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ONTARIO

SUPERIOR COURT OF JUSTICE

2009 CanLII 3557 (ON SC)

B E T W E E N:	)	
	)	
THADDEUS GRIFFIN	)	*Joel P. Rochon, Patricia LeFebour,* for the Plaintiff
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
DELL CANADA INC.	)	*Malcolm Ruby*, *Nigel Lawson*, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** May 28, 29, 30 and June 3, 2008

Proceeding under the *Class Proceedings Act, 1992*

LAX J.

[1] This is a proposed class proceeding for products liability that arises from the sale of allegedly defective notebook computers that were designed, manufactured and sold by the defendant Dell Canada Inc.

[2] Thaddeus Griffin ("Thad Griffin") and, by intended amendment to the Statement of Claim, his company, 1339850 Ontario Limited ("Griffin Leasing"), are the putative representative plaintiffs in this action. There are two motions before the court. The plaintiffs move to certify this action as a class proceeding pursuant to s. 5 of the *Class Proceedings Act,*

1992, S.O. c. 6 (the "*CPA*"). The defendant moves for a stay of the action pursuant to s. 7(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Arbitration Act*").

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[3] These motions again raise questions about the relationship between s. 5(1) of the *Class Proceedings Act*, which requires a court to certify an action as a class proceeding when the criteria for certification have been satisfied and s. 7(1) of the *Arbitration Act*, which requires a court to stay the proceedings when the parties have agreed to submit their dispute to arbitration. These motions also raise questions about the application of sections 7 and 8 of the *Consumer Protection Act*, 2002, S.O. c. 30 (the "*Consumer Protection Act*") which have the effect of making arbitration agreements in consumer contracts unenforceable and rendering s. 7(1) of the *Arbitration Act* inapplicable to class proceedings.

[4] For the reasons that follow, I conclude:

(a) A class proceeding is the preferable procedure for the resolution of the common issues in this action and the requirements for certification have been met.

(b) The defendant is not entitled to a stay pursuant to s.7 (1) of the *Arbitration Act*.

(c) It is unnecessary to determine whether sections 7 and 8 of the *Consumer Protection Act* apply.

Background

[5] The defendant, Dell, has manufactured and sold notebook computers in Canada to the consumer and business market segments since 1994. The notebook computers at issue are Dell Inspiron models sold in Canada between March 2003 and May 2005. During this period, Dell sold 118,629 Inspiron computers in five different models online and by telephone. The computers were sold to a broad cross-section of Canadians, including residents of all Canadian provinces from all backgrounds, businesses of all sizes and governments. The computers were sold for a multitude of home and business purposes and all came with a one-year limited warranty covering defects in workmanship and materials.

[6] All purchasers had the option of purchasing an enhanced warranty by extending the term or upgrading the scope of the warranty. Dell's Product Information Guide, included with each computer, provided a description of the scope and duration of Dell's standard warranty. In July 2007, Dell voluntarily extended the warranty term for Inspiron 5150 models sold in Canada to September 30, 2007 to afford Canadian purchasers similar treatment as 5150 purchasers in the United States who were offered an extended warranty as part of a settlement of U.S. proceedings. Class proceedings that were brought in the province of Quebec on behalf of all owners of Inspiron 5150 notebook computers residing in Quebec were settled in November 2007 on the basis of a further warranty extension to December 31, 2007.

[7] Dell's Terms and Conditions of Sale ("Terms and Conditions") disclaim express or implied warranties, except as provided in the one-year limited warranty or in any optional enhanced warranty that is purchased at the time of sale. The Terms and Conditions include a mandatory provision that all disputes and controversies be resolved through arbitration administered by the National Arbitration Forum ("NAF") in Minneapolis, Minnesota.

[8] In June 2004, Griffin Leasing leased a new Dell Inspiron 5150 notebook computer from National Equipment Leasing Inc. ("National") primarily for business purposes after looking at various Dell products on Dell's website. The cost was about $2,000. Before the sale transaction was entered into between Dell and National, Griffin, on behalf of Griffin Leasing, personally executed a document in which he specifically agreed to be bound by Dell's Terms and Conditions and acknowledged that the computer was to be used for business purposes. Griffin did not purchase an extended warranty. In February 2006, the computer began to experience overheating problems and eventually failed. National transferred title of the computer to Griffin Leasing shortly after.

[9] Ian Andrews and Kelly Reid are putative class members. Ian Andrews purchased an Inspiron 5160 notebook in November 2004 without an extended warranty for school and personal use at a cost of approximately $1,700.00. He began to experience unexpected shutdown problems in January 2007, about two and one-half years after purchase.

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[10] Kelly Reid's parents purchased an Inspiron 5100 notebook for her without an extended warranty in August 2003 for approximately $1,963.00 for school and personal use. About three years later, her computer experienced a hard drive failure. She replaced the hard drive at a cost of $200.00, but the computer later demonstrated problems of overheating, screen failure and automatic shutdown.

[11] In January 2007, Griffin delivered a Statement of Claim on behalf of a putative class alleging that five models of Dell Inspiron notebook computers sold in Canada were defective. In the draft Second Amended Statement of Claim, which I propose to treat as the pleading for the purpose of these motions, Griffin and Griffin Leasing (the "plaintiffs") allege that the computers were of poor workmanship and quality and unfit for their intended purpose as they were prone to overheating, power failure, inability to "boot up" and prone to unexpected shutdowns. They allege that the computers share common material defects and that the defendant knew of the defective nature of the computers, but failed to disclose this. The causes of action asserted are negligence, breach of contract, unjust enrichment, waiver of tort and breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34. There is a claim for punitive damages.

[12] The plaintiffs seek to have the action certified as a class proceeding on behalf of all individuals and entities in Canada who own, have owned or leased for their own use and not for resale from July 1, 2003, Dell Inspiron 1100, 1150, 5100, 5150 and 5160 model notebook computers. It is estimated that there are about 120,000 class members.

[13] The defendant seeks to have the action stayed under s. 7(1) of the *Arbitration Act*.

Evidence on the Motions

[14] The plaintiffs relied on affidavits from Thad Griffin, Ian Andrews, Kelly Reid and from Sonya Diesberger who is a lawyer at Rochon Genova, the law firm acting for the plaintiffs. She provided evidence that the law firm collected information from more than four hundred putative class members regarding their experience with their Inspiron notebook computers. The database was filed as an exhibit on her cross-examination.

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[15] The plaintiffs also relied on opinion evidence from Steven Fowler, who is an engineer and consultant. He examined the computers of six putative class members – two 5150 Inspiron computers and one computer from each of the other model series. He provided his opinion that the source of the computer malfunctions is improper circuit board soldering and that this defect can be demonstrated to be class-wide.

[16] The defendant delivered affidavits from William Tyrell, a senior manager at Dell and relied on opinion evidence from Dr. John Levy and Dr. Sridhar Moorthy. Dr. Levy has academic qualifications in engineering and computer science and is a consultant to the computer industry; Dr. Sridhar Moorthy has academic qualifications in engineering, statistics and business.

[17] The defendant challenged the admissibility of Mr. Fowler's evidence on two grounds: (1) that he was not qualified to provide expert opinion evidence; and, (2) that the opinion he provided is unreliable. On the question of reliability, Dr. Levy expressed the opinion that Mr. Fowler's testing methodology was unscientific. Dr. Moorthy expressed the opinion that Mr. Fowler did not have a valid statistical basis to conclude from the six computers he examined that all computers in these Inspiron model lines sold in Canada had the same defect.

[18] With this as background, I turn first to the motion for stay.

Motion for Stay

[19] This motion requires a consideration of the interrelationship among the *Arbitration Act*, the *Class Proceedings Act* and the *Consumer Protection Act*.

[20] The *Class Proceedings Act* mandates certification of a class proceeding if the requirements under s. 5(1) are satisfied:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defence of the class members raise common issues;

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(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,
(i) would fairly and adequately represent the interest 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 interest of the other class members.

[21] Section 7 of the *Arbitration Act* states in part:

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

…

2. The arbitration agreement is invalid.

….

[22] Sections 7 and 8 of the *Consumer Protection Act* read in relevant part as follows:

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a

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> class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

[23] Section 1 of the *Consumer Protection Act* defines "consumer" and "consumer agreement" as follows:

> 1. In this Act …
>
> "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes
>
> "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment

[24] Sections 7(2) and 8(1) of the *Consumer Protection Act* expressly incorporate the terms "consumer" and "consumer agreement".

[25] These provisions were proclaimed in force on July 30, 2005. Their effect is to permit consumers to proceed by way of a class proceeding to resolve a dispute arising out of a consumer agreement, regardless of an arbitration agreement and they serve to invalidate the operation of section 7(1) of the *Arbitration Act*. The defendant submits that whether the court can refuse a stay turns on the application of sections 7 and 8 of the *Consumer Protection Act* and advances an arsenal of arguments to demonstrate that these sections do not apply. According to Dell:

- As the plaintiffs' Inspiron computer was purchased by a corporate entity for business purposes, neither Griffin nor Griffin Leasing are "consumers" under the *Consumer Protection Act* and the *Act* has no possible application to them.
- As sections 7(2) and 8(1) incorporate the defined terms "consumer" and "consumer agreement", the only class members who can avoid the arbitration clause are "individuals" who bought an Inspiron computer for "personal, family or household purposes."

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- The triggering event for the application of the arbitration clause is on delivery of the computer as Dell's Terms and Conditions provide that by "accepting delivery", the customer agrees to "be bound by and accept those terms". All members of the class accepted delivery before sections 7(2) and 8(1) came into force on July 30, 2005.

- Dell's right to have all disputes directed to arbitration is a substantive contractual right and the presumption against interference with vested rights applies. The Legislature did not intend to interfere with these rights and sections 7 and 8 do not operate retroactively.

- Section 7 of the *Consumer Protection Act* is limited to rights "to commence an action in the Superior Court of Justice given under this Act." The plaintiffs have sought no substantive or remedial relief under the *Consumer Protection Act*. Their case is based on alleged common law negligence, unjust enrichment, breach of an implied statutory warranty (under the *Sale of Goods Act*), and breach of the *Competition Act*.

- The causes of action asserted in negligence, unjust enrichment, and breach of the *Competition Act* do not "arise out of the consumer agreement". These claims allege negligence in the manufacturing process, omissions by Dell to provide information when marketing the computers, and other general, but undefined, conduct. The negligence and unjust enrichment claims form the basis for the claim in waiver of tort and punitive damages. There is no basis to characterize these remedial claims as a "dispute arising out of a consumer agreement" under sections 7 or 8 of the *Consumer Protection Act*.

[26] The plaintiffs have responses, but I do not need to review them because for the purposes of resolving the stay motion, I am prepared to assume that all of the defendant's arguments are correct. I am prepared to assume that sections 7 and 8 of the *Consumer Protection Act* have no application to the plaintiffs, to class members, or to the causes of action they assert. I am prepared to assume that the arbitration clause in Dell's Terms and Conditions is a valid arbitration clause and that some or all members of the class, including the representative plaintiffs are bound by it. Given the assumptions I am prepared to make, there is no need to analyze the effect of sections 7 and 8 of the *Consumer Protection Act* on this class proceeding or to determine if it applies retroactively.

[27] But this does not end the matter. It leads to the heart of the matter. The heart of the matter is the relationship between s. 5(1) of the *Class Proceedings Act*, which requires a court to certify

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an action as a class proceeding when the criteria for certification have been satisfied and s. 7(1) of the *Arbitration Act*, which requires a court to stay the proceedings when the parties have agreed to submit their dispute to arbitration. The public policies supporting class proceedings and those supporting arbitration would appear to be in conflict. The Ontario Legislature has spoken with respect to consumers and consumer transactions in Ontario, but this has otherwise been the subject of ongoing discussion in Ontario and elsewhere in Canada.

[28] The question was answered by appellate courts in Ontario and British Columbia in two payday loan cases: *Smith v. National Money Mart Company*, (2005), 8 B.L.R. (4th) 159 (Ont. Sup. Ct.), appeal quashed, (2005), 12 B.L.R. (4th) 29 (Ont. C.A.), leave to appeal to S.C.C. refused, [2006] 1 S.C.R. xii ("*Smith*") and *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291 ("*MacKinnon*"). In both cases, the defendant, Money Mart, relying on an arbitration agreement in the loan contracts of putative class members, moved to stay the class proceeding. The motions for stay were dismissed and Money Mart appealed.

[29] The appeal courts determined that a motion for stay for submission to arbitration should be considered as a part of the preferable procedure analysis of a motion for certification. If an action is certified as a class action, an arbitration agreement will fall within an exception to the stay mandated by the arbitration statutes and this renders the arbitration agreement "invalid" in Ontario and "inoperative" in British Columbia. Subsequently, *Smith* was certified as a class proceeding in Ontario in January 2007 and *MacKinnon* was certified as a class proceeding in British Columbia in March 2007 and thus, the arbitration agreements were rendered "invalid" in Ontario and "inoperative" in British Columbia.

[30] A few months later, the Supreme Court of Canada released the decision in *Dell Computer Corp. c. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 and the companion judgment in *Rogers Wireless v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921. Money Mart brought renewed motions for stay before Justice Perell in Ontario and Justice Brown in British Columbia on the grounds that *Dell Computer* and *Rogers Wireless* had changed the law. In Ontario, Justice Perell also had to consider whether the amendments to the *Consumer Protection Act* that were

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proclaimed in force on July 30, 2005, applied retroactively to class members who signed payday loan agreements before this date.

[31] The motions were dismissed within weeks of each other in May and June 2008: see, *MacKinnon v. National Money Mart Company*, 2008 BCSC 710, 293 D.L.R. (4th) 478; *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 2248, 57 C.P.C. (6th) 99 (Sup. Ct.). Neither court accepted the defendants' position that the Supreme Court of Canada overruled previous appellate authority. Both courts concluded that the decisions in *Dell Computer* and *Rogers Wireless* had limited application because the Supreme Court had dealt with interpreting provisions in the *Civil Code of Quebec* and did not purport to interpret other legislation. Both

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courts concluded that it was appropriate to exercise discretion to refuse a stay based on the doctrine of issue estoppel. Justice Perell concluded that sections 7 and 8 of the *Consumer Protection Act* applied retrospectively.

[32] In November 2008, a five-member panel of the Ontario Court of Appeal dismissed Money Mart's appeal of Justice Perell's judgment: *Smith Estate v. National Money Mart Co.*, 2008 ONCA 746, 92 O.R. (3d) 641. The court decided the appeal on the grounds of issue estoppel and did not address Justice Perell's other reasons for refusing a stay.

[33] On the hearing of the motions before me, the defendant also argued that the Court of Appeal decisions in *MacKinnon* and *Smith* no longer applied and that the Supreme Court of Canada's decisions in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 and *Dell Computer* required the court to first determine the question of jurisdiction before going on to decide whether a class proceeding is the preferable procedure. It also drew support from the fact that in *Dell Computer*, the Supreme Court enforced against a putative online purchaser the very arbitration clause that is at issue in these proceedings. After the oral hearing concluded, I requested further written submissions to address the decisions of Justices Brown and Perell.

[34] The defendant seeks to distinguish *Smith* and *MacKinnon* on the basis that the stay motions there were brought after the proceedings had been certified. This is only partially correct. Although the renewed stay motions were brought after certification, Money Mart had brought motions for stay before certification before Justice Brown in British Columbia and Justice Ellen Macdonald in Ontario. The defendants appealed from the dismissal of the motions for stay.

[35] In British Columbia, Justice Levine, writing for a five-member panel of the court said in her judgment:

> [48] The case management judge [referring to Justice Brown] also correctly interpreted the word "inoperative" in the context of a class proceeding, when she said (at para. 32): "... where a proceeding meets the requirements of s. 4 of the *Class Proceedings Act*, the court must certify it as a class proceeding; the arbitration clause is, therefore, inoperative".

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> [53] Thus, the applications for a stay and for certification of the class proceeding must be dealt with together. The outcomes of the two applications are interdependent: the mandatory terms of the *Class Proceedings Act* mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute. On the other hand, if the proceeding is not certified as a class proceeding, there may be no basis for saying that the arbitration agreement is "inoperative".

[36] In Ontario, Justice Weiler said in her judgment:

> [14] My conclusion that the motions judge [referring to Justice Macdonald] correctly held that the legality of the arbitration provision should be determined at the certification hearing and that it is premature to attempt to stay the action beforehand is consonant with the decision of the five judge panel of the British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co.* That panel dismissed the appeal from the dismissal of an application to stay a proposed class action against the same company. The court rejected the "sequential approach" to the interpretation of two statutes. This would have resulted in the validity of the arbitration clause being determined first and only if the clause was "inoperative" under the *Commercial Arbitration Act* would a class action be considered. Instead, the court opted for an examination of the words of both the *Class Proceedings Act* and the *Commercial Arbitration Act* in the context of their schemes and underlying policies and held that such examination should take place at the certification hearing.
>
> [15] Here, at the certification hearing, the Superior Court judge will want to consider the wording of Ontario's *Class Proceedings Act*, the slightly different wording of s. 7(2) of the *Arbitration Act* that permits a judge to refuse a stay if the court finds that the arbitration agreement was "invalid," and s. 7 of the *Consumer Protection Act, 2002*, proclaimed in force July 30, 2005, which states...

[37] The defendant further submits that *Dell Computer* contains important statements of principle applicable to the interplay between class proceedings and commercial arbitration across Canada and makes reference to paragraphs 38-41 where Justice Deschamps outlines the international sources – the New York Convention and the UNCITRAL Model Law – that underlie the laws of Quebec and Canada relating to commercial arbitration. This may be true, but I do not see how the defendant can overcome the fact that there is not one reference in the judgment to the law of other provinces, a point addressed persuasively by Justice Perell in the following paragraphs of his judgment:

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> [237] In *Dell Computer*, Justice Deschamps, who writes the majority judgment, focuses her remarks exclusively to the *Civil Code of Québec*. There is no mention anywhere in her judgment of *MacKinnon v. National Money Mart Company* [or] *Smith* v. *National Money Mart Co.* In their factum and in their material for the motions now before the court, the Defendants make much of the fact that because of the presence of several intervenors from across Canada, the law from across Canada was before the Supreme Court. However, in *Dell Computer*, although the intervenors inundated the Supreme Court with the law from other provinces, the court did not comment and cannot be taken to have ruled on the Ontario legislature's design for the relationship between arbitration agreements and class proceedings, which is, of course, a moving target because the Ontario legislature and the legislatures of the other provinces are free to do something different from Québec. [citations omitted]
>
> [238] The Supreme Court did not purport to address the legislative choices of other provinces. Justice Deschamps does not refer to the law in other provinces or to the submissions of the intervenors. The statutory and common law underpinning of the law in other parts of the country is not mentioned, and I do not understand how it can be that Justice Deschamps' judgment can overturn settled case law in those provinces without actually mentioning it. The Defendants, therefore, develop a thesis at a doctrinal level to "effectively overrule" the case law that the Supreme Court does not mention. As I have demonstrated in this section, the doctrine does not prove their thesis.

[38] Justice Perell provides a detailed, comprehensive and compelling analysis in response to the argument that *Dell Computer* and *Rogers Wireless* “effectively overruled” the previous law and the reader is referred to paragraphs 211 to 288 of the judgment for a complete discussion of the issue. I agree with his analysis and his conclusion that the cases are ultimately cases about statutory interpretation and while the Supreme Court discussed general principles that could be applicable in common law jurisdictions such as the scope of an arbitrator to determine his own jurisdiction, nothing in *Dell Computer* changed the law that a court in Ontario or British Columbia may determine whether to stay or not stay an action within the context of the preferable procedure analysis of a certification motion. Justice Brown reached a similar conclusion.

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[39] Finally, Justice Perell recognized that in Saskatchewan, in *Frey v. Bell Mobility Inc*., 2008 SKQB 79, Justice Gerein applied *Dell Computer* to preclude a consumer class action against several cell phone companies in favour of arbitration, but he did so without any discussion or analysis. This is evident from the decision where Gerein J. said:

> [11] The Supreme Court of Canada has considered the matter of an arbitration clause *vis-à-vis* a class action. On July 13, 2007, they delivered two judgments; namely, *Union des consommateurs et al. v. Dell Computer Corporation* and *Rogers Wireless Inc. v. Muroff* (citations omitted). They are authority for the proposition that a binding arbitration clause removes a dispute from the jurisdiction of a superior court and of necessity precludes participation in a class action. In addition, the validity of the arbitration clause must be referred to an arbitrator in first instance.
>
> [12] I am bound by the cited decisions. Consequently, my decision that the class action prevails cannot stand. It follows that the certification order must be amended.

[40] With respect, I disagree with Justice Gerein. For the reasons given in *Smith* and *MacKinnon* on which I rely, I conclude that the Supreme Court of Canada did not change the law in Ontario or British Columbia. Dell's motion for stay is to be considered in the context of the motion for certification to which I now turn.

Certification

[41] For convenience, I again set out section 5(1) of the *Class Proceedings Act* ("*CPA*"):

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defence of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
> (i) would fairly and adequately represent the interest 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

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

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[42] The *CPA* is a procedural statute for the resolution of mass claims and at its core is the element of commonality. The purpose of a certification motion is to determine how the litigation is to proceed and not whether it can succeed. The question that underlies each of the certification requirements is whether the claims in the action can be appropriately prosecuted as a class proceeding. The plaintiffs must show some basis in fact for each of the certification requirements other than the requirement in section 5(1)(a) that the pleadings disclose a cause of action: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158.

[43] The *CPA* is remedial legislation and in *Hollick*, Chief Justice McLachlin directed the court not to take an overly restrictive approach, but rather to interpret it "in a way that gives full effect to the benefits foreseen by the drafters." She identified three important advantages served by class actions:

> [15] … First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. …

[44] Although the certification requirements are usually discussed separately, they are linked. There must be 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 at para. 14 (Sup. Ct.).

[45] The defendant contested each of the certification requirements, but the overarching theme is that the plaintiffs have shown no basis in fact for a common defect. It disputes that these five different models of computers or their owners are sufficiently similar to support class certification and submits that to overcome plain contractual terms that limit the defendant's liability, the plaintiffs allege untenable tort, unjust enrichment and statutory claims.

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5(1)(a) – Cause of Action

[46] The first criterion for certification is the disclosure of a cause of action. In *Cloud v. Canada (A.G.)* (2005), 73 O.R. (3d) 401, the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. Carey*, [1990] 2 S.C.R. 959 that is used for Rule 21 motions is also used to determine whether the proposed class proceeding discloses a cause of action. Unless the claim has a radical defect or it is plain and obvious that it could not succeed, the requirement in s. 5(1)(a) will be satisfied. This determination is to be made without evidence and claims that are unsettled in the jurisprudence should be allowed to proceed.

[47] As noted earlier, the plaintiffs plead claims in negligence, breach of contract, unjust enrichment, waiver of tort and breach of section 52 of the *Competition Act*. The following material facts are alleged in paragraphs 8, 9 and 10 of the Amended Statement of Claim:

> 8. The Computers share the following common material defects that cause the Computers to shut down unexpectedly or result in an inability to boot up and/or failure of the batteries to hold a charge:
>
> a) inadequate and defective cooling system incapable of managing the heat generated during normal operation of the Computer;
>
> b) Defective motherboard and soldered joints which crack breaking the Computers' power connection and leading to premature failure.
>
> 9. Dell continues to sell replacement motherboards, heatsinks, AC Adaptors, batteries and other parts to Class Members as well as service Computers which experience shutdowns or failure, even though Dell knew or ought to have known of the inherent defects described in paragraph 8.

> 10. Due to the inherent defects and contrary to the manner in which the Computers were warranted, marketed and sold by Dell, the Computers were of poor workmanship, quality and not suitable for their intended purpose.

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[48] The plaintiffs seek declarations that the defendant owed a duty of care to the plaintiffs and other class members (para. 2(b)) and that Dell was negligent in "designing, developing, testing, manufacturing, distributing, marketing, advertising and selling the computers in Canada" (para. 2(c)). The claim seeks general damages for negligence for $50,000,000 or, in the alternative, an Order for disgorgement of all profits earned from the sale of the computers (para. 2(d) and (e)), an Order that Dell reimburse the plaintiffs and class members for their out-of-pocket expenses (para 2 (f)), an Order that Dell refund the purchase price of the computers (para. 2(g)), and punitive damages of $10,000,000 (para. 2(h)).

Negligence

[49] The negligence claim is adequately pleaded and facts that would constitute breaches of a duty of care have been particularized at paragraphs 8 and 13 to 15, but this is a tort claim for pure economic loss. In *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, the Supreme Court of Canada described the five categories of negligence claims for pure economic loss that are recognized. They are:

(a) Independent liability of statutory public authorities;

(b) Negligent misrepresentation;

(c) Negligent performance of a service;

(d) Negligent supply of shoddy goods or structures; and,

(e) Relational economic loss.

[50] The only existing category available to the plaintiffs is the "shoddy goods exception". The defendant submits that the law in this area is clear and that it does not allow recovery in tort for defective products unless there is a concern that the defect causes a substantial danger. It relies on *Hughes v. Sunbeam et al.*, (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal to S.C.C. refused [2003] 1 S.C.R. xi, and submits that the Court of Appeal "unequivocally stated" that the

"shoddy goods" exception for pure economic loss claims only applies to unsafe goods. It also relies on the decision of the Supreme Court of Canada in *Design Services Ltd. v. Canada*, 2008 SCC 22 and distinguishes *Bondy v. Toshiba Canada*, [2007] O.J. No. 784, 39 C.P.C. (6th) 339 (Sup. Ct.) on the basis that the negligence claim in *Bondy* was accompanied by a claim for negligent misrepresentation which is an exception to the general prohibition against claims in negligence for pure economic loss.

[51] In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*, [1995] 1 S.C.R. 85, the court distinguished between construction or products that were defective and those that although defective were not dangerous. Although the underlying rationale for permitting recovery in *Winnipeg Condominium* was safety, La Forest J. was careful not to say that only dangerous defects warrant recovery for economic loss. The court left open the question of liability for non-dangerous defects as questions of quality of workmanship and fitness for purpose did not arise.

[52] *Hughes* concerned a defective smoke detector. The Court of Appeal overturned the motion judge who had struck the claim as disclosing no cause of action because the case fell "on the border" between dangerous and non-dangerous. The smoke detector was not dangerous *per se*, but reliance on a smoke detector that does not detect fires in time to escape injury could be dangerous. The court concluded that an evidentiary record was required and permitted the claim to proceed. In *Hughes*, the underlying rationale for permitting the claim to proceed was also safety, but I do not agree that in permitting that claim to proceed, the court "unequivocally rejected" this kind of claim.

[53] I do not dispute that there is appellate authority that supports the defendant's position: *Blacklaws v. Morrow*, 2000 ABCA 175, 261 A.R. 28; *Brett-Young Seeds Ltd. v. K.B.A. Consultants Inc.*, 2008 MBCA 36, 291 D.L.R. (4th) 688; *Ducharme v. Solarium de Paris Inc.*, [2008] O.J. No. 1558 (Div. Ct.). But see, *Sable Off-Shore Inc. v. Ameron International Corp.*, 2006 NSSC 332, 249 N.S.R. (2d) 122, aff'd 2007 NSCA 70, 255 N.S.R. (2d) 164 where the Nova Scotia Court of Appeal upheld the decision of the motion judge who had refused to strike a pure economic loss claim occasioned by a non-dangerous product. In that case, the defendant

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made a similar argument relying on a number of cases including *Hughes* to support it. About these authorities, the Nova Scotia Court of Appeal said:

> [25] Each of these cases is based on its own unique facts, some dealing with the issue after trial, some on a preliminary motion to strike or add a defendant, some deal with goods alleged to be dangerous, but found not to be, some concern negligent misrepresentation while others do not, and in some, the plaintiffs based their claim as damage to property. None squarely faced the issue, on a motion to strike, of whether the law is sufficiently settled so as to find that an action in tort for the recovery of pure economic loss, for the supply of non-dangerous products, is absolutely unsustainable.

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[54] The issue was squarely faced in *Zidaric v. Toshiba of Canada Limited*, [2000] O.J. No. 4590, 5 C.C.L.T. (3d) 61 (Sup. Ct.) where the motion judge struck the claim for failing to disclose a reasonable cause of action, but in *Gariepy v. Shell Oil Co*., [2002] O.J. No. 2766, 23 C.P.C. (5^{th}) 360 (Sup. Ct.), Nordheimer J. reached the conclusion that the possibility exists that claims for repairs in non-dangerous situations may yet be held to be recoverable and found that the economic loss claim disclosed a cause of action. I appreciate that *Gariepy* was decided before *Hughes*, but in my opinion *Hughes* did not purport to decide the issue. The court acknowledged that *Winnipeg Condominium* left the question open.

[55] In *Hughes*, Laskin J.A. explained why an evidentiary record was required in that case and listed five considerations which individually or collectively might affect the decision to impose liability, including:

> [33] … Hughes claim may be more about product quality than about product defects. A $20 smoke alarm may not perform as effectively as a $100 one. In short, the First Alert smoke detector may not be "defective" at all. For its low cost, it may be giving its owners all the protection they bargained for … *Whether tort law should regulate price and quality issues for products not themselves dangerous may have to be considered in this case.* (Emphasis added)

[56] This case raises a similar issue. The Inspiron computer may not be defective at all, but for its low cost, may be giving its owners the performance they bargained for. The defendant in fact argues that this action is being driven by those class members who did not purchase an enhanced warranty and that tort law should not come to their aid because they had the opportunity to

protect themselves by contract from the risk of economic loss and did not do so. In *Design*

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Services, the Supreme Court of Canada did not recognize tort liability for similar policy considerations and the defendant says they apply equally here. This may well be correct, but the plaintiff in that case had the benefit of an evidentiary record at a trial.

[57] The authors of *Canadian Tort Law*, 8th ed. (Markham: Butterworths, 2006), Allen Linden and Bruce Feldthusen, after discussing the law in the United States, the United Kingdom Australia and New Zealand, state at p. 475 that it is an open question whether Canadian courts will extend recovery in negligence to non-dangerous defects. They divide the Canadian decisions following *Winnipeg Condominium* into three categories, concluding that the "recent trend" is not to allow recovery as a matter of law. The Nova Scotia Court of Appeal points out in *Sable-Offshore* at para. 30 that the test is not whether the recent trend disallows recovery, but whether the claim is certain to fail. In *Hughes*, the court observed that on the present state of the law, the negligence claim would "likely fail". I make the same observation about the negligence claim in this case, but likelihood of success is not the test. Given the test that I must apply, it is not plain and obvious that the negligence claim cannot possibly succeed.

Breach of Contract

[58] The breach of contract claim is based on an implied contractual warranty, either at common law or under the *Sale of Goods Act*, R.S.O. 1990, c. S.1 to supply computers "free of defects in materials or workmanship under normal use during both the warranty period and the normal lifespan of the computers." The plaintiffs allege that Dell breached the contracts by supplying defective computers "that are substantially certain to fail well before their normal lifespan and were not suitable for their intended use." These allegations disclose a cause of action and Dells' objections are matters that can be raised when it delivers a Statement of Defence. The defendant has provided no authority that would support a finding that these allegations do not disclose a cause of action.

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Waiver of Tort/Unjust Enrichment

[59] The only certainty about waiver of tort is that it is an uncertain area of law. The defendant submits that there must be allegations of serious misconduct to give rise to disgorgement remedies and seeks to distinguish this case from the dangerous drug and medical device cases: *Serhan v. Johnson and Johnson* (2004), 72 O.R. (3d) 296 (Sup. Ct.), 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*; Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404, 39 C.P.C. (6th) 153 (Sup. Ct), aff'd (2008), 91 O.R. (3d) 691 (Div. Ct.); *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828, 50 C.P.C. (6th) 133 (Sup. Ct.), aff'd [2008] O.J. No. 1916, 55 C.P.C. (6th) 242 (Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. Sup. Ct.).

[60] In *Tiboni*, after referring to *Serhan*, *Heward*, and *Lefrancois v. Guidant Corp*., [2008] O.J. No. 1397, 56 C.P.C. (6th) 268 (Sup. Ct.), Cullity J. said:

> [61] The important element in the reasoning in the cases just mentioned was the uncertainty in the present state of the law relating to the disgorgement remedy, together with the decisions of the Court of Appeal that, for the purposes of motions to strike under Rule 21.01(1)(b), impose restrictions on the approach to be taken by a motions judge in such circumstances. I see no justification for departing from that reasoning on the basis of the pleading in this case. I note, in particular, that I do not accept the submission of Merck's counsel that the absence of fraud or wrongdoing sufficient to give rise to a disgorgement remedy distinguishes this case from *Serhan*. …

[61] The pleading in that case included allegations that the defendant engaged in a strategy of misinformation and that it denied and concealed the risks in disregard of the safety of consumers. In this case, there are no allegations that the defendant's conduct was harmful, but the plaintiffs allege that Dell made false and misleading representations to the public as to the quality, character and effectiveness of the computers and knowingly distributed defective computers for profit.

[62] In *Heward*, the Divisional Court explains that the waiver of tort doctrine is simply an election by a plaintiff to base a claim in restitution in order to recoup the benefits that the

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defendant has derived from the tortious conduct. The court states that as the modern theory of restitution is based upon the principle of unjust enrichment where it is unnecessary to prove a loss, waiver of tort is arguably available whenever tortious conduct has produced a profit. Indeed, in its view, the wrongful conduct of placing an unfit product on the market may arguably sustain a restitutionary remedy based upon waiver of tort: *Heward* at para. 36.

[63] The defendant argues that the Divisional Court did not intend to change the law as articulated by the House of Lords in *Attorney General v. Blake*, [2000] 4 All E.R. 385 (H.L.) that disgorgement remedies are granted in consumer and commercial cases only "in exceptional cases". Assuming this is correct, how would I know at this preliminary stage whether or not this is an exceptional case? In *Haddad v. Kaitlin Group Ltd.*, [2008] O.J. No. 5127 (Sup. Ct.), Perell J. permitted a plea of waiver of tort in a commercial matter, noting at para. 41 that the main uncertainty about waiver of tort is about the scope of the wrongdoing that will come within the doctrine. In *Serhan*, the majority concluded that as the doctrine was uncertain, there were matters of policy that could not be decided at the pleadings stage, *including its nature and scope* and whether it is an independent cause of action or a remedy for certain torts. These are to be resolved in the context of a complete record after a trial.

[64] Described in *Heward* as an "embryonic" doctrine, it is not possible to know whether the allegations of wrongdoing in this case will be found to sustain a restitutionary remedy based upon waiver of tort, but given that this is an unsettled and novel area of law, it is not plain and obvious that the claim cannot possibly succeed.

Competition Act

[65] Section 36(1) of the *Competition Act* provides a civil right of action for damages caused by conduct contrary to Part VI of the Act. Section 52(1) of the *Competition Act* makes it an offence to knowingly or recklessly make a representation to the public that is false or misleading in a material respect for the purpose of promoting the use of a product or any business interest. The plaintiffs plead that the defendant made false and misleading representations to the public as to the quality, character and effectiveness of the computers. They further plead that the non-

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disclosure of the defects constituted material and misleading misrepresentations. However, they have not pleaded what representations were made as to "quality, character or effectiveness", how they were made, when they were made and by whom they were made. These are simply bald allegations lacking in particularity and deficient in material facts. It is plain and obvious that this claim cannot possibly succeed on the present pleading, but I grant the plaintiffs leave to amend.

[66] The plaintiffs have met the first criterion for certification by pleading tenable causes of action in negligence, breach of contract and waiver of tort/unjust enrichment.

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5(1)(b) – Identifiable Class

[67] The second criterion for certification is the identification of a class on whose behalf the class proceeding is brought. Its purpose 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 at para. 10, 27 C.P.C. (4th) 172 (Ct. J. (Gen. Div.)). Class members are not required to have identical claims and it need not be shown that each class member would be successful in establishing a claim for one or more remedies: *Cloud* at para. 45.

[68] The plaintiffs propose the following amended class definition:

> All individuals and entities in Canada who own, have owned or leased for their own use and not for resale from July 1, 2003, Dell Inspiron 1100, 1150, 5100, 5150 and 5160 model notebook computers.

[69] The defendant has three objections to the proposed class definition: (1) it is over-inclusive because it includes those whose computer never failed and who have no claim against Dell; (2) it includes those whose computers were repaired under warranty and who have exercised a contractual or other right; and, (3) it is unworkable because only those class members whose computers failed and were not repaired under warranty would share an interest in the resolution of the common issues. These objections are variations on the same theme, namely that the class definition includes those who will have no claims either because their computer performed or because, if their computer failed, the defendant repaired it. This is just another way

of saying that there will be members of the class who will not have causes of action because they suffered no harm. This point was addressed by Cullity J. in *Tiboni* where he said:

> [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.

[70] In products liability cases, the scope of the proposed class should not normally be in dispute as the relationship between the class and the common issues is clear from the facts: *Hollick* at para. 20. I believe it is clear in this case. The class definition is acceptable subject to a few comments. The opening date for class membership should be the same as the opening date for the sales period, which was March 2003. There should be a closing date for membership which can be the date that notice of certification is given: *Matoni v. C.B.S. Interactive Multimedia (c.o.b. Canadian Business College)*, [2008] O.J. No. 197 at para. 86 (Sup. Ct.); *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252 at para. 97 (Sup. Ct.). The proposed definition includes putative class members in Quebec, but as a class action there for owners of the Inspiron 5150 notebook computer has settled, I am uncertain why they have been included. Subject to amending the definition to take account of these concerns, I am satisfied that it meets this requirement for certification.

5(1)(c) – Common Issues

[71] 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 (Sup. Ct.), aff'd, [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.). The underlying question of a common issue is whether the resolution of the 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.

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[72] 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.

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

> (a) whether the Defendant owed the Plaintiff and the Class a duty of care to ensure that the Computers were of merchantable quality, free from defects and fit for their intended purpose;
>
> (b) if so, whether the defendant breached its duty of care to the Plaintiff and the Class;
>
> (c) whether the Defendant breached s. 52 of the *Competition Act*;
>
> (d) whether the Defendant breached its warranty to the Plaintiff and the Class;
>
> (e) whether the Defendant is liable to the Plaintiff and the Class in damages and, if so, in what amount;
>
> (f) whether the class can elect to have damages determined through a disgorgement of the proceeds of the sales of the Computers sold to Class members. If so, in what amount and for whose benefit is such accounting to be made?
>
> (g) whether the Defendant is liable for punitive damages and, if so, in what amount; and;
>
> (h) whether pre-judgment interest is payable by the Defendant and, if so, at what rate.

Common Issues (a) and (b)

[74] The plaintiffs contend that the Inspiron computers of this model series are subject to common design and manufacturing defects that render them inoperable to the user and that it is possible to demonstrate this on a class wide basis. They rely on the expert evidence of Steven

Fowler who was retained to provide an opinion on the computer defects pleaded in the Statement of Claim and to determine the extent of alleged manufacturing defects through an examination of a sampling of computers from class members. He concluded that the computers' problems of unexpected shutdowns, inability to boot up and inability of the battery to hold a charge are a result of two common manufacturing defects: (a) inferior soldering quality; and (b) poor design of the case that permits excessive flexing and leads to premature breaking of the solder joints. He produced photographs of the disassembled computers that appear to show inadequacies in the soldering techniques and explained how this would cause the operational problems described by class members. There is uncontradicted evidence that laptop computers are more vulnerable to impact issues due to the stress of mobile use and the flexion of the keyboard from pressing on the unit. Mr. Fowler's evidence is that Dell did not manufacture a system robust enough to withstand the stress of the computer's intended and normal mobile use.

[75] The defendant challenges the admissibility of Mr. Fowler's evidence on the basis that he lacks the necessary qualifications to give an opinion and that his testing methods were unscientific and unreliable. I am asked to exclude the evidence and conclude that without it, the plaintiffs have not met their evidentiary burden to show a basis in fact for a common defect.

[76] The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).

Mr. Fowler's Qualifications

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[77] Mr. Fowler graduated from the University of South Carolina with a Bachelor of Science in Engineering in December 1973. Thereafter, he joined W. R. Grace and Company as an engineer in 1974 in their “Cryovac” division, a division of Grace that manufactured packaging material. In 1978, Mr. Fowler was appointed as an engineering manager at Cryovac and held this position until he left Grace in 1991. After leaving Grace, he worked briefly in a sales position for

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United Technical Products where he marketed conductive flooring relying on his electrostatics expertise and in 1993, established a consulting business that mainly focuses on radiation safety and electrostatic discharge.

[78] Mr. Fowler's current registration as an engineer comes from the National Association of National Association of Radio and Telecommunications Engineers or NARTE which is a "professional telecommunications association" that certifies qualified engineers and technicians in fields of telecommunications, electromagnetic compatibility/interference, product safety, electrostatic discharge, and wireless systems. Mr. Fowler's own curriculum vitae states that he is a "NARTE Certified ESD (or electrostatic discharge) Control Engineer."

[79] In his curriculum vitae, his sworn affidavits, and in his report, Mr. Fowler stated that his degree is a "Bachelor of Science in Computer and Electrical Engineering" and/or a "B.S. in Electrical Engineering." This is untrue. He has a general bachelor of science degree in engineering with no special designation in either electrical or computer engineering. He also claimed to be the head engineer of W.R. Grace for 20 years when he was not.

[80] In his affidavits, Mr. Fowler suggested that he was uniquely qualified to give evidence in this matter because he had provided an expert opinion for counsel for plaintiffs in the United States in litigation concerning the Dell Inspiron 5150 computer and that he was an expert witness in legal proceedings against Dell in the United States. The retainer involving Dell in the United States did not involve providing a written report or testimony. The opinion was given orally in a telephone call with U.S. counsel and Mr. Fowler was not deposed or a witness in that case.

[81] The exaggeration and misstatement of his qualifications and experience casts doubt on Mr. Fowler's credibility and on the weight to be given to his opinion. However, my task is not to assess the strength of his credentials or the probity of his evidence, but to decide if he has some special knowledge or experience that qualifies him to give an opinion on solder integrity. While Mr. Fowler is not an electrical or computer engineer as he claimed and has not published articles on solder techniques, he does have many years of engineering experience that involves design, manufacturing and maintenance of electronic components for process machinery and electronic

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devices and failure analysis of major systems and printed circuits, including component, wiring and solder failures. He has designed and patented a device for hearing impaired persons which used various soldering techniques for the microprocessor and memory circuits. In my opinion, he has the requisite experience to express an opinion on the computer defects pleaded in the Statement of Claim.

Mr. Fowler's Methodology

[82] The defendant challenges the reliability of Mr. Fowler's testing procedure and adduced evidence from Dr. Levy that Mr. Fowler did not follow standard procedure as his methodology cannot be replicated. Dr. Moorthy disputed that Mr. Fowler could project from a sample of six computers to the entire population of Inspiron computers generally, or to specific models, the existence of common manufacturing defects. It seems to me that these criticisms challenge the ultimate accuracy and reliability of Mr. Fowler's opinion, but not its threshold reliability. Mr. Fowler's opinion is based on his observations of poor soldering quality of the motherboard of a sampling of computers representing the five Inspiron models and by conducting pressure tests to simulate the failures described by class members. His testing methodology may be found to be inadequate to support his conclusions, but for the purposes of the certification motion, they are acceptable. As the defendants' computers are manufactured in accordance with Dell's standard manufacturing process, Mr. Fowler asserts that it is reasonable to extrapolate his findings to all other Inspiron computers of the models in issue in this action.

[83] Even if I were to ignore Mr. Fowler's opinion that the computers have a common soldering defect, I would nonetheless conclude that the plaintiffs have met their minimum evidentiary burden. The database that is an exhibit to Ms Diesberger's affidavit records information that has been collected from more than 400 putative class members. The defendant did not object to this evidence as inadmissible evidence but as insufficient evidence, pointing out that there are other kinds of repair complaints and that some users had no complaints. This is correct, but the vast majority of complaints are consistent with the problems described by Griffin, Andrews and Reid and with the observations of Mr. Fowler when he operated the computers in his laboratory. The persistence and remarkable similarity of the complaints in

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relation to each of the five models across such a large group of users amount to some evidence that there is reason to believe that the computers have a defect that interferes with their normal operation. The plaintiffs have satisfied the commonality requirement with respect to common issues (a) and (b). I would, however, rephrase these issues to read as follows:

> (a) Were the Dell Inspiron 1100, 1150, 5100, 5150 and 5160 model notebook computers of merchantable quality, free from defects and fit for their intended purpose?
>
> (b) Did the defendant owe a duty of care to the class members? If so, what was the standard of care? Did the defendant breach the standard of care?

Common Issue (c)

[84] Section 52 requires proof that there has been "a representation to the public that is false or misleading in a material respect". There are no allegations in the Statement of Claim sufficient to disclose a cause of action and the plaintiffs have provided no factual basis to support this as a common issue. The plaintiffs rely on *Bondy v. Toshiba*, but in that case, there was a representation that the computers were "the ultimate multimedia machine" and there was evidence that the computers were unable to perform the complex and difficult tasks that were represented. Here, there is evidence that the computers did not perform, but the plaintiffs produced no evidence that any representations were made to the public about how they would perform. In the absence of some evidence that the defendant made representations that were false and misleading, there can be no common representation and I reject this as a common issue.

Common Issues (d), (e), (f) (g) and (h)

[85] Common issue (d) relating to the question of warranty was neither addressed in the plaintiffs' factum nor in argument. During the defendant's oral submissions, Mr. Rochon said that he was seeking to certify a common issue based on an implied contractual warranty of fitness, but he did not return to this in reply or propose wording. As it stands, proposed common issue (d) is ambiguous and I will not certify it as a common issue, but the plaintiffs are granted leave to propose an amendment. I also will not certify common issue (e) on damages in its

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present form. While the plaintiffs have put forward sufficient evidence to show that liability in negligence or liability to account could be established as common issues, I agree with the defendant that any question of damages will be an individual issue unless the preconditions for an aggregate assessment are satisfied. This has not been proposed nor was it addressed. Common issue (f) relating to disgorgement and common issue (h) relating to pre-judgment interest are both acceptable.

[86] Common issue (g) relates to punitive damages. The defendant objects on the basis that there is no evidentiary foundation and relies on *Ragoonanan v. Imperial Canada Ltd.*, [2005] O.J. No. 867 (Sup. Ct.) as authority. Reliance on *Ragoonanan* is misplaced. In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, McLachlin C.J.C. accepted that an award of punitive damages on a class-wide basis may often be appropriate as it is premised on an inquiry into a defendant's conduct rather than its effect on class members. In *Ragoonanan*, Cullity J. would have certified punitive damages as a common issue if he had certified the common issues on liability. It was only because he did not certify the common issues on liability and compensatory damages that he refused to certify a claim for punitive damages. The defendant objects to the certification of this issue because the pleading of punitive damages lacks particularity and could not possibly give rise to this remedy. This is relevant to the merits of the claim, but not its commonality. It is appropriate to certify common issue (g).

[87] I have made some minor amendments to common issues (f) (g) and (h) and the list of common issues that I accept is set out below:

> (a) Were the Dell Inspiron 1100, 1150, 5100, 5150 and 5160 model notebook computers of merchantable quality, free from defects and fit for their intended purpose?
>
> (b) Did the defendant owe a duty of care to the class members? If so, what was the standard of care? Did the defendant breach the standard of care?
>
> (f) Can the class, or any subclasses, elect to have damages determined through a disgorgement of all or part of the gross revenue, or alternatively of the net income from the sale of the Inspiron 1100, 1150, 5100, 5150 and 5160 notebook computers in Canada? If so, in what amount and for whose benefit?

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(g) Should the defendant pay punitive damages and, if so, in what amount and how should punitive damages be distributed?

(h) Should the defendant pay pre-judgment interest and, if so at what rate?

[88] The heart of this litigation is the alleged negligence of the defendant. Common issue (a) was described in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at para. 42, 193 D.L.R. (4th) 67 as "the first step in every products liability case alleging negligent design, manufacture, or marketing." There are a significant number of Inspiron owners who represent all five models and describe the same problems: overheating, intermittent shut-down, failure to boot up and inability of the battery to hold a charge. There is some evidence that these operational problems are due to a design and/or manufacturing defect. It is not unreasonable to think that the Inspiron computers that were sold in Canada between 2003 and 2005 were designed and manufactured according to common specifications and processes and a defect, if there is one, would be class-wide. I acknowledge that the expert evidence is weak, but not so weak as to conclude that there is no evidence to submit to the trier of fact given the low threshold the plaintiffs must meet. In the context of the entire claim, the resolution of questions relating to the defendant's alleged negligence will, if the plaintiffs are successful, significantly advance the action, reduce the scope of the individual trials that remain and likely promote settlement.

5(1)(d) – Preferable Procedure

[89] In *Hollick*, Chief Justice McLachlin, said that the *CPA* is to be construed generously and directed lower courts to avoid taking an overly restrictive approach to its interpretation at the certification stage. The court found that the preferability requirement can be met even where there are substantial individual issues. At least since the 2004 decision of the Ontario Court of Appeal in *Cloud*, it has been recognized that this is a qualitative and not quantitative inquiry and that it is essential to assess the importance of the common issues in relation to the claim as a whole. The *Hollick* principles were summarized by Rosenberg J.A. in *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, 85 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. dismissed, [2007] 3 S.C.R. xii:

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> a) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> b) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> c) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

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[90] The defendant submits that the individual issues are significant and will far outweigh and overwhelm the common issues. This is a familiar refrain in contested class proceedings, particularly in negligence actions, but I do not agree that the so-called “multitude of individual issues” makes this proceeding unmanageable. I believe that the trial judge will be able to fashion efficient and fair procedures using the extensive powers and discretion conferred on the court by section 25. Whether and to what extent, other factors contributed to the computer failures are questions that can be determined at individual mini-trials, references or by other methods as directed by the trial judge. There is no reason to think that the defendant’s rights will be compromised in any way.

[91] Idiosyncratic and difficult issues of causation and damages did not prevent certification in *Bywater*, *Cloud*, *Tiboni*, *Medtronic*, *Lefrancois*, *Heward*, and *Andersen v. St. Jude Medical Inc.*, (2003), 67 O.R. (3d) 136 (Sup. Ct.). These are all cases where disparate harm to class members required individual assessments of causation and damage. Each case must be decided on its own facts, but in my view the individual causation and damage issues in this case are much less complex and difficult.

[92] It is fanciful to think that any claimant could pursue an individual claim in a complex products liability case. The defendant does not propose the alternative of individual actions, but relying on the arbitration clauses in Dell’s Terms and Conditions, submits that adjudication through arbitration administered by “NAF”, the National Arbitration Forum, is preferable to a

class proceeding. Adjudication through arbitration is simply a form of individual adjudication and each claimant will be required to bring separate proceedings before an arbitrator or arbitration panel instead of in the courts. This will achieve maximum judicial economy, but this is not what the legislators had in mind: *Markson* at paras. 73-74.

[93] NAF is a U.S. – based administrator of alternative dispute resolution services in Minnesota. NAF's Code of Procedure governs all arbitrations and while NAF offers several methods of dispute resolution including a documentary hearing, the arbitration process under its Code is a formal and relatively expensive process that includes discovery and can involve a full participatory hearing with oral testimony and argument. It is not the kind of process that would be easy for class members to navigate without legal representation. The multitude of individual issues that Dell says is involved in determining liability will inevitably lead to more complex and therefore more costly arbitration hearings, disproportionate to the small amounts in issue. I do not believe that class members will embark on a NAF arbitration to adjudicate their disputes with the result that Dell will effectively be immunized from accounting to class members for any wrong it may have caused. Access to justice will not be served. On the other hand, aggregating similar individual actions in a class proceeding avoids unnecessary duplication of fact-finding and analysis and distributes fixed litigation costs among class members, making it economical to prosecute this claim, thereby improving access to justice.

[94] The class action is an important tool to discipline those who cause widespread but individually minimal harm: *Western Canadian Shopping Centres* at para. 29. This was aptly put by Cullity J. in *Tiboni* and I adopt his words:

> [110] … As in other cases of products liability, a successful prosecution of this case as a class proceeding would act as a warning, and as a deterrent, to manufacturers and vendors tempted to subordinate their obligations to consumers – and their duties of care – to their profit-making objectives. To that extent, the continuation of the proceeding as a class proceeding will accord with the objective of behavioural modification.

[95] In order to meet the preferability requirement, the plaintiff is not required to show that there is a fair, efficient and manageable method of *resolving* the claim, but only that there is a

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fair, efficient and manageable method for *advancing* the claim. A class proceeding in this case achieves this goal and meets the objective of judicial economy.

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

[96] Griffin and Griffin Leasing are the proposed representative plaintiffs. The court must be satisfied that the proposed representative plaintiff will vigorously and capably prosecute the interests of the class: *Western Canadian Shopping Centres* at para. 41. I do not think there is much to the defendant's objection that Griffin lacks motivation to vigorously represent the class because he deposed that he was not in a position to take time away from his business to pursue arbitration.

[97] The defendant claims that Griffin/Grffin Leasing cannot adequately represent the interests of the class because they have no contractual privity with Dell and cannot assert claims based on breach of contract or the *Sale of Goods Act*. This argument is misconceived. First, the doctrine of privity is developing and it is not plain and obvious that the plaintiffs have no cause of action for breach of an implied warranty: *London Drugs Ltd. v. Kuehne & Nagel Int. Ltd.*, [1992] 3 S.C.R. 299, discussed in *Caputo* at paras. 22 and 23. Second, as the representative plaintiffs have valid causes of action against the defendant, they can assert a cause of action against the defendant on behalf of other class members provided that the causes of action all share a common issue of law or fact: *Healey v. Lakeridge Health Corp*., [2006] O.J. No. 4277, 38 C.P.C. (6th) 145 (Sup. Ct.); *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075, 14 C.C.L.T. (3d) 233 (Sup. Ct.), aff'd (2003), 64 O.R. (3d) 208 (Div. Ct.). Here, there is a nexus between the representative plaintiffs and class members because they all purchased or leased the identical product from the same manufacturer. The requirement in *Ragoonanan* and *Hughes* that there must be a valid cause of action against each defendant named in a class action does not apply here.

[98] The defendant further disputes that the plaintiffs are suitable representative plaintiffs to advance a claim under the *Consumer Protection Act*. I found it unnecessary to address the scope and application of the *Consumer Protection Act* for the purposes of the motion for stay. I also find it unnecessary to address this on the motion for certification. The plaintiffs' Second Amended Statement of Claim pleads and relies upon the *Consumer Protection Act*, but the plaintiffs have not sought any substantive or remedial relief under the *Consumer Protection Act*.

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They have not pleaded any material facts to give rise to any claim under the *Act*. They did not seek to certify any common issue for breach of the *Act*. It is therefore irrelevant that Mr. Griffin does not personally have a claim under the *Act*.

[99] During argument, Mr. Rochon advised that he would be seeking to add another representative plaintiff, possibly Mr. Andrews or Ms Reid. Although I believe Mr. Griffin is a suitable representative plaintiff who has no conflict with other class members, his circumstances differentiate him from other class members and it would probably be prudent to add another plaintiff who was a direct purchaser rather than a lessor. As Mr. Griffin ordered his computer by telephone, it might also be prudent to select someone who made an online purchase. The plaintiffs are granted leave to bring a motion to add an additional representative plaintiff or plaintiffs.

Litigation Plan

[100] The production of a workable litigation plan serves a two-fold purpose: (a) it assists the court in determining whether the class proceeding is the preferable procedure; and (b) it allows the court to determine if the litigation is manageable: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Sup. Ct.), aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.). The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed: *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Sup. Ct.) at para. 76.

[101] I have little doubt that this will be complex litigation and as such, a more detailed litigation plan is called for. This is a proposed national class that potentially comprises 120,000 individuals, corporations and government agencies, but the plan put forward is skeletal. There is insufficient detail to assess how Rochon Genova as class counsel proposes to manage litigation of this scope. The plan fails to address steps following a common issues trial except in a vague manner and provides scant detail of the proposed resolution of individual claims. Under the heading, "Distribution of Global Damages", there is reference to an Administrator receiving "the

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claim form", while under the heading "Individual Issues/Valuation Determination", it is proposed that each class member who seeks general and/or special damages will send a claim form to Rochon Genova. The plan provides no detail of the resources the law firm has to administer a claims process of this dimension to ensure that the interests of class members are protected and there is no analysis of the resources that will be required to litigate the class members' claims to conclusion. At several points, the plan simply proposes that issues will be addressed by agreement of the parties or by seeking direction from the court.

[102] While a litigation plan is a work in progress, a plaintiff must nonetheless put forward a plan that demonstrates that the litigation is workable. Little thought has gone into this plan. It is cursory at best and fails to satisfy section 5(1)(e)(ii) of the *CPA*. This will not result in the dismissal of the motion. As the plaintiffs have met the other requirements for certification, I believe it to be appropriate to certify the action conditionally, subject to the plaintiffs producing an acceptable litigation plan.

Conclusion

[103] Subject to the plaintiffs satisfying the above condition, I certify this action as a class proceeding as contemplated by these reasons. In view of the certification order and irrespective of the application of the *Consumer Protection Act*, the motion for stay is dismissed for reasons given on the motion for stay.

[104] Apart from the condition that the plaintiffs must satisfy, there are other outstanding matters to be resolved before the formal certification order can be taken out. These can be discussed and possibly resolved at a case conference to be arranged by the parties. If the parties cannot come to an agreement with respect to costs, this can also be addressed at the conference.

LAX J.

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COURT FILE NO.: 07-CV-325223D2[Toronto]
DATE: 20090203

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THADDEUS GRIFFIN

Plaintiff

- and -

DELL CANADA INC.

Defendant

REASONS FOR JUDGMENT

LAX J.

Released: February 3, 2009

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