

Case Name:

McCann v. Canada Mortgage and Housing Corp.

Between

**Frank McCann and David Guffie, Appellants, and
Canada Mortgage and Housing Corporation and Marc Rochon,
Claude Poirier-Defoy, Jim Millar, Karen Kinsley, Gerald
Norbraten, Jean-Guy Tanguay, David Metzack and Brian Knight,
being the Trustees of the Canada Mortgage and Housing
Corporation Pension Fund, Respondents**

And between

**Nicole Lacroix and Rosie Ladouceur, Appellants, and
Canada Mortgage and Housing Corporation and Marc Rochon,
Claude Poirier-Defoy, Jim Millar, Karen Kinsley, Gerald
Norbraten, Jean-Guy Tanguay, David Metzack and Brian Knight,
being the Trustees of the Canada Mortgage and Housing
Corporation Pension Fund, Respondents**

[2010] O.J. No. 2599

2010 ONSC 65

263 O.A.C. 273

90 C.P.C. (6th) 169

2010 CarswellOnt 4080

59 E.T.R. (3d) 125

Divisional Court File Nos. 398/09, 362/09

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

J.M. Wilson, A. Karakatsanis and A.W. Bryant JJ.

Heard: December 9-10, 2009; written submissions,
March 26, 2010.

Judgment: June 16, 2010.

(128 paras.)

Appeals from a certification judge's decision refusing to certify additional common issues and requested amendments to a certified class action (the Lacroix action), and refusing a request for certification in a second, proposed class action (the McCann action). The McCann action raised similar issues to the requested amendments in the Lacroix action, and the two appeals were heard together. Between 1995 and 2000, Canada Mortgage and Housing Corporation, a federal Crown corporation, downsized its operations and terminated approximately 50 per cent of its workforce. At the time of downsizing, there were significant surplus funds in the pension plan, and the issues raised in both actions arose from these funds. Two distributions were made from the surplus to CMHC and to the employees that remained with CMHC or who continued to be part of the pension plan. The class members in both the present claims asserted they were beneficiaries of the surplus funds in the pension plan held in trust by CMHC. The Lacroix group took the commuted value of their plan upon their termination prior to any distribution and did not receive any payment from the surplus funds. The McCann group received their proportionate share of the first distribution, but took the commuted value of their plan upon their subsequent termination and did not receive the benefit of the second distribution. While the Lacroix action was certified in 2000 including claims for breach of trust and fiduciary duty, the requested Lacroix amendments asserted an alternative claim for statutory relief, namely an order for a partial termination of the CMHC pension plan pursuant to s. 29(5) of the Pension Benefits Standards Act, 1985, as a consequence of the breach by the respondents of the conflict of interest provisions in s. 8(10) of the Act. Alternatively, they sought damages pursuant to s. 8(11) of the Act equivalent to what would have been paid if CMHC had declared a partial termination. The Lacroix appellants also sought certification of common issues of ownership of the pension plan and its surplus, common law estoppel and to add a claim for punitive damages. Meanwhile, the McCann applicants claimed for breach of trust and breach of fiduciary and statutory duties. They sought to certify as common issues whether a partial termination should have been declared by CMHC and the pension plan trustees, and if so, the appropriate remedy. The certification judge declined to certify the proposed amendments, save for the punitive damages claim in the Lacroix action, and declined to certify any of the common issues in the McCann action. The judge held that the proposed pleadings of partial termination and estoppel did not disclose a cause of action, that there were problems with the identification of the class, there were problems with the definition of the common issues, that a class proceeding was not the preferable procedure, and that there were problems with the claimants' proposed litigation plans. The issues were: (1) whether the judge erred in failing to certify the partial termination common issue in both actions; (2) whether the judge erred in failing to certify common issues in the McCann action; (3) whether the judge erred by failing to certify the ownership issue in the Lacroix action; (4) whether the judge erred by failing to certify the estoppel issue in the Lacroix action; and (5) whether the judge erred in law by failing to award the appellants costs out of the pension fund.

HELD: Appeals dismissed with \$20,000 in costs, payable by the appellants jointly and severally. (1) The judge did not err in refusing to certify the partial termination issue as framed. It was clear from the *Lomas v. Rio Algom Ltd.*, 2010 ONCA 175, decision that the court did not have jurisdiction to order partial termination or to order CMHC to proceed with a partial termination or to determine the terms of a partial termination for the purpose of awarding damages with respect to the surplus. The statutory scheme for the termination and wind up of pension plans must be followed. As a result, the judge was correct in determining the common issues with respect to partial termination should not be certified in either action. A court did not have the jurisdiction to grant damages based upon the hypothetical distribution of surplus on wind up following a partial termination of the pension plan. (2) There was no error in failing to certify common issues in the McCann action. It was clear that the basis for the breach of trust and the conflict of interest claims in the McCann action were based upon the failure to declare a partial termination. As such, the motions judge was correct to deny certification. (3) The judge did not err in refusing to certify the proposed common issue of ownership as framed, as it was linked to partial termination. The relevant ownership issue was already part of the certified common issues; (4) The judge did not err in refusing to certify estoppel in the Lacroix action relevant to the benefit enhancement claim. The appellants failed to plead all the requisite elements of estoppel. Moreover, the issue was miscast as estoppel when it was rather one of a breach of fiduciary duty and non-disclosure. Finally, there was no reason to disturb the judge's determinations that individual issues relating to reliance would overwhelm any common aspect of the issue, that such an issue would not meaningfully advance the litigation and that a common issues trial would not be the preferable procedure; (5) The judge did not err in the exercise of his discretion to refuse to order the costs of the proceedings from the CMHC pension plan. The judge correctly articulated the law, exercised his discretion and made no error in principle. Nor did he misapprehend the facts. There was no basis to interfere with the exercise of his discretion.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 5(1)(a), s. 30(1)

Office of the Superintendent of Financial Institutions Act, R.S.C. 1985, c. 18 (3rd Supp.),

Ontario Rules of Civil Procedure, Rule 21

Pension Benefits Act, R.S.O. 19980, c. P.8,

Pension Benefits Standards Act, 1985, 1985, c. 32 (2nd Supp.), s. 8(10), s. 8(11), s. 29(2), s. 29(5), s. 29(12)

Counsel:

Ari N. Kaplan, Paul N. Leamen, for the Appellants.

J. Brett Ledger, Andrea Laing, for the Respondents.

Ari N. Kaplan, William J. Sammon, for the Appellants.

J. Brett Ledger, Andrea Laing, for the Respondents.

The following judgment was delivered by

THE COURT:--

The Appeal

1 This appeal is from the decision of Charbonneau J. dated January 26, 2009, refusing to certify additional common issues and requested amendments to the Lacroix and Ladouceur statement of claim in a class action that is already certified, and refusing the request for certification advanced by McCann and Guffie ("the Certification Decisions"). The McCann plaintiffs were once part of the Lacroix action. The proposed McCann class action raises similar issues to the requested amendments in the Lacroix action, and the two appeals were heard together.

Overview

2 Between 1995 and 2000, Canada Mortgage and Housing Corporation ("CMHC"), a federal crown corporation, downsized its operations and terminated approximately fifty percent of its workforce. At the time of the downsizing, there were significant surplus funds in the pension plan. The issues raised in the Lacroix class action and the proposed McCann claim arise from these surplus funds.

3 Two distributions were made from the surplus funds to CMHC and to the employees that remained with CMHC or continued to be part of the pension plan. The class members in both the existing Lacroix claim and the proposed McCann claim assert that they are beneficiaries of the surplus funds in the pension plan held in trust by CMHC. The Lacroix group took the commuted value of their plan upon their termination prior to any distribution and did not receive any payment from the surplus funds. The McCann group received their proportionate share of the first distribution, but took the commuted value of their plan upon their subsequent termination and did not receive the benefit of the second distribution.

4 The Lacroix action was certified in a consent order in May 2000. The common issues that were certified on consent include claims for damages for breach of trust and fiduciary duty based upon common law trust principles. The McCann claimants were originally claimants in the Lacroix action, but requested that they be removed from the Lacroix action, and sought to commence their own class proceeding.

5 The requested Lacroix amendments asserted an alternative claim for statutory relief. They sought an order for a partial termination of the CMHC pension plan pursuant to s. 29(5) of the *Pension Benefits Standards Act, 1985*, 1985, c. 32 (2nd Supp.) ("the PBSA") as a consequence of the breach by the respondents of the conflict of interest provisions stipulated in s. 8(10) of the PBSA. In the alternative they sought damages pursuant to s. 8(11) of the PBSA equivalent to what would have been paid if CMHC had declared a partial termination.

6 The Lacroix appellants also sought certification of the common issues of ownership of the pension plan and its surplus, common law estoppel, and sought to add a claim for punitive damages.

7 The McCann appellants claimed for breach of trust and breach of fiduciary and statutory duties; the statement of claim is based upon CMHC's failure to declare a partial termination. They sought to certify as common issues whether a partial termination should have been declared by CMHC and the pension plan trustees, and if so, what is the appropriate remedy. The estoppel issue does not arise for the McCann action.

8 The certification judge concluded that the proposed amendments in the Lacroix action, with the exception of the punitive damages claim, and all of the proposed common issues in the McCann action should not be certified as common issues in the existing or the proposed class action. He concluded that there were problems with all of the requirements for certification found in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") including the following:

- * The proposed pleadings of partial termination and estoppel did not disclose a cause of action;
- * There were problems with the identification of the class;
- * There were problems with the definition of the common issues, particularly with respect to damages;
- * A class proceeding in this court was not preferable, as it was preferable for the claimants to proceed before the Superintendent of the Office of the Superintendent of Financial Institutions Canada ("OSFI"); and
- * There were problems with the claimants' proposed litigation plans.

Issues

9 All of the certification judge's findings and conclusions are challenged by the Lacroix and McCann appellants. The following specific issues are raised:

- * Did the certification judge err in law by failing to certify the partial termination common issue in the Lacroix action and the proposed McCann action?
- * Did the certification judge err in failing to certify common issues in the McCann action?
- * Did the certification judge err in law by failing to certify the ownership

issue in the Lacroix action?

- * Did the certification judge err in law by failing to certify the estoppel issue in the Lacroix action?
- * Did the certification judge err in law by failing to award the appellants costs out of the pension fund?

Jurisdiction and Standard of Review

10 The jurisdiction of this court to hear the appeal is found in s. 30(1) of the CPA:

30(1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

11 Substantial deference should be paid to the certification judge's expertise and detailed knowledge of the file. The certification judge in this case has had extensive involvement in this matter over a period of years. The reviewing court should intervene only where the certification judge has made a palpable and overriding error of fact, or otherwise erred in principle. Any errors of law are reviewable on the correctness standard. See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; *Pearson v. Inco*, [2005] O.J. No. 4918 (C.A.) at para 43; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.) at paras. 24 to 28.

Background Facts

12 In the 1990s, CMHC downsized its workforce through two programmes. The first occurred from May 1995 to 1996. The second was announced in 1996 and commenced for three years, beginning in January 1997.

13 During the period of the downsizing, there were significant surplus assets in the CMHC pension fund. The evidence is that it grew to approximately \$432 million by the time the downsizing programmes were completed.

14 CMHC made two "benefit enhancement decisions" to deal with the surplus assets. The first decision came into effect on January 1, 1999. CMHC announced that there was \$128.7 million eligible for benefits enhancement. \$100 million would be shared between CMHC and the remaining pension plan members. These funds were shared based upon the ratio of the historic contribution by the employer and the employees to the pension plan - that is 60% of the benefit was received by CMHC and 40% of the benefit was distributed to the remaining employees.

15 CMHC asserts that it used these funds to off-set the cost of other benefit enhancements for remaining pension plan members.

16 The appellants assert that CMHC acted solely in its own interest. The Annual Report of the

CMHC Pension Fund for 1999 states:

The benefit enhancements were provided to those who were stakeholders as at 1 January 1999. These benefits included an increase in the employee spousal survivor benefits formula from 60% to 66 2/3%, an employee 50% contribution holiday for 2 years, recognition of same sex spouses and a redesignation of contributions of \$44 million. The Corporation's share was \$66.0 million of which \$59.4 million was applied to offset the pension costs related to the workforce realignment program booked in the Corporation's books of account as at 31 December 1998. The balance of \$6.6 million will be available for the Corporation's future benefit.

17 The second benefit enhancement decision was made effective January 1, 2001. Again, the amount of the surplus distributed was notionally shared based on the historic contribution ratio as between employer and employee. CMHC did not withdraw money from the Fund. CMHC used its allocation of the funds to fund all of the pension benefit enhancements, and other programs.

18 These two benefit enhancements from surplus were provided only to employees, retirees and other persons who had benefit entitlements remaining in the pension benefit plan.

19 Therefore, Lacroix class members, all of whom were downsized prior to January 1, 1999 and took the commuted value of their pension, did not receive any benefit from the decisions. The proposed McCann class covers employees who received their share of the first benefit enhancement decision but not the second, except for a nominal amount related to their "transfer restriction annuities".

Procedural History

20 This case has been aggressively fought as is evidenced by the summary of procedures outlined in the CMHC factum.

21 Over the years, the plaintiffs have sought amendments to the claim and suggested many refinements to the class definition. Some of the requested amendments and refinements are in response to changes in the law as it has developed since the class action was originally certified in May 2000. Some of the amendments, particularly to the definition of the class, and the issue of estoppel, appear to be in response to concerns raised by the certification judge.

22 In the original Lacroix action, the issue of the amendment seeking to include a claim for partial termination was argued and denied by the certification judge in April 2003. The issue was appealed unsuccessfully by the plaintiffs to the Divisional Court, the Court of Appeal, and leave to appeal was dismissed by the Supreme Court of Canada on August 25, 2005.

23 In September 2006 it was proposed to remove the McCann claimants from the Lacroix action.

In the February 15, 2007 decision, Charbonneau J. granted an order severing the McCann action from the Lacroix action and directed that it proceed on its own "as if they had done so back in June 2002."

24 The severance order provided that the proposed McCann claimants were permitted to raise any proposed common issues, including the partial termination issue, and the Lacroix claimants were permitted to bring a certification motion to approve additional common issues.

25 In March 2007 the Lacroix claimants brought the motion to add the new common issues that are the subject matter of this appeal including ownership of the surplus, the partial termination claim, estoppel and punitive damages. In May 2007 the McCann claimants initiated their motion for certification claiming breach of trust based upon a duty to declare a partial termination. The motions judge allowed them to seek to add the partial termination claim again, despite *res judicata*, because the action had been reconstituted.

26 Prior to arguing the Certification Motions, CMHC brought identical cross-motions, challenging the jurisdiction of the Superior Court to determine issues of partial termination. CMHC unsuccessfully argued that the OSFI has exclusive jurisdiction over partial termination in accordance with s. 29(2) of the PBSA.

27 The certification judge dismissed the jurisdiction motions on March 4, 2008 and leave to appeal was denied ("the Jurisdiction Decision").

28 The appellants argue that the conclusions reached by the certification judge in the Certification Decisions are inconsistent with his findings and his conclusions in the Jurisdiction Decision. However, while the certification judge has dealt with the partial termination issue directly or indirectly in a number of different motions since 2003, the law has evolved during that period and it is the Certification Decisions that are under appeal.

The Proposed Class Actions

29 The Lacroix action, which originally included the McCann claimants, was certified on consent as a national class proceeding on May 4, 2000.

30 The Lacroix class members include former employees and plan beneficiaries who were downsized between January 1, 1995 and December 31, 1998 and who chose to take the commuted value of their pension, along with a termination package. In the calculation of the commuted value no credit was given to these employees for the pension surplus that was subsequently paid out to CMHC and to the remaining employees.

31 The Lacroix claimants have sought many amendments to the definition of the class for the action. The final version differed from the proposed class before the certification judge, and was amended further on the day of argument before this court. The final version of the proposed class

for the Lacroix action submitted to this court during argument is:

All former employees of CMHC with an entitlement in the CMHC pension plan whose employment terminated on and between 1 January, 1995 and 31 December 1998 as a result of CMHC's Work Adjustment Program, and who elected to withdraw their pension benefits, and their beneficiaries and estates.

32 There are currently five common issues certified in the Lacroix action:

1. Do members of the proposed class have an equitable and/or beneficial interest in the pension fund surplus which entitled them to an equitable share of what the defendants have characterized as "benefits enhancements" funded out of surplus?
2. If the answer to 1 is yes, did the election by the members to take the commuted value of their pension terminate any beneficial right or interest they might have had in the surplus by virtue of the trust and/or fiduciary relationship?
3. If the answer to 2 is no, did the failure of the defendants to include members of the class to the extent of their equitable share in what the defendants have characterized as "benefits enhancements" funded from surplus amount to breach of trust or fiduciary duty?
4. If the answer to 3 is yes, are the class members entitled to any remedy and, if so, on what basis?
5. If the answer to 2 is yes, should those class members
 - a) whose commuted value transfer election was reduced by the amount of the maximum income tax limit, but
 - b) who were permitted by CMHC to leave any commuted value balance over such limit in the plan to be received as a transfer restriction annuity rather than a residual cash payment (TRD sub-class), nevertheless be entitled to have any beneficial right or interest in the surplus determined as if their commuted value transfer had not occurred or only to the extent of the value of the transfer restriction annuity as was done by CMHC.

33 Before the certification judge the Lacroix plaintiffs sought to add three additional common issues. On appeal, they have entirely reformulated the common issues, with the bolded issues below representing the proposed new common issues. The Lacroix plaintiffs sought to amend their claim and to certify the following reformulated common issues:

(a) Is surplus in the CMHC pension fund owned by, and required to be distributed to the employee beneficiaries of the plan following the

termination or a partial termination of the plan?

(b) If the answer to (a) is yes, did CMHC breach its trust, fiduciary and/or statutory duties to the class members by failing to declare a partial termination and winding up of the pension plan pursuant to s. 29(5) of the *PBSA* for the benefit of the class members and if so,

(i) ought CMHC be ordered to declare such partial termination and winding up?;

or (ii) should CMHC be required to pay the class members damages pursuant to s. 8(11) of the *PBSA* for breach of trust, fiduciary and/or statutory duty within the meaning of s. 8(10) of the *PBSA*?;

(c) If the answer to (b)(i) is yes, what is:

the quantum of the total surplus attributable to the class period that is required to be distributed to the class members; and

the appropriate method of calculating the individual surplus allocations to which each class member may be entitled?

(d) If the answer to (b)(ii) is yes, what are the quantum of the damages owing to the class members?

(e) If the answer to (b) is no, do members of the proposed class have an equitable and/or beneficial interest in the pension fund surplus which entitled them to an equitable share of what the defendants have characterized as "benefits enhancements" funded out of surplus?

(f) If the answer to (e) is yes, did the election by the members to take the commuted value of their pension terminate any beneficial right or interest they might have had in the surplus by virtue of the trust and/or fiduciary relationship?

(g) If the answers to (f) is yes, are the Defendants estopped by their conduct as set out in paragraph 30.6 of the amended amended claim from alleging same assuming reliance?

(h) If the answer to (f) is no, or the answer to (g) is yes, did the failure of

the Defendants to include members of the class to the extent of their equitable share in what the Defendants have characterized as "benefit enhancements" funded from surplus amount to a breach of trust or fiduciary duty?

- (i) If the answer to (h) is yes, are the class members entitled to any remedy and, if so, on what basis?
- (j) **If the answer to (b) or (h) is yes, were the Defendants guilty of conduct that justifies an award of punitive and/or exemplary damages?**
- (k) If the answers to (b) and (h) above are no, should those class members
 - 1. whose commuted value transfer election was restricted by the amount of the maximum income tax transfer limit, but
 - 2. who were permitted by CMHC to leave any commuted value balance over such limit in the plan to be received as a transfer restriction annuity rather than a residual cash payment (TRA sub-class), nevertheless be entitled to have any beneficial right or interest in the surplus determined as if their commuted value transfer had not occurred or only to the extent of the value of the transfer restriction annuity as was done by CMHC.

34 The proposed McCann class covers employees who were terminated by CMHC and left the pension plan between January 1, 1999 and December 31, 2000. The McCann plaintiffs sought certification for the following class definition:

All former employees of CMHC who were pension plan members on 1 January 1995, who subsequently took their commuted value along with a workforce adjustment package and left the plan between the 1st January 1999 to the 31st December 2000.

35 The proposed common issues in the McCann action are:

- 1. Did CMHC hold the pension fund surplus in trust for the class members?
- 2. Did CMHC breach its trust, fiduciary and/or statutory duty by failing to pay the class members their full pro rata share of surplus when it distributed surplus on the 1st day of January, 1999?
- 3. Did CMHC breach its trust, fiduciary and/or statutory duty by failing to pay the class members their full pro rata share of surplus when it distributed surplus on the 1st day of January, 2001?
- 4. Did CMHC and the Trustees breach their trust, fiduciary and/or statutory duty to the class members by allowing CMHC to allocate for itself approximately 60% of the surplus that was distributed on the 1st January

- 1999 and the 1st January 2001?
5. Did CMHC breach its trust, fiduciary and/or statutory obligations to the class members by failing to declare partial termination of the pension plan fund trust pursuant to s. 29(5) of the PBSA?
 6. Did the Defendant Trustees breach their trust, fiduciary and/or statutory obligations by failing to ensure that CMHC declared a partial termination of the pension fund trust pursuant to s. 29(5) of the PBSA for the benefit of the class members?
 7. Did CMHC make a common representation and/or warranty to the class members that the surplus distribution that occurred on the 1st January 1999 was to be one time only?
 8. If the answer to (vii) is yes, will reliance on such representation and/or warranty by the class members be assumed?
 9. If the answers to any one of common issues (i)(ii)(iii)[(iv)] and (v) are yes, to what remedy are the plaintiffs entitled?
 10. Are the class members entitled to exemplary and/or punitive damages and, if so, in what amount?

36 The McCann appellants suggest in their factum that the certification judge did not apply the principles under s. 5(1) of the CPA specifically in relation to the McCann certification motion and in particular did not analyze issues (1) to (4). They further assert that the certification judge erred in refusing to certify proposed issues (7) and (8) arising from CMHC's misrepresentation to the McCann plaintiffs that there would be only one benefit enhancement package, when there were ultimately two, which was the same claim as that already certified in the Lacroix action. The misrepresentation claim in (7) and (8) is related to the common law claim regarding the second benefit enhancement.

37 The certification judge found that these issues were inextricably connected to the partial termination claim. The basis for the breach of trust and conflict of interest claim was the failure to declare a partial termination. Counsel confirmed in argument that the McCann action was premised upon the theory that CMHC was obligated to declare a partial termination under the PBSA. The McCann plaintiffs were not proceeding with a separate "benefit enhancement claim" that was in essence the same as that already certified in the Lacroix action. However, the respondents indicated that they would not oppose certification similar to the claim already certified in the Lacroix action if the McCann plaintiffs choose to do so.

Two Alternative Theories of Liability

38 In the Lacroix action, the claimants seek to advance two theories of liability giving rise to different remedies.

39 The original certified claim in the Lacroix action is referred to as the benefit enhancement

claim. The Lacroix claimants seek to recover their share of the funds distributed through the benefit enhancement decisions based upon breach of common law principles of trust and breach of fiduciary duty. In the benefit enhancement decisions the employer received sixty percent of the surplus, and the remaining employees received forty percent of the surplus. This formula was based upon the sharing of contributions to the pension plan.

40 The second theory of liability in the Lacroix proceeding is that the respondents had a duty to apply to OSFI for a partial termination, as they were in breach of their trust and fiduciary duties, as well as s. 8(10) of the PBSA. The Lacroix plaintiffs claim that the appropriate remedy to be granted by this court pursuant to s. 8(11) of the PBSA is an order for partial termination of the pension plan or, alternatively, damages in the equivalent amount.

41 In the partial termination claim, the plaintiffs seek their share of all of the surplus funds that would have been distributed upon a partial termination and wind up of the pension plan as a result of the downsizing. They assert that by the historic terms of the plan the surplus was owned by the employees and the employer had no right to any of the surplus.

42 Similarly, in the proposed McCann action the plaintiffs advance the argument that the CMHC and the administrators of the plan breached their trust, fiduciary and/or statutory obligations to the pension plan members by failing to declare a partial termination of the pension plan pursuant to s. 29(5) of the PBSA and by allocating surplus to CMHC, and seek the appropriate remedy from the court.

43 The common issues arising out of this partial termination claim were not certified by the certification judge and are the subject matter of this appeal.

The Partial Termination Claim

44 The starting point for the partial termination claim is that the plaintiffs are the beneficial owners of the entire pension plan surplus, not just forty percent of the surplus. The Lacroix plaintiffs assert that the employees are the sole owners of the surplus in accordance with the terms of the original trust agreement establishing the pension plan on February 13, 1959, combined with the pension fund rules and any updates. The McCann plaintiffs assert that CMHC held the pension surplus in trust for the employee beneficiaries.

45 The appellants argue that the employer was in a conflict of interest position between its role as employer and its role as administrator of the pension plan, and that the conflict should have been declared.

46 Section 8(10) of the PBSA requires the administrator to act in the best interests of plan members when they are in a conflict of interest position:

- (10) If there is a material conflict of interest between the role of an employer who is

an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator

- (a) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension council or to the members of the pension plan; and
- (b) shall act in the best interests of the members of the pension plan.

47 Section 8(11) gives jurisdiction to the court to fashion an appropriate remedy when an administrator has breached the s. 8(10) conflict of interest provision:

- (11) If an administrator contravenes subsection (10), a court of competent jurisdiction may, on application by the Superintendent or any other interested person, make any order on such terms as the court considers appropriate.

48 The appellants further assert that CMHC breached its trust, fiduciary and/or statutory obligations to the beneficiaries of the plan by failing to declare a partial termination under s. 29(5) of the PBSA, which provides:

- (5) An administrator who intends to terminate the whole or part of a pension plan or wind up a pension plan shall notify the Superintendent in writing of that intention at least sixty days before the date of the intended termination or winding-up.

49 Under the *Office of the Superintendent of Financial Institutions Act*, R.S. 1985, c. 18 (3rd supp), the Superintendent is responsible for maintaining the safety and soundness of federally regulated private pension plans. However, the Superintendent's jurisdiction is limited by s. 29(2) of the PBSA, which does not allow the Superintendent to declare a partial termination when there is simply a downsizing and the pension plan is in a surplus. It allows the Superintendent to declare a full or partial termination only if:

- (a) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;
- (b) the employer has discontinued or is in the process of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or
- (c) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).

50 It is clear that the OSFI had involvement in the file in 1997 and the issue of a partial termination was considered. All of the details of the OSFI involvement are not known. In 1997 departing employees raised concerns with the Superintendent. However, the Superintendent did not order partial termination. Ultimately, the Superintendent approved CMHC's surplus sharing decisions in the two benefits enhancement decisions. Decisions of the Superintendent are subject to

judicial review, which the appellants have not sought.

51 While the respondents admitted for the purpose of the Jurisdiction Motion, and for the Certification Motions, a breach of their common law and statutory duties, they refused to allow the appellants to cross-examine on these issues and to explore what went on between the OSFI and the respondents, arguing that the facts were irrelevant in the outstanding motions and OSFI would be prejudiced as it was not a party to the motions. The certification judge noted in the Jurisdiction Decision:

Some of the allegations made by the plaintiffs raise possible issues of nefarious conduct by the defendants with the cooperation or acquiescence of employees or agents of OFSI. ... I find the position of the defendants on the inadmissibility of the evidence which might shed light on the circumstances which led to the decision not to declare a partial termination to be very problematic. Such evidence may reveal the existence of gross breaches of the conflict of interest provisions of section 8.

52 On a Rule 21 motion and under s. 5(1)(a) of the CPA, the truth of facts pleaded are presumed. However it is also evident that the certification judge who has had carriage of this file was persuaded that there was some basis in fact to support claims of breach of trust or breach of the statute.

53 In the Jurisdiction Decision, at paras. 6-8, the certification judge made a number of findings on the same record relevant to the partial termination claim:

There is some evidence that when the defendants were devising and implementing the W.F.A., they considered whether they should partially terminate the plan. They consulted with their lawyers and actuaries. They discussed the matter with the Office of the Federal Superintendent of Insurance (OFSI). At one point, it would appear OFSI suggested to the defendants that the equitable treatment of the members of the plan might require that they declare a partial termination and suggested that the defendants should consider doing so. However, it would appear OFSI eventually completely left the issue with the defendants.

The defendants did not declare a partial termination. They proceeded to implement the WFA. In doing so, they used funds from the surplus to cover approximately \$60 million of the costs associated with the downsizing. Initially, the defendants showed this \$60 million as a debt owed by the defendants to the plan. Later, when they made the first distribution of surplus, that debt was forgiven. The surplus was further distributed by other means such as declaring contribution holidays and enhancing benefits.

54 In essence, the appellants allege that CMHC chose not to partially terminate the plan in order to put its hands on some of the surplus. They allege that the respondents breached their trust, fiduciary, and statutory duty under s. 8(10) of the Act, and that given the existence of a conflict of interest and their duties to the beneficiaries, CMHC was obligated to declare a partial termination to distribute the surplus funds.

55 The Lacroix plaintiffs therefore seek to certify as a common issue whether CMHC breached its trust, fiduciary and/or statutory duties to the class members by failing to declare a partial termination. They seek an order for the declaration of a partial termination and wind up of the plan. The appellants' alternative claim is for damages pursuant to s. 8(11) of the PBSA equivalent to the share of the surplus they would have been entitled to under a partial termination of the plan had the plaintiffs not breached their duty as fiduciaries and trustees and their duty under s. 8(10). The McCann plaintiffs proposed common issue on remedy is stated more broadly, and asks what remedy the plaintiffs are entitled to if the alleged breach of trust, fiduciary and/or statutory duty is established.

Analysis

56 The certification judge correctly outlined the principles that must be considered when applying the criteria in s. 5 of the CPA:

64 The Supreme Court of Canada has enunciated a number of key principles when applying s. 5 of the CPA:

The CPA must be construed generously in order to realize the three goals intended by the legislature namely judicial economy, access to justice and behaviour modification.

A certification motion is not meant to address the merits of the action but whether the action is appropriately prosecuted as a class action.

Except for the cause of action requirement, the representative has the onus of presenting an evidentiary basis in support of the existence of each criterion.

See *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534; *Hollick v. Metropolitan Toronto*, [2001] 3 S.C.R. 158.

65 In relation to the criterion of cause of action, the applicable principles at this

stage of the certification process are the same as the ones applicable on a motion to strike a pleading as not disclosing a cause of action. Those principles are set out as follows by the S.C.C. in *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321:

"... assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail (...) should the relevant portions of a plaintiff's statement of claim be struck out ..."

1. The Partial Termination Claim

57 The certification judge found that it would not be appropriate for the court to order a partial termination of the pension plan as it was not the preferable procedure and by-passed the Superintendent.

58 The appellants submitted during their argument that this cause of action was on all fours with *Lomas v. Rio Algom Ltd.*, [2008] O.J. No. 282 (Div. Ct.). However, the *Rio Algom* decision was recently reversed by the Court of Appeal in *Lomas v. Rio Algom Limited*, 2010 ONCA 175, released after argument of this appeal. The issue in *Rio Algom* was whether the court could compel an employer to commence proceedings to wind up a pension plan under the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("PBA"). We invited written submissions on the impact of the decision. We thank counsel for their submissions.

59 We conclude that it is now clear from *Rio Algom* that this court does not have jurisdiction to order partial termination or to order CMHC to proceed with a partial termination. As a result, the certification judge was correct in determining that the common issues with respect to partial termination should not be certified in either action.

60 In *Rio Algom*, the Court of Appeal considered whether a court could order the employer to apply for partial wind up under s. 68 of the PBA. The Court held that it cannot do indirectly that which it is unable to do directly and that the court does not have jurisdiction to order termination and wind up at the request of plan members (absent language in the pension plan documentation to the contrary) when the statute provides that the issue is to be determined by the Superintendent with the usual right of review after the initial decision.

61 While the Court of Appeal in *Rio Algom* dealt with the PBA, rather than the PBSA, Gillese J.A. noted at para. 34 that there are "no material differences" between the relevant provisions under

the PBSA and the PBA with respect to the issue of whether the court can directly or indirectly order or compel the wind up or termination of a pension plan. There is no equivalent to s. 8(10) or (11) of the PBSA in the Ontario statute. However, in our view, these sub-sections do not impact the reasoning in *Rio Algom*. Both *Rio Algom* and *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 rely upon similar policy considerations. Pension plans serve broad and long-term societal functions in providing economic support during retirement. Before a pension plan is wound up, surplus is only an actuarial concept and individuals entitled to the surplus assets do not have a specific interest in them. Members should not be able to deprive future employees of the benefit of a pension plan and often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. They are not without recourse because they can alert the Superintendent of their concerns, who can act in an appropriate case: see *Buschau* at paras. 17, 31, 34.

62 In reviewing the legislative scheme of the PBA, the Court of Appeal in *Rio Algom* concluded at paras. 72, 77 and 83 that to permit a court to determine at first instance whether a pension plan should be wound up would disrupt a "carefully calibrated, multi-layered process for deciding whether a wind up will be ordered when the wind up has not been initiated by the employer" and would constitute an "impermissible interference with the legislative scheme". At paras. 78 -79, Gillese J.A. explained:

First, the court would have to decide the matters of fact and law necessary in determining whether a wind up should be ordered. Those matters involve difficult questions of entitlement and calculations of liability for plan members' pensions, the adequacy of the plan assets to satisfy liabilities, prioritization of claims, methods of distribution, questions related to grow-in benefits and a host of other complex, technical issues. ... If the court were to order *Rio Algom* to commence wind up proceedings, it would violate the legislative scheme and amount to an unauthorized usurpation of the authority delegated to the superintendent. ...

Second, the procedural safeguards and appeal rights of all affected parties that are established by the statutory process would be eliminated. There would be no preliminary determination by the superintendent that a wind up was necessary and appropriate. ... Instead, the Ontario Superior Court of Justice would make the first instance decision.

63 In *Buschau*, the Supreme Court of Canada held that courts cannot invoke trust law and their inherent jurisdiction to compel an employer to wind up a pension plan at the request of the employees as it would amount to an unauthorized usurpation of the authority delegated to the Superintendent under the PBSA. The statute authorizes the Superintendent to hear such applications with recourse to the courts in accordance with the usual remedies of judicial review. The Supreme

Court held at paras. 28-31 and 34 that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to:

- i. the societal purposes for which pension plans exist;
- ii. the scheme of the legislation that governs pension plans; and
- iii. the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan.

64 In *Rio Algom* (at para 55-59), Gillese J.A. noted that the decision in *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 was not restricted to the interpretation of trust principles and the Supreme Court of Canada made it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan and that the statutory scheme for the termination and wind up of pension plans must be followed. The legislation strikes a balance between recognizing the employer's voluntary decision to establish and, subject to anything to the contrary in the pension plan documentation, to wind up pension plans, with the need to ensure that pension plan promises are met and pension funds are not misused.

65 The OSFI has a limited jurisdiction to order partial termination under s. 29(2) of the PBSA and the record discloses that it has never done so. It does not have a general power to force a partial termination. However, the fact that the Superintendent has limited jurisdiction to order termination or partial termination reflects the limits imposed by the legislature.

66 The certification judge relied upon an additional reason why the proposed amendments to the Statement of Claim and the proposed common issues do not constitute a cause of action. The appellants relied on *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152. In *Monsanto*, the Supreme Court held that under the Ontario legislation that termination includes and automatically requires wind up and distribution of the pension plan. However, in *Cousins and McNally v. Attorney General of Canada and Marine Atlantic Inc.*, [2008] F.C.A. 226, the Federal Court of Appeal distinguished *Monsanto* and held that s. 29(12) of the PBSA did not automatically entitle the employees to a distribution of the surplus upon the partial termination of a plan because unlike the Ontario legislation, termination under the federal legislation was separate from wind up and distribution. The court noted that the legislation was subject to the express terms of the plan. Of course, the entitlement for wind up and distribution following termination could arise from the express terms of the Plan.

67 The certification judge (at para. 137) relied upon *Cousins* to find that *Monsanto* does not apply to s. 29(12) of the PBSA and that a declaration of a partial termination would not automatically create a right under the legislation to receive a pro-rata share of the proceeds. The appellants submit that the certification judge made a critical error in his interpretation of *Cousins*, because the Federal Court of Appeal left open the question of whether the entitlement could flow from the express terms of the Plan: *Cousins* at paras. 46-47. In this case, the claims in both actions plead that the employees

own the surplus in the Plan. Given our conclusions on the court's jurisdiction to determine partial termination, we need not decide whether partial termination in this case would result in partial wind up and distribution of proceeds.

68 Accordingly, we conclude that the certification judge was correct in his decision with respect to partial termination, on the basis that this court in accordance with *Rio Algom* has no jurisdiction to order CMHC to declare a partial termination or to determine the terms of a partial termination for the purpose of awarding damages with respect to the surplus.

69 The remaining issue is whether the court may use a hypothetical partial termination as a measure of damages and to fashion a remedy under s. 8(11).

70 We conclude that considering partial termination as a measure of damages makes this already complex proceeding unnecessarily complicated. There is no single time line applicable to all members of either the Lacroix or the McCann class to trigger a partial termination. The surplus fluctuated over time. The scope and timing of a partial termination involves complex determinations, including considerations relating to the interests of the remaining members and the continuation of the plan. The determination of who is entitled to the partial termination may have no bearing to the class as defined by the plaintiffs - which may in turn create difficulties with the rational connection of the class members to the common issue. The court has ample tools to craft a fair remedy without embarking into the quantification of damages based upon a theoretical partial termination at an undetermined point in time.

71 In *Rio Algom* there were allegations of breach of trust and fiduciary duty. Gillese J.A. elaborates on the remedies that may be available to beneficiaries under conventional trust law which could conceivably be obtained from a court. She emphasizes at para. 95 that these should not include the ability to order the termination of a trust but could include various means of making restitution to the estate, including the requirement to account, an order for compensation, or removal of the trustees.

72 In our view, the Ontario Court of Appeal decision in *Rio Algom* and the Supreme Court of Canada decision in *Buschau* support the view that a court does not have jurisdiction to grant damages based upon the hypothetical distribution of surplus on wind up following a partial termination of the pension plan.

73 On partial termination and wind up, distribution comes from the surplus assets of the plan. An order for damages comes out of the employer's funds. However the surplus (to which the employer has contributed) would remain in the fund. Presumably, such an order would result in either a windfall to other plan members, or would result in a surplus that is not attributable to any plan members. If the damage award comes from the fund, or if the employer seeks recovery from the fund, in fact the court has indirectly ordered a partial termination. The essence of the claim is for a share of the surplus, even though characterized as damages. An order of damages that uses a hypothetical partial termination as a measure for damages is effectively an indirect partial

termination order.

74 The certification judge concluded that the common issue for partial termination should not be certified as it was not the preferable procedure in accordance with the CPA. He had concluded in the Jurisdiction Decision that the court does have jurisdiction to order partial termination based upon the law as it then stood. In accordance with *Rio Algom* released March 10, 2010, [2010] O.J. No. 932, we conclude that the court has no jurisdiction to order partial termination directly or indirectly.

75 For all these reasons, we conclude that the certification judge did not err in finding that the partial termination claim did not meet the requirements of s. 5(1)(a), (b) and (d) of the CPA. The certification judge's decision not to certify the common issues as framed was correct and we give no effect to this ground of appeal.

Is there a remaining statutory common issue?

76 Even though the partial termination issues cannot be certified for the reasons given, a court has specific jurisdiction to determine whether a plan administrator acted in the member's best interests when a material conflict of interest has been established under s. 8(10) PBSA. The motions judge appears to have determined that there was some basis in fact for the claim that CMHC was in a conflict of interest position within the meaning of s. 8(10). Section 8(11) gives a court broad discretion to fashion a remedy when there has been a breach of the s. 8(10) conflict of interest provision. It may be that a common issue could be fashioned as to whether there is a breach of s. 8(10) of the PBSA and, if so, what is the appropriate remedy under s. 8(11).

77 Our decision does not preclude the Lacroix or McCann appellants from pursuing the issue of a breach of s. 8(10) and the appropriate remedy pursuant to s. 8(11) of the PBSA (apart from relief based upon partial termination), as a common issue before the certification judge.

78 This was not submitted or argued on the basis of a stand-alone common issue. Given the procedural history of this matter and the numerous attempts to deal with these issues and the reformulations of both the class members and the common issues, in our view, it is not appropriate that we attempt to fashion this as a common issue.

2. Did the certification judge err in failing to certify common issues in the McCann action?

79 The McCann appellants suggested in their factum that the certification judge did not apply the principles under s. 5(1) of the CPA specifically in relation to the McCann certification motion and in particular did not analyze issues (1) to (4) as set out in para. 36. They further assert that the certification judge erred in refusing to certify proposed issues (7) and (8) arising from CMHC's misrepresentation to the McCann plaintiffs that there would be only one benefit enhancement package, when there were ultimately two, which was the same claim as that already certified in the Lacroix action. The misrepresentation claim in (7) and (8) is related to the common law claim

regarding the second benefit enhancement.

80 The first four proposed McCann common issues are similar to the Lacroix common law benefits enhancement claim, except that they refer to a statutory duty, dispute CMHC's right to have allocated a portion of the surplus distribution to itself in both benefit enhancement decisions (the "allocation of surplus issue"), and allege that CMHC represented that the first benefit enhancement would be "one time only" and, if so, reliance should be presumed.

81 With respect to the allocation of surplus issue, the certification judge found that a claim that CMHC did not have the right to retain some of the surplus for its own benefit could result only in an order that the money be restored to the fund in accordance with *Potter v. Bank of Canada* (2007), 85 O.R. (3d) 9 (C.A.); this alone would not create a cause of action, given that they were no longer plan members. Further, he held that there would be no rational connection between a broad claim relating to all plan members and the proposed class members. We are not persuaded that he erred in these determinations.

82 As well, with respect to the McCann plaintiffs claim that they were led to believe that the first surplus distribution was a "one time only" event and that they left the plan based upon that misrepresentation, the certification judge found there was no evidence of a common representation. His finding in this respect attracts deference. The certification judge also found that reliance was an essential element of such a claim.

83 The McCann plaintiffs are not proceeding with a separate "benefit enhancement claim" relating to the second distribution that was essentially the same kind of claim already certified in the Lacroix action. The McCann action fails to separate the benefit enhancement claim from the statutory partial termination claim. However, with respect to the second benefit distribution, the respondents indicated that they would not oppose certification similar to the claim already certified in the Lacroix action if the McCann plaintiffs choose to do so. It remains open to the McCann plaintiffs to seek redress by way of damages, including a claim for punitive damages, which was allowed by the certification judge in the Lacroix Certification Decision.

84 The certification judge found that the breach of trust claim relating to the surplus distribution through the benefit enhancement decisions was not an alternative claim to the partial termination claim but merely one of its components - the claims and the allegations were inextricably linked together. Counsel for McCann confirmed in argument that the McCann action was premised upon the theory that CMHC was obligated to declare a partial termination under the PBSA. Counsel described the McCann action as based upon both a common law and statutory breach of trust or conflict of interest case arising from s. 8(10) of the PBSA and submitted that the certification judge failed to address the provisions of s. 8(10) and (11).

85 It is clear that the appellants sought to rely on a partial termination claim. The common issues in the McCann action specifically relates to whether CMHC breached its common law and statutory duties by failing to declare a partial termination under s. 29(5). It is clear that the basis for the

breach of trust and the conflict of interest claims in the McCann action are based upon the failure to declare a partial termination. As such, the motions judge was correct to deny certification, for the reasons given above on the partial termination issue.

3. The Ownership issue

86 The ownership issue that the Lacroix plaintiffs requested to be certified in this appeal as reformulated is as follows:

Is the surplus in the CMHC pension plan owned by, and required to be distributed to the employee beneficiaries of the plan following the termination or a partial termination of the plan?

87 The certification judge concluded with respect to the ownership issue:

[139] I would have no difficulty finding that the "ownership" issue is a common issue if the partial termination was also certified. It is what has been described as the entitlement aspect of the plaintiffs' claim. Each member of the class must establish that the surplus would be available for distribution to the plan members upon termination. Although the defendants are correct when they argue that there is no entitlement to surplus before termination, it remains that entitlement is a necessary issue common to all class members. Its resolution would significantly advance the litigation. It is irrelevant whether it is decided before or after the failure to declare issue. However, having decided that the partial termination issue cannot be certified, it would serve no useful purpose to certify the ownership issue alone, see *MacDowell v. Ontario Northland Transportation Commission* (2006) 56 C.C.P.B. 296 at para 112.

88 The certification judge did not certify the ownership issue as it was intertwined with the claim for partial termination, which he denied. Given our conclusions on the partial termination claim, he was correct to do so.

89 The following two paragraphs from the Certification Decision confirm the importance of dealing with ownership as a common issue:

[69] It would appear that the parties had originally settled the certification motion on the basis that the defendants had failed to advise the plaintiffs that they were the beneficiaries of the trust, including the surplus but rather had misrepresented that the defendants were the owner of the trust. The failure to communicate who was the real owner of the surplus was alleged to amount to a breach of trust. However, the plaintiffs were not taking the position that the plaintiffs were relying upon any representation or failure to advise in making their election.

...

[86] One of the issues which will have to be decided in this case is whether or not the plaintiffs were the beneficial owners of the surplus.

90 The certification judge confirmed that the issue of who were the beneficial owners of the surplus is relevant and probative to determine the existing Lacroix certified common issues, including the breach of trust allegations and the claim for punitive damages.

91 However, the first common issue already includes the relevant ownership issue: "Do members of the proposed class have an equitable and/or beneficial interest in the pension fund surplus which entitled them to an equitable share of what the defendants have characterized as 'benefits enhancements' funded out of surplus?" Thus, the issue of ownership in the context of the certified claim is already a common issue.

3. The Estoppel Issue

92 Counsel confirmed that the estoppel issue was not relevant to the McCann action. The Lacroix appellants rely upon estoppel for the benefit enhancement claim which has been certified, and not the partial termination claim. The Lacroix plaintiffs assert that the defendants are estopped from arguing that the appellants gave up any beneficial interest in the plan when they elected to take their commuted value of their pension, and signed any releases, because CMHC had failed to advise them of their entitlement to surplus. Estoppel is pleaded as follows in their proposed Statement of Claim:

30.6 The Plaintiffs and class members state that the Defendants are further estopped from alleging that any beneficial interest the Plaintiffs and class members may have had in the pension fund surplus was terminated when they elected to take their commuted value and leave the plan, and that such estoppel arises out of one or all of the following facts:

- a) The Defendants' failure to advise the Plaintiffs and class members that they had a beneficial interest in the pension fund surplus;
- b) By the Defendants taking the position that CMHC owned the surplus to the exclusion of the Plaintiffs and class members;
- c) By failing to advise the class members that by taking their commuted value they were giving up any right they may have to the pension fund surplus.

93 The Lacroix plaintiffs seek to certify the following as a common issue: "... are the Defendants estopped by their conduct as set out in paragraph 30.6 of the amended amended amended claim from alleging same assuming reliance?"

94 The respondents counter that the Lacroix plaintiffs have not pleaded all the requisite elements of estoppel. In particular, they assert that they have not specified a class-wide representation, and they have not pleaded inducement or reliance. The appellants submit that it was open to them to plead estoppel as a shield. They further argue that the ongoing surplus was impressed with a trust and if the trustee knew material facts (such as the employees' beneficial interest in the surplus) and did not disclose those facts, then the trustee breached its obligation and reliance would be presumed.

Background to the estoppel issue

95 We note that there were two estoppel arguments before Charbonneau J. in 2003 concerning two different "representations". The first estoppel argument dealt with the wording of the releases that the appellants signed. The appellants at one time sought to certify as a common issue that the respondents were estopped by the wording of the releases themselves.

96 The appellants did not pursue the first estoppel argument as a common issue before the certification judge in the Certification Motion. He confirmed at para. 77 that "it remains therefore as an individual issue".

97 The outstanding estoppel issue arose as a result of comments made by the certification judge in a 2003 ruling refusing to decertify the Lacroix action. This is acknowledged in para. 70 of the Certification Decision: "In my reasons I also raised certain issues which, it would appear, gave rise to the plaintiffs' present request to certify an "estoppel" issue in relation to the benefit enhancement claim."

98 The appellants raised the estoppel issue before him in a previous motion, but the certification judge did not rule on it. He stated: "I note that I did not specifically reject or accept the certification of the estoppel issues. ... This was an oversight on my part".

99 The issue raised by the certification judge in his prior ruling giving rise to the present request to certify the common issue of estoppel is cited in the Certification Decision at para. 71:

The issues which have been certified do not give rise to an inquiry as to whether the plaintiffs or class members were misled into signing the releases by the defendants except to the extent that the defendant failed to advise the plaintiffs and class members of the existence of trust or fiduciary relationship between the plaintiffs and the defendants and the corresponding beneficial rights of the plaintiffs in the surplus.

If the plaintiffs wish to expand their claim in answer to the defendants' position that any rights the plaintiffs may have had in the surplus expired when they voluntarily left, by alleging that the releases were of no force and effect as a result of certain other misrepresentations, the plaintiffs must amend their

statement of claim and specifically plead facts in support of that claim. Otherwise evidence of any such misrepresentations would be irrelevant and inadmissible.

General Principles of Promissory Estoppel

100 The elements of promissory estoppel that must be proved are:

1. An existing legal relationship;
2. A representation by one party, intended to be acted upon, that they would not enforce their strict legal rights; and
3. Reliance on the representation by the other party.

101 The Supreme Court has affirmed this test in a number of cases. In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, for instance, the court discussed the requirements as follows:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

102 It is not clear that estoppel is appropriately raised at this stage, as the respondents' pleadings have not yet been finalized. The appellants seek to claim estoppel in response to an anticipated defence. We raised the issue of prematurity during argument and counsel for the respondents confirmed that they would be raising the defence anticipated by the appellants, and therefore although technically premature, it was necessary to rule on the issue.

103 We are of the view that the certification judge was correct in declining to certify the proposed estoppel issue for three reasons.

104 First, the certification judge declined to certify the estoppel issue because the appellants had failed to plead all the requisite elements of estoppel. We agree that there is a problem with the component of reliance.

105 Second, we agree with the comments of the certification judge that the appellants appear to have miscast the issue as one of estoppel. The certification judge suggested that the issue was one of misrepresentation or breach of fiduciary duty. In our view based upon the cases relied upon by the appellants, the issue miscast as estoppel is one of a breach of a fiduciary duty and non disclosure, rather than estoppel.

106 Finally, we see no reason to disturb the certification judge's determinations that individual issues relating to reliance would overwhelm any common aspect of this issue, that such an issue would not meaningfully advance the litigation and that a common issues trial would not be the preferable procedure.

Failure to plead the elements of estoppel

107 The respondents assert that the appellants failed to adequately plead the elements of misrepresentation and reliance required for an estoppel claim.

108 We agree with the certification judge's conclusion at para. 92 that the element of reliance for estoppel was not properly pleaded and that estoppel as framed was not an appropriate common issue. Reliance cannot be presumed, and must be pleaded as an individual issue: *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 at paras. 58-60.

109 However, we do not endorse the conclusions of the certification judge with respect to the analysis of representations or omissions.

110 The respondents argued that the only specific misrepresentation the appellants raised arose on December 4, 1997, after many of the class members had already left the plan (Lacroix Certification Decision, para. 47). As stated above in the passage from *Maracle*, the promise must be "unambiguous" although it may be inferred from the circumstances.

111 The appellants argue that the respondents' failure to advise may also constitute a class-wide representation. The representation may be implied and it may be by omission (see e.g. *Owen Sound Public Library Board v. Mial Developments Ltd. et al.* (1979), 26 O.R. (2d) 459 (C.A.)).

112 Charbonneau J. found at para. 92 that "there [wa]s no evidentiary record of any type to support the plaintiffs' claim" to establish a class-wide representation. He concluded at para. 86 that in accordance with the decision of the Ontario Court of Appeal in *Hembruff v. Ontario Municipal*

Employees Retirement Board (2005), 78 O.R. (3d) 561, there was no obligation to disclose to the appellants that they were the beneficial owners of the surplus. Charbonneau J. stated that "at best that would have been an opinion. Similarly, the allegation that the defendants told the appellants the defendants owned the surplus was not a statement of material fact but a statement of opinion."

113 The certification judge was required to determine if there was any basis in fact to support a common issue. However, it is not appropriate for a certification judge to weigh the evidence or inquire into the merits of the claim on a motion for certification: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] S.C.J. No. 67 at para. 16; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at para. 50.

114 We do not accept the conclusion of the certification judge that CMHC did not have a duty to disclose to the appellants in this case that they were the beneficial owners of the surplus, because the question of ownership remains a live issue. *Hembruff* dealt with proposed changes to a pension plan. The Court correctly found that decisions under consideration regarding benefits enhancement were not material. In this case, if the appellants are correct that they are the beneficial owners, it may be open to the appellants to claim that the respondents had a duty to disclose this information, or not represent that the employer owned the surplus.

115 Although we may not agree with the certification judge's analysis of the requirement of class wide representations and omissions, we agree with his ultimate conclusion that certification of estoppel as a common issue was not appropriate, nor did it add anything to advance the litigation.

116 Charbonneau J. concluded that for a claim of estoppel reliance cannot be presumed, and therefore the third element of estoppel remains an individual issue (see *Serhan, supra*). We agree with his conclusion that the cases relied upon by the appellants, although perhaps relevant and helpful to a claim for breach of fiduciary duty, do not change the onus of proof upon the appellants so that reliance can be presumed.

Did the appellants miscast the estoppel issue?

117 The certification judge found at para. 90 that the allegations raised in relation to an estoppels claim were better suited to breach of fiduciary duty or misrepresentation claim:

It is possible that these allegations could support a claim for damages for breach of fiduciary duty. However, the estoppel issue deals with what, if any, legal effect should be given by the court to the decision of the plan members to take commuted value and leave the plan. I agree with the defendants that this is a misrepresentation issue more than an estoppel issue, even though estoppel may very well arise by representation.

118 We conclude that the cases the appellants rely upon do not support an estoppel claim and a shift in the onus for reliance as suggested by Charbonneau J. However, the cases are relevant and

helpful to the appellants' claim for breach of fiduciary duty.

119 The cases deal with breach of fiduciary duty based upon material non-disclosure. If there is a breach of fiduciary duty based upon non-disclosure the case law supports the proposition that the respondents may not be entitled to enforce any release signed. They do not stand for the proposition that reliance can be assumed in the context of an estoppel argument.

120 The appellants rely upon *Commerce Capital Trust Co. v. Berk*, [1989] O.J. No. 614 (C.A.) and *Raso v. Dionigi*, [1993] O.J. No. 670 (C.A.) which adopt a line of English cases. The Ontario Court of Appeal has confirmed that once a breach of a fiduciary duty based on non-disclosure has been established, it is not appropriate for the court to inquire as to whether the transaction would have been entered into anyway. The Court relied upon the classic statement given by Lord Thankerton in *Brickenden v. London Loan & Savings Co.*, [1934] 3 D.L.R. 465, [1934] 2 W.W.R. 545 (P.C.) at p. 469:

When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

121 The "estoppel" argument is that the respondents cannot rely upon the appellants' decision to take their commuted value and leave the plan, because the respondents misrepresented or failed to advise the appellants of their beneficial interest in the surplus. In our view, the certification judge was correct in finding that this is not an estoppel issue. The appellants' concerns fit more properly within the law of breach of fiduciary duty, which has already been certified within the benefits enhancement claim.

122 We therefore conclude that the certification judge was correct in declining to certify the estoppel issue.

4. Should the costs of these proceedings be paid out of the CMHC pension fund?

123 In his Costs Endorsement of May 22, 2009, the certification judge dismissed the appellants' request for costs of the Certification Motion to be paid on a full indemnity basis out of the CMHC pension fund. The appellants submit that the certification judge erred on the basis that the certification motion involved the question of surplus ownership and thus the due administration of the fund and the answer would benefit all employees, including ongoing employees and therefore the certification motion, this appeal and all other interim proceedings reasonably taken ought to have been paid out of the pension fund on a full indemnity basis.

124 In a trilogy of cases Gillese J.A. has held that public policy permits costs to be payable out of a pension fund where proceedings are brought: 1. To ensure the due administration of the pension trust fund; or 2. For the benefit of all beneficiaries: *Burke v. Governor and Co. of Adventurers of England Trading into Hudson's Bay*, [2008] O.J. No. 3936 (C.A.) at para 10; *MacKinnon v Ontario Municipal Employees Retirement Board*, [2007] O.J. No. 4860 (C.A.) at para. 86; *Nolan v. (Ontario Superintendent of Financial Services)*, [2007] O.J. No. 3321 (C.A.) at paras. 11-12.

125 In our view, the certification judge correctly articulated the law, exercised his discretion and made no error in principle. Nor did he misapprehend the facts. His decision makes sense based on the history of this case and the nature of the claim. We see no basis to interfere with the exercise of his discretion.

Issues

126 We therefore respond to the issues raised as follows:

Did the certification judge err in law by failing to certify the partial termination common issue in the Lacroix action and the proposed McCann action?

The certification judge did not err in refusing to certify the partial termination issue as framed.

Did the certification judge err in law by failing to certify the ownership issue in the Lacroix action?

The certification judge did not err in refusing to certify the proposed common issue of ownership as presently framed, as it is linked to partial termination. The relevant ownership issue is already part of the certified common issues.

Did the certification judge err in law by failing to certify the estoppel issue in the Lacroix action?

The certification judge did not err in refusing to certify estoppel in the Lacroix action relevant to the benefit enhancement claim.

Did the certification judge err in law by failing to award the appellants costs out of the pension fund?

The certification judge did not err in the exercise of his discretion to refuse to order the costs of the proceedings from the CMHC pension plan.

127 The appeals are dismissed.

Costs of this appeal

128 Counsel agreed that \$20,000 was an appropriate quantum combined for both appeals. The respondents should have their costs in the amount of \$20,000, payable by the appellants, jointly and severally. The appellants indicated that they would determine the allocation of the costs.

J.M. WILSON J.

A. KARAKATSANIS J.

A.W. BRYANT J.

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