Date: 20100322
Citation: 2010 NLCA 20

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Docket: 07/64

BETWEEN:

THE DOW CHEMICAL COMPANY — APPELLANT

AND:

EDWARD RING, SR. AND MARY WILLIAMS — FIRST RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA AND THE MINISTER OF NATIONAL DEFENCE — SECOND RESPONDENT

AND:

PHARMACIA CORPORATION — THIRD RESPONDENT

And

Docket: 07/65

BETWEEN:

PHARMACIA CORPORATION — APPELLANT

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AND THE MINISTER OF NATIONAL
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AND:

EDWARD RING SR. AND MARY
WILLIAMS FIRST RESPONDENT

AND:

THE DOW CHEMICAL COMPANY AND
PHARMACIA CORPORATION SECOND RESPONDENTS

Coram: Cameron, Welsh and White, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 200601T2880

Appeal Heard: September 23, 24, 25 and 26, 2009
Judgment Rendered: March 22, 2010

Reasons for Judgment by Cameron, J.A.
Concurred in by Welsh and White, JJ.A.

Counsel for Dow Chemical Company: David Eaton, Q.C., Alan Mark, Michael Brown and Jennifer Teskey
Counsel for Ring and Williams: John Legge, Q.C. and Casey Churko
Counsel for the Attorney General: Catherine Coughlin, Peter Barber and Robert Drummond
Counsel for Pharmacia Corporation: Ivan Whitehall, Q.C., Peter Mantas and Daniel Boone

Cameron, J.A.:

[1] This is an appeal from the certification of a class action. The action was commenced by Edward Ring Sr. and Mary Williams against the appellants Attorney General of Canada and Minister of National Defence[1]. It is brought on behalf of persons who were present at Canadian Forces Base Gagetown in New Brunswick during the period 1956 to the present[2]. It is alleged that the spraying of herbicides at the base during that period of time caused, materially contributed to or materially contributed to the risk of causing, lymphoma for Ring and other members of the class. Dow Chemical Company (Dow) and Pharmacia Corporation (Pharmacia) were joined as third parties because they were the manufacturers of some of the chemicals used at CFB Gagetown during the relevant period. It is alleged that they are required to indemnify the Crown if the Crown is held liable.

[2] This decision disposes of three appeals which were heard at the same time and arise out of the same decision (2007 NLTD 146[3]). Because the parties have different roles in the different appeals, in this decision they will be identified as follows: Edward Ring Sr., who is a named respondent in each of the appeals and who is the remaining plaintiff in the action, will be referred to as Ring. All other parties will be referred to as the appellants, though each is a respondent in two of the three appeals. The appellants take the same position on the issues raised in the notices of appeal. If it is necessary to distinguish between the appellants, they will be specifically named.

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[1] Subsequent to the filing of the Notice of Appeal, the action was discontinued as against the Minister of National Defence and Ms. Williams was removed as a plaintiff. See: Appeal Book, Vol. 4, Tabs 29 and 30: Orders of Thompson J., filed June 6, 2008.
[2] The initial Statement of Claim was filed June 23, 2006.
[3] Leave to appeal was granted to the Attorney General of Canada and the Minister of National Defence on September 18, 2007, and to Dow Chemical Company and Pharmacia Corporation on April 15, 2008.

[3] The appellants submit that the Trial Division judge erred in holding that the criteria for certification of a class action had been met.

Class Action Legislation

[4] The circumstances under which a class action may be certified are contained in s. 5 of the **Class Actions Act**, RSNL 2001, c. C-18.1, which 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.

[5] Before turning to the submissions which relate to specific considerations on an application for certification, there are a number of general points to be considered.

Standard of Review

[6] The standard of review applied by an appellate court depends upon the nature of the matter being reviewed. A pure question of law is reviewed on a standard of correctness and an appellate court is free to replace the opinion of the trial judge with its own. Findings of fact, on the other hand, cannot be reversed unless the trial judge has made a palpable and overriding error. A determination of whether a legal standard was met involves the application of a legal standard to a set of facts which is a question of mixed fact and law. A question of mixed fact and law is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error in law and the applicable standard is correctness. These principles are well established: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

[7] The certification of a class action involves the determination of whether the standards specified in s. 5(1) of the **Class Actions Act** are met. This is a question of mixed fact and law, though as will be seen below for certain criteria a question of law is extricable.

[8] **H.P. Management Inc. (c.o.b. Greensleeves Pub Lounge and Restaurant) v. Newfoundland and Labrador (Department of Finance),** 2007 NLCA 65, addressed the principles in the context of an exercise of a discretion, in that case an order granting to one of two applicants the carriage of a class action. This Court said at para. 25:

> Review by this Court is therefore limited to determining whether the Trial Division judge erred by failing to apply or by misapplying an applicable principle of law or by making a palpable and overriding error in appreciation of the facts (**Moray Seafoods Ltd. v. Nasco Canada Ltd.** (2006), 256 Nfld. & P.E.I.R. 219 (NLCA), at paragraph 17).

See also: **Davis et al. v. Canada (Attorney General) et al.** (2008), 279 Nfld. & P.E.I.R. 1 (NLCA), para 23.

[9] Other courts have stated that deference is to be shown to a judge's findings in certification hearings, particularly those related to whether a class action is the preferable procedure to resolve the common issues of the class. See, for example, **Soldier v. Canada (Attorney General)**, 2009 MBCA 12, para. 22 and the cases cited there.

Burden of Proof and Standard of Proof on a Certification Application

[10] The onus is on the applicant for certification (in this case Ring and Williams) to establish the criteria for certification. All 5 criteria must be met by the applicant: **Davis**, para. 23.

[11] There is a different standard of proof applied to the first of the criteria (that the pleadings disclose a cause of action) than to the remaining four. The test applied in this Province to an application to strike a pleading (the plain and obvious test) is applied to the determination of the first criterion except, of course, the onus is upon the plaintiff applying for certification to show that the pleading is sufficient. The parties differ about the standard of proof applicable in respect of the criteria set out in s. 5(1)(b) to (e).

[12] Ring argues that he must meet only the standard of "some basis in fact." The appellants acknowledge that in **Hollick v. City of Toronto**, [2001] 3 S.C.R. 158, para. 25, McLachlin C.J. stated that the class representative must show "some basis in fact" for each of the certification criterion set out in s. 5 of the Act, other than the criterion that the pleadings disclose a cause of action. However, Dow, in its factum, citing **Dumoulin v. Ontario** (2005), 19 C.P.C. (6th) 234, para 27 and the appellants, citing **Murray v. Alberta (Calgary Health Region)**, 2007 ABQB 231, submit that the criteria stated in s. 5 (1)(b) to (e) must be established on a balance of probabilities. There is a distinction, the appellants argue, between the standard of proof required to establish the criteria for certification stated in s. 5(1)(b) to (e) (balance of probabilities) and that needed to demonstrate whether a minimum evidential basis for each of the certification criterion exists (some basis in fact). The appellants maintain that if it is necessary to resolve a factual question to determine if a certification requirement is met, the balance of probabilities standard applies. They reason that if there is to be a weighing of the evidence of the differing parties the standard must be the traditional standard of civil actions.

[13] I am not persuaded to the appellants' view. Indeed, Cullity J., the author of the **Dumoulin** decision, has expressed a different view from that advanced by the appellants. At paragraph 13 of **LeFrancois v. Guidant Corp.,** [2009] O.J. No. 2481, Justice Cullity discussed evidence admissible on an application for certification. He said:

> [13] … On such motions, evidence that bears only on the merits of the proceeding is generally inadmissible so that the certification motion is almost necessarily decided on the basis of a very incomplete evidential record: see *Caputo v. Imperial Tobacco Ltd*., [1997] O.J. No. 2576 (G.D.), and [2005] O.J. No. 842 (S.C.J.), at para 21. Evidence directed at the merits may be admissible if -- as in this case -- it also bears on the requirements for certification in sections 5 (1) (b) through (e) but, in such cases, the issues are not decided on the basis of a balance of probabilities but rather on that of the applicable much less stringent test of "some basis in fact" *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, at paras. 16-26; *Lambert v. Guidant Corporation*, [2009] O.J. No. 1910, at paras. 56-74. As Goudge J.A. stated in *Cloud v. Canada*, [2004] O.J. No. 4924 (C.A.), at para 50:
>
> > ... on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.
>
> [14] Whether or not the distinction I attempted to draw in *Dumoulin v. Ontario*, [2005] O.J. No. 3961 is tenable, I adhere to the view that the minimum evidential standard affirmed in *Hollick*, applies to factual issues that may be determinative of both the requirements for certification and the merits of the claims advanced on behalf of the class. The usual process of fact-finding is, therefore, not intended to be a feature of certification motions … .

[14] When, in **Hollick**, the Supreme Court established "some basis in fact" as the evidentiary threshold it was signaling a lesser standard of proof than that required for the determination of the merits of the claim. This position is consistent with the fact that at the certification stage the court is dealing with procedural issues, not substantive ones: **Bisaillon v. Concordia University**, [2006] 1 S.C.R. 666, para. 17. The fact that opposing parties may also provide evidence does not lead to the conclusion that the standard of proof must be the balance of probabilities. The Trial Division judge was correct when he stated that the evidentiary threshold for certification applications was "some basis in fact."

[15] At para 153 of his decision the Trial Division judge said, in the context of a discussion of common issues:

> [The plaintiffs] will ask the trial judge to infer that the degree of exposure would lead to their receiving a dose of chemicals which resulted either in lymphomas developing (for the subclass allegedly including Edward Ring) or in an enhanced risk of lymphomas developing. The Plaintiffs say they will be able to present expert evidence to support the drawing of that inference as to dose and response. The experts' affidavits filed to date do not persuade me that establishing certain areas at CFB Gagetown had sufficient chemical residue to create an unusual danger of exposure to dioxin and HCB will not assist the court in moving along the toxicological chain of causation and in determining whether the actions of the Crown and Third Parties led to Plaintiffs receiving a sufficient dose of chemicals to create an enhanced risk of the Plaintiffs developing lymphomas. Deciding whether the Plaintiffs can prove such unusual danger will have to await the presentation of their expert evidence.

The appellants cite this portion of the decision of the Trial Division judge in support of their submission that the Trial Division judge shifted to the defendants and third parties (the appellants), the burden of proving that there is no basis in fact for the certification. I do not agree that the Trial Division judge shifted the burden of proof. At paragraph 7 of his decision the Trial Division judge said:

> Much material has been filed on the scientific issues raised by the Plaintiffs' claims. I have concluded I need not deal here with all points raised in specific detail since this would involve assessment of the merits of the case, something not appropriate on a certification application. However, a summary of the material is needed for context to permit appropriate analysis of the Crown's and Third Parties' arguments that certification should not proceed because the great variability between proposed class members in relation to each of the steps in the "toxicological chain of causation" (source contaminant-exposure-dose received-disease caused) means that the Plaintiffs' proposed common issues are incapable of determination and the Plaintiffs have no real chance of success at trial.

I do not read the excerpt from paragraph 153, cited above, to be anything more than the expression of the Trial Division judge's conclusion that the affidavits provided by the Third Parties and the Crown had not fulfilled what he understood to be their purpose, that is, to refute the position of the plaintiffs that proof of exposure to certain levels of chemicals would assist in proving absorption of those chemicals by members of the class.

[16] Dow further argued that the Trial Division judge had "narrowed the scope of the Plaintiffs' burden of proof" in his statements at paragraphs 81 and 82 of his decision that the plaintiff must show a basis in fact "for the claim" rather than "for each of the certification requirements set out in s. 5

of the Act", as expressed in **Hollick**[4]**.** I do not agree with Dow's characterization of the Trial Division judge's statements on the subject of "the scope of the Plaintiffs' burden." First, at paragraph 73, the Trial Division judge quoted from the decision of Chief Justice McLachlin in **Hollick** in which she set out the principle relied upon by Dow. Second, at paragraph 83, the Trial Division judge stated his intention of considering each of the criteria for certification. The Trial Division judge's general statements did not reflect some limiting of the requirement for "some basis in fact" for each of the certification requirements in s. 5(1)(b) to (e).

[17] When one examines paragraphs 72 to 83, it is clear that the Trial Division judge was, in that portion of his decision, addressing two points: the evidentiary threshold required for an order of certification and the submission of the third parties, based on the fact that this is an environmental claim[5], that there was not sufficient evidence to demonstrate the required commonality among the proposed class members. In the impugned paragraph 82, when the Trial Division judge stated that he was satisfied that the plaintiffs had established a basis in fact for their claim he explained his conclusion by reference to **Hollick** and **Wheadon v. Bayer Inc.**, 2004 NLSCTD 72. He was indicating that there was sufficient evidence of the existence of a class for whom there is an action which may be taken. He returned to the scope of the class under the heading *An Identifiable Class.*

Evidence of Dr. Sears

[18] The third parties filed affidavits by John P. Giesy, Ph.D., environmental toxicologist; Dr. Philip Guzelian, toxicologist; Dr. Jack S. Mandel, epidemiologist; and Dr. Peter Wiernik, oncologist. In response, Ring filed the affidavit of Margaret E. Sears, Ph.D. Dr. Sears' field of expertise is chemical engineering.

[19] As the Trial Division judge described it, in her affidavit "Dr. Sears commented on affidavits filed by the Third Parties, including the affidavits of Dr. Giesy, Dr. Guzelian, Dr. Mandel and Dr. Wiernik." Dr. Sears stated

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[4] The actual quote from Hollick is "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."

[5] The appellants argued in the Trial Division, as they did in this Court, that environmental class actions involving personal injury were not suitable for certification because of a lack of commonality among class members "that is inherent in" such claims.

that she had been requested to "locate published literature related to the association between [2,4-D, 2,4,5-trichlorophenoxyacetic acid and picloram] and: (1) Non-Hodgkin Lymphoma; (2) Chronic Lymphocytic Lymphoma; (3) Hodgkin Lymphoma; and (4) Soft Tissue Sarcoma." Her affidavit included statements of opinion such as :

1. Dr. Mandel's statement … is not completely accurate (para 12);

2. the risk factors or potential alternative causes of illness … are not as numerous or diverse as Dr. Wiernik and Mandel portray (para 13);

3. Lymphomas have lengthy latency periods, and often do not develop in individuals for decades or more after exposure to causative agents (para. 24);

4. Scientific uncertainty in epidemiology translates into lower estimation of risks, as the estimate is obscured by confounding or unrecognized factors; (para 29)

5. There is substantial research demonstrating significant correlations between development of malignancies and exposure to Agent Orange, its components or contaminants (para 32).

6. There is sufficient evidence for an association between Agent Orange exposure and the malignancies: soft tissue sarcoma; non Hodgkin lymphoma; Hodgkin disease; and chronic lymphocytic leukemia (CLL) (para. 46).

Dr. Sears, who was not cross-examined on her affidavit, also stated other conclusions regarding connections between various herbicides and cancer.

[20] In the Trial Division, the appellants challenged the qualifications of Dr. Sears to give opinion evidence. In short, it was argued that her expertise did not include toxicology, oncology or epidemiology and, therefore, she could not give her opinion regarding the association between chemicals and malignant lymphomas. In his decision, the Trial Division judge referred to Dr. Sears' qualifications, including an article she had written which discusses the health effects and assessment of the herbicide 2,4-dichlorophenoxyacetic acid (2,4-D). He said, at para. 52:

> She is a published research scientist, science analyst and medical writer. She has knowledge and experience in chemical engineering, applied chemistry, industrial hygiene, health and diverse environmental matters.

The Trial Division judge agreed with the appellants' objections to Dr. Sears' qualifications in the fields of toxicology, oncology and epidemiology, but he admitted Dr. Sears' affidavit, saying, at para. 54 of his decision:

> … she had sufficient qualifications to act as a bibliographer and identify literature dealing with [the association between chemicals and malignant lymphomas]. This conclusion is a reasonable inference from the fact that she earned a Ph.D. from McGill University.

[21] The lesser standard of proof noted above does not, however, lessen the standards for admissibility of evidence. I agree with Mercer J., as he then was, in **Pardy v. Bayer Inc.**, 2003 NLSCTD 130, paras. 60-61:

> 60 Rule 48.02(1) permits the use of hearsay in affidavits on an application but it does not otherwise modify or eliminate the applicability of other rules of evidence. In particular, if the Court is to be provided with opinion evidence in a technical or scientific field it can only receive the same from an expert in the field. See Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed., (Toronto: Butterworths, 1999), Ch. 12. In R. v. Abbey, [1982] 2 S.C.R. 24, Dickson J. stated:
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": p. 42
>
> 61 The well developed case law respecting the receipt of opinion evidence makes it abundantly clear that the Court should only receive opinion evidence in a technical or scientific field, otherwise outside the experience and knowledge of the Court, from a person who is an expert in that field.

See also: **Risorto v. State Farm Mutual Automobile Insurance Co.** (2007), 38 C.P.C. (6th) 373, (Ont. S.C.J.) para. 53; and **Ernewein v. General Motors of Canada Ltd.** (2005), 218 B.C.A.C. 177.

[22] There are not many reported cases where courts have needed the assistance of experts in bibliography, though there is one reported case from the Trial Division[6]. In that case, however, the expert gave his opinion on an

[6] **Gibson v. Bassler** (1989), 76 Nfld. & P.E.I.R. 262.

index which had been prepared by one of the parties for the other, a matter which is entirely within the expertise of a bibliographer.

[23] The appellants submit to this Court that having ruled that Dr. Sears could not provide opinion evidence in the areas of toxicology, oncology or epidemiology, the Trial Division judge proceeded to considered her opinions in the those areas of specialty, on the basis that she was acting as a bibliographer.

[24] In the sections of his decision dealing with the homogeneity of lymphomas and that dealing with epidemiology, the Trial Division judge referred extensively to the evidence of Dr. Sears. In some cases he referred to Dr. Sears' opinion vis-à-vis something which had been stated by the appellants' expert witnesses. For example:

1. Dr. Sears agreed with Dr. Wiernik that lymphomas are now classified as B-cell, T-cell and NK-cell neoplasms, and Hodgkin's Lymphomas (arising from B-cells (para 55);

2. She stated clinical differences that arise during the progression of lymphoma are important for choosing a course of treatment, but should not be equated with fundamental differences in etiology (para. 56).

For the most part, he referred to Dr. Sears' accounts of what the published literature said. For example:

1. Dr. Sears noted literature which would challenge Dr. Guzelian's submission concerning how the dose makes the poison (para 61);

2. She stated, however, that the published literature on the association between the chemicals noted above and lymphomas indicated the conditions are thought to arise from a common stem cell (para 55);

3. Dr. Sears reviewed literature which suggests that chemicals such as pesticides may play a role in the eventual development of cancer by …(para 62);

4. Dr. Sears pointed out there is substantial research demonstrating significant correlations between development of malignancies and exposure to Agent Orange, its components or contaminants (para 63); and

5. Dr. Sears stated the literature indicates evidence of an association between Agent Orange exposure and the malignancies: Soft-tissue Sarcoma, Non-

> Hodgkin's Lymphoma, Hodgkin's Disease, and Chronic Lymphocytic Leukemia (para 66).

As is evident, even in this context, the Trial Division judge relied on Dr. Sears' exercise of judgment in fields in which she was not qualified to give opinion evidence. In the first example cited above, Dr. Sears would have to examine the opinion of Dr. Guzelian and other literature and come to an opinion as to whether they were, indeed, in conflict. Dr. Guzelian's area of expertise is toxicology. The Trial Division judge declined to declare Dr. Sears an expert in toxicology.

[25] At paragraph 82, the Trial Division judge concluded that he was satisfied that "some basis in fact" had been established by the affidavit of Tannis M. Marks regarding the number of individuals who had contacted Ring's counsel expressing concern about their or a family member's exposure to chemicals at CFB Gagetown, coupled with the "affidavit of Dr. Sears, and the affidavits of potential class members, who noted the existence of reasonably authoritative publications identifying the risk of lymphomas developing following exposure to dioxin and HCB … ."

[26] At best, as a bibliographer, Dr. Sears could state that there are texts or published papers on a subject. All such papers and texts would remain, however, inadmissible hearsay in the absence of the author of the work or an expert in the proper field who is prepared to adopt the work as authoritative and in accord with his or her own opinion. If there is a conflict among authors on the subject, it is not the type of "scientific fact" about which judicial notice may be taken. See: Bryant, Lederman, Fuerst, **The Law of Evidence in Canada**, 3d ed. (Markham, ON: LexisNexis, 2009), para. 12.200 and following and para. 19.35. It follows that scientific opinion must be presented to the court through the appropriate expert either in oral evidence or, in some circumstances, in an affidavit. A judge may not make findings on the basis of published scientific treatises discovered on the research of the judge or a bibliographer. To permit the use of material discovered in this way would be to undermine the law respecting expert evidence. It was an error in law to admit the affidavit of Dr. Sears for the purpose of proof of the content of published texts or papers discussed by her.

Fact Finders' Report

[27] The Department of National Defence established a project which examined the use of herbicides at CFB Gagetown. A number of reports were

produced as part of that project. However, the parties generally referred to them collectively as the Fact Finders' Report (The Report). Indeed, much of the detail regarding CFB Gagetown and the activity on the base which was used by the parties for the purpose of the application came from that report. The Report includes information about the location, size, topography and vegetation of CFB Gagetown. It outlines the purpose to which various areas of the base have been dedicated and details the history of spraying programs on the base, including whether ground spraying was carried out, the type of aircraft when aircraft were used, who did the spraying and the products used. The Report details two testing programs for defoliants carried out by the United States Department of the Army at CFB Gagetown in June 1966 and June 1967.

[28] The appellants do not adopt the findings of The Report on the merits of the claim but they were content to do so for the argument on certification. No exception was taken by Ring to the use of The Report at the certification hearing in the Trial Division, nor to the limited nature of its use.[7] Indeed, excerpts from the report are reproduced in schedules attached to the Certification Statement of Claim and The Report is also referred to in the affidavits of Ring and Kerry Eaton which were filed in the Trial Division by the plaintiffs. Having used The Report in this manner, it is not open to either party to challenge, on appeal, its use by the Trial Division judge for the limited purpose of the application for certification.

Defence not filed

[29] Counsel for Ring referred, on a number of occasions, to the absence of a Defence in this case. Generally a Statement of Defence is not required prior to the hearing of an application for certification. See, for example, **Mangan v. Inco Ltd.** (1996), 30 O.R. (3d) 90 (Gen. Div.); **All Ways Travel Inc. v. Air Canada,** [2003] F.C.J. No. 288; **Monsanto Canada Inc. v. Hoffman**, 2002 SKCA 120 and **R. v. Alberta Municipal Retired Police Officers' Mutual Benefit Society**, 2009 ABQB 44. There have been exceptions where a judge with management of the case required a Statement of Defence be filed prior to the certification hearing but, in the absence of such an order, the absence of a Statement of Defence cannot be said to be a basis for the determination of the issues on appeal.

[7] At para. 3 of his decision the Trial Division judge notes that the third parties do not adopt the findings of the report on the merits of the action but solely for argument on the certification.

Agent Orange

[30] The oral submissions to this Court by counsel for Ring contained indiscriminate use of the words “Agent Orange”. Counsel for Ring often used the term to mean any and all herbicides which had been sprayed at CFB Gagetown during the relevant period. In contrast, the Certification Statement of Claim defines it as “a 50:50 mixture of 2,4-D and 2,4,5-T.” It is also alleged that each of 2,4-D and 2,4,5-T contained TCDD (tetrachlorodibenzo-p-dioxin). In addition, the Certification Statement of Claim lists other chemicals used at CFB Gagetown, some of which, it is alleged, contained hexachlorobenzene. Many of the affidavits filed in support of the application contain reference to **Veterans and Agent Orange Update 2004,** which is said to be a publication prepared by the United States Government for veterans of the Vietnam War. That document is cited by affiants who are potential class members as support for the existence of a link between Agent Orange and Non-Hodgkins Lymphoma, Hodgkins lymphoma or chronic lymphatic leukemia. In this context, I understand that the affiants, when they use the term “agent orange”, are not espousing views about all herbicides.

[31] The parties differ about the years Agent Orange, as defined in the Certification Statement of Claim, was used at CFB Gagetown: Ring claims that it was sprayed in, at least, 6 different years and the appellants maintain that Agent Orange was sprayed only during 1966 and 1967, for a total of 7 days.

The Criteria

[32] The discussion which follows addresses the 5 criteria for certification. It will become evident, however, that it is not always possible to draw a line between criteria. For example, there must be a “rational connection” between the class as defined and the asserted common issues. This creates some overlap between the discussion of identifiable class (s. 5(1)(b)) and common issues (s. 5(1)(c)). It should also be noted that the **Class Actions Act** contemplates the existence of subclasses within the class.

[33] As noted above, the appellants maintain that the Trial Division judge erred when he held that all five criteria enunciated in s. 5 of the **Class Actions Act** had been met.

1. ***Cause of Action***

[34] As already stated, the standard of review applied by this Court depends on the issue being considered. The decision as to whether the pleadings disclose a cause of action turns on determinations of law and, therefore, it is reviewed on the standard of correctness: **Attis v. Canada (Minister of Health)** (2008), 300 D.L.R. (4th) 415 (ONCA), para 23; **Soldier v. Canada (Attorney General)**, 2009 MBCA 12, para 24. This Court is, therefore, free to substitute its opinion for that of the Trial Division judge as to whether it is plain and obvious that the action cannot succeed: **Walsh v. TRA Co.** (2007), 268 Nfld. & P.E.I.R. 111 (NLCA), paras. 11-16.

Allegation of breach of fiduciary duty

[35] Counsel for Ring argues before this Court that the pleadings included a claim based on the breach of a fiduciary duty. He concedes that there is no specific reference to the existence of a fiduciary relationship in the pleadings and that no submissions were made in the Trial Division on that basis. However, he maintains that the relationship between the Crown and its soldiers is of a fiduciary nature and that this could extend to their dependants and perhaps others.

[36] Counsel for Ring did not provide the Court with any jurisprudence to support the view that the relationship between the Crown and a soldier is a fiduciary relationship *per se*. A *per se* fiduciary relationship arises because of the inherent purpose of the relationship. An example is the solicitor-client relationship. However, even there, a "breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty" : **Galambos v. Perez**, 2009 SCC 48, [2009] 3 S.C.R. 247, para. 37. I would add that during submissions on an application to stay the certification application, heard by the Trial Division judge on March 27, 2006, counsel for Ring (not the same person who made oral submissions on appeal) stated: "we submit there's no status-based fiduciary duty or any analogous right to fiduciary duty."

[37] The law recognizes, however, that an *ad hoc* fiduciary duty may arise in certain circumstances.

[38] The general rule of pleadings is that a plaintiff must plead the material facts upon which he or she relies in respect of each of the constituent elements of the cause of action. In Horsman and Morley, **Government Liability Law and Practice**, looseleaf (Aurora, ON: Canada Law Book,

2007) at 10:80:10 the authors summarize, in my view correctly, what is required in pleading a case of breach of fiduciary duty against the Crown:

> … the plaintiff must plead the material facts alleged to give rise to the existence of a fiduciary relationship with the Crown or Crown officer, the existence of the duty owed by the Crown or Crown officer to the plaintiff by virtue of that relationship, the breach of the alleged duty, and the remedies sought. The pleadings must assert not only the general existence of fiduciary relationship, but also that the relationship gave rise to a relevant fiduciary obligation on the facts of the plaintiff's case.

[39] The Certification Statement of Claim is divided into five sections. The first three plead material facts regarding CFB Gagetown, the parties and the use of herbicides at CFB Gagetown. Section IV is entitled "Causes of Action." It is subdivided into three sub-sections: negligence, occupier's liability and punitive damages. Section V addresses the relief sought.

[40] In his oral submissions, counsel for Ring specified certain portions of the Certification Statement of Claim as being the basis of a claim for breach of a fiduciary duty. Under the portion of the Certification Statement of Claim related to negligence there are paragraphs directed to duty of care, standard of care, and causation. Under the section dealing with duty of care there is a list of previously recognized cases of a duty of care which are said to be analogous to this case. Four within that list were identified by counsel for Ring as indicating a claim based on fiduciary duty. They are:

> (b) misfeasance in public office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69;
>
> (c) a duty to warn of the risk of danger: *Rivtow Marine Ltd v. Washington Iron Works*, [1974] S.C.R. 1189;
>
> (j) paternalistic relationships of supervision and control, such as those of parent-child or teacher-student: *Dziwenka v. The Queen in right of Alberta*, [1972] S.C.R. 419 and *Bain v. Board of Education (Calgary)* (1993). 146 A.R. 321 (Q.B.); and
>
> (k) the duty of defendants who either exercise a public function that includes implied responsibilities to the public at large: *Dunn v. Dommion Atlantic Railway Co*. (1920), 60 S.C.R. 310 and *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.).

None of these cases is dependent upon a fiduciary relationship to give rise to a duty of care. They do not assist Ring in pleading a claim based on breach of such a duty.

[41] The Certification Statement of Claim includes a section on "proximity factors." This section is clearly directed to the first branch of the **Anns/Kamloops** test, which is applied in determining whether a duty of care exists (the first element of an action in negligence). See: **Anns v. Merton London Borough Council**, [1978] A.C. 728 (H.L.), **City of Kamloops v. Nielsen**, [1984] 2 S.C.R. 2 and **Cooper v. Hobart**, [2001] 3 S.C.R. 537. Under the discussion of "proximity factors," counsel referred the Court to paragraphs directed to a description of "formal position of power." These plead the power of the Crown over soldiers and the control of access to CFB Gagetown. Counsel also referred the Court to paragraphs 55 and 56 which are directed to the duties owed to invitees.

[42] **Galambos** considered the requirements for an *ad hoc* fiduciary duty in the context of a power-dependency relationship. The Court stated, at para 66 "… it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party." Cromwell J. said, at para. 74:

> In short, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not.

Assuming, for the purpose of argument, that the relationship between the Crown and members of the armed forces is capable of being characterized as a power-dependency relationship that, of itself, does not "materially assist" Ring in advancing a claim based on the breach of a fiduciary duty.

[43] The Certification Statement of Claim does not plead material facts upon which a court could find the existence of a fiduciary relationship. For example, there are no material facts pleaded upon which one could conclude that there had been the necessary undertaking on the part of the Crown (alleged fiduciary) to act in the alleged beneficiaries' interests.

[44] The position of Ring on this appeal cannot be strengthened by reliance on breach of fiduciary duty. No such claim is pleaded. He must rely on the claims which are properly pleaded.

Jurisdiction questions

[45] The appellants argue that the Trial Division judge erred in his consideration of three points relevant to the question of whether there is a reasonable cause of action and/or the question of whether a class action is the preferable procedure: (1) the effects of s. 9 of the **Crown Liability and Proceedings Act**, R.S.C. 1985, c. C-50 and s. 111 of the **Pension Act,** R.S.C. 1985, c. P-6; (2) the application of limitation periods to the individual cases; and (3) the impact of varying duties of care and standards of care during the period covered by the Statement of Claim. For the reasons which follow, in my view, these three points are not properly part of a s. 5(1)(a) analysis. Rather, they should be considered under the preferable procedure question (s. 5(1)(d)).

[46] As the discussion above noted, s. 5(1)(a) has been interpreted to be a requirement that the pleadings meet the plain and obvious test. A court, therefore, looks only to the pleadings – in this case the Certification Statement of Claim.[8] If other material must be referred to, s. 5(1)(a) is not the route. In his initial remarks to the Trial Division judge, counsel for the Crown noted that he had planned a motion to strike the Statement of Claim. Had such a motion been made, the Crown could have used one of three routes: an application under Rule 10.05(1), an application under Rule 14.24 or an application under Rule 38.01(1). An application under Rule 14.24 to strike a statement of claim because it disclosed no reasonable cause of action is generally made strictly on the basis of the pleadings. No evidence in aid of the application would be offered. An application seeking to have a matter dismissed for lack of jurisdiction where evidence to support the application is required could be made under Rule 10.05(1). Rule 38.01 permits the Court to hear, at any time prior to trial, an application to determine any relevant question or issue of law or fact, or both. Subsection (2) provides:

> 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.

An argument that the court lacked jurisdiction based on s. 9 of the **Crown Liability and Proceedings Act** might properly be made under Rule 38.01.

[8] See: **Walsh v. TRA Co.**, *supra* for a discussion of what may be considered on a Rule 14.24 application.

Section 9 of the **Crown Liability and Proceeding Act**, which will be discussed below, bars actions against the Crown in certain circumstances.

[47] The examination under s. 5(1)(a) of the **Class Actions Act** contemplates a procedure akin to that under Rule 14.24 which is confined to the pleadings. There may indeed be occasions where an issue of jurisdiction might be determined solely on the basis of the pleadings. There is not, in the pleadings, sufficient information about the basis for Ring's application for a pension and the current status of the appeal to make a determination regarding jurisdiction on this basis.

[48] Given the period of time involved and questions of discoverability the application of limitation periods would have to be determined on an individual basis for Ring (as it would for other members of the class) and would require reference to facts not pleaded. Consequently, compliance with s. 5(1)(a) cannot be determined on that basis. The issue would be one for determination at a later stage.

[49] Similarly, the impact of varying duties and standards of care clearly should not be part of the s. 5(1)(a) analysis. This too requires an extensive evidentiary basis before a decision could be made.

Negligence and occupiers' liability

[50] Ring's claim is based on occupiers' liability and negligence. The simplest statement of the elements of an action in negligence is that a plaintiff must establish: a duty of care exists; there has been a breach of the duty of care; and damage has resulted from the breach.[9] Occupiers' liability is considered to be a branch of the law of negligence[10], though the law is not necessarily precisely the same as the law of negligence. For the purpose of this discussion the critical point is that like the general law of negligence a plaintiff must show that a breach of duty by the defendant caused an injury or loss to him or her.

[51] Ring claims that, in breach of a duty of care owed to him and other members of the proposed class, the Crown sprayed herbicides at CFB Gagetown which created "toxic" areas within the base. All parties accept

[9] See Allen Linden & Bruce Feldthusen, **Canadian Tort Law**, 8th ed. (Toronto: Butterworths, 2006) , p. 108 for a discussion of various views as to how the elements of negligence are best expressed.
[10] Klar, Linden, Cherniak, Kryworuk, **Remedies in Tort**, looseleaf (Toronto: Carswell, 1987) Vol. 3, c. 18, para. 1.

that there are, at least, two subclasses within the proposed class: one is comprised of persons like Ring who claim to have developed some type of lymphoma as a result of the Crown's breach of its duty of care[11] and the other, much larger subclass, is comprised of people who have no known effect from any exposure to the herbicides (the asymptomatic subclass). It is not disputed that for those who have been diagnosed with lymphoma and who allege that the lymphoma is the result of exposure to the toxic chemicals, the pleadings disclose a cause of action.

[52] The differences between the parties regarding whether the pleadings disclose a cause of action relate to the position of members of the asymptomatic subclass. For this group, or for those of them who will be able to establish they were in a "toxic" area of CFB Gagetown[12], the remedy sought is the cost of testing to determine whether there is evidence of the presence of certain chemicals in their bodies. The traditional view of such claims is expressed in Fleming, **The Law of Torts**, 9th ed. (North Ryde, N.S.W.: LBC Information Services, 1998). At p. 216, the author observed: "Persons exposed to radiation or toxic chemicals must await the onset of injury if any, and even damages for cancerphobia or the cost of medical surveillance appear foreclosed." Ring was not able to provide any Canadian jurisprudence which would support the granting of a remedy in the case of this group. He relies on certain American jurisprudence, though it is clear that those cases are not universally accepted in the United States. The appellants argue that the American cases cited by Ring can be distinguished from this case. They say that the law of Canada does not recognize this claim and, therefore, for this very large subgroup the required cause of action is not present. Ring, while acknowledging that he is advancing a novel claim on behalf of the asymptomatic subclass, maintains that it is something which should be determined at trial, not at this preliminary stage.

[53] In **Risorto v. State Farm,** Cullity J. at para 23 summarized the proper approach to the first criterion for certification:

> It is well-established that [the question of whether a statement of claim discloses a cause of action] must be decided on the basis of the facts alleged in the pleading on the assumption that they will be proven at trial. Accordingly, evidence is not

[11] One could argue that this group is comprised of several subclasses defined by the type of lymphoma from which the member suffers. However, for the purpose of this submission an analysis based on the existence of two subclasses is sufficient.

[12] The Certification Order describes the class as "all individuals who were at CFB Gagetown between 1956 and the present and who claim they were exposed to dangerous levels of dioxin or hexachlorobenzene while on the Base."

> admissible to rebut such allegations. The test to be applied is whether it is plain and obvious that the plaintiffs could not succeed in establishing the alleged causes of action that are said to arise from the facts pleaded. For this purpose, the pleading is to be read generously and allowance made for drafting inadequacies. It has been held that the novelty of a cause of action is not, in itself, a reason for rejecting it and that a decision to do so should not be made if the court would be required to decide matters of law that are not fully settled in the jurisprudence and that should be viewed in the light of a full evidential record.

[54] The parties approached the question of whether a cause of action was pleaded for the asymptomatic subclass on the basis that the plaintiffs were seeking recognition of a new category which would support a pure economic loss claim. On the part of the plaintiffs, this is an acknowledgement that they are not in a position to prove physical damage (injury), whether to a member of the asymptomatic class or to his or her property. The submissions to the Trial Division judge regarding the "novel" aspect of the claim focused on whether a duty of care was owed by the Crown to the subclass which was not in a position to demonstrate an existing physical injury. This, in turn, required consideration of the application of the **Anns/Kamloops** test, as elucidated in **Cooper v. Hobart**. The first part of the test requires a court to determine if there is reasonable foreseeability of harm and a relationship of proximity. If these two elements are established a *prima facie* duty of care is assumed and the second part of the test is engaged. In this second part of the test, residual policy considerations directed to the effect of the recognition of a duty of care on other legal obligations are examined. It is also during the second part that a court would consider the distinction between policy and operational decisions by a government body and whether recognition of a duty of care in the circumstances of the case would result in unlimited liability to an unlimited class. The burden is upon the plaintiff to establish a *prima facie* duty of care (the first part of the test). The burden is upon the respondent to demonstrate why there should be no or a limited duty of care in the circumstances (the second part): **Childs v. Desormeaux**, 2006 SCC 18.

[55] In his examination of the issue the Trial Division judge reviewed the application of the **Anns/Kamloops** test. He decided that, contrary to the position of the Crown and third parties, this was not one of those cases where the second branch of the test could be determined on the basis of the pleadings and the applicable law. Rather he concluded that this novel aspect of the claim should not be determined until after the presentation of the plaintiffs' case so that the proper evidentiary basis would be available. I

would note again that the burden of proof on the second part of the test is on the respondent and if additional evidence is needed, evidence from the respondent would be necessary to complete the **Anns/Kamloops** analysis. This is consistent with the decision of this Court in **Law Society of Newfoundland and Labrador v. 755165 Ontario Inc.** (2006), 260 Nfld. & P.E.I.R. 222.

[56] However, in my view, the **Anns/Kamloops** analysis masked the critical difficulty with the cause of action for the asymptomatic subclass: the absence of a claim that the members of the group suffered damage. The Trial Division judge said, at para. 103:

> I do not accept the submission of Pharmacia that the Plaintiffs who have not been diagnosed with a lymphoma have failed to establish a cause of action because they seek a remedy without having first established an injury. The injury the Plaintiffs say they have suffered is the absorption of toxic chemicals, which may cause lymphomas in the future.

Here the Trial Division judge is impliedly rejecting the notion that this is a claim for pure economic loss. In contrast to this at paragraph 145 he said:

> In the case of Plaintiffs who have not developed any lymphoma, they wish to recover the cost of testing to determine whether they have dangerous levels of dioxin or HCB in their systems. This is a pure economic loss claim … .

[57] Before this Court counsel for Ring made it clear that members of the class who have not been diagnosed with lymphoma would not prove that they had absorbed toxic chemicals. That could require them to have the very testing they are seeking as a remedy on a finding of liability. Rather, the position of Ring is that by proving only that a member of the subclass had been in a "toxic area" of the Base any such member would be entitled to compensation based on the cost of testing to determine whether there are toxic levels of certain chemicals in his or her body at the time of the order. Accepting, for the purpose of discussion, that the existence of "toxic" areas demonstrates a breach of a duty of care, the plaintiffs seek to proceed directly from breach of a duty of care to compensation without the necessity of proving either economic or physical injury.

[58] The Trial Division judge stated that the remedy being sought was medical surveillance and testing. Initially Ring sought testing for the asymptomatic subclass to determine levels of chemicals, detoxification for those with a certain level of chemicals and medical surveillance (Vol. 7, pp.

1957 & 1973). However, during the course of submissions to the Trial Division judge, counsel for Ring confirmed that Ring was no longer seeking, on behalf of that subclass, compensation for detoxification or medical monitoring, though it should be noted that as to medical monitoring he made conflicting statements on the point: Vol. 7, pp 2109 – 2112. The final position taken by Merchant Q.C., counsel for Ring in the Trial Division, was that medical monitoring was not part of the claim. The Trial Division judge made a palpable error in finding that the members of the class who have not been diagnosed with a lymphoma are claiming to have suffered an injury (absorption of toxic chemicals). What the members of the subclass are seeking is testing to determine the level of certain toxins in their bodies. Damage (injury) to a plaintiff is an essential element in a claim in negligence. That is the element that is absent from the pleadings vis-à-vis the asymptomatic subgroup. Further, the risk of a future disease is not actionable in the absence of a present injury: **Grieves v. F T Everard & Sons and others**, [2007] UKHL 39. In addition, there is nothing in the pleadings to support the notion that members of the asymptomatic subclass suffered any economic injury. They do not claim for expenses to mitigate damage. For the purpose of this discussion it is unnecessary to resolve the question of whether absorption of any or all of the herbicides could be said to amount to damage and, if it could, what amounts would be required to reach that point.

[59] In summary, for the asymptomatic subclass the pleadings do not disclose a cause of action and the Trial Division judge erred when he held otherwise.

2. ***Identifiable Class***

[60] The **Class Actions Act** permits certification of a class comprised of as few as two persons (s. 5(1)(b)).

[61] The objective of the legislation is to limit the class to those who have a claim or an interest in the resolution of the common issues (**Hollick**; **Cloud v. Canada (Attorney General)** (2004), 73 O.R. (3d) 401 (C.A.), para. 46). In **Western Canadian Shopping Centres Inc v. Dutton**, [2001] 2 S.C.R. 534, para. 38, Chief Justice McLachlin succinctly stated the features of a class definition and their purpose when she said:

> 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.

In deciding if the definition states objective criteria, courts will sometimes ask whether the criteria are subjective. In **Bywater v. Toronto Transit Commission** (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) para. 11,Winkler J. (as he then was) referring to **The Manual for Complex Litigation**, 3d ed. (St. Paul, Minn.: West Publishing Co., 1995) noted that a criterion depending on a class member's state of mind would be subjective.

[62] Arriving at a class definition may be easier in some types of cases than in others. In **Hollick** it was said that in product liability cases the class might typically be "those who purchased the product" (para. 20). In environmental actions such as **Hollick** and this case, however, "the appropriate scope of the class is not so obvious" and "it falls to the putative representative to show that the class is defined sufficiently narrowly" (**Hollick**, para. 20). On the subject of finding the right balance in defining a class Chief Justice McLachlin said at para. 21 of **Hollick**:

> … The representative need not show that <u>everyone</u> 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 <u>unnecessarily</u> broad – that is, that 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. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended …
>
> [Emphasis in original]

It is recognized, however, that it is not intended that the class be limited to those who will be ultimately successful. A purpose of class actions is to deal with all potential claims at the same time so that defendants proceed with the knowledge that "all potential claims are resolved and all potential claimants are bound by the result, including those that may fail." **Attis v. Canada (Minister of Health)** (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.) para. 53.

[63] In this case, the application for certification, at its widest, described the class as "all individuals who were at CFB Gagetown between 1956 and the present." While various numbers have been used to estimate the potential size of the class it is generally agreed that it is in excess of 400,000[13] people and, thus defined, includes everyone who was at CFB Gagetown, for any period of time, between 1956 and the present, whether exposed to herbicides or not. It is common ground that the class would include serving and retired members of the Canadian Armed Forces, foreign soldiers, dependants and civilians.

[64] As large as the numbers are in this case, that fact alone does not make the definition too broad: **Frohlinger v. Nortel Networks Corporation** (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.), para. 23. The size of the class may not be problematic in cases where the damage resulting is easily and simply identified, often from the defendant's records. I think, for example, of those cases where there was an overcharge for a service.

[65] The Trial Division judge recognized the potential problem inherent in the proposed definition when he said, at para. 127:

> The concern of the Third Parties that the first class definition may be too broad and may include individuals who have no concern about exposure may be met by adding to the first definition the words "and who claim they were exposed to dangerous levels of dioxin or HCB [hexachlorobenzene] while on the Base."

Consequently, the certification order, approved by the Trial Division judge, defines the class as follows:

> All individuals who were at CFB Gagetown between 1956 and the present and who claim they were exposed to dangerous levels of dioxin or hexachlorobenzene while on the Base.

[66] The appellants submit that rather than solving the problem the solution chosen by the Trial Division judge has compounded the problem by permitting potential class members to self define whether or not they are in the class by their unilateral assertion of a desire to pursue a claim. In other words, they argue, the criterion added by the Trial Division judge is subjective and, for the reasons stated by Chief Justice McLachlin in **Dutton,** creates a circumstance where a class member could assert that he or she was not bound by the result of the class proceeding because he or she never

[13] At one point the estimated size of the class was said to be approximately 550,000 people.

"claimed" anything at the time of the trial of the action. They further submit that the required rational connection between the class and the proposed common issues is absent because the definition certified by the Trial Division judge does not, in fact, require that one have been exposed to any herbicide at CFB Gagetown or any particular level of exposure, let alone that there has been any absorption of the herbicide.

[67] Before turning to an examination of the certified class it is helpful to discuss in a generic sense the type of addition made by the Trial Division judge in this case. As already noted, the general rule is that criteria should not depend on the outcome of the litigation. A criterion which offended this rule would be a "merits based" test where one would not be able to determine the membership of the class until the outcome of the action. There has developed in the jurisprudence a somewhat controversial distinction between "merits based" and "claims based" tests for an identifiable class. An example of the first would be "all individuals who were at CFB Gagetown between 1956 and the present and who were exposed to dangerous levels of dioxin or hexachlorobenxene." The outcome of the litigation would determine if one had been exposed to dangerous levels of dioxin or hexachlorobenxene and therefore whether a member of the class. An example of the second would be the class certified in ***Rumley v. British Columbia***, 2001 SCC 69.

[68] In **Rumley**, the Court approved a class of residential school members who "claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school." It should be pointed out that in that case the parties agreed that the class was an identifiable class, so the issue was not placed before the Court. However, **Rumley** was filed by the Court at the same time as **Dutton,** in which the Court emphasized that criteria should not depend on the outcome of the litigation. **Rumley** is often cited as authority for the use of claims based tests.

[69] In **Ragoonanan v. Imperial Tobacco Canada Ltd**. (2005), 78 O.R. (3d) 98 (Ont. Sup. Ct.), Cullity J. discussed the question of the claims based test. He said at paras. 44- 46:

> References to "objective" and "subjective" standards are notoriously ambiguous. In Mulheron, op. cit., and the passage I have quoted from Nixon v. Philip Morris (Australia) Ltd., references to subjective criteria appear, for example, to relate to all those that raise individual issues rather than to those only that relate to a state of mind, exercise of judgment or personal choice of a particular individual. Whether the wider, or narrower, notion of subjective criteria

> is adopted it should, I believe, be understood to apply to the reference to persons who "claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress" in the amended notice of motion. A criterion that leaves a potential claimant free to decide at a convenient time whether he, or she, will be a class member and be bound by the judgment of the court, is, in my opinion, neither objective nor in accordance with the policy of the CPA or the purposes of class definition.
>
> If it were possible to define a class in terms of persons who claim that one, or more, individual issues should be decided in their favour, there would very likely be no members of the class - and no one bound by the decision - if the common issues were decided in favour of the defendant. Persons who made no such claim could, in subsequent proceedings, resist a defence of issue estoppel on that ground. In a class action for damages for breach of contract, for example, a decision at a trial of common issues, that there was no contract, could be ignored by putative class members who had never been called on to make a claim, and who subsequently commenced proceedings for restitutionary, or equitable, remedies that did not depend on proof of damages.
>
> Accordingly, and despite the respect and deference due, and accorded, to the judges who have expressed inconsistent views in other jurisdictions, I do not consider that the problem of merits-based definitions can be avoided in this case by replacing causation as a fact with the fact that causation is claimed or asserted - at some unspecified time - by a potential class member.

The decision of Cullity J. was affirmed by the Divisional Court (2008), 54 C.P.C. (6^{th}) 167.

[70] The criticism of claims based tests was also addressed by Winkler J. in **Attis**. In taking a different view from that of Justice Cullity in **Ragoonanan**, he said at paragraphs 56 & 57:

> The use of "claims made" limiters has not been universally accepted. Some courts have characterized them as verging into an impermissible "merits-based" definition. I do not share this view. If membership in a class is defined as those who make claims in respect of a particular event or alleged wrong, no determination of the merits of any particular claim is necessary prior to making a determination as to whether the claimant is a member of the class. Similarly, if a person's claim fails, it does not eliminate the person from the class, rather it demarks the claimant as a class member whose claim has been determined through a binding process. It is not the purpose of class proceedings, or class definitions, to bind only successful claimants. All those who may bring claims in respect of a particular event or allegation should be bound if possible, subject of

> course to the legislated exception of those putative class members who exercise the right to opt out of the class proceeding.[14]
>
> Another criticism of a "claims made" limiter on class description is that it does not provide the necessary certainty of identifying those who are bound by the class definition. In my view, this criticism is founded on too narrow an interpretation of both the class definition and the functions of a court supervising a class proceeding. Defining a class as those persons "who claim" includes those persons who may come forward in the future to make a claim. A defendant and, for that matter, the court, will be in a position to ascertain whether a particular person is included in the class and bound by the resolution of the common issues. In this respect, it is trite that class members need not be identified individually at the time the class is certified. Accordingly, utilizing a "claims made" in the appropriate case leaves the defendant in no different position vis à vis knowledge of the class membership than would be otherwise the case. As for the potential class members, the court can ensure that the notice adequately conveys the effect of the class definition and the fact that claims in the future may be barred as a result of the resolution of the proceeding.

[71] In **Merck Frosst Canada Ltd. v. Wuttunee**, 2009 SKCA 43, leave to appeal to the Supreme Court of Canada refused, [2008] S.C.C.A. No. 512, a primary issue was whether the chambers judge had erred in determining that the class defined constituted an identifiable class. Smith J.A., for the Court, in an extensive review of requirements for an identifiable class, discussed the distinction between a merits based test and a claims based test and the more recent refinements of the law before concluding, at para. 103:

> In my view, what emerges from this review is a requirement for careful scrutiny of the facts and circumstances of a particular case prior to deciding: (1) whether a particular class definition is too broad to satisfy the requirement that it be rationally connected to the causes of action and common issues identified in the case; (2) that a merits based definition will necessarily lead to circularity or otherwise be objectionable; and (3) whether a claims based class definition sufficiently meets the requirements of objectivity and certainty, in light of the established purposes of class definition.

I agree with this approach. This is not a question of form. The mere insertion of the words “who claim to” does not necessarily turn an unacceptable descriptor into an acceptable one.

[72] I turn now to the specific definition used in this case:

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[14] While in some provinces, residents from outside that province must opt out of the class action proceeding, the Newfoundland and Labrador legislation provides that to benefit from a class action residents from outside the province must opt into the class action (s. 17(2)).

> All individuals who were at CFB Gagetown between 1956 and the present and **who claim they were exposed to dangerous levels of dioxin or hexachlorobenzene while on the Base**. (Emphasis added)

I start from the proposition, which was not really challenged during the appeal, that "all individuals who were at CFB Gagetown between 1956 and the present" lacks the required rational connection to the causes of action and common issues identified by the plaintiffs. Given the pattern of spraying, its time frame and the size of the base, not every one of the 400,000 plus potential claimants in fact have a claim. Large numbers would not. The question then becomes whether the solution provided by the Trial Division judge solved the problem. The addition made by the Trial Division judge, which is in bold print above, limits class members to those who "claim they were exposed" rather than those who "were exposed." Ring argues that the problem of a merits base test has been addressed by the Trial Division judge's addition because it is not necessary to await the outcome of the trial to determine who claims and therefore who falls within the class. There are a number of problems with this analysis.

[73] First, the limiter does not address the problem of elimination of persons who have no claim. There are no objective criteria to enable one to assess whether any one of the approximately 400,000 people is properly part of the class. This is in contrast to cases like **Rumley** and **Wheadon v. Bayer**, 2004 NLSCTD 72, where the limiter was expressed in terms of those who claimed personal injury. In **Wheadon** the class was described as "persons … who were prescribed and ingested Baycol and who claim personal injury as a result, and persons who have a derivative claim on account of a family relationship with such a claimant" (para. 181). Limiters which are based on a claim of personal injury have been generally accepted on the theory that the injury is a fact which could be verified objectively, independent of the trial of the issue. Here, of course, a limit based on the existence of a personal injury would be unacceptable to Ring as the Certification Statement of Claim seeks redress not only for those persons who have contracted a lymphoma (an injury alleged to be attributable to the exposure to herbicides), like Mr. Ring himself, but also for persons who have had exposure to an as yet undetermined quantity of herbicides and who have no current symptoms of a lymphoma.

[74] Second, there is the difficulty of determining who is bound by a decision of the court. Chief Justice Winkler's description, at paragraph 57 of **Attis,** of who may be bound by a class definition based on a "claims made

limiter" puts the claims based test in the most providential light. Those who would be bound include anyone who may claim in the future. On this reasoning, the claims based limiter chosen by the Trial Division judge results, in fact, in a description which comes full circle to the original definition of "all individuals who were at CFB Gagetown between 1956 and the present." In short, on the view expressed by Chief Justice Winkler, the solution chosen by the Trial Division judge did not, in fact, narrow the class at all. Here, the class based limiter implemented by the Trial Division judge is not effective in narrowing the class.

[75] In New Brunswick, a claims based limiter was rejected by Justice McNally on an application for certification of a class action based on the same spraying of herbicides which gives rise to the claim in this case. In that case the physical area covered was wider than just CFB Gagetown and the injuries were broader than lymphomas. In **Bryson and Murrin v. Canada et al.**, 2009 NBQB 204, Justice McNally said, at para. 46:

> In my respectful view, the addition of the qualifying words **"who claim to"** does not, rectify the underlying problem with the overly broad definition of class members, in the sense that many members of the proposed class would likely have no claim for actual damages against the defendant and in those instances there would be no rational relationship or connection between those individuals and the common issues asserted in the action. In effect, the proposed class includes anyone who was within 10 kilometers of the base during the approximate 53 year period since 1956, and claims to have suffered injury or risk of injury from the application of the chemicals. The proposed definition does not require any actual exposure to the chemicals as a condition of class membership. It is axiomatic that without exposure in some manner there can be no damage and no claim for damages or personal injury.

At paragraph 48, he concluded:

> As it stands, the proposed class has virtually no meaningful restriction and would potentially include hundreds of thousands of claimants including many who had no actual exposure to the chemicals, as the evidence confirms that the chemicals were generally applied seasonally at fairly specific times of year and in specific areas of the base to which many in the proposed class would likely have had no access or exposure and therefore no real interest in the resolution of the proposed common issues. Nevertheless, one could reasonably anticipate that many such persons would have an interest in being tested for the effects of any possible exposure, even if never exposed or if in fact exposed, no matter how minimal the exposure, even though they exhibit no symptoms whatsoever. They would be class members under the terms of the proposed definition. The potential class would be limitless with many potential members, in many respects, having

> no real interest in the determination of the proposed common issues. In short, the proposed definition of class members is overly broad and more importantly, the criteria of membership do not "bear a rational relationship to the common issues asserted by all class members" and do not satisfy the requirements of section 6(1)(b) of the **CPA**.

The same could be said of the proposed class in this case.

[76] At paragraph 6 of his decision, the Trial Division judge described two other alternative class descriptions which had been proposed by the plaintiffs. Both would restrict the class to those who had already contracted certain specified diseases. Neither was advocated by Ring before this Court. In my view, the Trial Division judge made a palpable and overriding error when he found that the addition of the words "who claim they were exposed to dangerous levels of dioxin or HCB while on the Base" would result in a class which was not too broadly defined. The class as defined by the Trial Division judge remains unnecessarily broad and no acceptable limiter has been proposed.

[77] The difficulties thus far identified are sufficient to warrant allowing this appeal. However, I shall discuss the other criteria as well.

3. *Common Issues*

[78] The Act requires that the claims of the class members raise a common issue, whether or not the common issue is the dominant issue. Section 2(b) of the Act defines "common issues" to mean:

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

[79] Here, the Certification Order declared the following common issues for the class:

> (a) Did CFB Gagetown or parts of the Base, after spraying, constitute an unusual or unreasonable danger of causing a malignant lymphoma and, if so, when? If the Crown permitted the introduction of the chemicals into the environment at CFB Gagetown, in what amounts, in what parts, and at what times were the chemicals present at CFB Gagetown? Can the chemicals materially contribute to, or materially contribute to the risk of, causing lymphoid cancers in humans, and if so, what is the smallest amount?

(b) Ought the Crown to have known about or reasonably foreseen the creation of the unusual or unreasonable danger by creating the toxic areas at CFB Gagetown?

(c) Did the Crown fail to use reasonable care to prevent the risk of developing malignant lymphomas in those who were exposed to the toxic areas, and if so, when?

(d) If so, is an award of punitive damages appropriate under all of the circumstances and if so, how much, and can the award be as an aggregate monetary award to class members who subsequently establish an entitlement to compensatory damages?

(e) Can the members of the class recover the costs of testing for dioxin and hexachlorobenzene poisoning on an aggregate basis, and if so, how much should be awarded?

The Trial Division judge agreed with the appellants that the principal proposed common issue is the first one and that the others cannot be resolved before the court makes a determination on the first (para. 136). The appellants continue to advance that position and maintain that this interrelationship means that the first issue is a critical one on which all the others stand or fall.

[80] There is no real dispute about the principles involved in determining if a common issue exists. An issue will be common "only where its resolution is necessary to the resolution of each class member's claim": **Hollick**, para. 18. It is not common unless the issue is a substantial ingredient of each class member's claim. However, it is not necessary that common issues predominate over non-common issues (s. 5(1)(c)) or that the resolution of the common issues be determinative of each class member's claim or that all members benefit from the resolution thereof to the same extent (**Dutton**, para. 39; **Cloud**, para. 53).

[81] In **Dutton**, the Supreme Court of Canada specified an approach to the determination of commonality. It should be approached purposively. The underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. With regard to the common issues, success for one class member must mean success for all. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues (paras. 39 & 40).

[82] The fact that there are numerous individual issues to be determined in addition to the common issues does not undermine the commonality conclusion, but it is a matter to be considered in the assessment of whether a class action would be the preferable procedure (**Cloud**, para. 58).

[83] The first common issue asks:

> Did CFB Gagetown or parts of the Base, after spraying, constitute an unusual or unreasonable danger of causing a malignant lymphoma and, if so, when? If the Crown permitted the introduction of the chemicals into the environment at CFB Gagetown, in what amounts, in what parts, and at what times were the chemicals present at CFB Gagetown? Can the chemicals materially contribute to, or materially contribute to the risk of, causing lymphoid cancers in humans, and if so, what is the smallest amount?

Common issue No. 1 was described by the Trial Division judge as addressing the issue of whether or not alleged "toxic areas" at CFB Gagetown constituted an unusual or unreasonable danger of causing a malignant lymphoma. Common issue No. 1 is comprised of three questions. They effectively lay out Ring's plan of attack. First, CFB Gagetown would be divided into areas. Second, using military records, the court would determine when and what herbicides were sprayed in each area during the relevant period. This exercise would include an examination of the chemical content of each herbicide sprayed. Because the chemical content of any particular herbicide might change over the 50 plus years included in the claim, the chemical content would have to be determined for each spraying. Third, the court would determine if the chemicals sprayed or any combination of them can materially contribute to or materially contributed to the risk of causing lymphomas[15]. Fourth, for those chemicals which were held to have a causative relationship with lymphoma, the court would determine the smallest amount which could support a causative relationship.

[84] The premise of common issue No. 1 is that if more than the minimum amount required to create a toxic chemical were sprayed then this would be a step in proving the claims of all of the class. If less than the minimum amount were sprayed, it might eliminate the claim entirely.

[85] The appellants argue that common issue No. 1 is very complex and asks the wrong questions or omits certain essential steps if it is to provide

[15] The plaintiffs acknowledged that this was not a case where they could establish liability on the "but for" test. Rather they would be seeking to use the alternative "material contribution" test.

any valuable element of proof. They maintain that as there were at least 12 chemicals sprayed and 40 distinct lymphomas, hundreds of causal relationships would have to be determined, leaving aside the complicating factor of spraying having taken place over a period in excess of 50 years.

[86] The Trial Division judge accepted that as a first step a court would have to determine if exposure to dioxin and HCB at any dose might contribute to the risk of persons developing malignant lymphoma. He rejected the submission that the question was based on the assumption that all lymphomas have a common cause. At paragraph 145 he said:

> The Plaintiffs accept that, if they are successful in their common questions, there will still have to be individual hearings to determine whether a plaintiff received a minimum dosage which caused their particular malignant lymphoma. In the case of Plaintiffs who have not developed any lymphoma, they wish to recover the cost of testing to determine whether they have dangerous levels of dioxin or HCB in their systems.

[87] The Trial Division judge recognized that the proposed class action would have numerous hurdles to overcome because of both issues of proof of causation and questions about the availability of a remedy at law. However, citing the very complexity of the case and the potential costs, he concluded that access to justice favoured certification. He stated that judicial economy would benefit either by the shortening of individual trials which would have to be held or by the avoidance of thousands of trials if the common issue were resolved in favour of the defendant and Third parties.

[88] The Trial Division judge did not address the question of whether common issue No. 1 is a common issue for the whole of the class or a series of common issues to be determined for various subclasses. Unless the relationship between various chemicals and all types of lymphomas is the same, the determination will have to be made for each type of lymphoma. Presumably, for the subclass with no lymphoma, exposure to a minimum toxic amount of any type of chemical would trigger the testing.

[89] Similar issues arose in the **Wuttunee** and **Bryson** cases. Counsel for Ring submitted that here the claims are limited to those relating to lymphoma (those who have contracted a lymphoma or who are at risk of contracting a lymphoma by exposure to toxic levels of certain chemicals) and therefore the reasoning in those cases does not apply. In **Wuttunee**, the claim was on behalf of persons who had purchased Vioxx but found it unfit for the purpose of managing pain; those who claimed it caused or

exacerbated a cardiovascular condition; and those who claimed it caused or exacerbated a gastrointestinal condition. That diversity of complaints was held by the Saskatchewan Court of Appeal to be "fatal to consideration of [whether Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions] as a 'common' issue" because the question was not susceptible to a single answer that would apply to all members of the class (at para. 145).

[90] In **Bryson,** as in this case, the claim arose out of the spraying of herbicides at CFB Gagetown for a period of approximately 50 years. The injuries alleged included "a panoply of diseases, health problems and conditions allegedly caused by or related to exposure to the toxic chemicals" (para 3). In addressing the proposed common issue, "do the Toxic Chemicals emitted pose a risk to the lives and health of those exposed to them," Justice McNalley noted it suggested a single inquiry and a single answer for all class members. He added, at para. 68:

> In reality, the determination of even the general causation inquiry of whether a particular substance is known to be capable of causing (or "associated" with) the effects at issue, although perhaps interesting in itself, would likely be of little utility in the context of the proposed class action. Again, on this point it must be kept in mind that the plaintiffs indentify 74 individual products as toxic which are alleged to have been sprayed at the Base. A general inquiry into the toxicity of all of these products where it is not known if any of the potential claimants were ever exposed to a particular product, or that there is a potential claimant that has a condition that might be caused by a particular product, may be pointless and such a situation could hardly be seen to advance the interests of judicial economy or fairness to any of the parties.

At para. 73 he concluded:

> In short, in my view, the determination of the proposed common issues relating to causation in a common trial in the instant case will do little, if anything, "to avoid duplication of fact finding or legal analysis". Further, it has not been established that the resolution of the question of causal associations or links between all of the chemicals enumerated in the plaintiffs' action are "necessary to the resolution of each class members claim" and in fact that the resolution of this issue with respect to many or most of these chemicals is necessary to the resolution of any of the potential claims. The plaintiffs have undertaken an ambitious claim to address all of the potential claims that might arise out of the effects of the spray program conducted at Base Gagetown over the past 53 years. In doing so, they have over reached and framed an overly broad action defining the causation issues in very general terms and for which they have not demonstrated that the proposed

> common issues could be resolved in a practical or manageable fashion or would advance the resolution of the claims in a fair, efficient and manageable way.

I agree that this action is more narrowly framed than **Bryson**. However, similar concerns to those outlined in **Bryson** arise in respect of common issue No. 1.

[91] The Trial Division judge saw common issue No. 2 as following logically from No. 1 and addressing reasonable foreseeability of harm, a factor in determining if a private law duty of care exists. However, once again the facts of this case demonstrate that this seemingly simple general question requires a nuanced answer dependant on factors such as when in the 50 plus years one asks the question. What ought to have been known in 1957 is likely to be quite different from what ought to have been known in 2000. The answer to the question in 2000 does not assist the members of the class who were only at CFB Gagetown in the 1960s.

[92] As to common issue Nos. 3, 4 and 5, the Trial Division judge stated they "could be resolved without individual hearings, if the Plaintiffs are successful in persuading the Court as a matter of law, on the **Ayers**[16] and **Potter**[17] approach, that failure to use reasonable care to prevent the risk of developing malignant lymphomas, whether or not those lymphomas actually occur, entitles individuals who are exposed to the toxic areas, whether or not they can prove they received a dose, to recover the costs of testing for the presence of dioxin and HCB in their system" (para. 152). The Trial Division judge added that the novelty of the cause of action should not prevent the Plaintiffs having their day in court (para. 152). This point references, at best, a subclass of persons, which would include those exposed to an as yet undetermined level of toxic chemicals but who have as yet no known injury. An issue which applied to only those persons would not be a common issue to all of the class.

[93] Common issue No. 3 is also problematic because of the large period of time covered by the action which Ring seeks to have certified. What might have been a failure to use reasonable care in the circumstances of the year 2000 may not have been in 1960. I recognize that there have been cases certified where the standard of care might have changed over the time period covered by the claim: **Cloud** and **Rumley** are examples. They dealt with "systemic negligence" in running schools. That, however, does not

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[16] **Ayers v. Jackson Tp.** (1987), 106 N.J. 557.
[17] **Potter et al v. Firestone Tire and Rubber Company** (1993) 6 Cal. 4th 965.

convert issue No. 3 to a single question applicable to the whole of the class. That could only happen if the standard of care were the same for the approximately 50 years covered by the action. This case must be distinguished from those environmental claims where a single event or events over a relatively short period of time give rise to the action.

[94] Once again, what is framed as one question seeking one answer for all members of the class is in fact several questions requiring several answers which are dependent upon time of exposure of the individual members of the class.

[95] With respect to common issue No. 4, I would agree that the issue of availability of punitive damages may be a common issue. In this case, the evidence respecting punitive damages relates to a relatively restricted time frame and the impugned conduct was directed to the group rather than to individual members of the class or subclasses. However, it must be remembered that punitive damages are awarded only after consideration of whether general and aggravated damages, if any, would be insufficient to meet the goals of deterrence. The wording of the proposed common issue confirms its dependency on the success of earlier common issues: "If so, is an award of punitive damages appropriate under all of the circumstances and if so, how much, and can the award be as an aggregate monetary award to class members who subsequently establish an entitlement to compensatory damages?" The proposed question respecting an aggregate monetary award is similarly dependent on the success of earlier common issues. Since, in this case, the earlier proposed common issues do not meet the requirements of the law, this common issue must also fail.

[96] Common issue No. 5 is directed to whether members of the class can recover the costs of testing for dioxin and hexachlorobenzene poisoning on an aggregate basis. When one looks to paragraph 43(2) of the Certification Statement of Claim it is clear that that portion of the claim, which is described as "economic loss", is on behalf of the asymptomatic subclass. This was also stated by counsel for Ring in his submissions in the Trial Division (p. 1976). The claim is for the cost of testing to determine the presence of dioxin and hexachlorobenzene[18]. Counsel for Ring confirmed, in oral submissions to this Court, that the compensation for testing was

[18] It will be recalled that during submissions in the Trial Division, Ring abandoned claims for the cost of detoxification if those chemicals are found at unreasonable levels and the costs of periodic medical examinations to monitor the health and facilitate early diagnosis malignant lymphomas linked to 2,4-D, 2,4,5-T and picloram.

being sought as a remedy. That is, he acknowledged that he had to prove liability on the part of the Crown before any such order could be made. Common issue No. 5 therefore is for the benefit of the asymptomatic subclass, not for the whole of the class, certainly not for the claimants who already have been diagnosed with lymphoma. Common issue No. 5 is not a common issue for the whole of the class.

4. ***Preferred Procedure***

[97] Section 5(2) of the **Class Actions Act**, as noted above, provides some guidance regarding the factors to be considered in determining whether a class action would be the preferable procedure. For convenience I shall reproduce the section:

> (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.

[98] In his consideration of the factors set out in s. 5(2) the Trial Division judge noted that (b) did not arise in this case. He stated that he had dealt with the Defendants' and Third Parties' concerns respecting (a) (d) and (e) in the context of the discussion on common issues. He identified the concern as being that the resolution of the common issues would not significantly advance the action. He added:

> … where the class consists of tens of thousands of people, access to justice would be promoted and judicial economy achieved by having the common issues resolved at a single hearing. There may still be questions relating to both general causation and specific causation which remain. But it will be less costly and more

> efficient to have resolved in one trial the question of whether there is an association between dioxin and HCB and certain diseases, such as malignant lymphomas, and whether there were areas of toxicity created by the spraying at CFB Gagetown which could cause medical problems for the Plaintiffs.

[99] As to (c) the Trial Division judge acknowledged the potential concern arising out of the commencement of the **Bryson** case in New Brunswick. He addressed this concern by staying the certification order pending further submissions. That stay was subsequently lifted[19] and the decision of Justice McNally was filed on July 23, 2009. Justice McNally denied the application for certification in the **Bryson** case.

[100] In **Hollick**, the Supreme Court of Canada set out the approach to be taken to the question of preferability. The Court confirmed that preferability incorporated two ideas: "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim" and whether a class proceeding would be preferable (para. 28). The common issues must be considered in the context of the claims as a whole (para. 29). Is the class action preferable to other methods of resolving the claims, including, but not limited to the use of individual proceedings (paras. 30 and 31)? In performing the analysis, one must look at the circumstances considering judicial economy (para. 32), access to justice (para. 33), and behaviour modification (para. 34).

[101] The appellants submit that the Trial Division judge made palpable and overriding errors in his analysis of preferability by:

1. failing to give any, or adequate, consideration to the manageability of the action;

2. failing to consider that individual questions will predominate over common issues; and

3. incorrectly applying the class action rationales of access to justice and judicial economy to the preferability analysis.

[102] The appellants maintain that (1) environmental tort cases are not generally manageable and therefore not appropriate for class actions; (2) unmanageable cases do not serve judicial economy, and (3) unmanageable cases do not promote access to justice.

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[19] The Trial Division judge lifted the stay in a decision filed on December 11, 2007; Order filed on March 10, 2008.

[103] Historically, it is true that environmental claims, particularly those involving personal injury, have had difficulty being certified as class actions. **Hollick** was an environmental claim. Chief Justice McLachlin noted the serious difficulties about preferablility in that case. However, she did not declare that environmental tort cases should never be certified as class actions.

[104] Here, the Trial Division judge did not see any difficulties with the environmental nature of the case as being sufficient to undermine his conclusion that a class action was the preferable procedure. He noted, in particular, that recovery of the cost of testing for HCBs and dioxin would not be an economically viable claim to pursue on an individual basis. He was satisfied that judicial economy would result from the resolution of the common issues and that other proposed solutions (the only one specifically noted was the regulatory scheme under the **Pest Control Products Act**, S.C. 2000, c. 28) did not meet the goal of behaviour modification.

[105] It is an error to examine the question of preferability solely from the perspective of the common issues which, one would expect, would always benefit from a common proceeding: **Hollick**, para. 29.

[106] The Trial Division judge was correct in pointing out, as Chief Justice McLachlin did in **Hollick,** that one of the advantages of a class action was that it makes it economically feasible to prosecute claims that might otherwise not be brought at all.

[107] In **Rumley** (para. 29) the Court said:

> It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

As the above discussion illustrates, none of the proposed common issues is truly a common issue for each member of the class. Rather there is a series of issues common to the subclasses. Even if the proposed common issues were acceptable, the resolution of the issues in this action would be very complex. Under the guise of a common issue there would have to be a determination of the "toxic level" of each and every chemical sprayed and every combination of sprays used and a determination of how long each area was "toxic." Toxic levels, of course, would have to be related to the various

lymphomas. For each claimant there would have to be an assessment of when he or she was at CFB Gagetown, where he or she went on the base, what chemicals might have been in those areas at the time of the visit or visits and whether there might be a cumulative effect from multiple visits. For others, for example, those who helped clean mud from equipment, it would require an examination of where the equipment had been on the base and what chemicals had been sprayed in those areas. For claimants who had contracted lymphoma, even if Ring is correct regarding the chemicals used at CFB Gagetown, there would also have to be extensive medical evidence, among other things, before the connection alleged by Ring could be established between the spraying and the lymphoma. Inferences may be made in the case of environmental claims which arise out of one incident (e.g. one spill of a toxic substance). Here, in light of the time frame involved, the large number of people, the size of the base, and the different chemicals used, the proposed common issues are insignificant when compared to the large number of individual inquiries which would be needed to resolve this claim. I must conclude that judicial economy, if any, would be minimal.

Statutory Bars

[108] The appellants make two points regarding the **Crown Liability and Proceedings Act** and the **Pension Act**. The first is that these statutes provide a statutory limit on the jurisdiction of the court and any description of class members cannot include those over whom the court can have no jurisdiction. Alternatively, it is submitted that among the potential members of the class there are many who are, or were, members of the Canadian Forces at CFB Gagetown during the operative period. The affidavit of Mr. Kerry Eaton, Vice President of Crawford Class Action Services, corrected for an error in the number of foreign troops, would indicate that approximately three-fourths of the potential class members were Canadian Forces personnel at CFB Gagetown during the relevant period (pp. 3330-3331 of the evidence). The question of jurisdiction over these persons will have to be resolved in light of the **Crown Liability and Proceedings Act**. This point, the appellants submit, should have been considered in any analysis of whether a class action is the preferable procedure.

[109] Section 9 of the **Crown Liability and Proceedings Act** states:

> No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the

Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

Section 21 of the **Pension Act** reads, in part:

(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule H;

…

(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

(a) any physical training or any sports activity in which the member was participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;

(b) any activity incidental to or directly connected with an activity described in paragraph (a), including the transportation of the member by any means between the place the member normally performed duties and the place of that activity;

(c) the transportation of the member, in the course of duties, in a military vessel, vehicle or aircraft or by any means of transportation authorized by a military authority, or any act done or action taken by the member or any other person that was incidental to or directly connected with that transportation;

> (d) the transportation of the member while on authorized leave by any means authorized by a military authority, other than public transportation, between the place the member normally performed duties and the place at which the member was to take leave or a place at which public transportation was available;
>
> (e) service in an area in which the prevalence of the disease contracted by the member, or that aggravated an existing disease or injury of the member, constituted a health hazard to persons in that area;
>
> (f) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; and
>
> (g) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof.
>
> ...

(5) In addition to any pension awarded under subsection (1) or (2), a member of the forces who

> (a) is eligible for a pension under paragraph (1)(a) and (2)(a) or this subsection in respect of an injury or disease or an aggravation thereof, or has suffered an injury or disease or an aggravation thereof that would be pensionable under that provision if it had resulted in a disability, and
>
> (b) is suffering an additional disability that is in whole or in part a consequence of the injury or disease or the aggravation referred to in paragraph (a)

shall, on application, be awarded a pension in accordance with the rates for basic and additional pension set out in Schedule I in respect of that part of the additional disability that is a consequence of that injury or disease or aggravation thereof.

(6) A pension shall not be denied to a member of the forces under subsection (5) on the ground that, having regard to the disability for which the member was already receiving a pension, the member took part in any activities or went any place that the member ought to have known would cause the consequential disability.

[110] Section 111 of the **Pension Act** specifies:

> (1) In this section, "action" means any action or other proceeding brought by or on behalf of
>
> > (a) a member of the forces,
> >
> > (b) a person to whom this Act applies by virtue of any enactment incorporating this Act by reference, or
> >
> > (c) a survivor or a surviving child, parent, brother or sister of a person referred to in paragraph (a) or (b) who is deceased
> >
> > against Her Majesty, or against any officer, servant or agent of Her Majesty, in which damages are claimed in respect of an injury or disease or aggravation thereof resulting in disability or death.
>
> (2) An action that is not barred by virtue of section 9 of the *Crown Liability and Proceedings Act* shall, on application, be stayed until
>
> > (a) an application for a pension in respect of the same disability or death has been made and pursued in good faith by or on behalf of the person by whom, or on whose behalf, the action was brought; and
> >
> > (b) a decision to the effect that no pension may be paid to or in respect of that person in respect of the same disability or death has been confirmed by an appeal panel of the Veterans Review and Appeal Board in accordance with the *Veterans Review and Appeal Board Act*.

[111] Section 9 of the **Crown Liability and Proceedings Act** was considered by the Supreme Court of Canada in **Sarvanis v. Canada**, [2002] 1 S.C.R. 921. That case was concerned with whether the receipt of Canada Pension Plan benefits would bar a tort action. In the course of the decision Justice Iacobucci addressed the general application of s. 9 and, in obiter comment, examined the position of members of the Canadian Forces.

> [28] In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.

> [29] This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.
>
> **…**
>
> [38] Simply put, s. 9 of the *Crown Liability and Proceedings Act* establishes Crown immunity where the very event of death, injury, damage or loss that forms the basis of the barred claim is the event that formed the basis of a pension or compensation award. …

[112] In **Sarvanis** the Court makes it clear that the bar applies if the pension is given “in respect of” or on the same basis as the identical death, injury, damage or loss. Identical heads of damages are not required (para 29).

[113] The Trial Division judge quoted paragraphs 28 and 29 of **Sarvanis** in his decision. He stated, however, that “it is not plain and obvious to me that Ring’s pension is payable.” In this context the Trial Division judge defined payable as a presently enforceable legal right to collect a pension. Further he found that it was not plain and obvious that, if payable, the pension was payable “in respect of” facts on which the present action is founded. The Trial Division judge referred to the recreational activities of Ring at CFB Gagetown, as described in Ring’s affidavit, as being outside of the activities which would have given rise to a pension. At para. 117, he made a general statement that the allegations include allegations relating to exposure to toxic herbicides while hunting and fishing. As I read the decision of the Trial Division judge, he was, up to that point, considering a submission based on issue estoppel on the questions of causation and harm.

[114] However, he also considered s. 111(2) of the **Pension Act**. In that context he considered whether the class action ought to be permitted to proceed in the face of a legislative requirement for a stay. For the purposes of the argument of the appellants I shall assume the Trial Division judge would have applied the same reasoning to s. 9 of the **Crown Liability and Proceedings Act**, had he applied his mind to it. The Trial Division judge followed the reasoning of Gerein J. of the Saskatchewan Queen’s Bench in **Frey v. B.C.E. Inc.,** 2006 SKQB 331, in which Justice Gerein considered

the application of a section of the Saskatchewan **Arbitration Act** which required that a stay of proceedings be entered if a party to an arbitration agreement commenced a proceeding with respect to a matter to be submitted to arbitration under an agreement. In **Frey**, a class action was permitted to proceed notwithstanding the stay required to be granted pursuant to the applicable arbitration act.

[115] The Trial Division judge concluded this section of his decision as follows:

> … it is not plain and obvious that there are statutory bars to the Plaintiffs' action proceeding and I find that a reasonable cause of action has been alleged.

[116] The appellants submit that the Trial Division judge made two errors: first, he erred in narrowing the focus to Mr. Ring rather than the proposed class generally and secondly, it was not for the Trial Division judge to determine the pension status of Mr. Ring. It was further argued that the plain and obvious test was not the correct one.

[117] For the purpose of this discussion regarding whether a class action is the preferable procedure, the question is not whether the Trial Division judge was correct in his decision as it related to jurisdiction. For reasons discussed above, the Trial Division judge lacked the proper evidence to make a determination of jurisdiction. The question at this stage is what impact the legislation has on the discretion to be exercised regarding preferable procedure.

[118] The provisions of the **Pensions Act** and the **Crown Liability and Proceedings Act** indicate that for three-fourths of the potential members of the class there is legislation which: (1) might provide an alternative remedy, under legislation which provides certain advantages to the applicant which would not be available in a legal action; (2) might require that a stay of any action be granted until the availability of the alternative remedy is determined; and (3) might prevent the court from exercising jurisdiction if the other remedy is granted in respect of the facts upon which the claim before the court is grounded. Further, this case should be distinguished from products liability cases involving arbitration. In such cases it is probable that all the members of the class would be governed by the same or a similar arbitration clause. Here the legislation would not apply to all of the members of the proposed class. In this context, it is possible that the alternative procedure will be held to be the only one available to three-

fourths of the members of the class. The impact of the legislation in this context is the complication caused by the inefficiency of having to have the determination made for such a large percentage of the class. Further, this is not an issue that could be determined on a class wide basis.

[119] As to the preferred procedure, the determinations regarding the earlier criteria for certification undermine the basis for the decision of the Trial Division judge. Additional factors, such as s. 9 of the **Crown Liability and Proceedings Act** would not support the Trial Division judge's view of manageability of the action as a class action.

5. ***An Adequate Representative***

[120] The representative plaintiffs must establish, on the certification application, that they are able to fairly and adequately represent the interests of the class, have produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and notifying class members of the action, and do not have an interest in conflict with the other members of the class (s. 5(1)(e)).

[121] In his decision the Trial Division judge concluded that there were proper representative plaintiffs. As already noted, Ms. Williams is no longer a plaintiff. At paragraph 161 of his decision, the Trial Division judge rejected a number of submissions of the appellants which were based on the notion that Ring might have a conflict of interest. The appellants do not now challenge that finding. They do, however, argue that the Trial Division judge erred in concluding that there were proper representative plaintiffs in the absence of a proper litigation plan.

Litigation Plan

[122] In **Carom v. Bre-X** (1999), 44 O.R. (3d) 173 (S.C.J.), Winkler J. discussed the role of the litigation plan, and emphasized its importance in complex litigation. He said (at p. 203):

> The interrelation between the different elements of the certification test under s. 5(1) has been noted previously in these reasons. The requirements set out for the representative plaintiff accordingly do not stand in isolation. The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.

A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification. In this case, the national scope, the nature of the defendants, the uncertainty of the class size and the number of causes of action alleged mark this as litigation of the most complex nature and kind. Accordingly, a comprehensive and detailed litigation plan is required.

[123] In **Bellaire v. Independent Order of Foresters** (2004), 5 C.P.C. (6th) 68, Nordheimer J. discussed the content of litigation plans. He said:

> [53] Litigation plans will vary in the amount of detail they contain depending on the degree of complexity of the underlying claims. However, any litigation plan ought to contain some outline of how the representative plaintiff and his or her counsel intend to ensure that the common issues will be effectively and efficiently pursued if the action is certified. Without intending to be exhaustive, I suggest that the litigation plan ought to address matters such as the following:
>
> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (viii) if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues, and;
>
> (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.
>
> [54] I appreciate that any litigation plan will be a work in progress. It will need to be adjusted as the action proceeds. It may also be that the defendant and the court will need to have some input into variations to the proposed plan. None of those realities, however, relieves the representative plaintiff from his or her obligation to put before the court, on the certification motion, an initial effort at a

> plan to address these and other matters so that the court can be satisfied that, if the action is certified, some level of attention has been given to how the action will progress thereafter.

Similar lists have been included in other decisions and in commentaries. Other matters which it is said should be addressed include: the manner in which class members will be identified, if not already known; particulars of the notice, and where it is to be published; details of the process for distribution of the damage award; what is to happen to surplus funds, and how insufficient funds will be dealt with (Warren K. Winkler and Harvey Strosberg, **Issues of Evidence in a Class Action**, Law Society of Upper Canada, Special Lectures 2003).

[124] In this case, the appellants argue that there is no litigation plan, though it is acknowledged that some of the matters which ought to be addressed have been in the affidavit of Ring. In his affidavit Ring states his plan for communication with class members at various stages of the litigation: following certification, following determination of common issues and responding to inquiries.

[125] This is a question of substance, not of form, though the benefits of having a discrete litigation plan are obvious. I find a lack of specificity in the plan of Ring as relates to the individual issues which would have to be determined for members of the class, particularly those who have already been diagnosed with lymphoma. If this were the only problem with the criteria for certification one might order certification on the filing of certain information. That is not an option in this case in which the proposed class definition does not meet the requirements of law and no common issues have been identified, all of which undermines the Trial Division judge's decision that a class action is the preferable procedure.

Conclusion

[126] I conclude that for the reasons identified above, the Trial Division judge erred in certifying a class action. The appeal is allowed. The order certifying a class action is set aside. Pursuant to s. 37(1) of the **Class Actions Act** there shall be no order as to costs.

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M. A. Cameron, J.A.

I Concur: _____

B. G. Welsh, J.A.

I Concur: _____

C. W. White, J.A.