

A CLASS ACTION BLUEPRINT FOR ALBERTA

By William E. McNally and Barbara E. Cotton^{1 2}

Interesting things have been happening in Alberta recently regarding class action proceedings. Alberta is handicapped to a certain extent in that it does not have class action legislation to guide procedures akin to that in Ontario, British Columbia, Quebec and Saskatchewan, for example. Rather, Alberta must rely on Rule 42 of the *Alberta Rules of Court* to provide the basic framework for a class action proceeding, which is advanced by way of a representative action.³ In the absence of legislation, however, the courts have been articulating a blueprint for class action proceedings in Alberta.

The corner stones of this blueprint were recently established by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere et al.*⁴ a decision of McLachlin C.J. In this case the two representative plaintiffs, together with 229 other investors, had become participants in the federal government's Business Immigration Program by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"), which was incorporated by Dutton, the sole shareholder, for the purpose of helping investor class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings for the purpose of exploring for gold in Northern Saskatchewan. After the investors' funds were deposited it entered into agreements with Claude Resources Inc. ("Claude") for the purchase of rights to a crown surface lease and committed monies for further surface improvements and for the construction of a gold mill. To finance these obligations of WCSC Dutton directed that series A debentures be issued in an aggregate principal amount of \$22,050,000 to some of the investors. Dutton advanced more funds and corresponding debentures were issued. Eventually, the debentures were pooled. Claude had leased the lands and facilities back from WCSC and the payments required of Claude under the lease matched the payments required of WCSC under the debentures. Claude then announced that it could not pay the interest due on the debentures.

The two representative plaintiffs commenced a class action complaining that Dutton and various

affiliates and advisors of WCSC had breached fiduciary duties to the investors by mismanaging their funds. The defendants responded by applying to the Alberta Court of Queen's Bench for a declaration and an order striking out the portion of the claim in which the individual plaintiffs purported pursuant to Rule 42 of the Alberta *Rules of Court* to represent the class of investors. The Chambers judge denied the application, which was upheld by the majority of the Alberta Court of Appeal. The defendants then appealed to the Supreme Court of Canada, which dismissed the appeal and took the opportunity to review class action procedure in Alberta in general.

The heart of the decision is that, notwithstanding the absence of class action legislation in Alberta, class action proceedings can be advanced by way of representative actions pursuant to Rule 42 of the Alberta *Rules of Court*, with the courts exercising their inherent power to settle the rules of practice and procedure to govern class action proceedings as disputes are brought before them.

Principles previously established in the leading Alberta case of *Korte v. Deloitte, Haskins & Sells*⁵ were adopted in modified form such that class actions were held to be allowed to proceed under Alberta Rule 42 where the following conditions were met:

- (1) The class was capable of clear definition;
- (2) There were issues of law or fact common to all class members;
- (3) Success for one class member meant success for all; and
- (4) The proposed representative adequately represented the interests of the class.

Further, the Supreme Court of Canada stated that if these conditions were met, the court must also be satisfied, in the exercise of its discretion, that there were no countervailing considerations that outweighed the benefits of allowing the class action to proceed.

The Supreme Court of Canada gave further guidance with respect to this basic blueprint. With respect to the first criteria, it stated that the class must be capable of clear definition. Class definition is critical because it identifies the individual entitled to notice and the individuals who will be bound

by the judgement. The class must be defined clearly at the outset of the litigation and the class definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

With respect to the second criteria, there must be issues of fact or law common to all class members. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue would be "common" only where its resolution is necessary to the resolution of each class members claim. It is not essential that the class members be identically situated vis-a-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

With respect to the third criteria, success for one class 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. A class action should not be allowed if class members have conflicting interests.

With respect to the fourth criteria, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, 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 may not be "typical"

of the class, nor the “best” possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

The Supreme Court of Canada also inferentially adopted criteria as to when certification should not be denied. Certification should not be denied on the grounds that:

- (1) The relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues;
- (2) The relief claimed relates to separate contracts involving different members of the class;
- (3) Different class members seek different remedies;
- (4) The number of class members or the identity of each class member is unknown; or
- (5) The class includes subgroups that have claims or defences that raise common issues not shared by all members of the class.

The Supreme Court of Canada also addressed minor procedural points. It decided:

- (1) All potential class members must be given notice of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out before any decision is made that purports to prejudice or otherwise affect the interests of class members;
- (2) The court retains discretion to determine how the individual issues should be addressed once common issues have been resolved, and generally individual issues will be resolved in individual proceedings;
- (3) In the absence of comprehensive class action legislation, courts must address procedural complexities on a case-by-case basis with the court approaching the issues in a flexible and liberal manner, seeking a balance between efficiency and fairness; and
- (4) Discovery may be had as of right of a class representative; examination of other class members should be available only by order of the court upon the other party showing

reasonable necessity.

Thus the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere et al.* laid the foundation for class action proceedings in Alberta and opened the door for further development of a class action blueprint to be developed by the Alberta courts on a *ad hoc* basis.

In a recent important decision Mr. Justice John D. Rooke has responded to the Supreme Court of Canada's invitation to develop a class action blueprint for Alberta through judicial activism and has further established important leading principles. In the decision of *Pauli et al. v. Ace Ina Insurance et al*⁶ Rooke J. was called upon to settle certain procedural matters in the Alberta class action proceeding commenced in the wake of the *McNaughton*⁷ decision issued by the Ontario Court of Appeal. In *McNaughton* it was proposed that a class action proceeding be commenced in Ontario to recover damages resulting from insurance companies' deduction of a deductible from the actual cash value paid for an automobile when the title for the salvage was taken by the insurer. The applicant had applied to the court for a declaration that pursuant to the statutory condition in the Ontario *Insurance Act* the insurer was not entitled to deduct the deductible and the Ontario Court of Appeal had so declared. Leave to appeal to the Supreme Court of Canada was refused. Following the refusal of leave to appeal to the Supreme Court of Canada class action proceedings were commenced in various jurisdictions, including in Alberta by way of a representative action pursuant to Rule 42.

Rooke J., as designated case management judge regarding the Alberta representative action, was called upon as a preliminary matter to settle points of procedure and in doing so established another corner stone in the blueprint for class action proceedings in Alberta. Most significantly, he stated that there would be a presumption that the procedures for class action proceedings set out by the Alberta Law Reform Institute in its Final Report No. 85 on class actions⁸ would be the proper procedure.

He had two significant caveats with respect to this presumption: (1) none of the substantive provisions in the Alberta Law Reform Institute Report were to be applicable, absent proof that the

court had jurisdiction to so order; and (2) costs would be presumed to follow in the ordinary course of litigation, i.e., neither of the alternatives presumed by the Alberta Law Reform Institute with respect to costs would be presumed. In further reasons for judgement he clarified that the “substantive provisions” that he was referring to in his first caveat included the provisions regarding: the suspension of limitation periods, the adoption of evidence principles specific to class proceedings, the introduction of aggregate assessment of damages and class member rights of appeal.

Reviewing in detail then the recommendations of the Alberta Law Reform Institute in its Final Report No. 85, and excluding those recommendations which fall within the two caveats of Rooke J., it can be seen that this decision has established a presumption that the following procedure will govern class action proceedings in Alberta (presumably until such time as legislation is enacted in this area):

RECOMMENDATION No. 3

Criteria to establish a class action

- (1) Five criteria should be satisfied before an action is allowed to proceed as a class action. They are that:
 - (a) the pleadings disclose a cause of action,
 - (b) there is an identifiable class of two or more persons,
 - (c) the claims of the class members raise a common issue, whether or not the common issue predominates 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, and
 - (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.

- (2) “Common issues” should be defined to mean:
 - (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.
- (3) Subclasses having their own representative plaintiff should be created where the court is satisfied that this is necessary to protect the interests of the members of identifiable subclasses with common issues that are not common to the class as a whole or in fairness to defendants.

RECOMMENDATION No. 4

Factors that do not bar an action

In order to protect actions brought under the new regime from the restrictive interpretation the courts have placed on representative actions under Rule 42, Alberta should specify that none of the following five matters bar an action from being conducted as a class action:

- (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 ascertained or may not be ascertainable; or
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

RECOMMENDATION No. 5

Commencement and certification

- (1) Any person or entity who can otherwise commence an action or application should be able to commence a class action. That person should be required to seek certification (permission to take the action forward as a class action) and appointment as representative plaintiff within 90 days after the last statement of defense was served or at any other time with leave of the court.
- (2) A defendant should be able to apply for certification of a class of plaintiffs and appointment of

a representative plaintiff.

- (3) The court should be able to certify a person who is not a member of the class as the representative plaintiff where it is necessary to do so in order to avoid a substantial injustice to the class.
- (4) The court should have power to adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
- (5) A class that comprises persons resident in Alberta and persons not resident in Alberta should be divided into resident and non-resident subclasses.
- (6) A certification or subclass certification order should:
 - (a) describe the class in respect of which the order was made by setting out in the class's identifying characteristics,
 - (b) appoint the representative plaintiff for the class,
 - (c) state the nature of the claims asserted on behalf of the class,
 - (d) state the relief sought by the class,
 - (e) set out the common issues for the class,
 - (f) state the manner in which and the time within which a class member who is a resident of Alberta may opt out of the proceeding,
 - (g) state the manner in which, and the time within which, a potential class member who is not a resident of Alberta may opt in to the proceeding, and
 - (h) include any other provisions the court considers appropriate.
- (7) The court should be able to amend a certification order on the application of a party or class member or on its own motion.
- (8) Where certification is sought for the purpose of binding the members of a settlement class, court approval of the settlement should be required as it would if the action were to proceed.
- (9)
 - (a) The court should be able to decline to certify the litigation as a class proceeding or, on the application of a party or class member or on its own motion, decertify it if it is demonstrated that the criteria for certification are not met.
 - (b) Where the court refuses to certify or makes a decertification order, the court should be able to permit the proceeding to continue as one or more proceedings and make appropriate directions.

RECOMMENDATION No. 6

Selection of representative plaintiff

- (1) The representative plaintiff of a class or subclass should be a person who:
 - (a) would fairly and adequately represent the interests of the class or subclass,
 - (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class or subclass and of notifying class or subclass members of the proceeding, and
 - (c) does not have, on the common issues for the class or subclass, an interest that is in conflict with the interests of other class or subclass members.
- (2) Where it appears to the court that a representative plaintiff is not fairly and adequately representing the interests of the class or subclass, the court should be able to substitute another class or subclass member or any other person as the representative plaintiff.

RECOMMENDATION No. 7

Determination of class membership: opting out and opting in

- (1) Class members resident in Alberta who do not want to be bound by the outcome of a class action brought by a plaintiff on their behalf should be given an opportunity to opt out of the proceedings.
- (2) Where the court certifies a plaintiff class on a defendant's application, members of the class should not be able to opt out except with leave of the court. However, special provision should be made giving any member of the plaintiff class the right to apply to be added as a named plaintiff for the purpose of conducting their own case.
- (3) Potential class members who are not resident in Alberta but who wish to join the class action should be required to opt in to the proceedings.
- (4) The court should have the power to determine whether or not a person is a member of a class or subclass.

RECOMMENDATION No. 8

Participation of class members in proceeding

The court should have power to determine whether or not, when and how class members may participate in the proceeding if this would be useful to the class or subclass.

RECOMMENDATION No. 9

Notification of class members

- (1) The representative party should be required to notify all class members of
 - (a) the certification of the class proceedings,
 - (b) the resolution of common issues which have been resolved in favour of the class, which notice shall include notice of the right to attend and participate in the mandatory review of class counsel's fees and disbursements and give details of the scheduled review, and
 - (c) an application for certification of a settlement class, in which case, in addition to other matters stipulated, the notice should state the terms of the settlement,but the court may dispense with the notice if it considers it proper to do so.
- (2) In addition to the notice required under subsection (1), the court should be able to order that notice be given whenever the court considers it necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding.
- (3) Court approval of the content of any notice and the method of delivery should be required before notice is given.
- (4) With leave of the court, the representative plaintiff should be able to include in the notice of certification, a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.
- (5) The court should have the authority to order a party to give the notice required of another party, and to make any order it considers appropriate as to the costs of any notice.

RECOMMENDATION No. 10

Determination of common issues and individual issues

- (1) Unless the court orders otherwise,

- (a) common issues for a class should be determined together,
 - (b) common issues for a subclass should be determined together, and
 - (c) individual issues that require the participation of individual class members should be determined individually.
- (2) A resolution of the common issues, whether by judgment or settlement, should bind every member of a resident class who has not opted out of the proceedings and every member of a non-resident class who has opted in to the proceedings; it should not bind a resident who opted out of the class proceeding; and it should not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out.
- (3) With leave of the court, a class member who
- (a) did not receive notice of the certification order, or
 - (b) was unable by reason of mental disability to respond to the notice in time
- should be placed in the same position as a person who opted out of the class proceeding.
- (4) The court should have the power to decide whether and how to determine individual issues that are not resolved by the determination of the common issues and to make individual assessments of liability where this cannot reasonably be determined without proof by those individual class members. In deciding how the individual issues will be determined, the court should be able to dispense with or impose any procedural steps or rules that it considers appropriate, consonant with justice to the class members and parties.

RECOMMENDATION No. 11

Court powers

- (1) The court should have broad powers respecting the conduct of a class proceeding to ensure its fair and expeditious determination, including the power at any time to stay or sever any related proceeding.
- (2) The judge who makes a certification order should hear all applications before the trial of the common issues, but should not preside at the trial except with the consent of the parties.

RECOMMENDATION No. 12

Discovery and witness examination

- (1) (a) The defendant and representative plaintiff of a class or subclass should have the same rights of discovery against one another through record production and oral examination as would parties in any other proceeding.
 - (b) Class members should only be discovered after the discovery of the representative plaintiff, and then only with leave of the court which may impose any terms that it considers appropriate on the purpose and scope of the discovery and use of the evidence obtained.
 - (c) A class member should be subject to the same sanctions as a party for failure to submit to discovery.
- (2) The court should be able to require the parties to propose which class members should be discovered.
 - (3) Leave of the court should be required to examine a class member as a witness for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any judge or judicial officer in chambers.
 - (4) The court hearing an application for leave to discover class members or to examine a class member as a witness should be required to take into account
 - (a) the state of the class proceeding and the issues to be determined at that stage,
 - (b) the presence of subclasses,
 - (c) whether the discovery is necessary in view of the defenses of the party seeking leave,
 - (d) the approximate monetary value of individual claims, if any,
 - (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered, and
 - (f) any other matter the court considers relevant.

RECOMMENDATION No. 13

Application of Alberta Rules of Court

The Alberta Rules of Court should apply to class proceedings to the extent that those rules are not in

conflict with these recommendations.

RECOMMENDATION No. 14

Settlement, discontinuance, abandonment and dismissal

- (1) No settlement, discontinuance or abandonment of the issues common to a class or subclass should be permitted without the approval of the court.
- (2) In deciding whether or not to approve a settlement agreement, the court should be required to find that the agreement is fair, reasonable and in the best interests of those affected by it. In coming to that determination, the court should be directed to consider the following criteria:
 - (a) the settlement terms and conditions,
 - (b) the nature and likely duration and cost of the proceeding,
 - (c) the amount offered in relation to the likelihood of success in the proceeding,
 - (d) the expressed opinions of class members other than the representative party,
 - (e) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members,
 - (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members, and
 - (g) any other matter the court considers relevant.
- (3) The court dismissing a class proceeding, or approving a settlement, discontinuance or abandonment, should be required to consider whether and how class members should be notified and whether the notice should include:
 - (a) an account of the conduct of the proceeding,
 - (b) a statement of the result of the proceeding, and
 - (c) a description of any plan for distributing any settlement funds.^{9 10}

RECOMMENDATION No. 17

Monetary relief: determination of individual claims

- (1) The court should be able to specify procedures for the determination of individual claims where this is necessary to give effect to the order.
- (2) Where the court specifies procedures for the determination of individual claims, it should set a

reasonable time within which the claims must be made, after the expiration of which claims should be able to be made only with leave of the court.

- (3) In deciding whether to grant leave to make a late claim, the court should consider whether any other person would suffer substantial prejudice.^{11 12}

RECOMMENDATION No. 23

Agreements respecting fees and disbursements

- (1) Agreements respecting fees and disbursements made by the representative plaintiff and the class counsel should be required to be approved by the court. This approval should occur prior to, or simultaneously with, certification of the proceeding.
- (2) After the common issues have been resolved, the representative plaintiff must seek review of the agreement to ensure that the remuneration under the agreement is fair and reasonable in all of the circumstances. The review should be made by the judge who presided over the trial of the common issues or approved the settlement agreement, whichever is the case.
- (3) Fees and disbursements payable under an agreement should form a first charge on any monetary award in a class proceeding.
- (4) Where the court determines that the agreement ought not to be followed, it should be authorized to amend the terms of the agreement or
 - (a) determine the amount owing to the solicitor in respect of fees and disbursements,
 - (b) direct an inquiry, assessment or accounting under the Alberta Rules of Court to determine the amount owing, or
 - (c) direct that the amount owing be determined in any other manner.
- (5) Representative parties should be able to seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.¹³

RECOMMENDATION No. 25

Class counsel responsibilities

The Law Society of Alberta should document the role and duties of class counsel in class proceedings.

RECOMMENDATION No. 26

Defendant class actions

- (1) The Alberta class actions regime should provide for defendant class proceedings, that is, proceedings in which one or more individual plaintiffs seek relief against a defendant class. Except as otherwise indicated in subsections (2) to (4), the provisions dealing with plaintiff class actions should apply, with any necessary modifications, to defendant class actions.
- (2) Where a plaintiff intends to apply for certification of a defendant class proceeding, the proposed representative defendant should not be required to file a statement of defense on behalf of the class until after the certification hearing.
- (3) The condition precedent to certification, that the proposed representative plaintiff has produced a plan for advancing the proceedings on behalf of the class and for notifying class members of the proceeding, should not apply to the proposed representative defendant in a defendant class action.
- (4) Members of the defendant class should not have the right to opt out of a defendant class proceeding. However, specific provision should be made giving any member of the defendant class the right to apply to be added as a named defendant for the purpose of conducting their own defense.
- (5) A plaintiff should have the right to discontinue a defendant class proceeding without the approval of the court.¹⁴

RECOMMENDATION No. 27

Application of new class action provisions

If these recommendations are implemented, the new law should not apply to:

- (a) a proceeding that may be brought in a representative capacity under a statutory provision,
- (b) a proceeding required by law to be brought in a representative capacity, and
- (c) a representative proceeding commenced before the new law takes effect.

RECOMMENDATION No. 28

Implementation by statute

Alberta should implement the recommendations for a class proceedings regime by statute.

Rooke J. further developed the blueprint for class action procedure in Alberta by settling the following points:

- (1) In the absence of all defendants agreeing to be bound by a decision on the merits, the court should hear the certification application prior to a decision on the merits;
- (2) A “privity” or “Ragoonanan”¹⁵ application should be heard as the first part of the certification application;
- (3) If the defendants file an undertaking to be bound by the decision on the merits, the merits application can precede the certification application; and
- (4) The plaintiffs in the representative action are the appropriate applicants on both the certification and the merits applications, although the defendants might be cross applicants, particularly on the privity/Ragoonanan application.

If it can therefore be seen that, although Alberta operates under the handicap of not having class action legislation, the courts have fashioned a fairly detailed blueprint for class action proceedings in Alberta which will provide significant guidance until such time as legislation is forthcoming.

ENDNOTES

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1. William E. McNally is the senior partner of McNally Cuming Allchurch, Calgary, Alberta and practices extensively in the class action area; Barbara E. Cotton is the principal of Bottom Line Research & Communications, Calgary, Alberta.
 2. An expanded version of this article will be published in *The Advocates' Quarterly* in the spring of 2003.
 3. Rule 42 of the Alberta *Rules of Court* provides:

“42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.”
 4. [2001] 2 S.C.R. 534; (2001), 201 D.L.R. (4th) 385.
 5. (1993), 8 Alta. L.R (3d) 337
 6. [2002] A.J. No. 926; 2002 A.B.Q.B. 690; further reasons for decision released in a judgement dated July 31, 2002.
 7. *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2001), 54 O.R. (3d) 704 (C.A.), leave to appeal to the Supreme Court of Canada refused at [2001] S.C.C.A. No. 451.
 8. Alberta Law Reform Institute, *Class Actions (Final Report No. 85)* (Edmonton: Alberta Law Reform Institute, December, 2000).
 9. Recommendation No. 15 dealing with aggregate assessment of damages is not incorporated in the blueprint pursuant to the first caveat of Rooke J.
 10. Recommendation No. 16 dealing with the use of statistical evidence is not incorporated into the blueprint pursuant to the first caveat of Rooke J.
 11. Recommendation No. 17(4) is not incorporated as it deals with the award of aggregate monetary release.
 12. Recommendations No. 18 - 20 are not incorporated as they deal with aggregate assessment of damages; Recommendation No. 21 is not incorporated as it deals with appeal rights; Recommendation No. 22 is not incorporated as it deals with costs as between parties and Rooke J. ordered that costs would be presumed to follow in the ordinary course of litigation.
 13. Recommendation No. 24 is not incorporated as it deals with limitation periods.
 14. Recommendation No. 26(6) is not incorporated as it deals with limitation periods.
 15. *Ragoonanan Estates v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603.