COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Knight v. Imperial Tobacco Canada Limited,***
2006 BCCA 235

Date: 20060511
Docket: CA032730

Between:

Kenneth Knight

Respondent
(Plaintiff)

And

Imperial Tobacco Canada Limited

Appellant
(Defendant)

And

Her Majesty the Queen in Right of Canada

Appellant
(Third Party)

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Smith

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Place and Date of Hearing:	Vancouver, British Columbia 7 and 8 February, 2006
Place and Date of Judgment:	Vancouver, British Columbia 11 May 2006

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This is an appeal from an order of Satanove J. dated 8 February 2005, certifying the action as a class proceeding under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***CPA***"). The judgment is reported and can be found at (2005), 43 B.CL.R. (4th) 169, 250 D.L.R. (4th) 347.

[2] Imperial Tobacco Canada Limited ("Imperial") is a corporation that manufactures, markets and sells in British Columbia cigarettes branded as "light" and "mild". The plaintiff, Kenneth Knight ("Knight"), purchased and smoked these types of cigarettes manufactured and marketed by Imperial.

[3] On 8 May 2003, Knight brought a suit against Imperial, alleging that in the course of marketing these brands of cigarettes, Imperial engaged in deceptive acts or practices. The actions of Imperial were alleged to have contravened the provisions of two statutes, the now repealed ***Trade Practice Act***, R.S.B.C. 1996, c. 457 (the "***TPA***") and the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 (the "***BPCPA***"). The ***TPA*** was repealed on 1 July 2004, and replaced by the ***BPCPA***.

[4] The class defined by the order consists of persons who, during the period from July 5, 1974 to the opt-out/opt-in date set by the court, purchased the defendant Imperial's light or mild brands of cigarettes in British Columbia. It appears that this class could number in the hundreds of thousands. The nature of the claims asserted on behalf of the class relate to allegedly deceptive acts or practices by Imperial in the solicitation, offer, advertisement and promotion of its brands of

cigarettes contrary to the ***TPA***, for claims prior to July 4, 2004, and contrary to the ***BPCPA***, for claims after that date. The relief sought by the class members are remedies under the ***TPA*** and the ***BPCPA***. The remedies are sought under the provisions of ss. 18 and 22 of the ***TPA*** and ss. 171 and 172 of the ***BPCPA***.

[5] The common issues certified by the chambers judge to be tried in respect of the class are:

(i) Are the sales of the defendant's light and mild brands of cigarettes to class members for the class members' personal, family or household use "consumer transactions" as defined in the TPA and/or BPCPA?

(ii) Are the solicitations and promotions by the defendant of its light and mild brands of cigarettes to class members for the class members' personal, family or household use "consumer transactions" as defined in the TPA and/or BPCPA?

(iii) With respect to the sales in British Columbia of the defendant's light and mild brands of cigarettes to class members for the class members' personal, family or household use, is the defendant a "supplier" as defined in the TPA and/or BPCPA?

(iv) Are the class members "consumers" as defined in the TPA and/or BPCPA?

(v) Did the defendant engage in deceptive acts or practices in the solicitation, offer, advertisement and promotion of its light and mild brands of cigarettes contrary to the TPA and/or BPCPA, as alleged in the statement of claim?

(vi) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA and/or BPCPA, should an injunction be granted restraining the Defendant from engaging or attempting to engage in those acts or practices?

(vii) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA and/or BPCPA, should the Defendant be required to advertise the Court's judgment, declaration, order or injunction and, if so, on what terms or conditions?

(viii) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA and/or BPCPA, should a monetary award be made in favour of the class and, if so, in what amount?

(ix) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA, should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount?

(x) Did the Defendant wilfully conceal material facts relating to the causes of action asserted in this proceeding?

(xi) Whether the defendant's interactions with the government of Canada constitute a defence to claims under the TPA?

(xii) Whether the doctrine of *volenti non fit injuria* constitutes a defence to claims under the TPA?

(xiii) Whether the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 relating to the defence of contributory negligence have any application to a claim under the TPA?

The appellant Imperial did not contest the certification of issues (i) through (iv).

[6] Issues (i) through (x) were derived from the statement of claim. Issues (xi) through (xiii) were derived from the statement of defence.

[7] For the reasons that follow, I find that no claims advanced under s. 18 of the ***TPA*** were amenable to certification as a class action. I find that issues (v), (vi), (vii), (x), (xi), (xii) and (xiii) were properly certified as common issues. I find that the chambers judge was in error in certifying issues (viii) and (ix) generally, as these can only be certified in relation to that segment of the general class whose claims arose after May 8, 1997.

Availability of Certification as a Class Action under the *TPA* and the *BPCPA*

[8] The appellants argue that the chambers judge erred in certifying as common issues those issues that relate to claims advanced under s. 18 of the ***TPA*** and s. 172 of the ***BPCPA*** because, they assert, those sections provide for proceedings that may be brought in a representative capacity and s. 41(a) of the ***CPA*** prohibits certification of such actions. Section 41(a) of the ***CPA*** provides that the Act does not apply to any proceeding that may be brought in a representative capacity under another act. Section 18(1) of the ***TPA*** provides that an action may be brought by a person whether or not that person has a special or any interest under the Act or is affected by a consumer transaction. Section 18(3) of the ***TPA*** provides that any person may sue on that person's own behalf and on behalf of consumers generally or a designated class of consumers in British Columbia. Section 172 of the ***BPCPA*** provides that a person may bring an action in the Supreme Court for a declaration or injunction whether or not the person bringing the action has a special interest or any interest under the Act or is affected by a consumer transaction that gives rise to the action.

[9] It seems clear to me that s. 18 of the ***TPA*** is legislation of the sort that would preclude a claim brought under it from certification because of the provisions of s. 41 of the ***CPA*** and therefore the learned chambers judge erred in certifying the claim as it relates to s. 18 of the ***TPA***. The learned chambers judge considered that the s. 18 claims ought to be certified in the interests of justice to prevent two parallel proceedings. The judge relied upon the decision of the Ontario Supreme Court of Justice in ***Stern v. Imasco Ltd.*** (1999), 38 C.P.C. (4th) 347, 1 B.L.R. (3d) 198

[***Stern***]. The Ontario statute contained an analogous provision to s. 41 of the ***CPA***. However, I consider that case to be inapplicable to the present case because the legislative provision being considered there was quite different from the provision of the ***TPA*** at issue in this case. In ***Stern***, Cumming J. did not consider that the action brought by the plaintiff, Stern, seeking an oppression remedy under s. 241 of the ***Canada Business Corporations Act*** (the ***"CBCA***") had the character of a representative action. Because of that circumstance, the judge was of the view that a class proceeding founded upon the oppression action taken by the plaintiff under the ***CBCA*** could be maintained. I consider it was not open as a matter of law to the chambers judge to certify any claims advanced under s. 18 of the ***TPA***. However, that may not be of great materiality in this case because it seems to me that claims of this sort can properly be certified under s. 172 of the ***BPCPA***.

[10] It seems to me doubtful that it could be said that a proceeding under s. 172 of the ***BPCPA*** could properly be described as that type of action that could be brought in a representative capacity. There is no provision in this section that is similar in effect to s. 18(3) of the ***TPA***. While an individual may bring an action under s. 172 without having a special interest or indeed any interest under the statute, I do not consider that the section provides for the individual bringing the action to act as a representative of anyone else. Section 172 merely provides that the individual bringing the action does not have to have a specific interest in the consumer transaction that might give rise to an action. Accordingly, I do not conclude that s. 41 of the ***CPA*** precludes certification of an action seeking relief under that particular section of the ***BPCPA***.

[11] The appellants submit that the judge erred in certifying issues related to claims advanced by the plaintiff under the provisions of the ***TPA***, a repealed statute. I would not accede to this argument advanced on behalf of the appellants. The lawsuit was commenced seeking relief under the ***TPA*** in May of 2003, roughly 13 months before the ***TPA*** was repealed. The ***Interpretation Act***, R.S.B.C. 1996, c. 238, s. 35(1)(c), provides that the repeal of a statute does not affect a right or obligation acquired, accrued or incurred under the enactment repealed. I do not consider that the repeal of the ***TPA*** by the provisions of the ***BPCPA*** was destructive of vested rights that had accrued to persons under the ***TPA***, subject of course to matters such as limitations.

The Test for Certifying a Class Action

[12] Having determined that certification of issues related to s. 172 of the ***BPCPA*** as a class action is not barred by application of that Act, the remaining issues relate to the question of whether certification of those issues was appropriate. The test to be applied by the courts in determining whether or not to certify a class action is found in s. 4(1) of the ***CPA***:

> **4** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

In satisfying itself as to point (d) above regarding preferability, a court must consider all relevant matters, including the following (***CPA,*** s. 4(2)):

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[13] I note that these statutory provisions were reviewed and applied by the Supreme Court of Canada in ***Rumley v. British Columbia***, [2001] 3 S.C.R. 184, 2001 SCC 69 [***Rumley***].

[14] Mr. Knight argues that the provisions of the ***TPA*** and the ***BPCPA*** create statutory causes of action in favour of individuals who can establish that a supplier of goods or services has engaged in deceptive acts or practices in respect of consumer transactions. This type of legislation was described in ***Prebushewski v. Dodge City Auto (1984) Ltd.***, [2005] 1 S.C.R. 649, 2005 SCC 28 [***Prebushewski***], as a type of remedial litigation. Abella J. noted at paras. 33–36 of the judgment:

> 33 Part III of the Act, in which s. 65 is found, was originally enacted in 1977 as *The Consumer Products Warranties Act, 1977*, S.S. 1976-77, c. 15. It was part of an emerging legislative pattern in North America designed to equitably reconfigure the imbalance in bargaining power between consumers and those who manufacture and sell products. In order to inform consumers and protect them from unsafe products and fraudulent or deceptive practices, legislation was introduced to rectify consumer vulnerability resulting from such common law principles as *caveat emptor*.
>
> 34 In Canada, the federal government enacted the *Department of Consumer and Corporate Affairs Act*, S.C. 1967-68, c. 16. A new Department of Consumer and Corporate Affairs was given responsibility for coordinating the enforcement of a number of federal consumer protection statutes. Other significant federal enactments included the *Food and Drugs Act*, S.C. 1952-53, c. 38, the *Hazardous Products Act*, S.C. 1968-69, c. 42, the *Motor Vehicle Safety Act*, S.C. 1969-70, c. 30, the *Textile Labelling Act*, S.C. 1969-70, c. 34, the consumer notes provisions of the *Bills of Exchange Act*, R.S.C. 1952, c. 15, Part V (added by S.C. 1969-70, c. 48, s. 2), the *Weights and Measures Act*, S.C. 1970-71-72, c. 36, and the *Consumer Packaging and Labelling Act*, S.C. 1970-71-72, c. 41.
>
> 35 Provincial governments, through their jurisdiction over property and civil rights, also began to enact legislation designed to improve protection for consumers and enhance their remedial options. One such statute was Saskatchewan's *Consumer Products Warranties Act, 1977*.
>
> 36 When this statute was introduced in the Saskatchewan legislature, the then Minister of Consumer Affairs referred to a 1972 Ontario Law Reform Commission *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972), to explain why similar Saskatchewan warranty law was inadequate to meet the needs of

consumers. The Minister quoted the following passage from p. 23 of the report:

> [Ontario's *Sale of Goods Act*] proceeds from the fictitious premise that the parties are bargaining from positions of equal strength and sophistication . . . . Especially serious is the Act's preoccupation with the bilateral relationship between the seller and the buyer, which totally ignores the powerful position of the manufacturer in today's marketing structure. . . . [O]ur sales law is private law and it has failed to provide any meaningful machinery for the redress of consumer grievances. This last weakness is perhaps the most serious of all weaknesses, for as has been frequently observed, a right is only as strong as the remedy available to enforce it. [Emphasis in *Prebushewski*.]

[15] The respondent submits that the main issue in the litigation will be whether or not Imperial engaged in deceptive acts or practices in marketing cigarettes. The respondent relies upon the definitions found in the statutes concerning conduct having the capability, tendency or effect of deceiving or misleading an individual. The remedies being sought include a declaration that the defendant has engaged in such acts or practices, an order for an injunction against the continuation of such acts or practices and orders for monetary relief. The respondent argues that individual reliance is not a necessary ingredient of these causes of action.

[16] The appellants argue otherwise. They point to the language of the applicable statutory provisions as being indicative of the necessity for a consumer to prove individual reliance in order to obtain relief. They argue that because this is so, individual issues will overwhelm common issues and that the chambers judge therefore erred in certifying this action as a class proceeding. The appellants also submit that the chambers judge fell into error by conflating the low threshold test for finding a cause of action with the onus that exists on a plaintiff to demonstrate on a

balance of probabilities that the issues sought to be tried are truly common and ought to be litigated on a common basis.

[17] The chambers judge found that it might not be necessary for the plaintiff to demonstrate individual reliance by consumers on the conduct of the defendant to establish breaches of the statutes. She further held that evidence from individual class members should not be required to determine the extent of the defendant's knowledge about any alleged deception practised by the defendant concerning the nature of its product and its alleged deficiencies. She said at para. 49 of her reasons:

> [49] … Evidence from individual class members will not be required to determine the extent of the defendant's knowledge about the deceptive nature of its product and whether it kept silent about the alleged defects.

[18] Under the ***BPCPA***, "deceptive act or practice" is defined in s. 4(1) to mean, in relation to a consumer transaction,

> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor.

[19] Section 22 of the ***TPA*** and ss. 171 and 172 of the ***BPCPA*** afford a consumer a right to damages or restoration of value given for a contravention of the statutory

provisions, which right presumably is triggered if a transaction is found to be tainted by a deceptive practice. It seems to me that a key component to be established to afford recovery under the statutes is proof of deceptive conduct by a supplier such as the defendant. I consider it was open to the chambers judge to conclude that the determination of this issue would advance the litigation.

[20] The Supreme Court of Canada has discussed the approach that ought to be taken by a court to certification issues in a number of recent cases, including ***Hollick v. Toronto (City)***, [2001] 3 S.C.R. 158, 2001 SCC 68 [***Hollick***]; ***Rumley***, *supra*; and ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46. What I distill from those cases is that class proceedings legislation ought to be construed generously. Class actions serve judicial economy by avoiding unnecessary duplication in a multiplicity of actions, improve access to justice and serve to modify wrongful behaviour. It is necessary that the statement of claim disclose a cause of action, but the certification stage is not a test of the merits of the action. What the certification stage focuses on is the form of the action. The key question is whether the suit or portions of it are appropriate for the trial of common issues.

[21] To answer that often difficult question requires determining whether claims of the proposed class raise common issues. The proposed class must be capable of definition and it ought not to be unnecessarily broad. In the case of ***Hollick***, at p. 174, the Chief Justice noted a requirement that the class representatives should come forward with sufficient evidence to support certification and, of course, the opposing party has an opportunity to respond with evidence of its own on this issue.

Deficiency in information may result in the court not being able to find sufficient facts to enable it to determine that certification of certain common issues ought to be granted: ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348, 44 C.P.C. (5th) 350 (Ont. S.C.J.) [***Caputo***] and ***Ernewein v. General Motors of Canada Ltd.*** (2004), 135 A.C.W.S. (3d) 994, 2004 BCSC 1462, reversed (2005), 143 A.C.W.S. (3d) 634, 2005 BCCA 540, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 545 (QL) [***Ernewein***]. There is a duty lying upon a class representative to establish an evidentiary basis for certification.

[22] In this case, as in the ***Rumley*** case, there is no issue as to whether the pleadings disclose a cause of action or that the respondent is a proper representative plaintiff. The appellants here, however, submit that there is a lack of an identifiable class properly certifiable. They argued before the chambers judge and here that because individual reliance and individual transactions of consumers will have to be examined, this is not an appropriate case for certification as a class proceeding. They submit that the individual liability issues in the litigation will predominate over any common issues – ***CPA***, s. 4(2)(a). The appellants also question the appropriateness of the certification of any damages issues as common issues.

[23] It seems to me that in approaching this question of whether or not certification ought to be granted, the following comments of Cumming J.A. in ***Campbell v. Flexwatt Corp.*** (1997), 44 B.C.L.R. (3d) 343, [1998] 6 W.W.R. 275 (C.A.), leave to appeal dismissed [1998] S.C.C.A. No. 13 (QL) [***Campbell***], are apposite:

> 51 The *Class Proceedings Act* requires that the claims of the class members raise common issues which, for reasons of fairness and efficiency, ought to be determined within one proceeding. Common issues can be issues of fact or law and do not have to be identical for every member of the class. Section 1 of the *Class Proceedings Act* defines common issues as:
>
> (a) common but not necessarily identical issues of fact; or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.
>
> 52 This question of commonality of issues lies at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.
>
> 53 When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

[24] In the recent case of ***Cloud v. Canada (Attorney General)*** (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 657 (C.A.), the Ontario Court of Appeal said this at paras. 73-74:

> [73] As explained by the Supreme Court of Canada in *Hollick, supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.
>
> [74] *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in

> their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

[25] I also note that in ***Rumley*** at para. 33 the Chief Justice observed, "[i]n my view, the question at the commonality stage is, at least under the ***British Columbia Class Proceedings Act***, quite narrow."

[26] Heads (v) to (vii) contained in the certification order granted by Satanove J. deal with the issue of whether or not the defendant engaged in deceptive acts or practices concerning its light and mild brands of cigarettes and whether the court ought to grant the relief sought of an injunction and an order that the judgment of the court be advertised. These injunctive and advertising remedies were and are available under the applicable legislation. As I observed *supra*, it seems to me that the question of whether or not it can be established by the plaintiff that there have been deceptive acts or practices committed by the defendant in marketing cigarettes is central to the claims advanced on behalf of the plaintiff. Given the broad definition of deceptive acts or practices which includes acts or practices capable of deception, the question of deception or no deception is something that can, in my opinion, be litigated without reference to the circumstances of the plaintiff or individual class members. The situation with respect to this issue is somewhat analogous to that in ***Rumley***, where there was an allegation of systemic negligence made against a defendant. These comments of the Chief Justice at para. 30 of ***Rumley*** are apposite:

> 30 … The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without

> reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9). [Emphasis in original.]

Here, too, the question is one of a systemic course of conduct engaged in by the appellant, not limited by intention or effect to any one potential consumer.

[27] The appellants argue that because there was a multiplicity of advertising methodologies by the defendant over a large period of time and in varying legislative regimes, individual inquiries will be required to assess whether or not deceptive practices existed. They made references to cases such as ***Caputo***, *supra*, on this issue. In connection with that submission, I think the following passage from the reasons of the Chief Justice in ***Rumley*** is applicable in the present case:

> 31 In arguing that the necessary inquiry is inescapably individualistic, the appellant's principal contention is that the relevant standard of care, if framed at the appropriate level of specificity, would have varied over time. I am not persuaded that this should be an obstacle to the suit's proceeding as a class action. It is true that there has been a "dramatic . . . evolution" in law relating to sexual abuse between 1950 and 1992 and it is quite possible that the nature of a school's obligations to its students has changed over time. However, courts have often allowed class actions to proceed in similar circumstances: see, e.g., *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) (certifying class action for medical malpractice even though the action "concern[ed] allegations of a general practice over a number of years falling below acceptable standards" (p. 683)); *Chace v. Crane Canada Inc.* (1996), 26 B.C.L.R. (3d) 339 (S.C.) (certifying class action for negligent manufacture and sale over 11-year period on grounds that, if the defendant were "partially successful in its defence and

> ultimately found to have been negligent over part of the period only, that result c[ould] be accommodated in the answer to the general question" (p. 347)); *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) (certifying class action for negligence and spoliation over four-year period notwithstanding defendant's argument that "the standard of care would have been in flux throughout the material time" (p. 168)).
>
> 32 That the standard of care may have varied over the relevant time period simply means that the court may find it necessary to provide a nuanced answer to the common question. …

[28] The appellants also argue that the chambers judge did not engage in an analysis of whether a class action was the preferred way of proceeding. Specifically, the appellants argue the judge failed to canvas the preferability of other methods of proceeding in her reasons. I disagree. Finch C.J.B.C. in ***Hoy v. Medtronic*** (2003), 14 B.C.L.R. (4th) 32 at para. 38, 2003 BCCA 316, said of the deference required when reviewing findings of preferability:

> In *Flexwatt, supra*, this Court recognized that a chambers judge has a broad discretion in determining whether a class proceeding meets the criteria of s. 4 of the [*CPA*]. Determining whether a class proceeding would be preferable under s. 4(1)(d) is an important aspect of that discretionary power. An appellate court ought not to interfere with the exercise of this discretion unless persuaded that the chambers judge erred in principle or was clearly wrong.

[29] For the following reasons I do not consider the chambers judge to have erred in principle or to have been clearly wrong.

[30] As noted above, s. 4(1)(d) of the ***CPA*** incorporates s. 4(2) which lists the factors to be taken into consideration when addressing the issue of preferability. The factors listed in s. 4(2) are not exhaustive, nor are they mutually exclusive. Each of the factors necessarily informs the others. The chambers judge dealt with

each of the factors. The judge found, correctly in my view, that an individual action would be prohibitively expensive in this type of action. She found that the action by the Minister of Health of British Columbia, though similar in some respects, did not overlap with Mr. Knight's claim. She found as well that the policy goals of access to justice, judicial economy and behaviour modification were all engaged in this class action proceeding. She noted that the Director of Trade Practices had shown no indication that the ***TPA*** or ***BPCPA*** would be enforced by that office on behalf of consumers. In light of these findings I can see no error in the chambers judge's conclusion that a class action was the preferable way to proceed.

[31] Having regard to the authorities, I am of the opinion that an answer to the question framed as question (v), namely, "Did the Defendant engage in deceptive acts or practices in the solicitation, offer, advertisement and promotion of its light and mild brands of cigarettes as alleged in the statement of claim contrary to the TPA and/or BPCPA?" can be appropriately tried as a common issue. I do not consider that the learned chambers judge erred in certifying that question as well as questions (vi) and (vii), (relief questions), as being suitable for trial as common issues. Likewise, by a parity of reasoning with the situation in ***Rumley***, wherein it was found that a question concerning punitive damages could be tried as a common issue, subject to what I later say about limitations, I do not consider that the learned chambers judge erred in certifying heading (ix) as a common issue, namely, "If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA, should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount?" A class action proceeding would be the

preferable manner for the fair and efficient disposition of these issues. The resolution of these issues would serve to move the litigation forward. I note that the resolution of issue (v) would either significantly advance the litigation or effectively bring it to an end.

[32] I also consider that it was appropriate for the chambers judge to certify as common issues the matters raised under heads (x) to (xiii) in the certification order, namely:

> (x) Did the Defendant wilfully conceal material facts relating to the causes of action asserted in this proceeding?
>
> (xi) Whether the Defendant's interactions with the Government of Canada constitute a defence to claims under the TPA and/or BPCPA?
>
> (xii) Whether the doctrine of *volenti non fit injuria* constitutes a defence to claims under the TPA and/or BPCPA?
>
> (xiii) Whether the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 relating to the defence of contributory negligence have any application to a claim under the TPA and/or BPCPA?

Limitation Period

[33] More difficult issues arise with regard to the question of the appropriateness of certifying heads (viii) and (ix) as common issues. These are as follows:

> (viii) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA and/or BPCPA, should a monetary award be made in favour of the class and, if so, in what amount?
>
> (ix) If the Court finds that the Defendant has engaged in deceptive acts or practices contrary to the TPA, should punitive or

> exemplary damages be awarded against the Defendant and, if so, in what amount?

That is so because these issues engage limitations and postponement of limitations considerations. The appellants argued, relying on ***Novak v. Bond***, [1999] 1 S.C.R. 808, 172 D.L.R. (4th) 385 [***Novak***], that such issues inherently call for an individual assessment of the individual circumstances relating to particular claimants. ***Novak*** concerned an issue as to the postponement of a limitation period by reason of the particular circumstances of the plaintiff. McLachlin J. (as she then was) noted at p. 849 and 852:

> 86 Whether a particular circumstance or interest has the practical effect of preventing the plaintiff from being able to commence the action must be assessed in each individual case. Section 6(4)(b) requires that the circumstances and interests of the individual plaintiff be taken into account. What is a serious, substantial, and compelling interest in one case may not be so in another case. Purely tactical concerns play no role in this analysis because they do not relate to the practical ability of the plaintiff to bring an action, as assessed by a reasonable person who takes into account all his or her circumstances and interests. See *Trueman v. Ripley*, [1998] B.C.J. No. 2060 (QL) (S.C.). [Emphasis in original.]
>
> . . .
>
> 90 I conclude that delay beyond the prescribed limitation period is only justifiable if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized. The task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances.

[34] Limitation issues were not involved in the ***Rumley*** case as eventually certified because limitation defences are not available in sexual assault actions in this province. However, limitation issues clearly arise in the instant actions for

transactions occurring prior to May 1997. The chambers judge observed in her reasons, correctly in my opinion, that the limitations defence as a whole cannot be tried as a common issue. If that is so, I am of the view that it is not possible to decide on an award of damages to the class as certified since the composition of the class would be unknown. It could be possible for a class of individuals who entered into transactions after May 8, 1997, to be certified as a class, but I fail to see how claims related to transactions prior to that time could be litigated in the class proceeding. That is so because in order to have valid claims, individuals would have to be able to establish postponement of the limitation period: ***Novak***, *supra.*

[35] A similar difficulty arises with the question of an award of punitive damages. It appears to me that only those individuals who entered into transactions after May 1997 could comprise a class entitled to an award of punitive damages. The chambers judge relied on ***Rumley***. She said this:

> [55] Common issue number nine deals with punitive damages, which are an appropriate common issue because they focus on the defendant's conduct and do not require individual class member participation or assessment (*Rumley v. British Columbia,* [2001] 3 S.C.R. 184).

[36] In my opinion, this issue can be certified as a common issue but the class must be limited to those individuals who purchased cigarettes after May 8, 1997. I would allow the appeal from this aspect of the certification order to the extent indicated.

Aggregate Damages

[37] Concerning the issue of a damages award pursuant to heading (viii) of the judge's order, the respondent submits that this is an appropriate case for an aggregate award pursuant to Division 2 of the ***CPA***. One difficulty with this submission has already been adverted to, namely that this takes no account of the problem with respect to limitation periods. That particular issue should be susceptible of resolution by the same methodology I have suggested to limit the time period concerning punitive damages. The other difficulty with this submission is the relative novelty of this mechanism for determining damages. However, I do not find that novelty constitutes a bar to certification.

[38] The chambers judge said this in her reasons concerning the rationale for a possible award of aggregate damages in connection with issues (viii) and (ix):

> [51] Common issue numbers eight and nine deal with a form of monetary award. The plaintiff submits that ss. 29 and 30 of the *CPA* permit aggregate monetary awards and the use of statistical evidence to determine the amount of an aggregate monetary award and how it should be distributed. The plaintiff has tendered some affidavit evidence to indicate that the quantum of restitution or disgorgement can be established through the defendant's business records and statistical evidence. Alternatively, the plaintiff proposes to prove that the defendant's alleged deceptive practices have distorted the entire marketplace for tobacco products through the defendant's creation and sale of a supposedly safer cigarette, a product which the plaintiff says does not exist. The plaintiff's theory is that the fair market price of the defendant's product would have been different but for the defendant's alleged deceptive conduct. Therefore all class members paid too much for the product. There is no need for individual trials when the quantum of such an economic claim can be proved for the class as a whole.
>
> . . .

> [53] Sections 31 – 33 of the *CPA* detail the procedure for distribution of aggregate monetary awards to class members. Where it would be impractical or inefficient to determine the exact amount owing to individual class members, the court can order that all or part of the aggregate award be shared on an average or proportional basis. Section 34 of the *CPA* permits an order that any undistributed portion of an aggregate award may be applied in any manner that may reasonably be expected to benefit class members, such as distribution to charitable organizations treating or researching smoking related disease.
>
> [54] The defendant's objection to aggregate monetary damages is based on its approach to causation and reliance, which I have already found inapplicable to the plaintiff's claim.
>
> [55] Common issue number nine deals with punitive damages, which are an appropriate common issue because they focus on the defendant's conduct and do not require individual class member participation or assessment (*Rumley v. British Columbia,* [2001] 3 S.C.R. 184).

[39] There is limited precedential authority for damages being awarded via this methodology. We were referred to the Ontario cases of ***Kerr v. Danier Leather Inc.*** (2004), 23 C.C.L.T. (3d) 77, [2004] O.T.C. 397 (S.C.J.); ***Hague v. Liberty Mutual Insurance Co.***, (2004), 13 C.P.C. (6th), 121 C.C.L.I. (4th) 264 (Ont. S.C.J.); and ***Serhan (Estate Trustee) v. Johnson & Johnson*** (2004), 72 O.R. (3d) 296, 49 C.P.C. (5th) 283 (S.C.J.), leave to appeal granted: [2004] O.T.C. 969 (Sup. Ct. Jus.). I note that the case of ***Kerr*** was reversed on other grounds by the Ontario Court of Appeal: (2005) 77 O.R. (3d) 321, 261 D.L.R. (4th) 400. An application for leave to appeal to the Supreme Court of Canada has been filed. We were also referred, in argument by counsel, to a number of American authorities. All that can be presently said of those American authorities is that they do not speak with one voice.

[40] Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me

that it is appropriate for this issue to be left to be worked out in the laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.

[41] I would be reluctant at this stage of this proceeding to foreclose the respondent from litigating this issue as he proposes before the trial court. Accordingly, I would afford deference to the decision of the learned chambers judge to permit this damages issue to be litigated as a common issue. I would not accede to the arguments advanced under this head by the appellants.

[42] In the result, the appeals are allowed to the extent of limiting the class to the temporal period as indicated above and as indicated in para. 7 above. Otherwise, I would dismiss the appeals of the appellants.

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Madam Justice Huddart"

I Agree:

"The Honourable Mr. Justice Smith"