THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2007 SKCA 47 Date: 20070502

Between: Docket: 1148

Larry Hoffman. L.B.Hoffman Farms Inc., and Dale Beaudoin

Appellant

- and -

Monsanto Canada Inc. and Bayer Cropscience Inc.

Respondent

Coram:
Cameron, Gerwing, and Sherstobitoff JJ.A.

Counsel:
Terry J. Zakreski for the Appellant
Gordon J. Kuski, Q.C. and Richard W. Danyliuk for Monsanto Canada
Robert W. Leurer, Q.C. and Jason Mohrbutter for Bayer Cropscience

Appeal:

From:	2005 SKQB 225
Heard:	December 11, 2006
Disposition:	Appeal Dismissed
Written Reasons By:	The Honourable Mr. Justice Cameron
In Concurrence:	The Honourable Madam Justice Gerwing
	The Honourable Mr. Justice Sherstobitoff

CAMERON J.A.

[1] The question on this appeal is whether an action taken by the appellants against the respondents merited certification as a class action under *The Class Actions Act*, S.S. 2001, c. C-12.01. The action was ostensibly taken on behalf of numerous organic grain farmers for the recovery of damages alleged to have been suffered by them as a result of the introduction by the appellants of strains of genetically modified canola for use by farmers generally.

I. THE BACKGROUND

[2] The appellants, Larry Hoffman, L.B. Hoffman Farms Inc., and Dale Beaudoin are farmers who grow grain without the use of chemical fertilizers, herbicides, pesticides, and genetically modified organisms. As such, they are certified as "organic" grain farmers by private organizations involved in the business of marketing organically grown produce.

[3] There are six such organizations active in Saskatchewan, some of which are companies, others cooperatives, and still others associations. They maintain standards for "organically grown" produce and, under contract to grain farmers, certify them as "organic" grain farmers if they meet those standards. This enables these farmers to market their grain as "organically grown."

[4] The respondents, Monsanto Canada Inc. and Bayer Cropscience Inc., are companies engaged in the manufacture and distribution of fertilizers, pesticides, and herbicides, as well as the development and marketing of herbicide-resistant forms of canola. Canola is a variety of oilseed grown in

Western Canada and elsewhere in North America. In the mid 1990s, following several years of Canadian field testing, each of the companies introduced a genetically modified strain of canola into the Province of Saskatchewan and elsewhere in Canada. They did so with the endorsement of the Government of Canada, which approved the unconfined release of these strains of canola.

[5] Thus in 1995, Bayer Cropscience introduced “Liberty Link” canola, which had been genetically modified to resist glufosinate ammonium-based herbicides made by the company. Thereafter, the company began to sell Liberty Link canola to farmers and to license seed companies to incorporate it into their canola seed.

[6] In 1996 Monsanto did likewise. It introduced “Roundup Ready” canola, which had been genetically modified to resist glyphosate-based herbicides made by it. Thereafter, the company began to market Roundup Ready canola under license permitting farmers to grow it on condition they not reproduce it and on the footing the company retained ownership of the gene.

[7] Both Liberty Link and Roundup Ready canola soon found widespread acceptance among grain framers, for the successful production of canola on a commercial scale is particularly difficult without resort to chemical herbicides. But the practice of employing genetically modified organisms in agricultural production did not sit well with everyone, including the organizations involved in the certification of organic grain farmers in Saskatchewan. Between 1999 and 2000, some three to five years after the introduction of Roundup Ready and Liberty Link canola, these organizations decided to largely prohibit the presence of genetically modified organisms in organically grown crops and revised their standards accordingly.

[8] By then Monsanto had gained approval to field test a form of genetically modified wheat, raising fears in some quarters that wheat, the largest of all crops, was soon to go the way of canola. Among those concerned was an organization known as the Saskatchewan Organic Directorate-Organic Agriculture Protection Fund. It opposed Monsanto's initiative but had no right of action against the company. Nor did it have a right of action against Bayer Cropscience or Monsanto regarding the introduction of genetically modified canola. So, it arranged with the appellants, as individual farmers, to commence a class action against the companies aimed at stopping the introduction of genetically modified wheat and limiting the spread of genetically modified canola, both of which were alleged to be harmful to the interests of organic grain farmers and contrary to law. They commenced their action in January of 2002.

[9] Not long afterwards, Monsanto abandoned its initiative regarding genetically modified wheat. This destroyed the basis for the action as it pertained to wheat but not canola. As it pertained to canola, the action had a number of weaknesses. The Government of Canada had approved the unconfined release of Roundup Ready and Liberty Link canola well before the action was commenced. And the private organizations in the business of certifying organic grain farmers did not have any standards in place regarding the presence of genetically modified organisms until well after Roundup Ready and Liberty Link canola had been made available and become widely accepted. Only then did these organizations amend their standards to preclude the presence of genetically modified organisms in grain marked as "organically grown." Moreover, the companies do not grow canola but only make their varieties of seed available to farmers wishing to do so. Despite these weaknesses, those in control of the action decided to press on with it.

[10] The statement of claim alleges that the appellants and other organic grain farmers suffered financial losses as a result of the introduction and commercial use of Roundup Ready and Liberty Link canola. More particularly, the statement of claim alleges that these strains of genetically modified canola, which are open-pollinating, inevitably find their way onto their fields, thus preventing them from producing and marketing organically grown canola, and putting them to extra expense in producing other organically grown crops.

[11] The statement of claim goes on to allege that the companies are liable for these losses on the bases of negligence, nuisance, and trespass. In addition, the statement of claim alleges that the companies are liable on the bases of *The Environmental Management and Protection Act*, S.S.1983-84, c. E-10.2, and *The Environmental Assessment Act*, S.S. 1979-80, c. E-10.1. The claim alleges that each of Roundup Ready and Liberty Link canola constitute a "pollutant" within the meaning of *The Environmental Management and Protection Act* and that each was "discharged" into the environment contrary to this *Act*. The claim also alleges that the testing and unconfined release of these varieties of canola amounted to a "development" within the meaning of *The Environmental Assessment Act*, a development that did not have ministerial approval as required by this *Act*. In consequence, the companies are alleged to be liable for the losses sustained by the appellants, and liable to declaratory relief declaring their conduct unlawful.

[12] The action, while taken in the names of the appellants as representative plaintiffs, is in fact driven by the Saskatchewan Organic Directorate-Organic Agriculture Protection Fund. Indeed, the Organic Agricultural Protection Fund, acting through a committee or committees, instructed counsel and assumed control of the action pursuant to agreements with the appellants.

According to the agreements, the appellants agreed to be "named as plaintiffs", to relinquish control of the action, to attend court when required, and to produce all relevant information. In so agreeing, they obtained indemnities, indemnifying them against any costs that might be awarded against them for "acting as plaintiff[s]" in the action.

[13] Following the commencement of the action, counsel applied to the Court of Queen's Bench to certify the action as a class action under *The Class Actions Act.* In doing so, counsel identified the class as follows: All organic grain farmers in Saskatchewan who were certified as organic grain farmers, at any time between January 1, 1999 and the date of certification of the action as a class action, by any one of six named private certification companies, cooperatives, or associations.

[14] In support of the application, counsel filed a document identifying some twenty issues of fact and law said to be common to the claims of the class. Counsel also filed a litigation plan which proposed that the appellants be named representative plaintiffs but which also made it clear that the action would be funded by, advanced on the advice of, and controlled by the Organic Agricultural Protection Fund and its various arms, including its corporate and public relations committees.

[15] To succeed in their bid for certification, the appellants had to meet the prerequisites of section 6 of the *Act*:

> 6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class;

> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
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> (d) a class action would be the preferable procedure for the resolution of the common issues; and
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> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> > (i) would fairly and adequately represent the interests of the class;
> >
> > (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[16] The certification application came before Madam Justice Smith, then a judge of the Court of Queen's Bench, now a judge of this Court. It proved troublesome on several fronts. The causes of action were admittedly novel in many respects, and the class was difficult to identify, for it was difficult to conceive of many members of the defined class having a claim, and difficult to define the class relative to the causes of action and the proposed common issues. Identifying the common issues raised by the claims of the class members was correspondingly difficult. Moreover, the action was being driven not by the appellants, who were nominal plaintiffs only, but by the Saskatchewan Organic Directorate and especially the Organic Agriculture Protection Fund.

[17] Both sides introduced a good deal of evidence, and both made extensive submissions, all of which made for a thorough certification hearing. As it turned out, the appellants failed to satisfy Justice Smith that the requirements of section 6 had been met.

[18] To begin with, she was not satisfied the pleadings disclosed a cause of action, except under *The Environmental Management and Protection Act, 2002,* S.S. 2002, c. E-10.21 and *The Environmental Assessment Act.*

[19] In her view it was conceivable that the release of Roundup Ready and Liberty Link canola constituted the "discharge" into the environment of a "substance" having an "adverse effect" upon the environment, contrary to *The Environmental Management and Protection Act, 2002.* It was also conceivable, in her view, that the introduction of these forms of canola constituted a "development" within the meaning of *The Environmental Assessment Act,* a development that had not received prior ministerial approval and was, therefore, undertaken contrary to the *Act.*

[20] This was of no consequence, however, for she was not satisfied that any of the other requirements of section 6 of *The Class Actions Act* had been met. She was of the view the class as defined was not appropriately identifiable in the sense it was over inclusive in some respects, and under inclusive in others, and was not sufficiently related to the causes of action and the common issues. She was also of the view the common issues were not suitably identified and that a class action would not be the preferable procedure. In addition, she was of the view the appellants were not suitable representatives, given the fact they were nominal plaintiffs only and had relinquished control of the action to the Saskatchewan Organic Directorate-Organic Agriculture Protection Fund. In consequence she dismissed the application.

[21] At that, the appellants applied for and obtained leave to appeal.

II. THE APPEAL

[22] The appeal was taken on the specific grounds Justice Smith misapplied section 6 of *The Class Actions Act* in concluding that: 1) the pleadings, with the aforementioned exceptions, did not disclose a cause of action; 2) there was not an adequately identifiable class; 3) the claims of the class members did not raise common issues appropriate to the occasion; 4) a class action was not the preferable procedure; and 5) the appellants were not suitable representatives.

[23] The appeal raises a host of specific issues having to do with each of these conclusions. Since it is incumbent upon an applicant seeking to have an action certified as a class action to satisfy ***each*** of the several requirements of section 6 of *The Class Actions Act,* it is necessary to the success of the appeal for the appellants to convince this Court that Justice Smith erred in relation to ***all*** of the requirements.

[24] Beneath the specific issues raised by the first ground of appeal lies a more general issue: Whether Justice Smith adopted an excessively rigorous approach to determining if the pleadings disclosed a cause of action as required by section 6(a).

[25] We propose to address the appeal along the lines suggested by the grounds of appeal, beginning with the first and continuing with the others to the extent it proves necessary to do so.

1. Did Justice Smith misapply section 6(a) of *The Class Actions Act*

    (a) by adopting an excessively rigorous approach to the application of section 6(a); or

(b) by concluding that the pleadings disclosed no cause of action except under *The Environmental Protection Act, 2002* and *The Environmental Assessment Act*?

[26] (a) The question regarding the approach to s.6(a)

[27] It should be said at the outset that thoroughness is not to be confused with excessive rigour. Justice Smith examined the issues underlying the certification application with great care, including those to which section 6(a) gave rise. But that is not to say she adopted an excessively rigorous approach when applying section 6(a). Whether her approach was more rigorous than contemplated by the *Act* turns on the tests or standards she employed, not on the thoroughness with which she addressed the issues.

[28] In considering whether the pleadings disclosed a cause of action as required by section 6(a), she resorted to the "plain and obvious test", a test traditionally associated with the application of Rule 173(a) of *The Queen's Bench Rules* and its like. Rules such as these empower the courts to strike out a pleading as failing to disclose a reasonable cause of action or defence as the case may be. The test employed by the courts in the application of such Rules is described in *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959:

> …[A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat." Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. [p. 980]

[29] Having identified this as the test used by the courts in applying the likes of section 6(a), Justice Smith observed that on applications for certification of an action as a class action, unlike applications to strike out pleadings, the onus is on the representative plaintiff to demonstrate that the pleadings disclose a cause of action, not on the defendant to demonstrate otherwise.

[30] She then referred to a number of embellishments that have found their way into the case law regarding the nature of the "plain and obvious test" as it applies to the likes of section 6(a), including these: (i) the test does not amount to "preliminary merits test"; (ii) it posits a "very low threshold"; (iii) it is not to be engaged to the end of preventing "novel claims" from proceeding; (iv) it suggests a "generous" and "accommodating" view of the pleadings; and (v) it requires the defendant to show, plainly and obviously and "beyond doubt", that the action "could not succeed." (See Ward Branch, *Class Actions in Canada* (Looseleaf) (Toronto: Canada Law Book Inc., 2006) at 4-10 to 4-150; *Edwards* v. *Law Society of Upper Canada* (1994), 36 C.P.C. (3d) 116 (Ont. Ct. (Gen. Div.)); *Abdool* v. *Anaheim Management Ltd*. (1995), 121 D.L.R. (4th) 496 (Ont. Ct. (Gen. Div.)); and *Daniels* v. *Canada (Attorney General*) (2003), 230 Sask. R. 120 (Q.B))

[31] She went on to acknowledge that, while the embellished version of the test made for an increasingly "generous" approach to the application of section 6(a), it remained necessary to pay close attention to the pleadings when determining if they disclose a cause of action, bearing in mind the burden on the member of the class commencing the action to properly plead the cause or causes upon which the action is founded: *Tottrup* v. *Lund et al*., [2000] 9 W.W.R. 21 (Alta. C.A). With this in mind, she said that, while she would allow for flexibility in relation to possible amendments to the pleadings,

she did not intend "to relieve the plaintiffs of the general obligation to allege sufficient facts to support each element of the causes of action pled", adding that is not enough for the plaintiffs "to argue simply that the area of law at issue is complex and evolving and that the court should therefore refrain from determining the question until it has all the evidence at trial before it."

[32] This, then, is the test, or these the standards, she identified as applicable in determining whether the pleadings disclosed a cause of action as required by section 6(a). And she approached the issue on that basis.

[33] We are of the opinion that she cannot be said to have adopted an excessively rigorous approach. Indeed, the "plain and obvious test", which bears heavily in favour of the pleadings disclosing a cause of action, is of questionable application to section 6(a). This is especially so of the embellished version of the test, so even if the test should be taken to apply, notwithstanding what was said of the matter by the Supreme Court of Canada in *Western Canadian Shopping Centres* v. *Dutton*, [2001] 2 S.C.R. 534 at pp. 556-557, the embellishments should be left aside. This is so because much of the gloss put on the test can be misleading.

[34] It can be misleading, for example, to simply say the test does not amount to a "preliminary merits test." True, section 6(a) does not require an applicant for class action certification to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class." This particular "preliminary merits test" was once proposed in relation to legislation of this nature, only to be rejected in favour of the simple requirement that the pleadings disclose a cause of action. (See, *Hollick* v. *Toronto (City)*, [2001] 3 S.CR. 158 at p.170). In consequence,

section 6(a) is not to be seen as requiring an applicant for certification to verify the facts as pleaded, by affidavit or otherwise. Instead, the facts as pleaded are to be taken at face value. In this sense, confined to the factual merit of the cause of action, it is true that section 6(a) does not envision subjecting the pleadings to a "preliminary merits test."

[35] But that is about as far as one can go with this notion, for it remains necessary under section 6(a) for a judge to be satisfied that the pleadings disclose a cause of action. This must mean it remains for the judge, having accepted at face value the *facts* as pleaded, to be satisfied the facts as pleaded give rise to a cause of action in *principle*, for these are the two fundamental components of a cause of action. It has become clear in the light of *Cooper* v. *Hobart*, [2001] 3 S.C.R. 537, and *Edwards* v. *Law Society of Upper Canada*, [2001] 3 S.C.R. 562, that the likes of section 6(a) allow for testing the basis in principle of the cause of action. In this sense, which has to do with merit in principle as distinct from fact, it is not accurate to say that section 6(a) does not envision subjecting the pleadings to a preliminary merits test.

[36] *Cooper* and *Edwards* make it equally clear that the likes of section 6(a) are not to be regarded as precluding inquiry into "novel claims" when confronted with the issue of whether the pleadings disclose a cause of action. The legal novelty or complexity of a claim is not to be seen as standing in the way of such inquiry, nor seen to preclude a determination that the pleadings do or do not appear to disclose a cause of action.

[37] Nor is it particularly helpful to say that section 6(a) posits a "very low threshold," unless by this is meant that it is not difficult for competent counsel

to plead an authentic cause of action, and plead it appropriately in accordance with the rules and purposes of pleading. If this expression is meant to convey some further notion, however, it too can be misleading, for it can be taken to suggest that section 6(a) is to be applied with little if any vigour even in relation to principle. Again, *Cooper* and *Edwards* demonstrate that this is not so, for the basis in principle underlying the pleadings in those cases was vigorously examined, and the causes of action were found on the face of them to be lacking legal merit.

[38] Then there is the added gloss supplied by the supposed need to take a "generous" and "accommodating" view of the pleadings. The rationale for this is difficult to fathom, bearing in mind: (i) that the facts as pleaded are assumed to be true; (ii) that the pleadings are open to proper amendment; (iii) that the elements of a cause of action are a matter of law; and (iv) that the task at hand is to inquire into whether the facts as pleaded appear to give rise in law to the cause or causes of action relied upon. As Justice Smith aptly observed, this permits the court to "evaluate the legal basis of the plaintiffs' claim on the most optimal view of the facts, presupposing the plaintiffs have, in the pleadings, stated their factual case at its highest." More is not required.

[39] To all of this is added the further gloss that the defendant must show, plainly and obviously and "beyond doubt", that the action "could not succeed." This despite the repeated statement that the "plain and obvious test", as it applies to the likes of Rule 173, also applies to the likes of section 6(a), but with this difference: When it comes to the latter, the onus is on the applicant as representative plaintiff to show that the pleadings disclose a cause of action, not on the defendant to show otherwise. Obviously, there is something amiss here, something requiring explanation. But, while it is often

said that the "plain and obvious test" applies to the likes of section 6(a), subject to this difference, the difference is rarely explained, and the explanation is difficult. Indeed, it serves to cast doubt on the propriety of bringing this test to bear on the application of section 6(a).

[40] The difficulty flows from the fact the "plain and obvious test", as it applies to Rule 173, comes to bear upon a *negative* proposition: the pleadings do *not* disclose a reasonable cause of action or defence as the case may be. And the test posits a standard against which that proposition falls to be addressed. Thus a defendant who applies under Rule 173 to strike out a pleading bears the burden of satisfying the judge that the pleadings plainly and obviously do not disclose a reasonable cause of action.

[41] But what about a representative plaintiff who applies for the certification of a class action and must satisfy the judge that the pleadings disclose a cause of action as required by section 6(a)? Here the complexion of the matter changes, for the test is brought to bear upon a *positive* proposition: that the pleadings *do* disclose a cause of action. Does this mean the representative plaintiff has to satisfy the judge that the pleadings plainly and obviously disclose a cause of action? Not according to the cases. Still, the cases state that the "plain and obvious test" applies. And still, they state that the onus is on the representative plaintiff to show that the pleadings disclose a cause of action, not on the defendant to show otherwise.

[42] There seems no way to reconcile this conflicting state of affairs short of recognizing that the true import of bringing the "plain and obvious test" to bear on section 6(a) is to create a presumption in favour of the pleadings disclosing a cause of action, a rebuttable presumption open to rebuttal by the

defendant, not on the basis of fact, but on the basis the pleadings plainly and obviously do not disclose a cause of action in principle. Which raises the question of whether such a presumption was intended by the Legislature.

[43] It is clear from the historical development of class action legislation that the Legislature did not intend to saddle an applicant for certification with the burden of demonstrating, by affidavit or otherwise, a reasonable possibility that the facts as pleaded will be resolved in favour of the representative plaintiff at trial. Were it otherwise, the Legislature would have opted for a "preliminary merits test" in relation to fact. To that extent, which is to say to the extent the "plain and obvious test" posits a presumption that the facts as pleaded are capable of proof, the test may be fitted to the application of section 6(a), though it is unnecessary to have resort to the test for this purpose. It is enough to construe section 6(a) to this effect, having regard in particular to the historical development of the legislation. In other words, the absence of a "preliminary merits test" in relation to fact is itself a sufficient indication of such legislative intent.

[44] Beyond that, it becomes difficult to fit the "plain and obvious test" to the application of section 6(a), for it is difficult to conceive of the Legislature having intended to create a presumption in favour of the pleadings disclosing a cause of action in principle, as distinct from fact, a presumption capable of rebuttal only on a plain and obvious standard. Neither the nature and purpose of section 6(a), nor the overall purposes of the *Act* suggest such intention.

[45] Section 6 is essentially a screening mechanism, the purpose of which is to allow an action to proceed as a class action provided it is suitable for class action treatment. So far as the section extends to screening the *cause of action*,

as contemplated by paragraph (a), it may be taken to be aimed at allowing an action to proceed as a class action provided the applicant for certification satisfies the judge that the class has what appears to be an *authentic* cause or causes of action. This is consistent with the purposes of the *Act*, which lie in improved access to justice, litigation efficiency, and modification of behaviour by wrongdoers. None of these purposes is served by allowing an action to proceed as a class action unless the class appears to have a genuine cause or causes of action. Indeed, the purposes are otherwise undermined.

[46] That the pleadings disclose what appears to be a genuine cause of action takes on an added measure of significance in class action regimes that preclude an award of costs, as does the Saskatchewan regime. Section 40 of *The Class Actions Act* expressly precludes an award of costs on a class action except in the face of misconduct. The exception aside, the object of the section is to remove from this form of litigation the risk of an adverse award of costs in the event of failure. This is a significant financial risk, one which serves as a disincentive in relation to individual litigation. Obviously, the Legislature wanted to remove this risk, and this disincentive, from class actions, having regard for the overall purposes of the *Act* and their furtherance. Its removal can, however, serve as an incentive to the unscrupulous to commence less than genuine actions for the primary purpose of pressuring the defendant into a settlement, a settlement induced not by fear of being found to have engaged in any wrongdoing but by concern over the enormous cost associated with class action litigation. There is an obvious need to guard against such mischief in the interests of furthering, not distorting, the purposes of the *Act*, and of maintaining respect for, and confidence in, the class action regime.

[47] Given the nature and purpose of section 6(a) as a screening mechanism, designed to operate in a no-cost-recovery environment, it seems improbable that the Legislature should have intended to create not only a presumption that the facts as pleaded are capable of proof but also a presumption that the facts as pleaded give rise to a cause of action in principle—a rebuttable presumption open to rebuttal by the defendant but only on a plain and obvious standard. The first is readily appreciated. The second is more difficult to appreciate for the reason (additional to those already mentioned), that it has the effect of shifting the burden from the applicant, where it ordinarily lies, to the respondent, where it lies only exceptionally, and this without express provision to that effect in section 6.

[48] It is well to bear in mind that section 6 clearly contains a set of preconditions to the certification of an action as a class action, preconditions that may be seen to be concerned with the apparent genuineness of the claim (as in paragraph (a)), and its suitability for class action treatment (as in paragraphs (b) to (e)). On the face of it, the section expects the applicant to meet these preconditions to the satisfaction of the judge, meaning the applicant bears the burden of persuading the judge that each of the preconditions has been met. It would be anomalous to suppose that this is so in relation to the preconditions found in paragraphs (b) through (e), but not so of the precondition found in paragraph (a).

[49] This is not to say the burden regarding the requirement of paragraph (a) is onerous or otherwise. It is merely to say that it rests with the applicant barring deviation from the norm, but there is no indication in these provisions of an intention to deviate from the norm in relation to paragraph (a) but not paragraphs (b) though (e). Nor should it be thought, in light of the purposes

of the *Act*, that this is expecting too much of the applicant, for the applicant has only to satisfy the judge that the class has an apparently authentic cause of action based on the facts as pleaded and the law that applies. Unless the applicant can satisfy the judge of this, who would say the action should be certified as a class action, and to what legitimate end?

[50] Understood in this light, we are of the opinion Justice Smith correctly identified the essential nature of the matter when she said that, assuming the facts as pleaded are true, the representative plaintiffs must persuade the court that there exists a plausible basis for supposing the defendants could be liable to the claims of the class. This is a way of saying, simply and effectively, that the representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies. This also has the advantage of restoring balance to the screening process so far as it extends to the cause of action.

[51] There is a similar way to express a similar idea. In Quebec, the court is called upon to authorize a class action by a representative plaintiff if the court is of the opinion the facts as alleged seem to justify the conclusions sought: Article 1003(b) of the *Code of Civil Procedure*, R.S.Q., c. C-25. This was taken by the Supreme Court of Canada, in *Guimond* v. *Quebec (Attorney General)*, [1996] 3 S.C.R. 347, to require the judge to be satisfied that the action bears "a serious colour of right."

[52] In other contexts, the law requires that a party asserting a certain position make out a "*prima facie*" case of right, or show that there is a "genuine case to be tried", or that the case has an "air of reality" about it in principle, before being entitled to have the case advanced in one way or

another. These are all general expressions of a standard suitable to an occasion, a standard upon which a proposition falls to be addressed and determined. None are meant to serve as precise or exhaustive formulations. They are meant, instead, to set the tenor and tone of the matter.

[53] In the case of section 6(a) of *The Class Actions Act*, which calls upon a representative plaintiff to satisfy a judge that the class has an apparently authentic or genuine cause of action, there is in our judgment no more effective and balanced and functionally appropriate way of setting the tenor and tone of the matter than to expect the representative plaintiff to satisfy the judge that there exists a plausible basis in principle and presumed fact for supposing the defendants could be held liable.

[54] On the whole, then, we see no tenable basis for resort to the "plain and obvious test" in relation to section 6(a) of the Saskatchewan statute. The test might be resorted to for the limited purpose of supplying the presumption the pleadings disclose a cause of action in fact, as distinct from principle, but even then it serves no useful purpose, for the section itself falls to be so construed. In short, we think the test is best left to Rule 173, where it was designed to operate and where it has long operated effectively.

[55] That then brings us to the issue raised by the second branch of the first ground of appeal, and to whether Justice Smith erred in concluding that the pleadings did not disclose a cause of action, except in the two respects earlier referred to.

(b) The question respecting the causes of action

[56] Justice Smith began her consideration of whether the pleadings disclosed a cause of action with the following observation:

> [35] It is clear that the principal challenge faced by the plaintiffs in relation to this criterion is to persuade the Court that there is a plausible basis for imposing on the defendants' liability for losses the plaintiffs may have suffered as a result of the adventitious presence of GM canola in crops or fields of organic grain farmers, and for losses related to the fact that the standards imposed by third parties (organic certifiers or organic markets) might prohibit the use or presence of GMOs in relation to commodities marketed as organic.
>
> [36] The magnitude of this challenge is evident. In virtually every case, the plaintiffs conceded in argument that the cause of action asserted was in at least some respects novel, and relied heavily on the position that, given the novelty of the claim, it should be left for the trial judge to consider whether this is an appropriate case to expand the legal category at issue. This presents a recurring issue which is addressed in the discussion that follows. While the issue can only be determined in the context of the cause of action, in general I have concluded that it is open to the Court in this application, as it is under an application under Rule 173(a), to address the question of whether a novel claim has a reasonable prospect for success. Such determinations have been made on applications such as this, as I will demonstrate below. In some cases the Court may conclude that the matter ought to be determined in the context of a full evidential inquiry. In others, the facts to be assumed in support of the cause of action asserted are entirely clear and this Court as well as appellate courts will be at no disadvantage in addressing the issue on this application.

[57] Having thus noted that each of the causes of action was novel in some respects, she went on to painstakingly consider each of them, beginning with the common law causes of action in negligence, nuisance, and trespass.

(i) negligence, nuisance, and trespass

[58] In considering whether the pleadings disclosed a cause of action in these respects, Justice Smith first identified the governing body of principle in each instance and then applied it to the cause of action as pleaded, concluding in each

instance that the pleadings did not disclose a cause of action. Her analysis is found at pages 19 through 48 of her reasons for judgment as reported at (2005), 264 Sask. R. 1. We can find no material error of principle in her reasons, nor any material error in her application of the governing principles to the causes of action as pleaded. Indeed, we largely agree with her analysis. In our judgment, then, there is no tenable basis for interfering with her conclusion to the effect the pleadings did not disclose an apparently genuine cause of action in negligence, nuisance, and trespass.

[59] By way of brief elaboration, we may say we agree with her application of the principles of *Anns* v. *Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined in *Cooper* v. *Hobart* and *Edwards* v. *Law Society of Upper Canada, supra*. In our opinion she correctly concluded that the pleadings did not disclose a relationship of sufficient proximity to give rise to a *prima facie* duty of care of the nature of that pleaded and, even it were otherwise, there are sound policy reasons for negating the duty in view of the fact the federal government had approved the unconfined release of Liberty Link and Roundup Ready.

[60] The fact each of the defendants, after years of Canadian field testing, obtained the approval of the Government of Canada to the unconfined release of their varieties of genetically modified canola provides a powerful policy reason for not fastening on them the duty of care as pleaded. As a matter of law, this approval entailed compliance with a federal statutory scheme made up, among others, of the *Seeds Act*, R.S.C. 1985, c.S-8; the *Feeds Act*, R.S.C. 1985, c. F-9; and the *Food and Drugs Act*, R.S.C.1985, c. F-27.

[61] Moreover, the fact the standards of the several organizations involved in the certification of organic grain farmers did not extend to genetically

modified organisms at the time of the commercial release by the defendants of Roundup Ready and Liberty Link canola serves to undermine the notion that the defendants could be held liable in negligence for the losses identified in the pleadings. It is of considerable significance in this regard that these were standards set by private organizations in the business of certifying under contract to organic grain farmers; that genetically modified canola is known to be open-pollinating; and that these standards were amended to include genetically modified organisms only after the commercial release of Roundup Ready and Liberty Link canola.

[62] To suppose the defendants could be found liable in the face of these facts is to suppose too much of the law of negligence. In other words there is no plausible basis for supposing the defendants could be liable in negligence.

[63] As for the causes of action in nuisance and trespass, and again by way of brief elaboration, we agree with Justice Smith that they lack proper foundation and do not, therefore, provide a plausible basis for supposing the defendants might be liable on the bases of these torts. The defendants are not alleged to have grown Roundup Ready and Liberty Link canola. Rather, they are alleged to have made these varieties of canola seed available to farmers who then grew it on their own lands, which is to say on lands occupied or controlled by them not the defendants. As Justice Smith noted: “The implications of holding a manufacturer, or even inventor, liable in *nuisance* for damage caused by the use of its product or invention by another would be very sweeping indeed.”

[64] She went to note that so far as the cause of action lay in trespass, the plaintiffs conceded that, if direct interference with the land of another is required, the pleadings did not disclose a cause of action. She also noted that, even if one were to

adopt a liberalized view of the requirement for direct interference, the cause of action in trespass still lacked a proper foundation, for even then an action in trespass did not lie against the defendants as inventors and marketers of Roundup Ready and Liberty Link canola.

(ii) the statutory causes of action

[65] Justice Smith considered these in the same painstaking way, first identifying and interpreting the applicable provisions of each of the statutes, then applying the provisions to the causes of action as pleaded. She concluded that the pleadings did not disclose a cause of action in relation to *The Environmental Management and Protection Act,* but that they did disclose a limited cause of action in respect of *The Environmental Management and Protection Act, 2002* and a more complete cause of action in relation to *The Environmental Assessment Act.* Her analysis appears at pages 48 through 68 of her reported reasons for judgment. As her reasons disclose, she was doubtful that the pleadings disclosed a cause of action respecting the latter statutes but gave the benefit of the doubt to the appellants as plaintiffs.

[66] We are not satisfied she erred in her analysis regarding the cause of action founded on *The Environmental Management and Protection Act.* Indeed, we agree with her analysis. As for *The Environmental Management and Protection Act, 2002,* we note that it came into effect on October 1, 2002, some six or seven years after Roundup Ready and Liberty Link were introduced. In view of this, the appellants conceded before Justice Smith that their cause of action under this *Act* reduced to one for the recovery of clean-up costs associated with ridding their lands of volunteer Roundup Ready and Liberty Link canola plants. So reduced, there is comparatively little left of this cause of action. Still, the appellants wished to press on with it, and to have it tried in the context of a class action to be pursued on behalf

of the class as defined.

[67] With respect, this is unrealistic. Section 4 of *The Environmental Management Protection Act, 2002* prohibits the "discharge of a substance" into the environment in such amount, concentration, level, or rate as to cause an adverse effect upon the environment, but only to the extent such discharge is not expressly authorized by this *Act*, *by Act of Parliament*, or by regulation. Section 15 goes on to confer a private right of action for the recovery of compensation from persons responsible for the "discharge of a substance" into the environment. Applying these provisions to the release of Roundup Ready and Liberty Link canola, the unconfined release of which was approved pursuant to *an Act of Parliament*, it is virtually impossible to conceive of the pleadings disclosing any cause of action under this *Act*. Indeed, we are of the opinion there is no plausible basis in principle for the claim the defendants are liable on this basis.

[68] That leaves the cause of action founded on *The Environmental Assessment Act*. Section 8 of the *Act* requires a proponent of a "development" to obtain ministerial approval before proceeding with the development. The term "development" is defined in section 2 with reference to six criteria, five of which Justice Smith found to be inapplicable in light of their content, the content of the pleadings, and the thrust of the case law. The remaining criterion has to do with activity that is likely to cause widespread public concern because of potential environmental changes. Justice Smith thought it conceivable that the field testing and introduction of Roundup Ready and Liberty Link canola might constitute a "development" on the basis of this criterion.

[69] But the pleadings, which had been amended from time to time, did not in fact allege that the testing and introduction of these forms of canola was likely to have

caused widespread public concern over their environmental impact. Indeed, the pleadings disclose that these forms of canola found widespread acceptance and that even the organizations engaged in the business of certifying organic grain farmers were not concerned about the presence of genetically modified organisms in "genetically grown" grain until well after the introduction of Roundup Ready and Liberty Link canola. Only later, some three to five years later, did they alter their certification standards in this regard. Accordingly, it is difficult to say the pleadings disclose a genuine cause of action in this respect.

[70] Still, there is more to the matter than this, given the remaining indicia of what constitutes a development within the meaning of the *Act*, so it may be something could be made of this cause of action. In light of what follows, however, we do not find it necessary to determine the matter.

[71] That brings us to the next ground of appeal.

2. Did Justice Smith misapply section 6(b) of *The Class Actions Act*?

[72] The issue she was called upon to decide was whether the class as defined constituted an "identifiable class" within the contemplation of section 6(b) of the *Act*. She examined this issue with the same thoroughness as before. Her analysis appears at pages 68 though 84 of her reasons for judgment as reported at (2005), 264 Sask.R.1. As her reasons reveal, this is an issue of law, fact, and application of law to fact. As her reasons also reveal, she drew extensively upon the case law in deciding the issue, including the case law supplied by the leading authority, namely *Hollick* v. *Toronto (City)*, *supra*. She also drew extensively upon the evidence before her and made a number of findings of fact based on that evidence. On the whole, she concluded that the class as

defined by the application for certification did not constitute an "identifiable class" within the contemplation of section 6(b).

[73] Once again, we can find no tenable basis for interfering with her decision. In our judgment, she did not err in principle or fact, at least in any material respect, and did not err in the conclusion she reached. Indeed, for the reasons she expressed, we agree with her conclusion.

[74] She recognized that the class as defined in the application for certification was capable of being identified by reference to *objective criteria*, as required in principle, though in view of the evidence before her regarding the potential makeup of the class, she foresaw some difficulty in applying the definition to the end of achieving the objectives of clear class identification. Still, she was prepared to accept the class as sufficiently well identified, provided the additional requirement for appropriate identification was met, namely that there existed *a rational connection between the proposed class, the proposed cause or causes of action, and the proposed common issues*.

[75] She noted that this additional requirement has often been interpreted to mean that all members of the class must at least have a "colourable claim", and that the class definition should not be "over inclusive", sweeping in those who do not have a claim against the defendants, or "under inclusive", excluding arbitrarily those who share the same cause or causes of action. This is consistent with the case authority to which she referred and is in keeping with what was said of the matter by this Court in *Toms Grain & Cattle Company et al.* v. *Arcola* (2006), 279 Sask R. 281.

[76] She went on to recognize that this additional requirement leads to overlap in determining whether there is an identifiable class as contemplated by section 6(b); whether the claims of the class members raise common issues as envisioned by section 6(c); and whether a class action is the preferable procedure as called for by section 6(d). Nevertheless, she thought it was possible to sufficiently isolate the first of these matters from the others for the purposes of determining whether, in this instance, the class was neither over inclusive nor under inclusive based upon the evidence before her, and what that evidence did or did not establish in fact.

[77] She then went on to examine the relationship between the proposed class and the two principle claims in the statement of claim: (i) the claim for loss by organic farmers of a market for organic canola due to the alleged inability to produce, or to guarantee, a crop free from the adventitious presence of genetically modified canola; (ii) the claim for loss, including clean-up costs and other restrictions on organic production imposed by private certifiers, caused by the presence of volunteer genetically modified canola in organic fields. She examined this relationship on the basis of the evidence before her and what, in her judgment, the evidence established or failed to establish.

(i) market loss

[78] As for the relationship between the class as defined and the alleged loss of market for organically grown canola, she reached the following conclusion:

> [234] It is my conclusion that, while there may be some individual farmers within the proposed class who have suffered loss due to the inability, or perceived inability, to produce canola sufficiently free from GMO contamination to be marketed as

> organic, there is no evidence before me to indicate that all, a majority, or even a significant minority, of the proposed class of all organic grain farmers certified by one of the six named private certifiers have suffered such a loss. Only farmers who have had an organically grown crop of canola rejected because of GMO contamination, or farmers who, but for the risk of rejection due to GMO contamination, would have grown organic canola but did not, and thereby suffered a loss, have even a colourable claim pursuant to the statement of claim. All of the evidence before me indicates that there are many reasons why an organic farmer might choose not to grow canola, that these vary widely according to the circumstances of the farmer, and that there are no objective criteria by which one could determine whether an individual farmer would have grown canola but for the risk of GMO contamination. Further, there is no evidence before me to support a conclusion that the number of such farmers would be large. There is evidence of only one instance of an organic canola crop having been rejected by a buyer due to GMO contamination, and in this case the crop was sold to another buyer as organic. Attempts to solicit additional evidence have been to no avail.

[79] She went on to observe that, while a class definition is not necessarily over inclusive because it includes *anyone* not having a claim, it remains appropriate to have regard for the fact it includes *some* not having a claim, as in *Hollick* v. *Toronto (City),supra,* and *Mouhteros* v. *DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) (cited with approval in *Hollick*). She then referred to the special difficulties that arise with respect to class definition when establishing the existence of a claim requires individual inquiry, as explained in *Lau* v. *Bayview Landmark Inc.* (1999), 31 O.T.C. 220; 40 C.P.C. (4^{th}) 301 (Sup. Ct.) (cited with approval by this Court in *Toms Grain & Cattle Company et al.* v. *Arcola, supra*).

[80] At that, she concluded by saying this:

> [238] In addition to these problems, it must be recalled that the plaintiffs seek to define the class temporally, i.e., to include all organic grain farmers certified from 1996 to the date of certification. This definition would clearly include organic grain producers and even organic canola producers who were certified at a time when they were subject to no GMO restrictions either by their individual certifiers or by the export markets into which they sold organic canola. The evidence before me establishes that even today organic canola is grown and marketed as organic. There is no evidence of any loss predating Mr. Hoffman's claim that in 1997 he would

> have grown organic canola but did not due to the risk of contamination. It is clear that the class is, from a temporal perspective, overly broad.

[81] We are of the opinion that the foregoing is sound in principle, that the conclusions are amply supported by the evidence, and that accordingly there exists no basis for interference on appeal.

(ii) clean-up costs

[82] Speaking to the relationship between the class as defined and the claim for loss consisting of clean-up costs associated with volunteer plants and so on, Justice Smith noted that this claim was advanced as something of an afterthought; that the evidence adduced in support of the requisite relationship was rather wanting in the sense that only four instances of volunteer growth of genetically modified canola were identified; and that the appellants sought to generalize the claim as extending to the entire class on the basis of statistical evidence of the prevalence of volunteer canola in other crops.

[83] She then went on to find that the statistical evidence was ambiguous, inconclusive, and insufficient to the purpose for which it was adduced. With a view to that evidence, she said this, among other things:

> [241] ... Further, the likelihood of volunteer canola varies according to many factors, including the geographic area within Saskatchewan, weather, cropping practices, tillage practices, harvest practices, herbicide usage and weed management practices…In fact there is no evidence before me of the statistical probability of contamination of organic fields from GM canola blown over from a neighbouring field, the source of the contamination in the four cases deposed to.
>
> [242] In any case, in my respectful view, it is not possible to certify a class on the basis of a statistical likelihood that a small portion of that class may, in the future, experience certain losses. Certainly there is evidence before me that some organic fields have in fact been contaminated by GM canola, in each case blown over from a neighbouring field where GM canola was grown. However, the claim asserted in

> relation to volunteer GM canola on organic farmland is essentially an individual claim. There is no evidence that the problem is widespread among members of the proposed class. As to the risk of future contamination (if such could conceivably be considered a viable claim, for which there is some doubt), this would certainly vary according to farming practices, including the use of buffer zones to protect from contamination from neighbouring fields. [para. 242]

[84] In summing up, she said this:

> [243] It is my conclusion that there is no evidence before me that this claim is widely shared by members of the proposed class.
>
> [244] It is my conclusion that many and probably most of the members of the proposed class do not share in the causes of action asserted in the statement of claim. Those that do could only be determined upon an extensive individual inquiry.
>
> [245] I also note that in certain respects the proposed class is under inclusive. There is evidence that the list of six private certifiers in the class definition is not exhaustive of the organic certifiers who were or are active in Saskatchewan in the period in question. In addition, the claim in relation to the presence of volunteer GM canola plants in organic fields would not appear to be limited to organic grain farmers, but might affect other organic farmers as well. I noted above that one of the complaining affiants, Martin Pratchler, was, at the time in question, growing alfalfa.
>
> [246] I conclude that the plaintiffs have failed to provide a factual basis upon which I can conclude that there is an identifiable class in relation to the claims asserted.

[85] We may say that the principal difficulty with the class in this case is that, although the defendants might be liable to some, they cannot be liable to all. This is because of the wide-ranging circumstances of the farmers within the class. It is not as though the difficulty lies in an individual assessment of *damages*; it lies in individual determination of *liability*. As noted by Justice Smith, the class extends, first, to all organic grain farmers, not just those who have grown or intended to grow organic canola and, second, to organic farmers who produced organic canola before the organic certifiers or foreign countries had standards regarding the presence of organically modified organisms. And these are just two of the problems.

[86] Since we are not satisfied that Justice Smith erred in any material respect regarding the issues of whether 1) the pleadings disclose a cause of action and 2) there is an identifiable class, it is unnecessary for us to consider whether she may otherwise have erred. As we said at the outset, the appellants bore the burden of persuading us that she erred in *all* respects, not just one or even two. Hence, it is unnecessary to consider her analysis of whether the claim of the class members raises common issues, whether a class action would be the preferable procedure, and whether there is a suitable representative. Still, it might be useful to remark briefly upon the additional grounds of appeal involving these matters.

3. The Additional Grounds of Appeal

[87] The third ground of appeal concerns section 6(c) and the requirement that the claims of the members of the class raise common issues. Bearing in mind the need for a rational connection between the class, the cause or causes of action, and the common issues, it is clear that some of the members of the class would not share the alleged cause or causes of action and that accordingly there would be no common issues to be resolved in relation to them. For example, the first matter of fact said to be common to the class concerns the nature, extent, and scope of the prohibitions against genetically modified organisms in the United States, the countries in the European Union, and Japan. The resolution of this matter of fact would be of no relevance to an organic farmer who did not export to these countries, or who exported to these countries when there were no, or different, restrictions in place regarding genetically modified organisms. And that is just the beginning of the difficulties.

[88] The fourth ground concerns section 6(d) and the need to be satisfied that a class action would be the preferable procedure. In addressing this matter, Justice Smith identified a critical weakness in the position of the appellants. As she suggested, it is difficult to conceive of a class action being preferable when the class is not properly identified. So long as the class includes farmers who did not actually attempt to grow organic canola, there would have to be extensive individual inquiries to determine their reasons for not doing so, because the introduction of Roundup Ready and Liberty Link canola on a commercial basis may have been wholly, partially, or not at all influential in their decision not to do so. As she said:

> [326] The variations among possible claimants in the matter before me vastly exceeds those in *Hollick*. Members of the class sought to be certified farmed at various times, in various areas of the province, in various circumstances, were certified by various certifiers with varying standards (both among themselves and over time) and sold or tried to sell produce into various markets with varying standards (both among themselves and over time).

How, then, could a class action be the preferable procedure?

[89] Finally, she identified a number of critical concerns in relation to section 6(e) and the suitability of the plaintiffs as representatives of the class, weaknesses that flowed from the fact the plaintiffs had given up control of the action to the Organic Directorate-Organic Agricultural Protection Fund. Based on the evidence before her, she made the following findings of fact, findings which are unimpeachable:

> [331] Both of the individual proposed representative plaintiffs, Larry Hoffman and Dale Beaudoin, have executed a two-part document, titled "Legal Costs Indemnity Agreement" and "Agreement to Act as Representative Plaintiff"…the contents of which make it clear that neither of these individuals is instructing counsel nor assuming any responsibility for this action, but, rather, that both have assigned that right to a group called the Saskatchewan Organic Directorate Organic

> Agriculture Protection Fund ("SOD-OAPF"). The Saskatchewan Organic Directorate is an umbrella organization created to support the organic movement in Saskatchewan. There is no evidence before the Court as to the governing structure of SOD. It established a committee, the Organic Agriculture Protection Fund, to direct this lawsuit and instruct counsel. According to the evidence of Larry Hoffman, on cross-examination, the exact relationship between SOD and the OAPF committee is unclear, should there be a conflict between the committee and the umbrella organization.
>
> [332] In effect, these proposed representatives are not directing the litigation and have relinquished control over the conduct of the action to a committee whose own powers are unclear. They have agreed only "to be named" as plaintiffs and to attend court when required and produce all information relevant to the claim.

[90] She then elaborated upon the extent to which the plaintiffs had in fact relinquished control of the action, and on the makeup and functioning of the Saskatchewan Organic Directorate-Organic Agricultural Protection Fund:

> [334] The extent to which the named plaintiffs have assigned any responsibility for this lawsuit to others was confirmed on cross-examinations of Mr. Beaudoin and Mr. Hoffman.
>
> [335] Mr. Beaudoin, for example, admitted that he agreed to be named as a plaintiff when approached by Marc Loiselle, an active member of SOD-OAPF. He is not aware of the identities of all members of the SOD-OAPF committee and never met with the committee itself. He has no meetings with the committee to discuss the lawsuit. He knows there were "one or two" court applications previously in the action, but had not, prior to the certification hearing, attended any of the court proceedings. He does not receive periodic reports on the progress of the litigation from the committee, and does not receive reports of the committee's fundraising efforts for the lawsuit. I cannot conclude, in these circumstances, that Mr. Beaudoin "would fairly and adequately represent the interests of the class."
>
> [336] Mr. Hoffman has been somewhat more involved in SOD-OAPF and, indeed, had some small part in the formation of OAPF. It is the committee, and not Hoffman, who is raising money to fund the lawsuit, who has chosen and hired the experts who have sworn affidavits for the plaintiffs. He concedes that he is one of 12 members of the OAPF committee and that it is the majority of the committee that decides matters pertaining to the action. He concedes that he has no independent right to conduct the action and that his only voice in the conduct of the litigation is as a member of the OAPF committee. There is no election process for the committee and it is unclear how members are chosen.

[91] With that, she summed up the significance of all of this, making a point

with which we agree:

> [337] The representative plaintiff under *The Class Actions Act* has the responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the Court.

[92] The foregoing comments regarding Justice Smith's assessment of the issues arising out of section 6(c), (d) and (e) of the *Act* serve to illustrate the extent to which the application for certification was replete with weakness in every respect, and not just in respect of the question of whether the pleadings disclosed a cause or causes of action, as under section 6(a), and the question of whether there existed an identifiable class, as under section 6(b).

[93] In our judgment, then, this action did not merit certification as a class action. So, the appeal is dismissed. In keeping with the provisions of section 40 of *The Class Actions Act* there will be no order for costs.

Dated at Regina Saskatchewan this 2nd day of May 2007

"Cameron J.A."
Cameron J.A

I concur:

"Gerwing J.A."
Gerwing J.A.

"Sherstobitoff J.A."
Sherstobitoff J.A.