

CANADA / JUDGMENT

Baker v. Rendle

2016 BCSC 801

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 801 Baker v. Rendle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baker v. Rendle,

2016 BCSC 801

Date: 20160505

Docket: 13-3181

Registry: Victoria

Between:

Raymond Baker

Plaintiff

And

Gordon James Rendle, Robert Roderick Rendle,

Stanhope Dairy Farm Ltd., Foundation Organics Ltd.,

Matthew Mansell, Finish Line Transport Ltd. and

Organico Waste Recovery Systems Ltd.

Defendants

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

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Place and Date of Hearing:

Victoria, B.C.

September 8 and 9, 2015

Place and Date of Judgment:

Victoria, B.C.

May 5, 2016

Introduction

- [1] The plaintiff has launched a civil action against the defendants claiming damages for the tort of nuisance. The plaintiff also seeks injunctive relief prohibiting the defendants from continuing the nuisance.
- [2] On the present application, the plaintiff seeks an order certifying the proceeding as a class action under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "CPA").

Background

- [3] The plaintiff, Mr. Baker, is a retired correctional officer who lives on Old East Road in the District of Central Saanich ("Central Saanich"). Central Saanich is a member of the Capital Regional District (the "CRD"), which is the regional governing body for all southern Vancouver Island municipalities.

- [4] The defendants, Robert and Gordon Rendle (the "Rendles") are the owners and principal directors of the defendant Stanhope Dairy Farm Ltd. ("Stanhope"). The Rendles operate Stanhope from their 40 hectare parcel of land on Old East Road, in Central Saanich (the "Stanhope Property"). The Stanhope Property is located within the province's Agricultural Land Reserve and is zoned A-1 (Agricultural). Mr. Baker's home is located adjacent to the Stanhope Property.
- [5] Robert Rendle and the defendant Mr. Mathew Mansell are directors of the defendant Foundation Organics Ltd. ("Foundation").
- [6] Mr. Mansell is the sole director of the defendant Finish Line Transport Ltd.
- [7] The defendant Gordon Rendle is a director of the defendant Organico Waste Recovery Systems Ltd.
- [8] The Rendle family and Stanhope have a long history of farming on southern Vancouver Island. From approximately 1956 until 1978, the Rendles' parents operated Stanhope as an active dairy farm on the Stanhope Property. In 1978, the Rendles took over operations of Stanhope and subsequently purchased the Stanhope Property from their parents. The Rendles continued to operate Stanhope as a dairy farm on the Stanhope Property until approximately 2010. Since the fall of 2010, Stanhope has used the Stanhope Property for farming purposes, including producing forage crops which are harvested as hay and supplied to farms on Vancouver Island. Stanhope also has formed business relationships with a number of dairy farms on Vancouver Island and the mainland to house, feed and breed approximately 300 heifers on the Stanhope Property.
- [9] As part of its normal farming practices, Stanhope has always engaged in composting operations on the Stanhope Property. In his affidavit #2, sworn 14 May 2015, Robert Rendle explains:
- [7] Since my parents acquired the Property in the 1950's, manure produced on the Property has been composted and either sold or land applied to the Stanhope Property. When the manure is land applied it creates odours. This has been an ongoing practice and one that has not changed in over 60 years.
- [10] On 3 June 2011, the CRD issued Stanhope a Class 3 Composting Facility Recycler Licence, with an expiry date of 2 June 2016 (the "Licence"). Pursuant to the Licence, Stanhope was permitted to import and compost post-consumer food waste on the Stanhope Property. With the approval of the CRD, the Licence was later transferred to Foundation. Apparently, commercial composting operations commenced on the Stanhope Property around August 2011.
- [11] In 2012, Foundation and Stanhope began importing and composting CRD post-consumer food waste on the Stanhope Property. This food waste eventually produced 23 batches of Class A compost.

- [12] In March 2012, Ms. Lee Hardy, the plaintiff's wife, filed a complaint with the British Columbia Farm Industry Review Board (the "BCFIRB"). Specifically, Ms. Hardy sought to have the BCFIRB rule that the composting activity taking place on the Stanhope Property was not a "farm operation" or "normal farm practice" under the Farm Practices Protection (Right to Farm) Act, R.S.B.C. 1996, c. 131 (the "FPPA"). In October 2012, Ms. Michelle Bond filed a similar complaint with the BCFIRB. Although not an immediate neighbour like Mr. Baker and Ms. Hardy, Ms. Bond's property is located in close proximity to the Stanhope Property.
- [13] After receiving comprehensive written submissions from the interested parties, the BCFIRB concluded Ms. Hardy and Ms. Bond's complaints were vexatious. In the result, the hearing was terminated. In its written decision dated 4 October 2013, the board explained:
- [49] The statutory complaints process is significant not only because of the ultimate remedies BCFIRB can grant, which orders can be filed and enforced as orders of the Supreme Court: FPPA, section 6.1. It is significant also because the filing of a proper complaint entitles a complainant to apply for compulsory orders requiring the farmer and witnesses to produce documents and testimony, and to attend the hearing: section 11(5). These are significant compulsory powers. They can be intrusive, time-consuming and costly for all parties and witnesses.
- [50] These implications make it apparent that a complainant who comes before us with a complaint must do so with the bona fide intention of seeking the only remedy the FPPA can grant to that complainant - an order requiring the farmer to cease or modify the complained of practice. In our view, to come to the BCFIRB primarily seeking the opposite finding - that the person is not a "farmer" and is not even within the scope of the Act - abuses the Act's processes and is therefore vexatious. It is vexatious because it does not in good faith seek as its main purpose the only remedy section 6 makes available to complainants. It seeks instead to expose the farmer to the complaints process with the primary motive of removing the farmer's ability to rely on that defence in collateral proceedings filed in court (whether planned or concurrent) against the farmer. The law is clear that a "vexatious" proceeding includes proceedings brought for an improper purpose, other than the assertion of legitimate rights. As noted in *Dixon v. Storkcraft Manufacturing Inc.*, 2013 BCSC 1117 at para. 33, the terms "vexatious" and "abuse of process" have "strikingly similar" features.
- [51] In our view, it is abusive and vexatious to bring a complaint to BCFIRB which can only be dismissed if the panel accepts the complainant's principal position. If a complainant's position is that the respondent does not fall within the scope of the FPPA, the complainant can and should pursue the existing common law remedies.
- [52] The complainants argue that BCFIRB cannot avoid dealing with jurisdictional issues where they arise, including whether an operation is a "farm operation". We agree. However, we think there is a significant difference between cases where complainants are willing to proceed on the basis that the operation is a farm operation but the evidence, as it emerges,

raises a jurisdictional question, and cases where the complaint sets out with the clear purpose of asserting and showing the opposite. In the first case, the complainant is prepared to accept the essential condition for accessing the complaints process - that the person is a "farmer". In the second case, the person is in truth seeking to use the complaints process for possible use or benefit in a collateral court process.

- [53] There is no question that BCFIRB has jurisdiction to determine whether an operation is a "farm operation" or a "farm business". As just noted, where those questions must be confronted in a bona fide complaint, BCFIRB is required to address them. But the jurisdiction to determine whether an operation is a farm operation does not mean the BCFIRB (sic) is required to do so where a complainant's purpose for using the complaints process is to impact a concurrent or planned court proceeding.
- [74] The complainants argue that they "simply do not know" whether the operations on the property are farm operations, and they should not be prejudiced based on this - they cannot possibly know the answer until they have had the discovery that only the farm can provide. While we appreciate this position, the fundamental difficulty with their complaints as presently constituted is that the complainants do seem to know enough to be prepared to take the primary position before BCFIRB that this is not a farm operation, and they have not resiled from that position in the current submissions process even while asserting that they do not know. The only reasonable inference we can draw from that is that they do not wish to make a "concession" that might prejudice their position in collateral or contemplated court proceedings.
- [75] The complainants' intention to use the complaints process to prove that the FPPA does not even apply creates a serious risk that BCFIRB's processes could be used in ways that result in coercive procedural measures against the respondents and witnesses, and that may undermine the jurisdiction and discretion of the Court.
- [77] For the reasons set out in this decision, it is our view that these complaints are vexatious.
- [80] In the circumstances of this case, it is our view that the proper course of action is to refuse to continue the hearing in respect of these complaints pursuant to section 6(2)(b) of the FPPA.

[Emphasis in original.]

- [14] In January 2013, the CRD wrote to Foundation informing it of complaints it was receiving from Central Saanich residents concerning "nuisance odours" emanating from the composting activities on the Stanhope Property. The CRD expressed concerns about Foundation's ability to comply with the terms of the Licence and directed it to promptly rectify the situation. Over the course of the spring and summer of 2013, there was further correspondence and discussion between the CRD and Foundation concerning the nuisance odours that had been identified as originating from the composting activities on the Stanhope Property.

- [15] Eventually the CRD advised Foundation that it would hold a hearing to determine whether to suspend the Licence on account of Foundation's non-compliance with the Licence's terms. That hearing took place on 16 August 2013 and resulted in the Licence being suspended, effective 21 August 2013.
- [16] In September 2013, Foundation ceased importing and composting CRD post-consumer food waste on the Stanhope Property, thus bringing to an end its commercial composting operations.
- [17] On 13 September 2013, the plaintiff filed his Notice of Civil Claim.
- [18] Foundation's administrative appeal to the CRD from the decision to suspend the Licence was denied on 11 October 2013.
- [19] Foundation sought a judicial review of the CRD's decision to suspend the Licence. In reasons indexed as *Foundation Organics Ltd. v. Capital Regional District*, 2014 BCSC 85, Steeves J. denied Foundation's petition. In doing so, Steeves J. explained the factual circumstances surrounding the complaints that were being made about the commercial composting activities on the Stanhope Property:
- [22] The petitioner commenced composting operations in August, 2011. In the spring or summer of 2013 it began to use off-site food waste as feedstock. Very generally, batches of material are composted and a batch takes 60 to 75 days before the composting process is complete. As of August, 2013, 23 batches of Class A compost had been processed.

Complaints about the Petitioner's Composting Facility

- [23] Complaints from neighbours about odours from petitioner's composting operations began in December 2011 and they are a matter of some considerable public debate in the central Saanich area.
- [24] The frequency of complaints to the respondent about the petitioner's operation increased about mid-August 2012 and from then until July 18, 2013 there were 498 online complaints and an additional 180 complaints by telephone. More than 50 different individuals made the complaints. The numbers of complaints increased further in 2013 so that between April 1 and September 13, 2013 there were more than 1400 complaints about odours from the petitioner's composting facility. There were 50 complaints on one day, September 9, 2013.
- [25] The odours have been described as sewage like, putrid/rancid, rotten, sweet/fruity, sour, earthy, moldy/musty. About 60 of the complaints were of a severe odour (as determined by the respondent), causing physical responses such as vomiting, gagging, difficulty breathing, runny eyes and noses. In addition, some complaints were that people had to keep their windows closed and there were difficulties selling property because potential buyers commented on the odour. Some of the complaints were from neighbors who had lived in the area before and after the commencement of the petitioner's composting facility.

- [26] The respondent set up seven different monitoring stations around the perimeter of the petitioner's property between November 1, 2012 and September 8, 2013. On 229 of the 281 days monitored (or 81%), odours were detected emanating from the petitioner's Stanhope Property. An expert retained by the respondent also noted odours approximately 500 metres from the petitioner's property in September 2013. These were specifically identified as a rancid odour and described by the expert as a result of compost that was immature because the compost process had not completed.
- [27] From time to time the respondent inspected the petitioner's composting operations. The evidence includes eight inspection reports covering the period March 14, 2013 to July 16, 2013. One of these inspections (July 16, 2013) recorded "Faint sweet/sour odour of compost" outside the petitioner's Stanhope Property. All of the other inspections reported there was no odour or made no comment on odour.

[Emphasis in original.]

- [20] On 15 May 2014, Foundation surrendered the Licence and returned it to the CRD.
- [21] The plaintiff filed an Amended Notice of Civil Claim on 13 August 2014 and on 28 November 2014 he filed his Notice of Application seeking certification of his action under the CPA.
- [22] On 12 February 2015, the plaintiff filed a Further Amended Notice of Civil Claim. This resulted in an Amended Notice of Application for certification being filed on 27 February 2015. That is the application before me.

Statutory Provisions

- [23] An application to certify an action as a class proceeding must meet all of the following requirements of section 4(1) of the CPA:
- (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.

- [24] Section 4(2) mandates that when assessing whether a class proceeding is the preferable avenue of litigation, the court "must consider all relevant matters including the following:
- (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.

Analysis

Evidence and the Standard of Proof for Certification

- [25] An application for certification must be supported by affidavit evidence: CPA, s. 5(1).
- [26] The plaintiff bears the onus of establishing that the action satisfies the requirements set out in s. 4 of the CPA: *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 at para. 41.
- [27] The standard of proof required for the certification requirements, other than the requirement that the pleadings disclose a cause of action, has been described as "some evidentiary basis" or "some basis in fact": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99 and 100 ("Microsoft").
- [28] The standard of proof for class action certification was recently addressed by the Supreme Court of Canada in *Microsoft* at paras. 99 and 100:
- [99] The starting point in determining the standard of proof to be applied to the remaining certification [other than the existence of a cause of action] requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("Infineon"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).

[100] The Hollick standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in Hollick that evidence has a role to play in the certification process. She observed that "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" (para. 25).

[Emphasis in original.]

[29] In short, I must be satisfied that all of the statutory requirements of the CPA have been met. If I conclude, on the evidence before me, that any one of the requirements has not been met, then the application for certification must be dismissed. In this regard, there must be a sufficient evidentiary basis to allow the matter to proceed on a class basis "without foundering at the merits stage by reason of the requirements of s. 4(1) of the CPA not having been met": Microsoft, at para. 104.

[30] At the certification stage, the court does not engage in any detailed weighing of the evidence or resolve any conflicting facts. Instead, the court confines itself to determining whether there is some basis in the evidence to support each of the certification requirements: AIC Limited v. Fischer, 2013 SCC 69 at para. 43.

Section 4(1)(a): Do the Pleadings Disclose a Cause of Action?

[31] In his written submissions, counsel for the plaintiff described in general terms the basis for the present action:

[3] The cause of action is that the Defendants' actions in operating the composting business and trucking materials to and from the composting site (the "Stanhope Lands") caused noise, fumes and odours to emanate from the Stanhope Lands and therefore the Defendants are liable in nuisance to the persons who have suffered loss or injury as a result of the said noise, fumes and odours.

[32] While the defendants take issue with the claim that is founded on the rule in Rylands v. Fletcher, they accept that his general claim in nuisance discloses a cause of action.

[33] Consequently, there is no dispute that the first requirement for certification has been met.

Section 4(1)(b): Is there an Identifiable Class of two or more members?

[34] The second requirement for certification is that there is an identifiable class of two or more persons. The class members must be clearly defined with objective criteria, and there must be some rational relationship between the proposed members and the claims advanced on behalf of the class.

[35] In Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, Chief Justice McLachlin, in a unanimous judgment, described this requirement as follows:

[38] the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria [citations omitted].

[36] Certification only requires that the class members be identifiable. The individual members need not be individually identified.

[37] The plaintiff's contemplated class is defined by time and geography. In his Amended Notice of Application, the plaintiff describes the class as:

[A]ll persons who resided within the geographical area in Central Saanich, British Columbia, which is bordered by Mount Newton Cross Road to the north, Brookleigh Road to the south, the shoreline to the east and Oldfield Road to the west, and more particularly defined in pink on the map attached hereto as Schedule "A", or such other area that this Honourable Court deems appropriate, between October 2009 and now, or such other time period that this Honourable Court deems appropriate.

[38] The plaintiff justifies the manner in which he proposes to define the class by asserting that hundreds of Central Saanich residents, over a large geographical area and over an extended period of time, have complained about the noise, fumes and odours that have allegedly emanated from the composting operations on the Stanhope Property.

[39] The defendants contend that the proposed class is too broad and contains unmanageable subjective factors. In particular, the defendants argue that there is no evidence to justify the proposed seven year time frame or the size of proposed geographic boundaries.

[40] The contemplated class in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, was, much like the one in the present case, defined by geographic boundaries. That is, it encompassed some 30,000 residents who lived or had lived in the vicinity of a land fill operated by the City of Toronto. Although the court concluded that a class action proceeding was not the preferable means of resolving the claims, it did find the proposed class was an identifiable one. Writing for a unanimous court, Chief Justice McLachlin explained:

[17] The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied Stanhope Property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not

unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater*, supra, at pp. 175-76; *Western Canadian Shopping Centres*, supra, at para. 38.

- [18] A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act*, 1992. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.
- [19] In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, 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: see *Western Canadian Shopping Centres*, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated vis-à-vis the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that

[i]n circumstances such as are described in the statement of claim one would expect to see evidence of the existence of a body of persons seeking recourse for their complaints, such as, a history of "town meetings", demands, claims against the no fault fund, [and] applications to amend the certificate of approval

- [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. 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. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see *W. K. Branch, Class Actions in Canada* (1996), at para. 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).
- [41] The defendants contend that the circumstances of the present case are similar to those in *Roberts v. Canadian Pacific Railway Co. et al*, 2006 BCSC 1649. In that case the plaintiff sought to proceed by class action against the defendant railways for damages arising from the escape of coal dust from their rolling stock. The proposed class incorporated anyone who owned property within 500 meters of an identified portion of the defendants' tracks. Justice Ross declined to certify the action, in part because of a lack of evidence supporting the proposed definition of the class. In addressing this question, Ross J. observed:
- [27] In addition, the plaintiff and the witnesses for the plaintiff are residents who own property well within 50 metres of the railway tracks
- [28] This evidence does not provide an evidentiary basis to support the current scope of the Proposed Class. Indeed, if anything, the evidence suggests that the 500 metre zone on either side of the tracks is overly broad.
- [29] There is no evidence of the scope of the harm. The plaintiff's evidence involves complaints from residences in Kamloops, Hope and Chilliwack all originating from properties located quite close to the tracks. There is no evidence of patterns of coal dispersion within and throughout the Class Area. There is likewise no evidence of the impact of contamination throughout the Class Area.

[30] The undisputed evidence is that the Class Area contains significant diversity in ecosystem, patterns of settlement and land use. While CN specifically denies the assertion that coal dust escapes from CN trains along the Class Route, it has filed expert evidence from an engineer with expertise in air emissions, Mr. Peter Sagert. Mr. Sagert has provided expert opinion evidence that there are several factors that can affect the possibility of coal dust emissions from trains, including:

- (a) differences in coal type (thermal or metallurgical);
- (b) procedures employed by coal mines to load trains and procedures employed at coal ports to unload trains;
- (c) speed of the train;
- (d) existence of supplemental spray systems along the track;
- (e) meteorological conditions; and
- (f) dispersion factors.

This evidence was not disputed.

[31] It is also clear and undisputed from the expert evidence filed by the defendants that, because of the significant variability along the Class Route of the factors that affect coal dust emissions from trains, it is not possible to draw an inference from the complaints in evidence that coal dust from the defendant's trains is being dispersed throughout the Class Area.

[32] In the result, the defendants submit the Proposed Class is overly broad, arbitrary and lacking any rational connection with the asserted common issues.

[38] The plaintiff submits that the bar for class definition is a relatively low one and that over or under inclusion, or both, are not fatal as long as they are not illogical or arbitrary; see Windsor at para. 91. However in my view, even allowing for that latitude, the Proposed Class does not meet the necessary threshold. The fundamental problem is that this is a class whose membership is not readily identifiable, and no rational connection has been shown between the class and the asserted common issues. The plaintiff has not demonstrated that the Proposed Class is sufficiently narrow. Accordingly, I find that the plaintiff has not established that the Proposed Class constitutes an identifiable Class of two or more persons as required by s. 6(1) of the Act.

[42] I do not agree that the circumstances involving the alleged nuisance originating from the commercial composting activities on the Stanhope Property are comparable to the nuisance alleged in Roberts. The evidence before me indicates that residents of Tanner Heights, Martinvale Valley and Hunt Valley, the three Central Saanich communities that immediately surround the Property, have complained of physical discomfort as a result of fumes or odours that have been discharged from the Stanhope Property. There is also evidence of

complaints from homeowners far outside of the proposed class boundaries. The map that is attached as exhibit C to the plaintiff's affidavit #3, sworn 15 December 2014, illustrates how some of those complainants live seven to ten kilometers away from the Stanhope Property.

- [43] While the geographic area of the proposed class in the present case is large and includes a potentially huge number of people, I do not find that renders the proposed class unmanageable or unidentifiable. In this respect, I find the present case is more akin to Hollick than Roberts.
- [44] What causes me concern, however, is the proposed temporal facet of the class definition. The plaintiff's action focuses on the defendants' involvement and participation in an alleged "commercial composting business" that the plaintiff's claim was being operated on the Stanhope Property. There is no allegation or claim based upon the Property's use as a farm. In the Statement of Facts contained in the Further Amended Notice of Civil Claim, the plaintiff particularizes his claim as follows:
- [11] The Defendants and each of them are engaged in a common venture, the full particulars of their business and legal relationship is unknown to the Representative Plaintiff, to undertake the commercial receipt, transport, deposit, processing, storage and spreading of organic waste and other materials from, inter alia, the Capital Regional District, for profit.
- [12] In or about 2009, the [Stanhope Property], which had been operating as a dairy farm, was converted by the Defendants to an industrial/commercial composting facility (the "Composting Business").
- [13] From about that time to the present time the Defendants have caused noise and created noxious fumes and odours due to the transport, deposit, processing, storage, and spreading of decomposing organic materials on or about the [Stanhope Property] ("the Nuisance").
- [14] The Composting Business has expanded since conception and has increasingly compromised the Representative Plaintiff and the contemplated Class' use and enjoyment of their properties surrounding the [Stanhope Property].
- [20] The placement of composting materials on [the Stanhope Property] constituted a non-natural use of those lands, which was likely to cause mischief if the processing of those composting organic materials caused noxious fumes, gases, and vapours to escape. Noxious fumes, gases and vapours escaped from [the Stanhope Property] causing damage to the Plaintiff, the proposed Class Members, the Plaintiff's property, and the proposed Class Members' property.
- [45] In my opinion, the seven-year time frame for the proposed class, that is, from 2009 to the present, is too long and has no perceptible or rational link to the plaintiff's causes of action. Commercial composting on the Stanhope Property commenced in or around August 2011 and complaints began to emerge later that year. In my view, the more manageable and justifiable temporal definition for the proposed class would start from August 2011, and not 2009. Why the class would include those individuals who took up residence within the

proposed geographic area after the termination of commercial composting on the Stanhope Property is unclear. Arguably, the end date for class membership would be September 2013, when Foundation ceased its commercial composting operations. As noted in Hollick at para. 21, the court may certify an action on the condition that the definition of the class is further amended. But for the fact that I find the plaintiff has failed to meet the other statutory requirements for certification, I would have considered allowing the plaintiff to amend and focus the definition of the proposed class.

Section 4(1)(c): Do the Claims of the Class Members

Raise Common Issues?

[46] The third requirement for certification is commonality.

[47] "Common issues" are defined in s. 1 of the CPA 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.

[48] In *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 85, Willcock J.A. quoted with approval the decision of *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140, in which the court helpfully summarized the jurisprudence concerning the commonality requirement:

A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.

B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.

C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City)*, above, at para. 18.

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (CanLII), [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

[Emphasis added in Charlton.]

[49] Overall, there must be some evidentiary basis that certification of the common issue(s) will advance the claim as pleaded: *Charlton*, at para. 84. The Supreme Court of Canada describes the commonality requirement under the CPA as "quite narrow" in this regard: *Rumley v. British Columbia*, 2001 SCC 69 at para. 33.

[50] In his Amended Notice of Application, the plaintiff identifies the following issues as "common issues":

- (a) What was the nature of the business venture between each of the Defendants relative to the substantive issues raised in the Further Amended Notice of Civil Claim?
- (b) Were the Defendants engaged in a joint venture and, if so, to what degree?
- (c) To what extent may each Defendant be jointly or severally liable to the proposed class member?
- (d) Were the composting activities undertaken by way of a farm operation?
- (e) If the Court determines that the Defendants were engaged in a farm operation, then do the Defendants satisfy the requirements of section 2(2) of the Farm Practices Protection (Right to Farm) Act, RSBC 1996, c. 131, such that they are shielded from liability to the class members and the ability of the class members to obtain injunctive relief against the Defendants?
- (f) If section 2 of the Farm Practices Protection (Right to Farm) Act does not apply to the composting activities, then what were the times and degrees of penetration of the noise, fumes and odours of composting activities into the area where the proposed class members reside?
- (g) Did the Defendants' placement of organic waste constitute a bringing onto and keeping on [the Stanhope Property] a product likely to do mischief if it escaped within the meaning of the principle of law as set out in *Rylands v. Fletcher*?
- (h) Did the discharge of noxious fumes and odours constitute an escape within the meaning of the principle of law as set out in *Rylands v. Fletcher*?
- (i) If the Court answers the foregoing questions positively, are each of the Defendants strictly liable to the Plaintiff and the proposed class members in accord with the application of the principle of law as set out in *Rylands v. Fletcher*?
- (j) Did the Defendants, and in what manner and to what degree, act unlawfully and, in particular, without restricting the generality of the foregoing, were those acts contrary to all applicable government regulations and licensing and municipal by-laws in undertaking the composting operation on [the Stanhope Property]?
- (k) If the Court finds the Defendants have acted unlawfully, are they liable and, if so, in what amount, to the Plaintiff and the proposed class members for punitive damages?

[51] In his written submissions, counsel for the plaintiff asserts that "the question of commonality should be approached purposively" and that "the underlying question is whether certifying a class would avoid the duplication of fact finding or legal analysis." The defendants do not disagree; however they point out that in applying these principles one cannot lose sight of the simple fact that nuisance in one location does not necessarily lead to

nuisance in another. According to the defendants, there will be significant individual issues that will need to be addressed for each plaintiff within the class. These individual issues will, say the defendants, outweigh and overwhelm any common issues the class may share. I agree with the defendants.

[52] Nuisance of the type complained of in the instant case contains a high degree of subjectivity and requires an individualized assessment. The emails complaining of the composting activities on the Stanhope Property, that are attached as an exhibit to the plaintiff's affidavit #4, sworn 27 February 2015, are good examples of the individualized nature of the complaints.

[53] In her written submissions, counsel for the Rendles describes the principal difficulty with the plaintiff's proposed common issues:

[54] The severity of the interference with a person's use or enjoyment of property must be considered from an individualized context looking at degree or significance (is it substantial?) and then the nature, duration and effect of the interference, and from the context of a reasonable person in the circumstances of the particular neighbourhood (is it unreasonable, balancing all factors?).

[57] There are a number of individual issues that will be necessary to advance the litigation, including: (a) specific use of individual property; (b) type of building; (c) proximity of the property to the farm; (d) proximity of other uses, such as highways and farms; (e) date and time of the alleged nuisance; (f) environmental conditions on the date and time of the alleged nuisance; and (g) specific medical evidence. There will be many variables for each specific case that make it clear that this is not and thus, a common issue.

I agree.

[54] In my opinion, the defendants are correct when they submit that the issues identified by the plaintiff as being common are either not central (for example, the business relationships) or are central but not common (for example, liability in nuisance). Moreover, I agree that the plaintiff has failed to show how he can prove, on a class wide basis, the elements required to support his nuisance claim.

[55] While I accept that resolution of some of the common issues may be marginally helpful, I am not persuaded that it would move the litigation forward in any meaningful or noticeable manner. This is especially so given what I find would be the defendants' likely need to examine all of the proposed class members.

[56] In my opinion, the plaintiff has failed to meet the requirement of commonality.

Section 4(1)(d): Is a Class Proceeding the Preferable Procedure

for the Fair and Efficient Resolution of the Common Issues?

- [57] Given my finding with respect to the issue of commonality, the plaintiff's quest for certification of his action must fail. However, for the sake of completeness, I will continue and examine the remaining requirements.
- [58] The fourth requirement for certification is preferability. A class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues.
- [59] As noted earlier in these reasons, the factors enumerated in s. 4(2) of the CPA must be applied when deciding whether a class proceeding is the preferable procedure.
- [60] In *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), the Ontario Court of Appeal considered the question of "preferability" in the context of proposed class proceedings under Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6:
- [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.
- [75] At para. 30 of that decision the Court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.
- [Emphasis added.]
- [61] In *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918, Rosenberg J.A. synthesized the "preferability" factors as follows:
- [67] In *Cloud*, at paras. 73-75 Goudge J.A. identified a number of principles that apply in determining whether the plaintiff has met the preferable procedure requirement. I would summarize them as follows:

1. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
 2. The analysis must keep in mind the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.
 3. This determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole.
 4. The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.
- [62] With regard to the fourth factor articulated by Rosenberg J.A., it is important to note the difference between Ontario's class proceedings legislation and British Columbia's CPA. That is, in British Columbia, the court must, pursuant to s. 4(2)(a) consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members."
- [63] I am not convinced that all of the proposed common issues can be addressed and resolved for all members of the proposed class under the umbrella of a class proceeding. The plaintiff's proposed common issues (c), (f), (j) and (k) all require an individual assessment. In essence, they address the question of whether the constituent elements of nuisance exist and I agree with the defendants that this requires the consideration and assessment of factors particular to each class member. While the other articulated issues may be common ones, I find the defendants are correct when they argue those issues do not predominate over the issues that are individualized.
- [64] Notwithstanding the many complaints that have been made to the CRD about the composting activities on the Stanhope Property, there is no evidence of a significant number of potential class members showing an interest in individually controlling the prosecution of separate actions (s. 4(2)(b) CPA).
- [65] The plaintiff says he is not aware of any other proceedings "that would overlap with this action." This, in my view, does not completely address s. 4(2)(c) of the CPA. There was the aborted proceeding before the BCFIRB that could have addressed and resolved the question of whether the commercial composting operations on the Stanhope Property formed part of a legitimate farm business under the FPPA. For strategic reasons, likely related to the present litigation, the complainants deliberately refused to acknowledge before the BCFIRB that the Stanhope Property was being operated as a farm.
- [66] The plaintiff maintains that the only other means to resolve the proposed class members' claims against the defendants is for them each to begin their own legal actions, with the resulting duplication of efforts and costs. Respectfully, this statement is only partially correct. In my view, commencing individual actions is one way, but not the only way for the

potential class members to obtain access to justice. There are, in my view, other more practical and efficient means of resolving most, if not all, of the issues being raised by the plaintiff. The plaintiff's proposed common issues (a) and (b) could be addressed on discovery in the present action and the evidence before me suggests the defendants have attempted to provide the plaintiff with answers to these questions. The BCFIRB is an administrative body that has the jurisdictional competence and expertise to answer common issues (d) and (e). Common issues (g), (h) and (i) could be resolved through a Special Case under the Supreme Court Civil Rules. As for common issues (c), (f), (j) and (k), I agree with the defendants that these are not common in nature and will require an individualized assessment for each plaintiff.

- [67] Finally, with respect to s. 4(2)(e), I agree with the defendants that, given the nature of the claims being advanced, individual issues will likely arise at the early stages of the litigation, thus making the proposed class proceeding unjustifiably complicated.
- [68] In my opinion, there is a strong similarity between the present case and *Hollick*, on the question of whether a class proceeding is the preferred method of proceeding. If I were to remove "Keele Valley landfill" and replace it with "the Stanhope Property", I find the following passages from Chief Justice McLachlin's reasons could be applied to the present case with equal force:
- [32] I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints -- those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.
- [33] Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund

would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members' claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action -- even if the compensatory scheme promises to provide redress more quickly: see *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.

- [34] For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in *Western Canadian Shopping Centres*, supra, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, and *Environmental Protection Act*. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.
- [69] Keeping in mind the principles articulated in the jurisprudence as well as all of the statutory factors set out in s. 4(2) of the CPA, I am not convinced that certifying the plaintiff's action as a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. As such, I find the plaintiff has failed to meet this requirement for certification.

Section 4(1)(e): Is the Plaintiff an Appropriate Representative Plaintiff?

- [70] The plaintiff uses his property both as a home and a horse riding centre. The land is immediately adjacent to the Stanhope Property. The plaintiff asserts that on account of his close proximity to the Stanhope Property and the alleged nuisance causing operation that is or has been taking place there, he is "likely to more vigorously pursue the action and represent the class members' interests than a class member who resides further away."

Moreover, the plaintiff contends that he has produced a plausible and manageable litigation plan that will use a website, an email list, Canada Post and newspapers to ensure that all proposed class members are notified of the proceeding. Finally, the plaintiff has sworn in his affidavit evidence that on the proposed common issues, he has no interest that might conflict with those of other class members.

[71] While I accept the plaintiff holds a genuinely earnest desire to act as the representative plaintiff in this matter and that he has the energy and resources to do so, I am not convinced that he is a suitable candidate for the role. The proposed class area consists of areas that are rural, semi-rural, urban, suburban, commercial, industrial and residential developments. The area also includes other large active farms and agricultural lands, where farming activities produce associated noise and odours. In my opinion it cannot be said with any degree of confidence that the plaintiff's interests as a residential neighbour to the Stanhope Property would not conflict with the interests of those within the proposed class who, like the Rendles and Stanhope, operate commercial agricultural businesses.

[72] In my opinion, the plaintiff has failed to meet this last requirement for certification.

Conclusion

[73] In order for the plaintiff to be successful on this application, he had the burden of persuading the court that he met all of the statutory requirements that are set out in s. 4(1) of the CPA. In my opinion, the plaintiff has not done so. I am especially not persuaded that judicial economy, access to justice, and behaviour modification, as those three expressions are explained in the jurisprudence, support the plaintiff's position in this case. The commercial post-consumer food waste composting that is complained of ceased in September 2013 and in my opinion there are other more practical and less costly ways of addressing the dispute than the class action that is being proposed.

Order

[74] The plaintiff's application to have his action certified as a class proceeding is denied.

[75] The parties may speak to the issue of costs if that is necessary.

"G.R.J. Gaul J."

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