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No. 67

A.D. 2002
J.C.S.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

LARRY HOFFMAN, L.B. HOFFMAN FARMS INC.,
and DALE BEAUDOIN

PLAINTIFFS

- and -

MONSANTO CANADA INC. and AVENTIS CROPSCIENCE
CANADA HOLDING INC.

DEFENDANTS

BROUGHT UNDER *THE CLASS ACTIONS ACT*

Terry J. Zakreski

for the plaintiffs

Gordon J. Kuski, Q.C. and Richard W. Danyliuk

for the defendant Monsanto Canada Inc.

Robert W. Leurer and Jason W. Mohrbutter

for the defendant Aventis
Cropscience Canada Holding Inc.

FIAT

G.A. SMITH J.

April 10, 2003

[1] The defendants to a proposed class action have both applied to strike large portions of the affidavit evidence filed by the plaintiffs in support of the certification application, objecting to some affidavits in their entirety and to parts of others. The objections range from allegations that all or portions of certain affidavits are improperly based on information and belief, and are therefore inadmissible pursuant to Rule 319, to allegations that all or portions of affidavits are irrelevant or contain argument, speculation

or opinion, or mere polemic, intended solely to discredit the defendants, and are therefore scandalous within the meaning of Rule 327. There are also objections to the admissibility, on various grounds, of certain evidence tendered as expert opinion evidence.

[2] The applications raise both general issues as to what evidence is relevant and admissible on an application for certification, and specific issues in relation to certain passages in the affidavits impugned. They arise in the context of an action that was described in summary form in an earlier fiat in this matter, *Hoffman et al. v. Monsanto Canada Inc. et al.* (2002), 220 Sask. R. 95 (Q.B.) at 97:

[2] In the action, which is expressly stated to have been brought pursuant to the **Class Actions Act**, the plaintiffs, who are certified organic farmers in Saskatchewan, claim to bring the action on behalf of all organic grain farmers in Saskatchewan who were “certified organic farmers” at any time between January 1, 1996, and December 31, 2001, by any of six named “certification organizations”. The claim alleges that these organic farmers have lost the ability to market organic canola due to the contamination of organic canola crops caused by adventitious cross pollination from open-pollinated varieties of genetically modified canola “marketed and/or licensed and/or sold by [Monsanto Canada Inc. (‘Monsanto’) and Aventis Cropscience Canada Holding Inc. (‘Aventis’)]” in Saskatchewan. It claims further that the defendant Monsanto has been granted approval to conduct field trials of genetically modified [“GM”] wheat which will have a similar consequence for the sale by organic farmers of organic wheat and the plaintiffs claim an injunction restraining the release of genetically modified wheat into the Saskatchewan environment. The plaintiffs also expressly reserve the right to amend their claim to permit organic grain farmers residing outside of Saskatchewan to opt into the class action, if it is certified.

[3] The proposed representative plaintiffs originally filed seven affidavits in support of their application for certification: an affidavit from each of the individual plaintiffs, Larry Hoffman and Dale Beaudoin; the affidavit of Dr. Mae Wan Ho, Research Scientist, Director, and co-founder of the Institute of Science in Society, London, United Kingdom; the affidavit of Gary Smith, an Agrologist and Certified Organic Crop Inspector from Saskatoon; the affidavit of J. Wallace Hamm, Forensic Agrologist and Soil Environmental Scientist employed by darWall Consultants Inc. of Saskatoon; the affidavit of Michael J. Marriage, Managing Director and Shareholder of Doves Farm Foods Ltd., of Hungerford, Berkshire, United Kingdom, a manufacturer of organic cereal-based foods and buyer of organic grains; and the affidavit of Dr. Rene Van Acker, Associate Professor of Crop Management and Weed Science, University of Manitoba. Only the affidavit of Dr. Van Acker is not impugned on the within applications. In response to the applications the plaintiff filed a second supplementary affidavit by Larry Hoffman.

I. Outline of Objections Raised on the Applications

[4] I begin by briefly outlining the objections taken in relation to each of the affidavits impugned.

1. The Affidavit of Dr. Mae Wan Ho

[5] Dr. Ho proffers expert opinion evidence “on the health and environmental hazards associated with transgenic (“GM”) crops such as those of the Defendants.” She attaches a report to her affidavit as an exhibit, which is also impugned by the defendants. Her affidavit begins with a general description of the technical process used in the genetic modification of an organism, alleging the use, *inter alia*, of the cauliflower mosaic virus

(CaMV), gene carriers made from viruses or bacteria, and the insertion of an antibiotic resistance gene to select and identify those cells that have been successfully modified. She then goes on to allege “serious hazards” resulting from the defendants’ products, including: the transfer of transgenic constructs to the same or related species by ordinary cross-pollination; the risk of “horizontal gene transfer” wherein the new genetic construct is transferred to unrelated species (such as microorganisms, earthworms and anthropods in the soil, insects, birds, mammals and human beings) “interacting” with GM crops; a connection between CaMV and human hepatitis B virus and AIDS virus and the potential to create new viruses and to cause cancer; and, the risk of antibiotic resistant marker genes being taken up by bacteria and passed into pathogenic strains, making infectious diseases difficult to treat. She opines, “Because of the serious hazards associated with the Defendants’ crops, they should be immediately withdrawn from use.”

[6] The defendants’ initial and principal objection was that the Ho affidavit, alleging that genetically-modified crops are dangerous and inherently bad, was wholly irrelevant to the plaintiffs’ claim, which was seen as relating solely to the alleged loss of market for the sale of organic crops by organic farmers because of contamination of their crops due to adventitious pollination by genetically modified crops, and that it was scandalous and argumentative, designed solely to cast the defendants in a poor light. They sought an order striking out the affidavit in its entirety as scandalous. They argued in the alternative that many of the allegations in the Ho affidavit go beyond legitimate expert opinion, are argumentative, and fall outside the expertise of the witness, and they seek to have such allegations struck, one defendant arguing that, in the result, the affidavit is so riddled with such allegations that it should on this ground be struck in its entirety.

[7] Both defendants expressed particular concern related to the fact (supported

by affidavit evidence filed by the defendant Aventis) that the plaintiffs had posted all of the affidavit material filed in support of the certification application on an internet website. They argued that this compounds the prejudice to the defendants and that the Court should not permit its processes “to serve as a vehicle to publicize statements that are unnecessary and irrelevant to the proceedings in association with which they have been filed.”

[8] In response, the plaintiffs agree that the purpose of the Ho affidavit was to provide an expert opinion to the effect that genetically modified crops pose a serious threat to human health and are an environmental hazard. They argue, however, that this opinion is relevant to the plaintiffs’ action, pointing out that the first claim for relief in the statement of claim is for:

a declaration that the genetic modifications inserted into canola by the Defendants are “pollutants” within the meaning of the EMPA [*The Environmental Management and Protection Act*].

The first item listed in the certification application under “. . . nature of the claims, and the relief claimed” is:

a declaration that canola containing the genetic modifications inserted into it by the Defendants is a “pollutant” within the meaning of *The Environmental Management and Protection Act*, S.S. 1983-84, c. E-10.2 (the “EMPA”),

and an issue sought to be certified as a common issue is:

whether the Defendants' products are "pollutants" within the meaning of the EMPA.

[9] The defendants challenged this argument and I will return to this issue below.

2. The Affidavit of Gary Smith

[10] Mr. Smith purports to:

2. . . . provide an opinion on behalf of the organic farmers of Saskatchewan on organic farming in Saskatchewan and the impact of transgenic/genetically-modified ("GM") crops on organic agriculture in Saskatchewan.

[11] The plaintiffs say that this affidavit is offered to explain what organic agriculture is, to show that it represents an important and growing economic force in Saskatchewan, and to show why genetically modified organisms, ("GMOs") are prohibited in organic agriculture. The information is said to be relevant to the application to certify the class of organic farmers.

[12] The defendants object that the Smith affidavit and attached report do not meet the requirements for expert opinion evidence in that: the report is largely an assimilation of information contained in various reference materials; it provides insufficient detail as to the sources and the veracity of the information assembled; it fails to differentiate between what is offered as evidence of fact and what is opinion; where apparent statements of fact are made it is not clear what is offered on the basis of personal knowledge and what is offered on the basis of information and belief; and, when opinion

is offered, it is often not clear what facts are said to underlie the opinion.

[13] The defendants also object that the deponent claims to make “a sweeping, generalized, statement of the laws of various foreign jurisdictions, and the standards promulgated by private certifying agencies” even though he is not qualified as an expert in foreign laws.

[14] The defendant Aventis also objects that Mr. Smith “has ties” to the Organic Agricultural Protection Fund, “OAPF”. The individual plaintiffs depose that OAPF has been appointed by the plaintiffs to instruct their lawyer, Mr. Zakreski in all matters pertaining to this action. It is argued that, as a result, Smith is not independent and is therefore not qualified to proffer unbiased and independent expert opinion evidence.

3. The Affidavit of J. Wallace Hamm

[15] Mr. Hamm purports to provide:

2. . . . a preliminary expert opinion on behalf of the organic farmers of Saskatchewan on the economic impact of transgenetic (“GM”) canola and the potential impact of GM wheat on certified organic grain farmers of Saskatchewan.

[16] Mr. Hamm offers a preliminary opinion of the market impact of the introduction of genetically modified canola on organic farmers in Saskatchewan and of the expected impact if genetically modified wheat is introduced. His opinion is apparently based on certain data described in his attached report including statistics for the period 1990 to the present of Saskatchewan organic canola and wheat production and marketing. These statistics are said to have been collected by the Canadian Organic Growers and

Saskatchewan organic marketing certifying bodies. His research team also undertook a survey of organic processors and traders active in western Canada to determine the extent of “continued intolerance of GMO materials in the EEC and other countries.” In the report he undertakes to offer the following: an interpretation of this data in terms of past and future trends; a statement of assumptions used in estimating the economic impacts; the derivation of a formula for the estimation of economic impact on canola producers; a preliminary estimation of the past and future impact of genetically engineered Canola introduction on the income of certified Saskatchewan organic grain farmers; and an opinion on the potential economic impact of the introduction of genetically engineered wheat on certified Saskatchewan organic grain farmers.

[17] He also provides an opinion as to the potential size (and the desirable description) of the class sought to be represented in the action.

[18] The defendant Monsanto objects, primarily, that Mr. Hamm lacks the economic expertise needed to draw the economic conclusions he purports to draw from the data presented, and that the report fails to indicate the methodology used to compile the statistical data relied upon, particularly those related to a survey undertaken by the Hamm research team. This defendant also objects that the estimation of economic loss to organic farmers is not germane to the application for certification.

[19] The primary objection of the defendant Aventis (which also echoes the Monsanto objections) is that Mr. Hamm is not in a position to give independent expert opinion evidence because he has acted as an advisor to OAPF (it is said that he did not charge for his efforts in completing the survey as this was a “contribution” to the OAPF) and also because he is an organic farmer and is the general manager and principal of Pro-Cert, one of the listed certifying bodies in the statement of claim from which a portion

of the proposed class will derive. It is argued that he therefore has a vested interest in the outcome of the litigation. It is argued that these ties to the action render his opinion evidence inadmissible and that the entire affidavit must, on this basis alone, be struck.

[20] Counsel for Aventis also argued, alternatively, that Mr. Hamm purports to offer opinion evidence on foreign law and standards and is not qualified to do so. This defendant seeks that all references to foreign laws and standards contained in his affidavit and attached report be struck.

4. The Affidavit of Michael Marriage

[21] Mr. Marriage is the Managing Director and shareholder of the leading British manufacturer of organic cereal-based foods (such as biscuits, cookies, breakfast cereals, cakes and bread) and of home baking flours. It imports organic grains from many countries including Canada. His affidavit speaks to the extent to which products are tested and standards are enforced in relation to the requirement that organic product be free of GM contamination.

[22] The defendants object to a number of specific paragraphs of the Marriage affidavit. It is argued that some are improperly made on information and belief; some do not appear to be within Mr. Marriage's knowledge at all; some are too imprecise to be probative; some appear to be "indirect statements of the law or the application of law" and are inadmissible; some are statements of opinion which are not based on any expertise; and some are purely argument.

[23] These objections will be discussed individually below.

5. The Affidavit of Larry Hoffman

[24] Mr. Hoffman is a plaintiff in the action and seeks on the certification application to be designated a representative of the class of other organic farmers. His affidavit sets out his background with a view to demonstrating that he would be a suitable representative of the class. He also deposes to a number of other matters which the plaintiffs argue are relevant to the determination of the appropriate class, the common issues, and whether a class action is the preferable procedure for prosecuting the claim. Some paragraphs of this affidavit were clearly intended to be relevant to an application, which had accompanied the application for certification, for an interim injunction prohibiting the defendant Monsanto from marketing genetically modified wheat. However, this application has been adjourned *sine die*, and some of these paragraphs are therefore not immediately relevant.

[25] The defendants object to a number of specific paragraphs, or portions of paragraphs, of this affidavit on various grounds. Some are said to be argument or inadmissible opinion. Others are said to be statements not within the deponent's personal knowledge and not admissible pursuant to Rule 319. Some are said simply to be irrelevant and included solely to discredit the defendants. The defendant Monsanto objects to some paragraphs on the basis that these address only the merits of the plaintiffs' claim and are for this reason not relevant to the certification application.

[26] These objections will be considered individually below.

6. The Affidavit of Dale Beaudoin

[27] Mr. Beaudoin is also a plaintiff and also seeks on the certification

application to be approved as a representative plaintiff. The defendants object to only one paragraph of his affidavit, in which he deposes, “I have reviewed the Notice of Motion to be filed with this application. I believe that the common issues identified in the Motion exist for the rest of the class.” This is similar to a paragraph in Mr. Hoffman’s affidavit, to which the defendants also object. They argue that the statements are argumentative, are in essence a legal conclusion or opinion which is for the Court to draw, and that the paragraph offends the requirement that the deponent provide the source of the information on which he bases his belief or opinion.

II. Discussion and Analysis

A. Some General Principles

[28] Prior to turning to a discussion of the individual affidavits and portions of affidavits impugned, it is convenient to address some general principles in relation to the admissibility of evidence on certification applications that are raised by the defendants on these applications.

1. The admissibility on the certification application of evidence relating to or tending to establish the merits of the plaintiffs’ claim

[29] It is obvious that, in order to be admissible, the evidence filed in support of a certification motion must be relevant to the issues raised by that motion. Thus, the starting point for this discussion must be the criteria for a certification order, which are set out in s. 6 of *The Class Actions Act*, S.S. 2001, c. C-12.01 as follows:

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:

- (a) the pleadings disclose a cause of action;
- (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;
- (d) a class action would be the preferable procedure for the resolution of the common issues; and
- (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.

[30] Section 7(2) of the Act provides:

7(2) An order certifying an action as a class action is not a determination of the merits of the action.

[31] Section 10(1) of the Act is also relevant, and reads as follows:

10(1) A certification order must:

- (a) describe the class with respect to which the order was made by setting out the class's identifying characteristics;
- (b) appoint the representative plaintiff for the class;
- (c) state the nature of the claims asserted on behalf of the class;
- (d) state the relief claimed by the class;
- (e) set out the common issues for the class;
- (f) state the manner in which, and the time within which, a class member may opt out of the class action;
- (g) state the manner in which, and the time within which, a person who is not a resident of Saskatchewan may opt into the class action; and
- (h) include any other provisions the court considers appropriate.

[32] Rule 82(2) of *The Queen's Bench Rules* reads as follows:

(2) An application for a certification order pursuant to section 4 of the Act must be supported by an affidavit of the proposed representative plaintiff:

- (a) deposing to the proposed representative plaintiff's willingness to be appointed;
- (b) setting out the basis of the proposed representative plaintiff's personal claim, where applicable, and the reason the proposed representative plaintiff believes that common

issues exist for the rest of the members of the class;

- (c) setting out objective criteria for determining membership in the proposed class, and providing the proposed representative plaintiff's best information on the number of members in the proposed class;
- (d) setting out sufficient information to establish that the proposed representative plaintiff would fairly and adequately represent the interests of the class and is aware of the responsibilities to be undertaken;
- (e) exhibiting a plan for the class action . . .
- (f) setting out sufficient information to establish that the proposed representative plaintiff does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[33] Because most of the Canadian case law in relation to class action procedure has risen in the context of either the Ontario *Class Proceedings Act* or the British Columbia *Class Proceedings Act*, it is useful at this point to note that s. 4 of the British Columbia Act and s. 5 of the Ontario Act are almost identical to our s. 6, and that s. 8 of both Acts is equivalent to our s. 10. The exceptions regarding s. 4 and s. 5 in the British Columbia and Ontario Acts, respectively, are in relation to ss. (c), which in both cases reads “. . . affecting only individual members” and ss. (d), which reads “. . . for the fair and efficient resolution . . .” In addition, the British Columbia Act specifies in ss. 4(2) some criteria that must be considered in determining whether a class proceeding would be the preferable procedure for the resolution of the common issues. Neither the Ontario nor the Saskatchewan statute has a similar provision.

[34] It is clear from the criteria set out in s. 6, from s. 7(2) and from the case law that the certification motion is not intended to result in a determination on the merits of the action. Further, evidence is generally irrelevant to the s. 6(a) requirement that the pleadings disclose a cause of action, the assessment of which is to be made on the assumption that the allegations in the statement of claim are true. In fact, the test for this criterion has been widely interpreted as equivalent to the standard applicable in an application to strike out a statement of claim under our Rule 173(a), with the result that it must be plain and obvious that the claim cannot succeed on the basis of the pleadings before certification will be rejected on this basis.

[35] Nonetheless, it is now clearly established that evidence is not only allowed but required in relation to the remaining four criteria, and that, despite the foregoing point, this may well include evidence relating to the merits of the plaintiffs' claim. The issue arose recently in the decision of the Supreme Court of Canada in *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19. The issue was whether the appellant should be allowed to pursue his action against the City of Toronto as the representative of some 30,000 other residents who live in the vicinity of a landfill owned and operated by the City in relation to complaints of noise and physical pollution. McLachlin C.J.C. had this to say on the question of what evidence is relevant to the issues of class identification (criterion (b)) and the implicit requirement to show a rational connection between the class as defined and the asserted common issues (criterion (c)):

[22] The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. The recommendations of the Ontario Law Reform Commission's 1982 report on this point should perhaps be given limited weight because, as discussed above, those recommendations were made in the context of a proposal that the certification

stage include a preliminary merits test: see *Report on Class Actions, supra*, vol. II, at pp. 422-26 (recommending that both the representative plaintiff and the defendant be required, at the certification stage, to file one or more affidavits setting out all the facts upon which they intend to rely, and that the parties be permitted to examine the deponents of any such affidavits). The 1990 Report of the Attorney General's Advisory Committee is perhaps a better guide. That Report suggests that "[u]pon a motion for certification . . . the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to reply" (emphasis added): see *Report of the Attorney General's Advisory Committee on Class Action Reform, supra*, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

[23] This appears to be the existing practice of Ontario courts. In *Caputo, supra* [(1997), 148 D.L.R. (4th) 566 (Ont. Ct. - Gen. Div.)], the representative brought a class action against cigarette manufacturers claiming that they had knowingly misled the public about the risks associated with smoking. In support of the certification motion, the class representative filed only a solicitor's affidavit based on information and belief. The court held that the evidence adduced by the class representative was insufficient to support certification, and that the defendant manufacturers should be allowed to examine the individual class members in order to obtain the information required to allow the court to decide the certification motion. The "primary concern", the court wrote, is "[t]he adequacy of the record", which "will vary in the circumstances of each case" (p. 319).

[24] In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was

exposing the residents to health risks. The representative provided no evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that “the CPA requires the representative plaintiff to provide a certain *minimum evidentiary* basis for a certification order” (emphasis added). While the *Class Proceedings Act, 1992* does not require a preliminary merits showing, “the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order”.

[25] I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see *Report*, at p. 31 (“evidence on the motion for certification should be confined to the [certification] criteria”). The Act, too, obviously contemplates the same thing: see s. 5(4) (“The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence”). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is “plain and obvious” that no claim exists: see *Branch, supra*, at § 4.60.

[36] Although it is suggested that this would not in all cases be necessary, in the case before the Supreme Court in *Hollick*, as in *Taub*, which was cited and relied upon by the Court, the plaintiff was said to have an onus provide “a minimum evidentiary

basis” to show whether other members of the putative class shared a common complaint, reflected in the pleadings. This evidence, in *Taub*, was seen to be relevant and necessary to identify and define the scope of the putative class and of common issues. In *Hollick*, the Chief Justice went further, to suggest that the class representative must show “some basis in fact” for *each* of the criteria for certification except for the requirement that the pleadings disclose a cause of action.

[37] The further question, then, is whether evidence which is not directly relevant to any of the factors to be determined on the certification motion, but supports a positive assessment of the merits of the plaintiff’s claim, is admissible on the certification application.

[38] Prior to the Supreme Court’s ruling in *Hollick*, some Ontario courts had already expressed an inclination to give some consideration to the merits of the plaintiff’s claim on a certification application. Sharpe J. (as he then was) seemed to suggest in *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 389 (Gen. Div.) at 391 that, while there was to be no determination of merits at the certification stage, some consideration of the merits might nonetheless be appropriate by way of a screening process which he perceived to be a legitimate part of the certification inquiry, commenting:

. . . The certification motion is intended to screen claims that are not appropriate for class action treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation. . . .

[39] Although this statement was endorsed by Jenkins J. in *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.* (1999), 94 O.T.C. 247 (Gen. Div.), and by Somers J. in *Chadha v. Bayer Inc.* (2001), 200 D.L.R. (4th) 309 (Ont. S.C. of Justice, Div. Ct.) at 330, it may

have been given a more restricted interpretation, relating the evidential deficit to the narrow issues of the criteria for certification. In the latter case, for example, the Divisional Court held that, in failing to establish, by affidavit evidence, that he had suffered loss or damage, the proposed representative plaintiff failed to meet the onus of satisfying the Court that he was a member of the proposed class or that he would fairly and adequately represent the interests of the class, as required by the Act.

[40] In contrast to the broader view, the decision of Winkler J., in *Caputo et al. v. Imperial Tobacco Ltd. et al.* (1997), 148 D.L.R. (4th) 566 (Ont. Ct. - Gen. Div.) clearly confined admissible evidence to what was relevant to the certification criteria. In that case, the proposed representative plaintiffs sought to bring a class action representing all persons who had purchased cigarettes from the defendants, claiming that the defendants were aware or should have been aware of the addictive nature of nicotine in cigarettes and that the defendants misinformed the general public about their research regarding the addictiveness of nicotine. They claimed that addiction to nicotine compelled them to purchase and smoke cigarettes manufactured by the defendants, and that, in consequence, they had suffered loss, injury and damage. The defendants sought an order to compel the proposed representative plaintiffs to attend for cross examinations and to produce their medical records. In granting the order, Winkler J. considered what evidence is necessary on a certification motion. He commented:

. . . [T]he court's primary concern will be the adequacy of the evidentiary record before it, upon which it will determine the certification issues. The adequacy of the record will vary in the circumstances of each case. . . .

In Ontario, the practice varies from filing the affidavit of a representative party in support of the certification motion, to filing the affidavit of a solicitor. In many cases the latter

approach will provide a sufficient evidentiary record to decide the motion.

...

In the instant proceeding, the defendants submit there is insufficient evidence before the court to permit a determination of the certification issues. In support of the certification motion, the plaintiffs have filed the affidavit of Andreas Seibert, a solicitor in their offices. As is noted above, in many cases this will constitute a sufficient record. However, in the present case, the defendants assert that there is a myriad of potential issues relating to each class member's medical condition, and to individual choices which may have been made to commence and continue smoking. The evidence pertaining to these issues in the Seibert affidavit is based on the deponent's information and belief, which would make cross-examination on those issues futile. Hence, the defendants assert that the evidence of the plaintiffs themselves is required for the certification motion, in order to develop a sufficient evidentiary record for the court. I agree.

In consequence then, it is necessary to determine the permissible scope of the examination of the plaintiffs. It is common ground that an examination under rule 39.03 must pertain to an issue relevant to the motion in which the transcript is sought to be introduced as evidence. . . .

The *CPA* is a procedural statute, rather than substantive, and creates no new cause of action. A motion for certification under the *Act* deals only with whether the action ought properly to proceed by way of class action. . . .

Accordingly, any inquiry into the merits of the action will not be relevant on a motion for certification. The examination must be confined to those issues on the motion for certification on which the plaintiffs may have relevant evidence to assist the court. While evidence pertinent to the issues on the motion may, on occasion, overlap with

evidence going to the merits of the action, this incursion may be permissible if the evidence sought is also relevant to the motion. . . . (At pp. 571-73.)

[41] In the Ontario Court of Appeal decision in *Hollick v. City of Toronto* (1999), 46 O.R. (3d) 257 at 264, Carthy J.A. had this to say:

[12] This leaves open the question of whether the merits may be considered in any respect under s.5(1)(b) [that there is an identifiable class]. I see no error in looking beyond the pleadings and to the evidence presented to assist in the application of the criteria set forth in s. 5(1)(b), (c) and (d). If it were otherwise any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court. Similarly, the mere allegation that the class action is the preferable procedure would prevent the court from making its own assessment of the evidence under s. 5(1)(d).

[42] I have concluded that the better position is that, on the certification application, evidence as to the merits of the action is admissible only insofar as that evidence is also relevant to an issue to be determined on the motion. Overlap may, however, occur, as there is an onus on the proposed representative plaintiff to provide some evidentiary basis tending to show that he or she is a proper representative of the proposed class, which may include evidence that he or she has suffered a loss or damage, and an onus to establish the definition of the proposed class and proposed common issues, which may require some evidence that other members of the proposed class have suffered loss or damage sufficiently similar to that of the proposed representative plaintiff to raise common issues.

[43] In addition, it is now widely accepted that, despite the mandatory language

of s. 6 (“The court *shall* certify an action as a class action . . . if the court is satisfied that [the five criteria are satisfied]”), the Court has relatively wide discretion in relation to the requirement in ss. 6(d) of the Saskatchewan Act that a class action be the preferable procedure, and that the exercise of this discretion requires consideration of the scope and nature of the proposed litigation as a whole and a balancing of the relevant factors. Accordingly, the desirability of providing, on the certification motion, as complete a picture as possible of the proposed action, including the scope of the issues raised both in the claim and in defence, has generally been viewed by the courts as helpful in determining whether class action proceeding is the preferable procedure. This point is made by Ward K. Branch in *Class Actions in Canada*, looseleaf (Toronto: Canada Law Book Inc., current to Release December, 2002), at paras. 4.1530-40:

While it is not proper to determine the merits of the case on the certification application, this principle should not artificially limit the court’s examination of the factors necessary for a reasoned determination of whether a plaintiff has met the burden. As the court stated in *Castano v. American Tobacco Co.* [84 F.3d 734 (5th Cir. 1996)]:

Going beyond the pleadings is necessary, as a court must understand the claims, defences, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. [at 744]

Evidence that touches on the merits of the case need not be excluded from the supporting affidavits so long as it touches on relevant factors to certification. Indeed the court must have a good sense of all of the issues that will be raised in order to foresee the future conduct of the litigation. Without a complete presentation, the court will be unable to assess manageability or preferability.

[44] Also, see, generally, Branch at paras. 4.860-4.940 and particularly para. 4.920, where the author explains:

Ontario courts will consider the degree to which the resolution of the proposed common issues will resolve the dispute between the parties. The court will also consider the relative importance of the common and individual issues. The fairness, efficiency and manageability of a class proceeding are all affected where the substance and complexity of the individual issues overwhelm the common issues. The court should carefully review the facts which will need to be considered in order to resolve the claims of the proposed representative in order to assess at which stage the key controversies are likely to arise. If the heart of the case is dependent on facts relevant only to the representative plaintiff, that should serve as an indication that a class action may not be preferable. On the other hand, if (1) the proposed common issues are the heart of the case, and (2) these common issues can be resolved without substantial evidence from class members, the class action is more likely to be the preferable procedure.

[45] This aspect of the issue was also addressed by the Supreme Court in *Hollick*, which is now the leading authority on the proper approach to be taken to the determination of the question of preferability. Having concluded that evidence from complaint records documenting numerous complaints over many years was sufficient evidence that “many individuals besides the appellant were concerned about noise and physical emissions from the landfill” (para. 26), the Court went on to consider whether the test of “preferable procedure” had been met:

. . . in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions — judicial economy, access to justice, and behaviour modification: see also

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453, 121 D.L.R. (4th) 496 (Div. Ct.); compare British Columbia *Class Proceedings Act*, s. 4(2) (listing factors that court must consider in assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues — common and individual — raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

[28] The Report of the Attorney General’s Advisory Committee makes clear that “preferable” was meant to be construed broadly. The term was meant to capture two ideas: first the question of “whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim”, and second, the question of whether a class proceeding would be preferable “in the sense of preferable to other procedures such as joinder, test cases, consolidation, and so on”: *Report of the Attorney General’s Advisory Committee on Class Action Reform, supra*, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a “fair, efficient and manageable method of advancing the claim” without looking at the common issues in their context.

[29] The Act itself, of course, requires only that a class action be the preferable procedure for “the resolution of the *common issues*” (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members’ claims. I would not place undue weight, however, on the fact that the Act uses the phrase “resolution of the common issues” rather than “resolution of class members’ claims”. As one commentator writes:

The [American] class action [rule] requires that the class

action be the superior method to resolve the “controversy.” The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the “common issues” (as opposed to the entire controversy). [This] distinction . . . can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, *supra*, at § 4.690. I would endorse that approach.

[30] The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues “predominate” over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(B)(3) (stating that class action maintainable only if “questions of law or fact common to the members of the class predominate over any questions affecting only individual members”); see also British Columbia *Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedure, the court must consider “whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members”). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General’s Advisory Committee put it,

the preferability requirement asks that the class representative “demonstrate that, *given all of the circumstances of the particular claim*, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings” (emphasis added): M.G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.

[46] These authorities support the view that, on a certification application, the Court will be assisted by as full a picture as possible of the nature and scope of the proposed litigation, including an indication of the nature of the evidence that may be relevant to both the claim and the defence with respect to both the common and the individual issues.

[47] Finally, this view is also reflected, in Saskatchewan, in our Rule 82(2)(b), which requires an application for certification to be supported by an affidavit:

(b) setting out the *basis* of the proposed representative plaintiff’s personal claim, where applicable, and the reason the proposed representative plaintiff believes that common issues exist for the rest of the members of the class.

[Emphasis added]

2. The admissibility of statements sworn on information and belief

[48] Queen’s Bench Rule 319 reads as follows:

319 Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief,

with the grounds thereof, may under special circumstances be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same; and where affidavits upon information and belief are filed which do not adequately disclose the grounds of such information and belief the court may direct that the costs of such affidavits shall be borne by the solicitor filing the same.

[49] The applicants on the instant motions raise the general issue of the applicability of this rule in the context of the certification application.

[50] Two provisions of *The Class Actions Act* are relevant. Section 44 provides that the *Rules of Court* apply to class actions to the extent that those rules are not in conflict with the Act. Section 14, on the other hand, provides:

14 The court may, at any time, make any order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties any terms it considers appropriate.

[51] It is my view that the Court should begin with the assumption that the normal rules apply, but must recognize that the special nature of a class action proceeding provides a context that may affect the interpretation of a particular rule, and must be ready to consider whether some provision or provisions of the Act may make a particular rule inapplicable. After consideration of the arguments raised on these applications, I have concluded that Rule 319 does apply to a certification application. Nonetheless, that rule must be interpreted and applied in the context of the legislation and the Rules of Court that have been passed to implement that legislation, which determine the nature and

scope of the certification procedure and the material required to be filed in support of an application for certification. In addition, it is necessary to consider the growing volume of case authority reflecting judicial interpretations and applications of such provisions, some of which has already been discussed above.

[52] It is clear from the explicit wording of Rule 319 that an affidavit on information and belief may be admissible on an interlocutory application. Saskatchewan courts have held that all applications are either interlocutory or final, and that they are final only when they determine the principal matter in question, and finally dispose of the rights of the parties. All of the relevant case authority in Ontario and British Columbia supports the view that certification orders are procedural only, and do not determine the substantive rights of the parties. Affidavits sworn on information and belief are regularly accepted on certification applications in those jurisdictions. This is obvious on a reading of many of the cases relied upon by the defendants on these applications. See *Chadha, supra*, for example, at para. 54, where the Court concluded that the affidavit of the proposed representative plaintiff was deficient, not because it was sworn on information and belief, but because the deponent failed to state the source of his belief. See also *Branch, supra*, para. 4.1500.

[53] In a recent ruling in the matter before me, holding that the defendants herein are not obliged to file a statement of defence prior to the determination on the certification application, the Saskatchewan Court of Appeal clearly stated that “[t]he application for certification is not a merits hearing.” [*Hoffman v. Monsanto Canada Inc.* (2002), 220 D.L.R. (4th) 542 at 552.] Indeed, this point is made abundantly clear by s. 7(2) of the Act.

[54] I have no hesitation in concluding that a certification application is an

“interlocutory motion” within the meaning of Rule 319, and that the Court therefore may, in appropriate circumstances, as set out in the rule, receive affidavit evidence sworn on information and belief.

[55] Further, it is my view that, in particular, where the Act, the Rules, or the case law make it clear that the evidentiary onus to be satisfied by the affidavit in question is less than that of *proof* of its contents, this in itself may be sufficient to constitute a “special circumstance” sufficient to justify receiving an affidavit sworn on information and belief.

[56] Thus, for example, insofar as courts have suggested that the proposed representative plaintiff has an onus to provide an “evidentiary basis” relevant to aspects of the merits of his or her claim, it is clear that the evidential standard the Court has in mind is not that of “proof”, but only of *some* evidence to support the claim, for example, that the plaintiff has suffered loss and that a class exists of other persons who have suffered the same or a similar loss, sufficient to satisfy the Court of the existence of the requisite common issues. In one of the passages quoted above from the Supreme Court decision in *Hollick*, the Chief Justice cited with approval a recommendation that “upon a motion for certification . . . the representative plaintiff *shall* and the defendant *may* serve and file one or more affidavits setting forth the material facts upon which each intends to rely.” [At para. 22, emphasis in original.] Clearly the Chief Justice was not suggesting that the proposed representative plaintiff has an onus to *establish* the material facts upon which he or she intends to rely. Our own class action rules suggest a similarly low standard, at least with respect to certain matters to be established on the certification application. For example, Rule 82(2)(c) requires the proposed representative plaintiff to file an affidavit setting out, *inter alia*, his or her “*best information* on the number of members in the proposed class.” [Emphasis added.]

3. Are the defendants barred from bringing this application because of their demand for documents referred to in the impugned affidavits pursuant to Rule 213(1)?

[57] The defendant Aventis made an extensive demand for documents referred to in a number of the impugned affidavits, to which the plaintiffs responded. The plaintiffs argue that this should estop the defendant from now moving to strike these same affidavits, as this constitutes “approbating and reprobating”. The plaintiffs rely upon a principle articulated by the Saskatchewan Court of Appeal in *Iron et al. v. Saskatchewan (Minister of the Environment and Public Safety) et al.* (1993), 109 Sask. R. 49 (C.A.).

[58] I do not agree that demanding that documents referred to in an affidavit be produced for inspection is inconsistent with, or should be a bar to, a subsequent application to strike the affidavit. An analogy may be drawn with demanding particulars of pleadings and subsequently moving to strike out the pleadings under s. 173. It is possible that pleadings that appear faulty may be shown not to be so, or remedied, when particulars are given, or, alternatively, that the particulars may themselves reveal flaws not apparent on the face of the original pleadings. Inspecting documents referred to in an affidavit simply gives the opposite party a clearer picture of what is being alleged in the affidavit.

[59] On the other hand, if documents referred to in an affidavit have been demanded and produced, then both the plaintiffs and the defendants are entitled to have such documents considered along with the contents of the affidavit proper when the latter is attacked.

4. The determination of whether an affidavit is “scandalous” within the meaning of Rule 327.

[60] The defendants’ complaints about many of the allegations contained in the impugned affidavits are that they are “scandalous” and are included solely to discredit the defendants. The test to be applied is set out in *Bank of Nova Scotia v. R.* (1983), 24 Sask. R. 312 (Q.B.) at 314 as follows:

[21] Rule 327 gives the court power to strike out from any affidavit any matter which is indecent, offensive and made for the purpose of prejudicing the opposite party. It is material which is unbecoming and contrary to good manners and accepted pleading and practice.

[22] The rule is intended to apply to matters which are irrelevant to the proceedings and are included for an improper purpose. If the statements are relevant they cannot be scandalous. A matter will be struck out of an affidavit if it is both irrelevant and scandalous. . . .

. . .

[24] The test to be applied is whether the matter alleged to be scandalous would be admissible to show the truth of any allegation material to the relief claimed.

[25] For the purpose of this rule I must assume that the allegations contained in the affidavit are true and then decide if they are material to the application. . . .

[Cites omitted]

[61] In the matter before me, most if not all of the allegations said to be “scandalous” are argued to be irrelevant and immaterial to the plaintiffs’ claim. Thus, for the most part, the question in each case will come down to the question of relevance.

[62] The defendants also refer to the fact that the affidavits and summaries of the affidavits are available on a website with which the plaintiffs are associated. The implication, I assume, is that the impugned allegations have been filed for an improper purpose, publicity for the plaintiffs' cause, rather than support for the certification application. The defendants argue implicitly that to allow these portions of the affidavit evidence to stand is to lend the credibility of the Court process to this publicity, to the detriment of the defendants.

[63] It is my view that the contents of the plaintiffs' website are irrelevant to my consideration in this matter unless, as has not been shown to be the case, the plaintiffs are abusing the process of the Court. If the affidavits, or portions of the affidavits, are improperly before the Court on the certification motion, on any of the grounds alleged, they should be struck for the reason that to allow them to remain on the record invites if not mandates affidavits in response from the defendants, and risks delay and confusion in the conduct of the certification hearing.

B. The Specific Complaints

1. The Affidavit of Dr. Mae Wan Ho

[64] The affidavit of Dr. Ho is intended to provide an expert opinion on the health and environmental hazards associated with transgenic (GM) crops such as those of the defendants. The defendants' primary argument in relation to this affidavit is that it addresses issues that are not raised in the pleadings, which essentially allege that the plaintiffs have suffered economic loss from loss of the opportunity to grow and market organic canola (and anticipate similar losses in relation to wheat) because of adventitious contamination of organic crops by genetically modified crops. Thus, the first question to

address is whether the issues addressed by Dr. Ho are relevant, at all, to the plaintiffs' pleadings.

[65] Certainly it is true that the facts alleged in the statement of claim relate primarily to alleged adventitious pollination of organic crops grown by the plaintiffs (and members of the class sought to be certified) by genetically modified canola, marketed by the defendants, and resulting economic harm to organic farmers due to the rejection of GM contaminated crops by organic certifiers. Indeed, this economic loss (and an anticipated similar loss related to the potential release of GM wheat) is the only loss or damage claimed in the statement of claim. However, para. 40 of the claim adds the following:

40. Further, or in the alternative, the Plaintiffs state that the Defendants' genetic modifications are "pollutant", within the meaning of *The Environmental Management and Protection Act* (Saskatchewan) ("EMPA"), that has caused loss or damage to certified organic grain farmers because of its discharge into the Saskatchewan environment. The Plaintiffs state that at the time of the first discharge, the genetic modification was owned by the Defendants or, in the alternative, the Defendants were persons having control of the pollutant. The Plaintiffs therefore state that the Defendants are liable to certified organic grain farmers represented in this action pursuant to Section 13(3) of the EMPA for the damage sustained by them as the result of the introduction into the Saskatchewan environment of GM canola.

[66] Section 2 of *The Environmental Management and Protection Act*, S.S. 1983-84, c. E-10.2 (which has now been repealed) defined "pollutant" and "pollution" as follows:

2(u) “pollutant” means a substance that causes or may cause pollution of the environment;

(v) “pollution” means the alteration of the physical, chemical, biological or aesthetic properties of the environment, including the addition or removal of any substance that:

(i) will render the environment harmful to the public health;

(ii) is unsafe or harmful for domestic, municipal, industrial, agricultural, recreational or other lawful uses of the environment; or

(iii) is harmful to wild animals, birds or aquatic life.

[67] The relevant portion of s. 13(3) provided:

13(3) Subject to subsections (4) and (5), any person . . . has a right to compensation from:

(a) the owner of the pollutant and the person having control of the pollutant for loss or damage incurred as a result of:

(i) the discharge of a pollutant.

[68] As I have indicated above, the plaintiffs claimed as relief a declaration that the defendants’ products were “pollutants” within the meaning of the EMPA, and this is also identified by the plaintiffs as a “common issue” on the application for certification.

[69] *Prima facie*, these pleadings put in issue the question of whether genetically modified canola is environmentally unsafe. Whether a finding that the defendants’

products were “pollutants” within the meaning of the Act would in any case support the substantive relief sought in the statement of claim is an issue that the defendants may raise, if they see fit to do so, on the certification motion. However, that issue does not lie for determination on the instant applications. Similarly, the defendants’ argument that to put in issue the general environmental safety of genetically modified organisms would change the character of and vastly expand the scope of the litigation is a point that may be relevant in former context, but is not at issue on the instant motions.

[70] Accordingly, it is my conclusion that the defendants cannot succeed at this stage in their assertion that the allegations in the Ho affidavit have no relevance to the plaintiffs’ claim.

[71] The defendants also raise, in the alternative, a number of objections to specific portions of the Ho affidavit. These are raised primarily by the defendant Monsanto, as the defendant Aventis premises most of its objections on the claim that the general environmental safety of GMOs is not an issue raised on the pleadings. I have determined that this is not a valid objection. To the extent that Monsanto’s objections to specific portions of the affidavit are premised on the same point they do not require further comment.

[72] It is my view that most of the other objections raise issues of the merit or validity of the opinions offered by Dr. Ho. In the absence of clear evidence to the contrary, on an application to strike averments in an affidavit on the ground that they are scandalous, the Court should assume that they are true. Accordingly, it is my conclusion that objections of this character cannot succeed.

[73] This point is illustrated by consideration of this defendant’s objections to

para. 4(h). This paragraph alleges that the defendants' products create a risk of "horizontal gene transfer" which in turn could result in: "the generation of new viruses and bacteria by recombination"; "spreading antibiotic resistant marker genes to pathogens"; "random insertion of transgenic DNA into genomes of cells leading to genetic damage, some of which may trigger cancer"; and "reactivation of dormant viruses which are in all genomes." The defendant claims that there is no scientific basis for these opinions and that they are merely "scare tactics" which do not deserve to be considered by the Court. These objections clearly go to the merit or validity of Dr. Ho's opinion, with which the defendants disagree. I draw the same conclusion from the objections to para. 4(j). The objection to para. 4(k) is that it is argumentative and is not substantiated in the report. In fact, the paragraph is almost a direct quotation from the report. It is a statement of opinion. It is not "argumentative" simply because the opinion is controversial or the defendant does not agree with it. I conclude that this complaint, too, is an objection based on the merits of the averment and therefore cannot succeed.

[74] Paragraph 4(m) reads: "Because of the serious hazards associated with the Defendants' crops, they should be immediately withdrawn from use." I agree that this statement is simply argument and advocacy and is improperly included in the affidavit. But for the conclusions I draw below, I would strike this paragraph.

[75] Monsanto also objects to many passages in the report attached to the affidavit, but I conclude that these objections, as well, simply go to the merits of what are asserted as scientific conclusions in the report and cannot constitute a basis for striking the statements pursuant to Rule 327.

[76] The further question that must be addressed, however, in light of my discussion above, is the extent to which this affidavit is relevant not only to the merits of

the issues raised in the statement of claim, but to the issues to be determined on the application for certification. The plaintiffs make two arguments: (1) that Dr. Ho's affidavit serves to assist the Court in identifying an important common issue—whether the defendants' products are “pollutants” within the meaning of the EMPA—and gives the Court a sense of the scientific evidence germane to this issue, which may in turn assist the Court in determining whether a class action is the preferable procedure; and, (2) that it is anticipated that the defendants will argue that their products are completely safe, were adequately tested, and any prohibitions against them are unreasonable.

[77] On the second point, the plaintiffs point out that, although the defendants have not filed statements of defence, they have taken this position in various briefs filed in support of their various applications. This point is made in the plaintiffs' brief on this application, from which I quote:

27. . . . In paragraph 32 of Monsanto's Brief herein, for example, in explaining why the Affidavit of Dr. Mae Wan Ho is scandalous, it states “. . . the Defendants each obtained federal regulatory approval for the release of its GM canola.” In paragraph 16 of Aventis' Factum to the Court of Appeal on the filing of the Defences, it states:

Aventis has been marketing LibertyLink canola since 1995, when it received all necessary clearances, approvals and authorizations (including pursuant to the *Seeds Act*, the *Feeds Act*, and the *Food and Drugs Act*) for unconditional and unconfined release of LibertyLink canola into the environment.

[78] While I agree that the first of these points raised by the plaintiffs is germane to the certification application, I am very doubtful that the goal identified is well served

by this affidavit, in the context of this case. The affidavit goes far beyond identifying issues and describing evidence. It addresses the merits of one side of an extremely complex and heated scientific controversy—the general environmental safety of GMOs—an issue that should not, will not and could not possibly be determined on the certification application. To allow this affidavit to stand would invite the defendants to file affidavits of expert opinion on the other side of this issue and risks seriously complicating and confusing the issues which are properly to be determined on the certification motion. In short, evidence as to whether or not GMOs are inherently environmentally dangerous, while relevant to the merits of the plaintiffs' claim, is not directly relevant to any of the issues to be determined on the certification application. The certification hearing should not be taken up with lengthy and unhelpful arguments on the merits of this scientific dispute.

[79] I say this without implying any criticism of the plaintiffs or their counsel, for I appreciate that there is considerable authority supporting not only the admissibility of but the necessity for opinion evidence of this nature in support of the certification application. See, for example, *Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (S.C.) where the chambers judge commented at para. 22:

There is no question that the evidence filed in support of the certification order is scant. It is difficult to imagine that evidence (other than bare assertions) is not available to support the plaintiff's contention that the siding is defective. *In a product of this type, I would expect that expert evidence would be available and should have been tendered on the application for certification.*

...

... The scarcity of evidence makes more difficult the

determination of certification because the court is left to speculate as to the common and individual issues which may arise in the action. . . . [Emphasis added.]

[80] Nonetheless, the nature and tone of the defendants' response to this affidavit on the instant applications well illustrates that, in the context of this matter, an affidavit of the nature of Dr. Ho's, addressing, as it does, a highly controversial scientific debate, will not assist the Court or the parties in the task of determining the issues properly before the Court on the certification motion.

[81] The plaintiffs' goals for this affidavit, to give the Court a full picture of the nature of a common issue sought to be certified, and of the kind of evidence that will be required, will be equally well served, in the circumstances of this case, by an affidavit by one of the proposed representative plaintiffs, or even by counsel, similar in form to an expert witness notice, indicating that the plaintiffs would propose to call Dr. Ho as a witness, the nature of her qualifications, and a summary of her opinion evidence. The defendants may file similar material. Such an approach will, in my view, satisfy the need for the "evidentiary basis" of the merits of the plaintiffs' claim felt by the chambers judge in *Bittner, supra*, and in other cases I have already referred to. More significantly, it will give the certification judge a full picture of the issues and the nature of the evidence to be called, without engaging the Court, at this stage in the proceeding, in an in-depth consideration of the merits of the scientific dispute raised by the plaintiffs' claim. This procedure complies as well, in my view, to the view expressed by the Chief Justice in *Hollick* that the onus on the plaintiff is only to "set out" the material facts upon which he or she intends to rely, and the position of Winkler J. in *Caputo* that evidence is not permissible on a certification motion that is pertinent only to the merits of the action, as opposed to an issue that must be determined on the motion. Both views are quoted, *supra*.

[82] In short, on the certification application the Court is not concerned about the ultimate merits of Dr. Ho's opinion, or whether her affidavit is sufficient to establish, or prove, the views that she expresses. In that context, it is relevant only that she does hold such opinions, is qualified to give expert opinion evidence, and would do so at trial. The purpose of her affidavit on the certification application is only, as the plaintiffs argued, to provide context, not to prove the substance of its contents.

[83] That being so, I order that the affidavit of Dr. Mae Wan Ho filed in support of the certification application be struck and give leave for it to be replaced with an affidavit in the form I have described. I make this order to insure that the certification process does not become embroiled in the merits of a scientific dispute that cannot properly be determined on affidavit evidence, and does not, in any case, raise issues to be determined on the certification motion, but at trial.

2. The Affidavit of Gary Smith

[84] In analysing the alleged defects in the Smith affidavit it is essential to bear in mind the purposes of this affidavit, which, according to the plaintiffs, are to explain what organic agriculture is, and to show that it represents an important and growing economic force in Saskatchewan and why GMOs are prohibited in organic agriculture. This information is said to be offered to help the Court identify the following common issue and the preferability of having it determined in a class proceeding:

[W]hat is the nature and the extent of the prohibition against GM crops and GM contaminated crops in organic grain production in Saskatchewan and the markets in which Saskatchewan organically-produced grain is sold[.]

[85] It might be said, as well, that the affidavit offers some evidential basis for establishing the necessary “rational connection” between the class sought to be certified (all organic grain farmers in Saskatchewan, in the first instance) and the common issues sought to be certified, by showing that members of that class have suffered losses which would raise common cause with the proposed representative plaintiffs. All of these goals are clearly germane to the certification application.

[86] On the other hand, the affidavit must comply with Rule 319 and, in particular, the requirement that, where the affidavit is not based on personal knowledge, the grounds of the belief must be provided. Further, where expert opinion evidence is offered, it must be clear that it falls within the witness’ expertise, and what facts are said to support the opinion. A review of this affidavit and the attached report persuade me that what is being proffered is not so much expert opinion as evidence of fact based on information and belief. The defendant Aventis offers this general complaint:

79. In the present case, although Mr. Smith’s Affidavit is offered as a statement of an expert’s opinion, it is difficult, if not impossible, to differentiate between what parts are offered in evidence as proof of facts and what is opinion. Where apparent statements of fact are made, it is not clear what is offered as Mr. Smith’s own evidence, and what he offers on information and belief. Finally, when opinion is offered, it is often not clear what facts are said to underlie those [opinions].

[87] I agree with this criticism. I also agree with the comment of counsel for Monsanto that the “report” attached to the affidavit appears to be more a researched essay than an expert opinion report, and contains insufficient details as to the sources and veracity of the information included in the report. In fact, I agree with the defendants’

more general observation that the problems are in this case compounded by the attached report, which is, of course, itself unsworn, is not properly an expert report, and does not comply with the requirements for affidavit evidence.

[88] It is my view that the affidavit in its present form is not admissible for these reasons. I have concluded that it should be struck in its entirety. The following specific comments may be helpful, should the plaintiffs wish to file an amended affidavit by Gary Smith or another:

(1) The report which is Exhibit "A", Tab 1 to the present affidavit is not in its present form admissible. If the witness wishes to attest to the contents of the report, he must do so, not by swearing to an opinion as to the validity of a summary of its contents, but by proper averments, on information and belief or otherwise, in each case.

(2) For the purpose of this application, which is not intended to prove the merits of the plaintiffs' claim, (which I therefore find to be a "special circumstance" within the meaning of Rule 319) affidavit evidence based on information and belief will be received as to (1) the size and nature of the market for organic grain grown in Canada and in Saskatchewan; and (2) the extent to which certifying bodies throughout the world ban GM organisms. However, the source of the information must be clearly set out in proper affidavit form.

(3) I agree with the position of Aventis that, given Mr. Smith's position as an "advisor" to the OAPF committee, the organization established by the Saskatchewan Organic Directorate to fund this lawsuit, he cannot present independent expert evidence in this matter. However, I hold that he is not

precluded from giving evidence of the nature of organic crop production, including the use of crop rotation for weed control and the role that canola has played for that purpose. These matters are largely uncontroversial. Mr. Smith may well have personal knowledge of these matters or be in a position to swear to them on information and belief. Even if they are technically matters of expert opinion, his position as advisor to the plaintiffs would in the circumstances I describe go only to weight, and not to admissibility.

3. The Affidavit of J. Wallace Hamm

[89] This affidavit is proffered as a “preliminary assessment of the economic impact resulting from the introduction and proposed introduction of GM canola and wheat respectively on certified organic Saskatchewan grain farmers.” Mr. Hamm and his research team have collected organic canola and wheat production statistics for the year 1990 to the present. They have also done a survey of western Canadian organic producers and grain traders to collect “marketing data and experiences” which they have interpreted to determine (preliminarily) past and future trends in relation to the effect of GM contamination on marketing of organic grain. This witness also offers opinion evidence as to the size of the class sought to be certified.

[90] The first point to be made is that this evidence is clearly germane to issues to be determined on the certification application. As Chief Justice McLachlin pointed out in *Hollick, supra*, one issue to be addressed is:

. . . whether each of the putative class members does indeed have a claim — or at least what might be termed a “colourable claim” — against the respondent. To put it another way, the issue is whether there is a rational

connection between the class as defined and the asserted common issues. . . . [At p. 30.]

[91] The jurisprudence, including the *Hollick* decision, suggests that this is an issue that may or may not require evidence, depending on the nature of the case, for the nature and scope of the relevant class may, in some cases, be obvious from the pleadings. The Chief Justice explained:

[20] The respondent is of course correct to state that implicit in the “identifiable class” requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

[21] *The requirement is not an onerous one.* [Emphasis added] The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. . . . [At p. 31. Emphasis in the original except where stated.]

[92] In addition, Rule 82(2)(c) requires the plaintiff to provide his or her best

information as to the size of the class sought to be certified.

[93] Aside from relevance, however, the defendants raise other objections to the admissibility of the Hamm affidavit, all relating to its purported status as expert opinion evidence. These objections raise several issues that must be addressed.

[94] The defendant Aventis complains that Mr. Hamm cannot present unbiased or independent expert evidence because of his position as an advocate for the plaintiffs. This defendant has filed affidavit evidence that Mr. Hamm is the general manager and principal of Pro-Cert, one of the listed certifying bodies in the statement of claim from which a portion of the proposed class will derive. It is argued that this gives him an interest in the outcome of the litigation. In addition, like Mr. Smith, there is evidence that he has accepted an advisory role *vis-à-vis* the group that is funding the plaintiffs in this lawsuit, OAPF, and, indeed, that his report was provided free to this body as part of his contribution to the cause.

[95] The defendant argues that this connection is sufficient to make Mr. Hamm's evidence inadmissible insofar as it purports to be expert opinion evidence, citing primarily the opinion of Klebuc J. of this Court in *Kozak v. Funk; Kozak v. Nutter* (1995), 136 Sask. R. 12 (Q.B.). The plaintiffs argue that the purpose of the affidavit is not to *establish* the losses in question, (which is not an issue to be determined on the certification application), but only to provide an estimate of such losses, and to suggest a method for calculating them.

[96] On this issue, I find the position of the plaintiffs the more reasonable. In light of the nature of the evidence set out in this affidavit, and the evidentiary standard properly applied to the issues it addresses, it is my view that the status of Mr. Hamm as

an advocate for the plaintiffs is a matter which goes to weight, rather than admissibility. This conclusion relates only, of course, to the use of this affidavit on the certification application. Very different considerations come in to play in the context of a trial.

[97] It is clear from the passage quoted immediately above from *Hollick* that the *evidentiary* requirement in relation to many of the issues to be determined on the certification motion is not high. The plaintiff does not have to establish, on any standard, the extent of the loss experienced by members of the class sought to be certified. It need only provide some evidence, where the pleadings and context are not themselves sufficient to establish this, to provide an air of reality to the claim that there are real issues to be tried in relation to the putative class. It is relevant to note that in *Hollick*, the Supreme Court held that mere evidence of numerous complaints against the landfill was sufficient to meet the evidentiary requirement that there was a class of persons who shared the same interest in the resolution of the asserted common issue. There was, apparently, no evidence at all as to the *merits* of the complaints in question.

[98] The affidavit at issue does not offer a bare opinion on the issue of whether and to what extent loss has been suffered by members of the putative class. It cites data and organic canola production statistics for Saskatchewan in the period 1990 to 2001, collected from Saskatchewan certifying bodies, to conclude that “Saskatchewan organic producers steadily increased the land areas devoted to canola in the period 1992 to 1998. They drastically decreased canola acres and production in 1999 and thereafter.” If the defendants wish to contest this conclusion, they may offer their own evidence or argument to show that it is not warranted.

[99] Objections are also raised as to the conclusions drawn by this witness, and set out in the accompanying report, based upon a survey of western Canadian organic

producers and grain traders as to expectations for future organic wheat sales and production trends if the introduction of GM wheat cultivars is allowed. While these conclusions would seem to me to be open to challenge, on a number of grounds, including some raised by the defendants on this motion as to the nature of the survey itself, these challenges in my view raise issues of the weight to be given to this evidence rather than their admissibility, for the purpose of the certification motion.

[100] All of the data relied upon by this witness is available to the parties and to the Court. It is not, in my view, substantially different in evidentiary quality from the evidence of complaints deemed acceptable by the Supreme Court in *Hollick*. Again, it does not follow that this evidence would be admissible at trial, where the issues to be decided are significantly different, and the evidentiary standard is correspondingly higher.

[101] The defendant Aventis also complains that this affidavit suffers the same weaknesses as the Smith affidavit, of failing to identify whether statements are made on information and belief or the basis of opinions. I do not agree that the affidavit suffers from these weaknesses.

[102] Several complaints relating to specific portions of this affidavit or the attached report remain to be addressed.

[103] The defendant Aventis requests that all references in this affidavit or the attached report to foreign laws be struck, as Mr. Hamm does not purport to be an expert on foreign laws. This objection relates primarily to comments in s. 2.2 of the report that regulators of the global organic food industry have prohibited GMOs from various times in the 1990s, and that this situation is not likely to change. I agree that this witness does not claim expertise on this issue and no basis for this claim is set out in the report. These

references are to be disregarded for the purpose of the certification hearing. I add, however, that in my view it is unlikely that it will be necessary for the plaintiffs to find an expert in foreign law to establish, for the purpose of the certification hearing, the various standards in relation to GMO toleration relevant to this claim. These standards have already been provided to the defendants by way of replies to demands for particulars of the pleadings. If more than this is necessary, and this is a question to be argued on the motion itself, then an affidavit on information and belief, based upon information gleaned from the internet, should suffice.

[104] The defendant Monsanto challenges Mr. Hamm's expertise to draw "macro-economic" conclusions from the data upon which he relies. It appears from Mr. Hamm's *curriculum vitae* that this witness' qualifications are generally in the area of agrology and soil science. On the other hand, he has been qualified as an expert witness on several other occasions to quantify farm losses. On balance, I conclude that the defendant is correct on this point. Mr. Hamm may be able, of course, to testify on information and belief, as to the past values of the Saskatchewan organic canola production. I do not see how his calculations or estimates of future loss on the basis set out in the report can assist the Court. Sections 3.2 and 4.0 of the report are to be disregarded and paras. 4(d), (e) and (f) of the affidavit are struck.

[105] The defendant Monsanto challenges Mr. Hamm's estimate of the class size, based upon the statistical data he cites as to acreages seeded to organic canola and wheat. This evidence is in my view unobjectionable. Rule 82(2)(c) requires the proposed representative plaintiff to provide his or her "best information on the number of members in the proposed class."

4. The Affidavit of Michael Marriage

[106] Some objections to this affidavit are based on the claim that Mr. Marriage is improperly testifying on the basis of information and belief. This is, in my view, an overly technical interpretation of some of his averments. He is in the business of producing organic food products. He can properly claim personal knowledge of the business practices that relate thereto, including the claim in para. 6, “The regulations are interpreted very strictly. All organic agricultural products must be free of any GM contamination however caused.” I find that this paragraph is unobjectionable. I make the same finding in relation to para. 7. Paragraphs 8 through 11, on the other hand are at best unsupported opinion and at worst argument. They are struck.

5. The Affidavit of Larry Hoffman

[107] Larry Hoffman is one of the proposed representative plaintiffs. The defendants raise objections to a number of specific statements in his affidavit filed in support of the application for certification. I will deal with these objections *seriatim*.

1. Paragraph 4

[108] This paragraph describes Mr. Hoffman’s history as an organic grain farmer. It is clearly germane to the determination of whether he is an appropriate representative for the class sought to be certified. The following part of the paragraph, describing his motivation for the change from conventional to organic farming, is impugned:

4. . . . I had become disillusioned and discouraged by the number of my friends who were leaving farming. I felt increasingly powerless in the face of diminishing profit

margins and increasing dependence of expensive chemicals that often left me sick. Organic farming, with its premium prices and freedom from chemicals, offered an attractive alternative. I met many other organic farmers who were enthused and rewarded by the benefits of organic farming. Organic farming has been an enriching experience.

[109] Monsanto objects that this entire passage is argumentative and irrelevant. Aventis objects only to the statement that Mr. Hoffman “felt increasingly powerless in the face of diminishing profit margins and increasing dependence of expensive chemicals that often left me sick.” Aventis says that this statement is irrelevant to this litigation and is also otherwise scandalous.

[110] I find that the impugned passages are intended to explain Mr. Hoffman’s motivation for being an organic farmer and are germane to the question of whether he is a suitable plaintiff of a class which is proposed to include other organic farmers. They are not “scandalous” within the meaning of Rule 327.

2. Paragraph 20

[111] This paragraph includes the averment: “From reviewing Dr. Rene Van Acker’s affidavit filed herewith, and in particular the exhibited seed lot contamination studies, it appears that even certified seed growers have had significant contamination by GM canola. . . .” Only Monsanto objects to this, claiming that it is hearsay and in any case nothing more than opinion or argument.

[112] I find that this part of the affidavit is unobjectionable. Rule 82(2)(b) requires a proposed representative plaintiff to file an affidavit setting out the basis of his

or her personal claim. This averment complies with that requirement and also with the suggestion of the Supreme Court in *Hollick, supra*, that the proposed representative plaintiff should file an affidavit on the certification application setting out the material facts upon which his claim relies.

3. Paragraph 22

[113] Monsanto alone takes objection to the statement, “Organic wheat is generally easy to grow and easy to sell. . . .” on the basis that “Mr. Hoffman should not be allowed to assume and state that his own experience is common to all organic farmers.” I find that Mr. Hoffman is quite qualified to make this statement. Monsanto’s objection goes at best to the weight to be attached to it. This portion will not be struck.

4. Paragraph 23

[114] This paragraph avers that organic agriculture will be seriously harmed if GM wheat is introduced on the same scale as GM canola, stating:

23. . . . Without wheat, it would be very difficult for me to survive on my remaining crops. They are more expensive to grow, command lower premiums, and are not as easy to sell. I would expect that our markets would become more difficult to access without wheat supporting our organic grain sales. I fear that I would be forced back into conventional farming.

[115] Monsanto alone complains that these are not statements of facts, but are, at best, speculative, attempting to look into the future. I find this paragraph unobjectionable. One of the issues that the proposed plaintiffs seek to have certified is

that the introduction of GM wheat will cause them irreparable harm. Again, the rules and the jurisprudence require that they set out the basis of their claim by affidavit in support of the application for certification. As I have already indicated, this does not require them to prove the claim. They are simply required to indicate the material facts upon which they rely. As the plaintiffs point out, the issue in this case is whether the introduction of GM wheat will cause the representative plaintiffs irreparable harm. It necessarily requires that the affiant look into the future.

5. Paragraph 25

[116] Both defendants object to the following paragraph as nothing but an expression of opinion, argumentative and drawing a legal conclusion:

25. . . . The common issues listed therein [the Notice of Motion seeking certification of this action as a class action] are common for the rest of the proposed class. Any claim by an organic grain farmer against the Defendants pertaining to the introduction of genetically-modified canola and the proposed introduction of GM wheat would likely raise similar issues.

[117] A similar averment appears in para. 14 of the affidavit of Dale Beaudoin and is the only paragraph of that affidavit to which the defendants object. I agree that, in general, the proposed plaintiffs' opinions as to whether the criteria for certification are met are irrelevant. In Saskatchewan, the Court would have the option to disregard (as opposed to strike) such statements on this basis. In this particular case, I am inclined to give the paragraphs in question a benign interpretation, in any case. As the cases discussed above (including the passages quoted from *Hollick*) make clear, there are circumstances in which the nature of the claim may itself be sufficient to establish the

commonality of issues without the need for an additional evidentiary basis. While whether this is the case in the instant matter is essentially a matter of argument, and would perhaps be better left to the legal brief, the effect of these paragraphs is simply to put the defendants on notice that this position will be advanced by the proposed plaintiffs. I do not propose to strike these paragraphs.

6. Paragraph 26

[118] Both defendants object to the part of this paragraph which reads:

26. The membership of the proposed class can readily be determined. Each of the organic certifiers operating in Saskatchewan named in the Statement of Claim keeps accurate membership lists. . . .

[119] The objection is that the first sentence is opinion and the second is hearsay which is either inadmissible on a key issue to be determined on the certification application, or is not properly sworn on the basis of information and belief.

[120] The first sentence is merely introductory and is, in itself, unobjectionable, so long as the remainder of the paragraph supports its assertion. I hold that an affidavit based on information and belief is admissible on this point for the reasons I have already discussed. I agree, however, that this paragraph is not sworn on the basis of personal knowledge and that to be admissible the affiant must set out a proper basis for his belief with respect to *each* of the certifiers in question. Therefore, while an affidavit from someone responsible in each organization is not required, the proposed plaintiff must make appropriate inquiries in each case, and indicate the source of his belief in each case. This paragraph is struck for failure to comply with this requirement of Rule 319.

7. Paragraph 30

[121] This paragraph sets out facts that the proposed plaintiff believes can be shown in support of his claim. Only Monsanto objects to this paragraph, which it says purports to comment on the merits of the proposed application for certification. I find that this paragraph complies with the requirement, already discussed, in relation to Rule 82(2)(c), and is unobjectionable. Some of the defendant's objections to this averment go to the merits of the averment, in my opinion, and do not support the order sought.

8. Paragraph 31

[122] This paragraph sets out the basis for the plaintiffs' claim for an interlocutory injunction to prevent Monsanto from releasing GM wheat. The plaintiffs also seek, in the statement of claim, a permanent injunction. The defendant Monsanto objects to the paragraph on the basis that it is not based on personal knowledge, reflects opinion, and is argumentative. I hold that this paragraph is admissible on the basis, already discussed, that it is properly sworn on information and belief and sets out the basis of the plaintiffs' claim as is required by Rule 82(2)(c).

9. Paragraphs 32, 33 and 34

[123] These paragraphs clearly address the plaintiffs' application for an interim injunction and are not relevant to the application for certification. They will be disregarded in relation to the latter application.

10. Paragraph 36

[124] This paragraph reads:

36. By way of Replies to Demands for Particulars, our solicitors herein have particularized the various standards relevant to GM prohibitions in organic agriculture in Canada. The most important of these standards is of course the European standard which applies to the importation of organic grain into Europe. A full set of the organic standards referred to in the particulars and claim may be viewed and copied at the offices of our solicitors by counsel for the Defendants upon reasonable notice.

[125] Both defendants object to the paragraph. Aventis objects to what it says are statements of opinion on issues of law, and, if offered as *proof* of the standards referred to, should be struck on the basis that Mr. Hoffman is not qualified to comment on the existence, interpretation and application of foreign law. Mr. Hoffman's *beliefs*, on the other hand, are said to be irrelevant.


[126] My view of this paragraph is similar to that already expressed in relation to many of the other paragraphs of this affidavit objected to. The purpose of this affidavit is not and need not be to prove the existence or importance of the standards referred to. Its purpose is to comply with the requirements of Rule 82(2)(b), to provide the basis of the plaintiffs' claim, which it does by referring to facts which have been alleged in the pleadings and in the replies to the demands for particulars. I find that it is unobjectionable.

III. Conclusion

[127] The following affidavits or portions of affidavits filed in support of the application for certification are struck on the grounds set out above: the affidavit of Mae Wan Ho in its entirety; the affidavit of Gary Smith in its entirety; subparas. 4(d), (e) and (f) of the affidavit of J. Wallace Hamm; paras. 8-11 of the affidavit of Michael Marriage; para. 26 of the affidavit of Larry Hoffman. In addition, I have found that portions of the Hamm report described in more detail above are to be disregarded for the purpose of the certification application, and that paras. 32, 33 and 34 of the Hoffman affidavit are irrelevant to the certification application and are to be disregarded in that context.

[128] The applications are dismissed with respect to the remainder of the impugned affidavits or portions thereof. The proposed representatives are granted leave, should this be thought necessary, to file further material in support of their application for certification.

[129] As the issues raised here are novel, at least in this province, and as success is divided, there shall be no order as to costs.

 J.