

COURT FILE NO.: 05-CV-299031CP [Toronto]
DATE: 20090415

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**GERALD CLAYTON GLOVER, LINDA GLOVER, CACHITA WHITE
by her Estate Representative CLARENCE WHYTE, CLARENCE WHYTE,
ANNA RADA by her Estate Representative SONIA RADA, SONIA RADA,
ADELINE DAVIDSON by her Estate Representative THOMAS DAVIDSON
AND THOMAS DAVIDSON**

Plaintiffs

- and -

**CITY OF TORONTO and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

*William V. Sasso and Sharon Strosberg, for the Plaintiffs
Robert W. Traves, Cheryl M. Woodin, Leslie Mendelson and Mark Skuce, for the City of
Toronto
Kim Twohig and Lise G. Favreau, for Her Majesty the Queen in Right of Ontario*

HEARING DATES: September 16-18, 2008

REASONS FOR DECISION

LAX J.

[1] In September and October, 2005, there was an outbreak of Legionnaire's disease at the Seven Oaks Home for the Aged in Toronto. Seven Oaks is a long-term care

facility owned and operated by the defendant City of Toronto (“Toronto”). The cause of the outbreak was ultimately determined to be *Legionella pneumophila* which was found in the cooling tower located on the roof at Seven Oaks. A total of 135 were infected: 70 residents, 21 visitors, 39 staff and 5 members of the community who lived or worked near Seven Oaks. Twenty-three residents died. The Legionnaires’ outbreak was the first time since SARS in 2003 that Ontario faced the threat of an illness that could not be easily or quickly identified. For the first 10 days, the cause of the outbreak was unknown.

[2] Investigation of the outbreak was managed by Toronto Public Health (“Toronto”) which was assisted by the Central Public Health Laboratory of the Ontario Ministry of Health and Long Term Care (“Ontario”). The plaintiffs bring this action against Toronto and Ontario. They move to certify it as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992 c. 6. They seek to represent a class of persons (except Toronto or Ontario’s employees) who lived, worked or visited at Seven Oaks or within a three kilometre radius of Seven Oaks between September 1, 2005 and October 13, 2005 and contracted Legionnaires’ disease or Pontiac fever. In the proposed class action, the plaintiffs assert causes of action for negligence, breach of contract and declarations.

[3] The plaintiffs allege that Toronto was negligent and in breach of contract because it failed to prevent the growth of *Legionella* in the cooling tower, resulting in the dissemination of *Legionella pneumophila* into Seven Oaks and the neighbourhood. They claim that as a result of Toronto’s alleged negligence, class members were infected with Legionnaires’ disease or Pontiac Fever and became ill or died.

[4] The Central Public Health Laboratory was responsible for testing urine samples collected from residents and others in order to identify the cause of the outbreak. The plaintiffs allege that Ontario was negligent because it failed to use the correct test on the urine samples to identify the cause of the outbreak in a timely manner. In particular, the claim alleges that Ontario was negligent in using the ‘ELISA’ or in-house test to test for Legionnaires’ disease and that it ought to have used the Binax test. The plaintiffs claim

that as a result of Ontario's alleged negligence, class members did not receive timely appropriate treatment for Legionnaires' disease.

[5] Subject to a serious concern I have about the litigation plan which will need to be addressed, I have concluded that this is an appropriate case for certification.

Background

[6] *Legionella pneumophila* is a ubiquitous aquatic organism that causes 90% of the cases of the disease known as Legionellosis. Legionellosis takes two forms: a) Legionnaires' disease: a severe form of infection that causes pneumonia with symptoms of breathing problems, fever, chest pains and coughing; b) Pontiac fever: a milder respiratory illness that resembles acute influenza with symptoms of fever, muscle and joint aches, headache, cough, nausea and sore throat. Legionnaires' disease can be fatal for the elderly.

[7] Infection is not transmitted from person to person, but is contracted by inhaling small droplets of water or aerosols containing *Legionella pneumophila*. Aerosolized bacteria are carried by wind currents from the source and are emitted into the atmosphere. It is an environmental disease. The most probable incubation period is two to ten days. The incubation period for Pontiac fever is much shorter, about four to sixty hours.

[8] Beginning on October 1, 2005, urine samples of ill residents and staff members were submitted for testing to the Central Public Health Laboratory. ELISA urine antigen tests for Legionella were conducted. All samples came back negative. On October 6, 2005, cultures from autopsy lung tissues from three deceased residents tested positive for *Legionella pneumophila serogroup 1*. Based on the October 6, 2005 test results, Toronto Public Health announced that the likely cause of the outbreak was Legionnaire's disease. It offered prophylactic antibiotic treatment to all staff and residents. It ordered Seven Oaks to shut down its cooling tower and ventilation system for testing.

[9] On October 21, 2005, *Legionella pneumophila serogroup 1* was positively identified as the source of the outbreak based on test results which matched samples from the cooling tower with samples of the cultured lung tissues from the deceased residents.

Toronto Public Health issued a press release that explained how the disease spread. The press release stated:

“Lab tests showed that the cooling tower contained the same legionella bacterium found in samples taken from residents. An air intake is located near the cooling tower. Droplets containing the bacterium were spread through the Home by the air handling system. The disease then affected a vulnerable population of elderly residents as well as staff and visitors.”

[10] The ELISA test did not detect *Legionella pneumophila serogroup 1* in either the autopsy lung tissues or in the urine samples that were submitted for testing. Subsequently, the Central Public Health Laboratory obtained Binax test kits from hospitals in the United States on October 12, 2005, which confirmed *Legionella pneumophila* in the urine samples of the proposed representative plaintiffs, Anna Rada, Cachita White, Adeline Davidson and Gerald Glover. Anna, Cachita and Adeline were residents of Seven Oaks. Anna and Adeline died. Gerald and Cachita were hospitalized. The proposed representative plaintiff, Clarence Whyte is the son of Cachita White. Neither test confirmed *Legionella pneumophila* in his urine samples, although he was hospitalized with symptoms consistent with Legionnaires' disease.

[11] Following the outbreak, the provincial government convened an expert panel to investigate the matter. The panel produced a report entitled “*Report Card: Progress in Protecting the Public's Health*” (the “Walker Report”). Its purpose was to assess the response to the outbreak.

Certification Requirements

[12] Section 5(1) of the CPA sets out the criterion for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[13] The defendants vigorously contested certification on numerous grounds that are now familiar in contested class proceedings, including an overly broad class definition, lack of commonality, a failure to demonstrate that a class action is the preferable procedure and lack of evidentiary support for the certification requirements, in particular the proposed common issues.

[14] The plaintiffs relied on affidavits from the proposed representative plaintiffs and produced the opinion evidence of Dr. Janet Stout, a microbiologist and Associate Professor and Director of the Special Pathogens Laboratory at the University of Pittsburgh. Dr. Stout has studied Legionnaires' disease for 25 years and has published widely on the subject. The defendants challenged the sufficiency of Dr. Stout's evidence and delivered responding affidavits from Dr. Paul Edelstein, Dr. Thomas Marrie and Dr. Donald Low. They are each experts in infectious diseases. Dr. Edelstein has particular expertise in Legionnaires' disease. The defendants criticized Dr. Stout's opinion on a number of grounds and ask me to conclude that there is no evidence or no admissible evidence to raise common issues against either defendant.

[15] The plaintiffs have an evidentiary burden to show "some basis in fact" for each of the certification requirements other than the requirement in section 5(1)(a) that the claim discloses a cause of action. "Some basis in fact" is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is. It is not a requirement to show that the action will probably or possibly

succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial.

[16] These thresholds do not have to be met on a certification motion as there is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action. As such, the court is required to assess whether there is a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of the behaviour of wrongdoers: *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 (S.C.J.) at para.14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402.

[17] The essential issue to be resolved in this action is whether one or both defendants were negligent. I use that term loosely for the moment. If this action is certified, the plaintiffs will seek to prove at a common issues trial that Toronto owed a duty of care to the class in relation to the design, maintenance and testing of the cooling tower at Seven Oaks. They will seek to prove that Ontario owed a duty of care to the class, including those whose urine was tested at the Central Public Health Laboratory. They will seek to prove that both defendants breached a duty of care and that their conduct fell below the standard of care. On this motion, the plaintiffs have no obligation to do this. They are only required to show by some evidence that these issues can be resolved on a class-wide basis and that if they are set down for trial, their resolution will significantly advance the proceeding.

5(1)(a) – Disclosure of a Cause of Action

[18] The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):

- no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 25.

- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;
- the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi.
- matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 17(e).
- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679.

Toronto

[19] Toronto does not dispute that there is a properly pleaded cause of action in negligence against it. It raises two issues. It disputes the plaintiffs' submission that the claim for declaration is a cause of action and denies that there is a properly pleaded claim in contract.

[20] The declaratory relief sought by the plaintiffs in this case consists of a declaration that (i) the defendants were negligent and liable for damages, and (ii) a declaration that the defendants are vicariously liable in damages, although it is not specified for whom they are said to be vicariously liable.

[21] A declaration is not a cause of action *per se*, but a remedy granted by a court when a plaintiff has established a breach – or a threatened breach – of his or her rights. Declarations are the relief sought, not causes of action: *Elliott v. Canadian Broadcasting*

Corp. (1993) 16 O.R. (3d) 677 (Gen. Div.) at 696; see also, L. Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Carswell, 2007) at 1¹

[22] In support of their inclusion of “declarations” as a cause of action, the plaintiffs rely on *Smith v. National Money Mart Co.*, [2007] O.J. No. 46 at paras. 22-25, 37 C.P.C. (6th) 171 (S.C.J.), leave to appeal refused, [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.) and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at paras. 41 and 49. In both cases, the plaintiffs sought declarations that the fees charged by the defendant constituted a criminal rate of interest and that the agreements that they entered into with the defendant were therefore void. Declaratory relief was the only available means for enforcing the right asserted.

[23] In this case, the plaintiffs have sued the City for negligence (an actual cause of action), and seek a remedy in damages. I agree with the submission of Toronto that the pleading of declaration that the defendants were negligent is superfluous and adds nothing to this action in the way of common issues. Any common issues raised by the pleading that the defendants were negligent and liable to pay damages are the very same issues raised by a pleading for a declaration that the plaintiff was negligent and liable for damages.

[24] The claim for a declaration for vicarious liability in damages is not duplicative, but it is not well pleaded. Leave to amend is granted.

[25] The thrust of the breach of contract claim is that Toronto failed to perform its contractual and statutory obligations to provide a safe and healthy environment for residents. It is pleaded that each resident class member, including three representative plaintiffs who were residents at Seven Oaks, entered into a standard form residence contract with Toronto, which expressly or implicitly required Toronto to maintain the premises, including the cooling tower and other systems to a standard reasonably

¹ “The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights.”

required in the circumstances and that Toronto failed to do this. I am satisfied that the pleading makes out an adequate claim for breach of contract.

Ontario

[26] The nub of the claim against Ontario is its alleged negligent use of the ELISA test. Ontario disputes that the plaintiffs have sufficiently pleaded a claim in negligence against it and submits that pleas of breach of a standard of care and proximity are lacking. The claim makes the following allegations:

- the plaintiffs and class members were in a position of special reliance on the Central Public Health Laboratory to identify the cause of the outbreak.
- Ontario knew or should have known that the plaintiffs and class members would continue to be exposed to *Legionella pneumophila* and would not receive the most effective treatment until Legionnaires' disease was identified as the cause of the outbreak.
- Serogroup 1 is the most common and dangerous subtype of *Legionella pneumophila*. Ontario owed a duty of care to the plaintiffs and class members to identify Serogroup 1. It knew or ought to have known that the ELISA test failed to identify this subtype.
- Ontario was negligent in failing to discontinue use of the ELISA test and implement the Binax test. But for Ontario's failure to identify Legionnaires' disease earlier in the outbreak, the plaintiffs and class members would have received timely and effective antibiotic therapy tailored to Legionnaires' disease.
- Severely ill class members were not given Rifampin which is recommended for treatment of Legionnaires' disease.
- Class members and family class members have suffered loss and damage.

[27] In my opinion, the constituent elements of the tort of negligence have been adequately pleaded or can be readily inferred from the allegations of fact.

5(1)(b) – Class Definition

[28] Section 5(1)(b) requires that “there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant.” The purpose of a class definition is (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.) at para.10.

[29] The plaintiffs propose the following class definition:

Those persons who, in the Class Period, (excluding any of Toronto’s and Ontario’s employees) lived, worked or visited at Seven Oaks or within a radius of three kilometres of Seven Oaks, and contracted Legionnaires Disease or Pontiac Fever.

[30] As well, there is a family class defined as:

A family member of a Class Member as defined by section 61 of the *FLA*.

[31] The class period is defined as the period between September 1, 2005 and October 13, 2005.

[32] Toronto Public Health conducted an epidemiological investigation of the outbreak that covers the period September 1 to October 13. The plaintiffs rely upon this for the purpose of defining class membership and class period. The epidemiological investigation identified a total of 135 people who were infected during the outbreak, including 70 residents, 39 staff, 21 visitors and 5 people who lived or worked near Seven Oaks. Once staff members are excluded, the class size is 97. Of this group, 38 were identified as cases of confirmed Legionnaires’ disease. The remainder were either probable cases of the disease or were cases of probable Pontiac fever.

[33] The defendants rely on evidence from Dr. Edelstein that the classification of affected persons for epidemiological purposes is not equivalent to the requirement to prove on a balance of probabilities that a particular individual was in fact infected with Legionnaires’ disease by bacteria emanating from the Seven Oaks cooling tower. First,

they point out that *Legionella* is ubiquitous and there were other *Legionella* sources in proximity to Seven Oaks, for example, the Shoniker building next door. The proposed representative plaintiff Gerald Glover was the superintendent of the Shoniker building and responsible for weekly inspections of its cooling tower, which was found to also have the *Legionella* bacteria, although it did not match the strain found in the Seven Oaks cooling tower.

[34] Second, they argue that absent laboratory confirmation of Legionnaires' disease, it is likely that certain of the proposed class members actually contracted an unrelated illness, with similar clinical symptoms. For example, they say, the proposed representative plaintiff Clarence Whyte appears to fall into this category, as testing in his case was consistently negative for Legionnaires' disease.

[35] They submit that the number of people who in fact contracted Legionnaires' disease from Seven Oaks will be much lower because there will be people within the proposed class who contracted the disease from somewhere else and because there will be people within the proposed class who, while they may have been sick with symptoms consistent with Legionnaires' disease, did not in fact contract the illness at all. They particularly object to the inclusion of Pontiac fever as there is no reliable laboratory test to diagnose it.

[36] None of these arguments persuade me that the class definition as it relates to membership is improper. There is a basis in fact for believing that each of the representative plaintiffs may have contracted Legionnaires' disease from the Seven Oaks cooling tower. The fact that there may be another source for Legionnaires' disease is a matter to be pleaded in defence. That some class members will be unable to prove that they contracted either disease or, if they did, that it was from the cooling tower is not a reason to reject the class definition. A proper class definition does not need to include only those persons whose claims will be successful. As Cullity J. stated in *Tiboni*:²

² *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J.), [2008] O.J. No. 2996, leave to appeal to Div. Ct. refused, [2008] O.J. No. 4731.

[78] ... In any class action involving claims in tort for personal injury or economic loss, it is possible that the claims of some class members will be unsuccessful. This is virtually ordained by the authorities that preclude merits-based definitions.

[37] As to class period, Dr. Edelstein expressed the opinion that transmission began later than September 1 and ended earlier than October 13. However, his opinion is based on when the first *confirmed* case of Legionnaires' disease occurred and he does not take account of any cases of Pontiac fever. Allowing for the possibility that incubation periods can run longer than ten days as Dr. Edelstein acknowledged, the proposed class period is appropriate as there is evidence to show that the first case of probable Legionnaires' disease could have been contracted as early as September 1 if the incubation period was slightly longer than the norm. The shorter class period proposed by the defendants would satisfy the standard of medical certainty, but exclude some potential class members who might be able to satisfy the civil standard of proof on a balance of probabilities.

[38] I agree with the plaintiffs that the proposed class definition and class period cannot be defined more narrowly without arbitrarily excluding some potential class members. The definition includes a type of harm (contracted Legionnaires' disease or Pontiac fever), but it is not overly broad compared to the interest that class members have in common. A proposed class definition that lacked this qualifier could well be criticized as too broad. The inclusion of community members does not trouble me. There is evidence that community members were infected. If they contracted Legionnaires' disease or Pontiac fever during the class period, they have the same interest in the resolution of common issues as visitors and residents. Each could advance an individual claim. On the record before the court, there is a basis in fact for concluding that for the proposed class period, class members have a claim against the defendants for which there would be common issues rationally connected to the class.

[39] I think the wording of the class definition can be improved and will be clearer to potential class members if it read:

Those persons (excluding employees of the City of Toronto and the Province of Ontario) who, lived, worked or visited at Seven Oaks Home for the Aged, 7 Neilson Road, Toronto, Ontario or within a radius of three

kilometers, between September 1 2005 and October 13, 2005, and who contracted Legionnaires Disease or Pontiac Fever.

[40] The definition of the family class can also be improved. It should track the language of section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and specifically identify the relationships to a class member.

[41] Subject to these comments, I accept the proposed class definition.

5(1)(c) – Common Issues

[42] For an issue to be common, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick*, at para. 18. An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant. *Fehringer v. Sun Media Corp.*, [2002] O.J. No.4110, 27 C.P.C. (5th) 155 (S.C.J.), aff'd, [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.). The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 39.

[43] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in fact to show that issues are common: *Hollick*, at para. 25. An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud*, at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[44] The plaintiffs ask the court to certify the following common issues:

1. Did Toronto owe a duty of care to the Class Members in relation to the design, maintenance and testing of the Cooling Tower at Seven Oaks Home for the Aged? If so, what was the standard of care? Did Toronto breach the standard of care? Was Toronto negligent and/or in breach of contract? If so, when and how?

2. Did Ontario owe a duty of care to the Class Members including those whose urine was tested at CPHL? If so, did Ontario breach the standard of care? Was Ontario negligent and if so, when and how?
3. Can the damages of the Class Members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?
4. Should one or both of the defendants pay punitive damages to the Class Members and Family Class Members, and if so, in what amount?
5. Should one or both of the defendants pay prejudgment interest to the Class Members and Family Class Members, and if so, at what annual rate?
6. Should one or both of the defendants pay to administer and distribute any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

[45] The most significant of the common issues are Issues 1 and 2. In argument, the plaintiffs agreed that they do not require the negligence question and are content that it be deleted. As causation and damages are likely to be individual issues, a composite negligence question is inappropriate.

[46] The defendants dispute that questions of duty and standard of care can be addressed on a class-wide basis. They say that different duties may be owed at different times to different class members or may not be owed at all. I do not find this argument persuasive. Common issues include common but not necessarily identical issues of law that arise from common but not necessarily identical facts. The *Class Proceedings Act* gives the court the flexibility to deal with differentiation among class members. The trial judge has the power to adopt a nuanced approach and create subclasses when this is necessary: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 183 at paras. 31-32.

[47] The defendants' other objections to the certification of these common issues turn largely on the evidentiary requirement. This is addressed below.

Common Issue 1

[48] Dr. Stout provided her opinion that the circumstances of the outbreak as described in the October 21 press release from Toronto Public Health strongly suggest that Toronto failed to implement reasonable maintenance and monitoring procedures in accordance with accepted industry standards (the "ASHRAE Guidelines") to minimize and control *Legionella pneumophila* in the cooling tower.

[49] Toronto criticized Dr. Stout's opinion because "it lacks a sufficient factual basis." The Walker Report concluded that Toronto's maintenance of the cooling tower was acceptable. Toronto submits that this is "the only factual information about the City's conduct." I disagree. Dr. Stout's opinion was informed by the factors described in the press release and her expert knowledge of how *Legionella* develops, spreads, and can be controlled. It is true that her opinion is based on circumstantial evidence, but this is perfectly admissible evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) at § 2.78.

[50] Toronto contends that there continues to be "vigorous debate within the expert community about where Legionnaires' disease comes from." This surely is an issue for trial. On this motion, there is more than sufficient evidence to show that the source of this outbreak was the cooling tower at Seven Oaks and that *Legionella* was dispersed thorough an air intake valve located near the tower. There is evidence that as a result of the outbreak at Seven Oaks, some residents, visitors, staff and community members contracted or probably contracted Legionnaires' disease or Pontiac fever and became ill or died. Even without Dr. Stout's opinion, there is a basis in fact for the existence of issues that can be resolved on a class-wide basis to address Toronto's conduct in its design, maintenance and testing of the cooling tower at Seven Oaks.

[51] I also reject Toronto's submission that I cannot certify the breach of contract claim as a common issue. The plaintiffs have produced evidence of a standard form contract between Seven Oaks and the representative plaintiff, Anna Rada. It incorporates a Residents' Bill of Rights as set out in the *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13, which the plaintiffs plead and rely on. Item 18 of the Bill of Rights, which forms part of the contract provides: "Every resident has the right to live in a safe and clean environment."

[52] The plaintiffs will argue at trial that this is a contractual term to provide clean, uncontaminated air. Whether this term is found to be express or implied can be dealt with at a common issues trial because it applies to all residents and does not depend upon the individual knowledge, understanding or circumstances of each class member as in *McLaine v. London Life Insurance Co.* (2007) 233 O.A.C. 275, 53 C.P.C. (6th) 135 (Div. Ct.) and *MacLeod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331; 28 C.P.C. (5th) 160 (S.C.J.). See also, *Lavier v. MyTravel Holidays Inc.*, [2008] O.J. No. 2753, 59 C.P.C. (6th) 57 (S.C.J.) at para. 123, rev'd on other grounds, [2009] O.J. No. 1314.

Common Issue 2

[53] The negligence claim against Ontario has two parts: if Ontario had identified Legionnaires' disease earlier,

- (i) fewer people would have contracted the disease; and
- (ii) the representative plaintiffs and potential class members would have received appropriate treatment earlier.

[54] Dr. Stout's evidence is that Serogroup 1 is by far the most common and dangerous pathogen causing Legionnaires' disease and that to the knowledge of the Central Public Health Laboratory, the Binax test was specifically developed for rapid identification of this subtype through a urine sample. There would appear to be no dispute in the evidence that early and appropriate antibiotic treatment reduces both disease severity and mortality and that Legionnaires' disease treatment delay adversely affects patient outcomes.

[55] Ontario criticized Dr. Stout's "speculative statement" that the delay in identifying the cause of the outbreak caused an increase in morbidity and mortality. It produced evidence from Dr. Low and Dr. Marrie that an earlier diagnosis of Legionnaires' disease would have made no difference because the treatment for Legionnaires' disease and community acquired pneumonia ("CAP") are the same if physicians followed relevant guidelines for treating CAP. The Walker Report, on which Ontario relies, found nothing to criticize in the treatment that patients received. Thus, Ontario submits that even if it were found that Ontario fell below the standard of care in initially using the ELISA test, the plaintiffs have not put forward any evidence that this alleged failure was the cause of any damages or harm class members may have suffered.

[56] There are two responses to this submission. First, the plaintiffs are not required to produce evidence on each element of a cause of action pleaded. One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged. Second, whether or not the delay caused harm to any class member is dependent on proof of causation and damages, which Ontario asserts are individual issues. The plaintiffs are only required to show some basis in fact for the existence of common issues.

[57] Ontario has acknowledged that there was a 5-day delay in identifying Legionnaires' disease in the samples tested by the Central Public Health Laboratory and that it did not initially use the Binax test. The epidemiological curve in the Walker Report shows a sharp decrease in the number of new cases after October 1 (the first day the Central Public Health Laboratory received urine samples) but the same curve shows that some people could have been infected after October 1 based on an incubation period of 2 to 10 days.

[58] I do not have to decide whether a court would conclude that Ontario has duties to some or all class members, but the facts presented by the case raise the question of whether Ontario knowingly or carelessly put class members into harm's way when the Central Public Health Laboratory failed to identify Legionnaires' disease on October 1.

The cooling tower was not shut down until on or after October 6 and until then, there was continued exposure. As Legionella is carried by wind currents into the atmosphere, it is not known precisely when the risk of transmission ended. Toronto's expert, Dr. Edelstein, concluded that the transmission period likely ended October 1, but this is a question to be resolved at trial and not on this motion.

[59] The focus of proposed common issues 1 and 2 is the conduct of the defendants. The answers to them are not dependent upon findings of fact that would have to be made with respect to each class member. Their resolution will eliminate the need for each class member to separately have these issues adjudicated. All class members share an interest in determining whether they are owed a duty of care and whether either defendant fell below a standard of care. No class member can prevail without showing this: *Rumley*, at paras. 27 and 34; *Cloud* at paras. 51-53, 65 and 66. The evidence shows that there is a basis in fact for the court to conclude that these issues can be resolved on a class-wide basis. The submissions of the defendants essentially addressed the weight to be accorded the evidence, and in particular, the opinion evidence of Dr. Stout. While the expert evidence adduced by the defendants may ultimately lead a court to conclude that the defendants have no liability for the outbreak or its consequences, this is not a matter that can be resolved on this motion.

[60] Issues of duty, standard of care and breach of the standard of care have been certified as common issues in many other class proceedings where the essential ingredient of commonality was the defendant's alleged negligence.³ As in those cases, a finding with respect to the duty of care and the breach would significantly advance this proceeding. There is of course the possibility, often ignored by the defendants on a certification motion, that they will be successful, bringing an end to the proceeding.

³ *Anderson v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (S.C.J.), leave to appeal to Div. Ct. refused, [2005] O.J. No. 269; *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828, 50 C.P.C. (6th) 133 (S.C.J.), aff'd [2008] O.J. No. 1916, 55 C.P.C. (6th) 242 (Div. Ct.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404, 39 C.P.C. (6th) 153 (S.C.J.), aff'd (2008), 91 O.R. (3d) 691 (Div. Ct.); *Lefrancois v. Guidant Corp.*, [2008] O.J. No. 1397, 56 C.P.C. (6th) 268 (Sup. Ct.); *Serhan v. Johnson and Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.), aff'd (2006), 85 O.R. (3d) 665 (Div. Ct.), leave to appeal to C.A. refused M33963 (Oct. 16, 2006), leave to appeal to S.C.C. refused, [2007] 1 S.C.R. x.

[61] I approve common issues 1 and 2, amended to read:

1. Did Toronto owe a duty of care to the Class Members or any subclass or subclasses in relation to the design, maintenance and testing of the Cooling Tower at Seven Oaks Home for the Aged? If so, what was the standard of care? Did Toronto breach the standard of care? Was Toronto in breach of contract to residents of Seven Oaks? If so, when and how?
2. Did Ontario owe a duty of care to the Class Members or any subclass or subclasses including those whose urine was tested at CPHL? If so, what was the standard of care? Did Ontario breach the standard of care?

Common Issue 3

[62] Common Issue 3 raises the question whether aggregate damages should be certified as a common issue. Strictly speaking, it is not necessary to state this as a common issue as this determination is made by the common issues trial judge. It has become the practice to do this if the court is satisfied that there is a reasonable likelihood that the preconditions in s. 24(1) of the Act can be satisfied: *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974, 17 C.P.C. (6th) 307 (S.C.J.) at para. 25; *Serhan v. Johnson & Johnson et al.* (2006), 85 O.R. (3d) 665 (Div. Ct.) at para. 139; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401 at para. 45, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15.

[63] These conditions are (a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[64] This issue was addressed in *Bywater* where Winkler J. (as he then was) said at para. 18:

In my view, the case at bar is not appropriate for an aggregate assessment of damages. The action advances claims for personal injury, property damage and claims under the *Family Law Act*. These claims cannot,

"reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".

[65] In my view, this is a case like *Bywater* where causation will be an individual issue. The amount of damages claimed by each class member will vary in accordance with their individual circumstances. Proof of loss will be individual. As I do not believe that there is any reasonable likelihood that conditions (b) and (c) can be met, proposed common issue 3 should not be included as a common issue.

[66] Common issues 4, 5 and 6 were not seriously challenged and have been included as common issues in other cases: *Tiboni*, at para. 95; *Cassano*, at para. 72. I believe it is appropriate to include them in the issues to be tried.

[67] The plaintiffs have satisfied this criterion for certification.

5(1)(d) – preferable procedure

[68] This criterion requires a consideration of the extent to which the resolution of the common issues will achieve the three objectives of the *Class Proceedings Act*: access to justice, judicial economy and behaviour modification. It has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The preferability requirement can be met even where there are substantial individual issues to be resolved after the common issues trial as the preferability analysis is a quantitative and not a qualitative inquiry. The court is to assess the importance of the common issues in relation to the claim as a whole: *Cloud*, at paras. 73 – 75.

[69] The core submission of the defendants is that the nature, complexity and difficulty of the individual issues will outweigh or overwhelm common issues such that the resolution of the common issues in favour of the plaintiffs would not advance the

litigation to contribute in any meaningful way to the three goals of the Act. The only proposed alternative to a class proceeding is individual litigation. The defendants suggest that it would be feasible that those wishing to pursue individual claims could proceed through the Simplified Procedure or the Small Claims Court. They submit that the policy objectives of access to justice and judicial economy are better served by these existing and available procedures.

[70] In my opinion, this submission overlooks the enormous costs of marshalling the expert evidence that would be required to pursue this as an individual action. This is borne out by the evidence filed on this motion. The defendants emphasized the complexity of the medical evidence that would be required for individual trials. Clearly, this would be a deterrent to pursuing an individual action and would defeat the objective of access to justice. This result would immunize the defendants from liability for purely economic reasons. In contrast, the fixed costs of litigating the important common issues of duty of care, standard of care and breach will be shared among class members if the action is certified. These issues need only be litigated once, which improves access to justice: *Hollick*, at para. 15. As well, expensive, repetitive and time-consuming individual litigation with the potential for conflicting findings is avoided, advancing the goal of judicial economy.

[71] The damage claims in this action are likely to be very modest. Close to half of the claims belong to quite elderly individuals: the average age of confirmed cases of Legionnaires' disease was 84.5 years; the median age of probable cases of Legionnaires' disease was 73 years. It is likely that most class members would find it uneconomical to pursue an individual claim. Moreover, a class proceeding has the procedural advantages of discovery and case management. These are not available in an action in the Small Claims Court or under the Simplified Procedure.

[72] In *Cassano*, Chief Justice Winkler reminded us that section 25 of the CPA confers broad jurisdiction on the common issues trial judge to fashion procedures to facilitate the determination of individual claims where damages cannot be assessed in the aggregate as I expect will be the case here. As he noted, "the resolution of individual

issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice” (para.63). Otherwise, the goals of class proceedings will not be realized.

[73] It bears repeating that idiosyncratic and difficult issues of causation and damages did not prevent certification in *Bywater*, *Cloud* and *Rumley* and in numerous other cases of medical complexity such as *St. Jude*, *Medtronic*, *Tiboni* and *LeFrancois*. Similar arguments as to the significance and difficulty of the individual issues were made and rejected in these cases. I believe that this case is quite a bit less challenging in respect of the individual issues that will remain. As Legionnaires’ disease is a reportable disease, a great deal of the evidence, including medical evidence, that will be necessary to adjudicate the individual claims is already available. Toronto Public Health took active steps to identify potential cases at the time and investigated all reported cases. I do not see the individual causation and damage issues presenting the overwhelming obstacles predicted by the defendants.

[74] The nature and complexity of the causation and damages issues in the individual claims are not similar to those faced in *Dumoulin v. Ontario*, [2005] O.J. No. 3961, 19 C.P.C. (6th) 234 (S.C.J.). There, the court expressed concern about proving causation and damages in claims for exposure to toxic mould by occupants of a court house over a five year period because the health consequences of exposure to mould were matters of considerable scientific and medical controversy. Consequently, there was no scientifically-justified basis for treating the proposed class members as having a common disorder with a common cause. Unlike *Dumoulin*, there is a scientific basis for treating the proposed class members as having a common disorder with a common cause. Moreover, this is a focused class with a small number of members whose harm is alleged to have occurred over a short period of time.

[75] The 1982 *Report of the Ontario Law Reform Commission on Class Actions* recognized at p. 269 that “mass accident” cases would be based primarily on common law negligence and were appropriate for class treatment, notwithstanding the individual issues that would remain:

... although the Commission recognizes that, in the majority of cases, individual assessment of damages will be required, an expanded class action procedure could achieve economies for both the parties and the courts by determining in one proceeding the same basic factual and legal issues that would have to be litigated several times, and deferring individual issues for subsequent resolution.

[76] Finally, only a class proceeding has the potential to achieve the goal of behaviour modification. The elderly are at greater risk of developing Legionnaires' disease when exposed to *Legionella pneumophila*. A successful prosecution of this action will encourage those who are responsible for their well-being to take greater care in preventing an outbreak, which can have serious consequences for them and for others who are exposed. I agree that behaviour modification is not a driving feature of the claim against Ontario as following the outbreak the Central Public Health Laboratory started using the Binax test as well as the ELISA test to screen for Legionnaires' disease. Currently it only uses the Binax test as the supply of antibodies required to produce the ELISA test is unavailable. However, a class proceeding will meet the other objectives of the CPA. I find that a class proceeding is a fair, efficient and manageable method of advancing the claim and is the preferable procedure to resolve the claims of class members.

5(1)(e) – a representative plaintiff with a workable litigation plan

Representative plaintiffs

[77] Gerald Glover, Cachita White, Clarence Whyte, Anna Rada and Adeline Davidson ask to be appointed representative plaintiffs for the primary class consisting of persons who contracted Legionnaires' disease or Pontiac fever during the class period. Cachita White, Anna Rada and Adeline Davidson were residents of Seven Oaks. Each was diagnosed with Legionnaires' disease. Only Cachita survived the disease. Anna died on October 6, 2005. Adeline died on October 28, 2005. Cachita died of other causes in October 2007. Clarence Whyte is Cachita's son and was a regular visitor at Seven Oaks. He is listed as a "probable case of Legionnaire's disease" in the epidemiological study compiled by Toronto Public Health.

[78] Gerald Glover was the superintendent at the Shoniker building, a residential building for senior citizens located next door to Seven Oaks. On October 5, 2005, Gerald became extremely ill and was hospitalized. Subsequent testing confirmed that he was infected with Legionnaires' disease. Linda Glover is his wife. Sonia Rada, Clarence Whyte and Thomas Davidson bring the action as estate representatives. Ms Rada, Mr. Davidson and Ms Glover bring derivative claims under the *Family Law Act*, R.S.O. 1990, c. F.3.

[79] The defendants objected to the suitability of the proposed representative plaintiffs for two reasons: (i) the non-resident members of the class, including Mr. Glover and Mr. Whyte, have or may have a conflict of interest with the resident members of the class and (ii) none of the proposed representative plaintiffs have adequate knowledge of the action and an adequate understanding of the role and responsibilities of a representative plaintiff.

[80] As to the first objection, the defendants argue that because Mr. Glover and Mr. Whyte have different and more difficult issues of causation to contend with than do resident members of the class, this raises a conflict of interest. I do not accept this argument. A representative plaintiff need not share every characteristic of every member of the class or be typical of the class: *Western Canadian Shopping Centres* at para. 41. As well, if the differences between the situation of the representative plaintiff and the class members do not impact on the common issues, then the differences do not affect the plaintiff's ability to adequately and fairly represent the class and they do not create a conflict of interest: *Hoy v. Medtronic*, 94 B.C.L.R. (3d) 169, [2001] B.C.J. No. 1968 at paras. 83-85, aff'd, 14 B.C.L.R. (4th) 32, [2003] B.C.J. No. 1251 (C.A.). The fact that these plaintiffs may face more difficult issues of causation does not impact on their ability to represent the class on the common issues.

[81] As to the second objection, the proposed representative plaintiffs have each sworn affidavits attesting to their understanding of the major steps in the class action and the responsibilities of a representative plaintiff. They each depose that they are willing to

perform these responsibilities. As a result of their cross-examinations, the defendants put their ability to do this in issue.

[82] I have carefully reviewed the affidavits and the cross-examination transcripts of each of the proposed representative plaintiffs. In my opinion, it is incumbent on the court to read the transcripts generously. Cross-examination can be an intimidating experience for litigants, particularly those who are unsophisticated. Before concluding on the suitability of a proposed representative, the court must ensure that the questions asked by cross-examining counsel have been put clearly and fairly.

[83] Whether a proposed representative plaintiff can provide adequate representation was addressed by Chief Justice McLachlin in *Western Canadian Shopping Centres* at para 41:

... In assessing whether the proposed representative plaintiff is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by class members). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied however, that the proposed representative will vigorously and capably prosecute the interests of the class (citation omitted).

[84] In order to be satisfied that a proposed representative will vigorously and capably prosecute the interests of the class, I would expect a representative to have, as a minimum, an understanding that they are representing a class and a basic understanding of the nature of the claim. I am satisfied that with the exception of Mr. and Mrs. Glover, the proposed representatives more than satisfy this criterion. I am also satisfied that each has the motivation to vigorously and capably prosecute the claim. It is not an objection to their adequacy that none had reviewed the Walker Report or the affidavits of the defendants' experts. When read in context, their evidence on cross-examination demonstrates a sufficient understanding of this action and of their roles in it.

[85] Unfortunately, Mr. and Mrs. Glover do not cross this threshold. They appear to have no appreciation that they are representing a class. Nor do they understand the nature

of the plaintiffs' complaints against Toronto and Ontario. Both thought the claim was about late notice of the outbreak and that they are involved in the litigation to further their individual interests. I am not persuaded that either is a suitable representative plaintiff.

[86] I appoint Cachita White, Anna Rada and Adeline Davidson by their respective estate representatives as representatives for class members. I appoint Sonia Rada and Thomas Davidson as representative plaintiffs for family class members.

Litigation Plan

[87] The proposed litigation plan provides sufficient detail of the steps that will be necessary to reach a trial of common issues as well as the dissemination of notice. Should the common issues trial be determined in favour of the plaintiffs, the court will be asked to appoint an Administrator who will, *inter alia*, determine eligibility of class membership, and to appoint a Referee(s) to review any issues as to eligibility and to conduct damages assessments for some class members. The common issues judge will be asked to give directions as to a hearing or hearings for the adducing of generalized evidence about the nature of Legionnaires' disease and Pontiac fever and other topics which shall be applicable to all references.

[88] The plan contemplates the possibility of categorizing and assigning a minimum damage assessment in accordance with a grid, but it also contemplates that there will be hearings of individual issues before a Referee(s). So, for example, if the common issues trial judge decides that causation is an individual issue, there will be hearings before a Referee and the trial judge will give directions as to whether and when the Referees' hearings may be in writing or when a hearing with oral evidence is necessary depending on the nature and the complexity of the claim. The plan proposes that all individual issues will be decided by a Referee(s). The court will be asked to authorize the Referees to hold hearings to allow class members to adduce general and expert evidence which may be applicable to some or all individual hearings.

[89] Finally, the plan contemplates that the defendants will be participants at each stage of the adjudication of any individual issues, including class membership eligibility,

hearings on causation, and damages assessments. Notably absent, however, is class counsel. The litigation plan terminates the representation of proposed class members at the doorstep of individual assessments. As individual assessments of relatively modest claims are likely to be necessary in this class proceeding, the unexplained abandonment of class members at this crucial juncture is deeply problematic.

[90] Under the heading, “Class Counsel Fees and Administration Expenses”, the plan provides that the court will be asked to fix the amount of class counsel fees and to direct the Administrator and defendants to pay the fees “out of the monies recovered or owing” as a first charge and to fix the costs of the Administrator and the Referees and to order payment by the defendants as a second charge. It then provides:

68. Class counsel’s retainer does not include representation of each individual Class Member or Family Class Member in pursuing their claims after the determination of the common issues. However, Class counsel will make every effort to secure representation for those Class members who request legal assistance, including the option to represent some Class Members and Family Class Members in pursuing their claims.

[91] This provision raises a number of troubling questions. How will any class member be able to adduce general and expert evidence, including evidence about the nature of Legionnaires’ disease and Pontiac fever at a hearing before the Referee without legal representation? What is the basis on which class counsel will decide whether to exercise “the option” to represent some class and family members, but not others? Is it contemplated that class counsel can choose to pursue the economically viable claims and abandon the rest? If class counsel does not exercise “the option”, but is successful in securing legal representation for those class members who request it, what will be the arrangement for the sharing of fees? Is any lawyer likely to accept a retainer on behalf of a class member when class counsel fees are to be a first charge on any amount recovered or owing?

[92] There is little doubt that if this action is certified, a solicitor-client relationship will exist between counsel for the representative plaintiffs and the members of the class. Justice Nordheimer addressed this issue in *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (S.C.J.), [2004] O.J. No. 2308:

[7] ... I have earlier expressed the view that there is no solicitor and client relationship between counsel for the representative plaintiff and members of the proposed class prior to the certification of the action as a class proceeding - see *Pearson v. Inco* (2001), 57 O.R. (3d) 278 (S.C.J.). At the same time, it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of a class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably".

[93] Justice Nordheimer was analyzing the nature of the relationship between class counsel and class members after certification, but before the expiry of the opting out period. In *Lau v. Bayview Landmark Inc.* (2004), 71 O.R. (3d) 487, [2004] O.J. No. 2788, Cullity J. held that this analysis applied, *a fortiori*, where the opting out period has expired.

[94] In a class proceeding, a client does not have a right to choose his or her lawyer or have a right to terminate the retainer. If a class member is dissatisfied with counsel of record, he or she may opt out of the class, but by the time this proceeding reaches the stage of individual assessments, that time will have long passed. In my opinion, class counsel cannot unilaterally choose to terminate representation, but is bound to represent those class members who wish to pursue individual claims on the same basis as the retainer agreement provides until the class member or the court directs otherwise. It seems to me that the proposed abandonment of class members following the determination of common issues is completely at odds with the fiduciary duty that a lawyer has to a client, which includes the duty of loyalty: *R. v. Neil*, [2002] 2 S.C.R. 631 (S.C.C.). It is also completely at odds with the goals of class proceedings. Earlier I made reference to Chief Justice Winkler's remarks in *Cassano* and I repeat them here: "the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice". I am not satisfied that this goal can be achieved under the litigation plan that has been put forward.

[95] At the hearing, plaintiffs' counsel provided me with a supplementary brief of authorities which includes the litigation plans in *LeFrancois* and *Tiboni* and the supplemental reasons of Cullity J. in *LeFrancois*. In that case, the plaintiffs were successful in having the action certified if satisfactory amendments were made to the plaintiffs' litigation plan. The defendants challenged the adequacy of the amendments and the hearing of the certification motion resumed.

[96] In supplemental reasons, reported at [2008] O.J. No. 2402 (S.C.J.), Cullity J. describes the plaintiffs' revised litigation plan as consisting of two documents of which one – a Revised Compensation Plan – is a schedule to the other and incorporated in it. Unfortunately (and I believe inadvertently), the document provided to me purporting to be the *LeFrancois* litigation plan bears no resemblance to this. Nonetheless, I have reviewed both plans, which I presume were given to me as precedents. As far as I can tell, neither plan has a comparable provision to the one in issue here. If the court has approved a litigation plan with a similar provision, I am not aware of it.

[97] I therefore invite counsel to address this issue. Upon being satisfied of the concern I have raised, whether by amendment to the plan or otherwise, a certification order will issue in accordance with these reasons. Unless one of the parties requires a hearing, I am content to have this addressed at a case conference at which time a schedule for costs submissions can also be settled.

"J. LAX, J." _____

/ LAX J.

COURT FILE NO.: 05-CV-299031CP
DATE: 20090415

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GERALD CLAYTON GLOVER, LINDA
GLOVER, CACHITA WHITE by her Estate
Representative CLARENCE WHYTE,
CLARENCE WHYTE, ANNA RADA by her
Estate Representative SONIA RADA, SONIA
RADA, ADELINE DAVIDSON by her Estate
Representative THOMAS DAVIDSON
AND THOMAS DAVIDSON

Plaintiffs

- and -

CITY OF TORONTO and HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO

Defendants

REASONS FOR DECISION

LAX J.

Released: April 15, 2009