NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Health) v. Morrison Estate***, 2011 NSCA 68

Date: 20110715
Docket: CA 341235
Registry: Halifax

Between:

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and The Executive Director of Continuing Care for the Province of Nova Scotia

Appellants

v.

The Estate of Elmer Stanislaus Morrison, by His Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, by His Legal Guardian Elizabeth Lee and Elizabeth Lee

Respondents

Judges:	Hamilton, Beveridge and Farrar, JJ.A.
Appeal Heard:	May 17, 2011, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	Edward A. Gores, Q.C., for the appellant Raymond F. Wagner, Michael Dull and Sean D. MacDonald, for the respondents

Reasons for judgment:

[1] The respondents, the estate of Elmer Stanislaus Morrison, Joan Marie Morrison, John Kin Hung Lee and Elizabeth Lee are the plaintiffs in a class action lawsuit against the appellants (who I will collectively refer to as the AGNS). By decision dated May 20, 2010, now reported as 2010 NSSC 196, the Honourable Justice A. David MacAdam allowed the respondents' motion for certification of the class of plaintiffs and the causes of action in the class action. He found it was only necessary for the class to establish one cause of action to meet the threshold for certification under s. 7(1)(a) of the **Class Proceedings Act**, S.N.S. 2007, c. 28 (**CPA**).

[2] The AGNS appeals arguing that the Chambers judge erred in interpreting the provisions of the **CPA** and, in particular, his interpretation of s. 7(1)(a). In particular, it says the Chambers judge erred in certifying the class claims for breaches of ss. 7 and 15(1) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 without first determining that the claims disclose a cause of action.

[3] For the reasons I will now develop, I would allow the appeal and remit the matter to the Chambers judge to determine whether the pleadings disclose a cause of action in relation to ss. 7 and 15(1) of the **Charter**.

Facts

[4] By Originating Notice (Action) and Statement of Claim dated September 8, 2005, Elmer Morrison, by his litigation guardian, Joan Morrison and Joan Morrison, in her own right, initiated what was described, then, as a common law class action proceeding against the Attorney General of Nova Scotia. In that action they claimed damages based on a number of alleged breaches of provincial legislation including the Nova Scotia **Health Services and Insurance Act**, R.S.N.S. 1989, c. 197, **Homes for Special Care Act**, R.S.N.S. 1989, c. 203, the Nova Scotia **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 and the **Social Assistance Act**, R.S.N.S. 1989, c. 432. The plaintiffs make claims for misfeasance in public office against the Department of Health, the Minister of Health and the Executive Director; fraudulent misrepresentation and deceit was alleged against all

of the defendants; negligent misrepresentation was alleged as against the Department of Health; the plaintiffs rely upon a waiver of tort arising from the defendants' tortious conduct; breach of a fiduciary duty allegedly owed by the Department of Health to the plaintiffs, and they rely, in respect of the alleged breaches of fiduciary duty, on equitable fraud and unjust enrichment. They also claimed breaches of the **Canada Health Act**, R.S.C. 1985, c. C-6 and breaches of ss. 7 and 15(1) of the **Charter**.

[5] Unfortunately, Mr. Morrison died on May 6th, 2007, which necessitated an amendment to the Statement of Claim replacing Mr. Morrison's estate as a plaintiff. As well, John Lee, by his litigation guardian, Elizabeth Lee and Elizabeth Lee in her own right were added as plaintiffs. Certain other defendants were also added to the proceeding. There were a number of procedural motions by the parties including motions to obtain particulars, to remove individual defendants as parties and to further amend the Statement of Claim. The end result being that the action, for the purposes of the motion for certification before the Chambers judge, was the Second Amended Originating Notice (Action) and Statement of Claim dated December 24, 2008. The Second Amended Originating Notice (Action) reflects the addition of the Minister of Health of the Province of Nova Scotia and the Executive Director of Continuing Care for the Province of Nova Scotia as defendants. It also continued the action as a class action proceeding under the **CPA** which came in force on June 3, 2008.

[6] As an aside, on February 23rd, 2009, an Order was consented to by the parties which would have allowed for the filing of a "Second Fresh as Amended Statement of Claim". However, it does not appear that that statement of claim was ever filed and, for the purposes of the proceedings before the Chambers judge and this appeal, nothing turns on the existence of that order.

[7] The motion to have the proceeding certified as a class action was heard over four days in the fall of 2009 and the winter of 2010. The Chambers judge determined that there was a cause of action established by the plaintiffs under s. 7(1)(a) of the **CPA**, in this case the alleged breach of fiduciary duty by the defendant Minister of Health. He further found that there was no requirement on the class to establish more than one cause of action in order to meet the certification threshold. By Notice of Application for Leave to Appeal and Notice

of Appeal (Interlocutory), the AGNS appeals from the decision and order certifying the proceeding as a class proceeding.

[8] Although the AGNS's Notice of Appeal is couched in broad terms, it became apparent upon reading the AGNS's factum and its oral argument that the real issue on this appeal was the certification of the class **Charter** claims by the Chambers judge. In its factum the AGNS says:

> The Appellants/Defendants conceded causes of actions exist for the torts of fraudulent misrepresentation and deceit, waiver of tort and unjust enrichment in addition to the breach of fiduciary duty. Given the decision in the Court below, the Plaintiffs were not required to establish the *Charter* claims nor did the Court review them. Do the pleadings show *Charter* causes of action which survive s. 7(1)(a) scrutiny? The Appellants submit that they do not. A brief review of the pleadings reveals the representative plaintiffs have not established the *Charter* causes of action. (¶ 76)

[9] The motion for leave to appeal was heard by me in Chambers on May 12, 2011, at which time leave to appeal was granted.

Issues

[10] The issues on appeal can be reduced to one succinct issue:

> Did the Chambers judge err in his interpretation of s. 7(1)(a) of the **CPA** ?

Standard of Review

[11] There is no dispute between the parties on the standard of review. The proper interpretation of s. 7(1)(a) of the **CPA** is a question of law. The standard of review is correctness (**Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, ¶ 8).

Analysis

[12] The impugned portion of the Chambers judge 's decision on the interpretation of s. 7(1)(a) is succinct:

> 24 The fact that courts have assessed more than one of the causes of action pleaded does not suggest there is a requirement to establish more than one cause

> of action in order to satisfy s. 7(1)(a) (or its equivalents in other jurisdictions). Judicial reasons often contain more than one legal or factual finding, or line of reasoning, in support of the ultimate conclusion. It is not that resorting to alternatives is necessary, only that they may help to provide substance and support to the court's conclusion. But where, as here, there is admitted to be at least one cause of action that complies with s. 7(1)(a) (in this case, breach of fiduciary duty) an analysis of the other causes of action is unnecessary and would serve no purpose. If the defendants apply to strike any or all of the other causes of action, that will be the time to analyze them and to determine their merits, having regard to the applicable law and onus on such a motion.
> (Emphasis added)
>
> 25 There is no dispute that the pleadings disclose "a cause of action." Accordingly, the proceeding will be certified as a class proceeding.

[13] The Chambers judge, in his decision, references only the cause of action for breach of fiduciary duty having been conceded by the AGNS. As referenced earlier, the AGNS also conceded that the allegations of fraudulent misrepresentation and deceit, waiver of tort and unjust enrichment disclosed causes of action. The AGNS's complaint below, and before us, was that the class **Charter** claims did not disclose a cause of action and, as a result, the Chambers judge erred in certifying the **Charter** claims. I will come back to this point later in these reasons.

[14] This Court recently adopted and applied the "modern approach" to statutory interpretation in **Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)**, 2009 NSCA 44, where MacDonald, C.J. held:

> [36] The Supreme Court of Canada had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27 at 41; **Canada (House of Commons) v. Vaid**, 2005 SCC 30, [2005] 1 S.C.R. 667; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, 2006 SCC 46, [2006] 2 S.C.R. 447.

[37] It is suggested by some that this approach is no more than an amalgam of the three classic rules of interpretation: the *Mischief Rule* dealing with the object of the enactment; the *Literal Rule* dealing with grammatical and ordinary meaning of the words used; and, the *Golden Rule* which superimposes context. See Stéphane Beaulac & Pierre-Andre Côté in **Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimation** (2006), 40 Thémis 131-72 at p. 142.

[38] In any event, as Professor Ruth Sullivan explains in **Sullivan on the Construction of Statutes**, 5th ed. (Markham: LexisNexis Canada Inc., 2008) beginning at p. 1, this modern approach involves an analysis of: (a) the statute's textual meaning; (b) the legislative intent; and (c) the entire context including the consideration of established legal norms:

> The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. ...
>
> A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.
>
> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. ...

[39] That said, applying these dimensions is often easier said than done. Professor Sullivan elaborates at p. 3:

> The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases. [Emphasis by author]

[40] Thus in considering whether *s. 36* applies to the facts of this case, Professor Sullivan would invite us to answer three questions:

> Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
>
> > what is the meaning of the legislative text?
> >
> > what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
> >
> > what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

[41] Finally, in developing our answers to these three questions, Professor Sullivan invites us to apply the various "rules" of statutory interpretation:

> In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose

> and test the acceptability of outcomes against accepted legal norms.

[15] Section 9 of the **Interpretation Act** also directs us to consider, among other matters, the object to be attained by the statute (s. 9(1)(d)) and the consequences of a particular interpretation (s. 9(1)(f)).

[16] Therefore, in interpreting s. 7 of the **CPA**, I would phrase the questions directed to be answered by Professor Sullivan and endorsed by MacDonald, C.J., for the purpose of this appeal, as follows:

1. What is the meaning of the legislative text of s. 7 of the **CPA**;

2. What did the Legislature intend; and

3. What are the consequences of the AGNS's proposed interpretation?

Let me now turn to those questions.

What is the meaning of the Legislative Text?

[17] I will start with the full text of s. 7 of the **CPA**:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (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 dispute; and
>
> (e) there is a representative party who

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences 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; and
>
> (f) any other matter the court considers relevant.
>
> (3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement.

[18] Section 7 guides the certification judge in the decision-making process on an application for certification. A reading of s.7 in its grammatical and ordinary sense tells us that unless the following are established by the class, certification shall not be granted:

1. the pleadings disclose a cause of action
2. there must be an identifiable class

3. the proposed representative must be appropriate
4. there must be common issues, and
5. the class action must be the preferable procedure for the fair and efficient resolution of the dispute.

[19] The key words in s. 7(1)(a), for the purposes of this appeal, are "discloses a cause of action". Does this mean that the class need only show that the pleadings disclose one cause of action in order to be certified or, as the AGNS suggests, does it mean that each cause of action pleaded must disclose a cause of action in order to be certified. The legislative text in its grammatical and ordinary sense may be interpreted either way. Its ultimate meaning will depend on the answer to Professor Sullivan's remaining questions — the lawmaker's intention and the consequences should we endorse the AGNS's proposed interpretation.

What did the Legislature Intend?

[20] This involves a consideration of the words "discloses a cause of action" in the broader context and object of the **CPA**.

[21] The **CPA** contains no object clause. However, the **CPA**'s object and the Legislature's intent for the words can be gleaned from the other subsections contained in s. 7 of the **CPA**. In particular, the **CPA** requires the certification judge to consider:

- Whether the common issues predominate over issues affecting only individual members; (s. 7(1)(c))

- The class proceeding is a preferable procedure for the fair and efficient resolution of the dispute; (s. 7(1)(d))

- A plan has been produced that sets out a workable method of advancing a class proceeding; (s. 7(1)((e)(ii))

- Whether questions of fact or law predominate to the class members predominate over any questions affecting individual members; (s. 7(2)(a))

- Whether the class proceedings would involve claims or defences that are or have been the subject of other proceedings; (7(2)(c))

- Whether certifying as a class proceeding create greater difficulties than those likely to be experienced if relief were sought by other means; (s. 7(2)(e).

[22] Reading s. 7 as a whole, the object of the **CPA** and intention of the Legislature becomes apparent; the purpose of a class proceeding is to offer parties and the judicial system an efficient, cost effective means to resolve common disputes. The determination of the common issues is central to the certification of the class action. It follows that the common issues can only be determined in relation to a cause of action. Therefore, all claims would have to be reviewed to determine if they disclose a cause of action. It seems self-evident that for a claim to have a common issue it would have to disclose a cause of action.

[23] Although s. 7(1)(a) uses the singular "a cause of action", that simply means that a judge is looking at a singular cause of action to determine if it is to be certified. It does not mean that the court does not look at each cause of action to see whether they are disclosed in the pleading. To interpret the provision otherwise would allow class action plaintiffs to find one cause of action and then include any number of other claims regardless of how frivolous they may be. Such an interpretation defeats the object and intent of the **CPA** for the efficient, cost effective means of resolving common disputes.

[24] The respondent suggests that if the AGNS takes issue with the viability of the numerous causes of actions, they have an obligation to seek to strike each contested cause of action before, at, or after the certification motion. With respect, that defeats the purpose of class proceedings as I have outlined above and also ignores that it is the plaintiffs' burden in a class action lawsuit to establish the cause of action exists. Although the burden is not a heavy one, it is the plaintiffs'. To accede to the respondent's argument would result in "litigation by installments" with potential for multiple rounds of proceedings through various levels of court, a process to be avoided in class action litigation (**Garland v. Consumers' Gas Co.**, 2004 SCC 25; [2004] 1 S.C.R. 629, ¶ 90). When it comes to legislative intent, the interpretation of s. 7(1)(a) suggested by the AGNS is in keeping with the purpose and intent of the legislation.

The Consequences of the Attorney General's Interpretation

[25] With respect, it is illogical to suggest that one plaintiff must only establish one cause of action, and a certification judge must review only those parts of the pleadings to determine they establish one cause of action against one defendant, where multiple causes of action are set out by multiple plaintiffs (potentially representing multiple classes or sub-classes) against multiple defendants. To interpret the provision narrowly, as did the Court below, could work an injustice against some defendants in a class proceeding in which different causes of action are alleged as against different defendants.

[26] In Ward Branch**, Class Actions in Canada**,(Aurora: Canada Law Book Ltd., 2004), he describes the test for determining whether causes of action are established under this branch of the certification test:

> 4.60 The wording of this requirement is very similar to those provisions in the rules of court in Ontario and BC permitting the dismissal of a proceeding that does not disclose a cause of action. A similar test is applied. The only difference being that the onus to show a cause of action falls upon the party bringing the class action, as opposed to the party challenging the proceeding.
>
> 4.70 The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists.

[27] The existence of a cause of action is assessed strictly on the pleadings, assuming all facts pleaded are true and reading the claim generously realizing that drafting deficiencies can be addressed by amending the pleadings. (Branch, 4.80)

[28] On a certification motion, a proper interpretation of s. 7(1)(a) requires the court, in exercising its discretion, to consider any and all causes of action pleaded to determine if they met the threshold of disclosing a cause of action. The defendants are entitled to rely on the onus which rests on the plaintiffs to show that there are causes of actions against them.

[29] I am satisfied that the three questions lead to no other conclusion than that the proper interpretation of s. 7(1)(a) is that the pleadings, in a class proceeding, must disclose a cause of action for each claim being made by the class.

[30] The interpretation suggested by the AGNS is in keeping with the overall purpose of the legislation.

[31] This interpretation of s. 7(1)(a) is consistent with the recent Supreme Court of Canada case in **Alberta v. Elders Advocates of Alberta Society**, 2011 SCC 24. By way of background, in **Elders Advocates**, the class sought a return of monies or damages equivalent to the amount of any overpayment by elderly people. The amounts sought to be recovered were monies paid to the Government of Alberta for the costs of their housing and meals (an accommodation charge) when they were, by their circumstances, required to live in special facilities providing assistance and medical care.

[32] The class alleged that the government's conduct constituted a breach of fiduciary duty, negligence, bad faith in the exercise of its discretion and/or unjust enrichment. The class also brought an equality claim under s. 15 of the **Charter**. At the certification hearing, the certification judge struck out the plea of breach of fiduciary duty and partially limited the duty of care alleged in negligence (2008 ABQB 490). The Court of Appeal overturned the certification judge and held the class was entitled to pursue all three causes of action (2009 ABCA 403). Alberta appealed to the Supreme Court of Canada arguing that the claim should be struck out and the action decertified. The Supreme Court of Canada posed the question as follows:

> 4 ... The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out.
> (Emphasis added)

[33] The Supreme Court then reviewed each of the claims of breach of fiduciary duty; negligence; bad faith; unjust enrichment and the s. 15(1) **Charter** violation. (Alberta did not challenge the s. 15(1) **Charter** violation as a cause of action, but rather, argued that it should be an individual cause of action as opposed to a class action.)

[34] After reviewing each of the claims, the Supreme Court concluded:

> 102 Based on the foregoing, I would allow the appeal in part and strike the pleas of breach of fiduciary duty, negligence and bad faith. Without endorsing them, I would leave untouched the claim of discrimination under s. 15(1) of the *Charter* and the plea of unjust enrichment, along with any other pleas which survived in the lower courts and were not appealed to this Court. Certification of the class and the unaffected common questions will remain, since the action, in truncated form, survives.

[35] During the course of its decision, the Supreme Court held:

> 20 The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: (authorities omitted).
>
> 21 The issue we must decide on each of the disputed claims is whether this test is met and, separately, whether the class action should be decertified.
> (Emphasis added)

[36] The wording of the legislation in Alberta's **Class Proceeding Act**, R.S.A. 2000, c. C-16.5, is virtually identical to the wording of our s. 7(1). It provides that in order for a proceeding to be certified "the pleadings [must] disclose a cause of action". If it was unnecessary to review each individual cause of action to determine whether it is plain and obvious that a claim cannot succeed, then it would have only been necessary for the class in **Elders Advocates, supra**, to show that the unjust enrichment claim and the alleged **Charter** claim disclosed causes of action and the fiduciary duty, negligence, and bad faith would have been certified as well.

[37] A similar interpretation was given to the Ontario **Class Proceeding Act**, S.O. 1992, c. 6, by Nordheimer, J. in **Pearson v. Inco Ltd.**, [2002] O.J. No. 2764 (Q.L.)(Ont. S.C.J.):

> 84 While section 5(1)(a) refers to the pleadings disclosing "a" cause of action, I do not interpret that section as meaning that only one cause of action need be established and then the other causes of action alleged can just tag along with that cause of action. ... if certain claims are eliminated because they are based on non-existent causes of action, various individuals who might otherwise be members of the proposed class are also removed as prospective class members.

(Although this decision was overturned [2005] O.J. No. 4918 (Q.L.)(Ont. C.A.), the Court of Appeal did not address the certification judge's interpretation of "a cause of action".)

[38] Nordheimer, J. made a similar finding in **Gariepy v. Shell Oil Co.**, [2002] O.J. No. 2766 (Q.L.)(Ont. S.C.J.):

> 33 Having reached the conclusion that there is a proper cause of action alleged against the defendants in negligence, I must nonetheless consider whether the other causes of action are properly alleged. While I appreciate that section 5(1)(a) refers to the pleadings disclosing "a" cause of action, I do not interpret that section as meaning that only one cause of action need be established and then the other causes of action alleged can just piggyback on that cause of action. ...

[39] I agree with Nordheimer, J.'s comments in both cases. His interpretation is consistent with the Supreme Court of Canada's approach in **Elder Advocates, supra**.

[40] In conclusion, the certification judge must determine on each disputed claim whether the test for certification is met. The Chambers judge in this case, by determining that only one cause of action need be shown in order to meet the threshold for certification in s. 7, erred in his interpretation of that section.

Disposition

[41] The appellants conceded causes of action existed for the torts of fraudulent misrepresentation and deceit, waiver of tort and unjust enrichment in addition to the breach of fiduciary duty referred to in the Chambers judge's decision. However, it did not concede causes of action in respect of ss. 7 and 15(1) of the **Charter**. The appellants request that we find that the class **Charter** claims are not sustainable.

[42] I would decline to do so. It is more appropriate for the Chambers judge to conduct the analysis having regard to the proper interpretation of s. 7(1)(a) as set out in these reasons. The Chambers judge did not consider the class **Charter** claims to determine whether they disclosed a cause of action. Whether the **Charter** claims meet the required threshold should be addressed by the Chambers judge who can provide reasons, which, if necessary, can be reviewed by this Court.

[43] I would, therefore, remit the matter to the Chambers judge for a determination of whether the **Charter** claims should be certified.

Costs

[44] Given the novel nature of the subject-matter of this appeal, I would not award costs to either party.

[45] The appeal is allowed and the matter remitted to the Chambers judge.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.