Clerk's Stamp:

COURT FILE NUMBER	1914 00167
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	ST. PAUL
PLAINTIFF/APPLICANT	**CYNTHIA IRIS YOUNGCHIEF**
DEFENDANT/RESPONDENT	**THE ATTORNEY GENERAL OF CANADA, HIS MAJESTY THE KING IN RIGHT OF ALBERTA, LE DIOCESE DE SAINT-PAUL and/or THE DIOCESE OF SAINT-PAUL, ST. LOUIS PARISH, and BOARD OF TRUSTEES OF LAKELAND ROMAN CATHOLIC SEPARATE SCHOOL DIVISION** **Proceeding under the *Class Proceedings Act*, S.A. 2003 c. C16.5**
DOCUMENT	**SUPPLEMENTARY BRIEF OF LAW AND ARGUMENT OF THE RESPONDENT, BOARD OF TRUSTEES OF LAKELAND ROMAN CATHOLIC SEPARATE SCHOOL DIVISION, IN RESPONSE TO THE PLAINTIFF'S APPLICATION FOR CERTIFICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10220 – 103 Avenue NW Edmonton, Alberta T5J 0K4 Attention: Cristina Wendel, Philip Tinkler Phone : 780.423.7353/780.423.7102 Fax : 780.423.7276 File No. 519046-4

SUPPLEMENTARY BRIEF OF LAW AND ARGUMENT OF THE RESPONDENT (DEFENDANT), BOARD OF TRUSTEES OF LAKELAND ROMAN CATHOLIC SEPARATE SCHOOL DIVISION, IN RELATION TO THE PLAINTIFF'S APPLICATION FOR CERTIFICATION TO BE HEARD IN CASE MANAGEMENT ON SEPTEMBER 23-24, 2024 BEFORE THE HONOURABLE MR. JUSTICE JAMES T. NEILSON

TABLE OF CONTENTS

I. INTRODUCTION

1. This Supplementary brief is submitted on behalf of the Respondent (Defendant), Board of Trustees of Lakeland Roman Catholic Separate School Division ("**Lakeland Catholic**") in response to the Plaintiff's application for certification.

2. By way of background, the hearing of the Plaintiff's application for certification was scheduled for April 22-26, 2024. Following the delivery of the Respondents' briefs of law and argument in relation to the application for certification, the hearing of the application was postponed, at the Applicant's request, to permit the Applicant to amend her pleadings and to provide further or other materials or evidence in support of an amended certification application.

3. The Applicant filed an Amended Amended Statement of Claim on June 3, 2024 ("**AASOC**"). The Applicant also filed an Amended Application for Certification of Class Proceeding on June 3, 2024 ("**Amended Certification Application**"). Per the Amended Certification Application, the Applicant relies on the AASOC, the Affidavit of Cynthia Iris Youngchief filed 27 August 2020, and such further and other materials and evidence as counsel may advise and as this Court may permit.[1]

4. Pursuant to This Honourable Court's Procedural Order filed June 12, 2024, the Applicant was to have delivered any additional evidence in support of the Amended Certification Application by June 14, 2024.

5. The Applicant has not filed or served further or other materials or evidence in support of the Amended Certification Application, and her reply brief filed April 12, 2024 did not address Lakeland Catholic's previous observation that there is no evidence of an Ecole Notre Dame High School to support the "Class" definition the Applicant proposes.[2]

6. By a letter to the Applicant's counsel on August 15, 2024 annexed as Schedule "A" to this brief, counsel for Lakeland Catholic has proposed an agreement regarding the Amended Certification Application.

[1] Amended Application for Certification of Class Proceeding, filed June 3, 2024, paragraph 3.

[2] Brief of the Respondent, Lakeland Catholic Separate School District No. 150, filed March 28, 2024, at para. 35.

7. On August 17, 2024 the Applicant's counsel advised the Applicant declined the proposal, looked forward to receipt of Lakeland Catholic supplemental brief and would respond accordingly.

II. THE ISSUE

8. The issue to be determined continues to be whether the Applicant has satisfied the test for certification of this Action as a class proceeding pursuant to s. 5(1) of the *Class Proceedings Act,* S.A. 2003, c. C-16.5 ("***CPA***").

III. LAW AND ARGUMENT

9. As Lakeland Catholic noted in its previous brief, the Court must be satisfied as to each of the criterion in section 5(1) of the *CPA*. Where the Court is satisfied as to each of those criteria, it must certify the proceedings as a class proceeding, but may not do so unless each of the criteria have been met.[3]

10. The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources. That said, in *Pro-Sys Consultants Ltd v. Microsoft Corp.*, the Supreme Court of Canada stated that although not a merits determination, certification was meant to be a meaningful screening device, that does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".[4]

11. In this case, there must be "some basis in fact" to: (1) show the existence of an identifiable class that includes attendees of an Ecole Notre Dame High School; (2) satisfy the related criteria that "the claims of the prospective class members raise a common issue"; and (3) show that a class proceeding would be the preferable procedure for the fair and efficient resolution of such a common issue. "Some basis in fact" is a low threshold, requiring only a "minimum evidentiary basis". However, claims should not be certified if there is a complete absence of evidence to support the criteria.[5]

---

[3] *CPA*, ss 5(3) and (4). **[TAB1, Book of Authorities of the Respondent, Lakeland Roman Catholic Separate School District No. 150, In Response to the Plaintiff's Application for Certification ("BOA")]**

[4] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, at para 103, [2013] 3 SCR 477. **[TAB1]**

[5] *Spring v Goodyear Canada Inc*, 2021 ABCA 182, para 40. **[BOA TAB17]**

12. The evidentiary burden on a certification application must also be discharged by evidence that is admissible in accordance with the normal law of evidence.[6]

13. The burden to show some basis in fact to support the certification order is on the proposed representative of the asserted class.[7] On its review of the Applicant's evidence in this matter, Lakeland Catholic submits that this burden has not been met in relation to the existence of an Ecole Notre Dame High School.

IV. CONCLUSION

14. Lakeland Catholic does not oppose the certification on the terms set out in Schedule "A". If the Court is satisfied that all the certification criteria are satisfied for those terms, the Court has no discretion and is required to certify the action as a class proceeding accordingly.

15. If the Court is satisfied the Applicant has shown a sufficient basis in the admissible evidence demonstrating

    i. the existence of an Ecole Notre Dame high school,
    ii. the common issues the Applicant proposes actually exist in relation to such a high school, and
    iii. those proposed issues can be answered in common across the entire class,

    the Court can consider certifying the "Class" as defined in paragraph 1 b. of the Amended Certification Application, if the Court finds that the other certification criterion would be satisfied for that "Class".

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th day of August, 2024.

DENTONS CANADA LLP

Per: DocuSigned by: Cristina Wendel 267E3B31AB274CD... DocuSigned by: Philip Tinkler D0CDB8F55F2412...

Cristina Wendel, Philip Tinkler,
Counsel for the Respondent (Defendant),
Board of Trustees of Lakeland Roman Catholic Separate School Division

[6] *Ernewein v General Motors of Canada Ltd.*, 2005 BCCA 540, at para 31, leave to appeal to SCC refused, 31218 (23 March 2006) **[TAB2]**; *Spring v Goodyear Canada Inc*, 2020 ABQB 252, at para 89. **[TAB3]**

[7] *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158, at para 25. **[TAB4]**

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August 15, 2024

File No.: 519046-4

VIA E-MAIL: LGrey@gwsllp.ca

Grey Wowk Spencer LLP
5110 – 51 Avenue, Suite 200
Box 1028
Cold Lake, AB T9M 1P3

Attention: Leighton B.U. Grey, K.C.

Dear Mr. Grey:

RE: Cynthia Youngchief v AGC et al
Action No.: 1914 00167

With the August 30, 2024 deadline for filing our supplemental brief in mind, and more generally a desire to avoid an unnecessary attendance in St. Paul for the certification hearing if that is possible, we are writing to propose an agreement with the Plaintiff regarding the proposed certification of this action.

In so doing we note that no further evidence has been adduced that addresses the observation in paragraph 35 of our client's Brief in response to the Plaintiff's certification application filed March 28, 2024 concerning the definition of the class: There is no evidentiary foundation to support a determination that an Ecole Notre Dame High School existed at any material time.

Cynthia Youngchief has deposed that she attended Ecole Notre Dame, a school occupying a single building that served grades 1 through 6. No evidence has been adduced of another school, whether connected to the Ecole Notre Dame Elementary School in some way relevant to the issues the Plaintiff proposes be certified or at all. There is also no evidence that Cynthia Youngchief attended or had any experience or involvement with such another school that would make her an appropriate representative of persons who attended it.

Unless you can point us to such evidence, the legal position is quite clear. There must be a basis in the evidence to establish the existence of the class, as well as the existence of common issues across the class. On the record for the Plaintiff's Amended Application for Certification, the Court cannot certify a class whose definition refers to an Ecole Notre Dame High School.

The Board of Trustees of Lakeland Roman Catholic Separate School District (hereinafter "The Board of Trustees") therefore proposes that The Board of Trustees will agree to not oppose the certification on the following terms:

1. The “Class” or “Class Members” or “Survivor Class” shall be defined as “all Aboriginal persons, wherever they may now reside or be domiciled, who attended Ecole Notre Dame Elementary School in Bonnyville, Alberta, during the Class Period.”

2. A previously proposed “Family Law Class” has been redacted from the Plaintiff’s Amended Amended Statement of Claim filed June 3, 2024 as well as the Plaintiff’s Amended Application for Certification filed June 3, 2024, but for greater clarity and certainty there shall be no certification in respect of the Family Class.

3. The Class Period shall be the period from 1 September 1966 to 28 June 1974.

4. The Representative Plaintiff shall be Cynthia Iris Youngchief.

5. Grey Wowk Spencer LLP shall be appointed as Class Counsel for the Survivor Class.

6. The common issues shall be limited to and certified as follows:

    i. *Whether and to what extent each of the Defendants were involved in the operation and management of the school;*

    ii. *Whether each of the Defendants owed a duty to the Plaintiffs; and*

    iii. *Whether there was a breach of that duty.*

7. There will be no costs payable by The Board of Trustees in respect of the certification application.

8. If certification is granted by the Court the Plaintiff shall amend the Amended Statement of Claim filed June 3, 2024 to reflect the agreed term set out in point 1 above.

We look forward to hearing from you at your earliest opportunity.

Yours truly,

Dentons Canada LLP

DocuSigned by:
Philip Tinkler
D0CDBB8F55F2412...

Philip S. Tinkler
Senior Counsel

PST/lbk

cc: Dentons Canada LLP
Attention: Cristina Wendel (via email to Cristina.Wendel@dentons.com)

SUPREME COURT OF CANADA

CITATION: Pro-Sys Consultants Ltd. *v.* Microsoft Corporation, 2013 SCC 57

DATE: 20131031
DOCKET: 34282

BETWEEN:

Pro-Sys Consultants Ltd. and Neil Godfrey
Appellants
and
Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE
Respondents
- and -
Attorney General of Canada
Intervener

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 143)

Rothstein J. (McLachlin C.J. and LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Atofina Chemicals Inc. (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

[103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[105] Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Ernewein v. General Motors of Canada Ltd.,*** 2005 BCCA 540

Date: 20051103
Docket: CA032430

Between:

Barry Ernewein and Reynolds John Bonneau

Respondents
(Plaintiffs)

And:

General Motors of Canada Limited and General Motors Corporation

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

P.G. Foy, Q.C. and B.W. Dixon — Counsel for the Appellants

J.M. Poyner and P.J. Poyner — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
September 13, 2005

Place and Date of Judgment: Vancouver, British Columbia
November 3, 2005

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Kirkpatrick

> qualifications on those statements, general conclusions, opinions and recommendations.
>
> Taken with the statements I have referred to above within the Berger Report itself, it is clear that there is no basis upon which to admit the contents of the two reports for the truth of their contents. Further, given the contents, it is difficult to imagine what probative value the reports could have for the purposes of this litigation.
>
> The reports and the Ministerial Statement are not admissible for the truth of their contents. If there is some other reason to tender them at trial, I will hear argument at the appropriate time. [paras. 51-53]

[31] Returning to the case at bar, what "evidentiary basis" did the plaintiffs provide on the question of commonality? Certainly the conclusions reached by Mr. Peña set out above at para. 7 would, had they been properly adduced as expert opinion evidence, have provided a basis for a court to conclude that a series of common questions had been raised with respect to the design of motor vehicles with fuel tanks outside their frame rails. But as has been seen, the Chambers judge acknowledged that Mr. Peña's report was "not evidence", and no challenge to that ruling is made by the respondents on this appeal. Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants: see the discussion at paras. 31-52 of ***Epstein v. First Marathon Inc.*** (2000) 41 C.P.C. (4th) 159 (Ont. Sup. Ct. J.).

Court of Queen's Bench of Alberta

Citation: Spring v Goodyear Canada Inc, 2020 ABQB 252

Date: 20200414
Docket: 1401 03496
Registry: Calgary

Between:

Christopher Cole Spring

Applicant/Plaintiff

- and -

Goodyear Canada Inc. and The Goodyear Tire & Rubber Company

Respondents/Defendants

Reasons for Decision
of the
Honourable Madam G.A. Campbell

I. Introduction

[1] The Goodyear Tire & Rubber Company (**Goodyear US**) designs, manufactures and distributes tires.

[2] One of Goodyear's tire models was an all-season, on-/off-road all terrain truck tire that came in a variety of sizes and two versions known as Wrangler SilentArmor and Wrangler SilentArmor Pro-Grade Tires (**Pro-Grade WSA Tires**) (collectively, **WSA Tires**).

[3] WSA Tires were designed specifically for use on automobiles (mainly SUVs and light trucks) and marketed as a particularly rugged tire with enhanced toughness and versatility intended for use in severe driving conditions. Pro-Grade WSA Tires were designed for vehicles subjected to heavy duty vehicle use.

consisted of wording mandated by Transport Canada. At this stage, there is no evidence from Transport Canada or the NHTSA on this wording issue.

[84] The Plaintiff argues that the Recall Notice is an admission that Goodyear made voluntarily to consumers to advise them of a defect in the identified WSA Tires. The Plaintiff points to the criteria used by Transport Canada to satisfy itself in directing Goodyear to issue the Recall Notice and submits that Goodyear had other options that it could have pursued if it objected to the wording suggested by Transport Canada.

[85] The Plaintiff also points to Goodyear's voluntary inclusion of the Recall Notice in its affidavit evidence before the Court. Goodyear's representative Mr Henderson deposed to Goodyear's understanding of the Recall Notice, including its use of the word "defect". In this way, Goodyear relied on the Recall Notice, albeit for a different purpose.

[86] The Plaintiff also says that the Recall Notice is not being presented for the truth of the contents, but rather to show that Goodyear issued the Recall Notice to certain of its purchasers of WSA Tires. The Plaintiff suggests that, at this stage, this is sufficient to show some basis in fact and any further assessment of the Recall Notice is better left to the trial of the merits of the issues.

[87] Certification is not a trial of the merits in which applicable substantive law is a key part of the process. Rather, the focus on a certification application is procedural; the court's task is not to decide whether the plaintiff's claim is likely to succeed but to determine the preferable procedure for how the litigation is to proceed: ***Hollick*** at para 16.

[88] With the exception of the lower standard of proof for the first condition for certification, success on certification requires only "some basis in fact", not "proof of fact", because there can be no proving of substantive facts or a determination of the merits at the certification stage. Certification does not permit a court to extensively weigh or resolve conflicting evidence, assess the merits of the claim, or determine the strength or viability of a proceeding: ***Pro-Sys*** at paras 99–102. Further, if during the proceedings that follow certification, additional information establishes that the conditions for certification are no longer met, then an application can be made to decertify the action: ***Pro-Sys*** at para 105; *CPA* s 11(1)(b).

[89] Nonetheless, evidence tendered on a certification motion must meet the usual standards for admissibility: ***Williams v Canon Canada Inc***, 2011 ONSC 6571 at para 65, aff'd 2012 ONSC 3692; ***Ernewein v General Motors of Canada Ltd***, 2005 BCCA 540 at para 31, leave to appeal to SCC refused 31218 (23 March 2006).

[90] As previously stated, the parties dispute whether the Recall Notice is inadmissible on the basis of being hearsay evidence.

[91] Hearsay is presumptively inadmissible: ***R v Khelawon***, 2006 SCC 57 at paras 34–35. If the evidence is hearsay, then it must be assessed to determine whether it falls within an exception to the hearsay rule or has the requisite indicia of reliability and necessity: ***R v Mapara***, 2005 SCC 23 at para 15; ***Khelawon*** at para 42.

[92] The two defining features of hearsay evidence are that the statement is adduced to prove the truth of its contents and in the absence of a contemporaneous opportunity to cross-examine the declarant: ***Khelawon*** at para 35.

27699

01 295 036

JOHN HOLLICK

- v. -

THE CITY OF TORONTO

- and -

FRIENDS OF THE EARTH, WEST COAST ENVIRONMENTAL LAW ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, THE ENVIRONMENTAL COMMISSIONER OF ONTARIO AND THE LAW FOUNDATION OF ONTARIO
(Ont.) (27699)

CORAM:
The Rt. Hon. Beverley McLachlin, P.C.
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major
The Hon. Mr. Justice Bastarache
The Hon. Mr. Justice Binnie
The Hon. Madam Justice Arbour

Appeal heard:
June 13, 2001

Judgment rendered:
October 18, 2001

Reasons for judgment by:
The Rt. Hon. Beverley McLachlin, P.C.

Concurred in by:

The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major
The Hon. Mr. Justice Bastarache
The Hon. Mr. Justice Binnie
The Hon. Madam Justice Arbour

JOHN HOLLICK

- c. -

LA VILLE DE TORONTO

- et -

LES AMI(E)S DE LA TERRE, WEST COAST ENVIRONMENTAL LAW ASSOCIATION, ASSOCIATION CANADIENNE DES MÉDECINS POUR L'ENVIRONNEMENT, LE COMMISSAIRE À L'ENVIRONNEMENT DE L'ONTARIO ET LA FONDATION DU DROIT DE L'ONTARIO
(Ont.) (27699)

CORAM:
La très honorable Beverley McLachlin, c.p.
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour

Appel entendu:
le 13 juin 2001

Jugement rendu:
le 18 octobre 2001

Motifs de jugement:
La très honorable Beverley McLachlin, c.p.

Souscrivent à l'avis de la très honorable Beverley McLachlin, c.p.:
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour

Counsel at hearing:

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Michael McGowan
Kirk M. Baert
Pierre Sylvestre
Gabrielle Pop-Lazic

For the respondent:
Graham Rempe
Kalli Y. Chapman

For the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment:
Robert V. Wright
Elizabeth Christie

For the intervener the Environmental Commissioner of Ontario:
Doug Thomson
David McRobert

Avocats à l'audience:

Pour l'appelant:
Michael McGowan
Kirk M. Baert
Pierre Sylvestre
Gabrielle Pop-Lazic

Pour l'intimée:
Graham Rempe
Kalli Y. Chapman

Pour les intervenants Les Ami(e)s de la terre, West Coast Environmental Law Association et Association canadienne des médecins pour l'environnement:
Robert V. Wright
Elizabeth Christie

Pour l'intervenant le Commissaire à l'environnement de l'Ontario:
Doug Thomson
David McRobert

Citations

Ont. Ct. (Gen. Div.): (1998), 27 C.E.L.R. (N.S.) 48 (*sub nom. Hollick v. Metropolitan Toronto (Municipality)*), 18 C.P.C. (4th) 394, [1998] O.J. No. 1288 (QL).

Ont. Div. Ct.: (1998), 42 O.R. (3d) 473, 168 D.L.R. (4th) 760 (*sub nom. Hollick v. Metropolitan Toronto (Municipality)*), 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, 31 C.P.C. (4th) 64, [1998] O.J. No. 5267 (QL).

Ont. C.A.: (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (*sub nom. Hollick v. Metropolitan Toronto (Municipality)*), 127 O.A.C. 369, 32 C.E.L.R. (N.S.) 1, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244, [1999] O.J. No. 4747 (QL).

Références

C. Ont. (Div. gén.): (1998), 27 C.E.L.R. (N.S.) 48 (*sub nom. Hollick c. Metropolitan Toronto (Municipality)*), 18 C.P.C. (4th) 394, [1998] O.J. No. 1288 (QL).

C. div. Ont.: (1998), 42 O.R. (3d) 473, 168 D.L.R. (4th) 760 (*sub nom. Hollick c. Metropolitan Toronto (Municipality)*), 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, 31 C.P.C. (4th) 64, [1998] O.J. No. 5267 (QL).

C.A. Ont.: (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (*sub nom. Hollick c. Metropolitan Toronto (Municipality)*), 127 O.A.C. 369, 32 C.E.L.R. (N.S.) 1, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244, [1999] O.J. No. 4747 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Hollick v. Toronto (City)*, 2001 SCC 68. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Hollick v. Toronto (City)*, [2001] x S.C.R. xxx, 2001 SCC 68.

RÉFÉRENCE

Avant sa publication dans le R.C.S., ce jugement devrait être cité en utilisant la référence neutre: *Hollick c. Toronto (Ville)*, 2001 CSC 68. Une fois le jugement publié au R.C.S., la référence neutre sera utilisée à titre de référence parallèle: *Hollick c. Toronto (Ville)*, [2001] x R.C.S. xxx, 2001 CSC 68.

certification motion. The "primary concern", the court wrote, is "[t]he adequacy of the record", which "will vary in the circumstances of each case" (p. 319).

24 In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (emphasis added). While the *Class Proceedings Act, 1992* does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order."

25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see *Report*, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence."). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by

the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at § 4.60.

26 In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification: see also *Abdool v.*