

CANADA / JUDGMENT

Cantlie v. Canadian Heating Products Inc.

2017 BCSC 286

COURT

Supreme Court of British Columbia

DECIDED

22 February 2017

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2017 BCSC 286 Cantlie v. Canadian Heating Products Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cantlie v. Canadian Heating Products Inc.,

2017 BCSC 286

Date: 20170222

Docket: S129053

Registry: Vancouver

Between:

Craig Cantlie, Charity Cantlie

Chris Murray and Hourak Rahmani-Gorji

Plaintiffs

And

Canadian Heating Products Inc. d.b.a. Montigo Canada,

Miles Industries Ltd., Monessen Hearth Canada, Inc., Monessen Hearth

Systems Company d.b.a. Vermont Castings Group, Lennox Industries

(Canada) Ltd., Lennox Industries Inc., Lennox Hearth Products LLC.,

Security Chimneys International Ltd. and

John/Jane Does #5 through 99

Defendants

Corrected Judgment: the text of the judgment was corrected at paragraphs 277, 300 and 370 and the Appendix added on April 18, 2017

Before: The Honourable Madam Justice W. J. Harris

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

September 28-October 2, 2015

October 13-16, 2015

September 6-9, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 22, 2017

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Introduction

- [1] The plaintiffs seek to have this action certified as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c.50 ("CPA").
- [2] The plaintiffs, Charity Cantlie and Craig Cantlie, commenced this action on December 21, 2012 and applied for certification on June 18, 2013.
- [3] The certification hearing was scheduled for April of 2015. Shortly before the scheduled certification hearing, the plaintiffs entered into a settlement with a number of the defendants including Canadian Heating Products Inc., doing business as Montigo Canada ("Montigo"), Miles Industries Ltd. ("Miles"), Monessen Hearth Canada, Inc. and Monessen Hearth Systems Company, doing business as Vermont Castings Group (collectively the "Settling Defendants"). The partial settlement was approved by this court on May 26, 2015: *Cantlie v. Canadian Heating Products Inc.*, 2015 BCSC 1225.
- [4] The plaintiffs now seek an order certifying the action against the remaining defendants Lennox Industries (Canada) Ltd. ("Lennox Canada"), Lennox Industries Inc. ("Lennox Industries"), Lennox Hearth Products LLC ("LPH"), and Security Chimneys International Ltd. ("Security Chimneys") (collectively the "Lennox Defendants").
- [5] The certification hearing proceeded on September 28, 2015 for nine days. On the final day, before the plaintiffs had replied to the defendants' submissions, the plaintiffs applied for leave to add new representative plaintiffs and further amend the Notice of Civil Claim to remedy several issues raised by the defendants. Leave to amend was granted on February 24, 2016: *Cantlie v. Canadian Heating Products Inc.*, 2016 BCSC 694.
- [6] After the amendments were completed which included the addition of the representative plaintiffs Chris Murray and Hourak Rahmani-Gorji, the certification hearing concluded over four days in September 2016.
- [7] This application follows similar certification proceedings in the U.S.

Background

- [8] The essence of the plaintiffs' claim is that the defendants knew or ought to have known that the glass fronted gas fireplaces they manufactured and distributed were defective and dangerous and that they failed to take steps to make them safe or to warn owners of the dangers, causing the plaintiffs to suffer loss and damages.

- [9] The plaintiffs, Charity Cantlie and Craig Cantlie, are the parents of Owen Cantlie. On November 14, 2012, Owen, who was one year old at the time, burned his hand when it contacted a fireplace manufactured by one of the Settling Defendants. Mr. Murray, a resident of Kamloops, has a family home that was built in 2013 and contains a fireplace manufactured by the Lennox Defendants. Mr. Murray first learned of the risk associated with the fireplace when he heard of the settlement proceedings in or around August 2015. The plaintiff Ms. Gorji is a lawyer in North Vancouver. She and her family bought a newly constructed home in April 2015 which had been completed in late 2014. The home contains two fireplaces that Ms. Gorji has disabled due to a burn her niece received from a fireplace.
- [10] The Lennox Defendants are a related group of companies that have been involved in the design, manufacturing, marketing, and sale of glass fronted gas fireplaces in British Columbia since the 1990s. Lennox Canada was at all material times, and remains, a wholly owned subsidiary of Lennox Industries, a Delaware corporation. LHP, a California corporation, was formerly wholly owned by Lennox Industries through ownership of membership interests in various corporate entities. In 1999, LHP acquired Security Chimneys and it remained in the corporate structure until 2012 when Lennox Industries sold all the shares of LHP and Security Chimneys. LHP now does business as Innovative Hearth Products LLC ("IHP").
- [11] The fireplaces at issue encompass a range of products manufactured and sold by the defendants including sealed gas fireplaces, as well as fireplace inserts, stoves, and b-vent gas fireplaces. The common feature of the fireplaces is the glass or ceramic glass fronts or glass panels which reach high temperatures of up to 500°F when they are fully operational.
- [12] The defendants oppose the certification of the actions on a myriad of grounds. They generally claim that the plaintiffs have brought an economic loss claim in the guise of a personal injury action in the hopes of certifying what are fundamentally individual issues into a common issues trial. They submit that certification would undermine the goals of the CPA by promoting the duplication of fact finding and legal analysis as any future personal injury claim would have to deal with many of the same legal issues. They claim that the plaintiffs' approach has led to several issues with the pleadings including a failure to disclose a cause of action.
- [13] For the reasons that follow, I have allowed the certification of the class proceeding.

Affidavit Evidence

- [14] The affidavit evidence filed in support of the parties' respective positions is extensive. I will highlight certain evidence relevant to certification. The admissibility of some of the affidavits is contested, which I will also address.

Plaintiffs' Affidavit Materials

Dr. Verchere

- [15] Dr. Verchere is a Clinical Associate Professor of Plastic Surgery at the University of British Columbia and Head of the Division of Plastic Surgery and Medical Director of the Burn Program at British Columbia Children's Hospital. Her areas of research include burns and burn prevention in children and adolescents.
- [16] Dr. Verchere deposed that she has treated well over 100 children in the Province whose hands and/or faces were burned through contact with gas fireplaces which have a front surface that includes a transparent panel or panels made of glass, ceramic glass or similar material. She referred to her research study in which she found there were over 600 pediatric burn injuries in Canada from glass fronted fireplaces. In her opinion young children are at a particularly high risk for contact burns.
- [17] Dr. Verchere attached correspondence to the members of the Canadian Standards Association ("CSA") Joint Subcommittee on Standards for Vented Gas-Fired Warm Air Heaters in which they discussed issues regarding contact burns caused by high glass surface temperatures of gas fireplaces as early as July 11, 2001.
- [18] Dr. Verchere gave evidence as to her "many" contacts with fireplace industry representatives and regulators commencing in 2005, regarding possible design changes in fireplaces to address the burn risk to children from glass fronted fireplaces. She stated that fireplace industry representatives discussed children having been burned on gas fireplaces at meetings of the BC Safety Authority for gas fireplaces and the Hearth, Patio, and Barbeque Association ("HBPA"), as well as industry trade shows,. She referred to the HBPA having set up a Glass Safety Task Force to devise and implement industry-wide strategies to help protect children from fireplace burns.
- [19] She stated that gas fireplaces manufacturers announced a voluntary standard in 2012 by which manufacturers would offer a screen with every new fireplace sold. She referred to the litigation settlement in the U.S. in which two fireplace manufacturers, Lennox and Miles, as part of the settlement agreed to offer free protective screens to existing users of gas fireplaces.
- [20] Dr. Verchere also referred to a declaration from Dr. Dimick in the U.S. litigation in which he provided his opinion on the vulnerability and increasing number of burn injuries to children from fireplace glass. She deposed that his opinion was consistent with her own experiences in treating children reportedly burned from fireplace glass: that contact with such hot surfaces for less than one second can cause deep second and third degree burns to children, causing intense pain and requiring treatment at a hospital or appropriate facility.

- [21] Dr. Verchere deposed as to the public announcements issued by BC Children's Hospital regarding the increase in young children being burned from fireplaces (e.g. falling against the glass or insert resulting in injuries to the hands, fingers and face). She deposed that burns to children have continued despite efforts to make parents aware of the high surface temperatures of fireplaces.
- [22] The admissibility of Dr. Verchere's affidavit is challenged by the defendants.

Dr. Buc

- [23] Dr. Buc is a chemist and material engineer, with particular experience in fire and material research. She was engaged as an expert in the U.S. litigation involving the Lennox Defendants. Dr. Buc attached her October 26, 2009 declaration from the U.S. litigation in which she identified that Lennox fireplaces had the following design defects: The glass is too close to the flame from the burner or firebox is too shallow; the firebox is enclosed in glass panes which do not have an opening and which traps in the heat; and the glass pane is capable of transferring extremely high temperatures. She stated that the "overall design" exposed people to unguarded extremely high temperatures in sealed glass fronted fireplaces which present a unique hazard.
- [24] She referred to the standards used to measure surface temperatures of operating fireplaces, to determine skin contact temperature from heated surfaces, and heated surface conditions that produce contact burn injuries. She also referred to the standard for the glass on vented gas fireplaces.
- [25] She deposed to having developed a simple and effective "barrier" to prevent human skin contact burns caused by the high temperature of glass front gas burning fireplaces, at the request of class counsel for Lennox in the U.S. class action.
- [26] Dr. Buc also deposed that she tested the surface temperature of the fireplace in the home of Mr. and Ms. Cantlie and compared the temperature data to the burn hazard thresholds, which showed the temperature of the glass fronted fireplace reaching temperatures which exceeded the burn threshold.
- [27] Dr. Buc estimated a retrofit screen similar to the screen developed for Lennox in the U.S. could be developed at a cost of \$7,980 USD for engineering costs and \$360 USD for materials, based on her examination of the Cantlie's fireplace. She also estimated the cost of designing a screen for discontinued fireplaces at \$900 per screen design based on evidence of Mr. Binzer of Montigo.
- [28] Dr. Buc stated that, as screens are now mandatory, manufacturers have developed or are about to develop screens for fireplaces they currently are selling.
- [29] The defendants stated that they are no longer objecting to the expert report of Dr. Buc.

Dr. Pollack-Nelson

- [30] Dr. Pollack-Nelson is a human factor psychologist, who is a consultant in product design, warnings and instructions with respect to hazardous components and processes. She gave evidence in the U.S. litigation and attached her declarations dated August 21, 2009 and May 31, 2013, respectively, from those court proceedings.
- [31] In her declarations, Dr. Pollack-Nelson summarized her opinion that the Lennox glass fireplace was defectively designed because it reached temperatures up to 500°F; the immediacy of the burn potential of fireplaces during normal operation has been reported since 1998; Lennox had specific knowledge of serious burn injuries to young children since at least 2003; children were particularly vulnerable to burns due to the failure to incorporate an effective protective feature in the design; the use of a hazard-avoidance strategy was inappropriate for this product; and warnings in manuals or on the product will not be read or effective in communicating the burn hazard. She also summarized the basis for these opinions.
- [32] She deposed that despite knowledge of the high temperatures achieved by the fireplace during routine use and that young children had been burned from touching the glass on fireplaces as early as 2003, Lennox did not eliminate the hazard in its design or, if that were not possible, to guard against the hazard. She referred to the lack of consumer knowledge of the burn hazard and the likelihood that the glass fronts would be viewed as a protective barrier from the flames.
- [33] Dr. Pollack-Nelson deposed as to the standards which have been in place to test surface temperatures and burn risk to human skin. She also referred to several studies of pediatric burns which she deposed have consistently recommended barriers be employed to prevent injuries.
- [34] The defendants object to the admissibility of Dr. Pollack-Nelson's evidence.

Charity Cantlie

- [35] Ms. Cantlie is an educator who stated that she is prepared to be the representative plaintiff in the class action. She deposed to her knowledge of the issues and her role and responsibilities as a representative plaintiff in a class action in respect of the Consumer Class.
- [36] Ms. Cantlie also deposed as to her unsuccessful efforts to obtain a guard from one of the settling defendants after her son was burned.

Craig Cantlie

- [37] Mr. Cantlie is also an educator and the spouse of Ms. Cantlie. He deposed that when they purchased their home in the summer of 2011 from the previous owners, there was a gas fireplace in the home, which was manufactured by a settling defendant.
- [38] He deposed that their son Owen was burned on the fireplace in November of 2012. He stated that he purchased a free standing screen for his fireplace after his son was burned.
- [39] Mr. Cantlie deposed that he was prepared to be a representative plaintiff in respect of the health care costs class and that he understood his role and responsibilities as a representative plaintiff.

Chris Murray

- [40] Mr. Murray is a resident of Kamloops who deposed that he is prepared to act as a representative plaintiff in this action. He deposed that he has a home with a Lennox brand fireplace and that it was installed at floor level when he built the home in 2013. A contractor installed the fireplace for his family. It was not suggested to him that a screen or barrier might be available.
- [41] Mr. Murray stated that he first learned that a barrier or screen may be available when the class action came to his attention in approximately August of 2015. He acknowledged he did not read the product literature given to them by the builder. He stated that he subsequently read the Care and Operations Instructions, which included a reference to a free safety guards, with a web address and telephone number.
- [42] After learning of the partial settlement and the possibility of injury due to heat from gas fireplaces, he deposed that he was concerned about injury to his adult daughter who has a disability that affects her balance and to his grandchildren.

Marie Fleury

- [43] Ms. Fleury is a resident of Brantford, Ontario. She deposed that she has a Lennox brand fireplace in her newly built home. It was in her home when she and her family moved in. She stated that she was not offered a screen or barrier of any kind for the fireplace.
- [44] Ms. Fleury deposed that her son badly burned his hand on the fireplace when he briefly touched it, which occurred shortly before his second birthday. Her son required medical treatment and was away from daycare for one week. She said that she had to pay for her son's daycare and missed time from her work.
- [45] Ms. Fleury said that her family no longer uses the fireplace, although they used it frequently before her son was burned. She could not find anything on the internet to indicate that screen or barriers were available for her two sided fireplace.

Hourak Gorji

- [46] Ms. Gorji is a lawyer who lives in North Vancouver. She and her husband own a family home with two Lennox/Superior brand gas fireplaces, which was new when they moved into the home in April of 2015. The fireplaces had already been installed.
- [47] Ms. Gorji deposed that her four year old niece was burned by a gas fireplace in 2014. As Ms. Gorji had a toddler, she has had the fireplace off and disabled since moving into her home.
- [48] She said that she was informed by plaintiffs' counsel that a screen or barrier may be available free of charge.
- [49] In a subsequent affidavit, she attached documentation regarding the fireplaces which were in the home when they moved in. She stated that she had not reviewed the documentation prior to swearing the affidavit. In the document entitled "Care and Operation Instructions" she found a reference to a free safety guard with a telephone number and web address to obtain a safety guard. She deposed that she was unable to find anything related to fireplace safety guards or screens using that web address. In response to the affidavit of Priscilla Sims, Director of IHP's website, Ms. Gorji deposed that she had not seen any references to the availability of "fireplace guards" on the website she reviewed.
- [50] She deposed that she is prepared to be a representative plaintiff in the class action, either together with other plaintiffs or not.

Steven Ryder

- [51] Mr. Ryder deposed that he is the father of Riley Ryder and that in June of 2003 Riley suffered second and third degree burns to both of her hands and face from contact with the glass front of a gas fireplace. She was 13 months old at the time and required three surgeries as a result of her injuries. Mr. Ryder referred to the physical and emotional toll on Riley and to the emotional impact on the family.
- [52] He stated that when they move to their new home they received no instructions, literature or warnings regarding the fireplace.
- [53] The affidavit of Mr. Ryder is objected to by the defendants.

Martin Miles

- [54] Mr. Miles is the Chief Executive Officer and Product Director for the Settling Defendant, Miles Industries Ltd.
- [55] He deposed to the Canadian and American standards for fireplaces, inserts and stoves, depending on whether they are intended for heating or for decorative use. He referred to the various physical differences among product lines (e.g. size, installation location, heat output, venting, and screens or barriers) and the safety warnings used.

- [56] Mr. Miles attached ASTM standards for determining burn hazards associated with heated equipment from ASTM International (formerly, the American Society for Testing and Materials). Included in the ASTM standard is a method of calculating the contact time required to cause second and third degree burns to skin at various temperatures.
- [57] He gave evidence that he was a member of the CSA Technical Advisory Group for Vented Gas-Fired Warm Air Heaters (TAG"), which was asked on February 28, 2005 to review issues associated with burns from high glass surface temperatures of gas fireplaces and to make recommendations. One of the "key" items to be reviewed was "barriers" and he appended minutes of the TAG and its working group including proposed revisions to CSA standards. He also gave evidence that there was also a Glass Fronts Technology Safety Task Force, which was to communicate to the industry the work done and conclusions reached by the TAG.
- [58] Mr. Miles attached to his third affidavit depositions he made in the U.S. class action against Miles Industries Ltd in which, among other things, he agreed that warnings were not considered the most effective or primary approach to burn prevention.

Letitia Shamin

- [59] Ms. Shamin is an administrative assistant with the plaintiffs' law firm. She attached to her affidavits various documents and declarations from the U.S. class actions against the defendants, including the action involving Lennox Defendants.
- [60] She also attached minutes from the HPBA and BCSA meetings which were produced as a result of the order of Madam Justice Sharma which, among other things, indicate discussion with representatives of Lennox and other fireplace manufacturers, on the temperature of fireplace glass, the testing of screens and barriers, and hot surface contact burns and radiation burns from fireplaces.
- [61] Ms. Shamin also attaches Dr. Verchere's correspondence with representatives of the fireplace industry and regulators.
- [62] Ms. Shamin deposed to her unsuccessful attempts to access the website referred to by Mr. Krebs and Ms. Sims in their affidavits which included a link to information on safety and warnings related to Lennox gas fireplaces.
- [63] The admissibility of Ms. Shamin's affidavits is challenged.

Jenni Warburton

- [64] Ms. Warburton is also an administrative assistant with the plaintiffs' law firm, who gave evidence as to her search of the Lennox and other fireplace websites to order a safety barrier for glass fronted fireplaces. In a subsequent affidavit, she deposed that she could not locate any information on the ability to order a free safety guard on Lennox fireplaces through internet searches or by other means.

[65] The admissibility of Ms. Warburton's affidavit is challenged.

Defendants' Affidavit Materials

Thomas Krebs

[66] Mr. Krebs is the National Director of Sales for the defendant LHP, which is a Delaware company doing business as Innovative Hearth Products.

[67] In his affidavit, he sets out the corporate structure and history of the main Lennox Defendants. He deposed that Lennox Canada is a wholly owned subsidiary of Lennox Industries.

[68] Lennox Industries entered the fireplace market in 1994. In 1998, it acquired various subsidiaries that also designed and manufactured fireplaces, stoves and chimney systems. Security Chimneys was a subsidiary of Lennox Industries. The shares of Security Chimneys were sold on April 24, 2012, along with the other interests in the LHP business, to Lennox Hearth Holdings LLC and 9261-6044 Quebec Inc.

[69] Lennox Canada operated as a separate, wholly owned subsidiary of Lennox Industries and sold, among other products, gas burning fireplaces under various brand names such as Lennox, Marco and Superior until April 24, 2012.

[70] From 1994 to 2002, Lennox Canada manufactured Lennox fireplaces in Canada, and sold and distributed those and other fireplaces manufactured in the U.S. Since 2002, it only sold and distributed fireplaces in Canada which were manufactured in the U.S.

[71] Since April 24, 2012, neither Lennox Industries nor Lennox Canada now manufacture, design or distribute fireplaces in Canada or in the U.S. Lennox Industries and Lennox Canada continue to design, manufacture and sell other heating, ventilating and cooling products, such as furnaces and air conditioning units.

[72] When Lennox Canada manufactured and sold gas fireplaces, it did not generally sell directly to consumers but through a wide network of distributors, dealers, builders and installing contractors. Fireplace users interacted with dealers, contractors, distributors or builders, or they purchased home with fireplaces already installed.

[73] Mr. Krebs deposed that the use of gas fireplaces has become popular in recent years because they are easy to use, energy efficient, and, in some communities wood burning fireplaces are not permitted. They can provide heat and offer ambiance. He noted that there are a number of gas fireplaces which vary by size, venting, configuration, and type of glass. They can be installed in various locations in the home.

[74] He described the different types of direct vent, B-vent and bi-fold gas fireplaces, stoves and inserts produced by Lennox. He stated that there is variation in the temperature of the glass panels when the fireplaces are in use. They are designed not to exceed industry standards.

[75] He referred to a number of methods used to warn homeowners of the burn hazards and high surface temperatures associated with fireplaces (e.g. manuals, hang-tag warnings, leaflets, websites, and, starting in 2011, point of use labels). There were some change to the content and placement of the warnings to homeowners over time. Examples of some of the warnings referenced include:

! Warning

Do not attempt to touch the front enclosure glass with your hands while the fireplace is in use.

! Warnings

- Hot! Do not touch! The glass and surface of this appliance will be hot during operation and will retain heat for a while after shutting off the appliance. Severe burns may result.
- Carefully supervise children in the same room as appliance.
- If small children are present in the home, it is recommended that this appliance be fitted with a screen door or screen panel. See Page 17 for ordering information.

Warning: Children and adults should be alerted to the hazards of high surface temperatures, use caution around the appliance to avoid burns or clothing ignition. Young children should be carefully supervised when they are in the same room as the appliance.

[76] Mr. Krebs deposed that LHP has sold for many years optional accessory screen panel which were intended to be placed over the exterior glass surface of the fireplaces. LPH began making safety guard kits available free of charge in January of 2011, as part of the settlement of the U.S. class action against LHP and related companies. He stated that the free safety guards were also made available in Canada.

[77] He estimated that there were approximately 26,830 LHP fireplaces sold in Canada and 4,361 in British Columbia between 2008 and 2011. He deposed that the HPBA data suggests that between 65,000 and 122,000 direct-vent gas fireplaces were sold each year between 2004 and 2011 in Canada.

[78] Mr. Krebs deposed that neither LHP nor Lennox were aware of a complaint involving allegations that someone was burned in Canada and has been informed that it has received fewer than ten complaints in the U.S.

Eric Dufour

[79] Mr. Dufour is the Director of Research, Development and Manufacturing for Security Chimneys. Mr. Dufour deposed that Security Chimneys is now owned by M & G Group North America B.V.

- [80] Mr. Dufour stated that from 1989 to 2001, Security Chimneys designed, manufactured and distributed fireplaces to distributors, dealers and, to a lesser extent, retailers, in the U.S. and Canada. In approximately 2001, it stopped manufacturing, distributing, and selling gas fireplaces.
- [81] From 1989 to 2001, Mr. Dufour deposed that Security Chimneys manufactured a variety of direct-vent and B-vent fireplaces. Designs included fireplaces with glass fronts and side panels which would be installed in different areas of a home and at varying heights. He believed that the company's market share of fireplaces in Canada was approximately 5%.
- [82] Mr. Dufour described that a number of methods were used to warn consumers of the potential burn hazards and the high surface temperatures associated with the fireplaces, including labels and manuals.
- [83] He deposed that Security Chimney is not aware of any allegation of anyone being burned as a result of touching the exterior glass panel surface of a Security Chimney fireplace in Canada or the U.S.

Priscilla Sims

- [84] Ms. Sims is the Director of Customer Service for IHP, formerly LHP. She deposed that free fireplace safety guards are offered to customers in Canada and the U.S. The safety guards prevent direct contact with the glass surface of the fireplace through the use of a mesh screen that stands off from the unit. She deposed that such screens would reduce the severity of the burn but are not a substitute for following all of the warning and safety guidelines set out in the manuals.
- [85] Ms. Sims deposed that the free safety guards were made available by completing an on line form found on their website or contacting IHP by phone or through a distributor or retailer. She stated that a fireplace safety guard was available for the fireplace at the home of Mr. Murray.
- [86] She deposed that IHP has provided 187 guards to 177 owners in Canada. She stated that IHP is not able to provide guards for a very small number of IHP fireplaces and for those fireplaces a hearth gate is offered.

Bernadette Spearman

- [87] Ms. Spearman is an administrative assistant employed by the law firm of the Lennox defendants.
- [88] She deposed to her Google search using the search term "Superior fire place guard" and "Lennox fireplace guard" and the results of those searches. She stated that she was taken to what appeared to be an online superior free safety guard request form.
- [89] The admissibility of Ms. Spearman's affidavit is challenged.

Michael Lewis

- [90] Mr. Lewis is the General Manager of the Auburn, Washington facility for LHP. Prior to that, from approximately early 2014 to December 2015, he served as the website administrator for LHP.
- [91] He submitted an affidavit attaching screenshots of a digital archived copy of several of the defendants' websites as they allegedly looked in 2015, which he obtained using the "Wayback Machine" website.
- [92] The admissibility of Mr. Lewis' affidavit is challenged.

Objections to Admissibility of Evidence

- [93] As noted above, there were a number of objections to the admissibility of certain affidavits. I will address the objections to the extent necessary to determine if the contested evidence ought not be admitted for the purpose of determining whether there is some basis in fact for each of the certification requirements set out in the CPA.
- [94] In a previous ruling in this case, *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 2029, Mr. Justice Walker noted that the basic rules of admissibility of evidence apply during certification. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263, Mr. Justice Myers addressed the matter as follows:

25 Microsoft points out -- correctly -- that evidence filed in certification applications must be evidence that meets the ordinary criteria of admissibility. As was said by Newbury J.A. in *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 32

Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would no[t] seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants. See the discussion at paras. 31-52 of *Epstein v. First Marathon Inc.* (2000) 41 C.P.C. (4th) 159 (Ont. Sup. Ct. J.).

- [95] Further, Cullity J. of the Ontario Superior Court of Justice in *Slark (Litigation Guardian of) v. Ontario*, 2010 ONSC 1726, commented at para. 58 that the principles governing the admissibility of evidence should not be disregarded, even for the purpose of satisfying the unusually low standard of proof given the important consequences of certification.

- [96] I note, however, that where expert opinion evidence is adduced at the certification hearing, as is the case here, "it should not be subjected to the exacting scrutiny required at a trial": *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32 at para. 66. Certification is a procedural step and it is not appropriate for a court to review the evidence to the same extent as would be done in the trial of the merits on a full evidentiary record.
- [97] With these principles in mind, I will consider the objections as to admissibility of certain affidavits.

Rule 11-2 Attestation Objections

- [98] The defendants submit that the affidavits of Dr. Verchere should not be admitted on the basis that it does not conform to the requirement for expert evidence set out in Rule 11-2. The defendants assert that the affidavit, when made, did not contain a statement that the affiant gave evidence in conformity with her duty to assist the court and not to be an advocate for any party as required by the Rule.
- [99] The defendants rely on *Pichugin v. Stoian*, 2014 BCSC 2061, in which Mr. Justice Skolrood stated that the requirements of Rule 11-2(2) and 11-6(1) are mandatory, although subject to a residual discretion to admit a report notwithstanding that it did not comply with the Rules:
- [15] With respect to the February 6, 2014 report, I note, as submitted by the plaintiff, that the requirements of rules 11-2(2) and 11-6(1) are mandatory in that in order for an expert report to be admitted, those requirements must be complied with. That said, under Rule 11-7(6), the court has a discretion to permit an expert to testify where the rules have been breached, provided that there is no prejudice to the opposing party or the interests [of] justice require it.
- [100] In that case, the court found that the expert had failed to acknowledge and certify in the report that he understood the obligations set out in Rule 11-2 and his attempt to rectify this two months after the fact was not sufficient to satisfy the duty to the court. In my view, the circumstances of that case are distinguishable from the facts in the instant case.
- [101] As is evident from the correspondence from plaintiffs' counsel, Dr. Verchere was not retained as an expert by the plaintiffs in the action. She wished to volunteer to provide an expert opinion to the court in light of her knowledge of the matters underlying the action resulting from her experience treating children with burns from glass fireplaces. She had not been retained by plaintiffs when she filed her affidavit dated March 3, 2014.
- [102] When the plaintiffs' counsel became aware that there may be an objection to her report, counsel wrote to defendants' counsel on June 6, 2014 and confirmed that the plaintiffs "have not retained Dr. Verchere as our 'expert' and for that reason you will note that her affidavit does not include the language contemplated by Rule 11-2" and advised that he was confident she would do so if asked. When the defendants did not respond to the June 6,

2014 letter, the plaintiffs asked Dr. Verchere to provide the attestation required by Rule 11-2. She did so by affidavit dated October 10, 2014.

- [103] I note that the Rules contemplate that experts may be appointed by one party, jointly appointed, or appointed by the court. Regardless of how they are appointed, the Rules provide that they must certify that they are aware of their duty to assist the court and not be an advocate for either party. The Rules do not make provision for an "expert" volunteering to provide expert evidence, even though such evidence may be relevant to issues in a proceeding.
- [104] In my view, while Dr. Verchere's wish to demonstrate her independence by declining to be appointed by a party to the litigation may have been well-intentioned, her appointment as an expert in the proceedings was facilitated by the plaintiffs. Compliance with Rule 11-2 was required.
- [105] That said, in considering whether this is a proper case to exercise my discretion to nevertheless admit the expert report of Dr. Verchere notwithstanding her initial failure to make the required certification under Rule 11-2, it is not disputed that the reason that she did not initially provide the certification was because she wanted to demonstrate her independence. I am satisfied that this is a case where I can infer that she understood her obligation to be independent and to assist the court at the time she first swore her affidavit. She confirmed this in her subsequent affidavit, which was in the form required by the Rules. In these circumstances, I consider that it would not be in the interests of justice to exclude Dr. Verchere's report on the basis put forward by the defendants.
- [106] The defendants submit that Dr. Pollack-Nelson's affidavit is inadmissible on similar grounds. They argue that the opinion on which she purports to rely is contained in declarations from the U.S. litigation which contain no certification as required by the Rules. However, in my view, the nature and context of the declarations have to be considered. The declarations of Dr. Pollack-Nelson were sworn statements provided in court proceedings and are stated to have been given under penalty of perjury. The U.S. litigation involved corporate defendants, who are or were defendants in this action. Further, in swearing her affidavit in this jurisdiction, she provided the certification stipulated in the Rules. In so doing Dr. Pollack-Nelson swore that she was aware that she had a duty to assist the Court and that she was not an advocate for any party. The defendants' position would suggest that she had to repeat all of what she said in her prior declarations - which seems unnecessarily technical and not in keeping with the object of the rules and proportionality, as set out in Rule 1-3. In these circumstances, I find her certification sufficient to satisfy the requirements under the Rules.

Affidavits Containing Materials Irrelevant to Certification

[107] The defendants take issue with the expert reports of Dr. Verchere and Dr. Pollack-Nelson on the basis that they contain evidence that is unnecessary and irrelevant to the issues material to the certification.

[108] The plaintiffs respond that the fact that affidavits contain evidence that relates to the merits as opposed to the certification does not render such evidence inadmissible, referring to the comments of Cullity J. in *Anderson v. St. Jude Medical Inc.*, [2003] O.J. No. 4314:

8 I adhere to the comments I made on admissibility in the reasons for the decision on certification, and the earlier endorsement, and I will not repeat them except to reiterate that, to the extent that the objections are based on relevance, it is not correct that evidence relevant to the merits of the action is inadmissible for all purposes.

9 Some such evidence is almost always relied on by both sides in motions for certification. In particular, where the ultimate outcome of the action may depend, to any extent, upon the court's resolution of conflicts between the expert evidence of witnesses called on each side that is directly relevant to the merits of the action, the existence, and the nature, of the conflict may be the best evidence of the existence, and definition, of the issues that the plaintiffs seek to have accepted as common to all members of the class. It is trite law that evidence may be admissible for some purposes and inadmissible for others.

10 As Mr Branch states in *Class Actions in Canada* (paragraph 4.1540):

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

Where the court finds that the proceedings have been unduly protracted by an over-abundance of evidence, costs sanctions may be appropriate.

[Emphasis added.]

[109] The defendants contend that the evidence of Dr. Verchere and Dr. Pollack-Nelson regarding warnings, glass temperature, and burn risk pertain "solely to the merits of the action" and are, therefore inadmissible, relying in part on the decision of Madam Justice Sharma in response to a production of documents application in this case: *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 228.

[110] The plaintiffs respond that subsequent to the decision of Sharma, J., Mr. Justice Walker addressed the admissibility of the affidavits of Dr. Pollack-Nelson and Dr. Buc in *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 2029. The defendants sought to exclude the affidavits on a number of grounds, including that the decision of Sharma, J. effectively held the affidavits inadmissible or, in the alternative, that they be permitted leave to file reply

evidence. The plaintiffs observe that Walker, J. did not rule the affidavits inadmissible, although he allowed the defendants to renew their objection at the certification hearing and also allowed them leave to file reply affidavits. I note that the defendants elected not to file reply affidavits.

- [111] I reject the contention of the defendants that the evidence of warnings and temperatures of fireplaces is irrelevant to certification. I agree that such evidence is relevant to the merits of the claim. However, it is also relevant to certification. Evidence related to whether fireplace glass reaches temperatures that could burn on brief contact, whether it was common knowledge in the fireplace industry that the temperatures of glass in front of fireplaces could cause burns on brief contact, whether it was common knowledge in the industry that warnings were ineffective or insufficient, or whether it was common knowledge within the fireplace industry that children were being burned on glass fireplaces is relevant to common issues pertaining to negligent design and duty to warn. The resolution of such issues could be extrapolated to the class and advance the litigation. Therefore, evidence going to these issues is relevant to certification.
- [112] I would add that I did not take Justice Sharma's statements made in the context of an application for document production to be determinative of the issues before the court on certification and, indeed, I note that she ordered production of industry association documents as potentially relevant to a common issue.
- [113] Accordingly, I decline to find the affidavits of Dr. Verchere and Dr. Pollack-Nelson inadmissible on this ground. I find that they address matters relevant to certification.

Opinion Evidence Outside Area of Expertise

- [114] The defendants also object to paras.18, 51-53 and 56-59 of Dr. Verchere's affidavit as being outside her area of expertise. The defendants contend that she is not qualified to give an opinion on the efficacy of warnings, the availability of screens, or the class members' awareness of the burn risk associated with the fireplaces at issue.
- [115] In my view, Dr. Verchere's statements on these matters have to be considered in context. It is evident from her affidavit that she was observing an increasing number of cases in which children were burned from fireplace glass and, in the course of treating the children, was encountering parents who were not aware of the burn risks from fireplaces. She then describes her subsequent interactions with industry representatives and regulators regarding design changes to address this situation.
- [116] I did not take from the impugned paragraphs that she was expressing an expert opinion on the product design. Her statements regarding the burn risk to children, the efficacy of warnings, and the availability of screens were largely descriptive of her experience treating burn patients, her discussions with industry representatives, and her knowledge of the developments in the industry regarding the use of screens as a means to reduce the burn risk, which was a development then underway. Accordingly, while there were statements in

her affidavit which may have strayed into opinion evidence outside her expertise (i.e. that warnings alone were insufficient and that screens were a key means of reducing burns in young children), I consider that this is a matter that goes to their weight.

[117] I am also mindful of the comments of Mr. Justice Smith in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2007 BCSC 899, that the court should consider whether the report as a whole can assist the court when considering its admissibility:

17 It is also apparent from the foregoing authorities that when an objection is raised to the admissibility of an expert opinion, the opinion must be considered in its entirety. The experts who provide opinions in this Court come from many fields, but they are not expected to be experts in the law of evidence. It is almost always possible to isolate passages or phrases in a report that can be said to violate one or other of the rules that have been set out. In many cases, those passages can be excised or, in a case without a jury, simply ignored. Conversely, a report may be so permeated by improper considerations that excision of the most blatantly offending passages can not save it.

18 In each case, the question is whether the report, taken as a whole, is capable of providing the court with the assistance that is required. Of course, objections or criticisms that are not sufficient to render a report inadmissible may still be the subject of cross-examination and argument going to the weight the court should ultimately give to the opinion.

19 At the heart of all these considerations is a concern for the integrity and fairness of the trial process. In *Mohan*, the Court said:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

[At p.21]

20 Just as the admission of expert evidence will, in some cases, distort the trial process, there are circumstances where its exclusion could have the same effect. That concern must be kept in mind where, as here, a party who has already introduced expert evidence seeks to exclude expert evidence from the opposite party. Of course that does not mean that a completely inappropriate opinion can be made admissible merely by the fact that other expert evidence has been admitted.

[Emphasis added.]

[118] Taken as a whole, I consider that Dr. Verchere's affidavit is relevant and admissible on issues related to certification to the extent that she recounts her interactions with industry representatives as to their knowledge of the burn risk to young children from the glass on gas fireplaces and the developments in the industry to address burn risk, including warnings and screens. Accordingly, I do not accept Dr. Verchere's report should be found to be inadmissible on the basis that she provided an opinion outside of her expertise.

Ultimate Issue Objections

[119] The defendants object to paras. 18, 34, 37, and Exhibit P of Dr. Verchere's affidavit and Exhibits B and C of Dr. Pollack-Nelson's affidavit on the basis that they have assumed the role reserved for the court and have given evidence going to the "ultimate issue" in the hearing.

[120] However, an objection that an expert opinion goes to the ultimate issue to be decided by the judge is not, on its own, a basis to exclude the evidence. Courts have held that the old rule that expert evidence will necessarily be inadmissible if it goes to the ultimate issue in a case is no longer strictly adhered to. In *R. v. Burns*, [1994] 1 S.C.R. 656, at 666, McLachlin J. (as she then was) said:

While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at 666 (per Doherty J.A).

[121] Similarly, in *ING Insurance Co. of Canada v. Sportsco International L.P.*, [2004] O.J. No. 2254, Echlin J. of the Ontario Superior Court of Justice noted there is no longer a general rule excluding expert evidence on the ultimate issue:

11 Notably, the "ultimate issue" rule, which appears to have originated in the House of Lords over a century ago in *North Cheshire & Manchester Brewery v. Manchester Brewery Co.* (1898), [1899] A.C. 83 (U.K. H.L.), has "now been regarded as having been virtually abandoned or rejected" (per: Howland C.J.O. speaking for the Court in *R. v. Graat* (1980), 55 C.C.C. (2d) 429 (Ont. C.A.) at p.443; aff'd at: (1982), 2 C.C.C. (3d) 365 (S.C.C.) at p.381).

12 In *Sopinka, Lederman and Bryant, The Law of Evidence in Canada* (2d) (Butterworths: Toronto and Vancouver, 1999) at p.634, para. 12.70, it is observed that "there is no longer an absolute rule barring such testimony". The justification for such prohibition appears to have been the concern that the opinion might invade or usurp the function of the trier. The folly of such reasoning, was pointed out by Wigmore when it was observed that the trier has the power to accept or reject the evidence and is not obliged to take the expert's evidence as conclusive: J. Wigmore, *Evidence*, Vol. 7 (Chadbourn rev.) (Boston: Little, Brown, 1978) at par. 1921.

13 As recently as last year, Ontario's Court of Appeal observed that "there is no general rule excluding expert evidence in respect of the [ultimate] issue": *R. v. Bryan*, [2003] O.J. No. 1960 (Ont. C.A.) at paras. 16-17 (per Goudge, Abella, and Armstrong J.J.A.)

15 I specifically find that while portions of the affidavit come perilously close to addressing "the ultimate issue", it is open to this Court to deal with what, if any, weight ought to be attributed to those excerpts. Mr. Snowden conceded that in the end, its admissibility is a matter for the discretion of this Court. I am confident that this Court, (sitting without a jury), can independently rule upon matters within or outside the experience and knowledge of the Court without being improperly swayed by, or left improperly in awe of, the opinions of the expert.

[122] In the impugned paragraphs of the affidavit, Dr. Verchere commented that more needs to be done to address the dangers of fireplaces, she referred to children who had been burned by the glass on fireplaces, and she noted that no one she met in the fireplace industry, except one, had suggested that fireplaces do not get hot enough to cause burns on brief contact. Dr. Pollack-Nelson attached her declaration from the U.S. litigation against Lennox in which she provides her opinion regarding the defects in the design of glass fronted fireplaces and set out the basis for it.

[123] I agree with the plaintiffs' submissions that neither affiant purports to instruct the Court on any legal test. I consider that the opinions provide some assistance to the court in its determination of whether a common issue should be certified. Dr. Verchere's evidence is generally corroborative of other evidence regarding industry knowledge of the burn risk and touches on issues relevant to the common issues such as the duty to warn. The value of Dr. Verchere's particular statements is a matter which goes to their weight rather than admissibility. Similarly, I consider that Dr. Pollack-Nelson's opinion is relevant to certification in providing some basis in fact for the common issues such as negligent design.

[124] I also agree that their reports should not be considered in a piecemeal fashion directed to isolated passages that may be objectionable. As noted by Justice Smith in *Keefer Laundry*, expert reports should be considered as a whole. When the substance of the two reports is considered, I am not persuaded that the evidence of Dr. Verchere or Dr. Pollack-Nelson should be found to be inadmissible.

Hearsay and Reliance on Studies and Opinions

[125] The defendants submit that Dr. Pollack-Nelson's affidavit is inadmissible as it impermissibly relies on hearsay. In particular, the defendants argue that the affidavit relies on U.S. reports, witness statements, memos, comments, and research that have either not been produced or attached or are adduced for the truth of their contents but whose authors have not submitted affidavits or otherwise been subject to cross-examination. For example, they point to paras. 6, 7, 8, 13, and 15 and exhibits B, C, D, E, F, G, H, I, and J.

[126] With expert evidence, there is always a danger in the fact that an expert's opinion may be based on unsworn or untested materials. In *R. v. Lavallee*, [1990] 1 S.C.R. 852, Madame Justice Wilson at 893 extracted the following principles with respect to hearsay evidence in the context of expert opinions:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence;
2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based;
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion; and
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[127] Rather than making an expert's opinion inadmissible, the reliance on hearsay evidence affects the weight of such evidence and where expert opinion is based on a mix of admissible and inadmissible evidence, "the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies": *Lavallee* at 897. When deciding what weight to place on expert evidence, the trier of fact must "assess the extent to which the expert relied on hearsay evidence and factual assumptions, and the reliability of those hearsay statements and assumptions": *Bank of China v. Fan*, 2015 BCSC 590 at para. 80.

[128] When the totality of her evidence is considered, it is clear that Dr. Pollack-Nelson relied on a variety of information to come to her opinions including various standards, learned articles, and her own experience in the field. While certain materials may be hearsay and may affect the weight attributable to her opinions, they do not render her affidavit inadmissible.

[129] The defendants also object to the admissibility of Dr. Verchere's report on the basis that it attached an opinion of a Dr. Dimick made in "unrelated proceedings" in the U.S. litigation. I would not describe the proceedings in the U.S. as wholly "unrelated" to the current action (being part of U.S. class action against one of the original defendants). In any event, it is well established that an expert can rely on a variety of sources and resources in coming to his or her opinion and may rely on hearsay. As noted, it is for the trier of fact to determine the weight which is attributed to the opinion based upon the degree to which the underlying assumptions have been proven by other admissible evidence and the reliability of any hearsay: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40.

[130] While Dr. Dimick's declaration may be inadmissible for the truth of its contents, to the extent that it or other studies informed the opinion of Dr. Verchere, she is entitled to refer to it. This does not render her opinion inadmissible.

Dr. Verchere and Dr. Pollack-Nelson as Advocates

[131] The defendants submit that the affidavit of Dr. Verchere is "advocacy dressed up in the guise of an expert's report". They refer to paras. 18, 34, 37 and Exhibit P of her affidavit as highlighting her bias and advocacy.

[132] In *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 (S.C.), Mr. Justice McColl emphasized the need for expert testimony to be given in an objective and impartial manner so the court can place some reliance on it. He stated at 315:

25 Expert opinions will be rendered inadmissible when they are nothing more than the reworking of the argument of counsel participating in the case. Where an argument clothed in the guise of an expert's opinion is tendered it will be rejected for what it is.

[133] Mr. Justice Smith in *Keefer Laundry* also emphasized that "an expert should not be an advocate" but that there is a difference between an expert who advocates for a party and one who advocates for his or her opinion. At para. 16, the learned judge went on to explain:

In short, the Court should be able to approach the opinion with some confidence that the expert would have rendered the same opinion if he or she had been consulted by the opposite party. However, once an expert has formed an opinion through that process, he or she may be firm, emphatic or even strident in the way he or she expresses the opinion or defends it against contrary opinions.

[134] Similarly, in *Bolton v. City of Vancouver*, 2002 BCSC 537 at paras. 8-10, Mr. Justice Henderson emphasized that an expert is entitled to "argue" in support of his or her opinion.

[135] In this case, there is no objection generally to Dr. Verchere's qualifications as an expert in terms of her qualifications as a plastic surgeon and as a specialist who has been involved in treating children with burns and conducting research related to burn injuries and their prevention.

[136] It is evident from Dr. Verchere's affidavit that she has treated children who have reported to have been burned from fireplaces on numerous occasions; that she has discussed the burns she was increasingly encountering in her clinical practice with industry representatives and regulators; and that, in the course of doing so, she has expressed an opinion to them that design changes in gas fireplaces should be considered as, based on her experience, warnings were not sufficient to address the dangers posed to children.

[137] Her actions in meeting with industry representatives and regulators and expressing an opinion to them on the need to change the product design to reduce burn risk do not, by themselves, make her an advocate. Such actions are within the range of actions expected of a responsible physician and do not render her opinion unreliable. She was entitled to express her opinion firmly and emphatically.

- [138] Further, I observe that Dr. Verchere's evidence in relation to her contact with industry representatives, what she related to them, and what she observed during the course of treating children with burns is essentially fact evidence. A witness is entitled to be both a fact witness and an expert offering opinion evidence, provided the opinion evidence meets the criteria in *R. v. Mohan*, [1994] 2 S.C.R. 9: See *Davies v. Clarington (Municipality)*, 2016 ONSC 1079, *Andersen v. St. Jude Medical Inc.*, 2010 ONSC 3712. Much of what the defendants object to as advocacy is simply descriptive of her actions in bringing to the attention of industry what she was encountering in her practice.
- [139] While her comment that no one, with one exception, suggested to her that the gas fireplaces do not get hot to cause serious burns is somewhat argumentative, the remaining contested paragraphs do not lead me to conclude that her opinion is "dressed up advocacy". Dr. Verchere's concern for children does not justify the defendants' depiction of her evidence.
- [140] The defendants further submit that Dr. Pollack-Nelson's affidavit contains argument in the guise of evidence or otherwise exhibits bias as reflected by the language used and the inferences and conclusions reached without supporting evidence. They highlight a list of examples in support of this argument which include reference to paras. 7, 8, 9, 14, 18(a) and Exhibits B, C, E, F, and G which describe her interactions with industry representatives about the hazards from fireplaces and her opinion on the voluntary CSA and American National Standards Institute ("ANSI") standards for gas fireplaces.
- [141] As with Dr. Verchere, there is no objection generally to Dr. Pollack-Nelson's qualifications. She has credentials and experience in the area of product safety. The basis for her opinions is detailed in her attached U.S. declarations which describe her experiences in the industry and how they relate to the opinions she formed. While the defendants include in their list of objections her statement that "members of the gas fireplace industry knew or should have known, well before 2010 and likely before 2001 of the burn hazard posed by glass fronted gas fireplaces and of the means available to eliminate that hazard" as indicative of bias, I note that Dr. Pollack-Nelson described the interactions she has had with representatives of the fireplace industry to support this opinion.
- [142] Although, like Dr. Verchere, Dr. Pollack-Nelson expressed her opinion firmly and emphatically, I am not satisfied that any of the impugned sections of the affidavit could reasonably lead to the conclusion that Dr. Pollack-Nelson is biased such that her affidavit should be inadmissible. As I will discuss later in this decision, her affidavit supports the conclusion that there is some evidence of a design defect and of industry knowledge of the defect which is relevant to the common issues.

Admissibility of Mr. Lewis' and Ms. Spearman's Affidavits

- [143] The defendants seek to rely on the affidavits of Ms. Spearman and Mr. Lewis as evidence in reply to the cross examination of Ms. Gorji. The defendants cross-examined Ms. Gorji on July 25, 2016, and they submit that the testimony required them to submit evidence to "fill the gaps in her evidence". The gaps, as I understand them, relate to what searches were available at the time she searched the defendants' website and what those websites would have looked like at the time she did the searches.
- [144] The plaintiffs argue that these affidavits should not be admitted due to concerns over timeliness. They acknowledge that the class action procedures allow for a great deal of flexibility and that the court should be lenient when it comes to issues of timing; however, they submit that the timing of these two affidavits is well outside the scope of any acceptable flexible timeline.
- [145] Ms. Gorji swore her affidavits in November and December of 2015 and she was added as a party on February 4, 2016. The defendants applied to cross-examine her and I allowed the limited cross-examination on April 14, 2016: *Cantlie v. Canadian Heating Products Inc.*, 2016 BCSC 660. On July 25, 2016, a Judicial Management Conference was held in which deadlines were set for final submissions. The cross-examination of Ms. Gorji was held on the same day.
- [146] In the conference, it was agreed that the plaintiffs were to provide their new submissions by end of day July 26, 2016. The defendants were to provide theirs August 23, 2016 after which the plaintiffs would have until September 2, 2016 to file a reply. The certification hearing resumed on September 6, 2016. The plaintiffs submit that on the day that the defendants' submissions were due, in addition to receiving the joint submissions from the defendants, they received Ms. Spearman's affidavit and an unsworn copy of Mr. Lewis' affidavit. A sworn copy was provided a few days later.
- [147] In my view, the issue with these affidavits is that the defendants purport to be filing them in response to the cross-examination and Ms. Gorji's evidence and yet, they have not first given her an opportunity to comment on the evidence.
- [148] I granted leave to cross-examine Ms. Gorji on April 14, 2016. There was ample opportunity to resolve issues concerning her evidence before written submissions were due. I consider that admitting these affidavits without having put the substance of them before Ms. Gorji would result in prejudice that would outweigh any probative value. If the defendants wished to challenge the searches she conducted on the websites she saw, they should have first given her an opportunity to comment and, if necessary, filed timely affidavits in response. I, therefore, find the affidavits inadmissible.

Admissibility of Ms. Warburton's Affidavit

- [149] The defendants take issue with one of the affidavits filed by Ms. Warburton, an administrative assistant for plaintiffs' counsel. In the affidavit, Ms. Warburton deposed how the firm was contacted by several residents in BC that had heard about the partial settlement and wished to obtain a screen. She explained the searches she conducted through the internet and other means to locate the screens for the individuals.
- [150] The defendants rely on the recent Court of Appeal decision in *Simple Pursuits Inc. v. 0842748 B.C. Ltd.*, 2015 BCCA 382 which they submit is binding authority that this type of affidavit should be inadmissible as it goes to a controversial aspect of the case.
- [151] The plaintiffs respond that the case applied only to lawyers and not to employees of law firms and that several decisions including *Insurance Corp. of British Columbia v. Suska*, 2007 BCSC 1838 and *Phoenix v. Metcalfe*, [1974] B.C.J. No. 903 stand for the proposition that such evidence is admissible.
- [152] The plaintiffs rely on this affidavit in support of their arguments that the defendants' voluntary program that provides screens or barriers is not a viable alternative to these class proceedings due to the difficulty in finding information as to how to order the screens or barriers. However, I find it unnecessary to deal with admissibility of Ms. Warburton's affidavit. As will be noted later in these decisions, Ms. Gorji's affidavit provides some basis in fact for the difficulty in accessing the offer of a free barrier and this affidavit offers no further necessary evidence.

Admissibility of Ms. Shamin's Affidavits

- [153] The defendants submit that certain of Ms. Shamin's affidavits are inadmissible on the basis that they attach exhibits that are unnecessary, irrelevant and are hearsay.
- [154] The plaintiffs respond that the sworn in court statements of any witness are admissible and that, while out of court statements are not generally admissible, to the extent that they are agents of a party, the exception to the hearsay rule applies. Further, the plaintiffs submit that, given the limited ability to obtain evidence from the defendants prior to certification, the court should admit the evidence, relying on the Supreme Court Civil Rule 12-5(54), *Beazley v. Suzuki Motor Corp et. al.*, [2009] B.C.J. No. 2284.
- [155] I observe that the plaintiffs removed certain of the exhibits objected to but not all. I also observe that the defendants did not renew their objection to Ms. Shamin's affidavits in the last hearing dates. Nevertheless, I will consider the defendants' objections as they pertain to the affidavits in the Application Record.
- [156] With respect to Ms. Shamin's affidavits, I agree with the defendants that much of the information regarding the U.S. litigation in the impugned exhibits is either unnecessary to determine the certification issues or is repetitive of other affidavit evidence that does not offend the rule against hearsay. That said, I agree with the plaintiffs that the transcript of

the declaration of Mr. Dischner in the U.S. proceedings is admissible. In that regard, I note that the decision of the court in *Beazley* was subsequently considered in *Stanway v. Wyeth Canada Inc.*, 2013 BSCS 2250 and in *Bank of China*.

- [157] In *Stanway*, Madam Justice Gropper clarified, at paras. 36-39, that the correct approach to determining the admissibility of hearsay evidence in the form of transcripts from other proceedings is to be determined on a case by case basis, with the guiding principles to be the principles of necessity and reliability. In that case, Justice Gropper declined to admit the transcripts of the U.S. witnesses from other proceedings at the common issue trial as the plaintiff had not established the necessity of admitting the evidence.
- [158] Applying those principles of necessity and reliability to the instant case, I note that, unlike the *Stanway* case, this is a certification proceeding and not a trial. While the same rules of evidence apply, necessity should be viewed contextually. Mr. Dischner was a representative of the Lennox defendants and was located in California. There is no reasonable prospect that he would voluntarily have provided affidavit evidence for the plaintiffs. I am satisfied that the plaintiffs would not be able to obtain the evidence in another way for the purpose of certification. In terms of its reliability, I note that the deposition transcript upon which the plaintiffs seek to rely was made under oath in the U.S. class action proceeding against the U.S. Lennox Defendants involving the same or similar issues which are at issue in this action. In my view, his deposition is relevant to common issues related to the allegation of defective design and duty to warn and should, therefore, be admitted.
- [159] I also consider that the exhibits which append the industry association minutes and related correspondence from the HPBA and BCSA are relevant to the common issues related to the defendants' knowledge of burn risk from fireplace glass.
- [160] With respect to Ms. Shamin's description of her attempt to locate information on the Lennox website, as I noted above, this aspect of her affidavit is unnecessary as there is already evidence from Ms. Gorji on this point.

Admissibility of Mr. Ryder's Affidavit

- [161] The defendants challenge the admissibility of the affidavit of Mr. Ryder on the basis that it does not have any probative value. The defendants note that Mr. Ryder does not identify the manufacturer of the fireplace which was in the home at the time his son was burned.
- [162] I agree with the defendants. This is information that could have been obtained. Without it, I find no basis for the inclusion of the evidence. In that regard, I note there is other evidence of burn risks associated with glass fronted fireplaces.

Section 5(5) Objections

[163] The plaintiffs take issue with the affidavits filed by the defendants as they contend that the defendants are not in compliance with s. 5(5) of the CPA. Section 5 of the CPA states (in part):

Certification application

5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

- (2) A copy of the notice of motion and supporting affidavit must be filed and
 - (a) delivered to all persons who are parties of record, and
 - (b) served on any other persons named in the style of proceedings.
- (4) Unless otherwise ordered, a person to whom a notice of motion and affidavit is delivered under this section or on whom a notice of motion and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and deliver a copy of the filed affidavit to all persons who are parties of record.
- (5) A person filing an affidavit under subsection (2) or (4) must
 - (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
 - (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
 - (c) provide the person's best information on the number of members in the proposed class.

[Emphasis added.]

[164] The plaintiffs submit that the defendants have not filed an affidavit that meet the requirements imposed by s. 5(5)(b). They submit that the principal affiant for the defendants, Mr. Krebs, filed an affidavit that was deficient as it was evident that he was only deposing to what he personally knew rather than what the corporate defendants knew. The plaintiffs submit that the section imposes an obligation on the party (i.e. the corporate defendants) to file an affidavit in response in which the party swears that they know of no facts material to the certification application. They contend that limiting the statement to the personal knowledge of the individual who swears the affidavit is not adequate. While they recognize that this imposes a heavy burden on the defendants, they submit that this is appropriate given that many of the facts which may be used to establish "some basis in fact" are necessarily in the knowledge of the defendants.

[165] In response, the defendants submit that the affidavits do not fail to disclose facts material to the certification and that the plaintiffs have failed to provide authority for the suggestion that "some basis in fact" for the s. 4 requirements can be established by showing a defendant failed to meet the requirements of s.5(5)(b). They submit that there is no evidence that a failure to disclose was intentional or done in bad faith and that any non-disclosure was a result of differing views of what is or is not relevant to certification. If the plaintiffs had a concern about a lack of disclosure, the defendants submit that they should have brought a pre-certification motion for further disclosure on that basis. Further, they argue that the section should be interpreted to mean that each affiant need only swear that they personally know of no fact material to the application.

[166] The same issues were raised in *N&C Transportation Ltd. v. Navistar International Corp.*, 2016 BCSC 2129 where the main affiant had failed to include the declaration and Mr. Justice Skolrood highlighted the importance of the requirement:

31 However, I agree with *N&C Transportation* that the affidavit evidence is deficient in that there is no sworn statement with respect to the disclosure of material facts as required by s. 5(5)(b). The importance of this requirement is addressed by the authors of *Class Actions in Canada*, loose-leaf ed. (Toronto: Canada Law Book, 2014) at 4.1460:

Counsel in BC must be careful of the special responsibility placed on each affiant to swear that they know of no fact material to the application that has not been disclosed. This is a heavy responsibility that departs somewhat from the traditional adversarial approach. The affiant for the party opposing certification may not conceal those facts that would tend to show that certification is preferable.

In that case, the plaintiffs had argued that the deficiency should result in the court viewing the defendants' factual assertions sceptically. Justice Skolrood held that he was satisfied in that case that he could determine the relevant issues based on the extensive evidence presented.

[167] Section 5 concerns the requirement to file affidavit evidence in conjunction with an application for certification. It sets out the requirements for the applicant to file supporting affidavits which must, along with the notice of motion, be filed and delivered to all "person who are a party of record": ss. 5(1) and (2). The recipient of the notice of motion and affidavits must then file an affidavit in reply: s. 5(4). The section requires that affiants filing affidavit under the section "swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding".

[168] I am unable to agree with the defendants' interpretation of the section. The section imposes a requirement that "persons who are parties of record" (in this case, the corporate defendants) file an affidavit with the necessary declaration. An individual swearing an affidavit on behalf of a company that is a party of record is under an obligation to do their due diligence to ensure that the company knows of no other material facts. This burden ensures that corporate defendants do not intentionally or unintentionally undermine a

plaintiff's access to justice in a class action proceeding. Therefore, to the extent that a company is filing an affidavit under s. 5(4), the section requires that the affiant swear on behalf of the company that the company knows of no other information relevant to certification.

- [169] In regards to Mr. Krebs' affidavit, I find that there are indications that he was not swearing on behalf of the company. There is evidence from the defendants found in other affidavits to which he did not refer and which would have been available to him. For example, as the plaintiffs highlight, Mr. Krebs did not inform himself as to what was known by a Mr. Dischner, a senior employee of the Lennox Defendants, or Mr. French, another Lennox employee. From Mr. Miles' affidavit, it was shown that Mr. Dischner was privy to the information Dr. Verchere brought forward to industry members in 2005 about harm to children including severe burns. Mr. French sat on the CSA Technical Committee that, in July 2005 was told to "come up with technical solutions as quickly as possible." Neither fact was referred to by Mr. Krebs. He also, in his affidavit, states that he wasn't aware of burns in Canada. While the defendants take issue with arguments about their corporate knowledge of burns, they clearly had knowledge that burns were occurring in the U.S. Mr. Krebs appeared not to have taken steps to determine what was occurring in Canada.
- [170] I do not agree with the defendants' arguments that such inconsistencies are a result of divergent views of what was relevant to certification. In an action concerning an alleged dangerous product and the corporate knowledge of such dangers, information concerning events that speak to the corporate knowledge of the danger was clearly relevant.
- [171] As a remedy, the plaintiffs submit that where any evidence in the affidavits is controversial, it should be ignored and, where there is any doubt on whether some basis in fact exists, the benefit of that doubt should go to the plaintiffs. As will be noted, the plaintiffs have the burden of establishing "some basis in fact" in the evidence for several of the requirements for certification. I agree with the defendants that failure to comply with the requirements under s. 5 does not relieve the plaintiffs of this burden; however, I find that where the defendants rely on their own affidavits to attempt to rebut the plaintiffs' established basis in fact, I must give the defendants' evidence less weight as it is now unclear if there are other materials in the defendants' knowledge that were not included in the affidavits.

Legislative Framework

- [172] The CPA offers a procedural tool meant to ensure "judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis, access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own, [and] efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public" : *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para.15. As such, the CPA is to be interpreted and applied in a broad, flexible and purposive manner consistent with these objectives.

[173] The requirements for certification can be 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.

[174] Further, s. 7 of the CPA provides further guidance concerning certification:

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known;
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[175] The first certification requirement requires that the pleadings disclose a cause of action. This requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiffs' claim cannot succeed. While the pleadings are to be read generously, with a view to accommodate inadequacies due to drafting deficiencies, the court must "avoid only symbolic scrutiny of the adequacy of the evidence [a]cting as a gate-keeper the court must use the certification process as a meaningful screening device": *Jiang v. Peoples Trust Co.*; 2016 BCSC 368 at para.39. See also *Pro-Sys Consultants Ltd. v. Microsoft*

Corp., 2013 SCC 57 ["Microsoft"] para. 103.

[176] For all other requirements under s. 4 of the CPA, the plaintiffs must demonstrate on the evidence that there is "some basis in fact" to support each requirement: Hollick at para. 25. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage as the court is ill-equipped to resolve such conflicts at this stage: Microsoft at para. 102 This standard again requires the court to assume a gate-keeper role to ensure a claim is appropriate to proceed as a class proceeding. As the Supreme Court of Canada put it in Sun-Rype Products Ltd. v. Archer Daniels Midland Co., 2013 SCC 58:

68 Built into the class certification framework is the requirement that the class representative present sufficient evidence to support certification and to allow the opposing party to respond with its own evidence (Hollick, at para. 22). The goal at the certification stage is to ensure that this is an appropriate matter to proceed as a class proceeding (Pro-Sys, at para. 104). And while the certification stage is not a preliminary trial of the merits, "the judge must be satisfied of certain basi[c] facts required by [the CPA] as the basis for a certification order" (Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), at p. 381).

[177] Here, the plaintiffs seek to certify two separate and distinct classes: a "Consumer Class" including people who have Lennox fireplaces in their homes and a "health care cost class" which includes individuals who have been injured by a Lennox fireplace and who have received health care services such that they have a claim under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27 ("HCCRA"). The Consumer Class is further refined to include a "BC Consumer Subclass" which includes members of the Consumer Class whose fireplaces were the subject to a consumer transaction as that term is defined in the Business Practices and Consumer Protection Act, S.B.C. 2004, c.2. The plaintiffs, in their submissions, emphasized that the two classes are separate and distinct and that certification of either is independent of the other. I will therefore treat each class independent of the other for the purposes of certification, beginning with the Consumer Class.

[178] I also note that the plaintiffs' pleadings and submissions were, at times, vague as to what damages they are claiming in relation to the Consumer Class for the purposes of disclosing a cause of action. That said, I find that the essence of their claims relates to the economic loss associated with the necessary remediation of the fireplaces and, in particular, the provision of an "effective barrier".

The Consumer Class

Do the pleadings disclose a cause of action?

[179] For the purposes of certification, it is only necessary for the pleadings to disclose a single cause of action to satisfy s. 4(1)(a). However, certification judges should evaluate all of the causes of action pleaded as the determination of which causes of action are bound to fail based on the "plain and obvious" test will necessarily determine the scope of the common issues to be certified: see *Morrison Estate v. Nova Scotia (Attorney General)*, 2011 NSCA 68.

[180] As a preliminary matter, I note that in their submissions, the defendants relied extensively on Madam Justice Adair's decision in *Ladas v. Apple Inc.*, 2014 BCSC 1821 and the recent BC Court of Appeal decision in *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301. In each case, the court emphasized the need for careful scrutiny of the pleadings to ensure that all the requisite elements are pleaded with the sufficient material facts to make out each claim.

[181] In *Ladas*, Madame Justice Adair noted that, while the bar for s. 4(1)(a) is low, it is not so low that a judge can ignore a lack of material facts and allow bald legal conclusions for certification. She noted:

62 I do not agree with Mr. Galambos that Collette provides support for such a low bar. What Mr. Justice Macaulay in fact says at para. 36 of *Collette* is this:

[36] The principles to be applied in determining whether pleadings support a cause of action were reviewed in *Endean* at 165. I summarize them here:

- (1) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
- (2) It must be plain and obvious beyond doubt that the plaintiffs could not succeed;
- (3) The novelty of the cause of action will not militate against the plaintiffs; and
- (4) The statement of claim must be read as generously as possible, with a view to accommodating any drafting deficiencies.

63 I do not see this summary as providing support for the proposition that a failure to plead a material fact, necessary to state a complete cause of action, is something that can be overlooked, or for the proposition that, in the absence of a pleading of a material fact, the court will "infer" what it not there. The causes of action advanced by the plaintiff here -- breach of privacy and claims under the BPA -- are not novel causes of action. There is considerable guidance in the case law relating to what must be pleaded and proved. The consequence of failing to plead a material fact, necessary to state a complete cause of action, is that no reasonable claim has been pleaded: see *Young v. Borzoni*, at para. 20.

[182] In *Sandhu*, the Court of Appeal also cautioned counsel to be precise in their pleading. Counsel should avoid the practice in class action certifications of pleading every possible cause of action to see what sticks. The court commented:

49 Much of the difficulty faced by the judge in this case comes from the extensive list of causes of action presented by the plaintiffs, which of itself creates difficulties (much as over-charging in criminal cases does) and is a practice that cries out for restraint by selection of the claims most likely to succeed.

[183] In regards to the concept of "material facts", the court provided a discussion that is pertinent to the analysis:

51 It seems to me plain that the Rules are much as they were in the previous iteration, but with the addition of a section "Legal Basis". Clearly the requirement to set out the legal basis of the claim is intended to provide a listing of causes of action and reference to statutes that provide the underpinning for a claim. Yet it is not uncommon to see pleadings that dip more into legal argument, or include references to facts not actually set out in the "Facts" portion. For an understanding of the allegations that are required to be set out in Part 1 of a notice of civil claim, one may refer to *Jones (Litigation Guardian of) v. Donaghey* (2010), 2011 BCCA 6 (B.C. C.A.). There Justice Newbury observed, discussing the relationship between "issue" used in Rule 7-6(1) and "material fact":

[9] ... an "issue" is a disputed fact the resolution of which will, without more, have legal consequences as between the parties to the dispute.

[10] Such facts are referred to as "material" facts in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54, [2001] 2 S.C.R. 460:

[54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success.

[11] Professor James B. Thayer called them "ultimate" facts in *A Preliminary Treatise on Evidence at the Common Law*, Reprint (South Hackensack, N.J.: Rothman Reprints Inc., 1969) at 194, where he said, "... [R]easoning ... intervenes ... between the primary facts, what may be called the raw material of the case, and the secondary or ultimate facts", and at 197, where he stated, "When it is said that a fact is for the jury, the fact intended ... is that which is in issue, the ultimate fact, that to which the law directly annexes consequences."

[12] The Rules of Court, which governed when the underlying action was commenced, adopted the description "material" in Rule 19(1):

(1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies

[13] The Supreme Court Civil Rules has continued this traditional usage in Rule 3-1(2)(a):

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim. ...

[184] Mindful of the principles governing pleadings, I now turn to the causes of action found in the pleadings in this case. The plaintiffs' further amended Notice of Civil Claim advances the following causes of action in relation to the Consumer Class:

1. Negligence:
 - a) negligent development, design and testing;
 - b) negligent distribution, marketing, and sale - propensity to injure or failure to warn;
2. Negligent misrepresentation;
3. Breach of the Business Practices and Consumer Protection Act, S.B.C. 2004, c.2 ("BPCPA");
4. Breach of the Competition Act, R.S.C. 1985, C. C-34 ("Competition Act");
5. Strict liability; and
6. Waiver of tort.

1. Negligence

[185] The plaintiffs' pleadings in negligence are organized into two categories: negligent development, design, and testing and negligent distribution, marketing, and sale. In regards to the latter, the plaintiffs specifically claim negligent distribution, marketing, and sale in relation to a propensity to injure or, in the alternative, in relation to failure to warn. While the plaintiff must, for each negligence claim, plead the material facts in support of a claim in negligence (the existence of a duty, breach of the standard, and damages caused by the breach), each type of negligence claim have further, specific requirements that must also be addressed.

[186] I note that a focal point of the defendants' objection to the plaintiffs' pleadings in negligence was initially that the plaintiffs failed to distinguish between the negligence claims, relying on the decision in *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744. The plaintiffs, in response, amended their pleadings to further particularize the claims but also, relying on *Barwin v. IKO Industries Ltd.*, 2013 ONSC 3054 (Div. Ct.), argued that such itemization was not required. Given the amendments, I will focus on the defendants' objections that continue to have currency.

[187] In general terms, the defendants submit that the pleadings concerning the existence of a duty in relation to the negligence claims are deficient as they amount to a bald pleading that there exists a duty of care without any material facts to support the existence of the duty. They submit that the plaintiffs are not able to cure the deficiency by simply claiming that the typical products liability duty of care between a manufacturer and user of a product applies because the plaintiffs have chosen to frame the action in terms that are broader than manufacturer and user.

- [188] While it is true that it is insufficient merely to plead the existence of a duty of care because it is a conclusion of law that must be supported by pleading material facts (Ladas, at para. 82), the duty of care in the context of product manufacturing is often not controversial. Canadian courts have held that a duty of care has been extended to almost all participants in the chain of product distribution including manufacturers, distributors, and retailers: see for example *Leitz v. Saskatoon Drug & Stationary Co.* (1980), 112 D.L.R. (3d) 106 (S.K.Q.B.); *Pack v. Warner #5 (County)* (1964), 44 D.L.R. (2d) 215 (Alt. C.A.); and *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189. Further, courts have found that the duty of care owed by manufacturers extends beyond the original purchaser of a product to encompass other foreseeable consumers and users of a product such as subsequent purchasers: See *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 and *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.
- [189] Further, the claims brought by the plaintiffs are premised on the product causing harm or having the potential to cause harm. Such claims are typical in product liability claims and often give rise to distinct recognized duties of care. For example, in *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950, Perell J. summarized the case law as following four distinct categories:

5 For products liability claims, there are four established categories. First, manufacturers have a duty of care to consumers to see that there are no defects in manufacture that are likely to give rise to injury in the ordinary course of use: *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.). Second, manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge: *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at para. 20; *Lambert v. Lastoplex Chemicals Co.* (1971), [1972] S.C.R. 569 (S.C.C.) at p. 574; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). Third, manufacturers have a duty of care in designing the product to avoid safety risks and to make the product reasonably safe for its intended purposes: *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (Ont. S.C.J.); *Rentway Canada Ltd./Ltée v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (Ont. H.C.), *aff'd* [1994] O.J. No. 50 (Ont. C.A.). Fourth, there is a pure economic loss claim in negligence because manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger to the public: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.).

[Emphasis added]

- [190] In this case, the plaintiffs have pleaded material facts in support of the existence of a duty in several paragraphs of their further amended Notice of Civil Claim including at paras. 4, 6, 12, 14, 15, 16, 18, 26-31, 32, 33, 39, 40, 46, 47, 48, 54, and 55. The plaintiffs claim that the defendants developed, designed, tested, distributed, marketed, or sold fireplaces that were installed in the homes of members of the class that they knew were not safe to use without an effective barrier. I therefore find that they have sufficiently pleaded the material facts to support the existence of a duty between the defendants and the class at a general level.

[191] I turn now to the allegations concerning the content of the duty.

Negligent Development, Design, and Testing

[192] Allegations of negligent design are often the cornerstone of product liability claims. The plaintiffs' further amended Notice of Civil Claim particularizes the pleadings in regards to this cause of action at paras. 26 through 38, 72, 73, 76, 78 and 79. Specifically, the plaintiffs pleaded that the fireplaces are dangerous and defective as follows:

27. The fireplaces are defective and dangerous. Particulars of the defects and dangers include that:
- a) They all reach very high temperatures such that brief contact with the fireplaces can cause second or third degree burns (the latter being among the most severe kinds of burns, frequently resulting in extensive scarring and the need for skin grafts);
 - b) Children, the elderly and persons with disabilities that affect their balance are very vulnerable to sustaining serious injury by coming in contact with the fireplaces;
 - c) No warning is effective to prevent serious injury, particularly to prevent injury to children or the elderly, and persons with disabilities that affect their balance; and
 - d) None of the Lennox Defendants' "decorative screens", to the extent they were available as an optional accessory, [are] effective in preventing burns from brief contact with the fireplaces.

[193] They further pleaded that the fireplaces could have been developed and designed to include a safe and economically feasible effective barrier that would have significantly reduced the risk of severe burns resulting from accidental contact and that the defendants knew or ought to have known about the defects since the 1980s. They pleaded that the defendants willfully concealed from the public that the fireplaces contained the defects and dangers and that the fireplaces should not be used without an effective barrier.

[194] To succeed in a claim for negligent design, a plaintiff must at least establish that there is a design defect, that the defect created a substantial likelihood of harm, and that there exists an alternative design that is safer and economically feasible to manufacture: *Astrazeneca* at para.137.

[195] To determine if a product is defective, courts often apply a general and flexible approach in determining what it was reasonable to expect of the product in all the circumstances: *McEvoy v. Ford Motor Co.*, [1989] B.C.J. No. 1639 (S.C.) at para. 36. This may involve applying a "risk-utility" analysis that specifically takes into account the availability of safer alternatives: *Rentway Canada Ltd./Ltée v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 and *Tabrizi v. Whallon Machine Inc.*, [1996] B.C.J. No. 1212 (S.C.). As noted in the often cited case of *Nicholson v. John Deere Ltd.* (1986), 34 D.L.R. (4th) 542 (Ont. H.C.), *aff'd* at (1989), 57 D.L.R. (4th) 639 (Ont. C.A.), a manufacturer of a product does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the

same article without risk of harm.

[196] While there is authority that potentially limits the applicability of negligence claims in economic loss cases (e.g. for the design of merely shoddy goods: *M. Hasegawa & Co. Ltd. v. Pepsi bottling (Canada)*, 2002 BCCA 324), claims for economic loss associated with repair for products that pose a danger to health or safety, as the plaintiffs plead is the case here, have been recognized: *Hughes v SunBeam Corp. (Canada) Ltd.*, [2002] O.J. No. 3457 and *Barwin v. IKO Industries Ltd.*, 2013 ONSC 3054 (Div. Ct.). Courts have held that there are sound policy grounds for the certification and subsequent disposition of such claims as it encourages the remediation and repair of products that may result in more severe personal injury. Such considerations were explored in *Winnipeg Condominium*:

37 Apart from the logical force of holding contractors liable for the cost of repair of dangerous defects, there is also a strong underlying policy justification for imposing liability in these cases. Under the law as developed in *D. & F. Estates and Murphy*, the plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property must do so at his or her own expense. By contrast, the plaintiff who, either intentionally or through neglect, allows a defect to develop into an accident may benefit at law from the costly and potentially tragic consequences. In my view, this legal doctrine is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour. The Fourth District Court of Appeal for Florida in *Drexel Properties Inc. v. Bay Colony Club Condominium Inc.*, 406 So. 2d 515 (1981), at p. 519, explained the problem in the following manner:

Why should a buyer have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects? In the final analysis, the cost to the developer for a resulting tragedy could be far greater than the cost of remedying the condition.

Woodhouse J. in *Bowen v. Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394 at 417 (C.A.), described the problem in similar terms:

It would seem only common sense to take steps to avoid a serious loss by repairing a defect before it will cause physical damage; and rather extraordinary if the greater loss when the building fall down could be recovered from the careless builder but the cost of timely repairs could not.

Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behaviour.

- [197] There is no issue that the defendants, as manufacturers of consumer products, had a duty to take reasonable steps to ensure that their fireplaces were safe for their intended use. The defendants, in their initial submissions, took issue with the lack of pleadings concerning a safer and economically feasible alternative design. This was, however, remedied by the plaintiffs in their amendments. The plaintiffs have identified the effective barrier as a reasonable measure that would have made the fireplaces safer.
- [198] In pleading that the defendants designed a fireplace that had a foreseeable, and in fact foreseen, defect that substantially increased the risk of injury while knowing that an alternative design existed, the plaintiffs have pleaded the necessary material facts to support this claim and I cannot conclude that it is plain and obvious that the plaintiffs' claim for negligent design will fail.

Negligent Distribution, Marketing, and Sale - Propensity to Injure and Failure to Warn

- [199] The plaintiffs have pleaded that the defendants are liable for negligent distribution, marketing, and sale in relation to a product that had a propensity to injure or, in the alternative, in relation to a duty to warn. I note that the plaintiffs submit that no warning would have been effective given the inherent dangers and defects of the product: Nicholson at p.7. That said, the duty to warn claim still has substance to the extent that the plaintiffs have pleaded that the fireplaces were so dangerous that they should not be used without an effective barrier, which should have been communicated by the defendants.
- [200] The pleadings concerning this claim can be found throughout the further amended Notice of Civil Claim including in paras. 27 through 31, 46 through 53, 72, 73, 78 and 79. Generally, I am satisfied that there is sufficient material facts pleaded. The essence of the plaintiffs' claim as pleaded is that the glass in the front of the fireplaces reaches high temperature which cause burns on contact; that the defects and dangers were not evident when used as intended; that the fireplaces are accessible to children and persons with disabilities; and that the fireplaces did not come with a warning that they should not be used without an effective barrier.
- [201] The duty to warn was described as follows by the Supreme Court of Canada in Hollis:

(i) The Duty to Warn

20 It is well established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge. This principle was enunciated by Laskin J. (as he then was), for the Court, in *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569 at 574, where he stated:

Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purpose for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer.

The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered; see *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 at 1200 [[1973] 6 W.W.R. 692], per Ritchie J. All warnings must be reasonably communicated, and must clearly describe any specific dangers that arise from the ordinary use of the product

[202] I also note that courts have recognized that there can be a right to recover for pure economic loss based on a negligent failure to warn: see *Rivtow Marine Ltd. and Can-Arc Helicopters Ltd. v. Textron Inc.*, [1991] B.C.J. No. 3685 (S.C.) at para. 58.

[203] The defendants claim that the plaintiffs' failure to warn pleadings are fatally flawed for three reasons: first, the plaintiffs have failed to plead the necessary material facts; second, the plaintiffs' claim raises no duty of care given the obvious risk associated with fireplaces; and finally, the plaintiffs failed to plead they would have acted differently had they received an adequate warning.

[204] In regards to their first objection, the defendants submit that the pleadings lack particulars concerning the failure to warn, relying on the decision in *Astrazeneca* to argue that this is fatal to the cause of action. In that decision, Horkins J. held that the statement of claim failed to provide sufficient particulars regarding the alleged breach of a duty to warn as there was no indication of which particular defendants breached the duty and no pleadings concerning what warnings were given, how they were inadequate, and whether or how they could have been improved: *Astrazeneca* para.158 and 159.

[205] In respect of the pleadings, I find that the decision in *Astrazeneca* is distinguishable. The court there found that the description of the various defendants' role was inconsistent with the alleged activities in the pleadings which created confusion and a lack of clarity as to which defendant did what in relation to the drug. This is not the case here where there is no material difference in the type of negligent activity and no lack of clarity as to what case the defendants have to meet: see *Astrazeneca* para. 132.

[206] In regards their second objection, the defendants submit that the claim is bound to fail because manufacturers do not have a duty to warn where the danger posed by a product is manifestly obvious. They claim that the allegations posed by the plaintiffs are essentially a failure to warn that a fireplace can cause a burn and that this danger is so obvious that no duty to warn would be required. They claim this would be akin to requiring a warning that butcher knives will cut flesh.

- [207] I agree that all products exist on a spectrum of danger and that a manufacturer does not generally have a duty to warn if an inherent risk is manifestly obvious: see *Schulz v. Leaside Developments Ltd.*, [1978] B.C.J. No. 1319 (C.A.). However, this does not necessarily mean a manufacturer will never have a duty to warn for such a product, particularly where the design arguably masks the risk or, to use the words in the pleadings, where "the defects and dangers [were] not evident when the fireplaces are used as intended." If a manufacturer knows or ought to have known that their product contains a defect which increases the risk of a foreseeable injury if the defect is not remedied, the manufacturer may be under a continuing obligation to warn. Where a manufacturer learns of a potential risk subsequent to distribution of the product into the marketplace, or should have known of the risk based upon reasonably available information, the manufacturer will have a duty to inform current users of the product of that risk: *Hollis* at paras. 20 and 21. As a result, manufacturers also have an ongoing duty to keep informed of developments relating to their products and the industry generally: *Vester* at para. 15.
- [208] Here, the plaintiffs allege that the glass faced design is a defect that makes the fireplaces more dangerous than they should be. They claim that not only was it foreseeable that the design resulted in substantial injuries but that it was in fact known by the manufacturers that such risk existed and that a reasonable alternative design were available. They argue that in such a context, the manufacturers have a duty to warn. When the plaintiffs' pleadings are considered in the context of the principles outlined in *Hollis*, I conclude that it is not plain or obvious to me that the claim would fail because of the obvious dangers associated with fireplaces.
- [209] The third objection of the defendants is that the plaintiffs have failed to plead that they would have acted differently had an adequate warning been given and that the claim would therefore fail for want of causation. The defendants rely on the decisions in *Hollis* and *More v. Bauer Nike Hockey Inc.*, 2011 BCCA 419 in support of the proposition that in the context of a failure to warn claim, a plaintiff is required to prove that he or she would not have used the product, or would have used the product in the manner prescribed, if properly warned. However, these cases deal with claims for personal injury rather than economic loss and I am not satisfied that this is a requirement in all cases. Further, as noted above, the plaintiffs claim that no written warning would be effective in changing behaviour and that, in any event, warnings would not be effective for children and people with disabilities.
- [210] I am satisfied the plaintiffs' further amended Notice of Civil Claim provides particulars of a claim in negligence based on the defendants' duty to warn. In my view it is not plain and obvious that the claims against the defendants as pleaded cannot succeed.

Negligent Misrepresentation

[211] The plaintiffs pleaded that in marketing, advertising, and/or selling the fireplaces while knowing the fireplaces were defective and dangerous without disclosing that they should not be used without an effective barrier amounted to an actionable negligent misrepresentation. These pleadings can be found in paras. 54 through 62, 72, 73, 78 and 79 of the further amended Notice of Civil Claim.

[212] The leading authorities on recovery in this category of economic loss are *Queen v. Cognos*, [1993] 1 S.C.R. 87 and *Hercules Management v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.). In *Cognos*, the Supreme Court of Canada set out the following elements of a successful negligent misrepresentation claim at para. 33:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making said misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[213] When drafting pleadings alleging negligent misrepresentation, parties must set out with "careful particularity" the elements of the claim: *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.) at para. 30. Supreme Court Civil Rule 3-7(18) requires a party pleading misrepresentation to state full particulars in the pleadings. It states:

When particulars necessary

- (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

Such particulars should usually include the alleged misrepresentation itself; when, where, how, by whom and to whom it was made; its falsity; the inducement; the intention that the plaintiff should rely upon it; the alteration by the plaintiff of his or her position relying on the misrepresentation; and the resulting loss or damage to the plaintiff: *Rahn v McNeill* (1987), 19 B.C.L.R. (2d) 384 at 392.

[214] The plaintiffs in their further Amended Notice of Civil Claim defined the representations as follows:

56. The Defendants, including each of the Lennox Defendants, have since the 1980's marketed, advertised and/or sold in British Columbia and elsewhere in Canada fireplaces and in doing so represented to the public that the fireplaces were fit for their intended purpose and without disclosing the Defects and Dangers and without disclosing that the fireplaces should not be used without an Effective Barrier (the "Representation") when they knew or ought to have known that the fireplaces:
- a. Were subject to the Defects and Dangers;
 - b. The Defects and Dangers are not evident when the fireplaces are used as intended;
 - c. Would be installed in the Premises;
 - d. Would be installed in locations accessible by children, the elderly and persons with disability that affects their balance;
 - e. Should only have been sold with an Effective Barrier; and
 - f. Did not come with a warning that the fireplace was so dangerous that it should not be used without using it in conjunction with an Effective Barrier.

[215] Essentially, the plaintiffs plead a representation by omission which, I note, in some circumstances may be sufficient for a claim in negligent misrepresentation: *Strand v. Strand*, 2014 ABQB 754 at para. 33.

[216] The defendants submit that the pleadings concerning negligent misrepresentation are general, vague, and fail to provide the required material elements. Specifically, they submit that the plaintiffs have failed to plead that they relied on the representations to their detriment. They highlight the decisions in *Astrazeneca* at paras. 150-154 and *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at paras. 65-73 as examples of proposed product liability class actions in which negligent misrepresentations claims were held not to disclose a cause of action on the basis of a failure to plead that the plaintiff relied on the alleged misrepresentations and suffered damages as a result.

[217] After these arguments were tendered, the plaintiffs amended their pleadings to include the following:

59. The Plaintiffs and the Class Members relied on the Representation when they purchased and/or used their fireplaces.

The defendants respond that this is a bald conclusory pleading and that the plaintiffs do not plead any facts in support.

[218] I agree with the defendants' submissions that in cases where reliance is a required element of a tort, it is not sufficient for a plaintiff to simply state that they relied on a representation. There must be particularized pleadings concerning reliance: *Astrazeneca* at paras. 153 and 154. However, such specifics are often fatal to class action certification as they necessarily involve individual analysis: *Singer* at para. 71. In submissions concerning negligent

misrepresentation, the plaintiffs relied on the decisions in *Cognos, Sanghera v. Danger Figure Centre (Burnaby) Ltd.*, 2007 BCSC 1308 and *Catalyst Pulp & Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307. I find these decisions do not assist the plaintiffs' position. The decisions in *Sanghera* and *Catalyst Pulp* concern fraudulent misrepresentations in the context of contractual relations and do not address the issues raised by the defendants.

- [219] While it may be possible to bring a claim for negligent omissions in product liability cases, especially in the case where there is found to be a duty to warn or a negligent design (see *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at para. 195), the plaintiffs have not provided any authority for the proposition that the claim can be made without adequate pleadings of reliance. I agree with the defendants that the pleadings concerning reliance in this case are effectively a legal conclusion and insufficient particulars have been provided. There is nothing in the further amended Notice of Civil Claim to identify how the plaintiffs relied on the representations or the steps that they did or did not take to their detriment in reliance on the misrepresentation. As such, I find that the pleadings fail to disclose a cause of action for negligent misrepresentation.

BPCPA

- [220] The plaintiffs pleaded several claims under the BPCPA in relation to the BC Consumer Subclass at paras. 4, 6, 12 through 18, 24A, 24B, 26, 27 through 31, 56 and 63 through 67 of their pleadings.
- [221] The plaintiffs pleaded that the defendants engaged in "an unconscionable and/or a deceptive act or practice" under the BPCPA in breach of ss. 4, 5, 8 and 9, alleging that the defendants, as "suppliers", engaged in unconscionable or deceptive acts or practices by representing to the public that the fireplaces were fit for their intended purpose when they knew that they were not. The plaintiffs seek, pursuant to ss. 171 and 172, a declaration that the representations made by the defendants contravene the BPCPA, an interim, interlocutory and/or permanent injunction prohibiting the defendants from further contraventions, a restoration order, damages and an order that the defendants advertise to the public particulars of any judgment, declaration, order or injunction granted.
- [222] The defendants submit that the plaintiffs have failed to plead a cause of action under the BPCPA for several reasons including: the plaintiffs have failed to plead the particulars to support the existence of a "consumer transaction" or that the plaintiffs were "consumers" or that the defendants were "suppliers" within the meaning of the BPCPA; the plaintiffs have failed to plead the required element of reliance to show a causal connection between the contravention of ss. 4 and 5 of the BPCPA by the defendants and the loss or damage suffered by the plaintiffs; the plaintiffs have failed to plead the necessary particulars for breach by an unconscionable act; and the plaintiffs have failed to plead the specific requirements under ss. 171 and 172 of the BPCPA.

[223] I will deal with each objection in turn.

"Consumer Transaction" "Consumer" and "Supplier"

[224] A central focus of the defendants' submissions was on the definitions of a "consumer transaction", "consumer," and "supplier." The defendants submit that many of the proposed subclass do not have a cause of action under the BPCPA because they did not obtain their fireplaces in a "consumer transaction" from a "supplier" and are therefore not "consumers." The defendants maintain, and I accept, that many persons within the proposed subclass will have received their fireplaces through the purchase of a house that already had a fireplace installed. The defendants submit that the BPCPA does not apply to these individuals because they received their fireplaces in a private transaction when they bought their house and not from a supplier in a consumer transaction.

[225] With respect to the plaintiffs' pleadings, I note that the plaintiffs amended their Notice of Civil Claim to include the following:

24A. And the Consumer Class Representative Plaintiffs bring this action on their own behalf and on behalf of a proposed subclass of the Consumer Class consisting of all individual members of the Consumer Class where the fireplace in their Premises was the subject of a consumer transaction as that term is defined in the Business Practices and Consumer Protection Act, SBC 2004, c2 ("BPCPA") (the "BC Consumer Subclass").

24B BC Consumers Subclass Members were "consumers", and their fireplaces were the subject of "consumer transactions", within the meaning of the BPCPA.

65. The Defendants, including each of the Lennox Defendants, introduced the fireplaces into the stream of commerce and undertook the other activities described herein. The Defendants, including each of the Lennox Defendants, were "suppliers" to "consumer transactions", as those terms are defined in the BPCPA.

[226] The defendants argue that the amended pleadings are still insufficient as they are bald legal conclusions with no material facts plead in support and that the plaintiffs were still required to plead that the individuals advancing a claim participated in a consumer transaction. In response, the plaintiffs submit that the arguments made by the defence are not supported by reference to authority and, in any event, that the issue should not be determined at this stage of the litigation. I agree with the defendants that these pleadings are conclusory in nature; however, I am not persuaded that this is fatal to the cause of action.

[227] The concept of a "consumer transactions" is at the core of Part 2 of the legislative scheme. The remedies available under ss. 171 and 172 require a "contravention of the Act", which include a breach of ss. 4 and 5 and/or 8 and 9. Under these sections, suppliers are prohibited from unfair practices in respect of consumer transactions. Both "suppliers" and "consumers" are also defined in relation to "consumer transactions". The relevant definitions are as follows:

1(1) In this Act:

"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;

"consumer transaction" means

- (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
- (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a)

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

- (a) supplying goods or services or real property to a consumer, or
- (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit], includes a person who solicits a consumer for a contribution of money or other property by the consumer;.

[228] In interpreting the BPCPA, the Supreme Court of Canada and the British Columbia Court of Appeal have consistently applied a broad and purposeful approach given the legislation's consumer protection objectives. In *Seidel v. Telus Communications Inc.*, 2011 SCC 15, the Supreme Court of Canada commented:

37 As to statutory purpose, the BPCPA is all about consumer protection. As such, its terms should be interpreted generously in favour of consumers: *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129 (S.C.C.), and *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605, 48 B.C.L.R. (4th) 328 (B.C. C.A)

[229] This characterization was recently affirmed by our Court of Appeal in *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, leave to appeal ref'd [2012] S.C.C.A. No. 398, where the court stated that the BPCPA was a complete code in the regulation of consumer transactions directed at the protection of consumers and fairness and consistency in the consumer marketplace: *Koubi* at para. 63.

[230] This approach is also consistent with the modern, purposeful and contextual approach to statutory interpretation confirmed by the Court of Appeal in cases such as *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494. In that case, the court stated that the correct approach to statutory interpretation is set out by Professor Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974), at para. 13:

the words of an [enactment] are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the [enactment], the object of the [enactment], and the intention of the [the legislative body that passed the enactment].

[231] On plain reading of the legislation, the definition of "consumer transaction," "consumer," and "supplier" are broadly framed. For example, the definition of "consumer" includes within its scope persons who are supplied goods by a supplier that are primarily for personal or family use. Although there is reference to the consumer having participated in a consumer transaction, as there is no requirement for privity of contract, the apparent intention is to focus on the goods supplied rather than on the transaction in which the good were acquired. Subsection (b) of the definition of "consumer transaction" also suggests a broad interpretation as it extends the reach of consumer transaction to solicitations, offers, and advertisements. Other sections of the legislation similarly suggest an expanded application of a "consumer transaction". For example, s. 4, in defining deceptive acts or practices under the statutes, states that a deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

[232] As noted above, case law supports a generous interpretation of the BPCPA which gives effect to the purpose of the legislation. In that regard, I note that in *Reid v. Ford Motor Co.*, 2003 BCSC 1632, Gerow J. held that introducing a consumer good into the stream of commerce was arguably sufficient to meet the definition of a "suppliers": *Reid* at para. 63. This approach was more recently adopted by Punnett J. in *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544, aff'd 2015 BCCA 353, leave to appeal ref'd [2015] S.C.C.A. No. 431. In that case, drug manufacturers had argued that they were not "suppliers" under the legislation because their drugs were provided to individuals through a "learned intermediary" (i.e. a doctor). They argued that they had therefore not "participated" in a "consumer transaction". In rejecting this proposition, Punnett J. concluded that a liberal construction should be applied to a "consumer transaction" and rejected the contention that there must be immediacy between the supplier and consumer:

92 While Tracy may suggest there should be some immediacy between supplier and consumer to bring the transaction with the meaning of the BPCPA in my view it is distinguishable as was the case in Holmes, as it addresses separate legal entities, not the "learned intermediary" issue raised here. The defendants in the case at bar are still the corporate sellers and are the parties holding out the promotions and advertisements albeit to the intermediaries rather than the consumers themselves. I also note that with the broad availability of such information on the internet and through US advertising it is arguable that the end consumer is in fact now placed directly in receipt of such information.

93 Further, returning to the decision in Holmes, the following comments made by the British Columbia Court of Appeal in upholding the trial judge's decision (Holmes v. United Furniture Warehouse Limited Partnership, 2012 BCCA 226), suggest judicial intention to broaden the scope of the BPCPA, not narrow it. Donald J.A. speaking for the court, says:

[26] I would add that the key phrase in the definition of supplier as a person "who in the course of business participates in a consumer transaction" [emphasis added] may be open to a sufficiently wide interpretation to embrace the kind of participation alleged in para. 83 of the proposed consolidated statement of claim:

83. Further, the Defendant Directors personally developed and directed...and directed, authorized, permitted and acquiesced in the deceptive practices ...

94 As such in my opinion the word "participates" is to be given a wide interpretation under the BPCPA. I find support for this view in Robson v. DaimlerChrysler Corp., 2002 BCCA 354, where on appeal of the chambers judge's decision that the former Trade Practice Act did not include an American manufacturer the British Columbia Court of Appeal said that in introducing cars into the Canadian stream of commerce the US defendants ought to have known that they would be sold to consumers in Canada and that as a result there was an arguable case that they were suppliers under the Trade Practice Act. To a similar effect is Reid v. Ford Motor Company, 2003 BCSC 1632.

95 If the defendants are correct in their submission that immediacy is required, the purpose and effectiveness of the BPCPA would be thwarted. I conclude that a liberal construction must be applied to the "consumer transaction" at issue and that such a transaction includes one where a learned intermediary is involved. In addition, I am satisfied that the defendants are "suppliers" under the BPCPA. I note that recently in Stanway v. Wyeth Canada Inc., 2012 BCCA 260 (B.C. C.A.), the British Columbia Court of Appeal certified a class action involving a prescription drug. The court was clearly alive to the learned intermediary issue in doing so, although its effect on the BPCPA was not addressed.

[Emphasis added.]

[233] Here, the defendants offer a more restrictive interpretation of the BPCPA, in which subsequent purchasers of homes with fireplaces would not come within the ambit of a "consumer transaction." They rely on various authorities in support of their arguments including the decisions in *Ladas and Bryan v. Gill*, 2013 BCSC 1898.

[234] In *Ladas*, the plaintiffs alleged that Apple Inc. had breached the plaintiff's privacy rights and had committed a deceptive act in contravention of the BPCPA when they designed and sold a phone with an operating system that recorded and stored locational data. In declining to certify the BPCPA issues, Adair J. focused on issues concerning the adequacy of the pleadings. She noted the following:

111 However, there is no allegation anywhere in the NCC that Apple is a "supplier," or that anyone's acquisition of an iDevice was a "consumer transaction." These are defined terms in s. 1 of the BPA. One of the definitions of "consumer transaction" is "a supply of goods or services ... by a supplier to a consumer for purposes that are primarily personal, family or household." The NCC is completely silent on whether the plaintiff's (or any proposed class member's) acquisition of iDevices can be described in this way. Based on Ms. Ladas's evidence, for example, she acquired her iPhone 4 for office and business use.

112 "Consumer" is also a defined term and means "an individual, whether in British Columbia or not, who participates in a consumer transaction. ..." This definition has implications for the class description (which uses the word "persons," rather than "individuals").

113 Whether Apple is a "supplier" and whether any transaction is a "consumer transaction" are facts that would need to be pleaded (and proved) as part of a claim under the BPA. Here, they are simply not pleaded at all.

[Emphasis added.]

[235] In my view, the case does not support the defendants' interpretation. Adair J. found that the pleadings were silent on the way that the specific plaintiffs acquired their phones and that cell phones could also be used for business purposes. The pleadings in that case required pleadings concerning the specified the nature of the transaction in which the product was purchased given the nature of the goods. The same issue with respect to pleadings does not arise for fireplaces as they would not serve a business purpose when installed in a residential home.

[236] The defendants also submit that their position is supported by the decision in *Bryan v. Gill*, 2013 BCSC 1898. However, the "goods" at issue in that case was a medical device used during an emergency procedure which the court found was supplied to the doctor rather than the plaintiff. The court held that the device in the case was not provided to the plaintiff, indirectly or otherwise and was, therefore, never subject to a consumer transaction. Again, this is different than a fireplace that has been installed in a home specifically for purposes that are primarily personal, family or household within the meaning of the BPCPA.

[237] Finally, as the plaintiffs note, the remedies under the BPCPA do not appear to require a party to have participated in an impugned consumer transaction. Section 171 states that any "person" who is injured due to a contravention of the BPCPA may bring a claim if they suffered harm from that contravention. While the defendants argue that s.171 uses the word "person" so that individuals with claims under other parts of the Act have a remedy (for example for breach of Part 7 of the Act), I find this submission unpersuasive. This interpretation would require person to have one meaning for part of the legislation and another for other parts.

[238] I am not satisfied that the pleadings are deficient in including members of the subclass who did not purchase a fireplace directly from a defendant and in not pleading further material facts concerning the nature of the consumer transactions. I find that the plaintiffs' interpretation is not bound to fail and a determination of whether the BPCPA applies can be a common issue.

Breach of ss. 4 and 5: Deceptive Act or Practice

[239] The plaintiffs pleaded contravention of s. 4 of the BPCPA. While the pleadings are silent concerning s. 5, the provision that actually creates the prohibition, it is implicit from the pleadings that both are advanced. These provisions state:

4 (1) In this Division:

"deceptive act or practice" means, 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;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

- (a) a representation by a supplier that goods or services
 - (i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,
 - (ii) are of a particular standard, quality, grade, style or model if they are not,
 - (iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

- (iv) are available for a reason that differs from the fact,
- (v) are available if they are not available as represented,
- (vi) were available in accordance with a previous representation if they were not,
- (vii) are available in quantities greater than is the fact, or
- (viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

(b) a representation by a supplier

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

- (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[Emphasis added.]

[240] The plaintiffs say that it was a deceptive act for the defendants to fail to state, or to state in ambiguous ways, the burn hazard their fireplaces posed. The non-disclosure of a material fact can ground a cause of action under s. 4(3)(b)(vi). As noted *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260:

80 Turning to the wording of the BPCPA with those principles in mind, it is significant that the definition of a "deceptive act or practice" in s. 4(1), is broadly worded, including "an oral, written, visual, descriptive or other representation by a supplier" (s. 4(1)(a)). The wording of s. 4(3)(b)(vi) -- "representation by a supplier ... that fails to state a material fact" -- anticipates that an omission can constitute a deceptive practice. As I interpret s. 4(3)(b)(vi) of the BPCPA, in light of the definition of a deceptive act or practice in s. 4(1), non-disclosure of a material fact alone, absent a corresponding oral, written, visual, or descriptive representation, can ground a cause of action.

[Emphasis added.]

[241] However, the defendants submit that the claim is bound to fail because, as was the case under negligent misrepresentation, the plaintiffs have failed to plead material facts relating to reliance on the deceptive act or practice. They submit that reliance is required to establish a breach of s. 4. In support, they primarily rely on the decisions in *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122. In that decision, the Court of Appeal held at para. 60 that there could be no cause of action for breach of the BPCPA without some nexus between the alleged representation and the remedy sought. The defendants also refer to para. 34 of *Bryan v. Gill* in support.

[242] I find that these decisions have already been distinguished from situations found in this case. In *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 [Seidel SC], Masuhara J., in distinguishing *Loychuk*, found that the reliance was not a required element to show a breach of ss. 4 and 5:

92 The defendant relies on *Loychuk*, which directly addressed the definition of a deceptive representation under s. 4. In *Loychuk*, the plaintiffs argued that the releases of liability they signed were void because the defendant's website contained deceptive information about the safety of zip-lining. As in the present matter, the plaintiffs did not plead any material facts that showed they specifically relied on the defendants' misrepresentation. The decision states at para. 60:

Deceptive statements cannot be pleaded in the abstract. A consumer cannot allege that a statement was deceptive -- either in support of an assertion that a transaction was unconscionable or as an independent basis for damages -- without establishing that he or she relied on that statement in entering into the transaction in issue. Absent such a nexus a statement would not be a "representation", as it would not have been "used or relied upon by a supplier in connection with a consumer transaction."

93 Subsequent case law from this Court has been mixed. Some decisions of this Court have held that no actual deception on an individual basis is required to establish a breach of ss. 4-5 of the BPCPA: see e.g. *Clark v. Energy Brands Inc.*, 2014 BCSC 1891 (B.C. S.C.) at para. 75; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 (B.C. S.C.) at para. 157, aff'd 2015 BCCA 252 (B.C. C.A.). On the other hand, at least one case has followed *Loychuk* on this point: *Bryan v. Gill*, 2013 BCSC 1898 (B.C. S.C.) at para. 34. However, the conclusion in *Bryan* was arguably obiter because the BPCPA was found to be inapplicable to the transaction at issue.

94 I note that in *Loychuk*, the Court did not reference its previous decision in *Knight CA*. Also, *Loychuk* did not reference s. 4(2) of the BPCPA, which states that deceptive acts or practices may occur before, during or after a consumer transaction. Clearly, a consumer cannot rely on deceptive acts or practices that occur after the consumer transaction "in entering into the transaction in issue" which therefore brings into question the need for reliance under s. 4(2). Finally, the definition of "representation" in s. 4(1) only references reliance by a supplier, and not a consumer, in connection with a consumer transaction.

95 I would distinguish *Loychuk* as did the Court in *Jones*. In *Jones*, the Court of Appeal upheld the certification of a product liability class proceeding. The application judge had certified the following question, among others: "With respect to British Columbia residents, did any of the defendants breach a statutory duty under the BPCPA owed to class members who received the Durom acetabular hip implant in British Columbia and, if so, when and how?" (2011 BCSC 1198 (B.C. S.C.) at paras. 48, 75-80, 99). The statement of claim alleged breach of the BPCPA based on deceptive acts and practices.

96 The Court dismissed the defendants' appeal and distinguished *Loychuk* as follows (at para. 57):

... Loychuk was not an action brought under the statute [BPCPA]. Rather, the appellants, who were injured in an accident on the respondent's zip-line, claimed damages for the respondent's negligence and they invoked the statutory provisions in an attempt to avoid the effect of liability waivers they had signed. In the passage in question, the Court noted that the appellants could not resist the operation of the waivers on the basis of allegedly deceptive statements unless they showed they had relied on the statements. These remarks must be considered in their particular context and they are of no assistance to the appellants for present purposes.

The Court in Jones went on to say that while reliance may be required in order to recover compensatory damages under the BPCPA, that question did not arise at the certification stage in that case.

97 Accordingly, I conclude that the plaintiff need not plead that she was deceived by or relied on the defendant's alleged deceptive acts or practices.

[Emphasis added.]

[243] I agree with Masuhara J.'s conclusion that reliance is not required to show a breach of ss. 4 and 5 of the BPCPA.

[244] In the alternative, Masuhara J. went on to consider that the decisions in Loychuk had also been distinguished based on the nature of the alleged contravention. In *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 aff'd 2015 BCCA 260 ["Ileman SC"], Weatherill J. sought to reconcile the case law in this area by acknowledging that certain representations were of a character that reliance could be assumed under the BPCPA:

67 I am unable to conclude that the decisions in Loychuk and Bryan to the effect that a consumer must establish that he or she relied on the alleged deceptive representation would have been decided differently had the courts been alerted to the earlier decisions in Knight. It is my view that the apparent divergent lines of authority in Knight and Loychuk can be reconciled on the following basis:

- a) where the composition of the representation is such that a determination can be made as to whether it had the capability, tendency or effect of deceiving or misleading under the provisions of the BPCPA without the need for additional facts, the plaintiff need not prove that he or she was actually deceived by it because there is no need for individual inquiry to determine what comprised the representation. This will be the circumstance in most products liability and failure to warn cases. Examples include Knight (cigarette packages branded as "light" and "mild") and Jones (press release claimed a 99.5 percent success rate with the manufacturer's hip replacement implant);
- b) where the composition of the representation is such that a determination cannot be made as to whether it had the capability, tendency or effect of deceiving or misleading under the provisions of the BPCPA without additional facts, the plaintiff must demonstrate that he or she was aware of those additional facts. This was the situation in Loychuk (statements on a website that the plaintiffs may or may not have read and may or may not have induced them

to act) and Bryan (the equipment had been used by the hospital, not by the plaintiff, and there was no allegation that the plaintiff was aware of or relied upon the manufacturers statement).

[Emphasis added.]

[245] I find that as the representation here is in the nature of a failure to warn, there would be no need for an individual inquiry as to the deceptive nature of the representation where it is alleged that the product was dangerous and should not be used without an effective barrier. In my view, the representations would therefore fall into the first category referred to by Weatherhill J.

[246] In light of these decisions, I find that it is not necessary for the plaintiffs to have pleaded reliance to establish a breach of ss. 4 and 5 and, therefore, this cause of action is not bound to fail.

Breach of ss. 8 and 9: Unconscionable Acts

[247] The plaintiffs pleaded that the defendants are liable for breach of s. 8. Again, while the pleadings are silent concerning s. 9, it is implicit from the pleadings that both are advanced. These sections state:

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

- (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
- (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
 - (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
 - (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
 - (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
 - (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

- (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
- (f) a prescribed circumstance.

9 (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

- (2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

[Emphasis added.]

[248] The defendants submit that s. 8 codifies the common law of unconscionability and thus applies in circumstances of an unconscionable bargain, created by an imbalance of power, which creates an unfair advantage and an unfair result: Sandhu at para. 91. They argue that the plaintiffs failed to plead any material facts concerning these requirements.

[249] The issue of sufficiency of pleadings under ss. 8 and 9 was directly at issue in Sandhu. In that case, the Court of Appeal found that particulars concerning inequality, duress, or excessive terms were required for sufficient pleadings under these sections:

91 Last, under this Act, is the issue of section 8. This section applies in circumstances of an unconscionable bargain, created by an imbalance of power, which creates an unfair advantage and an unfair result. The respondents say that whereas much of s. 8 depends upon individual characteristics that go to the issue of inequality, not all of s. 8 does: Bodnar v. Cash Store Inc., 2006 BCCA 260 (B.C. C.A.) at para. 14. In particular, they say a transaction may be harsh or adverse without engaging the issue of inequality. In my respectful view, some aspect must be pleaded beyond the bare bones of a transaction, to alert the defendants to the aspect said to be unconscionable. Here, there is no specific allegation of inequality, duress, or excessive terms said to engage s. 8. The sole pleading in relation to this claim is:

- 17. Making any of the Misrepresentations is a deceptive and unconscionable act or practice pursuant to the BPCPA, ss. 5 and 8 and the Class Members are entitled to orders under the BPCPA, ss. 171 and 172.

[Emphasis added.]

[250] I find that the pleadings here are in essence the same as in the Sandhu case and lack any particulars concerning allegation of inequality, duress, or excessive terms. The plaintiffs simply state that the same representations that constitute the deceptive act also amount to an unconscionable act. However, this clearly cannot be the case as the representations speak to the failure to disclose rather than inequality or duress in conduct. The plaintiffs' pleading is therefore not sufficient to allege a cause of action under ss. 8 and 9.

Section 171

[251] The plaintiffs pleaded damages pursuant to s. 171 of the BPCPA which states:

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

(a) supplier,

who engaged in or acquiesced in the contravention that caused the damage or loss.

[252] The defendants submit that there is no debate that a pleading of detrimental reliance on a representation is necessary to disclose a cause of action for damages under s. 171. In support of this argument they cite the following from the decision of the Court of Appeal in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36:

69 In the result, I conclude that paras. 34-38 inclusive and subparas. (e) and (f) of the prayer for relief in the statement of claim are bound to fail insofar as they are based on an alleged breach or breaches of the BPA. In terms of monetary relief, this leaves the claim for the plaintiff's own damages in para. 29 of the pleading. As we have seen, however, such a claim is dependent on proof of a causal connection between a contravention of the BPA by the defendants, and loss or damage suffered by the plaintiff. No such causal connection has been pleaded, with the result that it is also bound to fail.

[253] While I accept that the language of the provision imports a requirement for a connection between the contravention and the damages claimed, I find that there is at least an arguable case for the plaintiffs that pleadings of reliance are not a requirement to establish the connection under s. 171. The Court of Appeal in *Wakelam* only referenced a requirement for a "casual connection": However, in *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561, Masuhara J. commented that reliance may not be needed depending on the nature of the contravention:

55 However, in my view whether reliance is required depends on the nature of the alleged contravention of the legislation. Where the alleged contravention involves a wrongful overcharge contrary to a term of a contract, the fact of the unauthorized overcharge causally links the breach to the plaintiff's loss. In these circumstances, the plaintiff need not show (and therefore need not plead) reliance.

[254] I agree that there must be some form of causal connection between the loss claimed and the alleged breach, however, reliance is not the only way to establish such a connection. In a case where the deceptive act claimed is the failure to warn consumers that a fireplace is unsafe unless used with an effective barrier, the loss to the plaintiffs in having to remediate the unsafe product through the use of an effective barrier or other means is causally linked to the deceptive act.

[255] In finding that there is support for the proposition that reliance is not a requirement for damages under s. 171, it is not obvious to me that a claim for damages would fail based on the pleadings notwithstanding the lack of material facts concerning reliance.

Section 172

[256] The plaintiffs also pleaded several remedies under s. 172. The plaintiffs seek a declaration pursuant to s. 172(1)(a) of the BPCPA, an interim and/or permanent injunction pursuant to s. 172(1)(b) restraining the defendants, an order under s. 172(3)(c) of the BPCPA requiring the defendants to advertise the particulars of any order made against them, and an order pursuant to s. 172(3)(a) that the defendants refund all sums the class paid to purchase the fireplaces or disgorge all revenue which they made on account of the fireplaces purchased by the class.

[257] These sections read in part:

Court actions respecting consumer transactions

172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
- (3) If the court grants relief under subsection (1), the court may order one or more of the following:
 - (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
 - (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

[258] First, the defendants argue that s.172(1)(b) does not allow for mandatory injunctive relief (i.e. the provision of an effective barrier for the fireplace). This same argument was made during the hearing to amend the pleadings. Having considered the further submissions of the parties, I remain of the view that mandatory injunctive relief in a case such as this falls within the scope of s.172(1)(b) and as previously expressed in *Cantlie v. Canadian Heating Products Inc.*: 2016 BCSC 694 (the "Amendment Decision"):

33 The defendants submit that s. 172(1)(b) of the BPCPA does not allow for mandatory injunctive relief. I was not referred to any authority which expressly considered whether mandatory injunctive relief is available under this provision of the Act. As a matter of general statutory interpretation and under the Interpretation Act, legislation is to be given a fair, large, and liberal interpretation as best ensures the attainment of its objects .

36 Viewed against the objects of the legislation and the purpose of the remedial authority granted to the court under s. 172 of the BPCPA, I am not persuaded that s. 172(1)(b) should be narrowly construed to preclude a court from granting an injunction which is mandatory in nature, if that is justified on the facts of the case, to restrain a supplier from contravening the Act. I note that the forms of injunctive relief have developed over time and there is no longer a clear distinction between mandatory injunctions and other forms of injunctive relief that once existed: *Vancouver General Hospital v. Stoffman* (1985), 68 B.C.L.R. 230 (B.C. C.A.); and *Hedstrom v. Manufacturers Life Insurance Co.*, 2002 BCSC 1502 (B.C. S.C.) .

37 Moreover, considered in the context of this case, it would not seem reasonable if a contravention of the Act were found to limit the authority of the court, for example, to restraining the selling of certain fireplaces, if some other form of injunctive relief would provide a more measured and effective remedy. I am not persuaded, therefore, by the defendants' position that it is plain and obvious that there is no reasonable basis for seeking a mandatory injunction under [s. 172(1)(b)] of the BPCPA

43 Having regard to this authority and assuming that the fireplaces are inherently dangerous as the plaintiffs allege, I am not satisfied that the order for the installation of barriers for fireplaces is bound to fail. In that regard, it is not insignificant that at the certification hearing the defendants have represented that they offer barriers to customers who wish them. The relief sought is not outside the realm of what the defendants themselves have recognized as a measure which may be taken to address concerns over the heat from glass fireplaces.

[259] In regards to an order for restoration under s.172(3)(a), the British Columbia Court of Appeal recently outlined the prerequisites for such as order in *Ileman v. Rogers Communications Inc.*, 2015 BCCA 260 ["Ileman CA"]:

53 As I read s. 172(3)(a), there are four prerequisites to the granting of a restoration order:

- a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) -- this requirement is set out in the opening words of s. 172(3);

- b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation - this requirement is explicit in s. 172(3)(a);
- c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier -- this requirement is a necessary implication of the use of the word "restore"; and
- d) The beneficiary must have "an interest" in the thing to be restored -- this requirement is explicit in s. 172(3)(a).

[260] While I held in the Amendment Decision that the plaintiffs had pleaded a sufficient interest to allow recovery under s. 172(3)(a) in the event that a contravention of s. 171 was found such that the fourth requirement in *Ileman CA* was satisfied, I left it open for the defendants to make further submissions on the matter.

[261] In response, the defendants submit that the plaintiffs' pleadings are deficient in that they do not plead that money flowed from the plaintiffs to the defendants such that they are entitled to restitution. Their arguments on this matter are summarized in their written submissions as follows:

- a) There is no pleading that the Lennox Defendants acquired money because of a contravention of the BPCPA, other than a pleading of a bare legal conclusion without a pleading of the necessary material facts;
- b) There is no pleading that the plaintiffs or any of the proposed class members were the source of money acquired by the Lennox Defendants; and
- c) There is no pleading that the plaintiffs have an interest in the thing to be restored. There remains no pleadings that the plaintiffs are entitled to damages under s.171

[262] As in the Amendment Decision, I find that the argument under (c) not persuasive. The focus of the defendants' remaining objections center on the third requirement stated in *Ileman CA* which requires beneficiaries of a restoration order to have been the source of the money obtained by the defendants. The plaintiffs, at para. 67 of their further amended Notice of Civil Claim, state the following:

The Defendants, and in particular each of the Lennox Defendants, have, by way of their contraventions of the BPCPA, obtained money within the meaning of s. 172(3)(a) of the BPCPA from members of the BC Consumer Subclass.

[263] For the purposes of certification, I find these pleadings sufficient. It is clear based on this paragraph and others what case the defendants must meet and it provides sufficient particulars about the source of the money for the purposes of a restoration order. I therefore find that the claims under s.172 are not bound to fail.

[264] In summary, I find that the plaintiffs have pleaded the required elements to disclose a cause of action under ss. 4, 5, 171, and 172 of the BPCPA.

Competition Act

[265] The plaintiffs further pleaded a breach of the Competition Act and set out the relevant pleadings at paras. 56, 68 through 71, 76, 77, 83, and 84 of their further amended Notice of Civil Claim. The Competition Act, much like the BPCPA, establishes a statutory cause of action under which individuals can obtain damages for breach of the legislation. However, in contrast to the BPCPA, the purpose of the Competition Act is primarily focused on the maintenance and encouragement of competition in Canada: s. 1.1 Competition Act.

[266] The plaintiffs pleaded that the defendants are in breach of s. 52 which entitles them to damages under s. 36(1). These provisions state:

36 (1) Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part VI, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Proof of certain matters not required

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

- (a) any person was deceived or misled;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

[267] Section 52 is contained in Part VI of the Competition Act, entitled "Offences in Relation to Competition." It is a regulatory offence and not, in and of itself, a cause of action. Section 36 provides a civil cause of action for a person who has suffered loss or damage as a result of conduct contrary to Part VI, such as a breach of s. 52: Singer at para. 102.

[268] The plaintiffs rely on the same representation as pleaded under the negligent misrepresentation and BCPA claims to serve as the basis for a breach of s. 52. The defendants again submit that the pleadings are deficient because they lack particularized pleadings concerning reliance.

[269] The requirement to plead reliance in a claim under ss. 36(1) and 52 of the Competition Act is well established. In *Wakelam* the Court of Appeal citing from *Singer*, held that reliance was a requirement to claim damages under s. 36 for a breach of s. 52:

91 In terms of the Competition Act, this leaves Ms. Wakelam's claim for "damages" suffered "as a result of" the defendants' breach of Part VI (founded on s. 36) as well as for her costs of investigation under s. 36(1). In this regard, I return to and respectfully agree with the Court's statement in *Singer*, which I reproduce again for convenience:

... [Section] 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.

Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the Competition Act, contains its own requirement that the plaintiff must have suffered loss or damage "as a result" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment.

[At paras. 107-8; emphasis added.]

This reasoning seems consistent with a comment made by the Court at para. 65 of *Pro-Sys Consultants Ltd. v. Microsoft Corp.* that s. 36 of the Competition Act allows anyone who has suffered loss or damage "as a result of conduct engaged in by any person contrary to Part VI" to "sue for and recover that loss or damage." (My emphasis.)

[Emphasis added in italics.]

[270] This decision was followed in *Finkel*, where Masuhara J., came to the same conclusion:

70 What is more problematic is that the plaintiff has not pleaded that he suffered loss or damage as a result of the misrepresentations made to the public. While s. 52(1.1) removes the requirement of proving reliance in order to establish a contravention of s. 52(1), the cause of

action created by s. 36 requires the plaintiff to show that he or she suffered damages "as a result" of the defendant's violation: *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 (B.C. C.A.) at para. 91, leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 125 (S.C.C.), citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) at para. 107.

71 Unlike the BPCPA claim, then, the Competition Act claim does require that the plaintiff show reliance on the alleged misrepresentation. The link required by s. 36 is only present if the misrepresentation "caused [the plaintiff] to do something - i.e., that he relied on it to his detriment": *Singer* at para. 108.

[Emphasis added.]

[271] As with the claim under negligent misrepresentation, the plaintiffs have not provided any authority in support of a conclusion that particularized pleadings of reliance are not required for a claim under the Competition Act. This is distinguishable from the jurisprudence under the BPCPA under which the consumer protection focus requires a broader reading and application of the statute. I also was not directed by the plaintiffs to any jurisprudence to support the proposition that an omission can be a representation under the Competition Act despite the courts conclusion in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (S.C.J.), aff'd 2012 ONSC 3692 (Div. Ct.) at para. 227 that "[t]he failure to disclose the alleged defect cannot be a "representation". As such, I am not satisfied that the pleadings disclose a cause of action under this legislation.

Strict Liability

[272] The plaintiffs say the defendants in this case are strictly liable, meaning they are liable for unintentional and non-negligent harm or injury. The defendants argue that courts in Canada have rejected the doctrine of strict liability in products liability cases. I agree with the defendants' submission. I observe that, in *Player Estate v. Janssen-Ortho Inc.*, 2014 BCSC 1122 Bracken J. rejected the doctrine of strict liability:

236 The plaintiffs say the defendants in this case are strictly liable to the plaintiffs. Teva and Sandoz argue that courts in Canada have rejected the doctrine of strict liability in products liability cases. I agree with that submission. The law in Canada is as stated in *Daishowa-Marubeni International Ltd.*

[273] The decision cites *Daishowa-Marubeni International Ltd. v. Toshiba International Corp.*, 2010 ABQB 627 in which Nason J. concluded as follows:

40 The law does not impose strict liability on manufacturers, the onus does not require that they produce items that are accident proof or incapable of doing harm. The manufacturer is not the insurer of anyone who suffers injury while using or misusing a product.

[274] I therefore conclude that the pleadings have not disclosed a cause of action under the doctrine of strict liability.

Waiver of Tort

[275] The plaintiffs' written submissions contain references to the doctrine of waiver of tort as an independent cause of action. However, the only reference to the doctrine in the pleadings is found in the remedies section which states:

(h) further, regarding the claims in tort, the Consumer Class Members reserve the right to elect, at or before trial, to waive the tort and seek disgorgement of the Defendants' benefits and/or profits associated with or arising from the wrongful acts and omissions as described above;

[276] The doctrine of waiver of tort has recently been the subject of judicial comment in a number of cases. The doctrine was described by the Supreme Court of Canada in *Microsoft* at para. 93:

Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, "thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct" (Maddaugh and McCamus, at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), at p. 18). Waiver of tort is based on the theory that "in certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages" (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that "it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).

[277] Our Court of Appeal has also addressed waiver of tort in *Koubi*, which was followed in *Wakelam*. In *Koubi*, after reviewing the development in this area of the law, the court concluded, at para. 39, that the question of whether waiver of tort is an independent cause of action or merely a remedial alternative has not been definitively answered. The Court, therefore, found that the chambers judge had not erred in finding an arguable case that the doctrine may provide an independent cause of action and, if so might merit the class to recover benefits gained by the defendants from their wrongful conduct without the necessity of demonstrating individual harm or damages.

[278] Here, the plaintiffs did not argue waiver of tort as a cause of action in any meaningful way and I find that, to the extent they may seek to advance it as a cause of action, the pleadings are deficient.

Is there an identifiable class of two or more members?

[279] The plaintiffs Ms. Cantlie, Mr. Murray and Ms. Gorji bring the action on their own behalf and on behalf of the proposed class of individuals (the "Consumer Class") which consists of:

All persons in British Columbia, and all other persons in Canada who opt-in to this proceeding in accordance with orders of the Court, who own, lease or otherwise occupy private property (the "Premises") where one or more glass or "ceramic glass" fronted gas burning fireplaces, fireplace inserts or stoves developed, designed, tested, distributed, supplied, marketed, advertised and/or sold by the Defendants have been installed the "fireplaces").

[280] This class consists of a further subclass, the "BC Consumer Subclass", consisting of all individual members of the Consumer Class whose fireplace in their premises was the subject of a consumer transaction as that term is defined in the BPCPA.

[281] In *Watson v. Bank of America Corp.*, 2014 BCSC 532, Bauman C.J.S.C. (as he then was) summarized the requirements for an identifiable class under s. 4(1)(b) as follows:

[63] [T]he plaintiff must provide some basis in fact for the existence of an identifiable class of two or more persons. The class must be clearly defined at the outset of the litigation as doing so identifies the individuals entitled to notice under the CPA, entitled to relief if the case succeeds, and bound by judgment unless they opt-out: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 [Dutton]; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

[64] To meet this requirement, the plaintiff must define the class with reference to objective criteria. Similarly, while the definition should be rationally related to the alleged common issues, the membership of the class must not hinge on the outcome of the litigation. Further, the class must not be defined too broadly or too narrowly in relation to the common issues. Ultimately, it is not necessary for the plaintiff to identify every class member, but it must be possible to determine whether or not a specific individual is a member of the class: *Sun-Rype* at paras. 52-62; *Dutton* at para. 38; *Hollick* at paras. 20-21.

[282] The plaintiffs need to show that there is some basis in fact that the class exists, that it is objectively determinable, and that there is some connection between the proposed common issues and the class as defined. In *Hollick*, Chief Justice McLachlin further elaborated on these requirements:

20 ... [I]mplicit 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: [citations omitted].

[283] It is the defendants' submission that the Consumer Class, being all individuals who own, lease or otherwise occupy private property with one of the fireplaces installed, is overbroad. They claim that the inclusion of lessees and occupants in the definition give rise to numerous different and individual issues in relation to which interest give rise to economic loss claims and which do not. It follows, they submit, that this may give rise to potential conflicts amongst the various interest holders because lesser interest may have various negligence claims for failure to affix warning labels, provide product documents, provide warnings, etc. The defendants highlight that in *Hollick*, the court noted that the scope of the appropriate class is not usually in dispute in product liability cases because the class is usually constrained to individuals who bought the product, which they claim is not the case here.

[284] In the event that the plaintiffs are successful at trial, it is important to consider which members of the class would be entitled to relief. In this regard, I agree with the defendants' submissions that the class may be unnecessarily broad. Clearly some of the class may not have a claim for economic loss if they are merely renting or occupying a place that has a fireplace installed. Such individuals would generally not be responsible for or have the authority to remediate the product if it was found to be defective. I find that the inclusion of individuals that "otherwise occupy" private property makes the class too broad for the purposes of this certification. There is no evident rational connection between the cause of action pleaded, these members of the class and the proposed common issues. I also find that it is too vague in terms of identifying who is in and who is out of the class.

[285] However, I am not satisfied that a lessee would never be entitled to relief based upon the terms of the lease. While I agree that the inclusion of lessees has the potential to give rise to individual issues, I find that these are not sufficient to hold that the class is overbroad. The possibility of individual issues is not determinative. As noted recently by Skolrood J. in *N&C Transportation*:

84 In any event, some difference in the interests of class members is not fatal to certification. For example, in *Hollick v. Toronto (City)*, 2001 SCC 68 [Hollick], the Supreme Court of Canada held that "[t]he representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue" (at para. 21, emphasis in original). Moreover, to the extent that differences among class members arise or become material post-certification, they can be dealt with either through sub-classes or as individual issues (see: *Reid v. Ford Motor Company*, 2003 BCSC 1632 at para. 37).

- [286] As will be discussed in the common issues analysis, I find that there are common issues that concern the class as defined (subject to the alteration noted) such that there is a rational connection between the class and those issues.
- [287] I am also satisfied that there will be more than two individuals in the class. According to Mr. Krebs' affidavit there has been an estimated 26,830 Lennox fireplaces sold in Canada and 4,361 in British Columbia between 2008 and 2011.
- [288] Finally, I find that the class definition is rationally connected to the common issues. While the class here is somewhat broader than the typical product liability action given the inclusion of individuals who may have purchased their fireplaces as part of a real estate transaction, I find that given the alleged danger associated with the product, the class is rationally connected to the common issues concerning breach of a duty of care and claims under the BPCPA.
- [289] The defendants also submit that the class is overbroad in that it is defined without any reference to the class period. They claim that without a time constraint on the class, it will be composed of individuals that are statute barred under the old Limitations Act, R.S.B.C. 1996, c. 266. In response, the plaintiffs argue that no defined limitation period should be imposed at the certification stage as there is some basis in fact to support the argument that no limitation in fact applies. Under the previous Limitations Act, the running of the limitations period could be postponed in various circumstances including where there is "willful concealment" of a material fact or under the "discoverability principles" found in s. 6. The plaintiffs submitted that there is some basis in fact that these provisions could apply in this case so as to postpone the applicable limitation period and that any determination of this issue should be done at the trial of the merits.
- [290] I find that there is some evidence to support the plaintiffs' submissions that there may have been concealment of material facts in this case: Verchere Affidavit at paras. 8-28 and Pollack-Nelson Affidavit at paras. 6-8; Ex C pp. 20, 29, 35; Ex D pp 88-91. If the plaintiffs are able to establish that the defendants did in fact know that their fireplaces posed a significant danger if not used without a effective barrier as early as 2001, the plaintiffs may be able to argue that any running of the limitation period was postponed. However, I do not find it necessary to deal with this issue in the certification process. The issue cannot serve to limit the class as it is one to be determined on its merits after the completion of discovery: *Chace v. Crane Canada Inc.*, [1997] B.C.J. No. 2862 (C.A.) at para. 19. If it is found that some members are indeed statute-barred, the CPA is "sufficiently flexible to take into account individual claims for postponement": *Gregg v. Freightliner Ltd.*, 2003 BCSC 241 at para. 71.
- [291] I therefore find that the class definition for the Consumer Class should be redrafted to exclude individuals who "otherwise occupy" private premises. The new class will be defined as follows:

All persons in British Columbia, and all other persons in Canada who opt-in to this proceeding in accordance with orders of the Court, who own or lease private property (the "Premises") where one or more glass or "ceramic glass" fronted gas burning fireplaces, fireplace inserts or stoves developed, designed, tested, distributed, supplied, marketed, advertised and/or sold by the Defendants have been installed the "fireplaces").

[292] Concerning the BC Consumer Subclass, the defendants' submissions that the class is overbroad and not objectively determinable are also not persuasive. As was discussed, a claim under the BPCPA may not require an individual to have obtained their fireplace directly from the defendants in an impugned consumer transaction to have a claim. Thus, it may be sufficient that the plaintiffs define the class as those individuals of the Consumer Class whose fireplace was acquired in a consumer transaction. The objectively determinable criterion is that fireplaces are located in private properties and have been sold in a consumer transaction at some point. This is different than cases involving items such as prepaid credit cards or air travel services which necessarily required subjective inquiries to determine the purpose for which such products were purchased: *Unlu v. Air Canada*, 2012 BCSC 60, rev'd 2013 BCCA 112, leave to appeal ref'd; *Ileman SC*.

[293] As well, in the event that the class is found to be too broad after certification as the proceedings continue, there are alternative avenues for addressing issues resulting from a broad class after certification as noted by Masuhara J. in *Seidel SC* :

147 Regardless of whether the proposed class definition or a narrowed one based on the definition of a "consumer" who participated in a "consumer transaction" is selected, to the extent that there are non-consumers or non-consumer transactions involved, this matter can be addressed after the common issues trial or under s. 27 of the CPA, or even under administrative protocols in the claims adjudication process dealing with eligibility. In class proceedings where there are a large number of claimants, significant post-common issues can be anticipated. I note that this was the reasoning in *Wellman* in finding that the class was adequately described (at para. 42). In *Wellman*, where a similarly broad definition was proposed, the Court expressly disagreed with the finding in *Ileman SC* that the identification posed an insurmountable hurdle.

[294] I therefore find that the plaintiffs have met the requirements under s. 4(b) of the CPA.

Do the claims raise common issues and do they predominate over issues affecting only individual members?

[295] Section 4(1)(c) of the CPA requires that the claims of the class members must raise common issues, although the common issues need not necessarily predominate over issues affecting only individual members. 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;

[296] Willcock J.A. in *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at para. 85, recently summarized the principles governing the assessment of common issues by reference to the decision of Singer at para. 140:

A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis.

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.

C: There must be a basis in the evidence before the court to establish the existence of common issues.

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.

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.

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.

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.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.

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.

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".

[297] The plaintiffs provided a long list of the proposed common issues for certification which are attached to this decision as an appendix. I note at the outset that the plaintiffs' list is somewhat repetitive. For example, common issues 11 and 15 both ask, in different ways, a question concerning the duty to warn. Also, common issue 7 and 12(a) both asked when the defendants first discover the dangers and defects associated with the fireplaces and if they

knew of them and issues 6 and 18 both speak to whether the fireplaces had a dangerous defect. Counsel did not review the common issues with the court in any great detail to explain why the issues were set out as they were. Therefore, for the purposes of the analysis, I have attempted to organize the issues into their relevant categories.

1. Factual Questions: Common Issues 1 and 2

[298] These two questions are simply factual inquiries on which all the cause of actions depend. As such, I find that they are appropriate for certification as follows (with the removal of any reference to testing as explained below):

A. Did the Defendants or any of them develop or design Fireplaces and if so, what models of Fireplaces did each Defendant develop and design and during what period of time?

B. Did the Defendants or any of them distribute, supply, advertise, market or sell Fireplaces and if so what models of Fireplaces did each Defendant distribute, supply, advertise, market or sell?

2. Uncertified Causes of Action: Common Issues 14, 27, 28

[299] There are several issues proposed by the plaintiffs that can be dispensed with given my conclusions above. As common issue 14 relates to the negligence misrepresentation claim which I found is bound to fail, it is not certified. For the same reason, as common issues 27 and 28 relate to the plaintiffs' claims under the Competition Act and in relation to strict liability, they are also not certified.

3. Negligence: Common Issues 3 - 13, 15, 16, and 18

[300] The plaintiffs propose a list of issues relating to their negligence claims including common issues 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16 and 18.

[301] Common issues 3, 4, and 5 are broadly drafted questions concerning the existence of a duty and the applicable standards generally. These questions "lie at the heart of every product liability/negligence claim" and, in cases concerning defective products, are appropriate for certification: N&C Transportation at para. 135. While counsel are to be cautious when drafting common issues in overly broad terms as "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", the plaintiffs in this case have gone on to specify narrow questions related to these broad issues: Rumley v. British Columbia, 2001 SCC 69 para. 29.

[302] The remaining issues can be organized into several categories: common issue 6 and 18 concern the existence of a defect and/or danger in the fireplaces; common issues 7, 12(a), and 12(b) relate to the defendants' knowledge; common issue 10 and 12(c) concern the risk assessment associated with the fireplaces; common issues 8 and 9 concern negligent research and testing respectively; common issue 11 relates to the defendants' duty to warn and issues 12(d), 13, and 16 concern the defendants' conduct in light of their duties.

- [303] I start with common issues 8 and 9, which relate to failures in research and in testing of the fireplaces. The defendants argue that the plaintiffs have not provided any evidence in relation to these claims. While I note the threshold for an evidentiary basis is low, I agree with the defendants' submissions. The plaintiffs have not provided the Court with any evidence that there were negligent acts on behalf of the defendants in relation to how they researched or tested the fireplaces. As such, I decline to certify these issues.
- [304] With respect to the defendants objection to the remaining specific negligence common issues, they object on two grounds: first, they submit that there is no basis in evidence for the common issues and, second, that a defect finding for the plaintiffs could not be extrapolated to the class and that the plaintiffs have failed to show that there is evidence of a credible and plausible methodology to show general causation on a class wide basis.
- [305] I note that inquiries into the existence of a defect are the "first step in every products liability case alleging negligent design, manufacture, or marketing": *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at para. 42. Strathy J., as he then was, in *Williams* reviewed the recent case law pertaining to product liability and noted that certification in product liability cases often turned on a plaintiff's ability to demonstrate some evidence that a defect exists:
- [171] This brief review demonstrates the need for the plaintiff to demonstrate on certification some factual basis for the proposition that the product owned by the plaintiff shares a common defect with the products owned by all members of the class. The plaintiff need not establish that the defendant is liable for the defect, but it must be shown that the defendant's liability to the class can be extrapolated from a finding in relation to the representative plaintiff.
- [172] Thus, in *Chase v. Crane Canada*, there was evidence of an unusually high failure rate amongst toilet tanks manufactured at a particular plant and expert evidence linking the failure to the process employed at that plant. In *Bondy v. Toshiba* and *Griffin v. Dell*, there was evidence that the plaintiffs' computers were shutting down or otherwise failing to perform in normal operating conditions and there was expert evidence linking those failures to deficiencies in design that were shared with other computers in the class. In both cases, there was a factual foundation for the proposition that findings concerning the plaintiffs' computers could be extrapolated to all the computers at issue. In *Koubi v. Mazda Canada*, the actions taken by the manufacturer, which applied to the entire class, helped to establish that there was a defect and that it was common to all the vehicles at issue.
- [173] On the other hand, in the cases that were not certified, the evidentiary record did not establish a basis in fact for the common issues. In *Chartrand v. General Motors*, the defect in the plaintiff's vehicle had not been established and there had been no recall of automatic transmission vehicles, which met all relevant standards. There was no evidence that the alleged defect could be determined on a class-wide basis. Similar conclusions were reached in *Poulin v. Ford Motor Co. of Canada* and *Ernewein v. General Motors of Canada Ltd.*

[174] The evidence to establish that the product is defective and that liability can be determined on a class-wide basis, may vary from case to case. In some cases, evidence that the defendant or regulatory authority has made a product recall may be sufficient. In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

[Emphasis added.]

[306] Another example of this approach can be seen in *Barwin v. IKO Industries Ltd.*, 2012 ONSC 3969 (Ont. S.C.J.) where Baltman J. stated:

51 It is undisputed that implicit in those allegations is the existence of a defect in the design and/or manufacture of the shingles. If the plaintiff can establish some factual basis to demonstrate that the product has a common defect across all class members, then, as with many product liability cases, it may be ideally suited to class certification: *Chace v. Crane Canada Inc.*, [1997] B.C.J. No. 2862 (B.C. C.A.), para. 16. That is because proof of the product's defect need only be made once, and can then be applied to the entire class of purchasers, "thereby providing access to justice where it would be impractical to take individual proceedings": *Williams*, above, para. 121.

[Emphasis added.]

[307] The defendants submit that there is no methodology proposed to determine the existence of a defect on a class-wide basis. In class proceedings, plaintiffs must show that there is some evidence of a credible and plausible methodology to prove general causation and the common issue at trial. However, I note that the question is not whether the resolution of the general causation question will advance the class claims, but rather, "whether there is a reasonable prospect of doing so": *Charlton* at para. 111; See also *Davis v. British Columbia Hydro and Power Authority*, 2016 BCSC 1287. The plaintiffs are required to "show how their common issue could be established at a common issues trial, remembering that the threshold, at this stage, is not an onerous one": *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at para. 38.

[308] Turning to the defendants' objections, the defendants submit that proof of the "defectiveness" of the fireplaces requires evidence concerning specific temperatures and installation locations and that there is therefore no methodology to extrapolate that a class wide defect exists i.e. general causation. They claim that the evidence in Mr. Krebs' affidavit establishes that there is variation among: the design features and characteristics between all the different types of products at issue; the installation and use options between all the different types of products at issue; the warnings received by class members; and the use and knowledge by class members of safety guards. The defendants therefore claim that this proposed "multi-model product liability class action" is not suitable for certification on the same basis as cases like *Vester* and *O'Brien*.

- [309] To the extent that variation does exist, it is not necessarily fatal to the certification as "even a significant level of difference among the class members does not preclude a finding of commonality": Microsoft at para. 112. In my view, while there is evidence of variability in the location of installation (e.g. installed at floor level, installed above floor level) and the design of the fireplaces (i.e. the style of the fireplace, the different ventilation systems), the common feature of all of the fireplaces at issue in these proceedings are the glass fronts and panels on the fireplaces which reach high temperatures. In Mr. Krebs' affidavit he appended photographs of the various types of fireplaces - all of which show glass fronts or panels. While there may well be some variation in the temperatures of the glass when the fireplace is operational, the evidence of the plaintiffs' experts is that the fireplaces glass reaches temperatures which are high enough to cause serious burns.
- [310] Similarly, while there are some differences in the words used in the warnings about the burn risks from fireplaces, I find that the defendants' warnings are similar in content in warning owners that the fireplace glass becomes hot enough to cause "severe burns". In any event, there is evidence from Dr. Pollack-Nelson that warnings will not be encountered by consumers; they are generally not read, and they are not effective. Her evidence was that it is beyond the average consumers' ability to discern the temperature of the front of the glass without data and it is unreasonable to expect that they would appreciate the front glass reaches temperatures up to 500°F.
- [311] While I accept that certain installations and designs may expose young children to greater risk of contact with the fireplace, there is no evidence to suggest that there is a location or design in which human contact with the fireplace would not be possible. Accordingly, I consider the cases involving medical devices which have different designs, are made of different materials, and are based on the idiosyncratic factors of patient health circumstances, are distinguishable. In Vester and O'Brien, the court found that there was no common issue across all products at issue, here I am satisfied that there is some evidence that such a defect exists.
- [312] In that regard, Dr. Buc's evidence was that there is a common design defect in the defendants' fireplaces (i.e. the glass is too close to the flame, the firebox traps the heat, and the glass pane is capable of transferring extremely high temperatures from the flame) that can cause burns. Her evidence was also that there is common and accepted means of measuring the surface temperatures of glass, the skin contact temperature from heated products, and the heated surface conditions that produce burn injuries. Further, Dr. Pollack-Nelson stated that the defendants, who have ANSI certified products, know the temperature of the fireplaces glass and related characteristics as such testing is required under the ANSI/CSA voluntary standards for each product. For example, section 2.13.1 states: "When equilibrium conditions are attained, the exterior of the glass surface shall be scanned using an infrared radiation thermometer. The highest temperature reading shall be recorded and the interior glass surface temperature calculated using equations outlined in Appendix 1, Glass Temperature Calculation "

- [313] Mr. Krebs' evidence confirmed that all of Lennox fireplace models are tested and certified, using ANSI and CSA standards. While he referred to the variable features and characteristics of the fireplaces, I observe that he also referred to fireplaces being in product families, based on type of fuel, ignition and physical configuration. He also described six basic types of gas burning fireplaces: direct-vent single-paned; B-vent; bi-fold outdoor, direct-vent inserts, B-vent inserts, and direct vent stoves.
- [314] I am therefore satisfied that the issues pertaining to the alleged design defect and propensity to injure in respect of the fireplaces with glass fronts or panels can be dealt with on a common basis. I am also satisfied that a method exists of analyzing the alleged defect in the design of products within each of these product types. In my view, such an analysis would advance the litigation.
- [315] I do not find the decisions cited by the defendants in *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 and *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée*, [2007] O.J. No. 4988 (S.C.J.), *aff'd* [2008] O.J. No. 4153 (Div. Ct.) determinative. In *Ernewein* the Court of Appeal, in rejecting the admissibility of certain expert reports, found that there was no evidentiary foundation for commonality. In *Poulin*, Mackenzie J. denied certification in part because the plaintiff had failed to establish on the evidentiary record that the variation found in different member's vehicles was of no consequence. Here, I find that commonality exists and the variations highlighted by the defendants are not sufficient to overwhelm the common assessment.
- [316] I would add that I do not find the defendants' submissions concerning the variations over time persuasive. The fact that the case involves a number of corporate defendants that created a product over a number of years does not mean that the common issues are individual in substance. For example, in *Rumley*, the Supreme Court of Canada held that certification can still be appropriate in cases involving variation over time:

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 (Ont. 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 (B.C. S.C. [In Chambers]) (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 common 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....

[Emphasis added.]

[317] With respect to the defendants' knowledge of the defect and the duty to warn, there is some evidence that the ANSI/CSA standards recommended that warnings about the temperature of the glass be included in product manuals and that, at least since 2009, recommended physical barriers be used. There is evidence that these standards were developed with input from the fireplace industry. There is also evidence that the defendants were involved in industry organizations such as the HPBA where there have been discussions concerning the burn risk to young children from fireplaces and the need to have effective barriers to address the burn risk. In the affidavit of Ms. Sims, she confirms that Lennox is a member of the HPBA in the U.S.

[318] Dr. Pollack-Nelson also deposed that the burn potential was well known and was the subject of published reports as early as 1998 and discussion within the industry since as early as 2003. She referred to various studies that discussed human tolerance to hot surfaces and recommended maximum temperatures for touchable surfaces. She also referred to studies that noted the increasing number of contact burns to children from glass enclosed fireplaces. Her evidence was that that the defendants were notified of incidents of burns to children as early as 2003.

[319] Dr. Verchere also provided evidence which suggested that the fireplace industry was aware that children were being burned on the glass from fireplaces and that there was discussion about design changes and the use of barriers at least since 2005.

[320] In my view, the question of whether there is a dangerous design defect, the knowledge of the defendants' of the alleged design defect and the existence of barriers or screens as a means of addressing the defect, are all issues which can be addressed on a common basis and would move the litigation significantly forward.

[321] Given these reasons, I find that the questions should be modified and certified as follows:

C. Did the Defendants or any of them owe Class Members a duty of care?

D. If the Defendants did owe the Class Members a duty of care, did the Defendants in the development or design of the Fireplaces breach the applicable standard (or standards) of care during the material times?

E. If the Defendants did owe the Class Members a duty of care, did the Defendants in the distribution, supply, marketing, advertisement and/or sale of the Fireplaces breach the applicable standard (or standards) of care during the material times?

F. Were the Fireplaces of the Defendants, or any of them, unfit for their intended purpose, defective and/or dangerous when used as designed and intended?

G. Did the Defendants, or any of them, know of these defects and dangers and if so, when?

H. Was the propensity of Fireplaces to cause very serious injury, particularly very serious injury to the most vulnerable, such that it outweighed the value of the use of the Fireplaces?

I. Did the Defendants, or any of them, have a duty to warn the public with respect to the Fireplaces and if so, how and to what extent did they warn, if at all?

J. Was the use of an effective barrier known to the Defendants?

K. What steps, if any, did the Defendants take to remedy and/or repair and/or initiated a product recall?

L. Were any warnings that were given by the Defendants adequate given the Defects and Dangers? Would any warning be adequate given the Defects and Dangers?

4. BPCPA: Common issues 17, 19, 20, 21, 22, 23, 24, 25, 26 and 29

[322] First, I note the common issues 24 through 26 are repetitive of issues dealt with under negligence and, while they incorporate additional substance concerning vulnerable individuals, I am not satisfied that anything is added by retaining the questions. Therefore, common issues 17, 19 through 23 and 29 remain. Common issues 20(a), 23, and 29 are repetitive in that they all ask whether there was a breach of the BPCPA by the defendants although all differ in their scope. I find issue 23 the most inclusive. Accordingly, I find that issues 20(a) and 29 are not required. Common issues 20(b) through (e) all concern the remedies sought under the BPCPA and common issues 21 and 22 are the legal questions concerning the applicability of the BPCPA in these circumstances.

[323] The defendants' main objection concerning the plaintiffs' common issues under the BPCPA relate to the issues concerning reliance. Given my findings concerning reliance, it is not necessary to address these arguments.

[324] The defendants also submit that the plaintiffs have again not tendered any evidence to show that there is a method to prove the common issues under the BPCPA in trial. I find the discussion concerning methodology under the negligence common issues equally as applicable here.

[325] In regards to the common issues related to the remedies under the BPCPA (common issues 20(b) through (e)), I am satisfied that the plaintiffs has shown some basis in fact to support their contention that entitlement to the remedies are common issues and can be litigated on a class wide basis. Issues 20(b), (c), and (e) relating to declarations, injunctions, and advertisement of any court orders respectively do not require individualized analysis and, in my view, answers to the questions would advance the litigation.

[326] In regards to 20(d), I agree with the defendants that some members of the class whose fireplaces were installed before they purchased their home would not necessarily be the source of money held by the defendants and would not be entitled to the benefits of such an order. However, I find that this is not necessarily fatal to certification of the restoration order issue. As Masuhara J. noted In Seidel SC, actual entitlement could be determined after the common issues trial:

175 With respect to the restoration order, the defendant repeats the argument that no such order can be given in this case given that the plaintiff has not shown an interest in the monies she seeks to be restored. Further, the defendant says that in terms of the class there would be many class members who have not suffered any loss based on the multitude of different rate plans and calling options that existed during the Class Period.

176 I have concluded based on Ileman CA that s. 172(3)(a) does not require a proprietary nexus. I have also concluded that individual reliance is not a prerequisite to relief under s. 172(3)(a).

177 In my view, the fact that there exists class members who may have not lost any money by reason of TELUS' alleged deceptive or unconscionable acts or practices does not preclude certification of this issue. Requiring every class member to have suffered a non-zero monetary loss as a precondition to granting a s. 172(3)(a) restoration order on a class-wide basis is contrary to the consumer-oriented interpretive approach mandated by the BPCPA and the CPA's goal of facilitating access to justice. Actual entitlement can be determined after the common issues trial as an individual issue and, potentially, pursuant to the aggregate monetary award provisions in the CPA.]

[327] One final note, in regards to common issue 19, I find that questions concerning whether the representatives had the effect of actually deceiving class members require individual analysis and are therefore not appropriate for certification. This question must therefore be redrafted to remove reference to the effect of the representation.

[328] I therefore find that the following common issues should be certified:

M. With respect to the Representation made by the Defendants, or any of them:

- i Was the Representation made to the public regarding the Fireplaces?
- ii. Was the Representation false, misleading and/or deceptive and either by what was represented or by omission?
- iii. Was the Representation made in good faith, honestly and truthfully?
- iv. Did the Representation disclose, or adequately disclose, the existence of the Defects and Dangers?
- v. Alternatively, was any disclosure incomplete, misleading or did it seek to minimize or downplay the defects and dangers?

- N. Did the Representation have the capability of deceiving or misleading consumers?
- O. Does the BPCPA apply to the Defendants' relationship to members of the Consumer Class?
- P. Were the Defendants "suppliers" to consumer transactions within the meaning of the BPCPA and/or its predecessor legislation?
- Q. In making the Representation did the Defendants, or any of them, breach the BPCPA and/or its predecessor legislation?
- R. If so:
- i. are Class Members entitled to a declaration pursuant to s. 172(1)(a) of the BPCPA that the Representation contravened the BPCPA?
 - ii. are Class Members entitled to an interim or permanent injunction pursuant to s. 172(1)(b) of the BPCPA restraining the Defendants or any of them from continuing to make the Representation?
 - iii. are Class Members entitled to an order pursuant to s. 172(3)(a) of the BPCPA that the Defendants or any of them restore to them the monies that have been acquired as a result of the Representation?
 - iv. are Class Members entitled to an order pursuant to s. 172(3)(c) of the BPCPA that the Defendants or any of them advertise to the public, in a manner that will ensure prompt and reasonable communication to consumers, particulars of any and all judgments, declaration, orders or injunction granted against them in this proceeding?
5. Remedies: Common Issues 30, 31, 32, 33 34, 35

[329] The remaining common issues proposed by the plaintiffs relate to the remedies sought in these proceedings and I will review each to determine their suitability for certification while keeping in mind that failure to certify does not necessarily preclude a trial judge from imposing a remedy deemed appropriate in future proceedings: Microsoft para.134.

[330] Common issue 30 concerns the request for a mandatory injunction requiring the defendants to provide effective barriers to each Consumer Class member. In the Amendment Decision at paras. 38-42, I found that an order for the installation of barriers for fireplaces was within the scope of remedies available under s. 172 of the BPCPA. In the event liability is found, this remedy would be well suited as a common issue and represents a focus of the plaintiffs' desired resolution. This issue will therefore be certified.

[331] The plaintiffs seek to certify common issue 31 for an aggregate award of damages. They reference s. 24(1) in their further amended Notice of Civil Claim however, such awards are made pursuant to s. 29(1) of the CPA. The section states:

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

- (a) monetary relief is claimed on behalf of some or all class members,
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[332] The Supreme Court of Canada has held that an aggregate monetary award under this provision is a procedural tool that provides a "method to assess the quantum of damages on a global basis" and that can only be used after a "finding of liability has been established": *Microsoft* at paras. 131 and 132. At the certification stage, aggregate assessment may be certified only if resolving the other certifiable common issues could be determinative of monetary liability: *Seidel* SC at para. 180.

[333] I note that In *Seidel* SC, Masuhara J. commented, at para. 186, that the ultimate criterion for the availability of an aggregate damage award is whether the defendants' liability can reasonably be determined without proof by individual class members, not whether the defendant's liability can be assessed with the same degree of accuracy as in an individual action. He stated that "by focussing on reasonableness, s. 29 of the CPA strikes a balance between accuracy and access to justice that is 'tilted in favour of access to justice': *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 3066, rev'd in part 2015 ONCA 921." He then referred to the three factors from the Court of Appeal in *Ramdath*: whether the non-individualized evidence presented by the defendants is sufficiently reliable; whether use of evidence will result in unfairness or injustice to the defendant, such as overstatement of its liability; and whether the denial of aggregate approach will result in a 'wrong eluding an effective remedy' and a denial of access to justice.

[334] That said, Masuhara J. also noted that s. 29(1)(c) has been interpreted to mean that there must be a credible or plausible expert methodology to assess the extent of the award: *Infiniteon* at para. 68. In that case, the plaintiffs had expert reports from both parties.

[335] I also note that in *N&C Transportation*, like our case, the plaintiffs relied on *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781 which allowed an appeal dismissing a certification application on the basis that, among other things, the defendants' liability did not require individual assessments to determine what the plaintiffs' would have done had they known about the impugned conduct. In that case, the plaintiffs brought forward allegations that the defendant bank had charged undisclosed fees to Visa credit card holder on foreign currency transactions. In allowing the appeal, the court noted that the "aggregate of [the bank's] liability [could] reasonably be expected to be capable of proof by resort to [the bank's] records of the amount of fee income it collected during the relevant time": *Cassano* at para. 45.

- [336] Applying the criteria here, s. 29(a) of the CPA is satisfied to the extent that monetary relief is claimed on behalf of the class. In respect of s. 29 (b), potential liability could be established on a class wide basis, even though monetary relief may depend on individual assessments. In this case, if the fireplaces are found to be defective without the use of an effective barrier, there would be no questions of fact or law other than those related to the entitlement to monetary relief. The only assessment required would be to quantify the cost of a barrier. I note that issues concerning which class members may or may not have already received a barrier or screen would not necessarily preclude such an award as the matter is to be determined based on whether there is proof of the defendants liability, not the entitlement of individual class members. Section 29 can still be satisfied in the event that not all class members suffered a financial loss: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 133 and *Seidel SC* at para. 181. With respect to s. 29(c), while the plaintiffs have not provided a detailed methodology, given the evidence that the defendants have already manufactured barriers for most products and the evidence from Dr. Buc regarding the costs associated with designing additional barriers for the remaining products, there is a reasonable likelihood that the defendants' liability to class members can determined without proof by individual class members. Accordingly, it follows that the common issue 31 should be certified.
- [337] The plaintiffs also seek to certify common issue 33 concerning disgorgement and restitutionary relief based on waiver of tort.
- [338] In respect of the BPCPA, the Court of Appeal in *Koubi* held, at para. 64 and 65, that because the legislation "represents a comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations it creates," the BPCPA cannot provide the "predicate unlawful act required for a cause of action based on waiver of tort and restitutionary damages": See also *Wakelam* at paras. 55-66; *Charlton* at para.121.
- [339] Accordingly, to the extent that the plaintiffs' waiver of tort claim relies on the breaches of the BPCPA, they cannot be certified. However, there is an arguable case that the plaintiffs may be entitled to seek disgorgement of profits of any negligent conduct which is proven. In that regard, I note the comments of the Ontario Divisional Court in *Serhan Estate v. Johnson & Johnson*, 85 O.R. (3d) 665 that the question of whether the remedy is available should be resolved in the context of a factual background of a more fully developed record:
- [157] Given the uncertain state of the law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation. This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

[340] This approach was accepted by the Supreme Court of Canada in *Microsoft*, where the Court said, at para. 97, that the pleadings stage is not the proper place to resolve the details of the law of waiver of tort.

[341] Accordingly, while it is unclear, given the unsettled state of the law, whether the allegations of negligence would be sufficient to ground the plaintiffs' claim for restitutionary relief, it is at least arguable that such an action may be grounded in negligent actions of the defendants and that the plaintiff class members would be entitled to recover any benefit the defendants gained from its alleged negligent acts. I therefore find that this issue can be certified.

[342] The plaintiffs seek to certify a common issue for punitive damages. Such damages focus on the need to punish morally reprehensible behaviour rather than simply compensating for loss. In the seminal case on the matter, *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the Supreme Court of Canada described punitive damages as follows:

36 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[343] As punitive damages are only available if all other penalties are found to be inadequate, claims for such damages would need to till resolution of any individual trials after the proposed common issues trial. This is not, however, fatal to certification of this issue. Indeed, as was noted by our Court of Appeal in *Chalmers v. AMO Canada Company*, 2010 BCCA 560, the fact that determination of the entitlement and quantification of punitive damages cannot be determined until conclusion of the individual trials does not preclude certification of a punitive damages issues:

[31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct, and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[Emphasis added.]

[344] Here, I agree that punitive damages are a common issue as there is some evidence that the defendants knew the product was defective (in causing burns to children) but did not take redesign or take corrective action until the U.S. settlement. There is evidence from Dr. Buc, Dr. Pollack- Nelson and Dr. Verchere that the defendants may have known of the incidents and the need for a solution as early as 2001. I therefore agree to certify this common issue to be resolved at the conclusion of all necessary proceedings.

[345] Finally, the plaintiffs seek to certify two additional issues, issue 35 concerning court ordered interest and 32 concerning joint and several liability. These issues were not addressed by the plaintiffs in any meaningful way in their submissions. At this juncture, I am not persuaded that these issues are appropriate for certification.

[346] Therefore, I find that the following common issues should be certified:

S. Should each of the Defendants with respect to their particular Fireplaces be ordered to provide free of charge an Effective Barrier to each Consumer Class member who has one or more of their Fireplaces?

T. Are the Defendants, or any of them, liable to an Order of disgorgement and restitution to the Consumer Class Members of all revenues or alternatively, all profits, derived by the Defendants in association with, or from, their wrongful conduct? If so, what is the amount for each Defendant?

U. Have the Defendants, or any of them, engaged in conduct warranting punitive or exemplary damages? If so, in what amount?

Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[347] The CPA requires that a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) of the CPA sets out a specific list of criteria to be assessed when determining preferability of the proceedings:

- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, 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.

[348] Our Court of Appeal in *Infineon* at para. 71, cited the following *Cloud v. Canada* (Attorney General), [2004] O.J. No. 4924 (C.A.), concerning the proper approach to the question of preferable procedure:

[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.

[Emphasis added.]

[349] Therefore, the plaintiffs must show that the class action as proposed is the preferable procedure in light of the statutory requirements and the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice. The Supreme Court of Canada has warned that this should not be construed as creating a requirement to prove that the proposed class action will actually achieve those goals in a specific case: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 22. Here, in reviewing the case through the objectives of class proceedings and the common issues as a whole, I find that the present proceedings will serve the objectives in a preferable manner.

[350] The defendants argue that given the multitude of individual issues and the challenges in proving some of the common issues, a class proceeding would be unfair and inefficient. Specifically, they claim that the plaintiffs face significant problems of proof regarding the applicable standard of care over the course of many years that would require an individual assessment and lead to a break down in the common proceedings. They further claim that the action faces issues in light of the damages that may be claimed. They note that the plaintiffs focus only on the economic loss claims and health care cost claims leaving the most significant individual personal injury claims outstanding and unresolved to be pursued separately. They claim that this will require separate proceedings and duplication in fact finding. Proof of any common issue on a class wide basis would be, they claim, an insignificant contribution to the advancement of the action.

- [351] First, as I have concluded above, there are common issues appropriate for certification that are not overwhelmed by individual inquiries. I made this finding despite issues concerning individual damages and causation, as the common issues in my view will answer fundamental questions that would advance the claims notwithstanding the type and extent of the damages individually claimed by the members of the class. Further, several of the remedies pleaded including the injunctive, restitutionary, and punitive relief are more appropriately dealt with on a class wide basis in this case. If it is found that the defendants have breached their standard of care by creating a risk that they knew about, certification of these issues would advance the goals of judicial economy, behaviour modification and access to justice.
- [352] If found to be liable, the proceedings will have a significant effect on the behaviour of defendants and other similar manufactures in Canada. The defendants submit that, to the extent that the plaintiffs focus their claim on the "need for barriers", certification of this class action is not necessary to achieve the goal of behaviour modification because Lennox has provided guards since 2011 and the new industry standard requires screens shipped with all new models. However, I am not persuaded that this is a legitimate alternative means to obtain recourse for the class members. As noted, there is evidence that the program was only instituted as a result of the U.S. class action, there appear to be obstacles to class members in finding the program to successfully obtain a barrier, and the evidence suggests that the program has not been well utilized. I note the evidence of Ms. Sims was that the Lennox Defendants have provided 187 safety guards to 177 fireplace owners in Canada - which I observe is less than 1% of the 26,830 fireplaces reportedly sold in Canada. This may suggest that the defendants' efforts to advertise the free safety guards have not been sufficient.
- [353] Concerning access to justice, the Court in Fischer highlighted five questions to assist in the determination of whether the class action will serve the goal of access to justice, namely: 1. What are the barriers to access to justice? 2. What is the potential of the class proceeding to address those barriers? 3. What are the alternatives to class proceedings? 4. To what extent do the alternatives address the relevant barriers? 5. How do the two proceedings compare? These questions must "not be considered in isolation or in a specific order, but should inform the overall comparative analysis": Fischer at para. 26.
- [354] The Court went on to highlight the sort of barriers to access to justice that may arise in court proceedings concerning certification:

27 The sorts of barriers to access to justice may vary according to the nature of the claim and the make-up of the proposed class. They may relate to either or both of the procedural and substantive aspects of access to justice. The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature. They may arise from such factors as the ignorance of the availability of substantive legal rights ignorance of the fact that

significant injuries have occurred limited language skills elderly age of the claimants frail emotional or physical state of the claimants or alienation from the legal system as a result of negative experiences with it... A common procedural barrier is that there is no other procedure available to afford meaningful redress

[Citations removed.]

[355] Here, economic considerations militate in favour of a class action proceeding. If the fireplaces do contain a dangerous defect, class proceedings will ensure a remedy for a broad class that would, in the absence of a class proceedings, require members to each pursue their own claim. Members may not be in a position to bring claims on their own. Further, the only alternative proceeding proposed by the defendants is the free barrier program. As noted above, I do not consider this approach to offer meaningful redress for the class members. I therefore am of the opinion that a class action proceeding are the only meaningful avenue for access to justice for the class.

[356] I therefore find that s. 4(1)(d) of the CPA is satisfied.

Is there an appropriate representative plaintiff?

[357] As noted, s. 4(1)(e) of the CPA requires 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.

[358] I was directed to several judgments outlining the general requirements and principles to be applied under this section including *Watson v. Bank of America Corp.*, 2014 BCSC 532 at paras. 71-75; *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (B.C.C.A.) at para. 75; *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717, aff'd 2004 BCCA 549 at para. 77; *Infineon* at para. 79; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41; *Finkel* at para. 123. These raised the following principles:

- The plaintiff must fairly and accurately represent the interests of the class. In making this assessment, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
- The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that they have a common interest with the class members and that the proposed representative will vigorously and capably prosecute the interests of the class.

- The plaintiff must have a litigation plan with a workable method of advancing the proceeding and of notifying the class members to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them.
- The plaintiff must not have a conflict of interest with other class members on the common issues. In some cases opt-out provisions may be relied on, or subclasses may be created, to alleviate any conflicts of interest.

[359] At the start of this action, the plaintiffs put forward Ms. Cantlie as the proposed representative plaintiff for the Consumer Class and Mr. Cantlie as the proposed representative plaintiff for the Health Care Costs Class. In the certification hearings held in September and October 2015, the defendants' position was that the Cantlie's settlement with the settling defendants meant they no longer had a cause of action, as required by the CPA, because their fireplace was manufactured by a settling defendant. As noted, prior to the conclusion of that certification hearing, the plaintiffs applied to both amend their pleadings and for leave to add a new representative plaintiff, Mr. Murray. Subsequently, on December 24, 2015, the plaintiffs applied to add Ms. Gorji as an additional representative plaintiff.

[360] The defendants continue to take the position that the action should not be certified as the plaintiffs have failed to satisfy the requirements for an appropriate representative plaintiff under s. 4(1)(e).

1. Ms. Cantlie

[361] The parties are in agreement that, given the terms of the settlement agreement reached between the Cantlie's and the settling defendants, Ms. Cantlie is no longer a member of the class. However, the plaintiffs argue that consideration of the economy of judicial resources and access to justice militates in favour of appointing Ms. Cantlie as a representative plaintiff under s. 2(4) of the CPA. For reference, s. 2 states:

Plaintiff's class proceeding

2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

- (2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.
- (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

- [362] The defendant submit that there is no evidentiary and principled basis in this case for the exercise of the courts' discretion under s. 2(4) to appoint a non-class member and that the burden of "substantial injustice" requires there to be some unusual circumstances, usually resting in the peculiar vulnerabilities of the class, that warrant the application of the provision.
- [363] Despite the fact that Mr. Murray and Ms. Gorji are involved, the plaintiffs contend that a substantial injustice to the class would occur if Ms. Cantlie was not permitted to remain a representative plaintiff. In this regard, the plaintiffs claim that not appointing Ms. Cantlie would prejudice the class because there would be a loss of demonstrated commitment and competence by Ms. Cantlie and because there would be a loss of the benefit of the knowledge and insight gained by Ms. Cantlie. They highlight the fact that Ms. Cantlie has deposed that she continues to be is still ready, willing and able to act in the representative capacity despite the settlement.
- [364] The defendants have highlighted the decisions in *Stewart v. Enterprise Universal Inc.*, 2010 ABQB 259 and *Dominguez v. Northland Properties Corp.*, 2012 BCSC 539 to demonstrate how significant the burden to certify a person under s. 2(4) as a representative plaintiff who is not a class member. This section has received little judicial consideration since its enactment, although, it is clear that the burden under the section is high and involves consideration of both the suitability of the plaintiff and the circumstances of the class members themselves.
- [365] In *Stewart*, Martin J. reviewed the application of a similar provision in Alberta's class action legislation. In the case, the plaintiff, a registered nurse, had brought a claim on behalf of employees and residence of a medical facility for negligent removal of asbestos by the operating company. The plaintiff's claim was struck prior to trial, leaving only the claims on behalf of the residents. In the decision, Martin J. recognized that, in order to continue as representative plaintiff, the plaintiff would have to be appointed under s. 2(4) given that she was not a member of the class. The court held, at para. 89, that allowing the plaintiff to represent residents against the defendants did not avoid "any demonstrated substantial injustice to the class". In coming to this decision, Martin J. noted at para. 88 that prior application of the section was limited to situations where the facts were exceptional.
- [366] In *Dominguez*, Fitzpatrick J. considered the application of the section in B.C. in the context of a class action involving temporary foreign workers. Prior to the decision, Fitzpatrick J. had already certified the class action and appointed a representative plaintiff; however, the appointed representative plaintiff had to relocate out of the country, making her a non-member of the resident class. In rejecting the argument that she was not an appropriate plaintiff, Fitzpatrick J. noted that access to justice was a paramount consideration when interpreting and applying s. 2(4): *Dominguez* at para. 34. Further, she commented that the case law emphasised a consideration of the special ability, experience or resources of the proposed representative plaintiff and the circumstances of the class members themselves: *Dominguez* at paras. 36 and 39. In finding that it would be a substantial injustice to not

allow the plaintiff to remain as a representative plaintiff, she emphasized the fact that the plaintiff had vigorously advanced the claim for the class members to date, had been substantially involved in the litigation, had an ongoing claim against the defendants, and that the class was particularly vulnerable given their foreign worker status: Dominguez paras. 36 - 50.

[367] Of note, in both cases the court referred to the decision in *Elder Advocates of Alberta Society v. Alberta*, 2008 ABQB 490 aff'd 2009 ABCA 403, rev'd on other grounds 2011 SCC 24. In that decision, Greckol J. at paras. 545-548 appointed a person who was not a member of the proposed class because he could advance the litigation on behalf of people who were aged and disabled. The appointment was upheld on appeal and was not further addressed on appeal to the Supreme Court of Canada.

[368] Here, Ms. Cantlie has been involved in the action since the outset and is committed to proceeding as a representative. Counsel highlights the fact that she has provided all necessary affidavits, has been cross-examined, and that she has carried out all of the obligations of a proposed representative. Further, she states that her motivations are to ensure that fireplaces are safe in general and they were never limited to her own situation. I do not doubt these intentions or the value of her contributions; however, I am not satisfied that not appointing Ms. Cantlie would result in a substantial injustice to the class.

[369] I do not find that the class has any particular vulnerability and in need of special consideration as was the case in *Elder Advocates of Alberta Society* and *Dominguez*. The class is made up of members of the public who have fireplaces made by the defendants installed in their homes. The class would include a variety of people from different socioeconomic and cultural backgrounds. The common bond of the class is that they own or occupy residence with fireplaces, not their relative abilities or circumstances. I see no reason Ms. Cantlie must be involved as a representative plaintiff given this consideration.

[370] Further, I do not see a reason why other members could not represent the class in an effective manner given the progress to date. Indeed, Mr. Murray and Ms. Gorji will be able to pursue the claims on behalf of class members and both have deposed that they will represent the class as these proceedings advance. The decision on how best to proceed with the litigation moving forward can be made by other members of the class.

Mr. Murray and Ms. Gorji

[371] The plaintiffs amend their pleadings in 2015 to add two new representative plaintiffs, Mr. Murray and Ms. Gorji.

[372] As noted, both Mr. Murray and Ms. Gorji have fireplaces manufactured by the defendants installed in their homes. The defendants nevertheless submit that they are not appropriate representative plaintiffs. They claim that Mr. Murray has a barrier installed and that his fireplace is no longer dangerous or defective and that Ms. Gorji's fireplace is not operational and she is now aware she can get a barrier (i.e. through the litigation process).

[373] I find these arguments unpersuasive. The proposed representative need not be "typical" of the class, nor the "best possible representative", rather, the court must be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class. The fact that Mr. Murray now has a fireplace barrier and that Ms. Gorji does not use her fireplace, does not mean that they have no cause of action against the defendants for their alleged negligence or alleged violations of the BPCPA. I find on the evidence that these two plaintiffs intend to vigorously pursue the claim even though they may have taken steps to make their fireplaces safe in the interim.

[374] I note that the plaintiffs have submitted an eight page litigation plan appended to their further amended Notice of Civil Claim. While it is clear that the plan may need to be amended moving forward, it is not the role of the court at certification to scrutinize the plan to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment: Fakhri at para. 77. I find that the plan is acceptable at this stage of the proceedings.

[375] The plaintiffs have therefore satisfied s. 4(1)(e) of the CPA.

The Health Care Cost Class

[376] Mr. Cantlie purports to bring an action under the HCCRA on behalf of the proposed class of individuals (the "Health Care Costs Class") consisting of:

All persons residing in British Columbia who have been injured by contact with a fireplace, and who are beneficiaries who have received health care services, as those italicized terms are defined in the HCCRA

[377] The HCCRA gives individuals who receive or could be expected to receive health care services the right to recover the past and future cost of those health care services from "wrongdoers". Section 2 of the HCCRA states:

Beneficiary's right to recover

2 (1) If, as a direct or indirect result of the negligence or wrongful act or omission of a wrongdoer, a beneficiary suffers a personal injury for which the beneficiary receives or could reasonably be expected to receive one or more health care services, the beneficiary may, subject to sections 6 [government may intervene in proceeding or assume conduct of claim] and 20 (2) and (3) [payments to government], recover from the wrongdoer

- (a) the past cost of health care services, and
 - (b) the future cost of health care services.
- (2) Subsection (1) applies whether or not the personal injury was caused in whole or in part by the wrongdoer.

- (3) For the purposes of subsection (1) but subject to section 20 (2) and (3) [payments to government], payment or expenditure by the government, whether directly or through one or more agents or intermediaries, under any of the Acts referred to in the definition of "health care services" or under any other government plan or scheme of insurance for past and future costs referred to in subsection (1) must not be construed to affect the right of the beneficiary to recover those costs in the same manner as if those costs are paid or payable by the beneficiary.
- (4) The past and future costs referred to in subsection (1) may be recovered as damages, compensatory damages or otherwise.

[378] Section 3 then imposes an obligation to bring a health care services claim if a person under s. 2 begins an action:

Obligation to claim

3 (1) If, in his or her own name or as a member of a class of persons under the Class Proceedings Act, a beneficiary referred to in section 2 (1) [beneficiary's right to recover] of this Act or his or her personal or other legal representative commences a legal proceeding against a person alleged to be the wrongdoer for damages arising from or related to the beneficiary's personal injury or death, the beneficiary or his or her personal or other legal representative must include a health care services claim in that legal proceeding.

- (2) Subsection (1) does not apply if the government has already done either of the following:
 - (a) settled the health care services claim referred to in subsection (1);
 - (b) commenced a legal proceeding under section 8 (2) [government has independent right to recover] to recover the past and future costs of health care services.
- (3) If a health care services claim has not been included in a legal proceeding described in subsection (1), the court must permit amendment of the originating documents, up to 6 months after the date on which the originating documents were filed with the court, in order to provide for that inclusion.
- (4) Nothing in the Limitation Act prevents inclusion of a health care services claim under subsection (3) if the original legal proceeding for damages under subsection (1) is brought within the time limited for doing so under that Act.

[379] Under the HCCRA, wrongdoer is defined as:

"wrongdoer" means

- (a) a person whose negligent or wrongful act or omission causes or contributes to a beneficiary's personal injury or death, and

- (b) a person who is responsible at law for the acts or omissions of a person referred to in paragraph (a),

but does not include the beneficiary.

[380] The HCCRA has had limited judicial treatment and I was not directed to any case law where it had been applied in the context of a class action with the exception of a brief reference in *Knight v. Imperial Tobacco Canada Ltd.* 2011 SCC 42. The HCCRA was considered in the decision of *Gosselin v. Shepherd*, 2010 BCSC 755 where Sewell J. stated the following concerning the scheme:

14 Counsel for the defendants submit that the Act creates a new statutory cause of action. I tend to agree with the defendant's counsel on this issue. The Act does create a statutory cause of action in favour of the government. I think that s. 2(1) of the Act also creates a statutory right to recover specific costs in addition to damages actually suffered by the beneficiary. In addition, the provisions of ss. 3(3) and 3(4) of the Act strongly suggest that the legislature regards a health care services claim as a new and distinct cause of action. However, on the view I take of the matters before me, I do not find it necessary to decide that issue.

15 The Act gives the government four different ways to recover the costs of health care services. Section 3(1) of the Act obligates a beneficiary who commences a legal proceeding against a wrongdoer for damages for personal injury or death to include a health care services claim in the legal proceeding. Section 3(3) provides that the Court must permit amendment of the originating documents up to six months after the date on which the originating documents were filed in the Court if a health care services claim has not been included in a legal proceeding. Section 6(1) of the Act permits the government to intervene in any proceeding referred to in s. 3 and assume conduct of the health care services portion of that proceeding. Section 7 provides that the government is subrogated to any right which a beneficiary referred to in s. 2 has to recover past and future costs of health care services under that section. Finally, s. 8 provides that, despite s. 2 and independent of its subrogated rights under s. 7, the government has a direct cause of action against the wrongdoer and may commence legal proceedings in its own name for the recovery of the past and future cost of health care services.

[381] In arguing against certification of this class, the defendants submit that the plaintiffs fail to meet all the requirements under the CPA. They argue that in bringing essentially an economic loss claim in conjunction with a claim for health care costs, the plaintiffs have not been able to sufficiently plead the health care cost claim. However, I note that the HCCRA claim is independent of the consumer claim and should be assessed on that basis.

[382] The defendants submit that the plaintiffs' pleadings are deficient as they lack pleadings that the defendants are wrongdoers, that the members of the class are beneficiaries, and that the plaintiffs suffered personal injury as a result of negligence or wrongful act or omissions of the wrongdoers.

- [383] The health care cost claim pleadings are included in the plaintiffs' pleadings at paras. 22, 24, 25, 27, 31, 37, 44, 52, 61, 74, and 75.
- [384] Generally, I find the pleadings sufficient for the purposes of certifying a health care cost claim at this stage. The plaintiffs, in essence, pleaded that as a result of the negligent behaviour of the defendants, class members will have incurred health care cost losses. While they may not have included pleadings specifically alleging that the defendants were wrongdoers, it is implied given that the definition of wrongdoer is "a person whose negligent or wrongful act or omission causes or contributes to a beneficiary's personal injury or death." The plaintiffs specifically pleaded that the defendants breach of their duty of care and that their representations resulted in past and future health care services.
- [385] The defendants further allege with respect to the Health Care Cost Claim that there remains no evidence that any person has suffered a burn injury as a result of touching the exterior glass surface of a defendants' fireplace such that they would have a claim under the HCCRA. Therefore, they argue that there are not more than two members of the Health Care Costs Class. I respectfully disagree. Dr. Verchere gave evidence that she has personally treated or supervised the treatment of well over 100 children in British Columbia who were seriously burned and she is currently involved in a study of more than 600 such incidence in Canada. Further, there is evidence Lennox Defendants have had a significant market share in both British Columbia and Canada. Finally, the plaintiffs provided an affidavit from Marie Fleury whose son was allegedly seriously burned in 2012 by a Lennox fireplace. I find based on this evidence, I can infer that there are two or more members of this class.
- [386] As noted, Mr. Cantlie brings the claim on behalf of the Health Care Costs Class. He, like Ms. Cantlie, is not a member of the class because of the settlement. However, unlike Ms. Cantlie, I find that there would be a substantial injustice if Mr. Cantlie was not allowed to continue as representative for this class. Appointing Mr. Cantlie would be consistent with the purpose of the legislation which is to allow the government to recoup health care costs incurred through the actions of a wrongdoer. In circumstances where the evidence of Dr. Verchere is that children are being burned through contact with the glass on gas fireplaces, it is in the interests of the public that a representative plaintiff be appointed under s. 2(4) of the CPA.
- [387] Unlike the Consumer Class, the evidence suggests that the class will be composed disproportionately of children and people with disabilities. Mr. Cantlie is the only representative plaintiff proposed for this class and, if he is not appointed, the class will be left without a representative plaintiff: see Dominguez as discussed above. I accept that Mr. Cantlie will continue to diligently advance the claim on behalf of the class.
- [388] Finally, in regards to the common issues, the plaintiffs propose the following common issues for the class:

36. If the defendants, including the Lennox Defendants or any of them, were negligent with respect to the Defects and Dangers or the Representation:
- That negligence caused or contributed, directly or indirectly, to personal injury which has resulted in past cost of health care services? If so, in what amount?
 - Is that negligence reasonably expected to cause or contribute, directly or indirectly, to future cost of health care services? If so, in what amount?
37. If the defendants, including the Lennox Defendants or any of them, made the Representation:
- was the Representation a wrongful act or omission within the meaning of the HCCRA?
 - has the Representation caused or contributed, directly or indirectly, to personal injury which has resulted in past cost of health care services? If so, in what amount?
 - is the Representation reasonably expected to cause or contribute, directly or indirectly, to future cost of health care services? If so, in what amount?

[389] Common issue 37(a) is appropriate for certification and will advance the litigation. The remaining common issues relate to causation and quantum and I find that these would require individual assessment. While the plaintiffs may be correct in arguing that a certificate issues under s. 16 of the HCCRA provides a common mechanism for proving damages for the class, the answer to this question would still require individual assessments as to the causal connection between any personal injury and the alleged representations. I therefore decline to certify the other issues.

[390] I therefore certify the following issues:

V. If the defendants, including the Lennox Defendants or any of them, were negligent with respect to the Defects and Dangers or the Representation:

- that negligence caused or contributed, directly or indirectly, to personal injury which has resulted in past cost of health care services? If so, in what amount?

Security Chimney

[391] While the Lennox and Security Chimney defendants made a joint submission in respect of the certification application, Security Chimney made a separate submission that the plaintiffs did not particularize the allegations to distinguish between Lennox and Security Chimney and that Security Chimneys stopped manufacturing, distributing and selling fireplaces in 2001. They refer to the application of limitation periods and also argue that any evidence in support of certification of Lennox cannot be used to certify the action against Security Chimneys.

[392] At this juncture, the evidence before me is that Security Chimney was owned by Lennox at the material times and did manufacture gas burning fireplaces with glass or ceramic glass fronts, including direct vent and b-vent fireplaces, in Canada. Lennox acquired Security Chimney in 1998 and did not sell until 2012. Also, as noted above, issues concerning limitation periods are to be left to be determined on a full record. I therefore find that for the purposes of certification, Security Chimneys should be included with the other defendants.

Conclusion

[393] In summary, for the reasons set out above, I certify this action as a class proceeding, subject to the following:

- i. The pleadings of negligent misrepresentation, strict liability, breach of the Competition Act and breach of ss. 8 and 9 of the BPCPA are not certified;
- ii. Ms. Cantlie is no longer a representative plaintiff; and
- iii. The common issues which are certified are as provided at paragraphs 298, 321, 328, 346, and 390.

[394] In the event that the parties do not agree on the matter of costs, the parties may make arrangements for submissions through Supreme Court Scheduling.

"Harris, J."

APPENDIX

PLAINTIFF'S AMENDED PROPOSED COMMON ISSUES FOR CERTIFICATION

1. Did the Defendants or any of them develop, design or test Fireplaces and if so, what models of Fireplaces did each Defendant develop, design or test and during what period of time?
2. Did the Defendants or any of them distribute, supply, advertise, market or sell Fireplaces and if so what models of Fireplaces did each Defendant distribute, supply, advertise, market or sell?
3. Did the Defendants or any of them owe Class Members a duty of care?
4. If the Defendants did owe the Class Members a duty of care, did the Defendants in the development, design and testing, of the Fireplaces breach the applicable standard (or standards) of care during the material times?
5. If the Defendants did owe the Class Members a duty of care, did the Defendants in the distribution, supply, marketing, advertisement and/or sale of the Fireplaces breach the applicable standard (or standards) of care during the material times?

6. Were the Fireplaces of the Defendants, or any of them, unfit for their intended purpose, defective and/or dangerous?
7. Did the Defendants, or any of them, know of these defects and dangers and if so, when?
8. Did the Defendants, or any of them, fail to properly research the design of the Fireplaces?
9. Did the Defendants, or any of them, fail to engage in adequate pre-market testing of the Fireplaces?
10. Was the propensity of Fireplaces to cause very serious injury, particularly very serious injury to the most vulnerable, such that it outweighed the value of the use of the Fireplaces?
11. Did the Defendants, or any of them, have a duty to warn the public with respect to the Fireplaces and if so, how and to what extent did they warn, if at all?
12. Do the Defendants, or any of them, have the means to remedy, modify and/or repair the Defects and Dangers? If so,
 - a. when did they first discover the defects and dangers?;
 - b. was the use of an Effective Barrier known to the Defendants and:
 - i. if so when was it known?
 - ii. If not:
 1. should it have been known?;
 2. and if so, when should it have been known?
 - c. was the use of an Effective Barrier a safe and economically feasible design alternative?
 - d. what steps if any did they take as a result, to remedy and/or repair?
 13. When, if ever, have the Defendants, or any of them, remedied, modified or repaired the Defects and Dangers for other users such as non-class members, including in particular:
 - a. commercial users; and
 - b. users in the United States?
 14. Did the Class Members rely on the Representation when they purchased and / or used their Fireplace?
 15. Were any warnings that were given by the Defendants, or any of them, adequate given the Defects and Dangers? Would any warning be adequate given the Defects and Dangers?
 16. Should the Defendants, or any of them, have initiated a product recall? If so, when?
 17. With respect to the Representation made by the Defendants, or any of them:
 - a. Was the Representation made to the public regarding the Fireplaces?

- b. Was the Representation false, misleading and/or deceptive and either by what was represented or by omission?
 - c. Was the Representation made in good faith, honestly and truthfully?
 - d. Did the Representation disclose, or adequately disclose, the existence of the Defects and Dangers?
 - e. Alternatively, was any disclosure incomplete, misleading or did it seek to minimize or downplay the defects and dangers?
18. When used as designed and intended, are the Fireplaces of the Defendants, or any of them, dangerously defective?
19. Did the Representation have the capability, tendency or effect of deceiving or misleading consumers?
20. If so:
- a. did the Representation violate s.5 of the BPCPA?
 - b. are Class Members entitled to a declaration pursuant to s. 172(1)(a) of the BPCPA that the Representation contravenes the BPCPA?
 - c. are Class Members entitled to an interim or permanent injunction pursuant to s. 172(1)(b) of the BPCPA restraining the Defendants or any of them from continuing to make the Representation?
 - d. are Class Members entitled to an order pursuant to s. 172(3)(a) of the BPCPA that the Defendants or any of them restore to them the monies that have been acquired as a result of the Representation?
 - e. are Class Members entitled to an order pursuant to s. 172(3)(c) of the BPCPA that the Defendants or any of them advertise to the public, in a manner that will ensure prompt and reasonable communication to consumers, particulars of any and all judgments, declaration, orders or injunction granted against them in this proceeding?
21. Does the BPCPA apply to the Defendants' relationship to members of the Consumer Class?
22. Were the Defendants "suppliers" to consumer transactions within the meaning of the BPCPA and/or its predecessor legislation?
23. In making the Representation did the Defendants, or any of them, breach the BPCPA and/or its predecessor legislation?
24. When did the Defendants first become aware that very young children, the elderly and persons with disabilities that affect their balance were particularly susceptible to injury from contact with the Fireplaces?

25. What steps were known to the Defendants to be available to reduce or eliminate the risk to children of burns from contact with the Fireplaces, and when did the Defendants know?
26. Can the Fireplaces be rendered safe via modifications such as Effective Barriers and if so, at what cost and how long will that take?
27. Does strict liability afford a possible legal remedy, based on the facts alleged in the Amended Notice of Civil Claim as it stands, or as it may reasonably be amended?
28. Did the Defendants or any of them, engage in conduct that is contrary to section 52 of the Competition Act 1985, c-34 (the "Competition Act")? If so, what was the duration of this conduct?
29. Did the Defendants, or any of them, engage in conduct that is contrary to the Business Practices and Consumer Protection Act, S.C.B. 2004, c.2 (the "BPCPA"). If so, what was the duration of that conduct?

DAMAGES

30. Should each of the Defendants with respect to their particular Fireplaces be ordered to provide free of charge an Effective Barrier to each Consumer Class member who has one or more of their Fireplaces?
31. Can an aggregate award of damages be made pursuant to s 24(1) of the Class Proceedings Act?
32. Are the Defendants jointly and severally liable for damages for their own conduct and that of the other Defendants?
33. Are the Defendants, or any of them, liable to an Order of disgorgement and restitution to the Consumer Class Members of all revenues or alternatively, all profits, derived by the Defendants in association with, or from, their wrongful conduct? If so, what is the amount for each Defendant?
34. Have the Defendants, or any of them, engaged in conduct warranting punitive or exemplary damages? If so, in what amount?
35. Are the Defendants, or any of them, liable to pay court ordered interest?
36. If the defendants, including the Lennox Defendants or any of them, were negligent with respect to the Defects and Dangers or the Representation:
 - a. has that negligence caused or contributed, directly or indirectly, to personal injury which has resulted in past cost of health care services? If so, in what amount?
 - b. Is that negligence reasonably expected to cause or contribute, directly or indirectly, to future cost of health care services? If so, in what amount?

37. If the defendants, including the Lennox Defendants or any of them, made the Representation:
- a. was the Representation a wrongful act or omission within the meaning of the HCCRA?
 - b. has the Representation caused or contributed, directly or indirectly, to personal injury which has resulted in past cost of health care services? If so, in what amount?
 - c. is the Representation reasonably expected to cause or contribute, directly or indirectly, to future cost of health care services? If so, in what amount?
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Prepared on 27 October 2026 · Esheria