COURT OF APPEAL FOR ONTARIO

CITATION: Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City), 2015 ONCA 572
DATE: 20150812
DOCKET: C59525 & C59526

Strathy C.J.O., LaForme and Tulloch JJ.A.

DOCKET: C59525

BETWEEN

Amyotrophic Lateral Sclerosis Society of Essex County

Plaintiff (Respondent)

and

The Corporation of the City of Windsor

Defendant (Appellant)

DOCKET: C59526

BETWEEN

Belle River District Minor Hockey Association Inc. and
Essex County Dancers Incorporated

Plaintiffs (Respondents)

and

The Corporation of the Town of Tecumseh

Defendant (Appellant)

Scott Hutchison, for appellant City of Windsor

Brendan van Niejenhuis, for the appellant Town of Tecumseh

Peter W. Kryworuk and Yola S. Ventresca, for the respondents

Heard: May 13, 2015

On appeal from the orders of the Divisional Court (Justices James C. Kent, Clayton Conlan and Michael N. Varpio), dated April 28, 2014.

Strathy C.J.O.:

[1] The appellant municipalities appeal the certification of two class actions which claim that charitable lottery licensing and administration fees collected by the municipalities are direct taxes and therefore *ultra vires* because the revenues far exceed the costs of administration: see *Eurig Estate (Re)*, [1998] 2 S.C.R. 565.

[2] The appellants acknowledge that some of the respondents' claims are appropriate for resolution by class action. They initially consented to certification of claims for fees paid within the limitation periods prescribed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[3] The appellants' primary objection is to the temporal scope of the class, which includes charities that have paid fees since 1990. They say this reaches too far back in time. This means, they say, that some of the common issues are not common to all class members and a class proceeding is not the preferable procedure for the resolution of all claims.

[4] These actions were commenced in 2008. Unfortunately, they are not yet out of the starting gate.

[5] For the reasons that follow, it is my view that with some adjustment these proceedings meet the requirements of s. 5(1) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*"). The time has come to ring the bell and get them on their way.

JUDICIAL HISTORY

[6] These actions have had a tortuous judicial history, having been twice certified, with ensuing appeals. I will describe that history to the extent necessary to understand the issues on appeal.

(1) Certification: Round One

[7] The plaintiffs commenced their actions on October 24, 2008. The proposed classes consisted of anyone who had paid licensing fees on or after January 1, 1990.

[8] The certification judge initially certified a class of charities that paid licensing fees in two time periods:

- October 24, 2006 and thereafter; and
- October 24, 2002 to December 31, 2003.

[9] The first period covered claims arising within two years of the commencement of this action and therefore within the two-year limitation period in the *Limitations Act, 2002*. The second period covered claims preserved by the transitional provisions of the *Limitations Act, 2002*.

[10] In limiting the claim to these periods, the certification judge accepted the municipalities' argument that claims falling outside these periods could not succeed because they were time-barred. He explained that in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, which concerned allegedly illegal fees collected by New Brunswick, the Supreme Court held that the limitation period began to run at the moment the province received payment. He rejected the plaintiffs' submission that the applicability of the *Limitations Act, 2002* should be determined at a later stage, either on a summary judgment motion or at trial.

[11] The plaintiffs appealed, with leave, to the Divisional Court. That court allowed the appeal for two reasons.

[12] First, the court held that the certification judge erred by interpreting *Kingstreet* as having established an absolute limitation period for claims of this type. The court noted that in *Kingstreet*, there was no discoverability issue that could have extended the applicable limitation period. By contrast, in this case the plaintiffs pleaded a discoverability/concealment issue.

[13] Second, and related, the discoverability/concealment issue raised questions of fact that could only be decided based on evidence. However, the inquiry under s. 5(1)(a) of the *CPA* is based on the pleadings alone and does not engage any discretion or fact finding. While it was not clear to the Divisional Court that the certification judge had considered any evidence under s. 5(1)(a), if he had, it would constitute an error of law.

[14] The Divisional Court remitted the matter back to the certification judge for reconsideration. It explained that it was open to him to truncate the class or the common issues or to dismiss the certification motion altogether, if he found the proceeding was inappropriate for certification without a temporal limit.

(2) Certification: Round Two

[15] The certification rehearing was held in November 2012. This time, the certification judge certified both class actions using the plaintiffs' originally proposed, and admittedly arbitrary, commencement date of January 1, 1990.

[16] The certification judge held, first, that the statement of claim disclosed a cause of action.

[17] Second, there was an identifiable class, defined as "all persons whether natural (including unincorporated associations) or corporate who have paid lottery licensing fees and/or lottery administration fees to [the municipalities] on or after January 1, 1990."

[18] Third, the proposed claims raised common issues as to liability, damages and limitation periods. The common issues certified were as follows:

> 1. In pith and substance are the lottery licensing fees and lottery administration fees that have been charged by [the municipalities] to members of the class during the claim period or any part thereof, taxes imposed in a manner contrary to s. 53 of the *Constitution Act, 1867*?
>
> 2. Do the statements and/or the conduct by and on behalf of the Hall Charities Association and/or Bingo Sponsor Association give rise to a defence in the nature of *laches*, estoppel, waiver or analogous equitable defences that bind the class or bind an identifiable subclass subject to the defendant's right to move under Rule 20 and/or Rule 21 of the *Rules of Civil Procedure*?
>
> 3. Apart from any arguments relating to discoverability and/or concealment, what is the limitation period applicable to such claims arising prior to the coming into force of the *Limitations Act, 2002* on January 1, 2004?
>
> 4. What is the effect, if any, of the transitional provisions contained in the *Limitations Act, 2002* upon the claims of the class members?
>
> 5. At what time (or times), if any, should the class members ought to have known that they had a claim against [the municipalities], such that the applicable limitation period began to run against all class members, having regard to the principles of discoverability and concealment?
>
> 6 If the said fees are taxes which are *ultra vires* or otherwise illegal, are class members entitled to an accounting and/or restitution of such taxes paid to [the municipalities] subject to any applicable limitation period, *laches*, waiver and/or estoppel arguments?
>
> 7. Having regard to all the circumstances, is an award of punitive damages appropriate in this case?

[19] The contentious common issues before this court are issues 3, 4 and 5, which relate to limitation periods.

[20] The certification judge rejected the municipalities' submission that these issues, and particularly common issue 5, would be unmanageable. He noted that because the plaintiffs limited the discoverability question to what a "reasonable person ought to have known", there would be no need to inquire into what each class member actually knew in order to determine this common issue.

[21] He held that the impact of the limitations issues should be dealt with later, rather than at the certification stage. He explained that after pleadings, production of documents and discovery, the application of the *Limitations Act, 2002* could be appropriate for determination on a summary judgment motion.

[22] Fourth, building on this analysis, the certification judge noted that he had previously held that a class proceeding would be appropriate to adjudicate the timely claims. He added, at para. 26: "And now on further analysis I am of the opinion that it is appropriate to permit those individuals who are outside the basic limitation period to have an opportunity to be heard." In his view, the limitations issue did not make the proceeding unmanageable.

[23] Fifth, and finally, the certification judge found that the representative plaintiffs were able to advance the claims of all class members, including those

with claims outside the basic limitation period. He did not address the issue of whether it was appropriate to create a subclass pursuant to s. 5(2) of the *CPA*.

[24] Justice Nolan granted the municipalities' motion for leave to appeal to the Divisional Court. In her view, the certification judge's preferability analysis did not demonstrate that he had considered the advantages and disadvantages of a class action and the manageability of a proceeding that included potentially time-barred claims.

[25] Justice Nolan also noted, at para. 25, that the certification judge "did not provide an analysis of whether the *prima facie* time-barred claims actually formed a subclass".

[26] The Divisional Court dismissed the municipalities' appeal. The court emphasized that the certification judge's decision was entitled to substantial deference unless he erred in law or principle.

[27] The Divisional Court approved the class definition and was not persuaded that the certification judge erred by failing to identify a subclass.

[28] It rejected the municipalities' argument that it would be unfair and inefficient to litigate the timely claims alongside the presumptively time-barred ones. It also rejected the municipalities' argument that the certification judge erred in finding that the representative plaintiffs could represent all class

members. The court held that it was open to the certification judge to find that the representative plaintiffs were suitable and did not have a conflict of interest.

[29] Finally, the Divisional Court held that it was open to the certification judge to find that there were common issues, including issues of discoverability, notwithstanding that some of the claims were clearly brought in time.

[30] The appellants appeal to this court, with leave.

ANALYSIS

[31] The appellants' submissions focused on: (a) the class definition; (b) whether subclasses are required; (c) the lack of commonality of some issues; (d) the inability of the representative plaintiffs to fairly represent the claims of all class members; and (e) whether a class proceeding is the preferable procedure for the resolution of the claims.

[32] I will address each of these in turn. In summary, in my view the class definition was arbitrary and some common issues lacked commonality. These are not fatal defects, however. They can be corrected by modifying the class definition, creating a subclass and stating subclass common issues. A subclass representative is not required, at this time. Thus modified, a class action remains the preferable procedure for the resolution of the claims.

(a) The Class Definition

[33] It is a basic principle that the plaintiff must define the class with precision and in a way that is neither over-inclusive nor under-inclusive: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158. In *Hollick*, McLachlin C.J. held that the putative plaintiff must show that the class has been defined sufficiently narrowly. She explained the nature of the exercise, at para. 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. [Emphasis in original.]

[34] In Warren K. Winker et al, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014), the authors set out the general principle that should guide the task of defining a class under s. 5(1)(b), at p. 93:

> A satisfactory class definition should bind the persons who ought to be bound and, therefore, the definition should not be under-inclusive. By the same token, a satisfactory definition should not bind persons who ought not to be bound, and, therefore, the definition should not be over-inclusive. An optimal class definition should not arbitrarily exclude those who share the same cause of action, or include persons without a claim.

[35] The certification judge recognized that s. 5(1)(b) of the *CPA* requires the plaintiff to define the class in a rational manner. He also correctly stated the purposes of the class definition: to identify persons who have a potential claim against the defendants; to define the parameters of the lawsuit so as to include persons who should be bound by the result; and to describe who is entitled to notice of certification. He acknowledged the January 1, 1990 date was arbitrary, but approved it nonetheless, suggesting that the scope of the class could be refined after a summary judgment motion based on the limitation period.

[36] The Divisional Court saw no error in the date being "somewhat arbitrary". It suggested that having no date could make the proceeding unmanageable and that the date could be revisited after discoveries, once the parties had a better handle on the historical claims.

[37] The actions were commenced on October 24, 2008. The "timely" claims, which the appellants concede can go forward, are those where payments were made: (a) from and after October 24, 2006, based on the standard two-year limitation period in the *Limitations Act, 2002*; and (b) between October 24, 2002 and December 31, 2003, based on the transition provisions in s. 24(7.1) of the *Limitations Act, 2002*, which provide for a six-year limitation period for claims relating to payments made before January 1, 2004.

[38] The appellants argue that claims outside these periods are "presumptively time-barred" and do not meet the test for certification under s. 5(1)(c), (d) and (e) of the *CPA* – they lack commonality with the timely claims, the proposed representative plaintiffs are inappropriate, and a class proceeding is not the preferable procedure.

[39] I agree with the appellants that the class should not have been defined using an arbitrary cut-off date. Arbitrariness in the class definition defeats some of the important purposes of class proceedings: binding all persons who ought to be bound by the decision, providing access to justice and achieving judicial economy. See *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234 (S.C.), at para. 20; *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (S.C.), at para. 12, aff'd (2008), 54 C.P.C. (6th) 167 (Div. Ct.). Nor was it appropriate to adopt a "wait and see" approach to the class definition, leaving it to the defendants to define its contours by a summary judgment motion. It is the plaintiffs' responsibility to define the class properly, not the defendants'.

[40] How, then, should the class be defined in this case?

[41] As I have explained, the appellants propose to limit the claims to the "timely" claims – i.e. those between October 24, 2002 and December 31, 2003, and from October 24, 2006 onward. The respondents complain that truncating the class in this way presupposes that claims outside these time periods are

time-barred – a conclusion that depends on a factual inquiry regarding discoverability. However, the case law is clear: where the resolution of the limitation issue depends on a factual inquiry, such as when the plaintiff discovered or ought to have discovered the claim, the issue should not be decided on the motion for certification: *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Div. Ct.), at paras. 140-145, leave to appeal to C.A. refused (unreported), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 494. See also *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, 88 C.P.C. (6th) 27, at paras. 38-39.

[42] On the other hand, if the classes are defined using no temporal limit, the claims would reach back to 1969/1970 when Ontario first introduced the licencing regime for charitable gaming. All parties appear to agree that a class definition stretching back more than four decades may make the proceeding unmanageable.

[43] In my view, the temporal boundary of the class can be defined in a rational way by reference to the ultimate limitation period in s. 15(2) of the *Limitations Act, 2002*. That provides, "No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place." This would result in a class definition encompassing persons who paid fees from and after October 24, 1993.

[44] Although s. 15(4) of the *Limitations Act, 2002* provides an exception to the ultimate limitation period in the case of wilful concealment, drawing the class boundary at the ultimate limitation period is not arbitrary because it separates claims that require proof of wilful concealment from those that do not.

[45] As I will explain, concerns with respect to manageability can be addressed by the creation of a subclass, by stating common issues for the subclasses and by appropriate case management. I will discuss the subclass issue next.

(b) Subclasses

[46] The court has the authority to certify a subclass of class members who have claims or defences not shared by all class members: *CPA*, s. 5(2). Subclasses are appropriate when there are common issues applicable to the class as a whole and other issues that are applicable to some, but not all class members: *Caputo v. Imperial Tobacco Ltd.* (2004), 44 C.P.C. (5th) 350 (Ont. S.C.), at para. 45.

[47] Here, issues of liability and damages are common to all class members. However, the claims of class members with presumptively time-barred claims raise common issues of fact and law not shared by those with timely claims. They should form a subclass. I would therefore certify a subclass of persons who paid fees between October 24, 1993 and October 23, 2002 and between January 1, 2004 and October 23, 2006. These are the payments made within the

"ultimate limitation period" in s. 15 of the *Limitations Act, 2002*, but not within the basic limitation period and not preserved by the transition rules of the statute.

(c) Common Issues

[48] A common issue must be a substantial ingredient of every class member's claim and its resolution must serve to advance the resolution of that claim: see *Hollick*, at para. 18; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46. The answer to the question must be capable of extrapolation to every member of the class: see *McKenna*, at para. 125; *Sankar v. Bell Mobility*, 2013 ONSC 5916, 52 C.P.C. (7th) 75, at paras. 91, 93, leave to appeal to Div. Ct. refused, 2013 ONSC 7529.

[49] The certification judge properly certified common issues relating to liability (issue 1), defences (issue 2) and remedies (issues 6 and 7) that are common to all class members.

[50] However, common issues 3, 4 and 5 are of no interest to class members whose claims are timely. Those issues are only applicable to the subclass members, whose claims may be subject to a limitations defence. They should be subclass common issues.

(d) Representative Plaintiffs

[51] The issue now is whether a separate subclass representative is required. The appellants say the representative plaintiffs cannot fairly and adequately represent the interests of the subclass.

[52] They rely on the principle expressed in *Stone v. Wellington County Board of Education* (1999), 120 O.A.C. 296 (C.A.), at para. 10, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 336, that "[w]here a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class."

[53] The appellants say the representative plaintiffs have a conflict of interest, because they have admitted to knowledge of certain facts that makes it impossible to rebut the presumption that they "discovered" their claims outside the limitation period. They say the subclass members with presumptively time-barred claims would be prejudiced if they were represented by these plaintiffs. Moreover, say the appellants, the representative plaintiffs may be inclined to sacrifice their interests in the time-barred claims in order to prosecute their timely claims.

[54] The appellants refer to s. 5(2) of the *CPA*, which provides that where, in the opinion of the court, the protection of subclass members requires that they be

separately represented, the court shall not certify the proceeding unless there is a representative plaintiff who would fairly and adequately represent the subclass, has produced a workable litigation plan on behalf of the subclass and who does not have, on the subclass common issues, a conflict of interest with the subclass.

[55] I do not read this statutory requirement as precluding the class representative from representing a subclass. It is only when the representative plaintiff cannot fairly and adequately represent the subclass that the need for a separate subclass representative arises: see *Pearson v. Boliden Ltd.*, 2001 BCSC 1054, 94 B.C.L.R. (3d) 133, at para. 73, varied on other grounds, 2002 BCCA 624, 222 D.L.R. (4th) 453; *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328, at paras. 75-83; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 476; *Caponi v. Canada Life Assurance Co.* (2009), 72 C.P.C. (6th) 331 (Ont. S.C.), at para. 56.

[56] It is not necessary to resolve the appellants' concerns at this time. The representative plaintiffs, like many class members, may have claims that are both timely and presumptively time-barred. They have an interest, at least at the present time, in advancing both types of claims. They certainly have an interest with all class members in the common issues of liability and damages.

[57] Moreover, I am not convinced that it is quite as obvious as the appellants suggest that the "admissions" made by the representative plaintiffs or their counsel are fatal to their claims. It has not been "definitively shown" that they have no claim.

[58] On the present record, I am not satisfied the representative plaintiffs are unable to represent all class members. It may be that at some future date it will be necessary to revisit this issue, but that issue, and when it should be addressed, are matters best left to the judgment of the case management judge.

(e) Preferable Procedure

[59] The remaining issue is whether this proceeding, as modified, meets the requirement of s. 5(1)(d) of the *CPA* – that is, whether it would be the preferable procedure for the resolution of the common issues.

[60] The preferability analysis asks two main questions, as set out in *Hollick*: (a) whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (b) whether a class proceeding would be preferable to other procedures.

[61] These questions are to be addressed through the lens of the three goals of class action proceedings – judicial economy, access to justice and behaviour modification: *Hollick*, at para. 27. However, there is no requirement to prove that

the class action will actually achieve these goals: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 22.

[62] Although recent case law, particularly *AIC Limited v. Fischer*, has focused on the second question – the comparison to alternative procedures – the proposed class proceeding must nevertheless be "fair, efficient and manageable" in order for it to be certified. As stated by Winkler J., as he then was, in *Caputo*, at para. 62:

> [I]t is not enough for the plaintiffs to establish that there is no other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. Both parts of the test must be considered in the context of the three goals of the *CPA*, judicial economy, access to justice and behavioural modification of tortfeasors.

[63] In this case, there are two issues of preferability. The first is the complexity introduced by the need to resolve potentially time-barred claims along with the timely claims. The appellants concede that a class action *could* combine timely claims and the presumptively time-barred claims. They say, however, that in this case the court should certify only a focused class of timely claims and leave the other claims to be pursued individually by those claimants who wish to do so.

[64] The second concern is the existence of different regulatory and fiscal regimes over the broad class period, which may necessitate individual inquiries, in individual time periods, to determine issues of both liability and damages.

[65] The difficulties faced by defendants simply by virtue of having to respond to common and individual issues do not make a class proceeding unfair, inefficient or unmanageable if those issues will have to be dealt with by the defendants one way or another. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50, the defendants argued that a class action proceeding "would be unfair to them and would create an unmanageable proceeding." Justice Goudge rejected that submission, stating at para. 89-90:

> The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials....
>
> That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in Rumley unmanageable and does not do so here.... Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

[66] The appellants argue that the certification judge failed to address the preferable procedure requirement. They say that combining the presumptively

time-barred claims with the timely claims is not the preferable procedure for the resolution of either. They submit the large quantum at issue in the presumptively time-barred claims makes them amenable to ordinary litigation. Their small likelihood of success, given the admissions of the representative plaintiff and the challenges of litigating those claims, makes it clear that they should not be litigated with the timely claims.

[67] I disagree. In my view, the significant features of class proceedings – the ability to case manage groups of claims raising common issues and the ability to make binding determinations of those issues – make a class proceeding appropriate to resolve these claims. With active and strategic case management, and a resolve by the parties to focus on the fair and efficient resolution of the issues, both liability and limitation period issues could be resolved relatively expeditiously.

[68] Section 12 of the *CPA* empowers the case management judge to make appropriate orders to ensure the fair and expeditious determination of the proceeding and to impose appropriate terms on the parties. This provision is procedural (see *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 293 O.A.C. 274, at para. 142) and does not permit a judge to ignore or override provisions of the *CPA*. However, together with Rule 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, it does permit the judge to impose procedural terms that will promote access to justice and judicial economy as well as ensure

the "just, most expeditious and least expensive determination" of the proceeding on its merits.

[69] The *Manual for Complex Litigation*, 4th ed., published by the American Federal Judicial Center in 2004, provides a useful catalogue of the features of effective case management at 10.13:

> Effective judicial management generally has the following characteristics:
>
> - *It is active.* The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
> - *It is substantive.* The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
> - *It is timely.* The judge decides disputes promptly, particularly those that may substantively affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
> - *It is continuing.* The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.

- *It is firm, but fair.* Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed ... for derelictions and dilatory tactics.

- *It is careful.* An early display of careful preparation sets the proper tone and enhances the court's credibility and effectiveness with counsel.

[70] Case management judges in class proceedings are of course required to be fair to both parties, and they should take the representative plaintiff's litigation plan as an important starting point in guiding the case management process. At the same time, they are entitled to seek and impose creative solutions to the efficient determination of the issues. The resolution of issues does not always require an adversarial hearing. Some case management judges and counsel find case management conferences to be an efficient way of resolving procedural issues, through discussion, negotiation and consensus, facilitated by the case management judge and without the need for formal rulings.

[71] The case management judge is entitled to give directions as to when certain steps should be accomplished and as to what motions may be brought, and when. The case management judge may prohibit motions from being brought before certain steps have been accomplished and may make orders as to the sequencing of motions. The case management judge is also entitled to

determine the order in which some issues are addressed. He or she is entitled, but not required, to determine whether some issues are amenable to summary judgment and to schedule the proceedings accordingly.

[72] In this case, individual issues may remain after the common issues have been resolved. It may be asserted that particular class members had special knowledge that triggered the commencement of the limitation period, notwithstanding that the information was not publicly known. Different regulatory regimes, fee scales and cost-recovery methods may require analysis of particular segments of the class period. I am not persuaded, however, that this would make the proceeding unmanageable or incapable of fair and efficient resolution. Indeed, it is my view that these issues can most effectively and fairly resolved in the context of this proceeding.

[73] As I suggested earlier, case management should be complimented by a resolve by the parties to focus on the fair and efficient resolution of the issues. That should be true in all litigation, but it is particularly important in complex litigation such as class proceedings. All the more so in a case like this, in which the ultimate cost will be borne by the public, one way or the other. It behooves the parties, assisted by the case management judge, to focus their energies accordingly.

DISPOSITION

[74] For these reasons, the appeal is allowed, in part, the judgment below is varied and the proceeding shall be certified as a class proceeding pursuant to s. 5(1) of the *CPA* on the terms set out herein.

[75] As success is divided, I would make no order as to costs.

Released: #1 AUG 12 2015

G.R. Strathy CJO

I agree, Hoy A.C.J.O.

I agree, M. Tulloch J.A.