleged common issues as set forth in para. [11] *supra*. In respect of those which are in contention between the parties (which constitute the vast majority of them), in my view, they are not amenable to class certification as common issues because they all require significant individual proof of reliance which would overwhelm the common issues.

[98] In **McKay v. CDI Career Development Institutes Ltd.**, [1999] B.C.J. No. 561 (S.C.), a former student of the defendant sought certification of a class action based in part on alleged misrepresentations regarding the school's courses, their content and their capacity to provide him with employment, all allegedly contrary to section 22(1) of the *B.C. Trade Practices Act*. (incidentally, one of the sections referred to, in part, in the **Knight** case relied on by the Plaintiff)

[99] In dismissing the application for certification in **McKay**, Blair J. stated at paras. 32, 33 and 35:

32 ... However, even accepting for the purposes of this certification application that CDI was involved in deceptive or unconscionable acts or practices as alleged, there remains the difficulty in determining whether the proposed class members

relied upon these deceptive or unconscionable acts or practices to their financial detriment.

33 The element of reliance, also found in the tort of negligent misrepresentation, stems from the words "because of", found in s. 22(1)(a) of the Trade Practice Act. I concur with Gow J., the trial judge in *Rushak v. Henneken*, *supra*, at para. 198 that the party seeking recovery under the Trade Practice Act must establish that the damages claimed resulted from their reliance on the alleged deceptive or unconscionable act or practice.

35 I conclude in the context of this certification application that the statutory relief sought by Mr. McKay from the Trade Practice Act suffers from the same difficulty found in the tort of misrepresentation: each class member would have to individually establish reliance upon and damages flowing from CDI's alleged deceptive or unconscionable act or practice.

[100] In this case, the Plaintiff and each class member would have to prove that he/she relied on the alleged misrepresentations by the Defendants, that the misrepresentation has constituted an unfair trade practice, and that they suffered an injury and damages as a result thereof. The Plaintiff does not make any such allegations in his affidavit. There is also a complete lack of even a minimal evidentiary basis for the Plaintiff's claims.

[101] Because the members of the class will be so differently situated in reference to their individual connection to the alleged common issues, it is impossible to conclude that the resolution of any particular issue will resolve the matter for all class members. As stated by MacLachlin, C.J., in **Hollick**, *supra*, at para. 18:

A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act*, 1992. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para.30). Further, an issue will not be "common" in the requisite sense

unless the issue is a “substantial ... ingredient” of each of the class members’ claims.

[102] I am not satisfied that the resolution of the contentious common issues will advance the litigation as there will have to be substantial evidence of individual reliance and damage by each class member.

[103] Common issues (a), (b) and (c) are not in contention.

[104] Issue (d), (i.e., did the Defendants engage in unfair trade practices) is not susceptible of being answered as a common issue without an allegation of individual reliance within the meaning I have found for a section 14(1) action.

[105] Issues (e) and (f) (injunction and advertisement) do not require resolution on a class wide basis as such remedies may be ordered in an individual action and will be binding on the Defendants for all purposes. As well, the Plaintiff has conceded that the Defendants have voluntarily ceased using the impugned descriptors so the issue is actually moot at this point and therefore could not advance the litigation.

[106] Issues (g) and (h) (aggregate monetary award and exemplary or punitive damages), while possibly capable of resolution as common issues pursuant to sections 29 to 32 of the CAA (See *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.)), without an adequate evidentiary basis setting out how it would work, it is impossible to certify them as common issues at this stage. The burden of putting forward an adequate evidentiary record falls squarely with the Plaintiff, even though the threshold may be low. As I have already indicated, the Plaintiff has not put forth any evidence in this regard.

[107] Proposed common issues (i), (j) and (k) (the Defendants interactions with the Government of Canada, *volenti non fit injuria*, and contributory negligence) relate

to defences which have not been raised as no defence has been filed. Issue (j) (the applicability of *volenti non fit injuria*) is so highly individualistic that it will not be common to all class members in any event.

Litigation Plan and Preferable Procedure

[108] In any class action certification application, the plaintiff must submit a workable litigation plan and establish that a class action is the preferable procedure to some other form of action.

[109] If individual issues dominate or overwhelm the proposed common issues, a class action may not be the preferable procedure as it would not meet the three overriding objectives of class action proceedings: access to justice, judicial economy and behavior modification. The resolution of the proposed common issues will not materially advance the claim of each class member as required because it will not be known to what extent any individual relied on any particular representation of the Defendants or to what extent the individual smoking habits of any person affected his injury or damages. In this case, the potential class could number in the tens of thousands and, even assuming a half day of evidence on individual issues, it can be readily seen that the objective of judicial economy (at least) will not have been met.

[110] The litigation plan of the Plaintiff is also deficient. The application for certification contemplates, at least in the alternative, that individual reliance may be an issue, although the Plaintiff's principal claim seeks to avoid it. However, the certification application and the litigation plan in support of it does not purport to deal with or even acknowledge these individual issues.

[111] The certification application is structured in such a way that suggests that there are no individual issues (except perhaps damages, which is allowed and are claimed on an aggregate basis in any case). However, this approach has proved to

be problematic in other cases where there have been found to be many individual issues.

[112] We in Newfoundland and Labrador are just embarking on this judicial odyssey regarding class actions and should attempt to learn from the experiences of others. A workable litigation plan presented at the time of the certification application which anticipates problems that may arise and which proposes solutions has proven through experience in other jurisdictions to be essential (see *Advocacy in Class Proceedings Litigation*, Justice Warren Winkler (2000) 19 *Advocates Soc. J. No. 1*, 6-9, page 3).

[113] In **Caputo v. Imperial Tobacco** [2004] O.J. No. 299 the representative plaintiff sought to certify a class action against major tobacco manufacturers in Canada for damages for personal injuries suffered by millions of Ontario smokers. Winkler, J. (as he then was) dismissed the application, finding that, among other things, it was not suitable for a class proceeding, a class proceeding was not the preferable procedure and no workable litigation plan had been presented.

[114] In respect of the failure to provide a workable litigation plan, Winkler, J. stated at para. 76:

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 endeavoured 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".

[115] Neither has the Plaintiff presented evidence on which the court can judge whether the three objectives of class action proceedings have been met and a class action is the preferable procedure. As stated by Winkler, J. in **Caputo**, *supra*, at para. 62:

62 ...it is not enough for the plaintiffs to establish that there is no 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 behavioral modification of tortfeasors.

[116] I have already alluded to the potential length of a common issues trial based on merely one-half day for individual issues of causation per potential member of a class numbering in the tens of thousands. It is difficult to see how this can assist in meeting the objective of judicial economy.

[117] Neither of the proposed class representatives, nor any other potential class member, has provided any evidence that there is any reason why there has not been an individual action taken against the Defendants outside of the class action proceedings nor that any number of people have written to the Director of Trade Practices to seek redress. The absence of such evidence undermines any sense that any potential class member is being denied access to justice. Indeed, another potential procedure is available and that is a Director's action under Section 15 of the Act, an option to which I have already referred. There is evidence that the Director has been served with the Statement of Claim but there is no indication why no action has been undertaken or what, if anything, has been planned in that regard. The Plaintiff simply appears to have dismissed out of hand the notion of a Director's action and has started his individual action pursuant to the CAA.

[118] As stated by MacLachlin, C.J., in **Hollick** at para. 31:

31 I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture 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": see Report of the Attorney General's Advisory Committee on Class Action Reform, *supra*, at p. 32; see also Cochrane, *supra*, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (loose-leaf), at para. 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

[119] As already stated, since the Defendants have already removed the light and mild descriptors from their cigarette packages and advertising, the objective of behaviour modification has arguably been met. In addition, the TPA creates penalties for breaches of the Act and that is another avenue for behaviour modification short of a class action proceeding.

Evidentiary Record

[120] As already alluded to, a plaintiff must present a sufficient evidentiary record to allow the court to make a proper determination of the application, acknowledging of course, that this is not a trial of the merits at this stage. In this case, the Plaintiff has not done so. For example, as already indicated, the Plaintiff proposes to prove damages on an aggregate basis, assuming no individual issues. Yet the only evidence put forward in support of the approach is a solicitor's affidavit and the *curriculum vitae* of an economic expert he proposes to give evidence on the issue. There is no affidavit from the expert setting out the methodology proposed to be used and how it can answer all the questions which may arise. By experience, such solicitor's affidavits are to be discouraged: *Advocacy in Class Proceedings Litigation*, *supra*, page 2. Even in **Knigh**, so heavily relied on by the Plaintiff, there was some affidavit evidence on the issue, although it was unclear exactly what: See **Knigh** (T.D.) para. 51.

CONCLUSION

[121] Even though I have above outlined a number of potential problems which the application presents for certification (although not exhaustively), I decline to certify the action under the CAA on the basis that the Plaintiff has failed to establish that he has a cause of action pursuant to the TPA. Were I to be called upon to do so, I would also dismiss it for the other reasons mentioned.

[122] The Plaintiff's application for certification is therefore dismissed.

JAMES P. ADAMS
Justice